DIRECTORATE OF LEGAL STUDIES
Chennai - 600 010

5 Year B.A. B.L., Course
Semester System

V- Year

X - Semester

COURSE MATERIALS

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1. CRIMINOLOGY AND PENOLOGY

CRIMINOLOGY

CONCEPT OF CRIME:

Emile Durkheim in his treatise says that, “a society composed of persons with angelic qualities would not be free from violations of the norms of that society”.

Cross and Jones defined crime as, “a legal wrong the remedy for which is punishment of the offender at the instance of the state”.

Raffale Garafalo stated that crime is an act which offends the basic sentiments of ‘pity’ and ‘probity’.

Donald Taft defines crime is a social injury and an expression of subjective opinion varying in time and place.

Criminal behaviour must respond to the following test inorder to be reckoned Every as a crime-

1. There should be an external act (actus)
2. It should
3. it some kind of punishments.
4. be done with some criminal intent (mens rea)
5. It should be prohibited conduct under the existing law, and

NATURE AND SCOPE OF CRIMINOLOGY:

The science of criminology is divided into 2 types namely:

1. Theoretical or pure criminology ; and
2. Applied or practical criminology.

Prof.W.A.Bonger preferred to study theoretical criminology under the following heads:

1. Criminal Anthropology
2. Criminal Sociology
3. Criminal Psychology
4. Criminal Psycho-neuro-pathology
5. Penology

The judicial approach to criminology suggests that an act to become a crime must confirm to 2 cardinal principles of criminal liability namely:

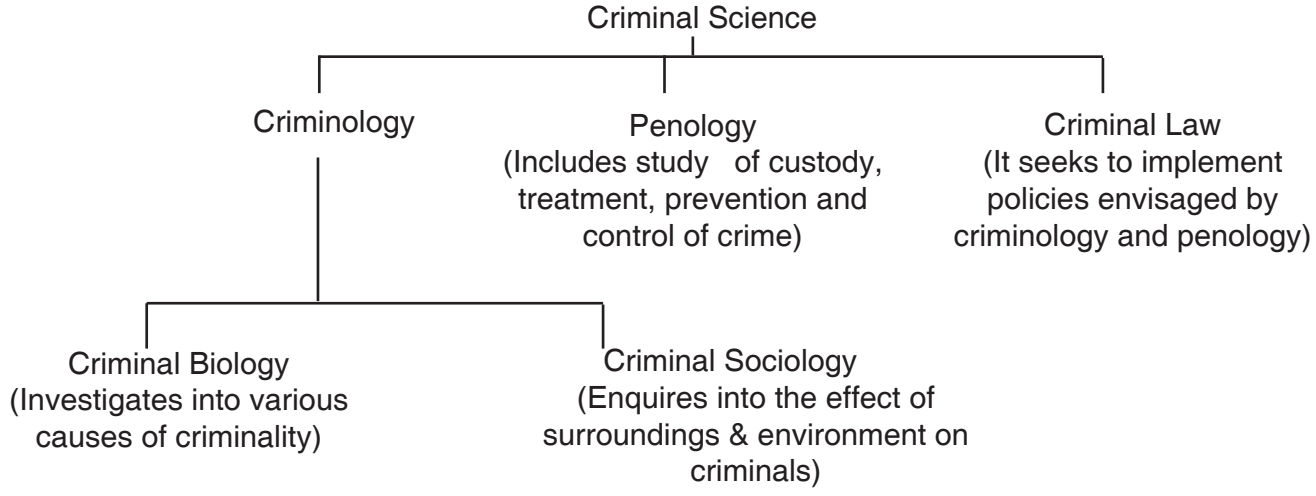
(i) nullum crimen sine lege

Which means no one is held criminally liable unless he has done an act which is expressly forbidden under the existing criminal law of the land and has a reprehensive state of mind to do it.

(ii) nulla poena sine lege

This means that no one can be punished for an act unless it is made punishable under the law.

No one is a born criminal but it is the circumstances that make him so; not because he wants to be a criminal but he is rather forced to lend into criminality.



SCHOOLS OF CRIMINOLOGY:

1. Pre-classical school of criminology:

It was generally believed that a man commits crime due to the influence of some external spirit called 'demon'. An offender commits a wrongful act not because of his free will but due to the influence of some external power.

2. The classical school:

Beccaria expounded his naturalistic theory of criminality by rejecting the omnipotence of evil spirit. He stressed that criminologists are concerned with the 'act' of the criminal rather than his 'intent'. This school came into existence due to the influential writings of Montesquie, Hume, Bacon and Rousseau.

3. Neo- classical school:

Neo-classists approached the study of criminology on scientific basis by recognizing that certain extenuating situations or mental disorders deprive a person of his normal capacity to control his conduct. They were the first to differentiate between first offenders and recidivists.

4. Positive school:

French doctors established that it is neither 'free will' nor the 'innate depravity' which actuated the offender to commit crime but the real cause of criminality lay in anthropological features of the criminal. There is co-relationship between criminality and the structure and functioning of brain.

5. Sociological school of criminology:

Tarade was the first to reject the anthropological approach of positivists and held that crimes were the outcome of human tendency to imitate others. Factors such as mobility, culture, religion, economy etc have a direct bearing on the incidence of crime in a given society.

CAUSATION OF CRIME:

Emile Durkheim says that crime is a natural phenomenon which is constantly changing with the social change. Lombroso stated that heredity was the sole cause of criminal behavior. The mentally deprived criminals are classified in to 4 heads namely:

1. Idiots
2. Imbeciles

3. Feeble minded criminals
4. Morally insane criminals

Law takes into account mental illness while determining the criminal liability of the offender.

R v. Mc Naughten M8431 10 CL AND F. 200

Mc Naughten was a political maniac who wanted to shoot Britain's Foreign minister Robert Peel instead killed his private secretary Drumond on 20th January, 1843 in day time. The killer was declared to be mentally insane by medical experts. The case involved 2 issues namely:

1. Whether the insane person is incapable of distinguishing between right and wrong?
2. Whether the argument that public safety demanded this plea should not be readily accepted as a defense to shield the criminal from penal consequences needed proper attention?

It was held that Mc Naughten was not guilty on the ground of his mental insanity.

Age and crime also has an inter-link. A child of 12 years age can tackle more difficult problems than an average young person. With each year of age, ability continues to grow and develop constantly.

$$I.Q = \frac{MA * 100}{CA}$$

Where,

IQ = Intelligence quotient

MA = Mental age

CA = Chronological age

Freud's theory of criminal behavior:

Sigmond Freud explained mental conflicts in terms of id, ego and super ego. Id generates basic biological and psychological urges and impulses in a person. Ego refers to the conscious personality of which the individual is aware. Super ego refers to the force of self-criticism and control inherent in every person.

SOCIOLOGICAL THEORY OF CRIME:

Prof. Sutherland gave 2 explanations for criminal behavior namely:

1. The processes operating at the time of the occurrence of crime which he called the dynamic explanation of crime and
2. The processes operating in the earlier life history of the criminal which he termed as the historical or generic explanation of crime.

The theory of differential association was propounded by Edwin.H.Sutherland in 1939. It asserts that crime is learnt by association with others. It centers round the theme that a person becomes criminal if there is an excess of influence on him favorable to the violation of the law as compared with the influences which are unfavorable to the violation of law.

Multiple factor theory:

Prof.Healy observed that it is not one or two factors which turn a man delinquent but it is a combination of many more factors such as:

1. Mobility
2. Culture conflicts
3. Family back ground

4. Political ideology
5. Religion and crime
6. Economic conditions
7. Influence of media etc

TENTATIVE THEORY OF CRIME:

Donald Taft observed that the relationship between economic structure and values and institutions derived there from. The behaviour whether criminal or non-criminal, can be regarded as a combined effect of culture and environment. The accepted social norms are called as lawful conduct and the disapproved norms are called as unlawful conduct.

CRIME AND ECONOMIC CONDITIONS:

William Aldrian Bonger observed that the relationship between economic structure and crime is direct or positive. Criminality, being an extension of normal economic activity has increases or decreases with the rise or fall in economy. The crime rate increases in periods of prosperity and decreases during periods of economic depression.

ORGANISED CRIMES:

An organized crime is an act which is committed by 2 or more criminals as a joint venture in an organized manner. They are the members of unlawful association. Different types of criminal organizations that may operate in the criminal world may be categorized in to the following heads:

1. Organized predatory crime
2. Crime syndicate
3. Criminal racket
4. Political graft

WHITE COLLAR CRIME:

A white collar crime belongs to persons belonging to upper strata of society. A white collar criminal is the one who violates the criminal law while conducting his professional qualities. A white collar crime is more dangerous to society than ordinary crimes because the financial loss to the society from white collar crimes is far greater than financial loss from burglaries, robberies, larcenies etc. The white collar crimes which are common to Indian trade and business world are hoarding, profiteering and black marketing. The areas where a white collar crime plays predominant roles are:

1. Tax evasion
2. Medical profession
3. Legal profession
4. Educational institutions
5. Engineering
6. Business deals
7. Computer related crimes such as pheakering, internet frauds, stalking etc.

Remedial measures:

1. By creating public awareness
2. Constitution special Tribunals
3. Enacting stringent regulatory laws with drastic punishments
4. Incorporating special chapter in Indian Penal Code
5. White collar criminals should be dealt sternly with stiffer punishments
6. Constituting National Crime Commission to deal the problem of Crime and criminality in all its facets.
7. Public Vigilance.

SEXUAL OFFENCES:

Sex crime is obviously one among such crimes which prevails in almost all societies from ages. Like any other western country, the sex delinquency in India has also recorded an upward trend in recent decades. The factors which are mainly responsible for rise in sex offences are as follows:

1. Endless desires of man
2. Loss of faith in religion
3. Industrial developments
4. Urbanization
5. Family unhappiness
6. Uncontrollable hooliganism
7. Disintegration of joint family
8. Loss of control of parents over children etc.,

Samresh Bose v. Amol Mitra, AIR 1986 SC 967:

The Supreme Court drew a distinction between obscenity and vulgarity and held that a vulgar writing is not necessarily obscene. Vulgarity arose a feeling of disgust and repulsion and also boredom but does not have effect of depraving, debasing and corrupting the morals of any reader which obscenity does. The test is objective. In the instant case the publication was not held to be obscene though it could be called vulgar

Hicklin's case [1868] QB 360

The court observed that the test for deciding obscenity is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and whose hands a publication of this sort mat fail.

ALCOHOLISM, DRUG ADDICTION AND CRIME:

Alcoholism and drug addiction are considered as victimless crimes. Persons with balanced emotional and physical health normally do not indulge in criminality or aggressive conduct. The National Committee on Drug Addiction was setup by the government to enquire in to the extent of drug addiction in the country and to recommend suitable re-habilitation program. Drugs are classified in to 2 categories namely:

1. Narcotic Drugs- such as opium, coco leaf, cannabis, pethedine etc.
2. Psychotropic Substances- such as valium, diazepam, tidijesic, morphine etc.,

R v. Tandi [1989] All ER 267 [AC]

The accused, a woman habitually takes 'yarmouth' brand of moderate alcohol. But on the day of incident, she consumed full bottle of 'Vodka' a high intoxicant. Having lost control she strangulated her 11 years old daughter to death. She raised the defense of insanity. But the court rejected her plea on the ground that she has voluntarily consumed a heavy dose instead of her usual mild drink in order to lose her mental ability to think and act rationally.

CRIME STATISTICS:

Crime statistics are the indices of intensity of crimes recorded annually in a particular country, religion or place. Crime statistics may be placed under 3 categories namely:

1. Police statistics
2. Judicial statistics or court statistics
3. Penal statistics

The statistical methodology serves as a useful technique for formulating strategies to combat crimes and criminality. This job is handled by well trained and well qualified professionals who have real aptitude for this work.

PENOLOGY

THEORIES OF PUNISHMENT:

The object of criminal justice is to protect the society against criminals by punishing them under the existing penal law. There are 4 theories of punishment namely:

1. Deterrent theory:

It seeks to create the same kind of fear in the mind of others by providing adequate penalty and exemplary punishment to offenders, which keeps them away from criminality.

2. Retributive theory:

It is based on the concept that evil should be returned to evil. Men should be given their due. The mathematical equation of crime is.,

Guilt + Punishment = Innocence

3. Preventive theory:

The real object of penal law is to make the threat generally known rather that putting it occasionally into execution. This concept makes the preventive theory realistic and humane.

4. Reformative theory:

It suggests that punishment is only justifiable if it looks to the future and not to the past. The main emphasis of this theory is rehabilitation of inmates in the peno- correctional institutions.

FORMS OF PUNISHMENT AND JUDICIAL SENTENCING:

Punishment is one of the oldest method of controlling crime and criminality. In primitive societies punishments were barbaric in nature. Some of the punishments which prevailed in the earlier societies were flogging, mutilation, branding, stoning, pillory, fines etc. section 53 of the Indian Penal Code provides for various forms of punishments such as:

1. Death penalty
2. Life imprisonment
3. Imprisonment
4. Forfeiture of property
5. Solitary confinement
6. Fine

Judicial sentencing is the personal responsibility of the judge, a matter for his conscience alone. The personality of the offender rather than the gravity of the offence should be guiding factor in judicial sentencing. It is mainly based and depends on the way and manner in which the case is presented before the judge by the police and the prosecutor.

Asgar Hussain v. State of U.P [1974] 2 SCC 518

The disparity in sentencing creates hostile attitude in the mind of the offenders and reduces the chances of their re-socialization as the offenders react strongly against the dis-criminality treatment meted out to them.

CAPITAL PUNISHMENT:

It is the highest form of punishment. There are 2 controversial views regarding the capital punishment.

1. Retentionists views- it has great deterrent value and commands obedience for law in general public.
2. Abolitionists views- enormous increase in the homicide crime rate reflects upon the futility of death sentence.

Offences punishable with death sentence under IPC:

1. Sec 121 - Waging War against Government
2. Sec 132 - Abetment of Mutiny

3. Sec 194 - Giving or fabricating false evidence leading to procure one's conviction for capital offence.
4. Sec 302 - Murder
5. Sec 396 - Dacoity with murder

Jagmohan Singh v. State of U.P [AIR 1973 SC 947]

The Supreme Court held that death penalty is not violative of Art.19 of the Constitution ofIndia.

The modes of execution of death sentence can be by the following ways:

1. Electrocution - prevailing in USA, UK, USSR, Japan
2. Guillotine - prevailing in France, Scotland and England
3. Shooting - prevailing in Russia and China
4. Gas Chambers - prevailed in USA and Germany
5. Hanging - prevailing in India and almost all countries Lachma Devi v.. State of Rajasthan [1986 Cri.L.J 364]

   Public hanging is held to be unconstitutional.
6. Lethal injection - prevailing in USA, UK, Canada

POLICE SYSTEM:

The primary duty of the police is to prevent crime and to maintain law and order in the society. The word 'police' is derived from the Greek word 'politeia'. The lack of public co-operation, unwillingness to help police, lack of social responsibility, criminalization of politicians etc is the problems faced by the police.

Patrolling and surveillance, preventive functions, investigation, interrogation of offenders search and seizure, control of juvenile delinquency etc are some of the functions of the police.

Prem Shankar Shukla v. Delhi Administration [AIR 1980 SC 1535]

Hand cuffing is held to be inhumane and unreasonable. It is repugnant to Art.21 in the light of personal liberty.

Legal function of Police:

1. Preventive functions
2. Conditional Release of Accused on Bond etc
3. Interrogation of offenders and suspects
4. Search and Seizure
5. Maintain Inquest register
6. Function as a Prosecutor
7. Identification etc
8. Control Juvenile Deliquency
9. General Welfare Functions

THE CRIMINAL LAW COURTS:

Most countries today have a regular hierarchy of courts for dispensation of criminal justice.

British Criminal Law Courts:

1. The House of Lords
2. The Court of Criminal Appeal
3. Queens Bench division of High Court
4. Assize court
5. The Central Criminal Court of London
6. Magistrate court

American Criminal Law Courts:

1. The Supreme Court of the United States
2. Supreme Court of the States
3. Superior courts
4. The lower trial courts
5. The inferior courts of local Magistrates

Criminal Law Courts in India :

1. The Supreme Court Of India
2. The High Courts
3. The Court of Session
4. The Courts of Judicial Magistrate

The main functions of the criminal law courts are:

1. Redressal of the complainant
2. Punishment of the offender
3. Fair and impartial trial of the accused
4. Maintenance of law and order in society

THE PRISON ADMINISTRATION:

The history of prisons in India reflects the changes in society's reaction from time to time. The modern prison system in India is based on British prison model.

The American prison system:

The American prison system comprises these two systems which were started simultaneously in Pennsylvania and Auburn.

1. The Pennsylvania system:

It was first introduced in Walnut street prison in Philadelphia in 1790. The arrangements of cells in this prison resembled the spokes of a wheel with guardroom in the centre.

2. The Auburn system:

It was built at Auburn in Newyork state in 1818-1819. The essence of this system lay in forced silence and separation at night but congregate work in shops during night.

The Elmira reformatory:

The earlier systems were superseded by the Elmira reformatory in Newyork which provided for indeterminate sentence, parole and probation. It served two purposes,

i) It helped in the rehabilitation of prisoners and

ii) Work in prison kept inmates engaged during their stay in prison with the result they were mentally and physically fit to return as a useful member of society after their release.

The British prison system:

The Act of 1778 passed by the British parliament marks the beginning of prison reforms in England. Sir Arthur Waller, the then chairman of Prison Commission for England and Wales suggested to the International Penal and Penitentiary Congress in 1925 that a set of general rules should be drawn up governing the treatment of prisoners in all the member countries.

Prisons in India

The Constitution of India placed "jail" along with police and law and order in the state list of the seventh schedule. Based on the suggestion made by Pakwasa committee, a Model jail was established at Lucknow in1949.

Prabhakar Pandurang v. state of Maharashtra [AIR 1966 SC 424]

The Apex court ruled that detention in prison cannot deprive the detenue of his fundamental rights.

OPEN PRISONS:

Open prisons are a twentieth century device for rehabilitating offenders to normal life in the society through after-care programmes. Semi-open prison institution called the Witzwill establishment was setup in Switzerland. Open prisons were established in UK in 1930s and in USA in 1940s. These prisons provide for the reformation of the inmates. Open prisons also prevails in Netherland, France, Norway and Sweden, Belgium, Australia, Thailand, Middle East countries.

In India, the development of open prisons can be traced from the middle of 19th century when the first All India Jail committee was appointed in 1836. The open prisons serve as a useful correctional measure for the treatment of offenders, such as open prisons at:

1. Sampurnanand camp, Chakiya.
2. Sampurnanand camp, Naugarh
3. Sampurnanand camp, Shahgarh
4. The Saraya Ghat camp, Varanasi
5. Sampurnanand agricultural-cum-industrial camp, Sitaranj, Uttaranchal
6. Open air camp, Durgapur
7. Nav Jiwan Shivir, Mungaoli etc.,

EXECUTIVE CLEMENCY, GOOD TIME LAWS AND INDETERMINATE SENTENCE:

The system of 'good time' laws was introduced to ease the problems of discipline in prisons and make the custody, security and control within the institution more meaningful and effective. This proved to be a successful one.

The greatest disadvantage of the indeterminate sentence is that the inmates are placed for his own salvation and he contributes to a considerable curtailment of his own sentence by good work and effective change in his mentality. Suspended sentence is different from indeterminate sentence because in the former the offender is prosecuted for his guilt but he is not institutionalized.

PAROLE:

Parole is the release from the penal or reformative institutions, of an offender who remains under the control of correctional authorities, in an attempt to find out whether he is fit to live in free society without supervision.

The main objectives of parole technique as stated in model prison manual are:

1. To enable the inmate to maintain continuity with his family life and deal with family members.
2. To save the inmates from evil effects of continuous prison life.
3. To enable the inmate to retain self confidence and active interest in life.

PROBATION OF OFFENDERS:

The term 'probation' is derived from the latin word probare which means 'to test' or 'to prove'. The history of probation can be traced back to the medieval concept of 'benefit of clergy' surving in England and Americal until the middle of the nineteenth century. The benefit of clergy ' permitted clergy and other literates to escape the severity of the criminal law. It meant suspension of the execution of sentence for an indefinite period as long as the delinquent behaved well.

The ultimate purpose of this is to reclaim back those young and first offenders to orderly society who have for certain reasons fallen into bad company or gone stray and landed in to criminality. John Augustus is the father of probation. Section 562 of Criminal Procedure Code, 1898 provides for statutory recognition of probation.

Probation in USA:

Under the American probation law, the benefit of release on probation extends only to,

1) Crimes of violence
2) Crimes involving use of deadly weapons
3) Sexual offences
4) Crimes against the Government or treason
5) Offences for which specific mandatory punishment is provided and
6) Recidivists.

Judicial Trend in India:

Somnath Puri v. State of Rajasthan, AIR 1972 SC 1490, the Supreme Court observed that the benefit of probation law cannot be invoked in case of offence of fraudulent misappropriation falling under Sectin 409 I.P.C and Section 5(2) of the Prevention of Corruption Act, 1947.

JUVENILE DELINQUENCY:

1.	CHAPTER I PRELIMINARY	sec : 1 to sec : 3
2.	CHAPTER II JUVENILE IN CONFLICT WITH LAW	sec : 4 to sec : 28
3.	CHAPTER III CHILD IN NEED OF CARE AND PROTECTION	sec : 1 to sec : 3
4.	CHAPTER IV REHABILITATION AND SOCIAL REINTEGRATION	sec : 1 to sec : 3
5.	CHAPTER V MISCELLANEOUS	sec : 1 to sec : 3

The term “juvenile” means “child” and “delinquent” means “criminal”. So the term “juvenile delinquency” means “crime committed by a child” or “child criminal”. The main purpose of this act is to provide care, treatment, development and rehabilitation to the juveniles.

CHAPTER I - PRELIMINARY

Section:1	Short title, extent and commencement
Section:2	Definitions
Section:2(a)	“advisory board’’
Section:2(b)	“begging”
Section:2(c)	“Board’’
Section:2(d)	“child in need of care and protection’’
Section:2(e)	“children’s home”
Section:2(f)	“Committee”
Section:2(g)	“competent authority”
Section:2(h)	“fit institution”
Section:2(i)	“fit person”
Section:2(j)	“guardian”
Section:2(k)	“juvenile” or “child”
Section:2(l)	“juvenile in conflict with law”

CHAPTER I - JUVENILE IN CONFLICT WITH LAW

CHAPTER III - CHILD IN NEED OF CARE AND PROTECTION

Section:29 Child Welfare Committee
Section:30 Procedure, etc., in relation to Committee
Section:31 Powers of Committee
Section:32 Production before Committee
Section:33 Inquiry
Section:34 Children's homes
Section:35 Inspection
Section:36 Social auditing
Section:37 Shelter homes
Section:38 Transfer
Section:39 Restoration

CHAPTER IV-REHABILITATION AND SOCIAL REINTEGRATION

Section:40 Process of rehabilitation and social reintegration
Section:41 Adoption
Section:42 Foster care
Section:43 Sponsorship
Section:44 After-care organization
Section:45 Linkages and co-ordination

CHAPTER V-MISCELLANEOUS

Section:46 Attendance of parent or guardian of juvenile or child
Section:47 Dispensing with attendance of juvenile or child
Section:48 Committal to approved place or juvenile or child suffering from dangerous diseases and his future disposal
Section:49 Presumption and determination of age
Section:50 Sending a juvenile or child outside jurisdiction
Section:51 Reports to be treated as confidential
Section:52 Appeals
Section:53 Revision
Section:54 Procedure in inquiries, appeals and revision proceedings
Section:55 Power to amend orders
Section:56 Power of competent authority to discharge and transfer juvenile or child
Section:57 Transfer between children's homes, under the Act, and juvenile homes, of like nature in different parts of India
Section:58 Transfer of juvenile or child of unsound mind or suffering from leprosy or addicted to drugs
Section:59 Release and absence of juvenile or child on placement
Section:60 Contribution by parents
Section:61 Fund
Section:62 Central, State, district and city advisory boards
Section:63 Special juvenile police unit
Section:64 Juvenile in conflict with law undergoing sentence at commencement of this Act
Section:65 Procedure in respect of bonds
Section:66 Delegation of powers
Section:67 Protection of action taken in good faith
Section:68 Power to make rules
Section:69 Repeal and savings
Section:70 Power to remove difficulties

CRIME PREVENTION:

The modern approach of penologists to crime preventions centers round 5 considerations namely:

1. Individualization
2. Re-socialisation
3. Legislative participation in correctional problem
4. Ecological interpretation of sociological problem
5. Public participation

The problems involved in the crime prevention are:

1. New technological offences
2. Wide use of electronic communication
3. Politicalisation
4. Terrorism
5. Lack of adequate knowledge in forensic science etc.,

Victimology is the branch of knowledge to elucidate the role of victim in the causation of crime. The reasons for non-reporting of crimes are:

1. Indifference
2. Apprehension of threat
3. Considerable loss of time and money
4. Lack of faith and confidence in police action
5. Social and public indignation etc.,

RECIDIVISM:

The term 'recidivism' means persistent indulgence in crime. Recidivists are crime repeaters. The offender who has a long criminal record and has been a frequent inmate of penal or correctional institution is called as recidivist.

G.B.Vold classified criminals into 4 major categories for the purpose of analyzing the problem of recidivism:

Category	Total population of Criminals
1. Psychologically disturbed criminal	30%
2. Psychologically normal but suffering from Inferiority complex	40%
3. Psychologically normal and educated criminals	10%
4. Hardened criminals	20%

The offenders may be classified into following categories:

1. Innocent convicts
2. Insane criminals
3. Criminals by accident
4. Occasional criminals
5. Habitual offenders
6. White collar criminals
7. Political offenders

In Mohd. Giasuudin v. State of Andhra Pradesh:

The Supreme Court emphasized the reformative aspect of penal justice that the sub culture that leads to anti-social behavior has to be encountered not by undue cruelty but by re- culturisation.

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2 . INTELLECTUAL PROPERTY LAW

Introduction

Property means the highest right; a man can have to anything, being that right which one has to land or tenements, goods or chattels which does not depend on another's courtesy: it includes ownership, estates and interests in corporeal things. The word property is used to denote the proprietary rights of a man as opposed to his personal rights.

Kinds of Property

Properties are of two types, either tangible or intangible i.e., corporeal or incorporeal.

(1) Tangible Property

Tangible property is the right or ownership in material things. It has got a tangible existence. E.g. Land, Buildings, Trees, etc.

(2) Intangible Property

It is also called incorporeal property. It includes the interests in non-material things and the rights which law recognizes and protects. E.g. Servitudes, Securities, Intellectual Property Rights

Intellectual Property

Intellectual Property is the creation of human mind, human intellect and hence called "Intellectual Property". Intellectual Property, although a hidden property, is an important means of accumulating tangible wealth. Unlike a tangible asset, the products of imagination, concepts or ideas have the capacity of being infinitely reproducible, once known. Absolute inalienable possession is neither possible nor culturally desirable. The law recognizes this and in no sense creates property rights to intellectual works and entrepreneurs are rights to the exclusive use and exploitation of ideas or concepts for particular commercial ends.

Intellectual Property comprises of two main branches:

Industrial Property:

Trade Mark, Patent and Industrial Designs.

Copyright:

Literary, Musical, Artistic, Photographic and Audiovisual works.

Need to protect intellectual property:

(1) No man should be permitted to represent his goods as being goods of another

(2) Creation of intellectual property involves high degree efficiency and requires quite a good imagination and labour. This hard earned property cannot be easily availed by third person to the unfair advantage of the creator.

(3) On protection of intellectual property, an exclusive right to use is conferred on the creator and that inspires the creator to invest more time and money for further creation.

(4) Protection to intellectual property is granted on registration and as a consequence of registration the public is made known of the new creation.

(5) The monopoly right granted on registration is only for a limited period, in case of patents and afterwards it becomes public juris.

(6) Protection of intellectual property is not only done keeping in mind the personal proprietary rights of the creator, but also in the national interest of encouraging, developing and bringing into commercial use of new inventions.

(7) Protection of intellectual property is one on three basis, Protection of -
   (a) Personal Proprietary Interest
   (b) Public Interest
   (c) National Interest

Protection against Unfair Competition

Protection against unfair competition has been recognised as one of the main objectives of intellectual property system. It does not grant exclusive rights to the owners with respect to the subject concerned, like in the case of patents, trade marks, etc. Infact, it prohibits any act of competition that is contrary to honest practices in industrial or commercial matters, referred to as "unfair competition". The acts of unfair competition not only adversely affect the competitors, which tend to lose their customers and market share; but also affect consumers as they are likely to be misinformed and mislead and tend to suffer economic and personal prejudice.

The following acts of unfair competition are closely related to IP and are directly relevant to consumer protection:-

- all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor
- false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor
- indications or allegations the use of which in trade is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for their purpose or quantity, of the goods.

Various Kinds of Intellectual Property

Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs. Common types of intellectual property rights include copyrights, trademarks, patents, industrial design rights and trade secrets in some jurisdictions

COPYRIGHT

In ancient days creative writers, musicians and artists wrote, composed or made their works for fame and recognition rather than to earn a living. The question of copyright never arose because copying was laborious and expensive. But, the invention of printing press, made it possible to produce copies of a work in large numbers at a low cost. Technological progress has made reproduction of copyright material easy and cheap, but at the same time it has made piracy of copyright work simple and difficult to control.

Object

A person works and produces something. The product of his skill and labour ought to belong to him. If other people were free to do this, they would be making profit out of the skill and labour of the author. So, it becomes necessary to confer certain exclusive rights upon the author and to provide remedies in case of any breach. So, the object of copyright law is to protect the author of the copyright work from an unlawful reproduction or exploitation of his work by others. This encourages the authors, composers and artists to create original work by rewarding them with the exclusive right for a limited period to reproduce the work for the benefit of the public. On the expiry of the term of copyright the work belongs to the public domain and any one can reproduce them without permission. Copyright is a negative right, that is to say, a right to prevent others from copying or reproducing the work.

Definition of Copyright

The statutory definition of copyright is given under Section 14 of the Copyright Act, 1957 which means the exclusive right to do or authorize others to do certain acts in relation to

(1) Literary, dramatic or musical work;

(2) Artistic work;

(3) Cinematograph film; and

(4) Sound recording.

Every author has a copyright in the work he creates. This is inherent in him by reason of he being an author. It creates in the author an exclusive right to produce, reproduce, publish and perform his work in all ways known and possible.

Characteristics of Copyright

1) Copyright is a creation of statute
2) It is some form of Intellectual Property
3) Monopoly Right
4) Negative Right
5) Multiple Rights
6) Copyright only in form not in idea and
7) Neighbouring Rights.

Literary Works

Copyright subsists in original literary works such as novels, poetry, history or books on any subject whatsoever. It includes computer programmes, tables and compilations including computer databases. To secure copyright for a product, it is necessary that the labour, skill and capital should be used sufficiently to impart to the product some quality or character which raw material did not possess.

Originally relates to expression of thought but such expression need not be novel. A person is entitled to get copyright for his works, if it is proved that, the same arrangement or combination of words have not been used before, even though, he might have borrowed much of his materials from others and combined them in a different manner.

Musical Works [Sec.13 (1)]

Musical work means a work consisting of music and includes any graphical notation of such work, but does not include any words or any action, intended to be song, spoken or performed with the music.

Artistic Works [Sec. 2 (c)]

Artistic work means (i) a painting, a sculpture, a drawing, an engraving, or a photograph, whether or not any such work possess artistic quality. (ii) a work of architecture or artistic craftsmanship. Essentially artistic copyright is concerned with visual image.

Publication

The term “Publication” connotes different meanings in the context in which it is used. Publication is defined under section 3 of the act, as it means making a work available to the public by issues of copies or by communicating the work to the public.

Communication can be made through satellite or cable or other means of communication to more than one household. Computer programmes can be published only by issue of copies for sale or for hire.

According to the provisions of Section 17, the author of the work is the first owner of the copyright in the work.

The copyright provisions do not recognise any copyright in an idea. The originator of an idea is not the owner of the copyright, copyright belongs to the person who gives concrete form to the idea.

Ownership of Copyright

The substance of copyright depends upon the following nationality requirements:

1. Published Work:
   The work must be published in India or when published outside India, the author must be a citizen of India at the date of publication (if alive at the date) or if dead at the time of death.
2. Unpublished work:
   The author at the time of making the work must be a citizen of India or domiciled in India.
3. Architectural work

Rights conferred by Copyright

Rights common for all works:

(1) To reproduce the work
(2) To perform the work in public
(3) Translation
(4) Adaptation

Term of Copyright

Sections 22 to 29 of the Act deal with the term of Copyright in various works. They are,

(a) Literary, dramatic, musical or artistic work:
   When published within the lifetime of the author, copyright subsists during the life time of the author and until sixty years from the beginning of the Calendar year next following the year in which the author dies.

(b) Cinematograph Film:
   Copyright subsists until sixty years from the beginning of the calendar year next following the year in which the film is published. The term of copyright is not the same for all kinds of works.

Licenses (Section 30-32B)

The owner of a copyright may grant an interest in the copyright by a license. A license is an authorization of an act, which, without such authorization would be infringement.

The Copyright Board is empowered to grant compulsory licenses under certain circumstances on suitable terms and conditions in respect of an Indian work.

Assignment

Section 18 deals with the assignment of Copyright. The owner of a copyright in an existing work or a prospective owner of a copyright of a future work can assign the copyright partly or wholly and either generally or with some conditions and either for a whole term or part thereof to another person. In case of a prospective work, the actual assignment will happen only the work comes into effect.

Modes of Assignment

No assignment of the copyright in any work shall be void unless it is in writing and signed by the assignor or his duly authorized agent. The assignment of copyright in any work shall identify such work and should specify:

- Rights assigned
- Duration (Five years if not specifically mentioned)
- Territorial extent of the assignment (presumed to be within India)
- Amount of royalty payable

Assignments can be revised, extended or terminated on mutually agreed terms. If the assignee does not exercise the rights assigned within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment.

Transmission of copyright

Section 19 of the Copyright Act says that, under a request, a person is entitled to the manuscript of a literary, drama, musical or artistic work, and if the work was not published before the death of the testament, the request shall, unless a contrary intention was made by the testator in his will or codicil, be construed as including the copyright in the work in so far as the testator was the owner of the copyright immediately before his death.

Manuscript = original document where the work is, in written or unwritten form

Relinquishment of copyright by the author

Section 21 of the Copyright Act says that, author of a work may relinquish all or any rights by sending a notice to the Registrar of Copyrights in the prescribed form and thereupon such rights cease to exist. Registrar of Copyrights shall publish about the notice in the Official Gazette in such a manner he may deem fit. The relinquishment of rights shall not affect any rights subsisting in favor of any person on the date of the notice.

Copyright Societies:

Sections 33 to 36A of the Copyright Act are the relevant provisions dealing with copyright societies. Copyright Society is such a legal entity which safeguards the interests of the owners of the work in which a copyright subsists. The author of a creative work is assured of commercial management of his work by these societies.

The Copyright Societies discharge the following functions:-

1. Grant licence of the copyright in the work for reproduction, performance or communication to public.
2. Locate instances of infringement of copyright and initiate legal action against the infringers.

Rights of Broadcasting Organisations:

The Broadcasting Organisations such as Television, Radio have been vested with certain rights known as 'Rights of Broadcasting Organisations'. The Copyright (Amendment) Act, 1994 has incorporated a new section in place of the old Section 37 of the Act.

