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FOREWORD

When I received an invitation from Ms. Rishika Jain, the Managing Editor of the Board of Editors to write a foreword for the Summer 2018, Fourth Volume (Issue II) of The Indian Journal of Law and Public Policy, two stanzas from the Tirikkurral came to mind, which, being apt, I wish to share with my young friends who quest for learning and knowledge.

> *"Learner, learn your learning full well and fault free. And make your learning with life's living truths agree"*
>
> *"In the soils of sand, the more you delve, the more rush it springs. So too in learning, the deeper you go, the more bounty it springs."*

There are two lessons to be learnt from these great sayings. First, learning which does not take within its fold life's living truths, has no meaning or purpose. Second, the more you strive for knowledge, the more you get at the end of your labour and toil.

With knowledge, one can never say I have learnt enough, and I need not pursue further. As I read through the articles, I discovered that they touched upon a wide range of subjects both traditional and contemporary.

While articles, which related to disparagement and infringement of trademark, encapsulate and, thereafter, attempt to distil the law on the subject. Articles on topics such as sting operations and the role of media and threat to human security bring out what aches and ails the society.

To cite an example in the topic pertaining to comparative advertising and generic disparagement, the authors have dealt with a whole range of judgments beginning with the judgment delivered by the Calcutta High Court in *M.P. Ramachandran's* case. This is one judgment which is cited in almost all cases pertaining to disparagement. I dealt with this judgment amongst others as a Single Judge when rendering a decision in *Dabur India Ltd. vs. Colortek Meghalaya Pvt. Ltd.* The authors have taken the trouble of examining the judgment of the Division Bench which in fact diluted some of the propositions that were laid down in *Reckitt & Coloman of India Ltd. vs. M.P. Ramachandran* case. The Division Bench while dismissing the appeal held unambiguously that false, misleading, unfair or deceptive advertising was not protected as commercial speech under article 19(1)(a) of the Constitution.

Therefore, every time a tortious action for disparagement is instituted, despite a whole array of judgments on the subject, it remains a challenge to determine, at the interim stage, as to whether the impugned action amounts to puffing or disparagement.

Likewise, the article on sting operations touches upon an area which is relevant for the Courts, the Executive and the Fourth Estate i.e. the Media. The ethicality of Media carrying out covert operations came under public glare in the recent past with the constitution of Justice Leveson Committee, by the Government of United Kingdom. The Committee was mandated to look into the infractions committed by the journalists employed by News of The world, who had illegally intercepted voice mail of a murder victim, Milly Dowler.

The article, on sting operations, therefore, does spring forth hope that the journal will in the near future, write about the ethics and the role of media in the contemporary society.

What is evident, though, upon perusal of the articles, that each of them have attributes of robust research, clarity of thought and precision. The Board of Editors along with the authors of these articles, in my view, have done a commendable job. Clearly, the articles contained in the Journal would add to the knowledge base of the reader.

I wish the Board of Editors, the very best in their future endeavors.

Hon'ble Justice Mr. Rajiv Shakdher
Judge, Delhi High Court
New Delhi

CONCEPT NOTE

The Indian Journal of Law and Public Policy is a peer reviewed, biannual, law and public policy publication. Successive governments come out with their objectives and intentions in the form of various policies. These policies are a reflection of the Executive's ideologies. Laws, concomitantly, become the means through which such policy implementation takes place. However, there might be cases of conflicts between the policy and the law so in force. These contradictions have given way for a continuing debate between the relationship of law and public policy, deliberating the role of law in governing and regulating policy statement of various governments.

This journal is our solemn effort to promote erudite discernment and academic scholarship over this relationship, in a way which is not mutually dependent on each of these fields but which is mutually exclusively and independent. The focus has been to give a multi-disciplinary approach while recognizing the various effect of law and public policies on the society.

(EDITOR IN CHIEF)

TABLE OF CONTENTS

BEYOND THE RISK SOCIETY: TACKLING THE THREATS TO HUMAN SECURITY

*Deeya Barik**

INTRODUCTION

In the recent times we need human security more than ever. With new threats developing every single day – from poverty to hunger; from unemployment to overpopulation; climate change, environmental issues and problems relating to health- we have to find ways to tackle these issues. Although starting out during the Cold War as a term used for protection of humans against an armed conflict, this term is now used to denote protection of humans against environmental, political, economic and social issues that pose a threat to the development of human beings.

Human Security focuses primarily on violations of human rights at national and international levels. It emphasizes aiding individuals by using people-centered approach for resolving inequalities that affect security.[1] One of the major failings of Human Security, according to its critics, is that it is too all encompassing and that it fails to achieve its ambitious goals for improving the human condition. [2]

According to United Nation's paper on Human Security in Theory and Practise[3], Human Security brings together the 'human elements' of security, rights and development. As explained in the paper[4], it is an inter-disciplinary concept that displays the following characteristics:

a) People-centered
b) Multi sectorial
c) Comprehensive
d) Context specific
e) Prevention oriented

* Author is a law student at Army Institute of Law, Mohali.
[1]http://www.humansecurityinitiative.org/definition-human-security (accessed on 10.09.17)
[2] Ibid
[3]http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/human_security_in_theory_and_practice_english.pdf (accessed on 10.09.17)
[4]United Nations' paper on 'Human Security in Theory and Practise'

With its main focus on human beings, Human Security revolves around making changes in the factors that affect the development of the human beings. In the present century when the world has been brought together by technology, we see that its size is shrinking which makes it more vulnerable to threats. As mentioned above, we have broadened our definition of human security from the traditional notion of an armed conflict, to possible threats from hunger, poverty, environmental hazards, health issues, terrorism et cetera.

Human Development is defined as the process of enlarging people's freedom and opportunities and improving their well-being. Human development is about the real freedom where ordinary people have to decide who to be, what to do, and how to live.[5] With the growing need of human security, human development is as important as any other thing. In such times, we should make sure that an individual is able to avail his rights as a citizen of a country so that it leads to his development. Basic human rights also play an important role in this scenario. If there is a hold on the development of an individual, they would not be a potential resource to a nation. Human Rights and human development are clearly expressed in former Secretary-General Kofi Annan's statement as 'integrated blocks of human security"[6], by the same nominal, on the Human Rights Day of 2006, Kofi Annan made clearer the inter-relationship of rights, development and security: "Today, development, security and human rights go hand in hand; no one of them can advance very far without the other two. Indeed, anyone who speaks forcefully for human rights does nothing about human security and human development-or versa-undermines both his credibility and his cause. So let us speak with one voice on all three issues, and let is work to ensure that freedom from want, freedom from fear and freedom to live in dignity carry real meaning for those most in need."[7]

THE CHANGING MEANING OF SECURITY

In international law, security has traditionally has been understood as national or state security—that is, the security of states as the primary subjects of international law, based on territorial integrity and sovereignty, as formulated in the UN Charter.[8] The maintenance of

[5]http://www.measureofamerica.org/human-development/ (accessed on 10.09.17)
[6] Annan. 2000
[7] Kofi Annan, Message of the United Nations Secretary-General, on the Human Rights Day of 2006 with a theme "Fighting Poverty: A Matter of Obligation not Charity", athttp://www.un.org/events/humanrights/2006/statements.shtml (accessed on 10.09.17)
[8] See Bjorn Moller, " National, Societal and Human Security: A General Discussion with a case study from the Balkans" paper prepared for the First international meeting of directors of peace research and training institutions, UNESCO, Paris (2000)

international peace and security, as laid down in Article 1 of the Charter, presupposes the territorial integrity and political independence of states. With the introduction of collective security in 1945, security was internationalized, allowing states—under Charter VII of the UN Charter--- to act collectively and, if necessary, with the use of force to uphold or restore international peace and security. National or state security and its offspring, collective security, have continued to dominate the international legal order. The concept has been broadened by including non-military threats and by reluctantly including internal violence in collective security and peacekeeping activities. Following these developments, global security and the concern for the survival of mankind entered the agenda. Human security seems to be a next logical step in the development of our ever expanding understanding of security.

Human security challenges our approach to security in at least two ways; it shifts the focus towards the individual, and it bases security firmly on common values. Rather than providing security for abstract entities—the state, the nation—human security focuses on the security—the well-being, safety and dignity—of individual human beings. In essence it means that there is no secure state with insecure people living in it. Indeed, it seems obvious that in today's world of rising non-traditional, nonconventional, and transnational threats, the protection of borders and the preservation of territorial integrity cannot be the ultimate goal of security. The driving factors of the human security debate, "the constraints on state sovereignty, the mobilization of international civil society in defence of international norms, and the sharing of power between state and non-state actors in a globalizing world, leave a clear message; the state is no longer able to monopolize the concept and practice of security.[9] The twin forces of globalization and localization make traditional notions of national security look like outdated concepts, and together they call for a rethinking of our understanding of security.[10]

Human security is a concept based on common values and not national interest. Bringing to the forefront the security of individuals and communities, and their quality of life and their dignity, allows changes to happen that would otherwise have been shielded behind territorial sovereignty, political independence, and national interest: "It may also be due to the fact that the human security initiative broke through a certain complacency in the international

[9] Sverre Lodgaard, " Human Security: Concept and Operationalization" p.4, available online at www.hsph.harvard.edu/hpcr/events/hsworkshop/lodgaard.pdf (accessed on 10.09.17)
[10] Rob McRae, "Human Security in a Globalized World," and Don Hubert, "Human Security and the New Diplomacy: protecting people, promoting peace", university press. 28 (2011)

community that had come to accept many things, such as the mindless destruction wrought by landmines, as immune to change."[11] What we are witnessing is "an overall shift in the normative context allowing for an evocation of security more consistent with humanitarian concerns."[12]

What does this mean for state security? In the context of refugee protection, it has been argued that "it is obvious that old paradigms based on the state system must be replaced --- or supplemented—by new models, one positive element of the assault on the Westphalian system may be the gradual acceptance by the international community that human security should take precedence over state security.[13]

However, it would seem overly ambitious to view human security as a substitute for national or state security. Not only will that state continue to be the cornerstone of the international legal order, but there will still be threats that fall within the traditional concept of interstate conflict. Whereas it will remain the goal of state security to provide protection from external aggression or military attack, a human security approach means that providing within the state an environment that allows for the well-being and safety of the population is an equally important goal. The challenge is "to shape a security paradigm that captures the need to reach out in defence of people as well as states, and that orchestrate and steer our endeavours in both directions."[14]

What human security does is to reduce the concept of state security from the overarching concern of international law to just one possible concept of security. Human security then complements state security and better defines the aim of state security – to protect the people,and it puts limitations on warfare that go beyond the constraints of international humanitarian and human rights law.[15] Military operations for the purpose of enhancing human security will therefore have to allow for more scrutiny on whether the means are adequate to the end. Certainly, such a development finds its critics among policymakers and academics alike.[16]

[11] Rob McRae: "International Relations and the New Diplomacy," in McRae and Hubert, Human Security and the new diplomacy, p.258.
[12] Matt McDonald, "Human Security and the Construction of Security" Global Society. 56 (2003)
[13] Gary G. Troeller, "Refugees, Human Rights and the Issue of Human Security" 55 (2016)
[14] Logaard, " Human Security," p.4
[15] Ernie Regehr " Defence and Human Security" Ploughshares Monitor, December 1999
[16] Ruth Wedgwood, " Gallant Delusions," Foreign Policy (September- October 2002): 45

POTENTIAL THREATS

1. HEALTH

"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[17]

Health security is an important aspect of human security, as good health is "both essential and instrumental to human survival, livelihood and dignity:" Today's highly mobile, interdependent and interconnected world provides multitude opportunities for the rapid spread of infectious diseases, and radio nuclear and toxic threats, which is why updated and expanded Regulations are necessary.[18]

In translating the concept of human security into practice, the health sector offers very important entry points for several reasons. First of all, various countries are generally more willing to get health-related assistance from industrialized countries because they are less likely to be politicized. Even countries with strict principles of state sovereignty are willing to accept international support to mitigate health threats within their own boundaries. Secondly, diseases and severe malnutrition cases are challenges that one can readily understand at an emotional level, making it easier to rally people in industrialized countries to support health initiatives for humanity at a large scale. Strong international commitment to taking a human security approach to dealing with global health has the potential to contribute to improved health for all humans.[19]

As a "human-centered approach," the core point of human security is individuals and communities at a large scale. In the health sector, this does not mean that diagnoses of diseases or education on prevention and treatment of illnesses are unnecessary. Rather, as a complement to such external expertise, it is important that people recognize their right to health and ask for necessary health services they deserve. People's participation as the rights-holders will help strengthen the health systems that will respond more effectively to their health needs. Second, the human security approach allows us to strengthen the interface between "protections" and "empowerment" present in the society. The "protection" strategy, through which basic social services are provided, is very crucial. Nevertheless, at the same time, the "empowerment" strategy is equally critical, so that people can take care of their

[17]1948 WHO Definition.
[18] World Health Report released by WHO, http://www.who.int/entity/whr/2007/en/, as assessed on 2.09.17
[19]KeizoTakemi, Sumie Ishii, Yasushi Katsuma, and Yasuhide Nakamura (2008). "Human Security Approach for Global Health," The Lancet, Vol.372, pp.13-14.

health and build their own resilience to cope with various threats. Examples include strengthening people's ability to act on their own to secure access to services; relying on community healthcare workers and be more aware of the various threats to the community members; and mobilizing people to focus more on the health of the community. In other words, it is imperative for those who have political and economic power not only to create a protective environment by providing vital services, but also to empower the individuals and communities so that they can have more control over their own health, allowing them to live with dignity.[20]

2. POVERTY

Poverty has an impact on almost every living person on this earth. According to estimates in 2013, 10.7 percent of the world's population lived on less than US$1.90 a day, compared to 12.4 percent in 2012. That's down from 35 percent in 1990.[21] Nearly 1.1 billion people have moved out of extreme poverty since 1990. In 2013, 737 million people lived on less than $1.90 a day, down from 1.85 billion in 1990.[22]Now when it has become difficult to control the population in many countries, poverty poses difficulty to a state on its path towards development. How is it possible to put to use the available resources like their monetary funds, when more than half of the country is living in poverty? Instead of putting their funds in things which might lead to their development, poverty comes off as a roadblock in this path.