Section 37 now provides that every broadcasting organization will have a special right termed the "Broadcasting Reproduction Right" in respect of its broadcasts. The term of the 'Broadcasting Reproduction Right' shall be twenty-five years from the date of broadcasts.

Performer's Rights:

Section 2(qq) defines the 'Performer' includes an acrobat, musician, singer, actor, juggler, snake-charmer, a person delivering lecture or any person who makes the performance. Section 2 (q) defines 'Performance' as any visual or acoustic presentation made by one or more persons

Section 38 of the Copyright Act provides that the Performer has the exclusive right to do the following:

i) To make sound recording or visual recording of the performance
ii) To reproduce a sound recording or visual recording of the performance,
iii) To broadcast the performance,
iv) To communicate the performance to the public otherwise than by broadcast.

The performer's right subsists for twenty-five years from the year of performance.

International Copyright:

Under the provisions of Section 40 the Government of India has the power to extend the benefits to works first published in any foreign country. This may be done through a notification inOfficial Gazette. By the Copyright (Amendment) Act, 1999 new Section 40A empowers Central Government to apply provisions of International Copyright to Broadcasting Organisations and the Performers in certain country.

Section 43 also empowers the Central Government to restrict the rights in the works of foreign authors first published in India.

Infringement of Copyright (Section 51-53A)

Copyright law confers upon the owner of a work a bundle of exclusive rights in respect of the reproduction of the work. If any of these acts relating to the work is carried out by a person other than the owner without a license from the owner or a competent authority under the Act, it constitutes infringement.

Exceptions to infringement are i) Fair Dealing, ii) Reproduction for Judicial Proceedings, iii) Reading or recitation in public, iv) Publication in a collection for the educational institutions, v) Reproduction by the teacher or pupil, etc.

Remedies for Infringement of Copyright (Section 54-62)

There are three kinds of remedies against infringement of copyright, namely:-

1) Civil Remedies

(a) Injunction
(b) Damages and accounts
(c) Delivery of infringing copies
(d) Damages for conservation

2) Criminal Remedies

(a) Imprisonment of accused
(b) Imposition of fine
(c) Seizure of infringing copies and delivery to the owner.

(3) Administrative Remedies

(a) Moving the Registrar of copyright to ban import of infringing copies into India.
(b) Delivery of infringing copies confiscated, to the owner.

Case Laws on Copyright:

1) Eastern Book Company v.. D.B.Modak, 2003 PTR 30
The court held that the defendants shall be entitled to sell their CD-ROMs with the text of the judgments of the Supreme Court along with their own head-notes, editorial notes, if any, which should not in any way be copy of the head notes of the plaintiff. The defendant shall also not copy the footnote(s) and editorial comment(s) appearing in the journal of the plaintiff.

2) Jaininder Jain v. Kangaro Industries (Regd) . 2006 PTC 411
The objection to registration to copyright was made. The appellant retired as partner from a partnership firm. The artistic work was owned by the partnership firm. It was held that the impugned order of Registrar passed after hearing of both parties was legal and proper.

3) Academy of General Education, Manipal v.. B.Mallini Mallya, (2009) 4 SCC 256
The Supreme Court held that section 52 of the Copyright Act provides for certain acts which would not constitute an infringement of Copyright. The appellant being an educational institution, if the dance is performed within the meaning of provision of clause (j) of subsection (1) of section 52 of the Act strictly, the order of injunction shall not apply thereto also.

4) Eastern Book Company and others v.. Naveen J. Desai and another, 2001 (1) RAJ 207 (Del)
Compilations made from matter available in public domain using independent skill and labour and his own skill and judgment cannot be treated as a pirated work of another person.

5) Gramaphone Co. of India Ltd v.. Mars Recording Pvt.Ltd and Ors, 2000 (4) RAJ 210(Kar)
In the case of royalty is remitted within 15 days notice for the consent of the owners of the Copyright as provided for under Sec.52, there is no need to wait for the receipt of actual consent after the expiry of 15 days.

6) Living Media India Ltd. v. Jitender V. Jain, 2002 (3) RAJ 430 (Del)

Plaintiff was telecasting news programmes in Hindi Aajtak. Defendant adopted a name for the newspaper Khaberein Aajtak. The fact that the latter has his name registered under Press and Registration of Books Act does not save him for copying the name Aajtak.

(7) Camlin Pvt.Ltd v.. National Pencil Industries, 2002(2)RAJ 464(Del)

Copyright subsists only in an original literary work. But it is not necessary that the work should be an expression of the original/inventive thought. Copyright Act is not concerned with the originality of ideas but with the expression of thought and in case of literary work, with the expression of thought in print or writing. Originality for the purpose of Copyright Law relates to the expression of thought. The essential requirement is that the work must not be copied from another work but must originate from the author.

8) A.Susiah v.. S.Muniswamy, AIR 1966 Mad 175

The court held that assignment of any work, to be valid, should be in writing signed by the assignor or his authorised agent. Also that in a case of infringement of copyright in respect of literary work of two joint authors, one of them who is aggrieved can maintain criminal action for the offence.

PATENT RIGHT

A patent is a monopoly right granted to a person who has invented a new and useful article or an improvement of an existing article or a new process of making an article. It consists of an exclusive right to manufacture the new article invented or manufacture an article according to the invented process for a limited period.

It is desirable in the public interest to encourage new technology improvement and any person deriving a new technology may upon disclosure of his new technology at the patent office demand to be given monopoly in the use of it for period of 20 years. After that period, it passes into the public domain. This temporary monopoly encourages the putting into practice of the invention and permits the inventor to make profits from it. This monopoly is not objectionable because if it had not been for the inventor anybody would have been able to use it at that time or any other time, since nobody would have known about it.

Basic Principles

(a) Invention must be new and useful:

Patent monopoly is granted only for inventions which are new and useful and which have industrial application.

(b) Invention not patentable:

It is not considered in the public interest to grant patent monopolies in respect of the discovery of a scientific principle, or an invention injurious to public health or a method of agriculture or horticulture, or a process for the treatment of human beings, animals and plants.

(c) Consideration for grant:

The consideration for granting a patent is the disclosure of the invention in the specification which is open to public inspection, so that on expiry of the term of the monopoly any member of the public can use the invention.

(d) Conditions for the grant:

Patent monopoly being purely a creation of the statute, the State can impose any condition for the grant.

(e) Commercial working of Inventions:

The object of a patent grant is not only to encourage inventions, but to see that the inventions are worked in India on a commercial scale. If the patented invention is not made available to the public of a reasonable price, the patent may be revoked.

(f) Abuse of patent monopoly:

To prevent the abuse of monopoly rights created by the patent grant, the act provides for compulsory licensing of the patented, invention on certain grounds.

(g) Avoidance of restrictive conditions

If the patentee tried to extend scope of monopoly right by imposing restrictive conditions on the purchaser or lessee of the patented article or the licensee of the patent, they can verywell be avoided under the Act.

Inventions Patentable:

(1) Inventions must relate to new and useful manner of manufacture, or new article or substance
(2) Invention should involve on inventive step
(3) It should be capable of industrial application
(4) It should not be declared by the Act as not patentable

Not Patentable:

(a) Frivolous or contrary to well established natural laws.
(b) The inventions whose primary use would be contrary to law or morality or injurious to public health.
(c) Mere discovery of a scientific principle or the formulation of an abstract thereon.
(d) Mere discovery of a new property or new use for a known substance.
(e) A substance obtained by a mere admixture resulting only in the aggregation of the components.
(f) The mere arrangement or rearrangement or duplication of known devices each functioning independently of one another in a known way.
(g) A method or process of testing applicable for improving the efficiency of a machine.
(h) A method of agriculture or horticulture.
(i) Any medicinal, surgical or other treatment of human beings, animals in plants.

Procedure to obtain Patent:

(1) An application for patent may be made by a person claiming to be the true and first inventor of the invention or by his assignee or his legal representative of the deceased person who immediately before his death as entitled to apply.
(2) Every application should be accompanied by a provisional or a complete application. The specification should describe the invention and should begin with a title sufficiently indicating the subject matter to which the invention relates.
(3) On filing of the complete application, the application for patent will be examined by an examiner. If the report of the examiner contains any objection to the application, the controller will communicate the gist of the objection to the applicant.
(4) After the applicants have complied with all the requirements of the office within the time prescribed, the controller may accept the complete specification and this fact will be advertised in the official gazette and thereafter the application and specification will be open to public inspection.
(5) Any person interested may give notice of opposition to the application within 3 months from the date of advertisement. The controller will decide the dispute after giving opportunity to both the parties.
(6) Where the period for filing of notice of opposition has expired or the opposition proceedings have been finally decided in favour of the applicant, the patent will be granted and the patent sealed and entered in the register.
(7) If the application has not been opposed, the request for sealing must be filed not later than six months from the date of advertisement of the acceptance of the complete specification.

(8) The date of sealing of patent is material for the purpose of calculating the term of patent in respect of food & drugs. It is also relevant for calculating the period for filing an application for compulsory licence.

(9) The patent will be dated as of the date on which the complete specification is filed. The purpose of "date of patent" is for calculating the duration of patent and for reckoning the time for payment of renewal fee.

Grant and sealing of patent:

(1) Where a complete specification in pursuance of an application for a patent has been accepted and either -

(a) the application has not been opposed under Section 25.and the time for the fiing of the opposition has expired; or

(b) the application has been opposed and the opposition has been finally decided in favour of the applicant; or

(c) the application has not been refused by the Controller by virtue of any power vested in him by this Act, the patent shall, on request made by the applicant in the prescribed form, be granted to the applicant or, in the case of a joint application, to the applicants jointly, and the Controller shall cause the patent to be sealed with the seal of the patent office and the date on which the patent is sealed shall be entered in the register.

(2) Subject to the provisions of Sub-section (1) and of the provisions of this Act with respect to patents of addition, a request under this section for the sealing of a patent shall be made not later than the expiration of a period of six months from the date of advertisement of the acceptance of the complete specification.

Secrecy of Inventions relevant for defence purposes

In case of the inventions which are considered by Central Government as relevant for national defence and security, Patent Act 1970 provides for secrecy directions, meaning that such inventions shall not be published till the time it is considered relevant for national defense. Controller may give direction for prohibiting or restricting the publication of information, relating to certain specific inventions or the communications of such information, if it appears to him that the invention in question is one of a class notified to him by Central Government as relevant for defence purposes or the Controller himself considers it to be so. He may give directions for prohibiting or restricting the publication of information with respect to the invention or the communication of such information.

If the invention belongs to one of the class notified by the Central Government, the Controller shall give notice to the central Government of the directions issued by him.

Restoration of Lapsed Patents

When a Patent has ceased to have effect due to non-payment of renewal fees within the prescribed time, the Patent may be restored by filing an application for restoration, within eighteen months from the date on which the patent ceased to have effect. Such an application can be made by the patentee / assignee, or his legal representative and in case of joint applicants, then, with the leave of the Controller, any one or more of them without joining the others. The applicant has to state, the circumstances which led to the failure of payment of renewal fees.

Rights of a Patentee:

(1) Exclusive right to make, use exercise, sell or distribute the patented article in India or use or exercise the method or process if the patent is for process.

(2) The patentee has power to assign, grant licences or otherwise deal with the patent for any consideration.

(3) The patentee may amend the complete specification of his patent on application made to the controller.

(4) A patentee has the right to surrender his patent, if he is not interested in working the patent.

(5) Patentee has the right to sue for the infringement of the patent.

(6) During the period from the date of advertisement of the acceptance of a complete specification and the date of sealing of the patent, the applicant can exercise all the privileges and rights of a Patentee except the filing of suit for infringement.

Limitations on the exclusive right:

(1) The patentee rights are exercisable only during the term of the patent prior to 2002 Amendment, in respect of invention claiming the method of process of manufacturing a substance for use or capable of being used as food, medicine, or drug, the term is five years from the date of sealing or seven years from the date of patent, whichever is shorter. In respect all other inventions, the term is 14 years. But after 2002 Amendment the term period in respect of all invention is 20 years.

(2) Any person for the purpose merely of experiment or research, or for the purpose of imparting instructions to pupil can make use of the patented article or process without the consent of the Patentee.

(3) Under certain circumstances and terms, the Govt. may use the patented invention or even acquire it, or prohibit a person from using an invention.

(4) Compulsory licences and licences of rights.

(5) A patent may be revoked for non-working.

Obligations of Patentee:

(1) The Patentee is under an obligation to work the patent in India, in such a manner that the reasonable requirements of the public are satisfied and the invention is made available to the public at a reasonable price.

(2) If the Patentee is not working the patent or abusing the monopoly or making unjustifiable threats of an action for infringement of the patent, then, the Patentee is likely to lose his exclusive rights.

Working of Patents

a. Patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay.

b. The Controller has the power to call for the information such as periodical statements as to the extent to which the patented invention has been commercially worked in India, as may be specified in the notice issued to that effect at any time during the continuance of the Patent

c. A patentee or a licensee shall furnish such information within two months from the date of such notice or within such further time as the Controller may allow.

d. The patentee and every licensee shall furnish a statement as to the extent to which the patented invention has been worked on a commercial scale in India, in respect of every calendar year, within three months of the end of each year.

Transfer of Patent:

A patent is a transferable property. It can be transferred from the original patentee to other person by assignment by patentee or by operation of law, for example, devolution of the rights in the legal heirs.

(1) Assignment

Transfer by a part of all of its rights or interest in the property. There can be three kinds of assignments: i) Legal Assignment, ii) Equitable Assignment, iii) Mortgage.

(2) Licence

A patentee can transfer a right by a licence agreement permitting a licensee to make, use or exercise the invention. The different kinds of licences are: i) Voluntary Licence, ii) Statutory Licence, iii) Exclusive/Limited Licence, iv) Express/Implied Licence

(3) Transmission

When a patentee dies, his interest in the patent passes to his legal representative. A patent also can acquire by the Government under the Act when reasonable requirements of public have not been met.

Revocation of Patent:

The patent may be revoked by the High Court on a petition of any person interested.Revocation of patents can be brought on any of the following grounds. These are enumerated under Section 64 of the Patents Act 1970 (as amended in 2005).

1) The invention as claimed through the claims in complete specification was claimed earlier through a valid claim contained in complete specification of another patent granted in India and having earlier priority date.
2) The patent was granted on the application of a person not entitled to apply under the provisions of the Patents Act, 1970.
3) The patent was obtained wrongfully i.e. in contravention of the rights of the petitioner or any person under or through whom he claims.
4) The subject-matter of any claim of the complete specification is not an invention within the meaning of the Patents Act.
5) The invention claimed through any claim of the complete specification is not new having regard to anticipation by previous publication and by prior claim as referred to in Section 13.
6) The invention claimed through claims in the complete specification is obvious or does not involve any inventive step having regard to what was publicly known or used in India or what was published in India or elsewhere before the priority date of the claim.
7) The invention as claimed is not useful.
8) The complete specification does not sufficiently and fairly describe the invention and the method by which it is to be performed.
9) The scope of any claim of the complete specification is not sufficiently and clearly defined or the claim is not fairly based on the matter disclosed in the specification.
10) The patent was obtained on a false suggestion or representation.
11) The subject of any claim of the complete specification is not patentable under the Patents Act, 1970.
12) The invention was secretly used in India before the priority date of the claim.
13) The applicant for the patent has failed to disclose to the Controller the information and undertaking regarding foreign applications or has furnished false information.
14) The applicant contravened any direction for secrecy relating to inventions relevant for defence or made / caused to be made an application for the grant of a patent outside India without prior permission from Controller.
15) The leave to amend the complete specification before the Controller and Appellate Board or High Court was obtained by fraud.
16) The complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention.
17) The invention as claimed was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

Section 85 of the Patents Act, 1970 deals with Revocation of Patents by the Controller for non-working of a patent to which a compulsory license has been granted.

Surrender of patents (Section 63)

(1) A patentee may, at any time by giving notice to the Controller, offer to surrender his patent.
(2) The Controller shall publish the offer in and also notify every person other than thepatentee whose name appears in the register as having an interest in the patent.
(3) Any person interested may after such publication, give notice to the Controller of opposition to the surrender.
(4) Receiving notice of opposition the controller shall notify the patentee.
(5) If the Controller is satisfied after hearing the patentee and any opponent, if desirous of being heard, that the patent may properly be surrendered, he may accept the offer and by order, revoke the patent.

Compulsory License:

A compulsory license, also known as statutory license or mandatory collective management, provides that the owner of a patent or copyright licenses the use of their rights against payment either set by law or determined through some form of arbitration. In essence, under compulsory license, an individual or company seeking to use a patent can do so without seeking the patent holder's consent, and pays the patent holder a set fee for the license.

Compulsory licensing, which basically means allowing a third party to make, use or sell a patented invention without the patentee's consent, has been viewed as a way of neutralising the perceived ills of the patent system. There has always been a danger that the patentee will abuse the monopoly granted to him. The patent is granted not only for the benefit of the patentee, but also for the benefit of the public at large. To prevent such monopoly, the Act has provided the grant of compulsory licences. The compulsory licences not only cover situations where a patent is not being worked, but also available in other circumstances such as where demand for a product is not being met on reasonable terms.

Infringement of Patents:

A patent confers the exclusive right on the patentee to make, distribute or sell the invention in India. An infringement would be when any of these rights as violated. Whether the act of a person other than the patentee amounts to infringement or not would depend upon.

i) The extent of the monopoly right conferred by the patent which is interpreted from the specification and claim containing in the application of the patentee.
ii) Whether he is infringing any of the monopoly rights of the patentee to make, distribute or sell the invention.

What can amount to infringement?

(1) The colourable imitation of an invention
(2) Immaterial variation in the invention,
(3) Mechanical equivalents.
(4) Taking essential features of the invention.

Remedies

Whenever the monopoly rights of the patentee are violated, his rights are secured by the Act through judicial intervention. The patentee has to institute a suit for infringement. The reliefs which may be awarded in such a suit are-

1) Interlocutory/interim injunction
2) Damages or accounts of profits
3) Permanent injunction.

Patent Agents

To practice as a Patent Agent under the Act, a person has to get his name registered as a Patent Agent at the Head Office or the Patent Office. He must be a citizen of India, has completed 21 years of age, has obtained a degree in science, engineering and technology and in addition has passed the qualifying examination for the purpose or is an advocate or has minimum of 10 years experience as examiner or commissioner.

Every Patent Agent shall be entitled to practice before the Controller and prepare all documents, transact all business and discharge such other functions as may be prescribed by the Controller.

Case Laws on Patents

1) Daniele Esse Officinee Meccaniche Spa v. Controller of Patents and Designs, 2000 (3) RAJ 199 (Cal)

   An application made for patent in foreign country before it became a convention country cannot have its priority if an application is made for patent in India. In order to have priority from the date of application made in foreign country, such application must have been made after that country became a convention country.

2) Natin Dave v. Union of India, 2004 (29) PTC 71 (Del)

   Inventive step means a technical advance or having economic significance or both along with a factor which makes it new and novel. Question of vires of a provision of law can be gone into only if the court has jurisdiction.

3) Sloptic Services India Ltd. v. PACACCA Biotech Ltd., 2006 (32) PTC 811 (ACD)

   Publication of invention in other countries renders the alleged invention sought to be patented lacks novelty or new. No patent can be granted in India.

4) Eurekha Forbes Ltd., v. Hindustan Unilever Ltd., 2008 (36) PTC 210 (Del)

   Patent does not confer any absolute right to use but it is subject to other laws. Where permission or licence is required to be taken, it has to be taken. If there is an earlier patent that patent only will prevail. If the patent is an improvement the latter must take permission by the other to the extent of the original.

5) Abid Kagarwala v. Edgar Haddle Co. (P) Ltd 1984 PTC 234

   If the specification is not properly drafted or specification furnished does not enable the person knowing the art to work the specification, grant of patent will be refused.

6) Paul Manfg. Co v. A.R.T.M & others, 2006 (32) PTC 285 Del

   When an alternative remedy of appeal and rectification are available it is premature to approach the High Court under special jurisdiction.

7) Zuko Engineers SA. v. Ministry of Commerce and Industries, 2003 (26) PTC 199 (Del)

   The respondents required the petitioner to pay fee for the renewal of patent in the category of individuals, which was applicable to legal entities other than individuals, either alone or jointly. The respondents took the view that since the name of the patentee is Zuko Engineers; the fee has to be paid for legal entity other than individual. The court held that the stand is erroneous in as much as the name of a concern cannot determine or be decisive of whether the concern is a proprietorship and is owned by individual or is a partnership firm.

8) Taylor and Scott v . Anand

   The Court observed that the way to ascertain whether a novel and useful improvement in machinery is an invention in the true sense is to consider how matters stood before improvement was discovered.

9) Research Foundation for Science Technology and Ecology and others v. Ministry of Agriculture and other (Basmati Patent)

In answer to a public interest litigation application, on the question of protecting India's Biodiversity particularly in relation to Basmati Patent dispute pending in USA, the Supreme Court taking notice of the fact that the Government is proceeding with the legislations on bio-diversity, Geographical Indications and Plant Varieties and Farmers Rights Protection directed the Government to take appropriate action for protecting Basmati rice against piracy.

INDUSTRIAL DESIGNS

Eye catching look or appearance enhances the market appeal, and hence the marketability of the product. Useful articles must also be visually attractive, if they are to catch the attention of potential buyers. Today's manufacturer of goods pays great deal of attention to the getup of his industrially produced articles. He pays meticulous care to choose and apply design-shape, pattern, configuration, ornamentation - for his products which will appeal to contemporary tastes. He invests substantial capital and employs professional experts for creating new designs. Legal protection for designs is highly inevitable. The Designs Act, 1911 confers "Copyright" in registered "Designs."

Designs Act 2000:

The Designs Act 2000 is the amended act of Designs act 1911, which solely enacted for the protection of the original design for a period of ten years or whatever the further period extendable. The new Act expanded the definition of a Design under section 2 (d).

Designs means only the features of shape, configuration, pattern or ornament or composition of lines or colours applied to any article whether two dimensional or three-dimensional or in both forms, by any industrial process or means whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and the judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device.

1) The purpose of the Design Act is to protect novel designs devised to be applied to particular articles to be manufactured commercially. It is not to protect principles of operation or invention, which, if protected at all, ought to be make the subject matter of a patent.
2) The features should appeal to the eye and should be solely judged by the eye and not by any functional consideration. The eye must be the eye of the customer on a visual test.

Registrable design:

(1) A design in order to be entitled to registration must be new or original. A design is undoubtedly new and original if the features of shape or pattern constituting the design are completely new in the sense that they were invented or created for the first time and were hitherto unknown.
(2) The design must not have been previously registered in India.
(3) The design must not have been previously published in India., i.e., published in India prior to the date of registration.
(4) The design must be applied to a particular article.
(5) The design must have visual appeal.

Non-registrable design:

The definition of design excludes the following from being considered as a design:

(a) Any mode or principle of construction or any thing which is in substract a mere mechanical device.
(b) Any trademark as defined in Sec.2 (1) (b) of Trademark Act, 1999 or property mark as defined in Sec.479 of IPC or any artistic work as defined in Sec.2(c) of the Copyright Act, 1957.

(c) A design which comprises or contains scandalous or obscene matter.

(d) A design which is not significantly distinguishable from known designs or combination of known designs.

Procedure for Registration:

The procedure for registration of a design is comparatively simple when compared to procedure for registration of a patent of trademark.

The procedure consists of the following steps:-

(1) Submission of application
(2) Acceptance or objections or refusal of application
(3) Removal of objections or appeal to Central Government
(4) Decision of Central Government
(5) Registration of the design

Rights conferred by registration:

(1) Exclusive right to apply the design to any article in any class in which the design is registered.
(2) Exclusive right to publish or expose or cause to be published or exposed, any article in any class of goods in which the design is registered to which such design is applied; and
(3) Exclusive right to import for the purposes of sale any article belonging to the class.

Term of copyright in a design:

Section 11 lays down that the term of the copyright in design is ten years from registration which may be extended to further for a second period of five years. Thus the maximum period of copyright in designs is fifteen years.

Piracy of registered design:

Infringement of a copyright in design is termed as "piracy of a registered Design". It is not lawful for any person to do the following acts without the consent or licence of the registered proprietor of the design. Section 22 of the Designs Act 2000, lays down that the following acts amount to piracy:-

(1) To publish or to have it published or expose for sale any article of the class in question on which either the design or any fraudulent or obvious imitation has been applied.
(2) To either apply or cause to apply the design that is registered to any class of goods covered by the registration, the design or any imitation of it.
(3) To import for the purpose of sale any article belonging to the class in which the design has been registered and top which the design or a fraudulent or obvious imitation thereof has been applied.

Action for groundless threat:

Section 23 of the Designs Act, 2000 states that in regard to groundless threats of legal proceedings in the case of registered designs the provisions of Section 106 of the Patents Act 1970 will apply in like manner as they apply to in the case of patents. In the case of groundless threats of infringement proceedings, the person aggrieved is entitled to the reliefs like a declaration or an injunction or damages. The proprietor of a design is entitled to a statutory right to protect his rights under this Act. But without filing any suit for infringement, if he threatens any other person by means of circulars or advertisements or by communications, orally or in writing, he can be stopped by aggrieved person. He can file a suit against him and get the reliefs mentioned above.

Case Laws on Designs:

1) Polar Industries Ltd. v. Usha International Ltd. (2000) PTC 469 (Cal)

The shape and ornamentation of the radial ribs of the fans are different. The defendant's design is not an obvious imitation of the plaintiffs' design. Defendant was ordered to keep separate account.

2) Hindustan Lever v. Dhanushkodi Nadar (1990) IPLR 97

If the design by user has become distinctive of the owner's articles it may be protected under the law of passing off. It has been held that the provisions of section 22 (2) of Designs Act, 2000 cannot be read as to exclude any action for passing off and for rendition of accounts.

3) Coca-Cola Co. v. Barr (1961) RPC 387.

The design of the plaintiff's beverage bottle was protected; the defendant has given undertaking not to use it. For success in such cases the article should be shaped in an unusual way not primarily for the purpose of giving some benefit in use or for any other practical purpose, but in order purely to give the article a distinctive appearance characteristic of the particular manufacturers' goods. In such an event the manufacturer may be able in course of time by extensive sales of the article and advertisement to establish such a reputation in the distinctive appearance of the article itself as would give him a cause of action in passing off if his goods were copied, because in the circumstances assumed the putting of the copy in the market would amount to representation that it emanated from the plaintiff.

4) Hello Mineral Water (P) Ltd. v. Thermoking California Pure, 2000 (4) RAJ 178 (Del)

Under the Designs Act, where damages could be appropriately awarded against infringer, the Court may not grant injunction, particularly where the defendant undertakes to pay such damages.

5) Glaxo Smithkline Consumer Health Care & Co & anr v. Anchor Health and Beauty Care Pvt. Ltd, 2004 (4) RAJ 504 (Del)

A small novelty may introduce new design but such novelty should be capable of making a design different and distinctive at the first sight of the consumer and should not require lot of effort find novelty. Plaintiff claimed novelty on the ground of three changes in the new design of rubber cushioning in the gap and rubber patches on the front and backside neck of tooth brush. The court held such a variation do not constitute a new design and it is merely a trade variation which is neither inventive not innovative.

6) Dabur India Ltd. v. Amit Jain, 2009 (39) PTC 104 (Del)

The plaintiff alleged that the bottles and caps were used by the respondents and produced deceptively similar to that of the plaintiff. The court held that mere fact that there may have been a registration in the U.S. in respect of similar bottles and caps cannot come in the way of plaintiff's seeking an order restraining the respondents from infringing its registered design the court granted interim injunction.

CONFIDENTIAL INFORMATION

There is no copyright in ideas. Copyright subsists only in the material form in which the ideas are translated. Since there is no copyright in ideas or information, it is no infringement of copyright to adopt the ideas of another or publish information derived from another, provided there is no copying of the language in which those ideas have, or the information has been previously embodied. So there is no remedy under Copyright law for unauthorized use of confidential ideas or information obtained directly or indirectly by one person to another. A remedy will have to be sought by proceedings of breach of confidence or trust. Section 16 of the Copyright Act specifically provides that the Act should not be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

A person who has obtained information in confidence should not be allowed to use it as a springboard for activities detrimental to the person who made the confidential information. The law on this subject is based on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it, without obtaining his consent.

It is matter of common knowledge that under a system of free private enterprise and therefore of competition it is to the advantage of a trader to obtain as much information as possible concerning the business of his rivals and to let him know as little as possible of his own.

Types of Confidential Information

(1) Trade Secrets

(2) Personal Confidence

(3) Artistic or literary confidence

(4) Government Secret

Requirements of Breach of Confidence

(1) The information must have the necessary quality of confidence about it.

(2) The information must have been imparted in circumstances importing an obligation of confidence.

(3) There must be an unauthorized use of that information to the detriment of the party communicating it.

Employer - Employee Relationship

A servant mutually has got every opportunity to acquire a great deal of knowledge of his master's method of business and of the science which his master practices. The servant when he leaves cannot be restrained from using the knowledge so acquired, so long as he does not take away secrets or lists of customers.

Information Acquired:

Information acquired by an employee in the course of his service falls under three categories

(1) Information which are trivial character and can be easily accessed from public sources of information.

(E.g.) Published patent specification)

(2) Information which the servant must treat as confidential but which once learned necessarily remains in the servant's head and becomes part of his own skill. So long as he is in service, he cannot use or disclose this information. But once he is out of service he is free to use or disclose and if at all the employer wants to protect this information, even after termination of service, he can do so only on an express stipulations.

(E.g.) Manufacturing process

(3) There are special trade secrets so confidential that, even though they may necessarily have been learned by heart, and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's.

(E.g.) Secret processes of manufacture of chemical formulae.

Industrial and Trade Secrets:

In case of confidential information relating to industrial or trade activities the following points must be considered.

(1) The information must be such that the owner must believe that the release of which would be injurious to the owner or advantageous to his rivals.

(2) The owner must believe that the information is confidential or secret.

(3) The owner's belief on the above points must be reasonable.

(4) The information must be judged in the light of the usage and practices of the particular industry or trade concerned.

Know - How:

Know-How indicates something essentially different from secret and confidential information. It indicates the way in which a skilled man does his job, and is an expression of his individual skill and experience. The general law protects only confidential information which is the property of the ex-employer, but not the know-how acquired by an ex-employee, which was not the property of his ex-employer.

Remedies:

The remedies for breach of confidence,

(1) Injunction
(2) Damages
(3) Delivery up
(4) Accounts for profits.

TRADEMARKS

Trade & Merchandise Marks Act, 1958.

A trade mark is a visual symbol in the form of a word, a device or a label applied to articles of commerce with a view to indicate to the purchasing public that they are the goods manufactured by a particular person as distinguished from similar goods manufactured or dealt with by other persons.

No man is entitled to represent his goods as being goods of another man; and no man is permitted to use any mark of another person. The foundation upon which the law relating to trade marks developed is that, the deception of the public by the offer for sale of goods as possessing some connection with a particular trade, which they don't in fact possess, is a wrong in respect of which, the trader has a cause of action. Trade marks is a kind of property and is entitled to protection under the law irrespective of its value in money, so long as it has some commercial value.

Registration of Trademarks:

Procedure for Registration of Trademark

1. Submission of application.
2. Examination by the Registrar.
3. Advertisement.
4. Opposition.
5. Registration.

Any person who claims to be proprietor of a trademark used or proposed to be used by him may apply to register the mark. The application for registration should contain the name & address of the applicant, the goods in respect of which registration is sought for, and whether the mark is already in use or proposed to be used. A specimen of the trade mark should be attached along with the application. Where the mark contains words in language other than English, translation of words should be furnished.

Before making an application to registration, if the applicant want to know whether or not his trademark is prima facie' inherently adapted to distinguish, he may make an application on Form TM-55 to get the opinion of the Registrar. The Registrar scrutinizes the application and if he is satisfied with regard to the compliance of legal formalities, the application is advertised in the trademark journal. Within a period of 3 months from the date of advertisement, if any opposition is received, that would be heard and decided by the Registrar if there is no opposition from private parties or the opposition proceedings are decided in favour of the applicant, the mark will be registered.

Marks Registrable in Part-A:

(1) Marks should contain or consist of atleast any one of the following particulars:
   (a) Name of the Company or individual or firm represented in a special manner or
   (b) The signature of the applicant
   (c) One of more invented words or
   (d) One or more non-descriptive words or
   (e) Any other distinctive mark

(2) The mark should be distinctive (Imperial Tobacco v. Registrar, Trademarks AIR 1977 Cal. 4J3)

Marks Registrable in Part-B:

The trademark sought to be registered should be distinctive or if not distinctive at least capable of distinguishing goods with which the proprietor of a trademark is connected.

Absolute & Relative Grounds of Refusal of Registration:

(1) The mark, the use of which is likely to deceive or cause confusion.
(2) Marks which are contrary to any law.
(3) Marks containing scandalous or obscene matter.
(4) Marks containing matter likely to hurt the religious susceptibilities or any class or section of the citizen of India.
(5) Marks which are otherwise disentitled to protection in a court.
(6) Marks which are deceptively similar.

Duration and Renewal of Registration:

The registration of a trademark is for a period of ten years but it may be kept on the register perpetually by renewing the registration at the end of every ten years.

Effect of Registration:

The registered proprietor of a trademark gets exclusive right to the use of the -

(1) Marks which are contrary to any law.
(2) Marks containing scandalous or obscene matter.
(3) Marks containing matter likely to hurt the religious susceptibilities or any class or section of the citizen of India.
(4) Marks which are otherwise dis entitled to protection in a court.
(5) Marks which are deceptively similar.

Duration and Renewal of Registration:

The registration of a trademark is for a period of ten year but it may be kept on the register perpetually by renewing the registration at the end of every ten years.

Effect of Registration:

(1) The registered proprietor of a trademark gets exclusive right to the use of the trademark in relation to the goods in respect of which the trademark is registered.
(2) He is entitled to obtain relief in respect of infringement of the trademark in the manner provided under the Act.
(3) No action for infringement can be initiated in respect of unregistered trademarks.

Assignment and Transmission:

Property in a trademark consists in the exclusive right to use the mark in relation to some goods. Assignment is a permanent transfer of the right to use. An assignment of a trademark must be in writing by act of the parties concerned.

Transmission means, transmission by operation of law, devolution, on the personal representative of the deceased person and any other mode of transfer, not being assignment.

Registered Users:

A registered proprietor who has got an exclusive right to use the mark may temporarily transfer the right to some third person and permit him to use the mark subject to certain conditions or restrictions that may be imposed by him. This is nothing but licensing of a trademark.

The registered proprietor and the licensee should jointly file an application before the registrar, to register the transfer of right. On registration, the licensee becomes a registered user. A registered user is entitled to use the mark subject to conditions and restrictions entered on the register as well as in the agreement between him and the registered proprietor.

Honest Concurrent user:

The whole essence of trademark jurisprudence is that the trade mark is intended to denote that goods come from one source and only source. Concurrent use of two or more persons of the same trade mark is completely contrary to this basic principle. Yet, as an exception to this

principle, under certain extraordinary circumstances registrars may permit registration of a trade mark by more than one proprietor, though the marks are identical or nearly resemble each often.

The following conditions to be satisfied for registration.

(1) The applicant must have honestly perceived the mark and put it into use honestly, without having any knowledge about the other registered trademark.

(2) The applicants use must be concurrent with the opponent's use of the registered mark and that the applicant's use has been concurrent with the opponent's registration is not enough.