How does poverty act as a roadblock? Living in poverty disables an individual's capability to afford the basic requirements. It becomes difficult to function the day to day activities when one is running low on income. One is unable to afford food, clothes or a proper shelter to stay in. Staying in makeshift homes, they are vulnerable to homelessness especially in urban areas. Standard of living in urban areas is more than what we have available in the rural areas. Although there are a lot of job opportunities available but not everyone is eligible for a certain job. These jobs require one to have educational qualifications which the people belonging to the poor group have been unable to acquire. They avail the free and compulsory education provided to them by the state but what after that? Tuition fees are too high and taking a loan is an extra burden. Hence, people settle for menial jobs which don't pay them

[20]Commission on Human Security (2003). Human Security Now: Protecting and Empowering People (New York: Commission on Human Security).Vol 55 (2012)
[21]https://openknowledge.worldbank.org/bitstream/handle/10986/25078/9781464809583.pdf (accessed on 10.09.17)
[22]http://www.worldbank.org/en/topic/poverty/overview (accessed on 10.09.17)

much. But in countries like India where there is so much discrimination on the basis of wealth, getting a job isn't easy. Thousands and thousands of its population faces unemployment. A person will only be able to earn a livelihood only when they have a secure job. Working at construction sites or as a manual labour isn't secure. They depend on taking loans from their colleagues and when they fail to pay their loan back they have to face serious consequences. They even contemplate suicide. Is this how we imagine a better future? We are in no way developing while living in poverty. Poverty requires full time focus and attention of the state.

3. CYBER TERRORISM

In this constantly evolving world, rapid changes in technology have opened doors to much advancement. However, our need to be connected at all times has also allowed access to a new nature of crime. Cyber terrorism can be explained as a range of illegal digital activities targeted at organizations with an intention to sabotage the organization's reputation, cause financial and operational damage.[23]

McAfee is detecting over million newer forms of viruses, Trojans every year.[24]Pharmaceutical companies, electronics and other organization have seen sharp rise in the malware attacks against them. Target Corporation lost over 70 million users details in a single attack.[25]Over the past years, cyber criminals in India seem to typically favour certain techniques- spear phishing and fund diversion attacks- to target corporate. The adoption of the Internet to carry out the business online in the recent years has resulted in upsurge of online frauds & crimes. According to "Crime in India -2014" report, published by NCRB, there has been an increase of over 65.3% in the number of Cyber Crimes reported under the ' The Information Technology Act,2000' in 2014. Apart from the crimes registered under the I.T. Act, there were number of crimes which involved usage of computers in the perpetration of crimes, registered under the provisions of the Indian Penal Code (IPC). A total of 9,473 cases under I.T. Act and Cyber Crimes under IPC provisions were recorded during the year 2014.[26]

[23]Matusitz, Jonathan(April 2005). "Cyber terrorism:".American Foreign Policy Interests.2: 137-147.
[24]http://www.mcafee.com/us/resources/reports/rp-quaterly-threat-q4-2014.pdf. (accessed on 10.09.17)
[25]"Target Now says 70 Million people hit in Data Breach", Wall Street Journal, by Paul Ziobro & Danny Yadron
[26] "The challenges of Policing the Cyberspace", Venkatesh Murthy, CBI Bulletin, Vol. XXIV.

According to Supreme Court lawyer and leading Cyber law expert Pavan Duggal while the threat of cyber attacks remains "imminent", the country lacks an institutionalist mechanism of the cyber army to deal with the threat. He also mentioned that cyber warfare as a phenomenon is not covered under the Indian cyber laws and cyber security is still ineffective as mass awakening towards it is missing or inadequate.[27]

Our approach towards the Internet should be technology-centric and not be tempted by any ideological or political overlays. Indian government should consider bringing in any new legislation or procedures that would not unreasonably burden the service providers in retention of the information and also guard the privacy of their customers. While the data localization may aid the law enforcement, it may too limit the features of the internet and affect the economic growth.[28] We need to clearly define the strategies for effective implementation of the cyber security policy released earlier. Collaboration with International Law Enforcement authorities and organizations working towards combating Cyber terrorism should be leveraged further. India should consider signing international conventions that would help the police in speeding up the investigation.[29]

4. WAR

In the last century, the world faced two of its worst wars in which thousands of people were killed and hundreds of cities, the old and the new, were destroyed. We've heard millions of accounts from the ones who survived those wars and their accounts were not at all pleasant. Enter 21st Century. A lot of weapons have been technically advanced. Automatic machine guns have replaced the good old Enfield rifles. A nation is at a brink of destruction with just a press of a button and we say that we're staying in harmony. Nations have turned against each other. State leaders are suppressing their own population by making the use of chemical weapons. How does one ensure that humans are safe?

Organisations like United Nations, Amnesty International, United Nations Development Programme, et cetera have been trying to maintain peace all over the world ever since its establishment. Whenever two nations are in conflict, the UN and its member nations try to solve the issue at hand by holding meeting and discussions where they rule out the solution to peacefully end the conflict. The Geneva Conventions and their Additional Protocols are

[27]India must wake up to cyber-terrorism http://gadgets.ndtv.com/internet/news/india-must-wake-up-to-cyber-terrorism-349274(assessed on 22.08.17)
[28]"The New Age of Cyber Crime", Sandeep Gupta, CBI Bulletin, Vol XXIV.
[29] "Cyber Forensic & the Admissibility of e-Evidence". Narender Singh, CBI Bulletin, Vol XXIV.

international treaties that contain the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war).[30]

These conventions will hold no importance if the human beings don't realise the possibility of what their actions would lead to if they wage war against another. In any case, if a state decides to carry out an armed aggression internally or externally, the security of human beings will ever be on risk. A counter-attack will have to be carried out to suppress the armed conflict in question, which further puts the security of the civilians at risk.

"The International Committee of the Red Cross is regarded as the 'guardian' of the Geneva Conventions and the various other treaties that constitute international humanitarian law. It cannot, however, act as either policeman or judge. These functions belong to governments, the parties to international treaties, who are required to prevent and put an end to violation of international humanitarian law. They have also an obligation to punish those responsible of what are known as 'grave breaches' of international humanitarian law or war crimes."[31]

Currently, the entire world is at the risk of possible terrorist attacks carried out by Muslim insurgents all around the world. Hundreds of innocent civilians have fallen victims in these attacks that have been carried out by the insurgents. As per the International Committee of Red Cross, the government and the ones who are parties to the international treaties are required to prevent these violations of international humanitarian law. State and the parties to these conventions should make their voices heard and spread the awareness at regular intervals.

Continuous hate and exclusion of certain groups from a society later becomes the breeding ground for terrorism and eventually leads to the formation of such terrorist organisations. It is the duty of the state to prevent such hate from developing from the first instance of it surfacing. Every citizen should be educated on solidarity towards different groups. People all over the world follow different religions and participate in the activities that their religion asks for. Each religion is equal and none is greater than the other. Thinking of one's own religion as superior to the rest will lead to nothing but respite towards the other. We should

[30]https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.html (accessed on 10.09.17)
[31]Robin Stocke, Tackling War Crimes, https://www.icrc.org/eng/war-and-law/overview-war-and-law.html (accessed on 10.09.17)

rather develop a closer relationship with other religions and bridge the gap. For it not only would lead to closer relations with each other but also would make the world a better place.

CONCLUSION

We are beginning to explore the potential and value of the concept of human security. As a potential strategy or agenda it is already well on the way to changing institutions and the practice of global governance. The plethora of issues of human security is not new to international law. These issues include a focus on the individual; the waning of state sovereignty and the rise of new actors; the shift in our understanding of security; the need and risks of 'saving strangers' through humanitarian intervention; the reform of the Security Council; the conduct of complex peace missions; and the need for an adequate reaction to new threats. Using human security as a more comprehensive and integrative way to look at these issues is the root of the challenge to international law.

International law and its institutions have acquired a certain degree of experience in some of the areas of the human security agenda. The UN Charter as the principal document in international law offers space for both the security and the human aspects of the concept—concern for security as a concept based on the sovereign state and concern for the fate of the individual human being. Human security brings into focus the question of how we can place the security of the individual on the same level as the security of the state. Human security confronts international institutions and the law of international organizations, first and foremost with regard to the future role of the Security Council, which is troubled with the task of finally breaking away from post- World War II constraints and moving toward a system of guarantees for the security of people that is more comprehensive, consistent and predictable than at present. A human security approach might lead to the creation of new instruments for conflict prevention and conflict management. The human security debate will have repercussions for the role of non-state actors in international law as both providers of and a threat to human security. It will allow international law to reflect better the realities of today's world, which comprises a multitude of actors.

Human security has the potential to bring together fields that have traditionally been kept apart—human rights, humanitarian affairs, development, security, and others. International human rights law, humanitarian law, the law governing people on the move, and the international law on combating terrorism could be priority areas of concern for a human security approach to international law. The close, yet not fully explored, relationship between

human security and human rights and the possible mutual enrichment between the two deserves more attention.[32] The way in which human security can help fill the problematic gap between humanitarian law and human rights law in situations of armed conflict is another avenue of research.[33] Human security certainly is a concept of particular importance for people on the move, who are by their very nature insecure: refugees, asylum seekers, migrants, internally displaced people, and trafficked persons.[34] Finally, considering international terrorism as a threat to human security rather than as a reason for waging an all-out, indefinite war should allow for a more responsible and measured way to make the world a safer place.[35]

Human security – as both an academic concept and a political agenda that takes up, reinforces, and underlines ongoing developments in international law—has the potential to become a new organizing principle of international relations. In this respect, human security seems to be a natural step in further moving international law beyond being concerned with national security toward including the fate of individuals as the ultimate beneficiaries of law. As a value-based approach to security with a focus on the individual as the ultimate beneficiary of international law, human security will continue to contribute to normative changes in the international legal order.

[32]See, for example, Ramcharan, Human Rights and Human Security, Vol I

[33] See, for example, the presentation of the International Committee of the Red Cross to the Fourth Ministerial Meeting of the Human Security Network, available online at www.icrc.org/web/eng/siteeng0.nsf/iwpList98/7983AC11FCDDF96DC1256BFE004EB18D (accessed on 10.09.17)

[34] For example, Troeller, " Refugees, Human Rights and the issue of Human Security" Vol I

[35] See, for example, Wolfgang Benedek, " Human Security and Prevention of Terrorism," in Wolfgang Benedek Vol I

COMPARATIVE ADVERTISING AND GENERIC DISPARAGEMENT: A PROBE INTO ITS STATUS IN THE INDIAN LEGAL SYSTEM IN THE LIGHT OF RECENT CASES

*Pratyayee Saha & Rudrani Sengupta**

INTRODUCTION

Advertising means, the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods and service. Whereas, Comparative advertising is, any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

In the case of *Murugeshan* v.*Ramu Hosieries*[1], it has been held that advertisement is a step in the process of infringement to solicit customer in the name of the impugned trade mark and the advertisement is calculated to induce people to believe that such property is meant for marketing. Cause of action in such a case can be taken to arise in the place where the goods are marketed or where the mark is exploited[2]

The Trade Marks Act, 1999 makes *specific* provision about infringement of a mark in the context of any advertising of that trade mark if such advertising –

a) Takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or
b) Is detrimental to the distinctive character; or
c) Is against the reputation of the trade mark.[3]

Thus, the above three types of advertising as stated is prohibited under §29(8) of The Trade Marks Act, 1999. Any advertisement of a registered trade mark not in consonance with honest business practices or if it is detrimental to the distinctive character or the reputation of the trade mark, would come within the scope of this particular provision. It apparently combines the law of unfair competition as referred to in the WIPO treaty of 1967 and the elements hitherto covered in unfair trade practices of §36A of MTRP Act, 1969 (repealed)

* Authors are 4th year students at School of Law, KIIT University.
[1] 1999 PTC 183 (Mad-DB).
[2]Jolen Inc. v. Shobhanlal Jain, 2005 (30) PTC 385 (Mad-DB).
[3] The Trade Mark Act, 1999, § 29(8).

and the Consumer Protection Act, 1986. The use of others' trade mark in comparative advertising would also be protected by §30(1)[4].

The expression "honest practices" is not defined in the Act or the Rules. The European Court of Justice in *Holterhoff*v. *Freiesleben*[5], expressed the view that,

> "By its very nature, such a concept must allow for a certain flexibility. Its detailed contours may vary from time to time and according to circumstances and will be determined in part by various rules of law which may themselves change, as well as by changing perceptions of what is acceptable. However, there is a large and clear shared core concept of what constitutes honest conduct in trade, which may be applied by the courts without great difficulty and without any excessive danger of greatly diverging interpretations…"

The court further described the concept as;

> "Expressing a duty act fairly in relation to the legitimate interests of the trade mark owner, and aim as seeking to "reconcile the fundamental interests of a trade mark protection with those of free movement of goods and freedom to provide services in the common market" in such a way that the trade mark rights are able to fulfil their essential role in the system of undistorted competition which the Treaty seeks to establish and maintain."

The European Court further referred to Article 10*bis* of the Paris Convention for protection of Industry Property which uses the expression "honest practices in industrial or commercial matters." Article 10*bis* defines an "act of unfair competition" as one which is contrary to such practices. The said Article runs thus:

The following, in particular, shall be prohibited:

1. 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;

2. 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;

[4] *Id.*
[5] [2002] F.S.R.23, 362, P.376.

3. Indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

The Trade Marks Act, 1999 has made a comprehensive provision for honest use of competitors' trade marks, use of any trade mark in business papers or in correspondence or exchange of letters and advertising both in spoken and visual formats. A bare perusal and literal interpretation of §29(8)(c)[6] makes it clear, that a statement about a competing trade mark, if it denigrates or causes disrepute to the impugned trade mark, would constitute infringement. Such a statement or advertisement should be restrained by the court. However, the problem arises when the statement is pleaded as truthful, whether it would then constitute infringement because it denigrates, is an issue which lacks clarity. It might be difficult to make a court accept what the truth is as it may become too contentious. Even the law may not permit private persons to settle this issue under the trade mark law, as the government or state may deal with untruthful or defamatory situations in the public interest under public law. The question whether a factually correct statement can be misleading was contemplated under §36A (1)(x) of the MRTP Act (repealed), it was answered in affirmative by the MRTPC in *Win Medicare* v. *Reckitt Benckiser*.[7]

COMPARATIVE ADVERTISING

Comparative advertising is advertisement where a party advertises his goods or services by comparing them with the goods and services of another party. This is generally done by either projecting that the advertiser's product is of the same or superior quality to that of the

[6] The Trade Marks Act, 1999, §29(8)(c).

[7]2002 (24) PTC 686 MRTPC; Whether under the existing principle as applied to trade mark cases, the court shall declare it as disparagement cannot be said with certainty, though such inclination is shown in one or two cases. The observations of the Supreme Court in Lakhanpal National v. MRTP Commission, AIR 1989 SC 1692, on the basis on which MRTPC had pronounced in their judgements, read as follows:

> "The issue cannot be resolved by merely examining whether the representation is correct or incorrect in the literal sense. A representation containing a statement apparently correct in the technical sense may have effect of misleading the buyer by using tricky language….It is therefore, necessary to examine whether the representation complained of contains the elements of misleading a buyer…Another way of stating the rule is to say that substantial falsity is on the one hand necessary and on the other hand adequate, to establish a misrepresentation and that where the entire representation is a faithful picture or transcript of the essential facts no falsity is established, even though there may have been any number of inaccuracies in unimportant details. Conversely, if the general impression conveyed is false the most punctilious and scrupulous accuracy in immaterial minutiae will not render the representation true"

Applying the test the MRTPC had concluded that the results as shown in the comparative table are bound prejudice the readers as far as 'betadine' was concerned. The commission added:

> "from the above ruling, it is abundantly clear that even a technically correct statement can be misleading and it all depends on the manner of presentation and the language used."

compared product or by denigrating the quality of the product compared. New or unknown brands benefit most from comparative advertising, because of the potential for the transfer of the intangible values associated with the reputed compared brand. Reputed brands keep agitating about the undue benefit which inures to such unknown or new brand and some practices have successfully objected to by a judgement in the ECJ,[8] which has been a matter of debate in Europe. There is an underlying assumption that the comparative advertising benefits the consumer as the consumer comes to know of the two products and their comparative features/merits.

Comparative advertising would include within its ambit, any advertising which could explicitly or by implications identifies a competitor or goods or services offered by a competitor.[9] The comparative advertising is deemed beneficial to the public interest. Whereas, §30(1) of the Trade Marks Act, 1999 seeks to protect the use of a registered trade mark by any person for the purpose identifying the goods or services as those of the proprietor, subject to the condition that the use is bona fide. In other words, the use must be in general accord with the trade practices and should not be taken to be an unfair advantage of the reputation of the mark or be detrimental to its distinctive character. Comparative advertising, or at least proper comparative advertising, is presumably to be taken as being honest, not unfair. It should be exerted for the purpose of identifying the genuine goods or services of the proprietor.

It is possible that by virtue of an advertising campaign a manufacturer gives his product a distinctive character, which the market exclusively associates with. The test is to inquire whether there is a likelihood of confusion resulting from the manner which the defendant's product has been advertised and whether the plaintiff is entitled to exclusive use of the idea. Laudatory epithets may be used by a manufacturer but to claim exclusivity a higher element of distinctiveness has to be demonstrated.[10]

Since comparative advertising has become a commercial practice in India it has been permitted as far as the comparison is concerned, where:

(a) It is not misleading…;

(b) It compares goods or services meeting the same needs or intended for the same purpose;

[8]L'oreal SA v. Bellure, NV [2010] EWCA CEV 535.
[9]*See* Art. 2(1) and 2(2)(a) of the Advertising Directive EEC.
[10]Glaxosmithkline Consumer Healthcare Ltd. v. Abobtt Healthcare Pvt. Ltd., 2009 (40) PTC 437 (Cal).

(c) It objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) It does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trademarks, trade names, and other distinguishing marks, goods or services and those of a competitor;

(e) It does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(f) For products with designation of origin, it relates in each case to products with the same designation;

(g) It does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation or origin of competing products;

(h) It does not present goods or services as imitations or replicas of goods and services bearing a protected trade mark or trade name.

This basically forms the pith of the laws prevalent in Europe, but are primordial in the context of the provisions of §29(8)[11].

In *Rickitt & Colman of India Ltd.* v. *M.P Ramachandran*[12], it was held that:

> "What he can claim is only that his product and his technology is superior. While comparing the technology and the products manufactured on the basis thereof, he can say that by reason of the new superior technology available to him, his product is much superior to the others. He cannot, however, while so comparing say that the available technology and the products made in accordance therewith are bad and harmful."

The following 5 principles were laid down by Calcutta High Court as a guiding factor for the grant of an injunction in such matters:

> "I. A tradesman is entitled to declare his goods to be the best in the world even though the declaration is untrue.

[11]The Trade Marks Act, 1999, §29(8).
[12] 1999 (19) PTC 741 (Cal).

II. He can also say that my goods are better than his competitors', even though such statement is untrue.

III. For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of the others.

IV. He, however, cannot while saying his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words, he defames his competitors and their goods, which is not permissible.

V. If there is no defamation, to the goods or to the manufacturer of such goods no action lies, but if there is defamation, an action lies for recovery of damages for defamation, then the court is also competent to grant an order of injunction restraining repetition of such defamation."

The above principles were also adopted by the same court in *Rickitt& Coleman of India Ltd.* v. *Kiwi T.T.K. Limited*[13].

In *Dabur India Limited* v. *Emami Ltd*.[14], where the advertisement sought to be conveyed by the T.V. commercial that the consumption of Chayawanprash during the summer months was not advisable and 'Amritprash' was more effective substitute for 'Chayawanprash' was held "clearly disparaging to the product of the plaintiff as there is an element of insinuation present in the said advertisement." Temporary injunction was granted against the commercial Telecast. It was further stated that even if there was no direct reference to the product of the plaintiff and only a reference is made to the entire class of 'Chayawanprash' in its generic sense, disparagement is possible.

A statement made by one trader that his goods are superior to those of a rival (mere puffing) even if it is false and known to be so and causes damage to the other is not actionable, for courts of law cannot be converted into advertising agencies for trying the relative merits of rival productions. However, such "privilege" is confined to those imprecise commendations which are a common part of advertising and to which a reasonable person does not attach very much importance. Accordingly, if the defendant chooses to form his comparisons in the

[13] 1996 (16) PTC 393.
[14] 2004 (29) PTC 1.

form of scientific tests or other statements of ascertainable facts, he will be liable if they are proved untrue.

One has to look at whether the advertisement merely puffed the product of the advertiser or in the garb of doing the same, directly or indirectly contended that the product is inferior. It was sought to be contended that insinuations against all are permissible though the same may not be permissible against one particular individual[15].

On the other hand, in *Godrej Sara Lee Ltd.* v. *Reckitt Benckiser (I) Ltd.*[16] it was observed that defendants' advertisement was that its product was better in the sense that it was more convenient to use the same for destroying two kinds of insects at the same time. There was no negative reference to the plaintiff's product, nor was it defamatory.

In *Boehringer Ingelhem Ltd.* v. *Vetplus Ltd.*[17] it was held that an injunction would only be granted if the comparative advertisement of the defendant was not "in accordance with honest practices in industrial and commercial matters". That is something which would be rare to determine at an interlocutory stage and certainly, in this case, could only be determined after trial with expert witnesses of opinion if not of fact also. In this case, interim injunction was hence, refused.

DISPARAGEMENT

The New International Webster's Comprehensive Dictionary Defines disparage/disparagement to mean:

> "to speak of slightingly, undervalue, to bring discredit or dishonour upon, the act of depressing, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation."

The Concise Oxford Dictionary defines disparage as under, to bring discredit on, slighting of and depreciate. Disparage in the common parlance means derogating or degrading or a condition of low estimation or valuation. To decide the question of disparagement we have to keep the following factors in mind:

a) Intent of Commercial

[15]Rickitt & Colman of India Ltd. v. M.P Ramachandran, 1999 (19) PTC 741 (Cal).
[16] 128 (2006) DLT 81.
[17] (2007) FSR 29, 737.

b) Manner of Commercial

c) Storyline of the commercial, and

d) The message sought to be conveyed by the commercial

Out of the above, "manner of the commercial" is of utmost importance. If the manner is ridiculing or condemning the product of the competitor then it amounts to disparaging, but, if the manner is only to show one's product is better or the best without derogating other's product, then that is not actionable[18]. In the electronic media, the disparaging message is conveyed to the viewer by repeatedly showing commercials every day thereby ensuring that the viewer's get a clear message as the commercial leaves an indelible impression on their mind. It is apparent that the disparagement is squarely covered under §29(8) (b) and (c) and the perpetrator is hit by §29(8)(a) of the Trade Marks Act, 1999.

The following Legal Principles are generally followed to decide whether the advertising is merely harmless comparative advertising or whether it denigrates the rival product giving a valid cause of action:

1. A manufacturer of a disparaged which though not identified by name can complain of and seek to injunct such disparagement[19].
2. Generic disparagement of a rival product without specifically identifying or pinpointing the rival product is equally objectionable.