(3) The registrar is entitled to impose certain conditions and limitations to minimize the risks of confusion and to avoid overlapping of rights.

Deceptive Similarity:

A mark which is deceptively similar to other mark is not eligible for registration.

A mark shall be deemed to be deceptively similar to another mark, if it so nearly resembles that other mark as to be likely to deceive or cause confusion.

The question of similarity between two trademarks, arising from their use is not being decided in vacuo, but to be determined always in background of the following circumstances:

(1) Nature of marks (word, device label)

(2) Degree of resemblance.

(3) The nature of the goods on which it is going to be used.

(4) The similarity in the nature character and purpose of the goods of rival traders.

(5) The social and educational background of a potential customer.

(6) Mode of purchase.

Infringement:

If a registered trademark is used by a person other than the registered proprietor and if the following conditions are satisfied, then it is called as infringement of trademark.

(1) The mark used by the person should be identical with or deceptively similar to a registered trademark

(2) The goods in respect of which it is used must be specifically covered by registration.

(3) The usage of the mark must be in the course of trade.

(4) The use must be in such manner as to render it likely to be taken as being use as a trademark.

(5) If the registered used, uses the mark in contrary to the agreement, it constitutes in fringement.

Acts not constituting Infringement:

(1) Use not covered by registration.

(2) Use on registered proprietors goods.

(3) Use on parts and accessories.

(4) Sale of goods lawfully acquired.

Passing Off:

Where a man uses his name or a name under which he trades, in connection with goods, in which he deals it, may be a trademark, though unregistered and it is not opened to another trader to use that name for trading purposes to mislead the trading public.

A passing off action is a remedy for the invasion of a right or property not in the mark, name or getup improperly used, but in the business or goodwill likely to be injured by the misrepresentation made by passing off one person's goods as the goods of another.

The concept of passing off was earlier restricted only to the representation of one person's goods as those of another. But now it has been extended and applied to business, services and professional associations also.

Remedies:

Section 106 lays down the reliefs which may be granted or any suit for infringement or passing off. Jurisdiction to grand the relief arises only on registration of the trademark or on accrual of cause of action for passing off.

Kinds of relief:

(a) Injunction restraining further infringement.

(b) Enquiry as to damages in respect of past infringement or instead there of, account of the profits made by the defendant, by sale of spurious goods.

(c) Delivery up for destruction or erasure of the infringing marks and labels.

Apart from these reliefs, criminal action can also be initiated against the infringe. The provisions for criminal action are aimed against false marking of goods and the application to goods of deceptive marks or deceptive trade descriptions.

Case Laws on Trademarks:

1) Himalaya Drug Co v. Gufic Ltd., AIR 2004 Bom 278

The medicinal preparation "Shaiiakt' was registered as original and distinctive trade mark. The party manufactured and marketed identical product under the name "Shaiiakt'. Both trade marks were visually and phonetically similar. It was held that the use of name "Shaiiakt' by opposite party was clear case of passing off. The word "Shaiiakt' is not bonafide description of product. The ground of interim injunction against opposite party was justified.

2) Shalimar Chemical Works Ltd. v. Surender Oil and Dal Mills, (2004) 119 Comp Case 535

The appellant company marketed coconut oil under registered trade mark "Shalimar". The respondent marketed sun-flower edible oil under the same name. The appellant filed a suit through its Director. It was held that once a trademark is registered, the person gets a statutory protection and he would have the right of restraining others from using the trade mark either identical or deceptively similar visually or phonetically.

3) Raj Wadhwa v. Glaxo India Ltd, (2005) 31 PTC 201

The opponents were registered proprietors of trade mark "GLUCON-D". The application sought for registration of trade mark "GOLDCON" by the appellant. It was held through no visual resemblance were between the two marks, close affinity of sound between the two words exists. It was held that the application for registration was rightly rejected by Assistant Register.

4) Thalappakatti Naidu Ananda Vilas Biriyani Hotel v/s Thalapakattu Biriyani and Fast Food, 2011 (48) PTC 586 (MAD)

The court held that the defendant is entitled to use the name for existing four shops as on Nov 19 2008. But benefit of the consent given by Anandha Vilas Biriyani Hotel would not be available in respect of shops or restaurants opened after the date. Granting limited injunction order in favour of the Dindigul hotel, court restrained Thalapakattu Biriyani and Fast Food Chennai from using "Thalappakattu" in any restaurant or shops opened after Nov 19, 2008.

5) Blue Hill Logistics Private Ltd v. Ashok Leyland Ltd & Anr, 2011 (48) PTC 564 (MAD)

Infringement of trademark 'LUXURA' belonging to the plaintiff by the defendant using the mark 'LUXURIA'. Plaintiff using the mark for its commercial auto-mobile/comfort bus registered in class 12. Plaintiff launched its luxury bus in 2006. Defendant adopting the mark to offer intercity comfort travel on the buses purchased from the competitor of plaintiff. Defendant unable to show that the use of the mark was without due cause. Interim injunction affirmed.

6) Crompton Greaves Ltd v. Salzer Electronics Ltd & Anr

Suit restraining the defendants from manufacturing the offending goods. Defendant manufacturing goods for second defendant. Earlier second defendant was purchasing goods from appellant. No trade secret passed on by plaintiff to the defendant. Defendant not using the mark of plaintiff. Dispute is not over trade mark but trade rivalry—Interim injunction cannot be granted.

7) Hilton International Co v. Mohd. Iqbal Qureshi & Anr, 2011 (48) PTC 558 (DEL)

Infringement of trademark 'HILTON' belonging to the plaintiff with H device. Mark also used as part of corporate name. Mark registered in class 16 and also as a service mar registered in class 41 & 43. The mark is having world wide reputation. Infringement of the mark proved by the evidence on record. Hence the suit for injunction, decreed.

8) Puma Sport v/s Bhatia Time, 2011 (48) PTC 556 (DEL)

Plaintiff is the registered proprietor of trade mark 'PUMA' for in class 14 with logo for use with watches and clocks. Defendants were using the mark. Deceptive similarity—Prima facie case made out. The court held that Local Commission should be appointed to seize the offending goods otherwise the plaintiff is likely to suffer irreparable loss. The Impugned order was set aside and the Local Commissioner was appointed.

9) Chandrabala Publications Pvt Ltd. & Anr v/s Chandamama India Ltd, 2011 (48) PTC 540 (MAD)

Suit restraining the defendants from using the trade mark 'CHANDABALA'. No similarity with the trade mark of plaintiff 'CHANDAMAMA'. Defendant, a free lance artist starting a new comic magazine for children. Plaintiff can not prevent defendant from starting the business. The court held that interim injunction can not be granted.

GEOGRAPHICAL INDICATIONS OF GOODS

The Geographical Indications of Goods (Registration and Protection) Act, 1999 (GI Act) is a sui generis Act of the Parliament of India for protection of geographical indications in India. India, as a member of the World Trade Organization (WTO), enacted the Act to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights. The GI tag ensures that none other than those registered as authorised users (or at least those residing inside the geographic territory) are allowed to use the popular product name. Darjeeling tea became the first GI tagged product in India, in 2004–05, since then 193 goods had been added to the list as of March 2013.

According to section 1 (3)(e) of the Act, Geographical indication has been defined as "an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality,

reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be."

Some of the registered geographical indications includes, agricultural goods like Darjeeling tea, Malabar Pepper, Bangalore Blue Grapes, manufactured goods like Pochampalli Ikat, Kancheepuram Silk, Solapuri Chadars Bagh Prints, Madhubani paintings etc. The complete list is available at List of Geographical Indications in India.

Registration of GI:-

- An application for registration must be made before the Registrar of Geographical Indications by any association of persons or producers 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.
- The application must be made in an appropriate form containing the nature, quality, reputation or other characteristics of which are due exclusively or essentially to the geographical environment, manufacturing process, natural and human factors, map of territory of production, appearance of geographical indication (figurative or words), list of producers, along with prescribed fees.
- The examiner will make a preliminary scrutiny for deficiencies, in case of deficiencies; the applicant has to remedy it within a period of one month from the date of communication.
- The Registrar may accept, partially accept or refuse the application. In case of refusal, the Registrar will give written grounds for non acceptance. The applicant must within two months file reply. In case of re-refusal, the applicant can make an appeal within one month of such decision.
- Registrar shall, within three months of acceptance may advertise the application in the GI Journal.
- If there is no opposition, the Registrar will grant a certificate of registration to the applicant and authorised users.

Goods which cannot be registered:-

Under Section 9 of the Act, the following indications cannot be registered:

- which would likely to deceive or cause confusion
- which would be contrary to any law for the time being in force; or
- which comprises or contains scandalous or obscene matter; or
- which comprise or contains any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India; or
- which would otherwise be disentitled to protection in a court; or
- generic names
- falsely represent to the persons that the goods originate in another territory, region or locality, as the case may be

Effect of registration and infringement:-

Registration of a GI gives its owner and the authorised users the exclusive right to use the indications on the good in which it is registered. Further, registration gives right to institution of suit against infringement and recovery of damages for such infringement. Infringement can be caused by use of the GI on such goods which indicates that such goods originate in such place other than its true place of origin or due to unfair competition. However, in case of non-registered GIs, a case of passing off can be instituted. Registration acts as a prima facie evidence of validity of the indication and ownership. The registration cannot be transferred, mortgaged, assigned or licensed, except in case of inheritance of the mark upon death of an authorised user.

Any person who falsely applies or falsifies any geographical indication, tampers the origin of a good, make or have in possession of dye, blocks, machines to use in falsification of GI may be punished shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakhs rupees. In case of second and for every subsequent offence, a person can be punished with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. However, the judge may under certain condition may reduce the sentence, and reasons for reduction of punishment must be written in the judgment. Other offences includes, falsely represent a GI to be registered, falsification of entries in register, falsely representing a place to be connected with GI Registry.

GLOBALTREND

Earlier, the entire gamut of intellectual property law was under the total coverage of domestic laws of each nation. When International trade grows to a larger extent, the protection and enforcement of these rights became a very complicated issue. Since these right varied widely around the world, it resulted in differences and became a source of tension in economic relations. New internationally agreed trade rules for intellectual property rights were seen as a way to introduce more order & predictability and for dispute to be settled more systematically.

Origin of WTO

The WTO is the successor to a previous trade agreement called the General Agreement on Tariffs and Trade (GATT), which was created in 1948. The WTO has a larger membership than GATT, and covers more subjects. Nevertheless, it was GATT that established, multilaterally, the principles underlying this trading system summarizes the history of GATT and the WTO. The WTO is both an institution and a set of rules, called the “WTO law”. Each of the almost 150

WTO members are required to implement these rules, and to provide other members with the specific trade benefits to which they have committed themselves. The main body of WTO law is composed of over sixty individual agreements and decisions. All of these are overseen by councils and committees at the WTO’s headquarters in Geneva; the WTO doesn’t have any local or regional offices. Large-scale negotiations, like the Doha Round, require their own special negotiating forum. At least once every two years, WTO members meet at the ministerial level. For the rest of the time, national delegates, who are usually diplomats and national trade officials, conduct the day-to-day work.

Functions of WTO

Among the various functions of the WTO, these are regarded by analysts as the most important:

- It oversees the implementation, administration and operation of the covered agreements.
- It provides a forum for negotiations and for settling disputes.

Additionally, it is the WTO’s duty to review and propagate the national trade policies, and to ensure the coherence and transparency of trade policies through surveillance in global economic policy-making. Another priority of the WTO is the assistance of developing, least-developed and low-income countries in transition to adjust to WTO rules and disciplines through technical cooperation and training. Finally, the WTO cooperates closely with the two other components of the Bretton Woods system, the IMF and the World Bank.

The most outstanding feature of the UR was the inclusion of agreement on Trade Related aspects of Intellectual Property Rights (TRIPS). The results of UR are to be implemented within 10 years from 1995.

TRIPS

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for many forms of intellectual property (IP) regulation as applied to nationals of other WTO Members. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994.

The TRIPS agreement introduced intellectual property law into the international trading system for the first time and remains the most comprehensive international agreement on intellectual property to date. In 2001, developing countries, concerned that developed countries were insisting on an overly narrow reading of TRIPS, initiated a round of talks that resulted in the Doha Declaration. The Doha declaration is a WTO statement that clarifies the scope of TRIPS, stating for example that TRIPS can and should be interpreted in light of the goal "to promote access to medicines for all." Protection and enforcement of all intellectual property rights shall meet the objectives to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

On copyrights and related rights, the Agreement requires compliance with the provision of Beme Convention to which India is a signatory and the present copyright Act already meets the requirements of the TRIP agreement to a larger extent. As far a Trade mark law is concerned, in India, Trade and Merchandise make Act 1958 has been repeated by a new Act - Trade Marks Act 1999. Though it has been passed in the parliament, it is yet to be enforced. The new Act provides for protection of service marks also.

As far as present law in India is concerned, it differs from the UR agreement to a larger extent in the areas of process patent, duration of patent, ones of proof of infringement and ceiling on royalty.

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3. HUMAN RIGHTS LAW

International human rights law refers to the body of International law designed to promote and protect Human Rights at the international, regional and domestic levels. As a form of international law, international human rights law is primarily made up of treaties, agreements between states intended to have binding legal effect between the parties that have agreed to them; and customary international law, rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way. Other international human rights instruments while not legally binding contribute to the implementation, understanding and development of international human rights law and have been recognised as a source of political obligation.

Human rights is a concept that has been constantly evolving throughout human history. They been intricately tied to the laws, customs and religions throughout the ages.

The first examples of a codification of laws that contain references to individual rights is the tablet of Hammurabi. The tablet was created by the Sumerian king Hammurabi about 4000 years ago

This kind of precedent and legally binding document protects the people from arbitrary persecution and punishment.

In ancient Greece where the concept of human rights began to take a greater meaning than the prevention of arbitrary persecution. Human rights became synonymous with natural rights, rights that spring from natural law .

According to the Greek tradition of Socrates and Plato, natural law is law that reflects the natural order of the universe, essentially the will of the gods who control nature. A classic example of this occurs in Greek literature, when Creon reproaches Antigone for defying his command not to bury her dead brother, and she replies that she acted under the laws of the gods.

This idea of natural rights continued in ancient Rome, where the Roman jurist Ulpian believed that natural rights belonged to every person, whether they were a Roman citizen or not.

Despite this principle, there are fundamental differences between human rights today and natural rights of the past. For example, it was seen as perfectly natural to keep slaves, and such a practice goes counter to the ideas of freedom and equality that we associate with human rights today.

In the middle ages and later the renaissance, the decline in power of the church led society to place more of emphasis on the individual, which in turn caused the shift away from feudal and monarchist societies, letting individual expression flourish.

The next fundamental philosophy of human rights arose from the idea of positive law. Thomas Hobbes, (1588-1679) saw natural law as being very vague and hollow and too open to vast differences of interpretation . Therefore under positive law, instead of human rights being absolute, they can be given, taken away, and modified by a society to suit its needs.

HISTORY AND EVOLUTION

The Cyrus Cylinder (539 B.C.)

In 539 B.C. Cyrus the Great, the first king of Persia, conquered the city of Babylon and freed the slaves and declared that all people had the right to choose their own religion, and established racial equality.

The decrees were recorded on a baked-clay cylinder in the Akkadian language with cuneiform script, which is known as Cyrus Cylinder, this ancient record has been recognized as the world's first charter of human rights.

It is translated into all six official languages of the United Nations and its provisions parallel the first four Articles of the Universal Declaration of Human Rights.

From Babylon, the idea of human rights spread quickly to India, Greece and Rome. There the concept of "natural law" arose, in observation of the fact that people tended to follow certain unwritten laws in the course of life, and Roman law was based on rational ideas derived from the nature of things.

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There are other documents asserted individual rights they are

1. The Magna Carta (1215);
2. The Petition of Right (1628);
3. The US Constitution (1787);
4. The French Declaration of the Rights of Man and of the Citizen (1789), and
5. The US Bill of Rights (1791)

are the written precursors to many of today's human rights documents.

The Magna Carta (1215)

Magna Carta, or "Great Charter," signed by the King of England in 1215, was a turning point in human rights. It is the most significant early influence on the extensive historical process that led to the rule of constitutional law today in the English-speaking world.

In 1215, after King John of England violated a number of ancient laws and customs by which England had been governed, his subjects forced him to sign the Magna Carta, which enumerates what later came to be thought of as human rights. Among them was -

1. the right of the church to be free from governmental interference,
2. the rights of all free citizens to own and inherit property and to be protected from excessive taxes.

It established the right of widows who owned property to choose not to remarry, and established principles of due process and equality before the law. It also contained provisions forbidding bribery and official misconduct.

Petition of Right (1628)

The next recorded milestone in the development of human rights was the Petition of Right, produced in 1628 by the English Parliament and sent to Charles I as a statement of civil liberties.

The Petition of Right, initiated by Sir Edward Coke, was based upon earlier statutes and charters and asserted four principles:

(1) No taxes may be levied without consent of Parliament,

(2) No subject may be imprisoned without cause shown (reaffirmation of the right of habeas corpus),

(3) No soldiers may be quartered upon the citizenry, and (4) Martial law may not be used in time of peace.

United States Declaration of Independence (1776)

In 1776, Thomas Jefferson penned the American Declaration of Independence. The Declaration stressed two themes:

1. Individual rights and
2. The right of revolution.

These ideas became widely held by Americans and spread internationally as well, influencing in particular the French Revolution.

The Bill of Rights (1791)

The Bill of Rights protects

1. freedom of speech,
2. freedom of religion,
3. the right to keep and bear arms,
4. the freedom of assembly and
5. the freedom to petition.

It also prohibits unreasonable search and seizure, cruel and unusual punishment and compelled self-incrimination. the Bill of Rights also prohibits Congress from making any law respecting establishment of religion and prohibits the federal government from depriving any person of life, liberty or property without due process of law.

In criminal cases it requires indictment by a grand jury for any capital offence, or infamous crime, guarantees a speedy public trial with an impartial jury in the district in which the crime occurred, and prohibits double jeopardy.

The Universal Declaration of Human Rights (1948)

In 1948, the United Nations Human Rights Commission brought the Universal Declaration of Human Rights under the chairmanship of Eleanor. It is considered to be the international Magna Carta for all mankind

In its preamble and in Article 1, the Declaration unequivocally proclaims the inherent rights of all human beings: “Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.All human beings are born free and equal in dignity and rights.”

The Member States of the United Nations pledged to work together to promote the thirty Articles of human rights that, for the first time in history, had been assembled and codified into a single document. In consequence, many of these rights, in various forms, are today part of the constitutional laws of democratic nations.

On October 24, 1945, in the aftermath of World War II, the United Nations came into being as an intergovernmental organization, with the purpose of saving future generations from the devastation of international conflict.

United Nations representatives from all regions of the world formally adopted the Universal Declaration of Human Rights on December 10, 1948.

The Charter of the United Nations established six principal bodies, including the General Assembly, the Security Council, the International Court of Justice, and in relation to human rights, an Economic and Social Council (ECOSOC).

The UN Charter empowered ECOSOC to establish “commissions in economic and social fields and for the promotion of human rights” One of these was the United Nations Human Rights Commission, which, under the chairmanship of Eleanor Roosevelt, saw to the creation of the Universal Declaration of Human Rights.

The Declaration was drafted by representatives of all regions of the world and encompassed all legal traditions. Formally adopted by the United Nations on December 10, 1948, it is the most universal human rights document in existence, delineating the thirty fundamental rights that form the basis for a democratic society.

Following this historic act, the Assembly called upon all Member Countries to publicize the text of the Declaration and “to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories.”

Today, the Declaration is a living document that has been accepted as a contract between a government and its people throughout the world. According to the Guinness Book of World Records, it is the most translated document in the world.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.

Right to life, liberty and security of person.

Article 4.

Prohibition of Slavery or slave trade in all their forms.

Article 5.

Prohibition of torture or to cruel, inhuman or degrading treatment or punishment.

Article 6 .

Right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and equal protection of the law. protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

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.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.

1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14 .

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15.

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 21.

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right to equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23.

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26.

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.

By 1948, the United Nations' new Human Rights Commission had captured the attention of the world. Under the dynamic chairmanship of Eleanor Roosevelt—President Franklin Roosevelt's widow, a human rights champion in her own right and the United States delegate to the UN—the Commission set out to draft the document that became the Universal Declaration of Human Rights. Roosevelt, credited with its inspiration, referred to the Declaration as the "international Magna Carta for all mankind." It was adopted by the United Nations on December 10, 1948.

In its preamble and in Article 1, the Declaration unequivocally proclaims the inherent rights of all human beings: “Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people....All human beings are born free and equal in dignity and rights.”

The Member States of the United Nations pledged to work together to promote the thirty Articles of human rights that, for the first time in history, had been assembled and codified into a single document. In consequence, many of these rights, in various forms, are today part of the constitutional laws of democratic nations.

The Universal Declaration of Human Rights is an ideal standard held in common by nations around the world, but it bears no force of law. Thus, from 1948 to 1966, the UN Human Rights Commission’s main task was to create a body of international human rights law based on the Declaration, and to establish the mechanisms needed to enforce its implementation and use.

The Human Rights Commission produced two major documents: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both became international law in 1976. Together with the Universal Declaration of Human Rights, these two covenants comprise what is known as the “International Bill of Human Rights.”

The ICCPR focuses on issues such as the right to life, freedom of speech, religion and voting. The ICESCR focuses on food, education, health and shelter. Both covenants proclaim these rights for all people and forbid discrimination.

Furthermore, Article 26 of the ICCPR established a Human Rights Committee of the United Nations. Composed of eighteen human rights experts, the Committee is responsible for ensuring that each signatory to the ICCPR complies with its terms. The Committee examines reports submitted by countries every five years (to ensure they are in compliance with the ICCPR), and issues findings based on a country’s performance.

Many countries that ratified the ICCPR also agreed that the Human Rights Committee may investigate allegations by individuals and organizations that the State has violated their rights. Before appealing to the Committee, the complainant must exhaust all legal recourse in the courts of that country. After investigation, the Committee publishes the results. These findings have great force. If the Committee upholds the allegations, the State must take measures to remedy the abuse.

SUBSEQUENT UNITED NATIONS HUMAN RIGHTS DOCUMENTS

In addition to the covenants in the International Bill of Human Rights, the United Nations has adopted more than twenty principal treaties further elaborating human rights. These include conventions to prevent and prohibit specific abuses such as torture and genocide and to protect specific vulnerable populations such as refugees (Convention Relating to the Status of Refugees, 1951), women (Convention on the Elimination of All Forms of Discrimination Against Women, 1979), and children (Convention on the Rights of the Child, 1989). Other conventions cover racial discrimination, prevention of genocide, political rights of women, Prohibition of Slavery and torture.

Each of these treaties has established a committee of experts to monitor implementation of the treaty provisions by its State parties.

EUROPEAN CONVENTION ON HUMAN RIGHTS

The Universal Declaration of Human Rights served as the inspiration for the European Convention on Human Rights, one of the most significant agreements in the European Community. The Convention was adopted in 1953 by the Council of Europe, an intergovernmental organization established in 1949 and composed of forty-seven European Community Member States. This body was formed to strengthen human rights and promote democracy and the rule of law.

The Convention is enforced by the European Court of Human Rights in Strasbourg, France. Any person claiming to be the victim of a violation in one of the forty-seven countries in the European Community which has signed and ratified the Convention, may seek relief with the European Court. One must first have exhausted all recourse in the courts of their home country and have filed an application for relief with the European Court of Human Rights in Strasbourg.

HUMAN RIGHTS INSTRUMENTS FOR AMERICA, AFRICA AND ASIA

In North and South America, Africa and Asia, regional documents for the protection and promotion of human rights extend the International Bill of Human Rights.

The American Convention on Human Rights pertains to the inter-American states—the Americas—and was entered into force in 1978.

African states have created their own Charter of Human and People's Rights (1981), and Muslim states have created the Cairo Declaration on Human Rights in Islam (1990).

The Asian Human Rights Charter (1986) was created by the Asian Human Rights Commission, founded that year by a group of jurists and human rights activists in Hong Kong. The Charter is described as a "people's charter," because no governmental charter has been issued to date.

HUMAN RIGHTS DOCUMENTS

1. Optional Protocol to the International Covenant on Civil and Political Rights
2. Second Optional Protocol to the International Covenant on Civil and Political Rights,
3. International Covenant on Economic, Social and Cultural Rights
4. Convention for the Protection of Human Rights and Fundamental
5. African (Banjul) Charter on Human and Peoples' Rights
6. American Convention on Human Rights

ENFORCEMENT OF HUMAN RIGHTS

Enforcement of international human rights law can occur on either a domestic, regional or international level. States that ratify human rights treaties commit themselves to respecting those rights and ensuring that their domestic law is compatible with international legislation. When Domestic Law fails to provide a remedy for human rights abuses parties may be able to resort to regional or international mechanisms for enforcing human rights.

International Human rights law is closely related to, but distinct from International humanitarian law. Similar, because the substantive norms they contain are often similar or related - for example both provide a protection from Torture. Distinct because they are regulated by legally distinct frameworks and usually operate in different contexts and regulate different relationships. Generally, human rights are understood to regulate the relationship between states and individuals in the context of ordinary life, while humanitarian law regulates the actions of a belligerent state and those parties it comes into contact with, both hostile and neutral, within the context of an armed conflict.

Enforcement of HR by world level

There is currently no international court to administer international human rights law, however, quasi-judicial bodies exists under some UN treaties they are

1. Human Rights Committee under ICCPR.
2. The International Criminal Court (ICC) has jurisdiction over the crime of genocide, war crimes and crimes against humanity.
3. The European Court of Human Rights, and
4. The Inter American Court of Human Rights enforce regional human rights law.

Although these same international bodies also hold jurisdiction over cases regarding international humanitarian law, it is crucial to recognize that the two frameworks constitute distinctly different legal regimes.

The United Nations Human Rights Bodies do have some quasi legal enforcement mechanisms. These include the Treaty Bodies attached to the current seven active treaties, and the United Nations Human Rights Council complaints procedures, with Universal periodic Review and United Nations Special Rapporteur known as the 1235 and 1503 mechanisms

The enforcement of international human rights law is the responsibility of the Nation State, and it is the primary responsibility of the State to make human rights a reality.

In practice, many human rights are very difficult to legally enforce due to the absence of consensus on the application of certain rights, the lack of relevant national legislation or of bodies empowered to take legal action to enforce them.

In over 110 countries National Human Rights Institutions (NHRIs) have been set up to protect, promote or monitor human rights with jurisdiction in a given country. Although not all NHRIs are compliant with the Paris Principles, the number and effect of these institutions is increasing. The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris on 7-9 October 1991, and adopted by United Nations Human Rights Commission Resolution 1992/54 of 1992 and the General Assembly Resolution 48/134 of 1993. The Paris Principles list a number of responsibilities for national institutions.

Universal Jurisdiction

Universal Jurisdiction is a controversial principle in international law whereby states claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence, or any other relation with the prosecuting country. The state backs its claim on the grounds that the crime committed is considered a crime against all, which any state is authorized to punish. The concept of universal jurisdiction is therefore closely linked to the idea that certain international norms are erga omnes, or owed to the entire world community, as well as the concept of jus cogens.

In 1993 Belgium passed a law of universal jurisdiction to give its courts jurisdiction over crimes against humanity in other countries, and in 1998 Augusto Pinochet was arrested in London following an indictment by Spanish judge Baltasar Garzon under the universal jurisdiction principle.

The principle is supported by Amnesty International and other Human Rights organizations as they believe certain crimes pose a threat to the international community as a whole and the community has a moral duty to act, but others, including Henry Kissinger argue that “widespread agreement that human rights violations and crimes against humanity must be prosecuted has hindered active consideration of the proper role of international courts. Universal jurisdiction risks creating universal tyranny - that of judges”.

Enforcement of Civil and Political Rights:

Art 28 of international convenient on civil and Political Rights provides for the establishment of Human Rights Committee. It accordance with this the Human Rights Committee has been established in 1977 to monitor and implementation of the international covenant on Civil and Political Rights.

Functions

1. To Study reports in the measures states parties have adopted to give effect to the rights recognized in the convenant and on the progress made in the enjoyment of those rights.
2. To formulate and transmit to the States Parties such general comments as it may consider appropriate.
3. To entertain and examine inter state communication.
4. To establish ad hoc conciliation commission under Art 41 or optional protocol to the international covenant on Civil and Political Rights.

Enforcement of Economic, Social and Cultural Rights

Human Rights and vulnerable groups

There are particular groups who, for various reasons, are weak and vulnerable or have traditionally been victims of violations and consequently require special protection for the equal and effective enjoyment of their human rights. Often human rights instruments set out additional guarantees for persons belonging to these groups; the Committee on Economic, Social and Cultural Rights, for example, has repeatedly stressed that the ICESCR is a vehicle for the protection of vulnerable groups within society, requiring states to extend special protective measures to them and ensure some degree of priority consideration, even in the face of severe resource constraints.

This part focuses on groups that are especially vulnerable to abuse of human rights; groups that are structurally discriminated against like women and groups that have difficulties defending themselves and are therefore in need of special protection. Twelve groups are discussed:

1) women and girls;
2) children;
3) refugees;
4) internally displaced persons;
5) stateless persons;
6) national minorities;
7) indigenous peoples
8) migrant workers;
9) disabled persons;
10) elderly persons;
11) HIV positive persons and AIDS victims;
12) Roma / Gypsies

WOMEN

Equality of rights for women is a basic principle of the United Nations. The Preamble to the Charter of the United Nations sets as one of the Organization's central goals the reaffirmation of "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". Article 1 proclaims that one of the purposes of the United Nations is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to, inter alia, sex. By the terms of the Charter, the first international instrument to refer specifically to human rights and to the equal rights of men and women, all members of the United Nations are legally bound to strive towards the full realization of all human rights and fundamental freedoms. The status of human rights, including the goal of equality between women and men, is thereby elevated: a matter of ethics becomes a contractual obligation of all Governments and of the UN.

The International Bill of Human Rights strengthens and extends this emphasis on the human rights of women. The Universal Declaration of Human Rights proclaims the entitlement of everyone to equality before the law and to the enjoyment of human rights and fundamental freedoms without distinction of any kind and proceeds to include sex among the grounds of such impermissible distinction. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of 1966, which translate the principles of the Declaration into legally binding form, clearly state that the rights set forth are applicable to all persons without distinction of any kind and, again, put forth sex as such a ground of impermissible distinction. In addition, each Covenant specifically binds acceding or ratifying States to undertake to ensure that women and men have equal right to the enjoyment of all the rights they establish.

The International Bill of Human Rights, combined with related human rights treaties, thus lays down a comprehensive set of rights to which all persons, including women, are entitled. However, the fact of women's humanity proved insufficient to guarantee them the enjoyment of their internationally agreed rights. Since its establishment, the Commission on the Status of Women (CSW) has sought to define and elaborate the general guarantees of non-discrimination in these instruments from a gender perspective. The work of CSW has resulted in a number of important declarations and conventions that protect and promote the human rights of women.

Originally established in 1946 as a subcommission of the Commission on Human Rights, but quickly granted the status of full commission as a result of the pressure exerted by women's activists, the mandate of the CSW included the preparation of recommendations relating to urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women should have equal rights, and the development of proposals to give effect to such recommendations. Between 1949 and 1959, the Commission elaborated the Convention on the Political Rights of Women, adopted by the General Assembly on 20 December 1952, the Convention on the Nationality of Married Women, adopted by the Assembly on 29 January 1957, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages adopted on 7 November 1962, and the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages adopted on 1 November 1965. Each of these treaties protected and promoted the rights of women in areas in which the Commission considered such rights to be particularly vulnerable. But it was believed that, except in those areas, women's rights were best protected and promoted by the general human rights treaties.

Although these instruments reflected the growing sophistication of the UN system with regard to the protection and promotion of women's human rights, the approach they reflected was fragmentary, as they failed to deal with discrimination against women in a comprehensive way. In addition, there was concern that the general human rights regime was not, in fact, working as well as it might to protect and promote the rights of women. Thus, the General Assembly, on 5 December 1963, adopted its resolution

1921 (XVIII), in which it requested the Economic and Social Council to invite the CSW to prepare a draft declaration that would combine in a single instrument international standards articulating the equal rights of men and women. This process was supported throughout by women activists within and outside the UN system. Drafting of the declaration, by a committee selected from within the CSW, began in 1965, with the Declaration on the Elimination of Discrimination against Women ultimately being adopted by the GA on 7 November 1967. Although the Declaration amounted only to a statement of moral and political intent, without the contractual force of a treaty, its drafting was none the less a difficult process. Article 6, concerning equality in marriage and the family, and Article 10, relating to employment, proved to be particularly controversial, as did the question of whether the Declaration should call for the abolition of the customs and laws perpetuating discrimination or for their modification or change.

The 1960s saw the emergence, in many parts of the world, of a new consciousness of the patterns of discrimination against women and a rise in the number of organizations committed to combating the effect of such discrimination. The adverse impact of some development policies on women also became apparent. In 1972, five years after the adoption of the Declaration and four years after the introduction of a voluntary reporting system on the implementation of the Declaration by the Economic and Social Commission, the CSW considered the possibility of preparing a binding treaty that would give normative force to the provisions of the Declaration and decided to request the Secretary-General to call upon UN Member States to transmit their views on such a proposal. The following year, a working group was appointed to consider the elaboration of such a convention. In 1974, at its twenty-fifth session and in the light of the report of this working group, the Commission decided, in principle, to prepare a single, comprehensive and internationally binding instrument to eliminate discrimination against women. This instrument was to be prepared without prejudice to any future recommendations that might be made by the United Nations or its specialized agencies with respect to the preparation of legal instruments to eliminate discrimination in specific fields.

The text of the Convention on the Elimination of All Forms of Discrimination against Women was prepared by working groups within the Commission during 1976 and extensive deliberations by a working group of the Third Committee of the General Assembly from 1977 to 1979. Drafting work within the Commission was encouraged by the World Plan of Action for the Implementation of the Objectives of the International Women's Year, adopted by the World Conference of the International Women's Year held in Mexico City in 1975, which called for a convention on the elimination of discrimination against women, with effective procedures for its implementation. Work was also encouraged by the General Assembly which had urged the Commission on the Status of Women to finish its work by 1976, so that the Convention would be completed in time for the 1980 Copenhagen mid-decade review conference (World Conference on the United Nations Decade for Women: Equality, Development and Peace). Although suggestions were made to delay completion of the text for another year, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the General Assembly in 1979 by votes of 130 to none, with 10 abstentions. In resolution 34/180, in which the General Assembly adopted the Convention, the Assembly expressed the hope that the Convention would come into force at an early date and requested the Secretary-General to present the text of the Convention to the mid¬decade World Conference of the United Nations Decade for Women.

At the special ceremony that took place at the Copenhagen Conference on 17 July 1980, 64 States signed the Convention and two States submitted their instruments of ratification. On 3 September 1981, 30 days after the twentieth member State had ratified it, the Convention entered into force - faster than any previous human rights convention had done - thus bringing to a climax United Nations efforts to codify comprehensively international legal standards for women.

Extracted from Progress achieved in the implementation of the Convention

on the Elimination of All Forms of Discrimination against Women:

Report by the Committee on the Elimination of Discrimination against Women (A/CONF.177/7).