In *S.C. Johnson & Son, Inc.* v. *Buchanan Group Pty Ltd*.[20] restraining the defendants from using the impugned advertisement, the High Court held that:

> "Every comparison does not necessarily amount to disparagement. Consequently, what is required to be answered is: whether there is denigration of plaintiff's product"

In the case at hand, both the plaintiff's and defendant's products were kitchen cleaners. Therefore the efficacy in cleaning tough kitchen stains with minimum effort should have been the core objective of manufacturing a product of such kind. The impugned advertisement undoubtedly shows that "CIF Cream" which is the defendant's product

[18]Pepsico Inc. v. Hindustan Coca Cola, 2003 (27) PTC 305 (Del-DB).
[19] Reckitt Benckiser (India) Ltd. v. Hindustan Lever Limited, 2008 (38) PTC 139 (Del).
[20] 2010 (42) PTC (Del).

achieves this objective quickly with least amount of effort in comparison to the product of its competitor. The impugned advertisement *prima facie* does seem to denigrate the plaintiff's product. Hence, the learned court decided to restrain the defendant from using the commercial.

In *Dabur India Limited* v. *Colgate Palmolive India Ltd.*[21] the issue of Trade Rivalry which lead to advertisements in which the product of an advertiser is extolled and the rival product is depreciated was considered. In that case, the TV advertisement complained that a cine star is seen stopping people from purchasing Lal Dant Manjan Powders. He further informs them of the ill-effects of Lal Dant Manjan by rubbing it on the purchaser's spectacles which leaves marks which are termed by him as being akin to sand-papering. He also endorses the Defendant Colgate's Tooth Powder as being 16 times less abrasive and non-damaging to the spectacles. He is heard telling the purchaser that it is easy to change spectacles but not the teeth. While granting the injunction and restraining the defendants from telecasting the TV Commercial, the judge held that:

> "Generic disparagement of a rival product without specifically identifying or pinpointing the rival product is equally objectionable. Clever advertising can indeed hit a rival product without specifically referring to it. No one can disparage a class or genre of a product within which a complaining plaintiff falls and raise a defence that the plaintiff has not been specifically identified."

In *Dabur India Ltd.* v. *Wipro Limited*[22], while comparing two products, the advertised product will but naturally have to be shown as better. The law, as accepted by the court, is that it is permissible for the advertiser to proclaim that its product is the best. This necessarily implies that all other similar products are inferior. In such a case there is no disparagement of the plaintiff's product and no injunction.

A. PUFFING UP

"Puffing" is exaggerated advertising, blustering and boasting on which a reasonable buyer would rely on. And is not actionable. Puffing may also consist of a general claim of superiority over comparable goods. But, that comparison should be so vague that it can be understood as merely the seller's expression of opinion. An exaggerated advertisement

[21] 2004 (29) PTC 401.
[22] 2006 (32) PTC 677 (Del).

which is placed with the intent to influence the customer's buying decision cannot be dismissed as puffing up.

It is to be stressed that:

a) Between clear-cut cases of permissible comparative advertising and impermissible "rubbishing" of a rival's product there may yet be a wild field of cases, and

b) The dividing line in such cases would have to be drawn on the basis of the test – "whether a reasonable man would take the claim of the alleged slander seriously, or take it with the proverbial 'large pinch of salt' and dismiss it as mere puffery". If it is the former then, it is a case of disparagement and if it is the latter, then it is a case of mere puffery which is not actionable.

A disparagement, even if generic is a disparagement and can be restrained at the behest of the affected party.[23] The true comparative statements are allowed. Comparative statements should stop discrediting or denigrating the other product. The Delhi High Court in *Reckitt & Coleman of India* v. *Kiwi T.T.K*[24], explained the concept of comparative advertising by stating that:

> "a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing of his goods and the same will not give a cause of action to the other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation or disparagement of the goods of the manufacturer in so doing. However, a manufacturer is not entitled to say that his competitor's goods are bad as to puff and promote his goods,"

B. TRADE LIBEL- MALICIOUS FALSEHOOD

The Defendant Trader has to bear in his mind that his advertisement does not fall within the four corners of what constitutes in law, malicious falsehood. Thus observing the High Court of Delhi in *Dabur India Ltd.* v. *Colortek Meghalaya Pvt. Ltd.*[25] referred to the

[23]Karamchand Appliances v. Sri Adhukari Brothers, 2005 (31) PTC 1 (Del).
[24] 63 (1996) DLT 29.
[25] 2010 (42) PTC 88 (Del).

following principles evolving in English Cases, like *White* v. *Mellin*[26] and *The Royal Banking Power Company* v. *Writ Grossley & Co.*[27]:

1) Trader is entitled to say that his goods are the best in the world. In doing so, he can compare his goods with another.

2) While saying that his goods are better than those of his rival traders he can say that his goods are better "in this or that or other respect".

3) Whether the impugned statements made to disparage the rival trader's goods is one which would be taken 'seriously' by a 'reasonable man'. A possible alternative to this test would be whether the defendant has pointed out the specific defect or demerit in the plaintiff's goods.

4) A statement by the defendant puffing his own goods is not actionable.

The court in the case of *The Royal Banking Power Company* v. *Writ Grossley & Co.*[28] held that in an action for malicious falsehood the plaintiff must necessarily plead and prove the ingredients of malicious falsehood, which are:

1) That the impugned statement is untrue;

2) The statement is made maliciously, that is, without just cause or excuse;

3) The plaintiffs have suffered special damage thereby.

Comparative advertising in which a trader makes express reference to the registered trade mark of a competitor, it constitutes infringement. In *Vodafone Group PLC* v. *Orange Personal Communications Services Ltd.*[29]the action was for malicious falsehood and infringement of the registered Trade mark. The Chancery Division while dismissing the plaintiff's case held that comparative advertising is permitted so long as such advertisement was not detrimental to and did not take unfair advantage of a registered Trade mark. The case was decided under §10 of the U.K. Trade Marks Act 1994.

In *Reckitt Benckiser (India) Ltd.* v. *Hindustan Lever Limited*[30] the matter concerned the disparagement of the plaintiff's soap sold under the Trade Mark "DETTOL" in

[26] (1895) AC 154 HL.
[27] (1901) 18 RPC 95.
[28] (1901) 18 RPC 95.
[29] (1997) FSR 34.
[30] 2008 (38) PTC 139 (Del).

the defendant's advertisement for promotion of its soap "LIFEBUOY". The court held that the advertisement was not merely to promote the superiority of the defendant's lifebuoy soup but to disparage plaintiff's Dettol soap, hence, injunction was granted against the Defendants.

I. POSITION IN U.K/EEC

The extent to which comparative advertising is permitted,[31] so far as comparison is concerned, where:

a) It is not misleading according to Art. 2(2), 3, 7(1);

b) It compares goods or services meeting the same needs or intended for the same purpose;

c) It objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

d) It does not create confusion in the market place between the advertiser and the competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor;

e) It does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor;

f) For products with designation of origin, it relates in each case to products with the same designation;

g) It does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

h) It does not present goods or services as imitations or replicas of goods or services bearing protected trade mark;

In short, Comparative advertising is permitted as long as such advertisement is not detrimental to and does not take any unfair advantage of a registered trade mark.[32] The Authoritative British Airways Case on Advertisements;

[31]EEC Article 3(1), *Also see* Pepsico v. Hindustan Coca Cola, 2003 (27) PTC 307.

In *British Airways Plc* v. *Ryanair Ltd.*,[33] Jacob J., for the Chancery Division Summarized the position as follow;

a) The primary objective of §10(6)[34] of the UK 1994 Act is to permit comparative advertising;

b) As long as the use of competitors mark is honest, there is nothing wrong in telling the public of the relative merits of the competing goods or services and using the registered trade mark to identify them;

c) The onus is on the registered proprietor to show that the factors indicated in the proviso to §10(6) exists;

d) There will be no trade mark infringement, unless the use of the registered trade mark is not in accordance to the honest practices;

e) The test is objective: would a reasonable reader be likely to say, upon being given the full facts, that the advertisement is not honest? ;

f) Statutory or industry agreed codes of conduct are not a helpful guide as to whether an advertisement is honest for the purpose of §10(6). Honesty has to be gauged against what is reasonable to be expected by the relevant public of advertisement for goods or services in issue;

g) It should be borne in mind that the general public are used to the way of advertisers and expect hyperbole;

h) The 1994 Act does not impose on the courts an obligation to try and enforce through the back door of trade mark legislation a more puritanical standard than the general public would expect from advertising copy;

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[32] Under Article 7(2) of Advertising Directive, Member states of EEC may not provide more extensive protection against comparative advertising, as far as the comparison is concerned. Vodafone Group PLC v. Orange Personal Communications Services Ltd., is a celebrated case on Comparative advertising in UK which will always have to be quoted as a starting point as every next case is summarizing, expanding or giving new interpretations to the views in the *Vodafone Case*. In the case, the action was for malicious false rule and infringement of the registered trade mark. The Chancery Division while dismissing the plaintiff's case had held that comparative advertising is permitted so long as such advertising was not detrimental to and did not take unfair advantage of a registered trade mark. The case was decided under s. 10 of the UK Trade Marks Act, 1994.

[33] F.S.R. (2001) 541, p. 551: [2001] ETMR 24.

[34] §10(5) & 10(6) of UK are analogous provisions to §29(6) (8) read with §30 of Indian Trade Mark Act, 1999. The legislations are not replica of each other, but in substance enact similar provisions though in quite different language.

i) An advertisement which is significantly misleading is not honest for the purposes of §10(6);

j) The advertisement must be considered as a whole;

k) As a purpose of the UK 1994 Act is to positively permit comparative advertising, the court should not hold words used in the advertisement to be seriously misleading for interlocutory purposes, unless on a fair reading of them in their context and against the background of the advertisement as a whole they can really be said to justify that description;

l) A minute textual examination is not something upon which the reasonable reader of an advertisement would embark upon;

m) The court should, therefore, not encourage a microscope approach to the construction of a comparative advertising on a motion for interlocutory relief.

DISPARAGEMENT AND PASSING OFF

In case of passing off the comparison is of the rival products having an established mark, trade dress or get-up. Familiarity with the established mark, trade dress or get up is presumed, because, it is this familiarity that the person intending to pass off his goods as those of the famous or more popular mark, exploits. In case of disparagement, the one who disparages another's product does not seek to make his product similar to the disparaged product, but to distinguish it from the disparaged product. Moreover, whether to disparage a product under the freedom of speech and expression as conferred by the Constitution of India, has been questioned. In the case of *Tata press* v. *MTNL*,[35] the court had said that though advertisement is a commercial speech, it does not permit defamation. In another case, Madan Lokur, J. added that it would be a little farfetched to say that an advertisement has the liberty to disparage the product of its competitor without any check, under the garb of freedom of speech.[36]

In *ICC Development (International) Ltd* v. *Arvee Enterprises*[37], the plaintiff filed an application for registration of words 'ICC Cricket World Cup South Africa 2003' and the logo and the mascot 'DAZZLER' in India and worldwide. The plaintiff was a corporation

[35] AIR 1995 SC 2438.
[36] Dabur v. Wipro, 2006 (32) PTC 677 at 681.
[37] 2003 (26) PTC 245 (Del).

incorporated to own control and all commercial and other intellectual property rights of the events organised by the International Cricket Council. It had all the rights for the "World Cup 2003". The defendant was using the word 'Philips: Diwali Manao World Cup Jao' and 'Buy a Philip Audio System and win a ticket to The World Cup'. The plaintiffs argued that the defendants were intentionally using those words, inserting a pictorial representation of ticket with an imaginative seat and gate number saying 'Cricket World Cup 2003', in the advertising campaign and that it amounted to 'passing off' as also 'unfair competition', and 'ambush marketing'. In so far as the word 'world cup' was concerned, it was declared to be a generic word, having a dictionary meaning, and was thus incapable of being used as a brand name. The defendant had not used the plaintiff's logo or mascot 'Dazzler' but merely offered the tickets as prizes in the advertising campaign. The plaintiff failed to make out a prima facie case for grant of ad interim injunction, and the same was refused.

The concept of Ambush Marketing is distinguishable from passing off and the Delhi High Court had observed thus:[38]

> "In the passing off action, there is an element of overt or covert deceit whereas ambush marketing is an opportunistic commercial exploitation of an event. The ambush marketer does not seek to suggest any connection with the event but gives his own brand or other insignia, a larger exposure to the people, attached to the event, without any authorization of the event organizer. The organizer calls it ambush marketing by the defendant, for promoting his brand or product without incurring financial obligation like the official sponsors. The ambush marketing may be inside the stadium like clash between official and personal endorsement or outside the stadium. However, in such cases there is no deception, therefore, the defendant's conduct cannot be categorised as wrongful or against public interest. It is part of freedom of speech and expression as guaranteed under Art. 19(1)(a)."

DILUTION

Disparagement and tarnishment in advertising causes dilution of a trademark and thus the doctrine of dilution is an independent and distinct doctrine of infringement and passing off in contrast to similarity of marks or trade dress. The underlying object of this doctrine is that there is a presumption that the relevant customers start associating a trademark with a new

[38] 2003 (26) PTC 245 (Del).

and different source of goods or services. It, therefore, results in smearing or partially affecting the descriptive link between the mark of the prior user and his goods. In other words, such kind of dilution is not a fair practice that is expressed in trade and commerce as not only does it reduce the force of value of the trademark but it also gradually tampers the commercial of the mark slice by slice.

INFRINGEMENT THROUGH ADVERTISING: INDIAN COURTS

1. In *PepsiCo Inc.* v. *Hindustan Coca Cola*,[39] pepsi, the registered owner of the trademark PEPSI, PEPSI COLA and GLOBAL DEVICE which is the original artistic device and copyright in the slogan YEH DIL MANGE MORE used the slogan along with the mark PEPSI for their soft drinks in all their advertisements. The defendants issued four ads to promote their brands THUMS UP and SPRITE. These ads were alleged to be bad as disparaging or infringing their goods or violating their rights and as such injunction was sought against their publication. The defendants had claimed that their ad was aimed at poking fun at the ads of others and the same permissible in law. The single judge had found the ad as actionable. When puffing or poking amounts to denigration of the goods of the competitor, it is actionable.

In appeal USHA MEHRA and O DWIVEDI, JJ. said: by calling the cola drink "yeh bacchon wali hain, bacchon ko yeh pasand ayegi,.. wrong choice baby," the court held that the respondents depicted the commercial in a derogatory and mocking manner. It cannot be called puffing up. The message was that kids who wanted to grow should not drink PEPSI, they should grow up with THUMS UP. The manner in which the message was conveyed did show a disparagement of the appellant's product. The appeal court in Pepsico held that it could be concluded that when the respondent, in the commercial, depicted the bottle with the Mark 'PAPPI with the global device' it was a clear insinuation by the respondent against the product of the appellant, i.e., PEPSI was meant for children only. It was true that by alleging a drink to be meant for children, it could not be termed as denigration, but the manner in which the boy was depicted as embarrassed was calculated to show the drink in low estimation.

[39] 2001 PTC 699 (Del); appeal decision in 2003 (27) PTC 305 DB.

Key elements to establish Infringement through disparagement[40]: In order to succeed in an action for infringement where disparagement is alleged, the plaintiffs will have to establish the following key elements;

a) That the defendant made a false or misleading statement of fact about the plaintiffs product;

b) That the concerned statement either deceived or had the capacity to deceive, a substantial segment of potential consumers;

c) The deception was material as it was likely to influence consumer's purchasing decisions.

2. In *Karamchand Appliances* v. *Sri Adhukari Brothers*,[41] the defendants commercial had shown the pluggy device of the plaintiff and dubbed the same an obsolete 15 years old method of chasing away mosquitoes. The advertisement claimed that the plaintiff's product was a latest machine available in the market which chased away mosquitoes at twice the speed. The court found the advertisement as disparaging and restrained the telecast of the advertisement. In the appeal, the DB had allowed the airing of any edited version of the commercial which did not disparage the goods of the respondent.

The case related to the modified commercial in which the defendant claimed that it was not showing anything similar to the pluggy device of the plaintiff. Upon scrutiny, the defendant was unable to establish that the pluggy device shown in the advertisement was 15 year old. The court restrained the telecast of the modified commercial, not only because the commercial disparaged the product manufactured and marketed by the plaintiff, but also because the claims made by the defendant about any technology advantage justifying the disparagement were not substantiated. Thus a disparagement even if generic is a disparagement and can be restrained at the behest of an affected party.[42]

3. On the 16th of June 2017, the Bombay High Court in the case of *Hindustan Unilever Limited (HUL)* v. *Gujarat Cooperative Milk Marketing Federation Ltd. (Amul)*[43] held that an action for disparagement of a plaintiff's product can be sustained against an advertiser, even if the advertisement is directed towards an entire class of products,

[40] Reckitt & Colman India v. M.P. Ramachandran, 1999 PTC 741.
[41] 2005 (31) PTC 1 (Del).
[42] Karamchand Appliances v. Sri Adhukari Brothers, 2005 (31) PTC 1 (Del).
[43] 2017 (71) PTC 396 (BOM).

in which the plaintiff's product falls. Even if no direct reference is made to the plaintiff's product and a generic reference is being made to an entire class, the action of disparagement can be upheld. Gujarat Cooperative Milk Marketing Federation, which markets Amul ice cream, was asked to stop telecasting certain misleading television advertisements which aimed to disparage the entire category of frozen desserts.

Hindustan Unilever Limited, the plaintiff has been carrying on the business of manufacturing and selling Fast moving consumer goods including frozen desserts and ice cream under the mark 'KWALITY WALLS'. KWALITY WALLS had been the first ever brand of Ice-creams being introduced to the Indian Market on a large commercial scale and till date, it shares a very outstanding status amongst the consumers. The products sold under the mark of KWALITY WALLS demand unblemished reputation and goodwill because these products are widely known for their quality and taste. These products have met all the requirements of the law, rules and regulations including the food safety requirements, hence have an impeccable command over the market. A civil suit for generic disparagement was brought by the plaintiff where they alleged that, since 4th of March 2017, Gujarat Cooperative Milk Marketing Federation had been airing television commercials which had been stating factually incorrect statements. These statements, according to the plaintiffs had created scepticism in the minds of the target audiences.

Hindustan Unilever Limited contended that the storyline, content, intent and the manner of the portrayal of the two Television Commercials by Amul implied that all frozen desserts contained hydrogenated vegetable oil (Vanaspati) which was thereby unsuitable for public consumption, especially children. The commercials portrayed a child being treated for a dental issue and thereby the father being instructed to feed the ailing child ice-cream and not frozen desserts as they contain Vanaspati.

Amul subsequently contended that their commercial was not directed towards the plaintiffs as no specific reference or mention was made. They stated that it was absolutely legitimate for them to show that all frozen desserts contain either Vanaspati or Vanaspati Tel. Further, Hindustan Unilever Limited claimed that 70% of the manufacturer of Frozen Desserts do not use Vanaspati, hence it was an extremely derogatory remark. Such television commercials send wrong implications to the public at large. Amul had also failed to place any befitting record to prove that all manufacturers use Vanaspati Tel. In fact, they could furnish material against only one manufacturer which mentioned Vanaspati in their ingredients. But, one manufacturer is not sufficient to mar the class of frozen desserts on the

whole. Ultimately, the Bombay High Court held Amul guilty of disparaging a rival product and subsequently running a negative campaign.

DEFENCES

The law under §30 of The Trade Mark Act, 1999 specifically excludes certain acts as not constituting infringement. It is proposed to be amplified by explicitly stating that there will be no infringement if the use of a mark is in accordance with honest practices in industrial or commercial matters and is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of a trade mark.

There is no infringement in the following cases:-

1. Where the use is in relation to goods or services to indicate the kind, quality, quantity, etc., of the goods or of rendering of services.

2. Use of the trade mark in a manner outside the scope of registration where a trade mark is registered subject to conditions or limitations.

3. Where a person uses the mark in relation to goods or services for which the registered owner had once applied the mark, and had not subsequently removed it or impliedly consented to use it.

4. A trade mark registered for any goods may be sued in relation to parts and accessories to other goods, or services and such use is reasonably necessary and its effects if not likely to deceive as to the origin.

5. The use of a registered trade mark being one of two or more registered trade mark which are identical or similar, in exercise, in exercise of the right to the use of that registered trade mark.

§30(1)(a)[44] enacts to the effect that there will be no infringement if the impugned use of the mark is in accordance with "honest practices" in industrial or commercial matters. There isno definition of the expression in the Act to explain as to what constitutes as "Honest practice". §11 of the U.K Act 1994 also uses similar expression, as also Article 6(1) of the Trade mark Directive of EEC. The precise elimination of "honest practices" is of course not given in the Trade mark Directive. By its very nature, such concept must allow for a certain flexibility. Its

[44] The Trade Marks Act, 1999, §30(1)(a).

detailed contours may vary from time to time and according to circumstances, and will be determined in part by various rules of law which may themselves change, as well as by changing perceptions of what is acceptable. However, there is a large and clear shared core concept of what constitutes honest conduct in trade, which may be applied by the courts without great difficulty and without any excessive danger of great diverging interpretations.

Article *10bis* of the Paris Convention for the Protection of Industrial Property (1967) refers to the concept of 'honest practices' and provides that any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. The article expressly declares that the following acts, in particular, should be prohibited:

1. 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;

2. 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;

3. Indications or allegations the use of which in the course of Trade is liable to mislead the public as to the nature, the manufacturing process, the characteristic, the suitability for their purpose, or the quantity, of the goods.

In *BMW case*[45], the court described the concept as expressing a duty to act fairly in relation to legitimate interests of the trade mark owner, and the aim as seeking to:

> "Reconcile the fundamental interests of trade mark protection with those of free movement of goods and freedom to provide services in the common market in such a way that trade mark rights are able to fulfil their essential role in the system of undistorted competition which the Treaty seeks to establish and maintain."[46]

[45]BMW v. Deenik, [1999] AII E.R. (EC) 235.
[46]Micheal Holterhoff v. Ulrich Freiesleben, [2002] E.T.M.R. 7,66.

In *Aktiebolager Volvo* v. *Heritage (Leicester) Ltd.*[47], the Chancery Division found:

> "It appears to be now well settled that the test of honesty for the purposes of the proviso is one that has to be asked in relation to that test in the present case is whether a reasonable motor service provider would think the use complained of in the present case, to be honest, or, rather, in accordance with honest practices in that business (see *Cable & Wireless PLC & Another v. British Telecommunications PLC*[48])."

The court further held that:

> "the application of the proviso namely 'the use in accordance with honest practices in industrial and commercial matters' involves "looking at the particular use complained of as being an infringement of the relevant trade mark and determining whether a reasonable person in the trade concerned, that is to say, in this case, the trade of motor car service provider, knowing all the relevant facts that the defendant knew, would think it an honest use of the trade mark concerned- that is to say, honest use in the commercial activity in which such a trader is involved. That, in my judgement, must involve considering all the circumstances surrounding the use complained of and the context in which that use was made."

In the aforesaid case, the court referred to the case of *BMW* v. *DEENIK*[49], where the question was whether a trader, not being an authorized dealer, in that case, in BMW Motor Cars, was entitled to use the name BMW being a registered Trade Mark of the BMW Manufacturing Company, in the context of holding itself out as having specialized expertise in serving BMW cars. In its conclusion, the court said thus,

> "Articles 5 to 7 of First Directive 89/104 …, and those, as I understand it, are articles which were not incorporated into the English 1994 Act in §§6, 10 and 11….Do not entitle the proprietor of a Trade mark to prohibit a third party from using the mark for the purpose of informing the public that he carried out the repair and maintenance of goods covered by that Trade Mark and put on

[47] F.S.R. (2000) 252.
[48] (1998) F.S.R. 383 (Ch. D).
[49] (1999) ALL E.R.(D) 183.

> the market under that mark by the proprietor or with his consent, or that he has specialized or is a specialist in the sale or repair and maintenance of such goods….unless the mark is used in a way that may create the impression that there is a commercial connection between the other undertaking and the trade mark proprietor, and in particular that the resellers business is affiliated to the trade mark proprietor's distribution network or that there is a special relationship between the two undertakings.

In the *Volvo case*, the court ruled that the defendant used the plaintiff's Volvo mark which might create and indeed was likely to create the impression that there was a continuing commercial relation or connection between the defendant and Volvo. Therefore the use of the word Volvo outside the defendant's premises and on the letter head stationery in the manner in which it has been used constituting infringement of the claimants service trade mark and as such they were prevented from enjoying the benefits of the proviso, by the fact that the use concerned was not in accordance with honest practices in industrial or commercial matters.