Published by the United Nations Department of Public Information

Convention on all form of Discrimination against woman is as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

The Convention defines discrimination against women as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

- to incorporate the principle of equality of men and women in their legal system,abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
- to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises

INTERNATIONAL HUMANITARIAN LAW

International humanitarian law (IHL) is otherwise called the law of armed conflict, jus in bello it regulates the conduct of armed conflicts. It defines the conduct and responsibilities of Belligerent nations, neutral Nations and individuals engaged in Warfare, in relation to each other and to protected persons, usually meaning civilians. Serious violations of international humanitarian law are called War crimes. International humanitarian law, jus in bello regulates the conduct of forces when engaged in war or armed conflict.

The source of international humanitarian law is

1. The Geneva Conventions and
2. The Hague Conventions,
3. Other subsequent treaties,
4. Case law,
5. Customary international law.

Difference between jus in bello and jus as bellum

Jus in bello is distinct from Jus as bellum which regulates the conduct of engaging in war or armed conflict and includes Crimes against peace and of war of aggression. Together the jus in bello and jus ad bellum comprise the two strands Law of war governing all aspects of international armed conflicts.

Modern International Humanitarian Law is made up of two historical streams:

1. The Hague Conventions of 1899
2. The Geneva Conventions 1863

Both are branches of Jus in bello, international law regarding acceptable practices while engaged in war and armed conflict.

The Hague convention determines the rights and duties of belligerents in the conduct of operations and limits the choice of means in doing harm." In particular, it concerns its elf with the definition of combatants, establishes rules relating to the means and methods of warfare, and examines the issue of military objectives.

In 19th centrury the systematic attempts to limit the savagery of warfare began and that particular period is called age of enlightenment. The purpose of warfare was to overcome the enemy state and this was obtainable by disabling the enemy combatants.

And thus there is a need to distinguish between combatants and civilians, the requirement that wounded and captured enemy combatants must be treated humanely, and that quarter must be given, some of the pillars of modern humanitarian law, all follow from this principle."

The Law of Geneva

The massacre of Civilians in the midst of armed conflict has a long and dark history.

Examples:

1. the massacres of the Kalingas by Ashoka in India,
2. the massacre of some 100,000 Hindus by the Muslim troops of Timur (Tamerlane) or
3. the Crusader massacres of Jews and Muslims in the Siege of Jerusalem 1099

The essential points seem to be these: In battle and in towns taken by force, combatants and non-combatants were killed and property was destroyed or looted. In the 17th century, the Dutch jurist Hugo Grotius wrote "Wars, for the attainment of their objects, it cannot be denied, must employ force and terror as their most proper agents."

Humanitarian norms in history

In the midst of the carnage of history, there were expressions of humanitarian norms to protect the victims of armed conflicts, i.e. the wounded, the sick and the shipwrecked which date back to ancient times.

In the Old Testament, the King of Israel prevents the slaying of the captured following the prophet Elisha's admonition, to spare enemy prisoners

In ancient India the Laws of Manu, describing the types of weapons that should not be used. "When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire

Islamic law indicates that "noncombatants who did not take part in fighting such as women, children, monks and hermits, the aged, blind, and insane" were not to be molested.

The first Caliph,Abu Bakr proclaimed "Do not mutilate. Do not kill little children or old men or women. Do not cut off the heads of palm trees or burn them. Do not cut down fruit trees. Do not slaughter livestock except for food."

Codification of humanitarian norms

During19th century that a more systematic approach was initiated. In the United States, a German immigrant, Francis Lieber, drew up a code of conduct in 1863, which came to be called the Lieber code in his honor, for the Northern army. The Lieber Code included the humane treatment of civilian populations in the areas of conflict, and also forbade the execution of POWs. At the same time, the involvement of a number of individuals such as Florence Nightingale during the Crimean War and Henry Dunant, a Genevese businessman who had worked with wounded soldiers at the Battle of Solferino, led to more systematic efforts to prevent the suffering of war victims.

Dunant found the International committee of red cross (ICRC) in 1863 and the convening of a conference in Geneva in 1864 which drew up the Geneva convention for the amelioration of the condition of the wounded in Armies in The Law of Geneva is directly inspired by the Principle of Humanity. It relates to those who are not participating in the conflict as well as military personnel hors de combat. It provides the legal basis for protection and Humanitarian assistance carried out by impartial humanitarian organizations such as the ICRC

Geneva Conventions

The Geneva Conventions are the result of a process that developed in a number of stages between 1864 and 1949 which focused on the protection of civilians and those who can no longer fight in an armed conflict. As a result of World War II, all four conventions were revised based on previous revisions and partly on some of the 1907 Hague Conventions and readopted by the international community in 1949. Later conferences have added provisions prohibiting certain methods of warfare and addressing issues of civil wars.

The Geneva Conventions are:

- First Geneva Convention “for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field” (first adopted in 1864, last revision in 1949)
- Second Geneva Conventio “for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea” (first adopted in 1949, successor of the 1907 Hague Convention X)
- Third Geveva Convention “relative to the Treatment of Prisoners of War” (First adopted in 1929, last revision in 1949)
- Fourth Geneva Conventio “relative to the Protection of Civilian Persons in Time of War” (first adopted in 1949, based on parts of the 1907 Hague Convention IV)

In addition, there are three additional amendment protocols to the Geneva Convention:

- Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. As of 12 January 2007 it had been ratified by 167 countries.
- Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. As of 12 January 2007 it had been ratified by 163 countries.
- Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem. As of June 2007 it had been ratified by 17 countries and signed but not yet ratified by an additional 68 countries.

While the Geneva Conventions of 1949 can be seen as the result of a process which began in 1864, today, they have “achieved universal participation with 194 parties.” This means that they apply to almost any international armed conflict.

Basic rules of IHL

The UN charter 1945 Art 2, and some other Arts in the charter, curtails the right of member states to declare war; the older and toothless Kellogg- Briand Pact of 1928 for those nations who ratified it but used against Germany in the Nuremberg War Trials also sets restrictions to conduct war. rules

1. Persons Hors de combat (outside of combat) and those not taking part in hostilities shall be protected and treated humanely.
2. It is forbidden to kill or injure an enemy who surrenders or who is hors de combat.
3. The wounded and sick shall be cared for and protected by the party to the conflict which has them in its power. The emblem of the "Red Cross," or of the "Red Crescent," shall be required to be respected as the sign of protection.
4. Captured combatants and civilians must be protected against acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
5. No one shall be subjected to torture, corporal punishment or cruel or degrading treatment.
6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare.
7. Parties to a conflict shall at all times distinguish between the civilian population and combatants. Attacks shall be directed solely against military objectives.

IHL prohibits on attacking Doctors or ambulances displaying a Redcross. It is also prohibited to fire at a person or vehicle bearing a white flag, since that, being considered the flag of truce, indicates an intent to surrender or a desire to communicate. In either case, the persons protected by the Red Cross or the white flag are expected to maintain neutrality, and they may not engage in warlike acts themselves; in fact, engaging in war activities under a white flag or a red cross is itself a violation of the laws of war.

It also provides it rules to acceptance of Surrender and the treatment of Prisoners of War; the avoidance of atrocities; the prohibition on deliberately attacking Civilians; and the prohibition of certain inhumane Weapons. It is a violation of the laws of war to engage in combat without meeting certain requirements, among them the wearing of a distinctive uniform or other easily identifiable badge and the carrying of weapons openly. Impersonating soldiers of the other side by wearing the enemy's uniform, and fighting in that uniform, is forbidden, as is the taking of Hostages.

INTERNATIONAL COMMITTEE OF THE RED CROSS

The ICRC is the only institution explicitly named under international humanitarian law as a controlling authority. The legal mandate of the ICRC stems from the four Geneva Conventions of 1949, as well as its own Statutes.

The International Committee of the Red Cross (ICRC) is an impartial, neutral, and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance.

Violations and punishment

During conflict, punishment for violating the laws of war may consist of a specific, deliberate and limited violation of the laws of war in reprisal.

Soldiers who break specific provisions of the laws of war lose the protections and status afforded as Prisoners of war but only after facing a "competent tribunal" . At that point they become an unlawful combatant but they must still be "treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial", because they are still covered by GC IV Art 5

Terrorists are only protected by the laws of war if the power which holds them is in a state of armed conflict or war and until they are found to be an unlawful combatant. Depending on the circumstances, they may be subject to civilian law or military tribunal for their acts and in practice have been subjected to Torture and/or execution. The laws of war neither approve nor condemn such acts, which fall outside their scope. Countries that have signed the UN Convention Agaist Torure have committed themselves not to use torture on anyone for any reason.

REFUGEE LAW

Introduction

International refugee law is a set of rules and procedures that aims to protect, first, persons seeking asylum from persecution, and second those recognized as refugees under the relevant instruments. Its legal framework provides a distinct set of guarantees for these specific groups of persons, although, inevitably, this legal protection overlaps to a certain extent with international human rights law as well as the legal regime applicable to armed conflicts under international humanitarian law.

The main sources of refugee law are treaty law, notably the 1951 Convention relating to the status of refugees (1951 Refugee Convention) and its 1967 protocol, and customary international law.

Customary international law applies to all states irrespective of whether they are a party to relevant treaties or not. Regional instruments represent a further set of protections, particularly the1969 organization of African Unity Convention (for Africa) and, although it is not formally legally binding, the 1984 Cartagena Declaration (for Latin America).

The Definition of a Refugee

International legal protection of refugees centres on a person meeting the criteria for refugee status as laid down in the 1951 Refugee Convention. Under Article 1(A)2, the term “refugee” shall apply to any person who:

“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Thus, according to this provision, refugees are defined by three basic characteristics:

- they are outside their country of origin or outside the country of their former habitual residence;
- they are unable or unwilling to avail themselves of the protection of that country owing to a well-founded fear of being persecuted; and
- the persecution feared is based on at least one of five grounds: race, religion,nationality, membership of a particular social group, or political opinion.

It is important to stress that the term “asylum seekers” refers to persons, who have applied for asylum, but whose refugee status has not yet been determined.

The Principle of “non-refoulement”

The obligation exists under Article 33 of the 1951 Refugee Convention not to return a refugee to a country of territory where he/she would be at risk of persecution:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

This is known as the principle of non-refoulement, which is considered part of customary international law and therefore binding on all states. The principle is also incorporated in several international human rights treaties, for example the 1984 Convention against Torture, which prohibits the forcible removal of persons to a country where there is a real risk of torture.

Internally displaced persons

Internally displaced persons (IDPs) are defined in the 1998 Guiding Principles on Internal Displacement as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border".

Internally displaced persons, who now constitute some 22 million persons, are persons whose situation is similar to that of refugees. However, there are several differences between IDPs and refugees. First, IDPs are not the subject of a treaty adopted at the universal level, although the Guiding Principles are based on binding international human rights and humanitarian law. Second, as opposed to refugees, IDPs have not crossed an international border from their country of origin. Third, the definition of IDPs in the Guiding Principles is significantly broader than the refugee definition, including those displaced by armed conflict, human rights violations and natural disasters, while the refugee definition is restricted to those with a well-founded fear of being persecuted on at least one of five grounds.

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

The Office of the United Nations High Commissioner for Refugees (UNHCR), also known as The UN Refugee Agency is a UN agency mandated to protect and support Refugees at the request of a government or the UN itself and assists in their voluntary repatriation, local integration or resettlement to a third country. Its headquarters are in Geneva, Switzerland and is a member of the United Nations Development Group.

History

The Legue of Nations and the formation of the UN, the international community was acutely aware of the refugee crisis following the end of WW II. In 1947, the International Refugee Organization (IRO) was founded by the United Nations. The IRO was the first international agency to deal comprehensively with all aspects pertaining to refugees lives. Preceding this was the United Nations Relief and Rehabilitation Administration, which was established in 1944 to address the millions of people displaced across Europe as a result of World War II.

In the late 1940s, the IRO fell out of favor, but the United Nations agreed that a body was required to oversee global refugee issues. Despite many heated debates in the General Assembly, the United Nations High Commissioner for Refugees was founded as a subsidiary organ of the General Assembly by Resolution 319 (IV) of the United Nations General Assembly of December 1949. However, the organization was only intended to operate for 3 years, from January 1951, due to the disagreement of many UN member states over the implications of a permanent body.

UNHCR's mandate was originally set out in its Statute, annexed to Resolution 428 (V) of the UN General Assembly of 1950 of 1950. This mandate has been subsequently broadened by numerous resolutions of the General Assembly and its Economic and Social council (ECOSOC).According to UNHCR,its mandate is to provide, on a non-political and humanitarian basis, international protection to refugees and to seek permanent solutions for them.

Soon after the signing of the 1951 Convention relation to the status of Refugees, it became clear that refugees were not solely restricted to Europe. In 1956, UNHCR was involved in coordinating the response to the uprising in Hungary. Just a year later, UNHCR was tasked with dealing with Chinese refugees in Hong Kong, while also responding Algerian refugees who had fled to Morocco and Tunisia in the wake of Algeria 's war for independence. The responses marked the beginning of a wider, global mandate in refugee protection and Humanitarian assistance.

Decolonization in the 1960s triggered large refugee movements in Africa, creating a massive challenge that would transform UNHCR; unlike the refugee crises in Europe, there were no durable solutions in Africa and many refugees who fled one country only found instability in their new country of asylum. By the end of the decade, two thirds of UNCHR's budget was focused on operations in Africa and in just one decade, the organization's focus had shifted from an almost exclusive focus on Europe.

In the 1970s, UNHCR refugee operations continued to spread around the globe, with the mass exodus of East Pakistanis to India shortly before the birth of Bangladesh. Adding to the woes in Asia was the Vietna war, with millions fleeing the war-torn country.

The 1980s saw new challenges for UNHCR, with many member states unwilling to resettle refugees due to the sharp rise in refugee numbers over the 1970s. Often, these refugees were not fleeing wars between states, but inter-ethnic conflict in newly independent states. The targeting of civilians as military strategy added to the displacement in many nations, so even 'minor' conflicts could result in a large number of displaced persons. Whether in Asia, Central America or Africa, these conflicts, fueled by superpower rivalry and aggravated by socio-economic problems within the concerned countries, durale solutions continued to prove a massive challenge for the UNHCR. As a result, the UNHCR became more heavily involved with assistance programs within refugee camps, often located in hostile environments.

The end of the Cold War marked continued inter-ethnic conflict and contributed heavily to refugee flight. In addition, humanitarian intervention by multinational forces became more frequent and the media began to play a big role, particularly in the lead up to the 1999 Nato mission in Yugoslavia, while by contrast, the 1994 Rwandan Genocide had little attention. The genocide in Rwanda caused a massive refugee crisis, again highlighting the difficulties for UNHCR to uphold its mandate, and the UNHCR continued to battle against restrictive asylum policies in so called 'rich' nations.

Function

UNHCR packages containing tents, tarps, and mosquito netting sit in a field in Dadaab, Kenya, on 11 December 2006, following disastrous flooding.

UNHCR was established on 14 December 1950 and succeeded the earlier United Nations Relief and Rhabilitation Administration. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another state, with the option to return home voluntarily, integrate locally or to resettle in a third country.

UNHCR's mandate has gradually been expanded to include protecting and providing humanitarian assistance to whom it describes as other persons "of concern," including internally displaced persons (IDPs) who would fit the legal definition of are refugee under the 1951 United Nations Convention Relating to Refugees and 1967 Protocol, the 1969 Organization for African Unity Convention, or some other treaty if they left their country, but who presently remain in their country of origin. UNHCR presently has major missions in Lebanon, South Sudan, Chad / Darfur, Democratic Republic of Congo, Iraq, Afghanistan, Iraq, Afghanistan as well as Kenya to assist and provide services to IDPs and refugees.

Palestine refugee mandate

United Nations Relief and works Agency for Palestine Refugees in the Near East

Most Palestinian Refugees - those in the West Bank,Gaza Strip, Lebanon,Syria, and Jordan - do not come within the responsibility of the UNHCR, but instead come under an older body, the United Nations Relief and Works Agency for Palestine Refugees in the East (UNRWA).

The UNRWA has a much broader definition of "refugee" than the UNCHR, including not only refugees themselves but their descendants in perpetuity; however, it only covers refugees stemming from the 1948 and 1967 Arab-Israeli wars. Other Palestinian refugees outside of UNRWA's area of operations do fall under UNHCR's mandate, if they meet the UNHCR's more limited definition of refugee.

Several new programmes are introduced to support and to heighten awareness of the issues faced by refugees around the world. These two new programs are a product of the benchmarks set out by the United Nations Millennium Development Goals.

THE REFUGEE SCENARIO IN INDIA

India has been home to refugees for centuries. From the time when almost the entire Zorastrian community took refuge in India fleeing from the persecution they were then subjected to on religious grounds in Iran, India has, from time to time continued to receive a large number of refugees from different countries, not necessarily from the neighbouring countries alone.

The most significant thing which deserves to be taken note of is that, there has not been a single occasion of any refugee originating from the Indian soil except the transboundary movement of the people during the partition of the country in 1947.

On the other hand, it has invariably been a receiving country and in the process, enlarging its multi-cultural and multi-ethnic fabric. In keeping with its secular policies, India has been the home to refugees belonging to all religions and sects. It is relevant to point out that since its independence India has received refugees not only from some of its neighbouring countries but distant countries like Afghanistan, Iran, Iraq, Somalia, Sudan and Uganda.

The South Asian sub-continent has often witnessed situations where refugees from one or the other neighbouring countries have crossed over to India. Considering the sensitivities of national and regional politics in the sub-continent, the problem of refugees crossing over to India cannot be totally disassociated from the overall security issues relevant locally. At the end of 1999, India had well over 2,51,400 refugees, who do not include those from countries like Afghanistan, Iran, Iraq, Somalia, Sudan and Uganda.

ACCORDING 'REFUGEE STATUS'

Even though India has been the home for a large number and variety of refugees throughout the past, India has dealt with the issues of 'refugees' on a bilateral basis. India, as explained in the earlier pages, has been observing a 'refugee regime' which generally conforms to the international instruments on the subject without, however, giving a formal shape to the practices adopted by it in the form of a

separate statute. Refugees are no doubt 'foreigners'. Even though there may be a case to distinguish them from the rest of the 'foreigners', the current position in India is that they are dealt with under the existing Indian laws, both general and special, which are otherwise applicable to all foreigners. This is because there is no separate law to deal with 'refugees'. For the same reason, cases for refugee 'status' are considered on a case-by-case basis. UNHCR often plays a complementary role to the efforts of the Government, particularly in regard to verification about the individual's background and the general circumstances prevailing in the country of origin. That agency also plays an important role in the resettlement of refugees etc.

It may be restated for purposes of clarity and understanding that a refugee is defined as one who is outside the country of nationality (or even country of habitual residence) due to one of the five grounds, namely, a well-founded fear of persecution on the basis of religion, race, nationality or membership of a political or social group. In some countries, a person who flees his home country because of armed conflicts or wars or other generalised violation of human rights and who may not be targeted on account of any of the five grounds specified above, is excluded from the purview of the above definition of 'refugee'. In many countries a difference is sought to be made between persecution effected by State agents and the one effected by non-state agents as may be the case in places where 'rebel' 'terrorist' and such other groups are active. Under such circumstances it is only those who are affected by the action of the State agents who are held to fulfill the definition of 'refugee' and not the latter.

One of the principal elements to satisfy a claim to refugee status is that the claimant must be 'genuinely at risk'. Various legal "tests" have developed which concern the standard of proof that is required to satisfy what constitutes being genuinely at risk or having a genuine well founded fear of persecution. Some of these tests have been articulated by courts in a number of countries

- In the case of INS v. Cardoza Fouseca interpretation of the "well founded fear" standard would indicate that "so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is not enough that persecution is a reasonable possibility..." The above standard was considered in R v. Secretary for the Home Department, the case of exparte Sivakumaran

- The judgement suggested that the 'test' should consider whether there is an evidence of a "real & substantial danger of persecution". The Canadian Federal Court of Appeal considered the above and disapproved the House of Lords formulation in Joseph Ayei v. Ministry of Employment & Immigration 1 . They considered the "reasonable chance" standard. Therefore, in sum, in considering the above 'tests' what can be gleened is a rather liberal standard which requires that if, "....there is an objective evidence to show that there is a reasonable possibility or chance of relevant prosecution in the claimant's state of origin", the claim should be adjudged well founded.

In the case of India, the decision as whether to treat a person or a group of persons as refugees or not is taken on the merits and circumstances of the cases coming before it. The Government of India (GOI) may be often seen as following a policy of bilateralism in dealing with persons seeking to be refugees. For example, Afghan refugees of Indian origin and others, who entered India through Pakistan without any travel documents, were allowed entry through the Indo-Pakistan border till 1993. Most of the refugees had entered India through the Attari border near Amritsar in Punjab. Subsequent to 1993, the Government altered its policy of permitting Afghan refugees freely into India.

In the case of a large number of them (many of them were Afghan Sikhs and Afghan Hindus) who had to flee from Afghanistan under circumstances which fulfilled one or more of the grounds specified earlier for being treated as a 'refugee', the GOI did not officially treat them as refugees. However, the UNHCR with the consent of the GOI, recognised them as refugees under its mandate and is rendering

assistance to them. In such cases, even though the local Government is kept in the picture, the UNHCR becomes responsible to look after them as well as 'administer' them and also to ensure that such refugees do not in any way violate the code of conduct governing them.

In contrast, in 1989, when the Myanmar authorities started suppressing the pro-democracy movement in that country and about 3,000 nationals of that country sought refuge in India, the GOI declared that in accordance with well accepted international norms defining refugee status, no genuine refugee from Myanmar would be turned back and in fact, they were accepted as refugees by the GOI. Similar is the case of Sri Lankan Tamil refugees crossing the sea to enter the southern Indian State of Tamil Nadu. The Government of India followed a specific refugee policy regarding Sri Lankan refugees and permitted them entry despite the fact that the refugees did not have travel documents.

In cases where the Government of India recognises the claim of refugee status of a particular group of refugees, there is minimal interference if any, caused to the refugees. This is the case even though there may be no official declaration of any policy of grant of refugee status to that group. However, there are instances where refugees recognised by the Government of India and issued with valid refugee identity documents by the government, are later prosecuted for illegal entry/over stay. The National Human Rights Commission had taken up successfully the cause of a number of Sri Lankan Tamil refugees who had been likewise prosecuted.

INDIA'S INTERNATIONAL COMMITMENTS

In India no separate laws to govern refugees. In the absence of such a specific law, all existing Indian laws like The Criminal Procedure Code, The Indian Penal Code, The Evidence Act etc. apply to the refugees as well.

Even though India is not a signatory to the 1951 Convention on refugees and also the 1967 Protocol, India is a signatory to a number of United Nations and World Conventions on Human Rights, refugee issues and related matters. India's obligations in regard to refugees arise out of the latter.

India became a member of the Executive Committee of the High Commissioner's Programme (EXCOM) in 1995. The EXCOM is the organisation of the UN, which approves and supervises the material assistance programme of UNHCR. Membership of the EXCOM indicates particular interest and greater commitment to refugee matters. India voted affirmatively to adopt the Universal Declaration of Human Rights which affirms rights for all persons, citizens and non¬citizens alike. India voted affirmatively to adopt the UN Declaration of Territorial Asylum in 1967. India ratified the International Covenant on Civil and Political Rights (ICCPR) as well as the International Convention on Economic, Social and Cultural Rights (ICESCR) in 1976. India ratified the UN Convention on the Rights of the Child in 1989. India ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1974 under which Article1imposes legally binding obligation. India accepted the principle of non-refoulement as envisaged in the Bangkok Principles, 1966, which were formulated for the guidance of member states in respect of matters concerning the status and treatment of refugees. These Principles also contain provisions relating to repatriation, right to compensation, granting asylum and the minimum standard of treatment in the state of asylum.

In order to get a clear understanding of the rights which devolve on the refugees on account of India's international commitments mentioned above and their relevance to law enforcement, it is pertinent to enumerate some of the more important rights accruing to refugees under the above mentioned Conventions. Article 13 of the Universal Declaration of Human Rights guarantees 'Right to Freedom of Movement', Article 14 'Right to Seek and Enjoy Asylum' and Article 15 the 'Right to Nationality.' Article 12 of the ICCPR deals with 'Freedom to leave any country including the person's own' and Article 13 'Prohibition of expulsion of aliens except by due process of law'. Under Article 2 A of the UN Convention on the Rights of the Child, the State must ensure the rights of "each child within its jurisdiction without

discrimination of any kind"; Article 3 lays down that "In all actions concerning children the best interest of the child shall be a primary consideration"; Article 24 relates to 'Right to Health'; Article 28 to 'Right to Education' and Article 37 to 'Juvenile Justice'.

REFUGEES AND THE INDIAN LEGAL FRAMEWORK

Refugees encounter the Indian legal system on two counts. There are laws which regulate their entry into and stay in India along with a host of related issues. Once they are within the Indian territory, they are then liable to be subjected to the provisions of the Indian penal laws for various commissions and omissions under a variety of circumstances, whether it be as a complainant or as an accused. These are various constitutional and legal provisions with which refugees may be concerned under varying circumstances.

Constitutional Provisions

There are a few Articles of the Indian Constitution which are equally applicable to refugees on the Indian soil in the same way as they are applicable to the Indian Citizens.

The Supreme Court of India has consistently held that the Fundamental Right enshrined under Article 21 of the Indian Constitution regarding the Right to life and personal liberty, applies to all irrespective of the fact whether they are citizens of India or aliens. The various High Courts in India have liberally adopted the rules of natural justice to refugee issues, along with recognition of the United Nations High Commissioner for Refugees (UNHCR) as playing an important role in the protection of refugees. The Hon'ble High Court of Guwahati has in various judgements, recognized the refugee issue and permitted refugees to approach the UNHCR for determination of their refugee status, while staying the deportation orders issued by the district court or the administration.

In the matter of Gurunathan and others v. Government of India and others and in the matter of A.C. Mohd. Siddique v. Government of India and others, the High Court of Madras expressed its unwillingness to let any Sri Lankan refugees to be forced to return to Sri Lanka against their will. In the case of P.Nedumaran v. Union Of India before the Madras High Court, Sri Lankan refugees had prayed for a writ of mandamus directing the Union of India and the State of Tamil Nadu to permit UNHCR officials to check the voluntariness of the refugees in going back to Sri Lanka, and to permit those refugees who did not want to return to continue to stay in the camps in India. The Hon'ble Court was pleased to hold that "since the UNHCR was involved in ascertaining the voluntariness of the refugees' return to Sri Lanka, hence being a World Agency, it is not for the Court to consider whether the consent is voluntary or not." Further, the Court acknowledged the competence and impartiality of the representatives of UNHCR. The Bombay High Court in the matter of Syed Ata Mohammadi v. Union of India , was pleased to direct that "there is no question of deporting the Iranian refugee to Iran, since he has been recognised as a refugee by the UNHCR." The Hon'ble Court further permitted the refugee to travel to whichever country he desired. Such an order is in line with the internationally accepted principles of 'non-refoulement' of refugees to their country of origin.

The Supreme Court of India has in a number of cases stayed deportation of refugees such as Maiwand's Trust of Afghan Human Freedom v. State of Punja ; and, N.D.Pancholi v. State of Punjab & Other. In the matter of Malavika Karlekar v. Union of India1 , the Supreme Court directed stay of deportation of the Andaman Island Burmese refugees, since "their claim for refugee status was pending determination and a prima facie case is made out for grant of refugee status." The Supreme Court judgement in the Chakma refugee case clearly declared that no one shall be deprived of his or her life or liberty without the due process of law. Earlier judgements of the Supreme Court in Luis De Raedt v. Union of Indiaand also State of Arunachal Pradesh v. Khudiram Chakma, had also stressed the same point.

Arrest, Detention and Release

There is yet another aspect of non-refoulment which merits mention here. The concept of 'International Zones' which are transit areas at airports and other points of entry into Indian territory, which are marked as being outside Indian territory and the normal jurisdiction of Indian Courts, is a major 'risk factor' for refugees since it reduces access of refugees to legal remedies. This legal fiction is violative of the internationally acknowledged principle of non-refoulement. In the matter of a Palestinian refugee who was deported to New Delhi International Airport from Kathmandu was sent back to Kathmandu from the transit lounge of the Airport. He was once more returned to New Delhi International Airport on the ground of being kept in an 'International Zone'. Such detention is a classic case on the above point barring legal remedies to the detained refugee. The only relief in such a case is through the administrative authorities.

Articles 22(1),22(2) and 25(1) of the Indian Constitution reflect that the rules of natural justice in common law systems are equally applicable in India, even to refugees. The established principle of rule of law in India is that no person, whether a citizen or an alien shall be deprived of his life, liberty or property without the authority of law. The Constitution of India expressly incorporates the common law precept and the Courts have gone further to raise it to the status of one of the basic features of the Constitution which cannot be amended.

The Indian Constitution does not contain any specific provision which obliges the state to enforce or implement treaties and conventions. A joint reading of all the provisions as well as an analysis of the case law on the subject shows international treaties, covenants, conventions and agreements can become part of the domestic law in India only if they are specifically incorporated in the law of the land. The Supreme Court has held, through a number of decisions on the subject that international conventional law must go through the process of transformation into municipal law before the international treaty becomes internal law. Courts may apply international law only when there is no conflict between international law and domestic law, and also if the provisions of international law sought to be applied are not in contravention of the spirit of the constitution and national legislation, thereby enabling a harmonious construction of laws. It has also been firmly laid that if there is any such conflict, then domestic law shall prevail.

'Leave India' Notices

Sec.3 of the Foreigners Act, 1946 may issue Leave India Notice to refugees who have failed to obtain extension of their travel permits, or who are ordered to be deported by the court. In such cases the refugee may be arrested if apprehended, and may be forcibly deported.

INDIA'S MEASURES FOR FULFILLING INTERNATIONAL OBLIGATIONS:

India has taken numerous steps and measures to fulfill its international obligations in respect of refugees. Some of the more important ones merit detailed mention.

Work Permits

There is no concept of work permits in India, although refugees who are granted residence permits do find employment in the informal sector, without facing any objection from the administration.

In fact, Tibetan refugees have been granted loans and other facilities for self- employment. Similarly, most Sri Lankan Tamils have been granted freedom of movement within the camp areas, enabling work facilities for them as casual labour. Similarly, Chakma and Afghan refugees have also been engaging in gainful, even if it is in minor forms of employment.

Freedoms

Refugees are allowed freedom concerning their movement, practice of religion and residence bur their basic freedoms are limited to the domestic Acts vis The Foreigners Act, 1946, Foreigners Order, Passport Act etc.

Handling Refugees Legally

From the moment of entry of a refugee into the Indian territory, the laws of India would apply to him/her. Therefore, enforcement and security personnel who have to deal with refugees, cannot overlook the legal requirements which have to be adhered to by them. In the following paragraphs an attempt has been made to identify some common situations which may be faced by enforcement and security personnel in dealing with refugees. An attempt has also been made to suggest possible courses of action within the legal framework.

The main purpose of this attempt is twofold. Firstly, it will help to focus on the need for showing due concern for human rights. Secondly, it is also important to create awareness about the unavoidable compulsions, which forced the person concerned to take refuge in the country and the inherent and unmistakable poignant human situation in the entire episode. It is pertinent to remember that the circumstances and facts pertaining to each refugee may be peculiar and different from the rest. In such cases, therefore, it is extremely important to ascertain, understand and appreciate the background of the compelling circumstances of each of the cases so that the law of the land may be applied in the most appropriate manner. It is in this context that the legal provisions, directions and guidelines, if any, issued by competent courts as also the practical experience gained in dealing with such cases, would come in handy.

Keeping the above aspects in view, some of the more important situations relevant to security personnel are enumerated below. An attempt has been made to highlight the more feasible options which could be considered in dealing with refugees. It goes without saying that these options have to be exercised within the legal frame-work of the country.

At the Point of Entry

Refugees may enter India by land, air and/or sea. Depending upon the point of entry, they will come into initial contact with immigration authorities at airports or sea-ports or with the border guarding authorities at the border check-posts. It is relevant to point out that more often than not, a refugee would be without valid travel documents or valid identity documents making his/her entry into the country 'illegal'. Since India has not yet incorporated the principle of non-refoulement in its legal statutes, the person concerned would have to face the prospect of being arrested and prosecuted as per the laws of the land. However, this should not be held against the intending refugee to debar entry as a matter of course. Therefore, the agency which comes into contact with the refugee initially, will have to satisfy itself about the bonafide of the intending refugee instead of pre-emptorily refusing entry. Under the circumstances, the ends of justice would be met if the person seeking refuge does not have valid travel documents, is arrested and produced in a court of law for appropriate judicial action. In the meanwhile, even as that person is under judicial detention, the security agency will have opportunity to verify his claims and also to notify the concerned competent authority in government to take decision in the matter. In such cases the help of the UNHCR could also be sought so that that agency would be in a position to help speed up the process of verification and also to render suitable help in finalising the legal process.

Detention

A refugee may face detention as soon as he/she illegally crosses the international border into India. It is pertinent to appreciate that the refugee has at that moment just entered an unknown country, after fleeing to save his/her life from his/her own country of origin. He/she may have undergone severe trauma of loss of family and friends in his/her homeland or en route India. The refugee in such situations may be unable to explain his/her background during initial interrogation, giving rise to apprehension on the part of local authorities regarding the genuineness of his/her subsequent refugee claim. He/she may be suspected to be a spy or infiltrator in the light of inconsistent statements that may have been made by him/her to the authorities. This is bound to be further compounded if the refugee is not in possession of the usual 'travel documents'. In fact, it would be very unreasonable to expect him/her to possess valid travel documents, considering the background of his/her having to escape from his/her own country. The same may result in further interrogation and continued detention pending registration of FIR (First Information Report, which is usually the basis of the start of 'investigation'). In such a situation there may be no course of action open to the refugee to follow, since he/she has no family to lean on locally and who may be aware of his/her plight. Further, the refugee would not be in a position to get a message across to any person outside regarding his/her predicament. What is more, because of the peculiarities of the circumstances, the refugee may be detained in a remote place further compounding an already difficult and unnerving situation.

In such circumstances it would be quite justified for the security agency to register a case under the provisions of IPC/Foreigners' Act etc. and even arrest the refugee and forward him/her to the court having local jurisdiction. In case the refugee desires legal help it is desirable that the local 'legal-aid cell' may be allowed to be contacted by the refugee. Where such facilities are not available and the refugee is not in a position to hire legal services on his/her own, the court may be requested to notify the UNHCR to render help to the refugee to seek legal assistance. If any local NGO is available and willing, their services may also be sought to help out the refugee.

Lack of Medical Aid in Detention

While in detention the refugee may be suffering from some physical ailment requiring immediate medical attention. In the event that the detaining authority does not provide the requisite medical aid, the same may result in devastating consequences. In some cases court's directions can be obtained and appropriate medical attention and treatment given to the refugee. Here again, NGOs can play a very useful role. In the case of a Palestinian refugee who was detained at the international airport in New Delhi consequent to a deportation order pending against him, a writ petition was filed to obtain the Delhi High Court's order that the refugee be provided at least the basic necessities like food and medical care. Knowledge of such cases would help security personnel to foresee and where necessary, seek the help of an agency like the UNHCR or a local NGO to render necessary help to the refugee.

Detention of Women Refugees

Most courts are of the opinion that in cases where there has been no grave breach of law by the accused woman (refugee), she may be released on bail pending trial. In the specific case of Marui, an Iraqi refugee who fled persecution from Iraq with her husband and children, the family was arrested in New Delhi. However, .Marui being a woman, was released on bail soon thereafter though her husband continued to be in detention till much later. Even after such a release, it is quite possible that the woman may find herself in some predicament having been suddenly isolated in a foreign country. In such specific cases, it would make the task of the security officials easier if they liaised with the UNHCR or any local NGO to provide the much needed psychological support to the refugee woman. Also, in such cases where deportation orders are passed by the courts, the UNHCR can help to rehabilitate the concerned

refugee in another sympathetic country. Knowledge on the part of security and enforcement officials of such available options would help in perpetuating humanitarian attitude on the part of security officials.