CONCLUSION

After ample amount of deliberations and research, we can conclude by saying that Comparative Advertising can be a malediction as well as a boon. It seems that comparative advertising holds eminent stature, yet is a matter entailing perennial debates and incessant contradictions. The present standing of comparative advertising with respect to its rival products is now a very well settled principle in consonance to the judicial precedents as well as with regards to the legal provisions. A tradesman can make fallacious declarations about his product being the best or better than that of his competitors. Moreover, can also make comparisons with regard to the advantages of his goods to that of his competitors'. But the law hinders him from saying that his competitors' goods are bad or inferior. Such comparative advertising thereby not only misleads the consumers but, is also violating the other traders' intellectual property right. In the light of which, it is actionable when the words go beyond a mere puff and constitute untrue statements of fact about a rival's product.[50]

[50]HALSBURY'S LAWS OF ENGLAND 278 (4th ed., 2006)

The finding in the decision of the *Delhi High Court in Dabur India Ltd.* v. *Wipro Limited*[51] is that defendant can claim his product to be better than that of the plaintiff but cannot say that the plaintiffs' product it inferior to that of the defendants. Through several judicial pronouncements, it has been made very clear that even if comparative advertising is done it should be fair and should not disrepute either the trade mark or the product of the competitor. The position of comparative advertising and Generic disparagement is almost the same throughout the world. Although in the garb of infringement it sometimes provides aid in increasing the consumer awareness as well as allows an advertiser to establish his brand in the market by propagating that his products are better than that of his competitors. But, at the same time, there needs to be certain rules and regulations in order to prohibit the misuse/abuse and to maintain a proper check and balance.

The interest of the public being of the utmost importance the court can never let the trade rivalries be settled in the market (as the court would not have the technical knowledge to decide as to which product is better), but that would have an ailing effect on the public at large. Because on one hand, it increases the awareness among the public but on the other hand misleading or disparaging advertisements can affect the public at large immensely. *In Pepsi Co. Inc. and others* v. *Hindustan Coca Cola Ltd.*[52], wherein it was held that though boasting about one's product is permissible, disparaging a rival product is not, whilst glorifying its product, an advertiser may not denigrate or disparage a rival product.

The trade mark laws have evolved to a great extent over a period of time, it now provides protection at every stage to the trade mark owners. With the advancement of science and technology it is duly expected that the users are to be reasonably well aware before they register their own trade mark, by virtue of which there can be no one with even a lightly similar mark which could create confusion for the customers. The trade mark owners are to be careful about their mark even beyond their territorial limits.

[51] 2006 (32) PTC 677 (Del).
[52] 2003 (27) PTC 305 (Del-DB).

TRADEMARK INFRINGEMENT THROUGH KEYWORD ADVERTISING IN INDIA: ISSUES AND CHALLENGES

*Chiranjeev Gogoi**

INTRODUCTION

The number of internet users all over the world has surpassed the 3 billion mark in 2014[1] and India alone contributes more than 300 million people to this number.[2] The Internet has undoubtedly become an inseparable part of people's lives and with it, the dependence on Google for acquiring any kind of information. Google is considered as the best search engine worldwide and this makes it a convenient platform for advertising of goods and services. It has banked upon this advantage and started its advertising business, called the Ad Words program which brings in the essential segment of its profit.

This program does not make users pay to conduct searches; rather, advertisers have to pay to have their advertisements appear in connection with particular search terms or results.[3] When a computer user inputs this particular term into the search engine, the search engine will create results according to the search engine parameters.[4] This implies that the advertisers are essentially required to buy the search terms for which their advertisement will be triggered on being searched. Other search engines like Yahoo have also adopted similar business programs of selling search terms to advertisers on the basis of the highest bidder for each term. When people enter a search term in a search bar, Google shows two types of results: the search results and sponsored links or an actual excerpt from the webpage, and the page's URL.[5] The sponsored links offer text advertisement over and above the side of the organic search results pages.

The cause of controversy arises from the AdWords program and other similar programs for the opportunity it provides to create confusion between competing trademarks leading to its infringement. Trademark infringement occurs when a person uses a mark which is identical

* The Author is currently an Associate at India Juris Law Firm.

[1] World Internet Usage and Population Statistics November 15, 2015, INTERNET WORLD STATS, http://www.internetworldstats.com/stats.htm, last accessed 14th December 2015

[2] *Id*

[3] Kitsuron Sangsuvan, Trademark Infringement Rules in Google Keyword Advertising, 89 UNIVERSITY OF DETROIT MERCY L REV. 136- 180, 137 (2012)

[4] *Id*

[5] Google AdWords: An Overview for Advertisers, https://support.google.com/adwords/answer/1704410?hl=en, last accessed on 15th December 2015

with trade mark in relation to goods or services in the course of his trade. The infringement must be with respect to a trademark which is registered and further, the infringement should be in such manner so as to render the use of the mark likely to be taken as being used as a registered trade mark.[6] The display of a Sponsored Link on searching a particular term may result in confusion in the mind of the user as to the origin of the goods.

In India, courts have recently encountered trademark infringement action based on a competitor's purchase of keywords used in concurrence with search engines to sponsored links.[7] These actions aim to bring out two different kinds of liabilities: firstly, the plaintiff alleges trademark infringement by the competitor for purchasing the trademarked keyword and sponsoring the advertisement. Secondly, trademark infringement can be committed by the search engine itself for selling keyword linked advertisements and trading on the value of the plaintiff's protected mark. This has mandated a detailed study of the subject and the issues which arise from it in order to ensure that technology developments do not come in the way of trademark protection.

Understanding Google's Keyword Advertisement

Google Inc. whose parent company is Alphabet Inc. is now worth more than $367 billion[8] and this towering market capitalisation is mostly a result of the income generated by the advertising that accompanies search results. Google began AdWords, a program of selling advertisement based on specific keywords, in 2000.[9] In 2004, Google eliminated many restrictions on the use of trademarks as keywords. Prior to 2004, Google allowed trademarks to be used as keywords, but would remove such advertisement if trademark owners complained. After 2004, Google no longer responded to complaints regarding the use of trademarks as keywords, meaning that their use was unrestricted.[10]

Keyword advertising allows search engines providers and their advertisers to deliver related, modified and consumer-specific advertisement to its users which in common practice is termed as contextual advertising. Google operates on a pay for placement basis only, where

[6] §29. Indian Trademarks Act 1999
[7] Consim Info Pvt. Ltd. v. Google India Pvt. Ltd. &Ors., 2013(54)PTC578(Mad)
[8] Forbes, The World's Most Valuable Brands, http://www.forbes.com/companies/google/ last accessed on 18th December 2015
[9] Press Release, Google, Google Launches Self-Service Advertising Program http://googlepress.blogspot.in/2000/10/google-launches-self-service.html, last accessed on 19th December 2015
[10] Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1359–60 (2008).

search results are primarily based on paid placements and not relevance. The distinction between relevance-based search results, or natural search results, and sponsored advertisement is best explained in the present context, by reference to the Google search engine.[11] As we often observe, search results often lead to one or more paid advertisements appearing alongside the unpaid (organic or algorithmic) results.

Various factors affect whether a particular ad appears or not, including the details of the search query, the amount that is bid, past performance of the ad in the context of such searches (i.e., click-through rates), and whether and how the bid is limited by the bidder.[12] For example, bidders can target their advertisement by location, time, search device employed, and language.[13] Private entities purchase the keyword in question and when the consumer clicks on the ad, the entity pays Google the amount it bid.

Under this scheme several situations may arise. The first is where an advertiser may opt for a generic search-term as the keyword which can result in adverse consequences for its competitors. For example, a manufacturer of cars may select keywords such as 'cars', 'vehicles', 'four-wheel drives' and the like as a keyword.[14] This scenario does not give rise to any trademark related issue. In contrast, the second scenario is directly attached to the use of an existing trademark as the keyword. However, in cases where the advertiser is a third-party (not being the owner of the trademark) but chooses to use an existing trademark as the keyword to display its own advertised link linking its own website offering its own goods/services, such an act would severely affect the business of the trademark-holder.

Trademark Policy

There was a period when Google did not allow advertisers to link their advertisement to the trademarks of others, but in 2004 its advertising policy was amended in the United States and

[11] Amanda Scardamaglia, Keywords, Trademarks, and Search Engine Liability, in SOCIETY OF THE QUERY READER: REFLECTIONS ON WEB SEARCH 163-175, 165 (René König and Miriam Rasch eds., 2014)
[12] *Check and Understand Quality Score*, GOOGLE, https://support.google.com/adwords/answer/2454010?hl=en, last accessed on 19th December 2015; *Understanding Ad Position*, GOOGLE, http://support.google.com/adwords/answer/, last accessed on 19th December 2015
[13] *Using Keyword Matching Options*, GOOGLE, http://support.google.com/adwords/bin/answer.py?hl=en&answer=6100&topic=16083&ctx=topic, last accessed on 19th December 2015
[14] AlthafMarsoof, Keywords Advertising: Issues of Trademark Infringement, 4 JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY 240-251, 241 (2010)

Canada to allow advertisers to purchase their competitors' trademarks as keywords.[15] This policy was subsequently applied to the United Kingdom and Ireland in 2008 and the rest of Europe in 2010.[16]After the Court of Justice of the European Union held in March 2010 that Google's AdWords system does not violate European trademark law, Google changed its AdWords policy in various European countries in September 2010.[17]In 2013 the policy was applied further in countries including India, China, Hong Kong, and Australia, with Google announcing that it will no longer prevent advertisers from selecting a third party's trademark as a keyword in advertisement targeting these regions. Following this change, Google allowed third parties to register keywords without the approval of the trademark owner, with only a limited complaint procedure for trademark owners.

Soon after this policy change, the recent outbreak of litigation concerning the issue had started. In its defence, Google is not allowing unchecked use of trademarks, as the company states that it still "reviews trademark complaints that relate to the content of the keyword advertisement, not the keywords purchased to trigger the advertisement."[18] However, the owners of the protected marks may still argue that even by simply allowing a competitor to sponsor an ad associated with trademarked terms, the search engines are allowing competitors to take unfair advantage of interest associated with the marks.

Microsoft's Yahoo! and Bing search engines initially had a keyword policy which differed somewhat from Google's, but in 2011, the company announced it was amending its Intellectual Property Policy so as to no longer review complaints in relation to the use of trademarks as keywords in the United States and Canada, in order to align its practices with the current industry standard.

[15]Google Advertising Policies Help, 'AdWords Trademark Policy', https://support.google.com/adwordspolicy/answer/6118?rd=1.

[16]Matthew Saltmarsh, 'Google Will Sell Brand Names as Keywords in Europe', *The New York Times*,4 August 2010, http://www.nytimes.com/2010/08/05/technology/05google.html?_r=0; Amanda Scardamaglia, Keywords, Trademarks, and Search Engine Liability, p. 167

[17] Court of Justice of the EU, Google France v. Louis Vuitton Malletier, Mar. 23, 2010, Joint Cases C-236/08 to C-238/08, ECR 2010, I-02417.

[18] Benjamin Aitken, Keyword-Linked Advertising, Trademark Infringement, And Google's Contributory Liability, 4 DUKE LAW AND TECHNOLOGY REVIEW 1-13, 3 (2005)

KEYWORD LINKED ADVERTISING

One of the critical steps in effective advertising is placing the ad where interested consumers may see it. Advertisers utilize many methods to get their advertisement in front of consumers. There are several instances when using another's keyword becomes necessary in the advertisement of one's own goods. As opposed to a trademark use that intentionally causes confusion as to the source of the product or service, many advertisers wish to identify themselves as competitors of the trademark holder. Trademark uses that serve only to identify the trademark owner's product or service or are used in comparative advertising qualify as fair use and are not subject to infringement claims.[19] There are many instances when it becomes necessary for an advertiser to use another's trademark including advertisement for services supplementary to the trademarked product or service and advertisement comparing a trademarked product to a competitor's. For example, online shopping services necessitate using another's keyword in their website or as a keyword in order to sell products of that brand. Or websites that offer similar services may have to use others' trademark to show a comparison between the goods.

Many trademark-holders that are complaining about the keyword linking practice are requesting that the search engines disallow all use of their trademarks as keywords. The trademark holders often argue that even by simply allowing a competitor to sponsor an ad associated with trademarked terms, the search engines allow competing traders to take unfair advantage over the trademark holder in the case of registered trademark. For example, eBay has requested that all keywords that use eBay's trademark be unavailable to advertisers.[20] However, providing a complete bar to the use of all trademark references as keywords for ad-linking would be denying any legitimate fair use defences to accusations of infringement.