Detention of Refugee Children

Refugee children face many problems which deserve to be treated with due sensitivity, care and caution by the authorities concerned. Usually, access is provided to detained mothers to meet their children and tend to their needs. There are, however, cases of sufficiently grown up refugee children who may be between the ages of 15 and 18 years of age and who may be detained for non possession of valid travel documents. Such a problem mostly arises due to the fact that children are not granted separate residential permits but are included in their parent's permits. In cases involving children who do not possess separate residential permits, the UNHCR may be in a position to help sort out the problem, particularly because in cases where refugee children are separated from their families, UNHCR makes all possible attempts to reunite them. Therefore, it will be advantageous if the security agency concerned seeks the help and assistance of the UNHCR in such matters.

In the specific case of Winston Venojan, a Sri Lankan Tamil refugee, thanks to the UNHCR, the 17 year old boy, who had got separated from his parents, was reunited with them. In this case the boy was arrested on landing at New Delhi. Bail was, however, granted to him within a short time. In genuine cases of this kind, the security agency should always consider not to oppose bail. In the meanwhile, the UNHCR got clearance from the British Immigration and Nationality Department for the boy to travel to the UK. However, the refugee could not be permitted to leave the country till the disposal of the case for the violation of some of the legal provisions under the Indian laws. Luckily this matter was speedily disposed off on the intervention of the Delhi High court. Once the court's orders were obtained, the refugee was provided with Red Cross travel documents to travel to London. The security agency can further help in such genuine case by speedy investigation and filing of charge sheet in time.

Securing that the Refugee is not Untraceable on Release from Detention

Release of a refugee from detention is often fraught with legalities. Courts are sometimes reluctant to direct release of the refugee without ensuring about securing his/her presence in a specific place. The primary concern of courts while barring the deportation of refugees is that the refugee should not become "untraceable". In some cases of this kind, courts have agreed that the refugee may be handed over into the "care of UNHCR". This would ensure that the refugee will be available whenever wanted. In addition, the UNHCR would take care of the refugee till the legal issue is disposed of. In cases where the UNHCR refuses to take custody of the said refugees, there will be no alternative but to send the refugees back to Jail.

Securing against Re-arrest on Release from Detention

The refugee on release from prison after serving his/her sentence may still not be having valid travel documents. In such circumstances, the refugee may face the risk of re-arrest while commuting from the prison to secure residential permit/refugee certificate etc., Hence the authorities are often requested to provide police escort to the refugee to enable him to reach the authorised place safely and to secure documents for valid stay in India. This measure would help speed up to regularise the stay in India, which is desirable from both the point of view of security as well as humanitarian considerations.

Timely filing of Charge Sheet by the Prosecution to Enable Pleading Guilty

The need for timely filing of charge-sheet in courts of law cannot be over emphasizes, particularly in the cases of refugees. Only when the charge sheet is filed it is possible for the refugee to be aware of the charges against him and to plead guilty to the same. In some cases the refugee may require early disposal of his/her case, hence filing of charges at an early stage is crucial.

Right to Information

Right to Information is added into the HumanRights ion for the reasons. RTI stands to Information. Right to Information is a part of fundamental rights under article 19(1) of the Constitution.Aritical19(1) says that every citizen has freedom of speech and expression. As early as in 1976, the Supreme Court in the cse of Raj Narain v. State of UP, that people cannot speak or express themselves unless they know. Therefore, right to information is embedded in article 19. In the same case, Supreme Court further said that India is a democracy. People are the masters. Therefore, the masters have a right to know how the governments, meant to serve them, are functioning. Further, every citizen pays taxes. Even a beggar on the street pays tax (in' the form of sales tax, excise duty etc) when he buys a piece of soap from the market. The citizens therefore, have a right to know how their money was being spent. These three principles were laid down by the Supreme Court while saying that RTI is a part of our fundamental rights. On the other hand in International Scenario Right to Information and its aspects find articulation as a human right in most important basic human rights documents, namely, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. At regional levels, there are numerous other human rights documents, which include this fundamental right for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter on Human and People's Rights, etc. The Commonwealth has also formulated principles on freedom of information.

Right to information is a key to the democratic governance of a nation. It is a powerful tool to fight against evils of society su ;h as corruption. Today a law student should be equipped with socio-legal factors . Law student must fully participate in public life - The information gained would allow him to participate in priority setting and decision making -

When a section of a public spirited citizen question the government - The authorities are cautious that their actions could be questioned.- It would make government efficient helps to exercise personal rights. Government are made accountable through RTI- It confers equal treatment and equal justice.

Any Public information belongs to people . Any Public document is a open document. Knowing right to Information Act,2005 makes a student to commit and act with social responsibility. The fact true is that there should not be lack of Knowledge on information as Knowledge is empowerment.

Access to information sooner would be a fundamental right in long run. Access to information is something every citizen of India can demand. So a law student studying law should definitely know the fundamentals of right to information act so as to question the human right violations and to promote transparency and accountability. f ^

HumanjLightsand Unit ix and Unit x

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4. CLINICAL COURSE - IV

A. MOOT COURT EXERCISE AND INTERNSHIP (INTERNAL)

(30 Marks)

CHAPTER I

1. Meaning and Importance.

Mooting is considered a specific form of simulation in which students are asked to argue points of law before a simulated court. The students are required to exercise all their skills of preparing and presenting a legal argument with persuasion. Participation in moot Court develops law students which is one of the most important factors for the success in legal profession. It provides the students the opportunity to draft plaint, prepare written statements and points of arguments and also to frame charges, etc. They may have experience of drafting public interest petition and presenting it before the court. They may learn the art of cross-examination and argument which plays important role in winning the cases. It will provide the students the experience of collecting the relevant cases on the specific issues involved in the cases. It will, thus, enable the law-students to be aware of the lawyering process, and attain the skill as advocacy. The students get opportunity to apply the principles of law to the cases assigned to them.

Participation in the moot Courts develops not only the legal skill but also the presentation skill. It also enables the students to learn the art of persuasion. It gives them confidence to speak before the people. Actually good command over the language, good power of expression, good knowledge of law, good common sense and good presence of mind, all help a lawyer to become a successful lawyer. These qualities are achieved only by practice. The organisation of moot Courts provide opportunity to the students to attain these qualities.

Mooting develops among the students ability to argue for the side with etiquette of the court-room. By the participation in the moot Court the participation in moot Court develops among the students the ability to identify the legal issues, collect legal materials, prepare the arguments, argue for a side without losing the temper and answer the questions asked by the court or other side. These qualities are considered necessary for success in the legal profession.

By participation in the moot Courts the students may learn the manner of dealing with the court. They may have the practical knowledge of the importance of being respectful to the court. According to Mr. Justice Raj Kishore Prasad :

> "More important than intellectual equipment is moral equipment. An advocate is always expected to maintain calms and self-possession and a pleasant humour. He should be respectful to the. Court. He owes this duty not for the sake of the temporary incumbent of the judicial office but for the maintenance of its supreme importance. He can be a deferential without being object and independent and fearless while being respectful.
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> He should never interrupt the judge when he speaks but should wait for the judge to complete his statement. He should take time to consider the question put by the judge to him in all respects and then give in reply. A hurried reply may lead him into a trap. An advocate should neither argue when he is not called upon to argue nor continue his arguments when the judge is in his favour and is not anxious to hear more from him.
>
> An advocate should not lose balance of temper, if the judge does not react as he expects.

These qualities will be attained by the students by experience. The participation in Moot Courts will provide the students opportunity to get such experience.

The contempt of court is a burning, problem which the country is facing today. At present the cases of contempt of court are at increase. Several cases have been brought to the notice of the court in

which the advocates have been found to have committed the contempt of court. The contempt of court should be taken seriously as it is a challenge to the rule of law, which is essential for the very existent of an orderly society. At present the courts are very alert and trying their best to knell down the person (howsoever high he is) who wilfully disobeys the order of the court or scandalizes or lowers the authority of the court or prejudices or interferes with the due course any judicial proceedings. However, in spite of all efforts, the contempt cases are at increase. In Baleswara Debata v. Priya Nath Mohanty, Mr. Justice Hansaria has said that this court has noted with regret the growing tendency of wilful violation of the court's order. It is felt that time has come to award really deterrent and exemplary sentence to keep in tact the Majesty of law and the fabric of administration of justice. It should always be remembered that the object in punishing the contempt is not to protect the judge personally but to prevent unlawful interference with the due administration of justice and to protect and strengthen the public confidence in the system of administration justice.

> "When the court exercises this power, it does not do so to vindicate the dignity and manner of the individual judge who is personally attacked or scandalized but uphold the Majesty of law and of the administration of justice. The foundation of the judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded."

Sometimes the contempt are committed in ignorance. They are committed because the contemners do not have sufficient knowledge of the contempt law. By participation in the moot Courts the students may have sufficient knowledge of the contempt law and practice and thereby the contempt which are committed in ignorance may be avoided.

By participating in the moot Court the students will learn also the duties of an advocate. The advocates are expected to assist the court in the administration of justice.

Lawyers collect materials relating to the case and thereby assist the court in arriving at a correct Judgement . They are officers of the court and the court acts on their statements and therefore they are under duty to be absolutely fair to the court. They are required to make accurate statements of facts and should not twist them. They are under the duty not to misguide the court. However, an advocate should not be servile and in case there is proper ground for complaint against a judicial officer, it is not only his right but also his duty to submit his grievance to the proper authorities. Many duties of the lawyers to the court are codified by the Bar Council of India and their breach is treated as professional misconduct and punished according to the Provisions of the Advocates Act. Actually self-restraint and respectful attitude towards the court, presentation of correct facts and law with a balance of mind and without over statement suppression, distortion or embellishment are requisites of good advocacy. These qualities may be attained only by practice and the organisation of moot Court provides such opportunity to the students.

Citation of cases is an art and plays important role in winning the case. Citing the minimum but relevant cases is considered better than citing a large number of cases containing the same or similar principles of law or containing the principles of law not relevant for the issues involved in the case. Besides, if a judgment in a case cited is criticised, the advocate must remember that criticism should be of judgment or reason for the decisions and it should not be of the judge's conduct or it should not amount for costing aspersions on the integrity, fairness or ability of the judge. The cases should be cited after explaining the relevance statutory provisions. It is better to explain the relevant statutory provisions and thereafter give reasons including the judicial decisions in support of the interpretation adopted. The whole report should be real thoroughly to get the principles of law laid down in the case. It is better to prepare personal notes containing the principles of law laid down in different cases. The note book should be prepared year-wise and also subject-wise. Modern devices like computer, etc. may also be used for this purpose.

Dealing with the client is also an art and it is attained by practice. In dealing with the client the lawyer must be fair and honest. He should make honest and fair appraisal of the chances of success of a case and advise the client accordingly, K.V. Krishnaswamy Aiyar has said :

> " Let me refer to your conduct towards a client who comes to you for help. Receive him with kindness and listen with sympathy to all that he has to say. He may repeat himself but do not snub him. Allow him to have his say in full. It may be declamation, it may be inactive and abuse of the other side. He may speak, not as if he were addressing a jury on whom he desires to impress the strength and truth of his case. But it is well that you should hear the whole tale, for it is desirable that you should not miss even one relevant fact, through you may have to get it by a process of shifting many irrelevant ones. It is less inconvenient to listen to superfluous facts than to stand the chance of missing what may be essential. Do not intempt your client in his narration, but reserve your questions to the end when he makes a pause."

In dealing with the client an advocate is required to have in mind the rule of the Bar Council of India dealing with his duties towards his client.

The aforesaid qualities can be attained by careful observation of the proceedings in the court and also of the dealing of the advocates with client and judges. The students participating in the moot Courts must have full knowledge of drafting the plaints and written statements, examining and cross-examining the witnesses, arguing the case, etc. The moot Courts will provide them opportunity to apply their theoretical knowledge to the practical problems or cases or issues assigned to them. They may get professional knowledge, even without being enrolled as an advocate.

2. Difference between Moot Court & Court.

Moot court is an artificial court organised for the students. By participating in the moot courts the students attain the professional skill. It differs from the real court in several respects. The moot does not exercise the judicial power of the State. It has not statutory power to decide the disputes between the parties.

According to Stephen in every Court, there must be least three constituent parts—the actor, reus and judex : the actor or plaintiff, who complains of an injury done; the reus or defendant, who is called upon to make satisfaction for it, and the judex or judicial power which is to examine the truth of fact and to determine the law arising upon that fact and if any injury appeals to have been done, to ascertain and by its officers to apply, the remedy. In the opinion of Tek Chand, J., the name "Court", for this purpose, is confined to judicial tribunals. Mr. Jagdish Swarup and Mr. Vinod Swarup have observed that a Court is charged with a duty to decide disputes in judicial manner and it declares the rights of parties in a definite judgment which has finality and authoritativeness. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their respective claims/stand and to adduce evidence in proof of it. The evidence is and may be legally taken on oath. The obligation to give a decision is on the consideration of the evidence adduced and submissions made and in accordance with law.

Thus, to constitute a court, an authority or a body or tribunal must exercise the judicial power of the State and must have derived this power from the State. Along with these attributes, it must have power to give a decision or a definite judgment which has finality and authoritativeness

In S.K. Mohammedbhikhan v. Manager Chandra Bhanu Cinema, the Court has held, that an authority to be considered as judicial authority, the following tests must be satisfied

(1) The power entrusted to the authority must be judicial power of the State, meaning thereby, the authority must be enjoined to adjudicate upon the disputes between the parties. There must be a *lis* between the contesting parties presented before the authority for adjudication and decision.

(2) The source of the power must emanate from the statute and must not be based merely on agreement between the parties. The power must statutorily flow and must continue to inhere in the authority subject to the limitation by the statute conferring such power.

(3) The manner of exercise of power must partake of essential attributes of Court, though minor trappings or inconsequential attributes may be absent. These essential attributes of the Court would include right of the contesting parties to represent their case not necessarily orally before the tribunal, ascertainment by the authority of the disputed question of fact posted for its consideration by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence led before the authority, if the dispute between them is a question of law, the submission of legal arguments by the parties and the power of the authority to enforce attendance of witnesses, production of documents etc., to enable the authority to effectively decide their dispute in a judicial manner.

(4) The resultant or end-product of the exercise of such power by the authority must result in a binding decision between the parties, concluding the lis between the parties so far as the authority dispute is concerned. The said decision must have finality and authoritativeness. The decision rendered by such authority must dispose of the whole matter by a finding upon the facts in dispute and an application of the law of land to the fact so found including where required a ruling upon any disputed question of law.

The word "Court" cannot be interpreted to include all the tribunals, but a tribunal which satisfies the above tests will be included within the meaning of the word "Court". Thus, a tribunal is taken as a Court when it is given by the statute the judicial power to decide the disputes between the parties and the decision is authoritative and final so far as the authority or body is concerned and, thus, the decision will be final if no appeal can be filed or is filed against it.

The judges of the Moot Court are not appointed by the President of India or the Governor of the State. They do not exercise the judicial power of the State. They have no statutory power to decide the disputes between the parties. Actually the Moot Court is not a real Court. It is an artificial court and may consist of any law expert, whether or not he is or has been a Judge of any Court. It is constituted not to decide the disputes between the real parties, but to provide opportunity to the law students to apply the principles of law to the cases assigned to them. Its object is to enable the students to be aware of the lawyering process.

3. Manner of organising or conducting the Moot Court.

Moot Courts may be conducted or organised in several ways, but its object should always be kept in mind. It should provide opportunity to the students to prepare and present a legal argument and have practical knowledge, as far as possible, of the 'lawyering process. The students should have opportunity to argue the point of law before a group of persons. Thus, the Moot Court should be conducted in such a manner as to develop the practical skill of the students.

The following manners of organising or conducting the Moot Courts are notable —

(a) Imaginary legal case.

The most important method of conducting the Moot Court is to prepare an imaginary case and one group of the students should be assigned the work of representing one side and another group should be assigned the work of representing the other side. The case may be civil case of criminal case. It may also be a writ petition. In each case the students should handle the case as an advocate handles the case of his client. The students should be asked to prepare the plaint, if he presents the plaintiff and the written statement in case he represents the defendant.

In case of writ-petition they should be asked to draft the petition themselves and the students representing the other side should be asked to counter the arguments of the petitioner so that his petition

may not be allowed. In criminal cases the emphasis should be on the writing of complaint, jurisdiction and powers of the Criminal Courts, determination of the legal issues involved collection of materials on the issues and final argument. In such kind of mooting the mooters, will be able to have the practical knowledge of drafting of the plaints, written statements, and writing of complaints, etc. They will also learn the art of cross-examination and argument.

It is to be noted that in civil cases, a suit is commenced by presentation of the plaint. In the plaint the name of the Court in which the suit is sought, name, description and place of residence of the plaintiff and of the defendants, the facts constituting the causes of action and when it arose, the relief claimed, the value of the subject-matter of the suit for the purposes of the jurisdiction and of the court-fees, etc. should be clearly stated. Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and in case such property can be identified by boundaries or numbers in a record of settlement or survey the plaint shall specify such boundaries or numbers.

After the plaint being filed, the party against suit it has been filed is given opportunity to admit or deny the facts stated in the plaint and present his own case. This is called written statement. Order VIII of the Civil Procedure Code contains rules relating to the written statements. As per the rule the defendant may and if so required by the Court, shall, at or before the first hearing or within such time as the court may permit, present a written statement of his defence. Before the preparation of the written statements the plaint should be examined carefully and then written statements should be prepared.

Actually drafting of plaint is an art and a well drafted plaint is one which gives a clear picture and does not jumble up facts which are difficult to follow. It should be divided into small paragraphs and follow the sequence of events and dates. The cause of action, the place and date of cause of action, the fact that it is within time, the valuation and the relief claimed should all be clearly stated.

Dr. B. Malik, CJ, has said that to the order side which a lawyer has to defend the same rules apply. He has to make out a clear defence, the facts alleged should be clearly admitted or denied, but there may be facts about which he has no, knowledge and would like the plaintiff to prove the same, he can say it is 'not admitted'. He has further said that he has also the right to give his own version of the whole case and set out in clear cogent language his own defence to which the plaintiff has a right of replication.

Arguing the case plays important role in winning the case. The experience will enable a person to understand the art of arguing the case in such a manner as to convince the Judge. For the preparation of arguments the mooter should have full knowledge of the pleadings of the parties. He should have full knowledge of the admissions and denial of the facts and evidence given by the witnesses. In arguing a case the strongest points should be emphasized. The strongest point should be argued till the Court appears to have grasped them.

Thus, this manner of conducting the Moot Court is of utmost importance. It will enable the mooters to learn the art of advocacy. In such mooting the facts should be taken to be proved and the mooters should argue only on the question of law involved in the imaginary case prepared for the mooters. Being an imaginary case, the examination and cross-examination of the witnesses would be a quite difficult task. The presentation skill should be given due importance in awarding the marks to the mooters.

(b) Decided case.

One method of organising or conducting the Moot Court may be the discussion on a decided case. For this purpose a case decided by the Court should be selected and a group of students should be assigned to speak in favour of the principles laid down in the case and other group should be asked to speak against the said principles, i.e. the point out the defects in the ruling. Each student should be asked to speak within the time allowed to him. Each side should submit the written submissions and should counter the arguments of the other side stating the reasons. Each side should be given reasonable time to collect materials in favour of its view. This will require the students to visit the law-library, consult the

law books and journals and prepare the points of argument. By such mooting the students will be able to find out the *ratio decidendi* and evaluate it. They can be able not only to find out the *ratio decidendi* but derive a conclusion as to its correctness and effects. It will develop the capacity of the students to argue a legal point.

In the mooting the manner of speech along with the use of gesture of the speaker should also be taken into consideration. In criticising the news of the Judges the language should be soft and decent. The judgment should be criticised and not the conduct of the Judge who had delivered the judgments. It should always bear in mind that if the conduct of a judge is criticised, it may amount to contempt of Court.

In such mooting each students should be asked to submit his written argument. If a side consists of more than one students, each students should submit his argument separately. Thereafter each student should be asked to speak for ten minutes to explain his written argument.

The Moot Court, thus, provides the students an opportunity 'to learn the law by practice. It develops the legal skill, presentation skill and also the presentation skill of the mooters. It provides them opportunity to speak before the class-room and answer the questions put to them without loosing the temper.

(c) Moot Court on Specific Legal Subject

A specific legal subject may be selected and the students may be asked to collect materials, submit their written arguments and speak within the specified time so as to explain them arguments. The questions may be put to them by the students, teachers, etc. present in the Moot Court. The students may be divided into groups. The students belonging to the same group may be asked to collect the materials and prepare the arguments collectively. Even in such condition, each students of the group should be asked to speak for sometimes to explain the written arguments, etc. This will require the students to visit the library, read the books, journals and Articles, prepare the arguments and develop the speaking-power. It will develop not only the legal skill but also the presentation skill.

4. Factors for Success

For success in Moot Court the mooters should pay special attention to the following—

I. Preparation of Case.

Preparation and presentation of a case is an art which is attained by practice. They play important role in success.

In the preparation of the case the most important facts should be selected and they should be remembered with accuracy. This will enable the mooter to supply the facts whenever he is required to supply. It will also provide him confidence. The events should be arranged and noted down in the order of dates. The relevant documents should also be studied carefully. The grounds or arguments in favour of the opponent should also be carefully studied and the counter-arguments should be prepared systematically.

After study of the facts of the case and the relevant documents there should be research on the law on the matter. The relevant text-books and case-law should be studied thoroughly and carefully. On this point the suggestions of learned K.V. Krishnaswami Aiyar are notable. He has said :

> " When you consult a text-book I ask you never to confine yourself to looking up the particular narrow point from the index at the end. It is better for you to tern your attention to the contents of the book and study all the relevant chapters that have any beaming on the subject. A topic is best studied when you study it from all angles with reference to all aspects that leads to it or flows from it. Such study alone will make you understand the subject-matter with exactitude and you will then be able to reason it out in Court with confidence."

In studying a case the whole report should be carefully read from beginning to end. Even the facts of the case should be read as it will provide assistance in understanding the scope of the principles of law laid down in the case. It is better to prepare personal notes containing the principle of law laid down in the cases.

On this point again the view of learned, K.V. Krishnaswami Aiyer is notable—

" In studying case-law it is the habit of the indolent to be content with reading the headnotes that you showed never be. The headnotes may be in accurate. They may be imperfect anyhow, that is not the way to study the decision. A decision is closely related to the facts of the case and your application of it to those of another must depend upon the similarity in the situations which you have to establish. You should, therefore, study the whole report from beginning to end, master the facts of it and how it was decided in relation to them."

He has further said :

" You must also study decisions with the definite aim of understanding their precise scope and effect and their proper limitations with their distinctions. A labourious efforts without a discriminating study of this kind is of no use and may even prove dangerous. You might consider from a broad study that a particular decision that you come across is opposed to the view that you desire to present. But studied with case and understood with its proper limitations, that decision not only might he distinguishable but might also strengthen your case by establishing other important phases in the scheme of your arguments of which the view that you present may be the narrow aspect."

Certain suggestions of Chief Justice V.G. Oak to the advocates are also relevant for the mooters. According to Hon'ble Chief Justice V.G. Oak has said that having mastered the facts, the advocate has to address himself to question of law. Not only the advocate has to keep ready the decisions which support him but he has also to study the authorities that his adversary is likely to cite. Many statutes have been amended from time to time, the lawyers must be acquainted with the latest amendments. It is risky to refer to old editions of books or statute-law. The advocate has to present the case of his client in the best light and thereby help the Court to arrive at the correct decision. He is written his right in stressing the points which are in his client's favour. But the advocate must not mislead the Court on questions of fact. The maxim "Everything is fair in love and war" is not applicable to law courts.

In his Article, 'The Art of Winning Cases Justice ram Labhaya has stated that methodical preparation of the case is the most essential perquisite for success. It is indispensable for the proper presentation of the case. Facts have to be mastered knowledge of facts generates confidence which is of great assistance in carrying conviction. After, a clear, chronological precise and brief statement of facts, the next important step in presentation is a clear statement of the points in controversy in logical sequence, so that it is possible to proceed from step, each step forming a link in the chain of argument. Reference to the relevant provisions of the statute must necessarily precede the discussion of authorities and precedents. It has been made clear that the Courts generally do not feel satisfied with the decisions in interpreting the statute till the relevant provisions of the statute are fully and properly examined. It is best to begin with them, to interpret the language of the statute as it stands, giving all reasons including those gathered from decided cases in support of interpretation sought to be placed on them. Resort to case law should normally be the last step in the process of argument. One necessary condition of the use of precedent is that before they are cited, they should be digested.

Citation of cases is also an art and plays important role in winning the case. A lawyer should know all the relevant cases on the points involved in the case. He must keep in mind the past decisions, the law laid down in the cases and also the facts on which the law has been laid down. A lawyer should always keep in mind that his opponent way cite the precedent in favour of his client and therefore he should always be prepared to face such a situation and he can meet such a situation successfully, if he himself knows fully the precedent on the issues involved in the case.

Citing the minimum but relevant cases is considered better than citing a large number of cases containing the same or similar principles of law or containing the principles of law not relevant for the issues involved in the case. A good lawyer should avoid the citation of many cases on the same cases.

The best and most relevant can should be selected. As far as possible the cases decided by the highest court should be cited. If the decisions of the highest Court are not available on the point, then, the lawyer should select a decision of the Court higher than the court before which the lawyer is arguing the case. If this is not possible, then the decision of the courts of co-ordinate jurisdiction with the Court before which he is arguing the case. If there are several decisions of the Courts of co-ordinate jurisdiction, the lawyer should cite the case which gives the best reasons for the decision that the lawyer wish his Court to adopt.

The best manner of citing a case in Court is for the advocate to read the case first outside the Court, to digest it and then to pick out the most relevant and essential passages from that report and finally to place the selected passages before the judge that procedure not only avoids unnecessary waste of time but also heightens the effect of the citation. It is best for the advocate to assimilate the precedents in his own chambers first before citing them in Court.

If a judgment in a case cited is criticised, the advocate must remember that the -criticism should be of judgment or reasons for the decisions and it should not be of the judge's conduct or it should not amount for casting aspersions on the integrity fairness or ability of the judge. Ah advocate is required to know not only as to how a case should be cited but also as to how a case should be criticised. In the words of Justice RB. Mukharji :

> " Criticism of the judgment in a reported case always acquires greater dignity when such criticism is not personal and derogatory to the Court which decided it. Such criticism should always be based on the merit of the decision quoted, by impeaching its reasons, by assailing its logic and by distinguishing its facts and law."

The precedent, thus, no doubt, play important role in winning the case but it should be cited after stating and explaining the relevant statutory provisions. It is better to state and explain the relevant statutory provisions and thereafter give reasons including the judicial decisions in support of the interpretation adopted. The full report of the case should be thoroughly studied to get the principles of law laid down in the case.

II. Preparation of Arguments.

Preparation and manner of arguments play important role in success and therefore mooters should pay special attention to them. For preparation of arguments the mooter is required to have the full knowledge of the pleadings of the parties and contents of the relevant documents. He should also be conversant with the admissions and denial of facts and the evidence given by the witnesses. He should have the knowledge of the latest case law on the issues involved in the case. The points of arguments should be noted down and the facts and law should be written on each point so that all the relevant points may be presented at the time of argument and no point is missed. He should speak slowly and clearly. He should have full control over his temper and should not lose balance of temper if his plea is not accepted.

In arguing a case strongest points should be emphasized and the weak points as far as possible, should not be raised in such a way as to attract the Court. The strongest point should he argued till the Court appears to have grasped them. Arguments on each issues should be written out. The names of witnesses and the documents in support of the issue should be clearly noted.

According to Mr. Justice Khosla the more carefully the facts are studied the easier it is to streamline them into the course of the arguments. Small and apparently unimportant details become significant, when the overall picture is presented. So master the facts well and base the case on them. Facts are really the foundation of each case and if the foundations are badly laid, the superstructure cannot be firm.

The record of the case should be studied with the object to discover the weak points and also the strong points in the opponent's case. It should always be kept in mind that the opponent will stress on his

strong point and he is to face it. Therefore, even the strong points of the opponent should be gathered and prepare the argument in such a way as to meet them and prove them as insignificant in relation to the decision under appeal. The weak points in the opponent case should be emphasized much so as to prove that the weakness is of such a nature- that in spite of everything else the judgment under appeal cannot be sustained.

The suggestion by Mr. Justice G.D. Khosla to lawyer is also useful to the mooters. He opined :

" He must make a very careful study of his case and find out the points which favour him and the points which go against him. If he cannot effectively answer some part of his opponent's case he should lay stress on his weakness and make the most of his own strength. He should try to show that in the ultimate analysis the balance inclines in his favour despite some circumstances which he cannot explain away, circumstances which might appear to favour the respondent, but are in reality inconclusive. In presenting his case in Court he should try to win the confidence of the judge by his honesty and frankness. He should not be perturbed by momentary reverses and should try to persuade rather than compel. He should maintain a happy mean between dull solemnity and course humour. He should be as brief as he reasonably can and should at all times shun verbosity as he would a deadly enemy."

(Excerpts of the material taken from - Moot Court, Pre-Trial preparation and participation in Trial Proceedings - by **Dr. Kailash Rai)**

III. Principle of Natural Justice

Now-a-days the principle of natural justice are given much more importance. Therefore, the mooter must have clear knowledge of the principle of natural justice so that in the preparation of plaint or written statements or arguments he may plead them whenever required to get success.

Principles of natural justice are not embodied rules but they are judge-made principles developed to secure justice and to prevent miscarriage of justice. Earlier these principles were applied only to the judicial functions, but later on their ambit was extended to the quasi-judicial function, and at present these principles apply not only to the judicial and quasi-judicial functions, but also to the administrative functions. It has now been established that the distinction between the quasi-judicial and administrative is not relevant as the duty to hear is attracted wherever an action is likely to have civil consequences to a person. The basic principle is that where a person or public body has the power in reaching a decision to affect the rights of subjects, then, that person must comply with what have become known as the rules of natural justice. The real test is the effect of the decision on the rights of the person affected. The dividing line between administrative power and quasi-judicial power is quite thin and is being gradually obliterated and the horizon of natural justice is gradually expanding. The principles of natural justice has now been extended even to pure administrative function. Principles of natural justice are treated as a part of the Constitutional guarantee contained in Article 14. Non-compliance with the principles of natural justice results in arbitrativeness which is the same as discrimination and where the discrimination is the result of State action, it is a violation of Article 14.

The concept of natural justice has been defined variously by different judges, lawyers and other scholars. It has been taken to mean requirements of substantial justice, or substantial requirements of justice. In Vionet v. Barrett, Lord Esher, M.R. has defined it as "the natural sense of what is right and wrong". In Ridge v. Baldwin,

Harman, L.J. equated it with 'fair play in action'. In re H.K. (An Infant) Lord Parker has defined it as 'duty to act fairly'. In Regina v. Secretary of State for Home Affairs, Parte Hoselaball, Lord Geoffrey Lane, L.J. has defined it as "common fairness". In Maneka Gandhi v. Union of India, Mr. Justice Bhagwati has taken it as fair play in action.

The following principles of natural justice are notable—

ILLUSTRATIVE MOOT PROBLEM

Dolphins Pvt Ltd. Rep. by its Managing Director & Another v. State of Vadanadu & Others

- The State of Vadanadu is a coastal State in the Union of India. Its Capital city is Nagara. Though the State is of very conservative people, the City of Nagara is among the most Cosmopolitan cities across India. Though filled with ancient temples, the city after the advent of 21st century saw splurge in number of shopping malls, theatres and commercial complexes.
- Nagara is also an educational hub, with students coming here to study from various parts of India. Last decade had seen an increase in incoming of woman students from various parts of India. Apart from that, being an education hub, the city has eventually become the hot spot for software companies and various upcoming business concerns with wide business & job prospects, which led to increased presence of young professional apart from students.
- The City of Nagara had a lot of pubs, bars and dance bars apart from regular business of liquor through retail. The pub culture was well prevalent among the youth of Nagara. The people from rest of Vadanadu, and the elders in general, however were against the pub culture. There were various articles in right wing conservative journals condemning the pub culture and criticising the style of dressing and free mingling involved therein. On the other hand, the youngsters found such views misplaced and considered pubs as nothing but harmless recreation and a stress reliever. In any event, there was no denial that, culture of consumption of alcoholic drinks was on the increase among youngsters. Further, there were also objections from the general public to dance bars as they felt, it promoted vulgarity and depraved cultural values, apart from demeaning women. On the other hand, the women dancers found it to be a viable employment and many of them disagreed with the conservative opinions expressed.
- The State of Vadanadu, in the recent, witnessed increase in number of crimes against women. There was increase in reports of cases of molestation and rapes, kidnapping etc. especially during night time. The State Government though took measures to check such problems, it was not of much avail.
- In the year 2012, Human Rights Initiative, a social organisation published a report regarding offences against women in the State of Vadanadu. The report contained alarming details regarding exploitation of women in dance bars and of possible prostitution rackets. Further it also noted that, the pattern of offences is more in areas where there was consumption of liquor. There were also found to be drug abuses in places like bars and pubs. A couple of other NGO's published very similar reports. These reports were widely published in newspapers and news magazines and were subject matter of hot debate on the internet. However, the State Government apart putting up a few more check posts and increase in patrolling, to check violence against women in general, no concrete action was taken regarding the aspects which were brought out in the report. Further there was a large public outcry against drunkenness in general and increase of the habit among youngsters, both boys and girls.
- In the Circumstances, Rashtriya Vikas, a Social Organisation and a popular NGO sent a representation to the State Government regarding the issues that have been pointed out in the Report of Human Rights Initiative and other reports and prayed to the State to take steps in regulating, or otherwise closing down such pubs and dance bars which cause, apart from cultural issues, security & health concerns. As no action was seen forthcoming, from the State Government, and the authorities orally indicating that they wouldn't be inclined to take such steps, the Rashtriya Vikas filed a Writ Petition before the High Court of Vadanadu, seeking for a writ of mandamus directing the Respondent State Government and its authorities to take appropriate steps in regulating pubs, bars & dance bars & and such similar places, and pass any such further or other Order. The Hon'ble High Court, after finding the State's stand not satisfactory, allowed the writ petition by Order dated 15.12.2012 directing the Respondent to frame appropriate policy/regulations and issue directions to regulate the activities of pubs, dance bars and similar places and pending such issuance, the Hon'ble High Court thought it fit

to also issue various directions, which it stated that, shall be in force until appropriate regulations are framed or law is passed by the Government. The said directions are as follows:

- All Bars, Pubs, Dance Bars and like places shall remain closed between 8.00 PM and 6.00 AM, except those Bars in Star Hotels, which shall seek permission of State Government, for keeping it open beyond 8.00 PM.
- Wherever, Alcoholic drinks are served, women shall not be engaged by the management of pubs, bars or hotels for dancing.
- Any person below the age of 21 will not be allowed entry into bars, pubs or dance bars. No person below the age of 24 shall be served alcoholic drinks in any place.
- Any violation of the above directions, will entitle Closure of the concerned Pub, Bar or Hotel, which the State Government shall carry out on receipt of any complaint/s after due enquiry.
- The State Government may also levy any penalty if it deems fit.
- The above directions severely affected the functioning of pubs and bars, and they approached the State Government to pass fresh regulations, in consultation with them, and in specific, to permit them to function beyond 8.00 PM among other claims. The State Government, in any event was aggrieved by the Decision of the High Court, as it practically usurped its powers, i.e., of the Executive/Legislature and hence preferred an appeal before the Division Bench of the High Court of Vadanadu, which though admitted the appeal, did not stay the single Judge's Order. Moreover, the State Government eventually finding it convenient for Law and Order, let the directions to continue in force and did not pass any direction or law in supersession of the same.
- Aggrieved by the above developments, Dolphins Pvt Ltd, a company which runs a popular chain of pubs and bars by the name 'Golden Rock', which also employs a number of women dancers and is well known for its care of employees, represented by its Managing director, filed a Writ Petition before the Hon'ble Supreme Court, challenging the legal validity of the directions issued by the Vadanadu High Court by its Order dated 15.12.2012. The principal grounds of challenge was that, it violated fundamental rights of the petitioners and various other persons running such concerns and of the rights of its employees, apart from it being without jurisdiction. The Rashtriya Vikas, which was the petitioner before the High Court, was additionally impleaded by the Hon'ble Supreme Court as a respondent party, apart from, The Registrar, High Court of Vadanadu & the State of Vadanadu, which were already parties before the Supreme Court. Similarly, Shyam Kumar a popular actor & celebrity filed another writ petition as a public interest litigation under Art 32, challenging the directions as violative of the fundamental rights of the youngsters, who having become adults and having the capacity to decide for themselves should not be prevented from the choices they have and challenged the directions for violation of Art 14, 19 & 21 of the Constitution. The said writ petition was tagged along with the one filed by Dolphins Pvt Ltd.
- The Rashtriya Vikas, contended before the Supreme Court that, the writ petitions are not maintainable, as it challenges a Court Order, which is opposed to the settled law of the land such as, Judicial decisions cannot violate fundamental rights, Orders in nature of Certiorari not issuable to superior Courts etc. Apart from completely supporting the Order of the Hon'ble High Court on merits, the Rastriya Vikas further raised a preliminary contention that, the petitioner company not being a citizen cannot maintain a writ petition, as far of violation of Art 19 is concerned. To the contra, the counsels for the petitioners contended that, though it is true that, a Judicial Order in the traditional sense may not violate fundamental rights, considering the fact that, the Judicial Orders passed nowadays extend far beyond the regular Judicial functions and partake character of Executive/Legislative functions, as in the present case and therefore in such circumstances, it is required that a writ petition should be entertained by the Hon'ble Supreme Court, if it finds any violation of Fundamental right, in fact. The counsel for the petitioners further contended that, the proposition laid down in N.S. Mirajakar's case

may not hold good, in light of the diverse nature of Orders passed by Courts today, which was not contemplated by the N.S.Mirajkar Judgment, and hence it needs to be distinguished as not to apply to the present case or otherwise ought to be reconsidered. On the point of, maintainability on the Art 19/Citizenship aspect, it was contended that the above said objection is hypertechnical and the decision in State Trading Corporation case can be overlooked as it has been watered down by various subsequent Judgements of the Hon'ble Court.