Likelihood of Confusion

Section 29 of the Trademarks Act outlines what constitutes infringing use of trademarks, and prohibits any use in the course of trade of a registered mark or a deceptively similar mark thereof that "is likely to cause confusion". Thus, the likelihood of confusion plays an important role in determining whether a competitor's use of a mark is an infringing use. One

[19] Playboy Enter., Inc. v. Terri Welles, 279 F.3d 796, 801 (9th Cir. 2002)
[20] Benjamin Aitken, *supra* note 18, 3 (2005)

important dimension to whether third parties should be allowed to register trademarks as keywords is the effect such use has on consumer behaviour. On the one hand, it could be that consumers become confused by advertisement based on third-party keyword registrations, because they assume that such advertisement originate from or are sponsored by the trademark owner.[21] On the other hand, it could be that consumers realize that an ad based on a third-party keyword registration is not linked to the trademark owner, and that they appreciate the increased information and competition resulting from such keyword use.[22] Internet search engines have greatly expanded the role played by trademarks in consumers' search processes. While surfing for options, consumers deliberate on whether to use a trademarked keyword, or whether to combine it with other words to make the meaning and use of the trademark more precise about the product or service. This has made it easier for firms to keep a track of the use of their trademarks by the consumers.

THE INDIAN SCENARIO

In India, there is no legislation which explicitly restricts the use of trademarks as search engine keywords. Trademark owners have accordingly turned to existing doctrines in trademark law for a potential remedy. Section 29 of the Trademarks Act 1999 deals with infringement of registered trademark and Section 29(7) includes infringement under advertising.

In the case of *Consim Info Pvt. Ltd. v. Google India*,[23] the issue of trademark infringement through keyword advertising was discussed by the courts at length for the first time in India. In general, the number of cases arising out of infringement through keyword advertising is minimal in India, mostly because of the lack of awareness of intellectual property rights among owners. In this case, the appellant was the registered trademark owner for terms like Bharatmatrimony, Tamilmatrimony, Telugumatrimony, etc. and had prayed for a permanent injunction restraining the defendants from using these trademarks or their variants as AdWords, Keyword Suggestion Tool or as a keyword for internet search. The appellant being a leading company involved in online matrimonial services using internet as a platform had adopted several trademarks as mentioned above in the course of its trade and owned several

[21] Stefan Bechtold and Catherine Tucker, Trademarks, Triggers and Online Search, 11 JOURNAL OF EMPIRICAL LEGAL STUDIES 718- 750, 719 (2014)
[22] *Id*
[23] *supra* note 7

domain names at par with their trademarks. The appellants contended that the consumer who searches for the appellant's online service for getting information would, in all probability will use the appellant's trademarks as key words in the respondents search engine.

The respondents argued that their use of the appellant's trademark in the impugned Ad program did not constitute the use 'in the course of trade', and the use of such trademark is alignment with honest business practice. The Key Word Suggestion Tools automatically produces a list of web-links by considering the number of hits counted by the term/trademark. Therefore, there is no human intervention in the process of selection of the term/trademark as Key Word by the search engine. However, the respondents contended that they never used the appellant's trademark in the sense of a trademark over the goods or services as contemplated under the Act. Therefore, such use would not amount to infringement or passing off.

The appellants in this case further claimed that whenever a Web server through the search engine 'Google' using as Key Words, any of their trademarks or the constituent parts thereof such as Bharat, Assam, Tamil, Matrimony etc., the links to the websites of the competitor advertisers also appear on the right hand side of the page, as Sponsored Links. Each sponsored link has i) an Ad title ii) an Ad text and iii) the URL (Uniform Resource Locator) of the advertiser's website.[24] The appellant claimed that an infringement happens, when the trademark of the appellant is used in the Ad title or Ad text by a competitor, deceptively similar to it and if such an advertisement appears on the Sponsored Links. Since the choice of the keyword is made by the advertiser through the Keyword Suggestion Tool provided by the search engine, the appellant contended that the search engine is guilty of aiding and abetting such infringement. They charged Google with indirect or contributory infringement and claimed that the AdWords used by advertisers in the Sponsored Links, as Ad title or Ad text, are selected by assistance from the Keyword Suggestion Tool provided by the search engine itself. In case an advertiser uses the Key Word Tool to find the appropriate AdWords, which would easily lead to his website, the

[24]Consim Info Pvt. Ltd. v. Google India Pvt. Ltd. &Ors., 2013(54)PTC578(Mad)

search engine suggests several key words that could be adopted by the advertiser so that the link to his website would appear at as many locations as possible.[25]

The court accepted the argument of the respondent and dismissed the case on the ground that the registered marks were descriptive of the service being provided. Thus, liability of both the advertiser as well as the search engine was nullified and Google managed to escape liability. The court in this case only looked into the issue of likelihood of confusion and did not stress upon the test to determine contributory infringement of intermediaries in keyword advertisement cases.

POSITION IN THE EUROPEAN UNION

Trademark infringement under Community law can be referred to two different legislative bases. The first basis is established under Trademark Directive II, Article 5(1), stipulating that: The Trademark holder shall be authorized to prevent all third parties not having his consent from using in the course of trade. (a) any sign which is identical with the trademark in relation to services or goods which are identical with those for which the trademark is registered.[26] The second basis of trademark infringement is found under Trademark Directive II, Article 5(2), constituting that: Any Member State may also provide that the trademark holder shall be authorized to prevent all third parties from not having his consent from using in the course of trade any sign which is identical with, or similar to, the trademark with respect to services or goods which are not similar to the those for which the trademark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of trademark.[27] Also implicated in the keyword cases in the European Union is E-Commerce Directive.[28] While not a trademark provision in itself, the E-Commerce Directive sets out a liability exemption for certain hosting activities of information service providers.

In the European Union, numerous national courts had to decide (1) whether an advertiser can be held liable for trademark infringement if it uses a trademarked keyword, and (2) whether

[25] Choose keywords for Display Network Campaigns, available at https://support.google.com/adwords/answer/2453986?hl=en, last accessed on 21st December 2015
[26] Trademark Directive II Article 5 (1)(b)
[27] Trademark Directive II Article 5(2)
[28] E-Commerce Directive 2000/31

search engine operators can be held liable as well, either through primary or secondary liability doctrines. Courts in France and Belgium, and some courts in Germany, had ruled that the AdWords system violates trademark law or unfair competition law, on the grounds that the advertisers and/or Google are using trademarks to confuse consumers, and are free riding on the goodwill of trademark owners. Courts in the United Kingdom and other courts in Germany had ruled the opposite, while decisions in Austria and the Netherlands had come out somewhere between these opposing viewpoints.[29]

Thus, the ECJ announced two opinions, answering several questions referred to it by French and Austrian courts on the appropriate interpretation of the provisions in relation to keyword advertising. The first of these opinions, answered questions referred to the ECJ by the French Court of Cassation, the highest court in France. The French court stayed the proceedings in each of three cases to refer questions to the ECJ for a preliminary ruling. The questions arising out of these cases dealt with the application of Article 5 of the Directive, Article 9 of the Regulation, and Article 14 of the E-Commerce Directive to the question of keyword advertising.

The first dispute that reached the European Court of Justice was Google France v. Louis Vuitton Malletier.[30] The Court held that a producer of fake Louis Vuitton products may violate trademark law if his keyword-backed ad creates the impression that his products are actually produced, or at least authorized, by Louis Vuitton. Concerning Google's liability, the court held that Google was not using the Louis Vuitton trademark in its AdWords system in a manner covered by European trademark law. Google was merely operating a service that might enable advertisers to engage in trademark violations. Turning to secondary trademark infringement, the Court noted that Google could be shielded from liability by provisions of the E-Commerce Directive 2000.[31] However, it must be noted that this would depend on whether the Google AdWords system is a merely automatic and passive system, or whether Google plays an active role in selecting and ordering advertisement. The ECJ decided that search engine operators do not infringe trademarks by selling keywords that correspond to third party trademarks. This is because although search engines are carrying out commercial

[29]*supra* note 21, 723 (2014)
[30]Google France SARL v Louis Vuitton Malletier SA [2010] C-236/08, C-237/08 and C-238/08.
[31] Section 4, Liability of Intermediary Service Providers, ELECTRONIC COMMERCE DIRECTIVE, DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

activity in the course of trade, these activities do not constitute use, as required for the purposes of trademark infringement. The ECJ held that:

> The fact of creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign. To the extent to which it has permitted its client to make such a use of the sign, its role must, as necessary, be examined from the angle of rules of law other than Article 5.[32]

In the second French case, Viaticum, a proprietor of French marks, along with Luteciel, the company that maintained Viaticum's website, also brought suit against Google for selling their marks as keywords.[33] As in the previous action, Google was found liable for trademark infringement by both the trial and appellate courts, and Google again appealed to the French Court of Cassation.[34] Similarly, in the third case, an individual trademark proprietor and his licensee brought suit against Google and two advertisers who had purchased the proprietor's marks as keywords from Google.[35] After being found liable of trademark infringement, Google and the two advertisers successfully appealed to the French Court of Cassation. In each of these cases, the Court of Cassation stayed the proceedings and referred questions to the ECJ for a preliminary ruling on the interpretation of the Directive and Regulation.

Following the decision of the ECJ, Google changed its trademark policy in the AdWords Program in September 2010 with regard to who was allowed to purchase a trademarked keyword to trigger advertisement across all continental European countries. After the policy change, Google still offered a procedure for trademark owners to complain about the use of their trademark by third parties. It is noteworthy however, that in the cases that were referred to the ECJ by the French Courts, the French Courts had initially found liability of advertisers and Google in the national courts. However, on referring questions to the ECJ, the liability was removed on the basis of the E-Commerce Directive 2000.[36]

The liability limitations in the Directive apply to certain clearly delimited activities carried out by internet intermediaries i.e. to the technical process of access and transmission

[32]Google France SARL v Louis Vuitton Malletier SA [2010] C-236/08, C-237/08 and C-238/08 at 57
[33] Google France & Google, paras 35-36
[34] *Id*, para 36
[35]*Id*, paras 38-40
[36] Article 12 – 14 of the E-Commerce Directive

provision, as well as storage of information provided by a recipient of the service in a communication network. The liability limitations provided for by the directive are established in a horizontal manner i.e. they cover civil, administrative and criminal liability for all types of illegal activities initiated by third parties online, including copyright and trademark piracy, defamation, misleading advertising, etc.[37] Article 15 prevents Member States from imposing on internet intermediaries, with respect to activities covered by Articles 12 to 14, a general obligation to monitor the information they transmit or store or a general obligation to actively seek out facts and circumstances indicating illegal activities.[38] However, it does not prevent public authorities in the Member States from imposing a monitoring obligation in a specific, clearly defined individual case. Moreover, Articles 14 and 15 do not affect the possibility for Member States of requiring hosting service providers to apply duty of care which can reasonably be expected from them and which is specified by national law, in order to detect and prevent certain types of illegal activities.[39]

From these provisions of the E-Commerce Directive it may be argued that the court overlooked the fact that Article 15 did talk about imposing a monitoring obligation in individual cases on intermediaries. The ECJ while shielding Google from liability should have imposed a certain duty of care on Google to monitor the use of its AdWords Program in allowing the selection of trademarks as keywords. This would have allowed trademark owners the desired protection from keyword advertising while also giving them adequate leverage to file an action against Google in the future. After all, the AdWords Program would fall in to the category of a specific and clearly defined individual case on the ground that the Program involves a Pay-Per-Click system whereby Google generates revenue every time a user clicks on the Sponsored Link triggered by the keyword. This gives Google enough incentive to induce infringement by competing advertisers through auctioning trademarks as keywords.

POSITION IN THE UNITED STATES

The Lanham Act is the federal trademark statute in the United States wherein Sections 32, 43, and 45 are the provisions relevant to the keyword issue. Section 32 imposes liability for "use

[37] Study on the Liability of the Internet Intermediaries, 2007, http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf, last accessed on 28th December 2015
[38] *Id*
[39] *Id*

in commerce" of another's registered mark without the registrant's consent if that use "is likely to cause confusion, or to cause mistake, or to deceive," and Section 43(a) gives similar protection to unregistered marks. Like the ECJ, US courts have not applied trademark provisions to keyword cases in a uniform fashion, and until recently, courts in the United States were split roughly into two camps regarding the trademark use doctrine as applied to internet advertising.[40] On April 3, 2009, the Second Circuit held in Rescuecom v. Google[41]that the practice of selling trademarks as search engine advertising keywords can qualify as a ''use in commerce'' under the Lanham Act. This allowed the court to further delve into the issue of "likelihood of confusion" that may arise from such use of the registered trademark in the course of trade.