- The Hon'ble Supreme Court finding that various questions of Constitutional importance being involved in the above cases both on preliminary issues and on merits, held it as a fit case to be referred to a Constitution Bench. The Hon'ble Supreme Court further observed in its referral Order, with respect to the issue of challenging a Judicial Order under Article 32 that, a number of related issues have not been conclusively decided and that in view of the expansion in the scope of Judicial Orders passed, the decision in Naresh Sridhar Mirajkar v. State of Maharashtra & Ors needs to be reconsidered. It further opined that, in view of the subsequent holdings in Bank Nationalisation & other cases the Judgment in State Trading Corporation of India Ltd v. C.T.O also should be reconsidered. In the circumstances, the matter was placed before the Hon'ble Chief Justice for passing appropriate Orders. The Chief Justice of India constituted a Bench of 11 Judges to decide the issues of Constitutional reference, and also the merits of the case, if the Bench deems fit and the matter is posted for final hearing.

The Issues identified are as follows:

- (a) Whether a Writ Petition challenging a Judicial Order is maintainable or in other words, whether a Writ Petition can be filed challenging an Order of Court?
- Whether 'Judiciary' falls within the definition of 'State' under Art. 12 of the Constitution of India?
- If a writ petition can be filed against a Judicial Order, what kind of Orders, or Orders of which Courts could be challenged? What kind of Writ is issuable in such cases?
- Whether a company can file a writ petition alleging violation of fundamental rights under those provisions which apply only to 'citizens' and not to all 'persons'?
- In any event, whether the directions issued by the Hon'ble High Court in its Order, is Constitutionally valid? Whether the directions violate the Fundamental Rights enshrined in Part III of the Constitution of India ?

Note:

- Dolphins Private Limited, is a company registered under Companies Act 1956, having its registered office at Nagara, Vadanadu. 90 % of the shareholding is held by individuals who are citizens of India. Remaining 10 % is held by Investec Holdings Limited, a Company having its registered office at Mumbai, Maharashtra.
- The Arguments for the Petitioner side will be for Dolphins Pvt Ltd. & Shyam Kumar, and for the Respondents, be for Rashtriya Vikas. The contentions/stand of the Government parties is not specified herein.
- It shall be presumed that the Court goes on to hear the case on merits also.
- The Issues given here are broad propositions that arise, it can be elaborated or reframed and addressed in a convenient manner. However every issue must be addressed with the preliminary issues being addressed first.
- The meaning of pubs, bars, and dance bars will be as commonly understood

Moot Problem - Formats of the Petitioner Memorial to given Facts of the case

THE HON'BLE SUPREME COURT OF INDIA

(Under Article 32 of Constitution of India; 1950)

W.P. Nos. _____ & ____ of 2013

(Special Original Jurisdiction)

Dolphins Pvt. Ltd. & Athr. .....Petitioner/ Petitioners

-versus-

The State of Vadanadu.
And 2 Others .....Respondents /Respondents

MEMORANDUM ON BEHALF OF THE PETITIONERS

2013

COUNSEL FOR THE PETITIONERS

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LIST OF ABBREVIATIONS

AIR	All India Report
Art	Article
CTC	Current T.N. Cases
Ft nt	Foot Note
HC	High court
MLJ	Madras Law journal
Para	Paragraph
Sec.	Section
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports
v.	Versus
WLR	Writ Law Reporter
W.P.	Writ Petition

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STATEMENT OF JURISDICTION

These petitions are filed before this Hon'ble Supreme Court, invoking its jurisdiction under Article 32 of the constitution of India. The Petitioner Humbly Submits to the jurisdiction of this Hon'ble Court.

FACTS IN BRIEF

1) Nagara, Cosmopolitan city, capital of the coastal state of Vadanadu in the Union of India. Besides being an educational hub is also a spot for software. The City of Nagara had a lot of pubs, bars and dance bars apart from regular business of liquor through retail which was popular among youth. The State of Vadanadu, in the recent, witnessed increase in number of crimes against women. There was increase in reports of cases of molestation and rapes, kidnapping etc. especially during night time.

2) In the year 2012, Human Rights Initiative, a social organisation published a report that contained alarming details regarding exploitation of women in dance bars and of possible prostitution rackets involved long with the business of dance bars. Further it also noted from the pattern of offences that, it is more in areas where there was consumption of liquor, i.e. near bars, liquor shops where drug abuses was also found.

3) In the circumstances, Rashtriya Vikas, an NGO filed a Writ Petition before the High Court of Vadanadu, seeking for a writ of mandamus directing the respondent State Government and its authorities to take appropriate steps in regulating pubs, bars & dance bars & and such similar places, and pass

any such further or other Order. The Hon'ble High Court, after finding the State's stand not satisfactory, allowed the writ petition directing the Respondent to regulate the activities of pubs, dance bar.

4) The directions issued by the State Government severely affected the functioning of pubs and bars, and they approached the State Government to pass fresh regulations. The State Government was aggrieved by the decision of the High Court for usurping its Executive/Legislative powers and hence preferred an appeal before the Division Bench of the High Court of Vadanadu, which admitted the appeal, but did not stay the single Judge's Order.

5) Aggrieved by the above developments, Dolphins Pvt Ltd company (90 % of the shareholding is held by individuals who are citizens of India) which running pubs and bars, which also employs a number of women dancers and is well known for its care of employees, represented by its Managing Director, filed a Writ Petition before the Hon'ble Supreme Court, challenging the legal validity of the directions issued by the Vadanadu High Court. The principal grounds of challenge was that, it violated fundamental rights of the petitioners and various other persons running such concerns and of the rights of its employees, apart from it being without jurisdiction. The Rashtriya Vikas, which was the petitioner before the High Court, was additionally impleaded by the Hon'ble Supreme Court as a respondent party, apart from, The Registrar, High Court of Vadanadu & the State of Vadanadu, which were already parties before the Supreme Court.

6) Similarly, Shyam Kumar a popular actor & celebrity filed another writ petition as a public interest litigation under Art 32, challenging the directions as violative of the fundamental rights of the youngsters, who having become adults and having the capacity to decide for themselves should not be prevented from the choices they have and challenged the directions for violation of Art 14, 19 & 21 of the Constitution. The said writ petition was tagged along with the one filed by Dolphins Pvt Ltd.

7) The Rashtriya Vikas, contended before the Supreme Court that, the writ petitions are not maintainable, as it challenges a Court Order, which is opposed to the settled law of the land such as, Judicial decisions cannot violate fundamental rights, Orders in nature of Certiorari not issuable to superior Courts etc. Apart from completely supporting the Order of the Hon'ble High Court on merits, the Rastriya Vikas further raised a preliminary contention that, the petitioner company not being a citizen cannot maintain a writ petition, as far of violation of Art 19 is concerned.

8) The Chief Justice of India constituted a Bench of 11 Judges to decide the issues of Constitutional reference, and also the merits of the case if the Bench deems fit; and the matter is posted for final hearing.

QUESTIONS PRESENTED

Arguments on Procedural Issue

Issue 1

A. WRIT PETITION CHALLENGING THE JUDICIAL ORDER IS MAINTAINABLE

B. JUDICIARY COMES WITHIN THE PURVIEW OF ARTICLE 12 OF CONSTITUTION OF INDIA

C. A WRIT CAN BE DIRECTED AGAINST SUBORDINATE COURTS AND ALSO AGAINST ORDER OF APEX COURT

Arguments on merits

Issue 2

II. WHETHER A COMPANY CAN FILE A WRIT PETITION UNDER ART,19 OF THE CONSTITUTION OF INDIA?

Issue 3

A. WHETHER THE DIRECTIONS ISSUED BY THE HON'BLE HIGH COURT IN ITS ORDER, IS CONSTITUTIONALLY VALID?

B. WHETHER THE DIRECTIONS VIOLATE THE FUNDAMENTAL RIGHTS ENSHRINED IN PART III OF THE CONSTITUTION OF INDIA?

SUMMARY OF PLEADINGS

I. A) WRIT PETITION CHALLENGING THE JUDICIAL ORDER IS MAINTAINABLE

It is submitted that the petitioner challenges the legislative action of the judicial order and not the order in itself it is also submitted that the Impugned Judicial order is beyond Jurisdiction as it violated the doctrine of separation of powers, which is the salient feature of constitution and hence the impugned order is not sustainable in tracks of law. It is submitted that the ratio decenti of Mirajkar's case is not applicable to the present case as the impugned order in mirajkar's case was the one which is within the court's jurisdiction, but in the present case the impugned order is not within its jurisdiction.

B). JUDICIARY COMES WITHIN THE PURVIEW OF ARTICLE 12 OF CONSTITUTION OF INDIA

It is submitted that in the constituent assembly debates while clarifying the doubts with regard to state under Art. 12 , Dr. Ambedkar stated that "every authority who have power to make laws or the power to have discretion vested in it are state". Moreover the exclusion of Judiciary Under Art. 12 would defeat the purpose of remedy under Art.32

C). A WRIT CAN BE DIRECTED AGAINST SUBORDINATE COURTS AND ALSO AGAINST ORDER OF APEX COURT

A writ can be directed against the subordinate court and Supreme Court under many instance has recalled or reviewed and modified the order of the Hon'ble High Courts. A writ may also lie against the apex court when the said order is out of the scope of the court and it has violated the fundamental rights.

II. WHETHER A COMPANY CAN FILE A WRIT PETITION UNDER ART.19 OF THE CONSTITUTION OF INDIA?

The petitioner company is entitled to file a writ petition under Art.32 of the constitution of India since the essential conditions for applying art.19 are fulfilled in this case. Further it is submitted that the word 'citizen' includes a company also. Hence the court is bound to exercise its jurisdiction to test the infringement of the petitioner's fundamental rights. It submits that the impugned order of the High Court is violative of fundamental rights of the petitioner. Thus the subsequent holdings of this court in its landmark precedents must be reconsidered henceforth the court is obliged to admit the petition to uphold the interest of the justice.

III. A). WHETHER THE DIRECTIONS ISSUED BY THE HON'BLE HIGH COURT IN ITS ORDER, IS CONSTITUTIONALLY VALID?

The petitioner humbly submits that the Hon'ble High court does not have the jurisdiction to make orders or decrees or directions which may have power of law made by legislature. Since the Hon'ble High Court cannot issue a direction to the State Government to enact a particular law, in support of the same Series of Precedents, Commentaries and Articles are placed. Hence the Hon'ble High Court has no jurisdiction to legislate; which if violated will amount to over usage of Judicial Activism. This over usage of Judicial Activism amounts to Judicial Excessivism:

B). WHETHER THE DIRECTIONS VIOLATE THE FUNDAMENTAL RIGHTS ENSHRINED IN PART III OF THE CONSTITUTION OF INDIA?

The Petitioner humbly submits that, the impugned order violates the petitioner's fundamental rights. The preliminary contention is that the impugned order dated 15.12.2012 violates fundamental rights of the petitioners and various other persons running such concerns and of the rights of its employees, apart from it being without jurisdiction. The interim Direction is violative of Art.14 of the Constitution of India; it affects the right to Trade and business. Further Article 15 is being hit by the impugned order and Livelihood and personal Liberty is being infringed by the impugned order.

PLEADINGS

Arguments on Procedural Issue ISSUE 1:

I .A). WRIT PETITION CHALLENGING THE JUDICIAL ORDER IS MAINTAINABLE

It is submitted that the present writ petition is maintainable. Further it is a well settled principle of law, that any person to whom the fundamental rights are infringed can move this Hon'ble apex court under Art.32 of Constitution of India[1] and to seek remedy under Art. 32 of Constitution of India is in itself a fundamental right. The petitioner in the present case, has come up with the petition, challenging the validity and legality of the order passed in the Hon'ble High Court of Vadanadu, in giving directions, legislating the business of bars and pubs and dance bars and thereby restricting their hours of working, by stepping into the shoes of legislature. Which therefore grossly infringes the fundamental rights of the petitioner under Art.19 (1) (g) and Art. 21 of the Constitution of India. Hence the petitioner has invoked special original jurisdiction of this Hon'ble court under Article 32 of Constitution of India to enforce his fundamental rights. The contentions of the respondents with regard to the maintainability of the Writ Petition challenging the validity of the Hon'ble High Court's order is being refuted and the following arguments are made in support of the same :

A.(1) High Court order is challenged as it exercised legislative action through judicial order:

It is submitted that the Hon'ble High Court of Vadanadu has erred in not only allowing the writ petition filed by the respondent NGO Rashtriya Vikas but further stepped into the shoes of the legislature and thereby enacted the laws regulating the pubs and bars and prescribed the working hours and age limit for persons to serve and drink liquors, which was out of the scope of its jurisdiction. The Constitution of India envisages the doctrine of Separation of powers which in turn a salient feature of the Indian Constitution. The Legislature, executive and Judiciary are considered to be the three pillars and separate tracks, which should never intend to intersect, but unfortunately the impugned order which is under challenge is nothing but a legislative action is taken by a judicial order. Prima facie a judicial order may not violate a person's fundamental rights by itself. However there is a reason to believe that an legislative action taken in pursuance of judicial order can violate fundamental rights. Therefore, in the present case, what the petitioner intends to challenge is not the judgment of the court but the legislative action of the judicial order. Moreover the petitioner was not a party to the impugned proceeding and the impugned order being a judgment in rem and a blanket order, the petitioner's fundamental right is grossly violated and hence the present petition under Art. 32 of Constitution of India, challenging the legality and validity of the impugned judicial order is solely maintainable. In this context it is pertinent to note the decision of the Hon'ble apex court in the case of **Asit Kumar Kar Versus State of West Bengal & Others**[2] wherein while dealing with the very same and similar sets of facts the Hon'ble Court held that if an order can to be passed violating the principles of natural justice (i.e) without adding them as a party and if they are suffered by the said order, a petition under Art. 32 of Constitution of India can be invoked to recall the impugned order passed by the court. Applying the principles laid down in the case cited (supra) to the present case this Hon'ble court has inherent power either to recall or quash the impugned High Court order.

A.(2) The Impugned Judicial order is beyond Jurisdiction and not sustainable in tracks of law

It is submitted that the Writ Petition filed before the Hon'ble High Court was not maintainable and the Hon'ble High Court ought to have dismissed the petition in limine but the impugned order came to be passed by the Hon'ble High Court of vadanadu by going out of the scope of its jurisdiction and gave directions in regulating laws for the pubs, bars and dance bars, which is arbitrary, unreasonable and illegal in the tracks of law. Moreover it is a well settled principle that the court is not vested with a power to

[1] Chiranjit Lal Chowdri -v.- Union of India AIR 1951 SC 41. [2] 2009 (2) SCC 703

issue a writ directing the Parliament or Legislature to enact laws. Judiciary cannot act as alien powers in enacting the laws. The Impugned order discriminates and violates the fundamental rights of the petitioner such as Right to earn livelihood, Right to profess free trade and occupation etc.

It is pertinent to note that in the case of **Union of India -v.- Prakash .P. Hinduja**[3] the Hon'ble Supreme Court held that under Indian constitutional scheme parliament exercises sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. The same view was reiterated in the cases of **Supreme Court Employees Association -v.- Union of India[4], State of Jammu and Kashmir -v.- A.R.Zakki[5]** wherein it is held that no court shall direct the legislature to enact the law by writ of mandamus. It is further submitted that in the case of **A.K.Roy -v.- Union of India[6]** the Hon'ble apex court while dealing with the issue in implementing the 44th amendment of the Constitution the court observed hereunder: *"The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the court to compel the government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive,….."*

It is noteworthy mentioning the case of **Indian Soaps and Toiletries makers Association -v.- Ozair Hussain and Others.**[7] while dealing with the similar issue the Hon'ble Supreme Court set aside the order passed by the High Court, giving interim directions by entering into the domain of the legislature and thereby directed the government to enact laws. on the sole ground that the parliament/legislature, is sovereign to enact the laws and it cannot be influenced by judiciary as alien power and the operative portion of the order is usefully extracted hereunder :

"we hold that the High Court under Article 226 of the Constitution of India has no jurisdiction to direct the Executive to exercise power by way of subordinate Legislation pursuant to power delegated by the Legislature to enact a law in a particular manner, as has been done in the present case. For the same reason, it was also not open to the High Court to suggest any interim arrangement as has been given by the impugned judgment. The writ petition filed by Respondent being not maintainable for issuance of such direction, the High Court ought to have dismissed the writ petition in limine.."

It is also pertinent note that in the Constitutional Case Conference (Canada);1999 his Lordship Rosalie Silberman Abella, Court of Appeal for Ontario in his key note address held that rights should be distributed by legislatures, not courts, and that the enforcement of the Charter by courts has therefore resulted in judicial trespass on legislative supremacy, resulting in an impairment of democratic governance.

A.(3). The Ratio Decenti of Mirajkar's case is not applicable to the present case :

In the case of **N.S.Mirajkar -v.- State of Maharashtra[8]**, the Hon'ble Judge of the Bombay High Court, passed an oral order of injunction not to mediate the evidence given by the witness before the court in newspapers and any other mass media, as the same would sternly affect the business of the witness. The said oral order of the Hon'ble Judge was challenged in the Hon'ble Bombay High court, by way of proceedings under Art. 226 of Constitution of India, as it infracts the fundamental rights. The Hon'ble High court of Bombay refused to exercise its jurisdiction and the same was dismissed in limine, and hence the Writ Petition under Art. 32 of Constitution of India was filed and the matter was referred to Constitution bench consisting of nine Judges, who in majority view held that the oral order of the learned single judge does not violate the fundamental rights of the petitioner as the act committed was within his competent jurisdiction and cannot find fault with. And further held that judicial action within competent jurisdiction cannot infringe or contravene the fundamental right.

In Mirajkar's case the Majority view held that any judicial action or order having jurisdiction cannot infract the fundamental rights. Therefore the Hon'ble courts holding is restricted to Art. 19 (1) (a) and

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[3] 2003 (6) SCC 195 (Para 29) [4] 1989 4 SCC 187 (Para. 51) [5] 1992 Supp. (1) SCC 548
[6] 1982 (1) SCC 271. [7] AIR 2013 SC 1834 : 2013 (2) CTC 464 [8] AIR 1967 SC 1

judicial action within its jurisdiction. While being so, the preposition of the Mirajkar's case cannot be extended to infringement of fundamental rights other than Art. 19 (1) (a) and the act is out of scope of its jurisdiction. Infringement of fundamental right is a pure question of fact, while that being so it must be judged on case to case basis. Therefore the Ratio Decenti laid down in the Mirajkar's case cannot have blanket application in all kinds of judicial order. It is also pertinent to note that this Hon'ble apex court under several occasion have found the orders to be violative of fundamental rights. Moreover, in the instant case it is vice versa to that of Mirajkar's case and the Hon'ble High Court breaches the doctrine of separation of power and does an act of legislature, for which it is lacking jurisdiction. Therefore this Hon'ble court cannot apply the same yardstick as applied in Mirajkar's case.

It is submitted that the functions performed by the judiciary and particularly in the present case were not in contemplation of this Hon'ble court while deciding the Mirajkar's case. After the decision in the Mirajkar's case, the courts have expanded their writ jurisdiction extensively. The role of courts have extensively increased in the era of judicial activism, where the courts perform certain actions which are essentially in nature of work done by legislature or executive. Therefore applying the yardstick of Mirajkar's case to the case one in hand is would indirectly justify the injustice done by the court. Hence it is prayed that this constitution bench may reconsider or differentiate the principle/Ratio Decenti laid in Mirajkar's case.

B). JUDICIARY COMES WITHIN THE PURVIEW OF ARTICLE 12 OF CONSTITUTION OF INDIA

It is submitted that the Legislature, Executive and Judiciary are the three independent pillars of the constitution of India. In the Constitution of India under Art. 12, the term Judiciary is not explicitly mentioned but that cannot be stated that the judiciary is excluded. On the other hand the term judiciary is inclusive within the purview of term 'other authority' enshrined under Art. 12 of the Constitution. In the case of **University of Madras -v.- Shanta Bai**[9], the Hon'ble Madras High Court evolved the principle of "ejusdem generis" which meant only authorities who perform governmental or sovereign functions can be included under Art.12. Applying the principle laid down in the case cited (supra) Judiciary perform sovereign and governmental functions and prima facie would come within the purview of Art. 12 of the Constitution of India. Moreover it is pertinent to refer the dissenting view of the Mirajkar's case wherein Hon'ble Justice Hidayatullah and Hon'ble Justice Rajagopala Ayyangar respectively held that although Art. 12 specifically does not include judiciary as a state, the same cannot be said to be excluded from it as the definition under Art. 12 is inclusive. **It is pertinent to note that the National Commission to Review "The Working Of The Constitution", in the year 2002,** had recommended that in article 12 of the Constitution, the following explanation should be added; Explanation: – In this Article, the expression other authorities shall include any person in relation to such as it functions which are of a public nature.

B.(1) Constituent Assembly Debates on Art. 12

It is respectfully submitted that in the constituient assembly debates while clarifying the doubts with regard to Article 7 [10] Dr. Ambedkar stated that **"every authority who have power to make laws or the power to have discretion vested in it are state"** The above statement of the Dr. B.R.Ambedkar itself is suffice to show that the Judiciary is a state and the intention of the farmers of our constitution was also the same.

B.(2) Exclusion of Judiciary Under Art. 12 would defeat the purpose of remedy under Art.32

It is submitted that the state is prohibited from making laws which are inconsistent with fundamental rights. If judiciary is not a state under Article 12 then it implies that the judiciary is not prohibited from violating fundamental rights. On the other hand in the dissenting view of Mirajkar's case their lordships Hidyatullah.J and Rajagopala Ayyangar.J observed that there is an implication that the judiciary is indirectly empowered to violate fundamental rights by its actions. If Judiciary are not considered to be state then the citizens are remediless against the judicial order which violates fundamental rights. Under certain circumstances there might be an appeal remedy against such orders but that would not be as

[9] AIR 1954 Mad 67

[10] Presently Art. 12 of Constitution of India.

effective as one under Art. 32 of Constitution of India. The situation is even worse if the order violating the fundamental rights are passed by the supreme court, the least could be done in such case is by way of an curative petitions. Therefore if Judiciary is excluded from Art. 12 of the Constitution, the same would defeat the very purpose of the remedy to enforce fundamental right under Art. 32 of Constitution of India.

B(3). Alternate limb of Argument

It is alternatively submitted that the definition of state under Art. 12 of the Constitution of India starts with a phrase **"Unless the context otherwise requires"**. Therefore in the certain context the term 'state' includes what is not meant in Art. 12 of the Constitution of India. The present case in hand is a case wherein, the context judiciary as state is highly required and unless and until the term judiciary is brought within the context of the state, the petition under Art. 32 is not maintainable.

C) A WRIT CAN BE DIRECTED AGAINST SUBORDINATE COURTS AND ALSO AGAINST ORDER OF APEX COURT

The Constitution of India confers Supreme Court; the power to issue various kinds of writs, to enforce any of the fundamental rights provided in Part III. No words of Art. 32 limits the power of supreme court to issue writs. It is held in the case of **T.C.Basappa -v.- T.Nagappa**[11] that the writ limitations and technicalities in England does not apply to India. The approach of the courts in the area of fundamental rights must not be whether the authority is a state within Art. 12 of the Constitution but, whether the person or authority is a threat to fundamental right. In other words, it must not be the 'type of agency' but the 'threat to fundamental rights' it must be the determining factor for issue of writs under Art. 32[12].

The Supreme Court is the highest judicial forum in India and all other courts are subordinate to it. The Constitution makers, to make the provision of fundamental rights meaningful and justiciable have included Art. 32 to enforce the fundamental rights. As all citizens would not be able to approach the Apex court it was necessary to provide for the remedy in High Court also. Conferring of Writ Jurisdiction to High Courts does not make them equivalent to the Supreme Court. This is supported by a fact that a high court order in writ proceedings can be appealed to the Supreme Court by way of an Special Leave Petition under Art. 136 of Constitution of India and the order of a Supreme Court in a writ petition under Art. 32 cannot be appealed and it is equivalent to the order of appeal arising out of special leave petition.

Further it is submitted that the constitution itself provides that the power conferred on the High Court to issue writs shall not be in derogation to the supreme courts power to issue writs under Art. 32(2)[13] . This Prima facie shows that the Supreme Court's power to issue a certiorari to all its subordinate courts is not prejudiced by conferring High Court's to issue the same. On the other hand it is not possible for challenging the order of the supreme court cannot be made as Art. 141 of Constitution envisages that the order made by Supreme Court has binding effect on all courts. The same principle or yardstick cannot be applied when subordinate court order is sought to be challenged in apex court and there is no constitutional justification to deny the same[14].

It is also submitted that for a certiorari to be issued the court need not be an inferior court, but must be a court that is inferior to that of court issuing writ. In the present case the Hon'ble High Court is a subordinate/ inferior court to that of the Hon'ble Apex court and hence the writ of

Certiorari can be issued. At this juncture it is pertinent to refer the dissenting view of Hon'ble Justice Mr. Ayyangar.J in the decision of **Ujam Bi -v.- State of U.P.**[15] held that the very fact that certiorari has been included under Art. 32(2) and that Certiorari is issued generally to courts while performing the judicial function, is enough to show that the makers of the constitution contemplated judicial acts violating fundamental rights and writ being issued to correct the same. Further it must also be noted that if rights guaranteed under Art. 19(1)(g) and Art. 21 which is being grossly violated by the Judiciary, if cannot be enforced they need not be given the status as Fundamental Rights if they are not meant to be enforceable under Art. 32.

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[11] AIR 1954 SC 440 [12] I.P.Massey, Administrative Law , Page 300 7th Edition EBC. [13] Pari Materia to Art. 226 (4)

[14] D.D. Basu Commentary on Constitution of India, Pg. 663 8th Edition 2009 LNBW [15] AIR 1962 SC 1621

It is pertinent to note that a three judge bench of the Hon'ble Supreme court in the case of **A.G -v.- Lachmi** [16] allowed a joint petition and quashed a judicial order of the Hon'ble Rajasthan High Court which had directed the death sentence to be executed in a public hanging, on the sole ground that such a direction infracts the fundamental right under Art. 21 of the Constitution. It must also be noted that in two other instances the supreme court entertained the petitions challenging the order of the Supreme Court itself. In **Supreme Court Bar Association -v.- Union of India**[17] the constitution bench reconsidered its view in **Vinay Chandra Mishra's case** [18]. In the decision of **M.S.Ahlawat -v.- State of Haryana** [19] the apex court reconsidered its view in the judgment of **Afzal -v.- State of Harayana** [20].

C(1). Legal appeal remedy is not a bar to file Writ Petition Under Art. 32

An appeal remedy may be availed in the case of normal order. However in a case of violation of fundamental right the position of the person against whom the order is different from the normal cases. It is a settled preposition of law that in case of infringement of a fundamental right the rule of alternate remedy does not apply. In the famous case of **K.K.Kochunni -v.- State of Madras** [21] the Hon'ble apex court after referring to the case of **Rashid Ahamed -v.- Municipal Board**[22] and **Romesh Thappar -v.- State of Madras**[23] held that the mere existence of the adequate alternate legal remedy cannot per se be a good and sufficient ground for throwing out the petition under Art. 32 of Constitution of India. The similar view was reiterated by another constitution bench of the Hon'ble Supreme Court in the case of **Kharak Singh -v.- State of U.P.**[24] The right enshrined under Art. 32 is an additional and overriding remedy and does not take into account of other remedies available like appeal [25]

C.(2) The Writ Petition is not barred by the Doctrine of Res Judicata:

It is respectfully submitted that in the case of **Jaswant Singh -v.- Custodian of Evacuee Property**[26] the Hon'ble court envisages the yardsticks to be applied to prove that it is barred by the doctrine of Res Judicata they are :

i) Competence of the court
ii) Parties of their representatives
iii) Matters in issue
iv) Grounds raised in the issue
v) Final Decision.

by applying the above principles it is very clear and evident that the present Writ Petition under Art. 32 of Constitution of India is not hit by the doctrine of Res Judicata.

Arguments on merits

ISSUE 2:

II. WHETHER A COMPANY CAN FILE A WRIT PETITION UNDER ART.19 OF THE CONSTITUTION OF INDIA?

The Petitioner Company is entitled to file a Writ Petition under Art.32 of the Constitution of India. A company registered, under the Indian Companies Act and having its head office inside this state and having a majority of share holders to be of a particular country then the company shall be considered by large to be a company of that country. It is a legal person, separate and distinct from its individual members [27]. But, if the State action impairs the right of the share-holders as well as of the company the Court will not be concentrating merely upon the technical operation of the action deny itself jurisdiction to grant relief. In the -present case the petitioner's claim was that impugned order of the High court has infringed the rights guaranteed under Article 19 of the Constitution. Hence the petitioner challenges the infringement of the rights.

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[16] AIR 1986 SC 467. [17] 1998 (4) SCC 409. [18] 1995 (2) SCC 584. [19] 2000 (1) SCC 278. [20] 1996 (7) SCC 397.
[21] AIR 1959 SC 725. [22] AIR 1950 SC 163 [23] AIR 1950 SC 124 [24] AIR 1963 SC 1295.
[25] D.D.Basu : Commentary on Constitution of India, Pg. 667 Vol.I 8th Edition 2007, LNBW. [26] 1985 (3) SCC 648.
[27] Rustom Cavasjee Cooper v. Union Of India AIR 1970 SC 564

A). ESSENTIAL CONDITIONS FOR APPLYING ART.19 ARE FULFILLED IN THIS CASE:

The Constitution does not define the word 'citizen', that Part II of the Constitution which deals with citizenship is not material inasmuch as it is concerned with natural persons only and is not exhaustive and that the Citizenship Act (LVII of 1955) which provides for certain matters relating to citizenship but defines the word 'person' so as to exclude artificial persons like corporations aggregate, cannot also be regarded as exhaustive [28]. The Petitioner thus contends that corporations aggregate, were citizens before the Constitution and the Citizenship Act, continue to enjoy the privileges of citizens, one of which is the guarantee in Article 19. In **Chiranjit Lal Chowdhuri v. Union of India** [29] it was held that "The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons. An incorporated, company, therefore, can come this Court for enforcement of its fundamental rights and so may the individual shareholders to enforce their own. But it would not be open to an individual shareholder to complain of an Act which affects the fundamental rights of the company except to the extent that it constitutes an infraction of his own rights as well."

For the application of Art.19, two conditions are necessary (1) that the claimant to the protection of the right must be a citizen and (2) that the right infringed must be one of the fundamental freedoms mentioned in Art. 19. If these two conditions are fulfilled, the citizen is entitled, subject to the restrictions imposed by the Article to enforce the rights against their infringement by action executive or legislative or by Judiciary or by any Government or the Legislature of the Union or the State and all local or other authorities within the territory of India or under the control of the Government of India. In the Present Case the petitioner Company falls under the purview of 'Citizen', and the right s violated by the impugned order are fundamental in nature. The following arguments are places to substantiate this point [30].

A.(1) The word 'Citizen' includes a Company also:-

The word 'citizen' should be liberally construed to include a corporation aggregate which consists 90% of Indian citizens only. Secondly a company has an existence which is independent of its members and the Corporation cannot be equated with the shareholders or the Government since the corporate veil cannot be allowed to be pierced. It could not have been intended that while every individual citizen should be protected, a group of citizens, should by mere incorporation, lose the benefits of the guarantee in Article 19. We are dealing here with a registered company. The personality of the members has little to do with the persona of the incorporated company. The persona that comes into being is not the aggregate of the personae either in law or in metaphor. The corporation really has no physical existence; it is a mere 'abstraction of law' as Lord Selborne described it in **G. E. Rly. v. Turner** [31]. The Petitioner intends citing certain obiter statements from Janson v. Driefontein Consolidated Mines Ltd[32].such as: "I assume that the corporation..... was to all intents and purposes in the position of a natural born subject of the late South African Republic." (Lord Macnaghten-p. 497) "The company must clearly be treated as a subject of the Republic notwithstanding the nationality of its shareholders." (Lord Brampton-p. 501)

The petitioner contends that there is no difference between 'nationality' and "citizenship" and the two words are synonymous and relies upon the following passage from "One of the terms frequently used synonymously with nationality is citizenship. Historically, this is correct for States with the Roman conception of nationality, but not for States with the feudal conception of nationality, where citizenship is used to denote not political status but membership of a local community. It has, however, become usual to employ the term citizen instead of subject in republican States- including common law countries such as the United States ; he who before was a 'subject of the King' is now a 'citizen of the State' - and in that sense and in those States the terms 'nationality' and 'citizenship' must be regarded as synonymous.[33]

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[28] State Trading Corporation of India v. C.T.O, AIR 1963 SC 1811
[29] [1950] S.C.R. 869, 898.
[30] Supra ft nt;2
[31] [1872] L.R. 8 Ch. App. 152. (2) [1897] A.C. 22, 51.
[32] L.R. r 1902 1 A.C. 492.
[33] Weis on Nationality and Statelessness in International Law (1956) pp. 4-5-

Therefore the petitioner company with Indian nationality must be presumed to be a Citizen under the constitution of India .

A.(2) Court is bound to exercise its jurisdiction to test the infringement of the petitioner's Fundamental Rights:-

A measure executive, legislative or Judiciary may impair the rights of the Company alone, and not of its shareholders; it may impair the rights of the shareholders and not of the Company: it may impair the rights of the shareholders as well as of the Company [34]. In the present case the latter applies.

Jurisdiction of the Court to grant relief cannot be denied, when by a court order, the rights of the individual shareholder are impaired, if that action impairs the rights of the Company as well. The test in determining whether the shareholder's right is impaired is not formal, it is essentially qualitative: if the State action impairs the right of the shareholders as well as to the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief. The shareholder of a Company, it is true, is not the owner of its assets; he has merely a right to participate in the profits of the Company subject to the, contract contained in the Articles of Association. But on that account the petitions will not fail [35]. A.(3) The Impugned order of the High Court is Violative of Fundamental Rights of the Petitioner:

By a petition praying for a writ against infringement of fundamental rights, the petitioner may seek relief in respect of his own rights and not of others. In the present case the petitioner seeks relief in respect of his own Fundamental Rights and not of the Company. The petitioner claims that by the impugned order the rights guaranteed to him under Arts. 19 of the Constitution are impaired. The Directions issued are without judicial competence in that they interfere with the guarantee of freedom of trade and are not made in the public interest [36]; The judgement is invalid because it bears no public purpose as it infringes the livelihood of enumerable Dancers, women, and workers involved in that occupation. In consequence of order if implemented by the State would affect the value of the investment of the share holders and the profit will be substantially reduced, this would make the petitioners to suffer great financial loss [37]. The petitioners are deprived of their right as a popular chain of pubs and bars to carry on business through the agency of the Company, and that in respect of this the order was not passed taking into considerations of the livelihood involved in the business. A reasonable opportunity to submit the petioner's points are also being denied. Thereby the basic principle of Audi Alterem Partem is violated [38].

B). THE SUBSEQUENT HOLDINGS OF THIS COURT IN ITS LANDMARK PRECEDENTS MUST BE RECONSIDERED:

The view of this Hon'ble Court in the Bank Nationalisation Case [39] and State Trading Corporation Case must be reconsidered as they are no longer a good law to with hold present day's complex issues. The judgment of this Court in The State Trading Corporation of India Ltd. & Others v. The Commercial Tax Officer, Visakhapatnam & Ors [40] has no bearing on the present issue. In that case in a petition under Art. 32 of the Constitution the State Trading Corporation challenged the infringement of its right to hold property and to carry on business under Art. 19 (1) (f) & (g) of the Constitution and this Court opined that the Corporation not being a citizen was incompetent to enforce the rights guaranteed by Art. 19. Nor has the judgment in Tata Engineering and Locomotive Co. Ltd. v. State of Bihar and Ors [41]. Has any bearing on the question arising in these petitions. In a petition under Art.32, of the Constitution filed by a Company challenging the levy of sales-tax by the State of Bihar, two shareholders were also impleaded as petitioners. It was urged on behalf of the shareholders that in substance the interests of the Company and of the shareholders were identical and the shareholders were entitled to maintain the

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[34] The Bengal Immunity Company Limited, v. The State of Bihar [1955] 2 S.C.R. 603. [35] 1963 AIR 1811, 1964 SCR (4) 89
[36] Dwarkadas Shrinivas v. The Sholapur Spinning & Weaving Co. Ltd. and Others [1950] S. C. R. 869. (2) [1964] 4 S.C.R. 99
[37] Chiranjit Lal Chowduri v. The Union of India [1950] S. C. R. 869. [38] [1964] 4 S.C.R. 99.
[39] Rustom Cavasjee Cooper v. Union Of India AIR 1970 SC 564 [40] 1963 AIR 1811, 1964 SCR (4) 89
[41] 1965 AIR 40, 1964 SCR (6) 885

petition. The Court rejected that contention, observing that what the Company could not achieve directly, it could not relying upon the "doctrine of lifting the veil" achieve indirectly. The petitioner seeks in this case to challenge the infringement of his own rights and not of the Dance Bars and pubs of which he is a shareholder. It is urged that in any event the guarantee of freedom of trade does occur in Part III of the Constitution, and the petitioner is entitled to maintain a petition for breach of that guarantee in this Court [42]. The petitioner seek by this petition to enforce the guarantee of freedom of trade and commerce, livelihood without discrimination: the petitioner claims that in Directing the State the High Court has violated a constitutional restriction imposed in Art. 142 in determining the extent to which his fundamental freedoms are impaired, the order which the judiciary is incompetent to enact must be ignored [43]. It is not necessary to consider whether the Constitution bars the petitioner's claim to enforce his rights. The order prima facie does not seek to extinguish or modify the right of the petitioner: it seeks to take away expressly the rights guaranteed under the Constitution. Assuming that the petitioner is not entitled to set up his right to enforce his guaranteed rights, the petition will not still fail. The preliminary objection raised by the respondent against the maintainability of the petition must fail.

C). THE COURT IS OBLIGED TO ADMIT THE PETITION TO UPHOLD THE INTEREST OF THE JUSTICE:

Under the Constitution, protection against impairment of the guarantee of fundamental rights is determined by the nature of the right, the interest of the aggrieved party and the degree of harm resulting from the impugned order and not by impairment of the right of the individual and not the object of the Judiciary in taking the impugned action, as the measure of protection [44]. To concentrate merely on power of the judiciary and the object of the Judiciary action in exercising that power is therefore to ignore the true intent of the Constitution. In this Court, there is, however, a body of authority that the nature and extent of the protection of the fundamental rights is measured not by the operation of the Court action upon the rights of the individual, but by its object [45]. Thereby the constitutional scheme which makes the guaranteed rights subject to the permissible restrictions within their allotted fields, fundamental, got blurred and gave impetus to a theory that certain Articles of the Constitutions enact a code dealing exclusively with matters dealt with therein, and the protection which an aggrieved person may claim is circumscribed by the object of the impugned order. Protection of the rights is most needed when there is an actual threat [46]. To argue that State action which deprives a person permanently or temporarily of his right to property, or personal freedom, operates to extinguish the right or the remedy is to reduce the guarantee to an empty platitude. Again to hold that the extent of, and the circumstances in which, the guarantee of protection is available depends upon the object of the State action, is to seriously erode its effectiveness.

Examining the problem not merely in semantics but in the broader and more appropriate context of the constitutional scheme which aims at affording the Individual the fullest protection of his basic rights and on that foundation to erect a structure of a truly democratic polity, the conclusion, in our judgment, is inevitable that the validity of the impugned order must be adjudged in the light of its operation upon the rights of the individual and groups of individuals in all their dimensions [47]. Thus the Court is obliged to admit the petition to uphold the interest of the Justice.

ISSUE 3:

A). WHETHER THE DIRECTIONS ISSUED BY THE HON'BLE HIGH COURT IN ITS ORDER, IS CONSTITUTIONALLY VALID?

The petitioner humbly submits that the Hon'ble High court does not have the jurisdiction to make orders or decrees or directions which may have power of law made by legislature. In areas where there is no legislation the Hon'ble supreme court is empowered under art 142 to make orders, decrees or

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[42] Vellukunnel v. Reserve Bank of India [1962] Supp. 3 S.C.R. 632. [43] [I.L.R. (1961) Kerala 166]
[44] The State of Bombay v. R.M.D. Chamarbaughuala I.L.R. [1955] Bom. 680. [45] Supra ft nt 4
[46] Supra ft nt 18 [47] supra ft nt 19

pass directions which shall have the force of an enactment similar to that of legislature, and may extend throughout the territory of India until suitable legislation is made by the legislature to occupy the field. The Hon'ble High court does not have the jurisdiction to pass or make such directions or orders as done by Supreme Court under the power conferred to it by Art 142. The same has been held by the Supreme Court in its various judgments.

In **State of Haryana v. Naresh Kumar Bali,** [48] it has been held that

"The extraordinary powers to do complete justice, available to Supreme Court under art 142(1), are not available to a high court under art 226."

In **State of H.P. v. Mahendra Pal**,[49] **1995 Supp (2) SCC 731**. the Hon'ble Supreme court has held that "The power conferred on the Supreme Court by Art 142 were not available to the High Courts under Art 226"

In **Sanchalakkshri v. Vijayakumar raghuvirprasad Mehta**,[50] **(1998) 8 SCC 245 (Para 8): C.M.singh v. H.p.Krishi vishva vidyalaya [51], (1999) 9 SCC 40 (Para 5)**.

"The inherent power of the court under 142 coupled with the plenary and residuary power under art 32 and 136 embraces power to quash the criminal proceedings pending before any court and in the absence of analogous provisions the high court/tribunals do not have similar power."

In **A.K. Jain (Dr.) v. Union of India** [52] gave directions under Article 142 to regularize the services of the ad hoc doctors appointed on or before October 1, 1984. It is a direction under Article 142 on the peculiar facts and circumstances therein. Therefore, the High Court is not right in placing reliance on the judgment as a ratio to give the direction to PSC to consider the cases of the respondents. Article 142 — power is confided only to this Court.

A.(1) The Hon'ble High Court cannot issue a direction to the State Government to enact a particular law

The petitioner submits that the Hon'ble High Court has acted in excess of its jurisdiction, in directing the State Government to enact a law. It is a well settled principle of law that the Judiciary cannot issue a mandamus directing the Legislature to enact a particular law. The Judiciary could have acted in restraint, by only recommending or by making a suggestion to the State Government, or directing the parties to approach the concerned Ministry and represent their grievances. Instead the Hon'ble High Court has acted beyond the powers conferred to it by the Constitution, by directing the State Government to enact a law.

A.(2) Series of Precedents, Commentaries and Articles to support the above view point:

In many cases the Supreme Court has held that the judiciary cannot direct the Legislature to enact a particular law or implement it, and has severely criticised, judicial excessivism in the name of judicial activism. The judges have urged that the court should restraint itself from interfering with the legislature's power and independence. In **Supreme Court Employees Welfare Association v. Union of India** [53],. held The Court cannot issue a writ directing the legislature to enact a law or rule.

In the case of **State of Himachal Pradesh v. Parent of a Student of a medical college** [54] a Supreme Court full made the following observations: "public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that under the guise of redressing a public grievance it does not encroach upon the sphere reserved by the Constitution to the Executive and the legislature.....the court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the Court may consider it to be. That is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution……Court cannot group the function assigned to the executive and

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[48] (1994) 4 SCC 448; (1994) 2 UJSC 226 (Para 16); [49] 1995 Supp (2) SCC 731. [50] (1998) 8 SCC 245 (Para 8): [51] (1999) 9 SCC 40 (Para 5) [52] 1987 Supp SCC 497 : 1988 SCC (L&S) 222 : (1988) 1 SCR 335
[53] (1989) 4 SCC 187: AIR 1990 SC 334 [54] (1985)1 SCC 169

the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature".

In the case of Suresh Seth v. Commissioner, Indore Municipal Corporation [55], a Full Bench of the Supreme Court including Chief Justice Lahothi has held that "this Court cannot issue any direction to the Legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation".

Similarly in Bal Ram Bali v. Union of India [56] the Hon'ble Supreme Court has held that "Courts cannot issue any direction to the Parliament or to the State legislature to enact a particular kind of law".

In the case Divisional manager, Aravalli golf club v. Chander Hass [57] held: "We are compelled to make these observations because we are repeatedly coming across cases where Judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism Judges cannot cross their limits and try to take over functions which belong to another organ of the State". Under our Constitution, the Legislature, Executive and Judiciary all have their own broad spheres of operation. Ordinarily it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction. There is broad separation of powers under the Constitution and each organ of the State: the legislature, the executive and the judiciary must have respect for the others and must not encroach into each other's domains. The theory of separation of powers first propounded by the French thinker Montesquieu broadly holds the field in India too writes:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals [58]."

"The Petitioners supports the view expressed above. Indian Judiciary today, since very often it is rightly criticized for `over-reach' and encroachment into the domain of the other two organs."

In **Indian Drugs & Pharmaceuticals Ltd. v. The Workman of Indian Drugs & Pharmaceuticals Ltd** [59] Justice Markandey Katju has clearly told that " judges must exercise judicial restraint and must not encroach in to the executive or legislative domain".

In **N.K. Prasada v. Govt. of India** the Hon'ble Supreme court has held that "The Court should not encroach into the sphere of the other organs of the State".

In **State of U.P. v. Jeet S.Bisht** [60] the Supreme court has held that the Judiciary can only make recommendations, but cannot direct the Legislature to enact a law.

No doubt the Court can make a recommendation to the State Governments that the salaries and allowances of the members of the State and District Fora are inadequate and should be increased, but that is about as far as the Court can go. It can only make recommendations but it cannot give binding directions in this connection. By a judicial verdict the Court cannot amend the law made by Parliament or the State Legislature.(Para 14) This Court cannot interfere with the Central or State Government in the exercise of their functions. At best this Court or the High Court can make recommendations for increase of salaries, allowances and betterment of working conditions, etc. but there its jurisdiction ends. It cannot give binding directions in this connection.(Para 35)

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[55] AIR 2006 SC 767 [56] (2007)6 SCC 805 [57] (2008)1 SCC 683 [58] In chapter XI of his book The Spirit of Laws- Montesquieu [59] (2007)1 SCC 408 [60] (2007) 6 SCC 586

In **S.C. Chandra and Ors. v. State of Jharkhand and Ors.** [61]

"Judges must exercise judicial restraint and must not encroach into the executive or legislative domain."

Tapash Datta v. Union of India, W.P.No.(C) 2565/2007.

From the above principle's laid down by the Hon'ble Supreme Court it is clear that

(i) The Judiciary cannot direct the legislature to enact a particular law.

(ii) The Judiciary must always exercise restraint and not venture into the domains of Legislature or Executive.

(iii) Directing the legislature to enact is ultra vires of the Court's powers.

A.(3). Whether the Hon'ble High Court has the jurisdiction to legislate:

The doctrine of separation of powers clearly states that the Legislature will legislate and the Judiciary will adjudicate. The functions of the three organs of the state have been clearly stated in the constitution. One organ of the state cannot do the function of the other organ. Courts have power only to interpret law but cannot make them. This principle has been reiterated often by the Supreme court in its various judgements. In P.Ramachandra Rao v. State of Karnataka a Constitutional Bench of the Supreme Court has held that

"When judges by judicial decisions lay down a new principle of general application of the nature specifically reserved for legislature they may be said to have legislated, and not merely declared the law…….Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature".

In **S.R.Batra v. Taruna Batra** [62] the Supreme court has reiterated the same

"It is only the legislature which can create a law and not the Court. The courts do not legislate, and whatever may be the personal view of a Judge, he cannot create or amend the law, and must maintain judicial restraint."

In **Asif Hameed v. State of Jammu and Kashmir** [63] it was held that

"Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs."

In the case of **Gasket Radiators (P) Ltd. v. ESI Corpn** [64] the hon'ble Judges of the Supreme Court observed that

"We once again have to reiterate what we were forced to point out in **Amar Nath Om Prakash v. State of Punjab** [65] that judgments of courts are not to be construed as Acts of Parliament. Nor can we read a judgment on a particular aspect of a question as a Holy Book covering all aspects of every question whether such questions and facets of such questions arose for consideration or not in that case".

A.(4) Over usage of Judicial Activism amounts to Judicial Excessivism:

In the following paragraphs views of various jurists are quoted, where they substanciate the disadvantages of judicial legislation, and has discouraged judicial legislation. There by concluding that over usage of Judicial activism amounts to Judicial Exessivism.

(1) "We must distinguish law-making by legislators from law-making by the courts. Legislators can lay down rules purely for the future and without reference to any actual dispute; the courts, insofar as

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[61] JT 2007 (10) 4 SC 272 [62] (2007)3 SCC 169 [63] AIR 1989 SC 1899 [64] (1985)2 SCC 68
[65] AIR 1985 SC 218, 1984 (2) SCALE 769, (1985) 1 SCC 345

they create law, can do so only in application to the cases before them and only insofar as is necessary for their solution. Judicial law-making is incidental to the solving of legal disputes; legislative law-making is the central function of the legislator [66]"

(2) While recording appreciation of judicial activism, sounds a note of caution "it is plain that the judiciary is the least competent to function as a legislative or the administrative agency. For one thing, courts lack the facilities to gather detailed data or to make probing enquiries. Reliance on advocates who appear before them for data is likely to give them partisan or inadequate information. On the other hand if courts have to rely on their own knowledge or research it is bound to be selective and subjective. Courts also have no means for effectively supervising and implementing the aftermath of their orders, schemes and mandates. Moreover, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases. Courts have also no method to reverse their orders if they are found unworkable or requiring modification [67]". Highlighting the difficulties which the courts are likely to encounter if embarking in the fields of legislation or administration, the learned author advises "the Supreme Court could have well left the decision making to the other branches of government after directing their attention to the problems rather than itself entering the remedial field".

(3) "Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court." "In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law through directions is not a legitimate judicial function. [68]"

The principle laid down in the cases and in the opinion of the jurists are summed up as follows

(i) The judiciary cannot do the function of other organs of the state.

(ii) The judiciary should not violate the doctrine of separation of powers and legislate.

(iii) Such an act is ultra vires of its jurisdiction.

There is an exception to this principle, in the case of Supreme Court. The Supreme Court under the powers conferred to it by Constitution under Art 142 where there is legislation in a particular area can fill such vacuum and will be valid until suitable legislation is made. Thus the directions issued by the Hon'ble high court in its order, is constitutionally invalid.

B).WHETHER THE DIRECTIONS VIOLATE THE FUNDAMENTAL RIGHTS ENSHRINED IN PART III OF THE CONSTITUTION OF INDIA?

The Petitioner humbly submits that, the impugned order violates the petitioner's fundamental rights. The preliminary contention is that the impugned order dated 15.12.2012 violates fundamental rights of the petitioners and various other persons running such concerns and of the rights of its employees, apart from it being without jurisdiction [69]. The balance of convenience is also in favour of the petitioners. The petitioner submits the following arguments with regard to the same.

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[66] Salmond on Principles of Jurisprudence (12th Edition) (page 115);

[67] "Judicial Activism and Constitutional Democracy in India", commended by Professor Sir William Wade, Q.C. as a "small book devoted to a big subject

[68] Professor S.P. Sathe, in his recent work (Year 2002) "Judicial Activism in India Transgressing Borders and Enforcing Limits", touches the topic "Directions: A New Form of Judicial Legislation"(p.250)

[69] Facts pg no. 5

B.(1) The interim Direction is violative of Art.14 of the Constitution of India:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Prohibition of discrimination on grounds…[70]" . Without taking this provision into consideration the High Court has passed an interim direction which reads as"

All Bars, Pubs, Dance Bars and like places shall remain closed between 8.00 PM and 6.00 AM, except those Bars in Star Hotels, which shall seek permission of State Government, for keeping it open beyond the said prescribed hours." Firstly, any layman would clearly see the discrimination entrusted in this direction. The Hon'ble High Court has erred in differentiating the pubs, bars and dance bars from the Pubs, Bars and Dance Bars of the Star hotels. But nowhere a reasonable ratio is laid down by the court to justify its stand [71]. Secondly the court can never solemnize that the time restriction laid upon ordinary pubs and letting free the Star Hotel pubs and dance Bar would make a drastic revolution within the Society which is alleged to have various allegations due to the functioning of Pubs, Bars and Dance Bars. Further, no credential proof is placed by the order or is the Factual circumstances to show that, all the immoral, ill cultured activities are carried out only within ordinary pubs, Bars and Dance bars and not in that one belonging to the Star Hotels.

The Direction of the High Court stating that "Any person below the age of 21 will not be allowed entry into bars, pubs or dance bars. No person below the age of 24 shall be served alcoholic drinks in any place." Is also not in accordance with the provisions of the constitution and other laws regarding age factor, thus discriminately violates Art.14 of the Constitution. As for as the rights over property is concerned the age of majority of persons domiciled in India is 18 years and for all other Rights the age for attainment of Majority is 21. [72] Even the age limit for right to Vote is determined to be 18[73]. The differentiation fails the test of 'intelligible differentia' as there is no reasonable basis for classification. It fails the test of 'differentia' having nexus to the object of the legislation' as this direction has nothing to do with the object of the legislation and first of all to apply this test, the differentiation is not intelligible [74]. The directions as violative of the fundamental rights of the youngsters, who having become adults and having the capacity to decide for themselves should not be prevented from the choices they have and challenged the directions for violation of Art 14, 19 & 21 of the Constitution [75]. So laying an unreasonable restriction and discriminating persons who have attained majority against those who have attained a same will not withstand the test of equal protection of law. Thereby the interim direction is in pure violation of Art.14.

B.(2) The High Court order affects the right to Trade and business :

Art.19 (1) (g) provides right to freedom to practise any profession, or to carry on any occupation, trade or business. But with reasonable restriction laid down by the law [76]. Though the said right is hedged by a reasonable restrictions stipulated under Article 19(2), the impugned order is draconian as it infringes the fundamental right of the petitioner to freedom to profess any occupation guaranteed under Article 19(1)(g) of the Constitution [77]. The direction stating that "All Bars, Pubs, Dance Bars and like places shall remain closed between 8.00 PM and 6.00 AM.." is violative of the petitioners fundamental right. The official and logical time a Pub or a Bar or a Dance bar can function only during Night hours. The peak hour of Business is possible only during nights and not during daytime. No Bar owner can expect a working professional to spend his time in Bar during the normal working hours i.e forenoon and noon. The sole purpose of running a business in Bar, Pubs and Dance Bars is defeated by the said direction. Further this direction would instigate a normal professional to spoil his work and get into a bar, since Bars wouldn't be functioning after 8.00 P.M. In fact the court order is the factor which is leading to a distrustful culture and not that of the Bars.

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[70] Article 14 of the Indian Constitution [71] Suneel Jatley Etc v. State Of Haryhana 1984 AIR 1534, 1985 SCR (1) 272
[72] Sec.3 Indian Majority Act, 1875 [73] Representation of the People Act, 1950 [74] Karimbil Kunhikoman v. State Of Kerala 1962 AIR 723, 1962 SCR Supl. (1) 829 [75] Facts pg no. 5 [76] Art.19 (2) of the Indian Constitution
[77] N.V.Sankaran Alias Gnani v. The State Of Tamil Nadu W.P.No.11311 of 2012 and M.P.No.1 of 2012

Secondly enumerable number of workers, dancers, Bar tenders, owner‘s and connected people‘s profession is affected thereby causing them great despair and financial loss. Women dancers find it to be a viable employment for their survival [78]. Persons who have become adults have the capacity to decide for themselves and shall not be prevented of their choices [79]. All these people are severely affected by the said direction.

A court first of all cannot legislate to restrict the fundamental right and more so atleast a reasonable cause must be there to substantiate its decision [80]. Neither of these conditions is fulfilled in the present order. B.(3) Article 15 is being hit by the impugned order: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth [81] is guaranteed by the constitution. Women are said to be treated equally to that of the men, but the order vitiates the claim. It discriminates women by passing the direction of “Wherever, alcoholic drinks are served, women shall not be engaged by the management of pubs, bars or hotels for dancing.” by way of this direction the order has actually discriminated on grounds of Sex which is prohibited under Art. 15 of our Constitution. Further Art. 15 (3) clearly lays down that only a State legislature can make special laws relating to protection of Women and Children [82]. It nowhere reads that a court can propound a law by its own. Thus a refuge which could be opted by the respondents under Art. 15 (3) will lose much of its validity. B.(4) Livelihood and personal Liberty is being Infringed by the impugned order: No person shall be deprived of his life or personal liberty except according to procedure established by law [83]. Here in the present case, by passing those five interim directions presuming to regulate the alleged activities in Pubs, Bars and Dance Bars, the court has erred in providing justice. The order deprives the equal protection, equality before law, it affects the occupation of concerned people, and being a discriminatory order, all the more affects the mere survival of numerous persons involved in these employment and thus has infringed the livelihood of everyone. Procedure established by law [84] is by way of legislature. And as contended earlier, judiciary cannot step into the shoes of legislature or executive, as this would amount to judicial excessivism. For all the above said reasons, the impugned order passed by the High Court on 15.12.2012 is violative of Fundamental rights enshrined in Part III of the Constitution of India. Hence liable to be quashed.

PRAYER

Wherefore, it is humbly prayed before this Hon‘ble Supreme Court of India, in the lights of the issues raised, arguments advanced and authorities cited, the court may be pleased to issue a WRIT of CERTIORARI and declare that :

The present writ petition is allowed, there by the impugned order of the Hon,ble Division Bench of the High Court of Vadanadu is quashed.

And pass such further or other orders, as it may deem fit and proper and thus render justice.

Dated on this 9th day of October, 2013.

(Sd/-)

Counsels for the Petitioners.

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[78] Facts pg no.2
[79] Facts pg no 5
[80] Saghir Ahmad v. The State Of U. P. And Others1954 AIR 728, 1955 SCR 707
[81] Art. 15 of the Indian Constitution
[82] Art.15 (3) of the Indian Constitution
[83] Art.21 of the Indian Constitution
[84] Maneka Gandhi v. Union Of India 1978 AIR 597, 1978 SCR (2) 621

Moot Problem - Formats of the Respondents Memorial to given Facts of the case

THE HON'BLE SUPREME COURT OF INDIA

(Under Article 32 of Constitution of India; 1950)

W.P. Nos. _____ & ____ of 2013

(Special Original Jurisdiction)

Dolphins Pvt. Ltd. & Athr. .....Petitioner/ Petitioners

-versus-

The State of Vadanadu.

And 2 Others .....Respondents /Respondents

MEMORANDUM ON BEHALF OF THE RESPONDENTS

2013

COUNSEL FOR THE RESPONDENTS

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LIST OF ABBREVIATIONS

AIR	All India Report
Art	Article
CTC	Current T.N. Cases
Ft nt	Foot Note
HC	High court
MLJ	Madras Law journal
Para	Paragraph
Sec.	Section
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports
v.	Versus
W.P.	Writ Petition
WLR	Writ Law Reporter

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STATEMENT OF JURISDICTION

These petitions are filed before this Hon'ble Supreme Court, invoking its jurisdiction under Article 32 of the constitution of India. The Respondent contends the jurisdiction of this Hon'ble Court in this present writ petition.

FACTS IN BRIEF

1) Nagara, Cosmopolitan city, capital of the coastal state of Vadanadu in the Union of India. Besides being an educational hub is also a spot for software. The City of Nagara had a lot of pubs, bars and dance bars apart from regular business of liquor through retail which was popular among youth. The State of Vadanadu, in the recent, witnessed increase in number of crimes against women. There was increase in reports of cases of molestation and rapes, kidnapping etc. especially during night time.
2) In the year 2012, Human Rights Initiative, a social organisation published a report that contained alarming details regarding exploitation of women in dance bars and of possible prostitution rackets involved long with the business of dance bars. Further it also noted from the pattern of offences that, it is more in areas where there was consumption of liquor, i.e. near bars, liquor shops where drug abuses was also found.
3) In the circumstances, Rashtriya Vikas, an NGO filed a Writ Petition before the High Court of Vadanadu, seeking for a writ of mandamus directing the respondent State Government and its authorities to take appropriate steps in regulating pubs, bars & dance bars & and such similar places, and pass any such further or other Order. The Hon'ble High Court, after finding the State's stand not satisfactory, allowed the writ petition directing the Respondent to regulate the activities of pubs, dance bar.
4) The directions issued by the State Government severely affected the functioning of pubs and bars, and they approached the State Government to pass fresh regulations. The State Government was aggrieved by the decision of the High Court for usurping its Executive/Legislative powers and hence preferred an appeal before the Division Bench of the High Court of Vadanadu, which admitted the appeal, but did not stay the single Judge's Order.
5) Aggrieved by the above developments, Dolphins Pvt Ltd company (90 % of the shareholding is held by individuals who are citizens of India) which running pubs and bars, which also employs a number of women dancers and is well known for its care of employees, represented by its Managing Director, filed a Writ Petition before the Hon'ble Supreme Court, challenging the legal validity of the directions issued by the Vadanadu High Court. The principal grounds of challenge was that, it violated fundamental rights of the petitioners and various other persons running such concerns and of the rights of its employees, apart from it being without jurisdiction. The Rashtriya Vikas, which was the petitioner before the High Court, was additionally impleaded by the Hon'ble Supreme Court as a respondent party, apart from, The Registrar, High Court of Vadanadu & the State of Vadanadu, which were already parties before the Supreme Court.
6) Similarly, Shyam Kumar a popular actor & celebrity filed another writ petition as a public interest litigation under Art 32, challenging the directions as violative of the fundamental rights of the youngsters, who having become adults and having the capacity to decide for themselves should not be prevented from the choices they have and challenged the directions for violation of Art 14, 19 & 21 of the Constitution. The said writ petition was tagged along with the one filed by Dolphins Pvt Ltd.
7) The Rashtriya Vikas, contended before the Supreme Court that, the writ petitions are not maintainable, as it challenges a Court Order, which is opposed to the settled law of the land such as, Judicial decisions cannot violate fundamental rights, Orders in nature of Certiorari not issuable to superior Courts etc. Apart from completely supporting the Order of the Hon'ble High Court on merits, the Rastriya Vikas further raised a preliminary contention that, the petitioner company not being a citizen cannot maintain a writ petition, as far of violation of Art 19 is concerned.
8) The Chief Justice of India constituted a Bench of 11 Judges to decide the issues of Constitutional reference, and also the merits of the case if the Bench deems fit; and the matter is posted for final hearing.

QUESTIONS PRESENTED

Arguments on Procedural Issue : Issue 1

A). WHETHER THE WRIT PETITION CHALLENGING THE JUDICIAL ORDER IS MAINTAINABLE?

B). WHETHER 'JUDICIARY' FALLS WITHIN THE DEFINITION OF 'STATE' UNDER ART.12 OF THE CONSTITUTION OF INDIA?

C). IF A WRIT PETITION CAN BE FILED AGAINST A JUDICIAL ORDER, WHAT KIND OF ORDERS, OR ORDERS OF WHICH COURTS COULD BE CHALLENGED? WHAT KIND OF WRIT IS ISSUABLE IN SUCH CASES?

Arguments on merits : Issue 2

II. WHETHER A COMPANY CAN FILE A WRIT PETITION UNDER ART. 19 OF THE CONSTITUTION OF INDIA?

Issue 3

A). WHETHER THE DIRECTIONS ISSUED BY THE HON'BLE HIGH COURT IN ITS ORDER, IS CONSTITUTIONALLY VALID?

B). WHETHER THE DIRECTIONS VIOLATE THE FUNDAMENTAL RIGHTS ENSHRINED IN PART III OF THE CONSTITUTION OF INDIA?

SUMMARY OF PLEADINGS

I. A). WHETHER THE WRIT PETITION CHALLENGING THE JUDICIAL ORDER IS MAINTAINABLE?

The Present writ petition challenging the high court order is not maintainable since the petitioner does not have Locus Standi to file this writ petition. It is submitted that a judicial order cannot violate fundamental rights. Further the order of the High Court is within its jurisdiction and not a nullity:

B). WHETHER 'JUDICIARY' FALLS WITHIN THE DEFINITION OF 'STATE' UNDER ART.12 OF THE CONSTITUTION OF INDIA?

The definition of the state under article 12 does not include the judiciary. It is also submitted that a writ does not lie to a court of concurrent jurisdiction, acting in judicial capacity. It submits that the high courts are not inferior courts in the scheme of our constitution. Thus this proposition constitutes a binding precedent and is a settled proposition of law.

C). IF A WRIT PETITION CAN BE FILED AGAINST A JUDICIAL ORDER, WHAT KIND OF ORDERS, OR ORDERS OF WHICH COURTS COULD BE CHALLENGED? WHAT KIND OF WRIT IS ISSUABLE IN SUCH CASES?

The High Courts are not constituted as inferior courts in our constitutional scheme. Therefore, the Supreme Court cannot issue a writ under Article 32 to a High Court. It is a settled position in law that no judicial order passed by any superior court in judicial proceedings can be said to violate any of the fundamental rights enshrined in Part III. It may further be noted that the superior courts of justice do not also fall within the ambit of State or other authorities under Article 12 of the Constitution. And hence a writ petition cannot be filed against a judicial order.

II. WHETHER A COMPANY CAN FILE A WRIT PETITION UNDER ART.19 OF THE CONSTITUTION OF INDIA?

It is submitted that the present writ petition is not maintainable, because no fundamental right of the petitioner is, directly impaired by the impugned judicial order of the High Court of Vadanadu, or by any action taken there under. The present writ petition is not maintainable since the Petitioner's Company is a Juristic Person and not a natural person and cannot have any fundamental rights infringed. It is also submitted that there is no explicit provision guaranteeing fundamental right to a company. Moreover Section 2(f) of the Citizenship's act; 1955 clearly specifies that company is not a citizen under the act,

while being so this court can only construe and cannot construct what is not indented in the constitution and the petitioner company has no locus standi and the present writ petition deserves to be dismissed.

III. WHETHER ORDER OF THE HIGH COURT INFARCTS FUNDAMENTAL RIGHTS OF THE PETITIONER?

The respondent would like to humbly submit that, the impugned order does not violate the petitioner's fundamental rights. The owners of these pubs and bars peoples take advantage of such addiction of people towards these pubs and bars, target these areas and make it to be the breeding ground for Prostitution and drug abuse, due to which the crime rate in the city of Nagara has highly increased, particularly the crimes against the women. Many articles and reports of the state magazines testifies it. Hence, larger group of society demanded the laws regulating these bars and pubs and dance bars. When the issue concerning regulating the bars and pubs, came before the court, the Hon'ble High court took into consideration of all these aspects and after the finding that the state governments stand not satisfactory, the court in balance of convenience court made an interim directions regulating these pubs, bars and dance bars in such a way that their occupation is not prohibited. It is also submitted that the order of the Hon'ble High Court is constitutionally valid and It has become an accepted principle that when the legislature has failed to enact a law on a particular subject, and people's fundamental rights are denied due to the non enactment, the judiciary can issue directions to redress the denial of fundamental right. Moreover in profession and occupation which falls under the category of res extra commercium cannot said to have vested fundamental right in their occupation. Such things are mere privilege of the state. Even assuming their fundamental rights are violated the directions of the court comes within the purview of the reasonable restrictions and it was taken in the Interest of public and to control law and order in the city.

PLEADINGS

Arguments on Procedural Issue

ISSUE 1:

I. A.WHETHER A WRIT PETITION CHALLENGING A JUDICIAL ORDER IS MAINTAINABLE?

A.(1). The writ petition challenging the high court order is not maintainable:

It is humbly submitted that the writ petition is not maintainable. It has become a settled of the position of law that a High Court order passed in judicial capacity cannot be challenged under article 32, as violative of fundamental rights[1]. The following arguments are submitted to support the same.

A.(2). The petitioner does not have Locus Standi to file this writ petition:

The respondent humbly submits before this Hon'ble Supreme Court of India that the petitioner does not have locus standi to file the present writ petition. It is a settled principle of law that no judicial decision can violate a fundamental right of any person. This principle has been laid down by the Supreme Court in **Naresh Shridhar Mirajkar v. State of Maharashtra** [2] and has been consistently reiterated by many Constitutional Benches of this Hon'ble Court in the case of **Triveniben v. State of Gujarat** [3], has held that "The judicial verdict pronounced by court in relation to a matter cannot be challenged on the ground that it violates one's fundamental right. The judgment of a court cannot be said to affect the fundamental rights". In the case of **Gopal Das Mohta v. Union Of India** [4] and other Supreme Court Cases it has been held that, a person has no right to complain under art 32 where no fundamental right has been infringed.

A person could move a petition under art 32 only when his fundamental right is violated. But the Hon'ble Supreme Court has held that no judicial decision can violate a fundamental right. Therefore the

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[1] Naresh Shridhar Mirajkar v. State of Maharashtra AIR 1967 SC 1 : (1966) 3 SCR 744

[2] AIR 1967 SC 1 : (1966) 3 SCR 744 [3] (1989) 1 SCC 678 : 1989 SCC (Cri) 248 [4] AIR 1955 SC 1

petitioner's fundamental right is not violated and hence the petitioner does not have locus standi to file the present writ petition.

A.(3). A judicial order cannot violate fundamental rights:

The Important question of whether a judicial decision can violate a fundamental right came before the Supreme Court adjudication in the case of Naresh Mirajkar [5]. The majority of the court empathetically held that the argument that a judicial decision violates the fundamental rights of the petitioner is based on a complete misconception about the true nature and character of judicial process and judicial decisions. Honourable Court went on to that no judgement of a court of competing jurisdiction passing order on the case before it can be said to violate fundamental rights.

As early as in 1954 in the case of Budhan Choudari [6] the question as to whether a High Court judgement can be challenged as violative of article 14 came for adjudication. The court referring to a judgement of Justice Frankfurter [7] held that a judicial pronouncement cannot be challenged as violative of article 14 unless there is any purposeful discrimination. Further a mere vesting of discretion in judges does not make such power arbitrary as power to make decisions are an essential part of judicial adjudication.

The majority in the case laid down the proposition that no judicial order of a court of competent jurisdiction can be said to violate article 19 (1). This Hon'ble court in the Triveniben case [8] held that, it has become a settled principle that a judgement of a court cannot be challenged to be violative of article 14 and 21. The guarantee under these articles are only against the state and not available against the others.

A.(4). The order of the High Court is within its jurisdiction and not a nullity:

The order of the Hon'ble High Court is within its jurisdiction. The writ jurisdiction of the High Court is very wide. It is conferred with power to issue writs for any other purpose apart from fundamental rights[9]. In extraordinary circumstances, the writ jurisdiction can be exercise to do complete justice. Hence the present writ petitionfiled under Art.32 against an order of the High court, is not maintainable and liable to be quased.

B) WHETHER 'JUDICIARY' FALLS WITHIN THE DEFINITION OF 'STATE' UNDER ART.12 OF THE CONSTITUTION OF INDIA?

B.(1) The definition of the state under article 12 does not include the judiciary:

The state in normal sense means the legislature, executive and judiciary. However for the purpose of part III and part IV, state has been specifically defined in article 12. The definition expressly includes the legislature and the executive of the Centre and the states. However there is no inclusion of judiciary in the same. Considering the way in which our constitution was made, the judiciary begin an organ of the state could not have been left without intent to exclude it. Further a perusal of the constituent assembly debates [10], suggest that nowhere there was an effort to bring judiciary within the meaning of state under article 12. Further under „other authorities [11], judiciary can be included when only while functioning in its administrative capacity. The superior courts are not subject to the jurisdiction of the other superior courts when acting in its judicial capacity [12]. Further the judiciary cannot be said to be an instrumentality of the state, is not financed by the government and it is not in any manner under the control of government of India. However while exercising its rulemaking power, or exercising and administrative functions, the judiciary may fall under 'State'. As the issue does not arise in the present case, such a proposition is not denied or conceded. For these reasons Judiciary does not fall under the purview of the State under Art.12.

B.(2) A writ does not lie to a court of concurrent jurisdiction, acting in judicial capacity:

Even assuming that a court order is violative of fundamental rights, the same cannot be challenged under article 32. Only an appeal shall be preferred to correct the same. The reason is that the remedy

[5] AIR 1967 SC 1 : (1966) 3 SCR 744 [6] AIR 1955 SC 191 [7]Snowden v.hughes, (1943) 321 U.S.1
[8] Supra ft nt 3 [9] Art.226 of the Indian Constitution [10]Vol VII, Draft Art 7. Nov 25
[11] State of Bihar v. Bal Mukund Shah, (2004) 4 SCC 640; State of Punjab v. Ajaib Singh, AIR 1953 SC10; Ranjit Singh v. Union Territory of Chandigarh, (1991) 4 SCC 304 [12] Rupa Ashok Hurra v. Ashok hurra (2002) 4 SCC 388

under article 32 is available only against state action. The judiciary not being state under article 12 is not amenable to the writ jurisdiction of this Hon'ble court. Further although article 32 gives a constitutional guarantee to move the Supreme Court, the same is only by way of 'appropriate' proceedings.

The petitioners may site a few instances where judicial orders have been entertained, especially as in the case of **A.G v Lachmi** [13] wear under article 32 a high court order directing death by public hanging was challenged to the violative of article 14 and 21. Supreme Court although holding that the same is violative of article 21 and 14, did not issue a writ, quashing the high court order. One of the reasons being, that the order was revoked by the high court. Therefore the judgment does not constitute a binding precedent, for the court to follow, in setting aside high court order in the writ proceeding. Secondly the order was issued by a full bench of the Rajasthan high court. In any case an appeal lie towards the Supreme Court under article 134 or by an S.L.P under article 136. Therefore the Supreme Court in exercise of its inherent powers might have treated the same to be an appeal. Further the high court order was in contravention of rules which existed at the time. Therefore the same cannot be relied upon by the petitioner. The petitioners reliance upon the **Supreme Court Bar Association case** [14], Where in an application under article 32, a constitution bench of this Hon'ble court, reconsidered its judgement in the **Vinay Chandra Mishra case** [15], **M.S. Ahlawat** [16], the Supreme Court reconsider its judgement in the case of **Afzal v. State of Haryana** [17] is not sustainable. In both those cases maintainability was not challenged by the respondents. Therefore the same cannot be a binding precedent to support the petitioners cause. Again, as there is no remedy available against an order of the Supreme Court, the exercise of its inherent Powers the Supreme Court admitted to writ petitions. The same submission was put before this Hon'ble court in the Rupa Ashok Hurra [18] case, and the same was this Court's reply. However in the present case a review petition remedy before the division bench of the high court is available and only that remedy should be availed by the petitioner after duly impleading itself in that petition. Further in Supreme Court Bar Association case the question was about the exercise of Supreme Courts power [19] in disregard of express statutory powers and not of violation of fundamental rights by Judicial actions [20]. B.(3) The high courts are not inferior courts in the scheme of our constitution:

It is well settled that the powers of this court to issue writs of Certiorari under article 32 (2) as well as the powers of the High Court to issue similar rights under article 226 are very wide. In fact the powers of the High Courts are under Art.226 are, in a sense, wide than those of this court, because the exercise of the powers of this court to issue writs of Certiorari is limited to the purposes set out in Art.32(1). The nature and the extent of the writ jurisdiction conferred on the High Court by article 226 were considered by this court as early as 1954 in T.C. Basappa v. T. Nagappa [21]. And this Hon'ble court held that, "in view of the express provisions in our constitution, we need not now look back to the early history of the procedural technicalities of these writs in English law, nor feel oppressed by any difference or charge of opinion expressed in particular cases by English judges. We can make an order or issue a writ in the nature of Certiorari in appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law.

One of the essential features of the writs ,according to Mukerjee.J., is that the control which is exercised to take over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. The supervision of the Superior Court exercised through writs of certiorari goes to two points, one is the area of inferior jurisdiction and the qualifications and conditions of that exercise; the other is the observance of law in the course of exercise. Further High Court is itself a court of record [22] and has the power to punish for its contempt. Therefore the High Court is not an inferior court under a

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[13] AIR 1986 SC 467 [14] Supreme Court Bar Association v. Union Of India (1998) 4 SCC 409
[15] Vinay Chandra Mishra, Re (1995) 2 SCC 584 [16] M.S. Ahlawat v. State of Haryana (2000) 1 SCC 278
[17] Afzal v. State of Haryana (1996) 7 SCC 397 [18] (2002) 4 SCC 388 [19] Art 129 & 142 [20] M.P.Singh:Shukla's Constitution Of India: Page 33, 11th edn 2008, EBC [21] AIR 1954 SC 440 [22] Art. 215 of the Indian constitution

constitutional scheme. Hence a certiorari wouldn't lie for the same. B.(4). The proposition constitute a binding precedent and is a settled proposition of law:

The proposition laid down in the Mirajkar case has been accepted by a constitutional bench of this Hon'ble court in Rupa Ashok Hurra case and followed in the Surya Devi Rai case subsequently. Therefore this proposition constitute a binding precedent and the opinion that the same as obiter [23] in Mirajkar is no longer applicable. In the present case the judgement binds Inter parties and therefore the same cannot be raised in a 32 petition. Even in case of a fundamental right, alleged to be violated, the parties are bound by the decision and they cannot be permitted to reopen [24].

C) IF A WRIT PETITION CAN BE FILED AGAINST A JUDICIAL ORDER, WHAT KIND OF ORDERS, OR ORDERS OF WHICH COURTS COULD BE CHALLENGED? WHAT KIND OF WRIT IS ISSUABLE IN SUCH CASES?

The respondent humbly submits that, it has become a well settled position of law, that this Hon'ble Supreme Court cannot issue a writ under Art 32 against the High court.

1. The High Courts are not constituted as inferior courts in our constitutional scheme. Therefore, the Supreme Court would not issue a writ under Article 32 to a High Court.
2. It is a settled position in law that no judicial order passed by any superior court in judicial proceedings can be said to violate any of the fundamental rights enshrined in Part III.
3. It may further be noted that the superior courts of justice do not also fall within the ambit of State or other authorities under Article 12 of the Constitution."

The above points are the propositions laid by this Hon'ble Supreme Court in **Rupa Ashok Hurra v. Ashok Hurra,**[25] This is evident when para 7 of the judgment is read. "Having carefully examined the historical background and the very nature of writ jurisdiction, which is a supervisory jurisdiction over inferior courts/tribunals, in our view, on principle a writ of certiorari cannot be issued to coordinate courts and a fortiori to superior courts. Thus, it follows that a High Court cannot issue a writ to another High Court, nor can one Bench of a High Court issue a writ to a different Bench of the same High Court; much less can writ jurisdiction of a High Court be invoked to seek issuance of a writ of certiorari to the Supreme Court. Though, the judgments/orders of High Courts are liable to be corrected by the Supreme Court in its appellate jurisdiction under Articles 132, 133 and 134 as well as under Article 136 of the Constitution, the High Courts are not constituted as inferior courts in our constitutional scheme. Therefore, the Supreme Court would not issue a writ under Article 32 to a High Court. Further, neither a smaller Bench nor a larger Bench of the Supreme Court can issue a writ under Article 32 of the Constitution to any other Bench of the Supreme Court. It is pointed out above that Article 32 can be invoked only for the purpose of enforcing the fundamental rights conferred in Part III and it is a settled position in law that no judicial order passed by any superior court in judicial proceedings can be said to violate any of the fundamental rights enshrined in Part III. It may further be noted that the superior courts of justice do not also fall within the ambit of State or other authorities under Article 12 of the Constitution". (Para 7).

In **Naresh Shridhar Mirajkar –v.- State of Maharashtra** [26] some journalists filed a writ petition in the Supreme Court under Article 32 of the Constitution challenging an oral order passed by the High Court of Bombay, on the original side, prohibiting publication of the statement of a witness given in open court, as being violative of Article 19(1)(a) of the Constitution of India. A Bench of nine learned Judges of this Court considered the question whether the impugned order violated fundamental rights of the petitioners under Article 19(1)(a) and if so whether a writ under Article 32 of the Constitution would issue to the High Court. The Bench was unanimous on the point that an order passed by this Court was not amenable to the writ jurisdiction of this

Court under Article 32 of the Constitution. Eight of the learned Judges took the view that a judicial

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[23] H.M Sheervai, Constitutional Law of India, Vol I pg 396 [24] Supreme Court Employees Assn v. Union Of India (1989) 4 SCC 187 [25] (2002) 4 SCC 388 [26] AIR 1967 SC 1 : (1966) 3 SCR 744

order cannot be said to contravene fundamental rights of the petitioners. "(Per Gajendragadkar C.J, Wanchoo, Mudholkar, Sikri and Ramaswami,JJ.) : This Court has no power to issue a certiorari to the High Court. When the High Court has the power to issue the writ of certiorari, it is not, according to the fundamental principles of certiorari an inferior court or a court of limited jurisdiction. The Constitution does not contemplate the High Courts to be inferior courts so that their decisions would not be liable to be quashed by a writ of certiorari issued by the Supreme Court." Thus it has become a settled principle of law that, the nature of writ jurisdiction is only supervisory. In that case, Courts issuing writs are superior Courts. Therefore one superior court cannot issue writ to another superior. Thus it has become a well established principle of law that, the Supreme Court cannot quash a High Court order under its writ jurisdiction. Hence a writ petition challenging a judicial order is not maintainable or in other words, a writ petition cannot be filed challenging an order of the High court.

Arguments on merits

ISSUE 2 :

II. WHETHER A COMPANY CAN FILE A WRIT PETITION UNDER ART.19 OF THE CONSTITUTION OF INDIA?

It is submitted that the present writ petition is not maintainable, because no fundamental right of the petitioner is, directly impaired by the impugned judicial order of the High Court of Vadanadu, or by any action taken there under. The petitioner company being a private incorporation and managing director is not absolute owner of the company and is incompetent to maintain the petitions complaining that the rights guaranteed under Arts. 19 of the Constitution is impaired and the following submission are made in substantiating the same.

A. The Petitioner's Company is a Juristic Person:

A company which is being incorporated under the Companies Act; 1956 is a legal and juristic person, separate and distinct from its individual members [27]. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the profit. Similarly a director of a Company is merely an agent for the purpose of company's management. Therefore share holder or a director may not therefore be entitled to move a petition for infringement of the rights of the Company. By a petition praying for a writ against infringement of fundamental rights, are same except in a case where the petition is for a writ of habeas corpus and probably for the infringement of the guarantee under Arts.19 and 21, the petitioner may only seek relief in respect of his own rights and not of others [28]. The shareholder or Managing director of a, Company, is not the owner; he has merely a right to participate in the profits of the Company subject to the, contract contained in the Articles of Association. Therefore the petitioner being a company which is a juristic and legal entity cannot have infringement of any right and the present petition is liable to be dismissed on this sole ground.

B. The term Nationality and Citizenship are not synonymous

It cannot therefore, be said that Part II of the Constitution or the Citizenship Act, 1955, confers the right of citizenship or recognizes as citizen any person other than a natural person. They do not contemplate a corporation as a citizen. In none of the relevant decisions this Court gave its considered judgment on the present issues and the question now raised are open questions. 'Nationality' and 'citizenship' are not synonymous. A corporation can claim nationality which is ordinarily determined by the place of its incorporation. But while nationality determines the civil rights of a natural or artificial person, particularly with reference to international law, citizenship is intimately connected with civic rights. All citizens are, therefore, nationals of a particular State and enjoy full political rights but all nationals are not citizens and do not have full political rights [29]. C. No explicit provision guaranteeing fundamental right to a company.

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[27] State Trading Corporation –v.- C.T.O 1963 AIR 1811 1964 SCR (4) 89 [28] Supra ft nt 1

[29] Chiranjit Lal Chowdhuri v. Union of India [1950] S.C.R. 869, Dwarkadas Srinivas of Bombay v. The Sholapur Spinning & Weaving Co. Ltd. [1954] S.C.R. 674 and Bengal Immunity Co. Ltd. v. State of Bihar, [1955] 2 S.C.R. 603

It is humbly submitted that there can be no citizens of India, which is not mentioned in Part II of the Constitution or by the Citizenship Act, 1955. Citizenship Act (LVII of 1955). It is absolutely clear on a reference to the provisions of this statute that a juristic person is outside the purview of the Act. The Constitution in Part II, as already indicated, has determined who are Indian citizens at the commencement of the Constitution. But the Constitution does not lay down any provisions with respect to acquisition of citizenship or its termination or other matters relating to citizenship, after the commencement of the Constitution. This Statute has to be enacted by way of legislation supplementary to the provisions of the Constitution as summarised above. The definition of the word "person" in s. 2(1) (f) of this Act [30] says that the word "person" in the Act "does not include any company or association or body of individuals, whether incorporated or not". Hence, all the subsequent provisions of the Act relating to citizenship by birth citizenship by descent, citizenship by registration, citizenship by naturalisation and citizenship by incorporation of territory have nothing to do with a juristic person. It is thus absolutely clear that neither the provisions of the Constitution, Part II, nor of the Citizenship Act aforesaid, either confer the right of citizenship on, or recognise as citizen, any person other than a natural person. This appears to be the legal position, on an examination of the relevant provisions of the Constitution and the Citizenship Act. These provisions are wholly exhaustive and contemplate only „natural persons'. Part III of the Constitution makes a clear distinction between fundamental rights available to „any person' and those guaranteed to all citizens', indicating thereby that under the Constitution all citizens are persons but all persons are not citizens. Part II of the Constitution relating to 'citizenship' is clearly inapplicable to juristic persons and the provisions of the Citizenship Act, 1955, enacted by Parliament under Art. 11 of the Constitution would clearly go to show that the persons are outside the purview of the Act[31].

It is pertinent to note that the term 'citizen' in Art. 5 is not wide and exhaustive as in Art. 19 of the Constitution or that Part II of the Constitution supplemented by the provisions of the Citizenship Act, which deals with citizens, left out the of account citizenship in relation to juristic persons. When the Constitution confers any particular right to be enjoyed by a citizen it uses the words "any citizen" or "all citizens" in clear contradistinction to those rights which are to be enjoyed by all natural persons and not to a juristic persons. The precedents of the Supreme Court of the United States which hold that corporations are citizens of the State of incorporation for purposes of federal jurisdiction cannot be followed in India. The diversity of citizenship which has led to such rulings does not exist in India. As a corporation is a separate entity from its members, it is not possible to pierce the veil of incorporation to determine the citizenship of its members in order to give the corporation the benefit of Art. 19 and this Hon'ble Court cannot override Section 2 (f) of the Indian Citizenship act; 1955 and thereby exercise jurisdiction since the provision is not declared to be ultra vires.

D. The court can only construe and cannot construct

The nature and personality of an incorporated company have their origin in a fiction of law. This personality arises from the moment of incorporation and from that date the persons subscribing to the memorandum of association or joining as members become a body corporate. But they cannot be said to raise their status and even if all of them are citizens of India, the Company does not become a citizens of India. The seven freedoms guaranteed by Art. 19(1) arc for the citizens of India[32]. The Constitution in using the word "person", a word of larger import, in some other places makes its intention to exclude corporations is clear and this was the intentions of the farmers of our constitution. In the case of **Maru Ram –v.- Union of India** [33] Hon'ble Mr. Justice. V.R. Krishna Iyer while speaking for the majority held that the court can only construe and cannot construct anything new, if does so would amount to judicial legislation. By applying the principles laid in the above case to the present case in the absence of any provision regarding violation of fundamental right to a company in the constitution, the court cannot interpret something which is not intended by the constitution.

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[30] Section (2) (f) of Citizenship Act; 1955

[31] Sinha.J in State Trading Corporation –v.- C.T.O 1963 AIR 1811 1964 SCR (4) 89 [32] Maneka Gandhi v. Union Of India 1978 AIR 597, 1978 SCR (2) 621 [33] 1980 SC 2147

It is submitted that in the instant case the company represented by its managing director is one who filed this petition that too on behalf of their staffs and more over none of the share holder who are natural person have come up with such petition, prima facie go to show that there is no fundamental right being contravened to its share holders. The Dolphins private limited is not, therefore, a citizen either by itself or due to the acquisition of majority share (90%) by Indian [34]. Its Indian nationality is not to be confused with citizenship of natural persons and the word 'citizen' in Art' 19(1) (f) and (g) can refer to no other than natural persons. Therefore the present writ petition filed by a private incorporated company alleging infraction of the fundamental right has no locus standi and petition deserves to be dismissed.

ISSUE 3:

III. WHETHER ORDER OF THE HIGH COURT INFRACTS FUNDAMENTAL RIGHTS OF THE PETITITONER?

The respondent would like to humbly submit that, the impugned order does not violate the petitioner's fundamental rights. The respondent would like to refute the petitioner's contentions and clarify the Hon'ble Supreme court about the directions which are challenged.

It is submitted that the directions are issued to regulate pubs, bars and dance bars. India is a developing country, witnessing westernization. But westernization in bars, pubs and dance bars are concerned, it is against culture and tradition of vadanadu. In the situation like this there is an high probability of a minor child being addicted to pubs and bars. The owners and other peoples take advantage of such addiction to these pubs and bars, target these areas and make it to be the breeding ground for Prostitution and drug abuse, due to which the crime rate in the city of Nagara has highly increased, particularly the crimes against the women. Many articles and reports of the state magazines testifies it. Hence, larger group of society demanded the laws regulating these bars and pubs and dance bars. When the issue concerning regulating the bars and pubs, came before the court, the Hon'ble High court took into consideration of all these aspects and after the finding that the state governments stand not satisfactory, the court in balance of convenience court made an interim directions regulating these pubs, bars and dance bars in such a way that their occupation is not prohibited.

A) The Hon'ble High court's order was within Jurisdiction and constitutionally valid :

It is submitted that the Hon'ble High court of Vadanadu respects the doctrine of separation of powers. However when there is legislative vacuum, the judiciary can fill it, to enforce and preserve the fundamental rights of the people. It has become an accepted principle that when the legislature has failed to enact a law on a particular subject, and people's fundamental rights are denied due to the non enactment, the judiciary can issue directions to redress the denial of fundamental right. This has been the view expressed by the Hon'ble Supreme Court in the decision of **Common Cause (A Regd. Society) -v.- Union of India,**[35] wherein Hon'ble Justice Sema Held :

"I am also of the view that if there is a buffer zone unoccupied by the legislature or executive which is detrimental to the public interest, judiciary must occupy the field to sub serve public interest. Therefore, each case has to be examined on its own facts". (Para 69)

The same view was reiterated in the decision of **State of U.P. v. Jeet S. Bisht** [36], the Hon'ble apex court held :

"In a situation of this nature where the action or inaction on the part of the executive government of a State or Union Territory would lead to virtual closure and/or non-functioning of such an important judicial fora created under the Act, it is permissible for the superior courts, and particularly this Court, while exercising its constitutional functions, to issue necessary directions for proper and effective implementation of the provisions thereof. (Para 63)."

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[34] Facts pg no 8 – note No.1 [35] (2008) 5 SCC 511, [36] (2007) 6 SCC 586,

The respondent would further like to bring to the notice of this Hon'ble Supreme Court. that in the case of Assn. for **Democratic Reforms -v.- Union of India** [37] a peculiar question of whether the substantial question of law of public importance raised was whether in a nation constitutionally wedded to republican and democratic form of Government, where election as a Member of Parliament or as a Member of Legislative Assembly is of utmost importance for democratic form of the country, before casting votes, voters have a right to know relevant particulars of their candidates; and whether the High Court had jurisdiction to issue directions in a writ petition filed under Article 226 of the Constitution of India came up before the Hon'ble Delhi High Court. The High Court of Delhi entertained the writ petition and directed the Election Commission to disclose to the voters information's pertaining to each of the candidates contesting election to Parliament and to the State Legislatures and the parties they represent. Aggrieved by the aforesaid direction of the High Court, an appeal was filed before the Supreme Court by the Union of India. A three-Judge Bench of this Court, in **Union of India v. Assn. for Democratic Reforms** [38] upheld the direction. Repelling the arguments of the appellant, this Court held:

"However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till a suitable law is enacted."(Para 19 and 20)

"It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. (Para 45)"

In the above case, the Hon'ble Supreme Court has accepted the validity of the directions issued by the Hon'ble High Court of Delhi. The same principle applies to the present case. In the present case, the legislature has not taken any steps to regulate pubs, bars and dance bars and executive also has not taken steps. By failure of such action the fundamental rights of various persons are affected and the law and order of the city went out of control and the city became the unsafe place to live in, particularly for women's. Therefore to enforce the fundamental rights guaranteed by the Constitution, the Court has exercised its jurisdiction and passed orders after hearing the necessary parties and hence the impugned order is constitutionally valid

B). The Hon'ble High Court has the power to issue such directions.

The power to issue such directions is conferred to the Supreme Court by Art 142. It is humbly submitted that the High Court also has the power to issue similar directions using the inherent powers of the court. The legislative backing for that power is present in Art 226.

Art 226 reads as follows

" Power of High Courts to issue certain Writs-

(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) the power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories……."

[37] (2002) 5 SCC 294 : AIR 2002 SC 2112

[38] (2002) 5 SCC 294 : AIR 2002 SC 2112.

If the first two clauses are read, it is clear that the High Court has the power and it is its duty to issue writs in appropriate cases to enforce fundamental rights. The writ jurisdiction of the High Court is very wide and includes not only fundamental rights but other rights also. The writ jurisdiction of the High Court is conferred to enforce the fundamental rights guaranteed. It is not only the power of a High Court, but also the duty of the High Court to issue such orders. In the case of **Khajoor Singh (Lt Col,) v. Union of India** [39], the Hon'ble Supreme court held :

"The power of the High court under article 226 of the constitution is of the widest amplitude and it is not confined only to issuing of writs in the nature of habeas corpus, etc., for it can also is sue directions or orders against any person or authority, including in appropriate cases of any government." Therefore it is humbly submitted that the High Court's action is not ultra vires of its jurisdiction. The power to issue a writ in nature of a mandamus is given to the High Court by clause (1) of Art 226. Clause(1) also says that " High Court shall have the power, throughout the territory in relation to which it exercises jurisdiction, to issue to any person or …….". Therefore as per the wordings of Art 226, the High Court has the power to issue a writ to anyone within its territory. It is submitted that Art 226 confers the power to the High court to pass such directions, and no other provision in the constitution, although not supportive to it is not contrary to it. Thus the action of the High court passing directions to regulate pubs bars and dance bars is not in excess of its jurisdiction.

The respondent would like to cite the views expressed by a former Supreme Court Judge in the case **B.C. Chaturvedi v. Union of India**,[40] in concurring judgment of Hon'ble Justice Hansaria in the Constitutional Bench of this Hon'ble Supreme court it has been held that:

"I am in respectful agreement with all the conclusions reached by learned brother Ramaswamy, J. This concurring note is to express my view on two facets of the case. The first of these relates to the power of the High Court to do "complete justice", which power has been invoked in some cases by this Court to alter the punishment/penalty where the one awarded has been regarded as disproportionate, but denied to the High Courts. No doubt, Article 142 of the Constitution has specifically conferred the power of doing complete justice on this Court, to achieve which result it may pass such decree or order as deemed necessary; it would be wrong to think that other courts are not to do complete justice between the parties. A very large percentage of litigants would be denied this small relief merely because they are not in a position to approach this Court, which may, inter alia, be because of the poverty of the person concerned. (Para 21)

It deserves to be pointed out that the mere fact that there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that they have not to do complete justice, and if moulding of relief would do complete justice between the parties, the same cannot be ordered. Absence of provision like Article 142 is not material. This may be illustrated by pointing out that despite there being no provision in the Constitution parallel to Article 137 conferring power of review on the High Court, this Court held as early as 1961 in **Shivdeo Singh case** [41] held :

"High Courts can also exercise power of review, which inheres in every court of plenary jurisdiction. I would say that power to do complete justice also inheres in every court, not to speak of a court of plenary jurisdiction like a High Court. Of course, this power is not as wide as which this Court has under Article 142. That, however, is a different matter.(Para23)

I had expressed my unhappiness qua the first facet of the case, as Chief Justice of the Orissa High Court in paras 20 and 21 of **Krishna Chandra Pallai v. Union of India** [42], by asking why the power of doing complete justice has been denied to the High Courts. I feel happy that I have been able to state, as a Judge of the Apex Court that the High Courts too are to do complete justice. This is also the result of what has been held in the leading judgment."

Thus the order of the High Court of Vadanadu is not in excess of its jurisdiction and the impugned order is the one which is within its limit and this Hon'ble apex court cannot interfere in it .

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[39] AIR 1961 SC 532: 1961 (2) SCR 828. [40] (1995) 6 SCC 749, [41] AIR 1963 SC 1909 [42] AIR 1992 Ori 261 (FB)

It is further submitted that the directions of the Vadanadu High court, is a reasonable one and are based on sound logic and they do not violate the Part III of the Constitution. The impugned directions are as follows. The respondent will prove the validity of all the directions taking one at a time.

i) All bars, pubs,, dance bars and like places shall remain closed between 8.00 P.M and 6.00A.M , except those bars in start hotel, which shall seek the permission of the state government, for keeping it open beyond the said prescribed hours.

The Hon'ble High court of vadanadu after taking into consideration of the facts that these pubs, bars and dance bars have become the breeding ground for illegal activities such as drug abuse, prostitution and other crimes against the women's and further noted that all these occurs during the night times, passed the above direction inorder to protect the city from heinous crimes, particularly against women.

ii) Whenever, alcoholic drinks are served, women shall not be engaged by the management of the pubs or dance bars or hotels for dancing.

The Hon'ble High Court of Vadanadu after taking into consideration of the facts that inorder to cover more customers many of the bars have dance bars and the dancers are young women's and they are trafficked and their safety was at stake and hence the court passed the above direction in order to protect the safety of the women working in these dance bars also and the same is not violative of Art. 15 of the Constitution of India.

iii) Any person below the age of 21 will not be allowed entry into the bars, pubs or dance bars. No person below the age of 24 shall be served with alcoholic drinks in any place.

The capital city of Nagara is does not only serve as a city to eke out people's livelihood but also acts as an educational hub and people from all over the country to Nagara for their academics and the Hon'ble High court after taking note of the fact that these students who came for studying is addicted to these bars and pubs and dance bars and moreover these student groups are targeted for the immoral and unlawful activities, such as drug abuse etc. hence the Hon'ble court passed the above direction. It is also pertinent to refer the Legal Drinking age limit [43] of the other states with the territory, it is seen that many states have 21 to be the legal drinking age, while that being so, a person having become major has no effect when his voluntary act contravenes Art. 47 of Constitution of India and the court can impose restrictions.

C). Fundamental Right of the Petitioner is not Violated

It is respectfully submitted that in the case of **Har Shankar -v.- Excise Comissioner**[44] the Hon'ble apex court held that there is no fundamental right to trade or business in relation to intoxicants. The same view was reiterated in the case of **State of Punjab -v.- Devans Mordern Breweries Ltd**. wherein the Hon'ble supreme court held that trade in liquor is not a fundamental right, but a mere privilege of the state. The Majority view further held that a citizen has no fundamental right to trade or business in liquor as the same is res extra commercium.

It is submitted that in the case of **Nashirwar -v.- State of M.P**[45]. the Hon'ble apex court held that there is no fundamental right to trade in liquor because of the reasons of public morality and public interest and heavy dangerous character of the liquor.

I am advised to submit that in the decision of **Krishnan Kumar Narula -v.- State of Jammu and Kashmir**[46] the Hon'ble supreme court observed that while standards of morality could afford guidance to impose restrictions they could limit the scope of right. The immoral deal should not affect the quality or character of the people and it is a well grounded conjuncture for imposing restrictions. In the instant case the bars, dance bars and pubs are res extra commercium and they functioned in such a way that it affected the morality and standard of the people. They crime rate drastically grew up and many reports testifies it majorly occurs in the places near bars and pubs, while that being so the Hon'ble High court in the interest of justice restricted the activities which affected the morality and standard of the people.

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[43] Annexed in Compendium [44] AIR 1975 SC 1121 : 1979 (3) SCC 212 [45] AIR 1975 SC 360 : 1975 (1) SCR 29.
[46] AIR 1967 SC 1368 : 1967 (3) SCR 50.

It is respectfully submitted that in the case of **Khoday Distilleries Ltd. -v.- State of Karnataka**[47] the Hon'ble constitution bench of the supreme court held :

i) Right to practice any profession business does not extend to practicing a profession or to carry on any occupation, trade or business does not extend to business or trade or occupation which is of vicious and pernicious and if it is condemned by the larger people of the society, it does not entitle to its citizen to carry on such obnoxious trade, which injures the health, safety and welfare of the general public and there cannot be a fundamental right to carry on the business in crime.

ii) Article 47 of the constitution of India considers intoxicating drinks and drugs as injurious to health and impeding the raising level of nutrition and standards of living and improvement of the public health.

It is submitted that in series of decisions the Hon'ble apex court in the cases of **Kaushal -v.- Union of India**[48]**, Satpal -v.- Lt. Governor**[49] **& State of M.P. -v.- Nandlal**[50]**,** held that the is competent to prohibit the trade in liquor either in its manufacture or sale. It is humbly submitted that by applying the principles laid in the precedents cited supra is clear, evident and undisputed that petitioner company is not vested with any fundamental rights. Even assuming Sthat petitioner company has fundamental rights, the same is not absolute one since the occupation is res extra commercium (outside commerce) and subject to restriction and the restriction in the present case was a reasonable one and this Hon'ble court cannot with the impugned order.

PRAYER

Wherefore, it is humbly prayed before this Hon'ble Supreme Court of India, in the lights of the issues raised, arguments advanced and authorities cited, the court may be pleased to adjudge and declare that

- The present writ petition is disposed off, there by the Hon'ble Division Bench order of the High Court of Vadanadu is upheld.

And pass such further or other orders, as it may deem fit and proper and thus render justice.

Dated on this 9th day of October 2013.

(Sd/-)

i.	Moot Court (Atleast 3 Moot Problems one each in Constitutional Law ; Criminal law & Civil Law with10 marks each i.e. 5 marks for written submission & 5 marks for oral advocacy)	30 Marks
ii.	Observance of Trial (Atleast 2 Cases: Civil - 1; Criminal - 1)(Student shall Attend two trials in the Course of the Last two or three years of B.A.B.L., Degree Course and Maintain a record and enter the various steps observed during their attendance of different days in the court assignment.)	30 Marks
iii.	Interviewing Techniques and Pre-Trial Preparations and Internship Diary (Student shall observe two interviewing sessions of clients at Lawyer's Office/Legal Aid Office and record proceedings in a diary, Which will carry 15 marks. Further, student shall observe the preparation of documents and court papers by the Advocate and the procedure for the filling of the suit / petition and record the same in the diary, which will carry 15 marks)	30 Marks
iv.	Viva Voce Examination (on all the above 3 aspects)	10 Marks
	TOTAL	**100 Marks**

[47] 1995 (1) SCC 574 : 1994 (4) SCALE 528.
[48] AIR 1978 SC 1457 : 1978 (3) SCC 558
[49] AIR 1979 SC 1550 : 1979 (4) SCC 232
[50] AIR 1987 SC 251 : 1986 (4) SCC 566.