Before the Rescue.com case, the Second Circuit had found that use of trademarks as keywords "is not use of the mark in a trademark sense" as contemplated by the Lanham Act. District courts in the Second Circuit were influenced on this issue by 1-800 Contacts, Inc. v. WHENU.COM, Inc. where the defendant was sued for distributing software that provided contextually relevant advertising to computer users by generating pop-up advertisement depending on the website or search terms the computer user entered into his internet browser.[42]The district court found that the plaintiff had not shown that its mark had been used in commerce as defined in Section 45 of the Lanham Act because the use of the mark by the defendant was "internal."[43] In Merck & Co. v. Mediplan Health Consulting, three of the defendants had purchased the keyword ZOCOR, a registered mark of the plaintiff, from search engines Yahoo! and Google.[44] The district court, noting the decision of *1-800 Contacts*, held that "this internal use of the mark 'Zocor' as a key word to trigger the display of sponsored links is not use of the mark in any trademark sense."[45] The Second Circuit vacated the judgment and remanded to the district court, concluding that the practice of recommending and selling trademarks as keywords does indeed qualify as a "use in commerce" and that "Google's recommendation and sale of Rescuecom's mark to its advertising customers are not internal uses.[46] The decision does oblige Second Circuit courts

[40] Tyson Smith, Googling a Trademark: A Comparative Look at Keyword Use in Internet Advertising, 46 TEXAS INTERNATIONAL LAW JOURNAL, 232-256, 250 (2010)
[41]Rescuecom v. Google,562 F.3d 123 (2nd Cir. 2009)
[42] 1-800 Contacts, Inc. v. WhenU.com, 414 F.3d 400, 404–05 (2d Cir. 2005)
[43]*Id*
[44] Merck & Co. v. Mediplan Health Consulting, 425 F. Supp. 2d 402, 415 (S.D.N.Y. 2006) at 407, 415
[45]*Id*, at 415
[46]*supra* note 41, at 127, 129

in future keyword cases to determine whether a likelihood of confusion exists rather than simply disposing of the case at the threshold question of trademark use. Beyond the Second Circuit, courts have generally been in agreement that use of a trademark as a keyword qualifies as use in commerce, and the focus has been more on whether the use is likely to cause confusion.[47]

In Playboy Enterprises, Inc. v. Netscape Communications Corp., the Ninth Circuit considered the practice of "keying" by search engines, in which an advertiser wishing to have its ad displayed in response to an internet search must choose among various lists of terms related to its ad as provided by the search engine.[48] In deciding the case, the court focused almost exclusively on the likelihood of confusion without addressing whether the use by the search engines was a trademark use. In 800-JR Cigar, Inc. v. GoTo.com, a "pay-for-priority" search engine "solicited bids from advertisers for key words or phrases to be used as search terms, giving priority results on searches for those terms to the highest-paying advertiser."[49] The search engine also had a tool that suggested terms for advertisers to bid on. The Third Circuit concluded as a matter of law that the "use in commerce" requirement was met because the search engine "injected itself into the marketplace" by placing paid advertisements above any natural listings and by marketing terms to advertisers through its Search Term Suggestion Tool. The court discussed the likelihood of confusion factors and considered initial interest confusion, ultimately finding material issues of fact and dismissing the motion for summary judgment.

When use in commerce was established in the Rescuecom case, the courts reasoned that internal uses of a mark could still deceive consumers which marked a shift away from its previous analytical framework of strictly separating use from likelihood of confusion. In the Playboy case, the courts went further in combining the use and likelihood of confusion analysis. The court essentially ignored the use question by merely stating that the "defendants used the marks in commerce" without clarifying on why this qualified as an actionable use. In evaluating the likelihood of confusion, courts have looked at the traditional likelihood of confusion factors. Some courts have considered the doctrine of initial interest confusion, while others have declined to apply it to keyword use.

[47] Jonathan J. Darrow & Gerald R. Ferrera, 17 TEXAS INTELLECTUAL. PROPERTY. L.J. 223, 261 (2009)
[48] Playboy Enters., Inc. v. Netscape Commc'ns Corp., 354 F.3d. 1023–24
[49] 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F. Supp. 2d 273, 277 (D.N.J. 2006).

CONTRIBUTORY INFRINGEMENT

The Lanham Act does not have any provision which deals explicitly with contributory infringement. To remedy this situation, the Supreme Court developed a test for liability as a contributor to infringement in Inwood Laboratories, Inc. v. Ives Laboratories, Inc., stating that "liability for trademark infringement can extend beyond those who actually mislabel goods with the mark of another."[50] In this case, the manufacturer of a generic drug produced its product with the same colouring and general appearance as the brand name drug sold by the plaintiff. The evidence at trial indicated that even though the generic's manufacturer did not label its product with the plaintiff's trademark, some pharmacists had intentionally mislabelled the generic drug as the brand name version and were selling it as such. The plaintiff contested that the design of the generic drug contributed to the infringing action taken by the pharmacists. The defendant manufacturer was not held liable for the actions of such pharmacists, but the test for what actions would constitute contributory infringement was established.[51] The court held that:

> "If a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit."[52]

The court further held the following points relevant in determining contributory liability:

1. Whether the platform provider is aware of the said infringement
2. Whether the platform provider has the ability to monitor and control the use of your product or service
3. Whether the platform provider is in a position to receive some benefit from the infringement

However, applying this standard to establish contributory infringement of search engines has not brought about any liability till date. This test requires that the plaintiff must first prove that Google has intentionally induced the infringement. But Google claims that it does not dictate what keywords are associated with an ad, the advertiser chooses its own keywords; the advertiser is responsible for the text of the ad which is the source of the possible infringement; and lastly, Google has stated its willingness to remove trademark terms from

[50]Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982).
[51] Benjamin Aitken, Keyword-Linked Advertising, Trademark Infringement, And Google's Contributory Liability, 4 DUKE LAW AND TECHNOLOGY REVIEW 1-13, 8 (2005)
[52]*supra* note 50, at 854

bidding upon reasonable requests from trademark owners. This goes a long way in escaping liability as Google terms of service clearly state that they are not liable for trademark infringement and are willing to take down any infringing material that is brought to their notice. Secondly, the plaintiff must show that Google, despite knowing about the alleged infringement, continued to sell the trademark of the plaintiff as keywords to its competitors. Thus, the knowledge of infringing activities is necessarily required to prove contributory infringement. But Google has argued that its role in the keyword-linking advertising practice is a "pure machine-linking function," which could not be termed as a trademark use. In the case of Tiffany v. eBay,[53] the Second Circuit considered whether eBay caused contributory infringement by allowing customers to sell counterfeit Tiffany products on the site. It was found that eBay was not liable for contributory trademark infringement because it possessed only "general" knowledge that counterfeit Tiffany products were being sold on its website, and because eBay immediately removed listings of Tiffany products from its website right after it was notified of specific items believed to be counterfeit. Based on this case, it is reasonable to conclude that general knowledge is not sufficient to establish liability.[54] Rather, specific knowledge that the buyer is engaging in trademark infringement is needed for secondary liability.[55] Thus, Google has so far managed to escape liability in cases of contributory infringement even when the Inwood test was applied. But this has determined that there is no affirmative duty to take precautions against infringing activities, once knowledge of that activity is attained, a duty to remedy the situation exists.

It maybe argued however, that contributory infringement of search engine could have been established with the help of the Inwood test. Firstly, while establishing awareness of the service provider, what must be looked into is not whether Google has actual knowledge of the said infringement; rather merely that it should have knowledge of the infringement carried out on its search engine. Secondly, while establishing Google's ability to control and monitor the use of its AdWords Program, regard must be had to the fact that by the use of the economic model known as "Pay-for-Placement", the Server (Google) has the last and absolute control over what exactly is displayed on the search page when the users type in the relevant terms and also has the power to choose how and where which links will be placed. And lastly, Google stands to gain monetary profits every time a user clicks on the Sponsored

[53] Tiffany (NJ) Inc. v. eBay Inc. 600 F.3d 93, 106 (2d Cir. 2010).
[54] *supra* note 3, at 178
[55] *Id*

Link. As per the AdWords Program, the advertiser is required to pay Google a certain sum of money every time a user clicks on the advertisement placed by the advertiser by buying the search terms as keywords. Thus, it provides enough incentive for Google to induce an infringement by a third party. It is clear that all the requirements set out for contributory infringement are thus fulfilled.

CONCLUSION

Because of the internet's impact on the economic situation of nations, the issue of using trademarks as keywords in internet advertising has emerged as an important topic in India. While the number of such cases that have come up before Indian Courts is minimal at present, perhaps due to lack of awareness, it is certain that more of such cases are sure to come up in the future. The judgement in Consim Info Pvt. Ltd. v Google India has marked the beginning of keyword advertisement cases leading to infringement as well as set a precedent for the future cases. However, the Indian Judiciary and Indian Legislature has a long way to go in the development of cases and regulations in order to protect trademark owners from internet based infringement.

The shortcomings in this regards maybe enumerated as follows:

1. The Trademark Act, 1999 does not define what constitutes "use in the course of trade". This ambiguity leads to lack of uniformity in deciding whether the use of registered trademarks as keywords would amount to "use" as required by Section 29 of the Act to establish infringement. Moreover, the Madras High Court in the Consim case did not dwell upon the issue of use and directly delved into the issue of likelihood of confusion. This has left scope for further disputes on whether it would amount to use if the trademark, despite being bought as a keyword does not appear in the Ad Title or the Ad Text and is merely used to trigger the competitors' website.
2. An important lesson to be taken from the European Union is the E-Commerce Directive which was used by the ECJ to shield Google from contributory infringement. In India, though the issue of intermediary infringement has been taken up in the IT Act, there are several loopholes which have contributed to more ambiguity in determining secondary liability of search engines. The IT Act, thought heavily borrowed from the E-Commerce Directive has failed to differentiate between the different classes of intermediaries.

3. The Madras High Court, in determining likelihood of confusion dismissed the action merely on the ground that the trademarks in question were descriptive of the service that was being provided both by the appellants and respondent. Though Indian Trademark Law has established the grounds of likelihood of confusion, there is a need for such grounds to be tested in the context of internet uses of trademarks in advertisements. Here, the courts should have developed certain tests to determine likelihood of confusion in relation to the internet and which is highly advanced technology.
4. In developing the test for likelihood of confusion in consumers based on advertisements on the internet, a clear standard must be followed as to the class of purchasers. In other words, the level of sophistication of a consumer using the internet must be determined by way of empirical study as the test of a consumer having ordinary intelligence would not be applicable here.
5. A brief overview of all the cases in various jurisdictions has thrown light on the fact that Google has never been held liable in any jurisdiction. Even though certain courts in France and Austria had initially held Google liable for contributory infringement, on being referred to the ECJ Google has managed to escape liability every time. Also, even when the Inwood test in the US is applied to establish contributory infringement, the underlying problem remains that a plaintiff must establish underlying direct trademark infringement in order to meet liability for contributory infringement.

The manner in which marketers manipulate trademarks constantly changes, which is why, even more than how keyword advertisement are adjudicated today, it matters that the current keyword cases be decided on doctrinally durable and correct grounds that will not impair the ability of trademark owners to take action against more mischievous marketing mechanisms tomorrow.

STING OPERATIONS: THE ROLE OF MEDIA AS A VIGILANTE

*Ahkam Khan & Parimal Kashyap**

INTRODUCTION

A sting operation is an investigative exercise undertaken by media to uncover the malpractices prevalent in the society. It is an inseparable part of the modern news casting, albeit with questionable moral issues included.[1] These undercover operations embark to disentangle the administrative procedures by an agent who pretends to be a part of the game– by acting like a supplicant, a vulnerable candidate, a support-searcher or a potential bribe supplier.[2]Masterminding somebody under the lawful drinking age to request that a grown-up purchase an alcoholic beverage for them or conveying a snare auto (likewise called a honey trap) to get a car thief and recording them on tape are certain examples.[3] Another example might be a journalist pretending to be an interested party looking to get his work done in a government office by bribing the officials.

Sting operations are full of inquiries of legitimacy, and objectivity that are hard to manage in light of the fact that the journalist is a common person loaded with his predispositions for or against somebody or something. Therefore, the rightfulness of a sting operation cannot be determined objectively as the journalist may have a bias towards or against a certain person that he might target. In addition, in the present world where video doctoring tools are easily accessible and widely used, the question of legitimacy of the sting operation audio/video is yet another issue for thought.

The word 'Sting Operation' was first used in the movie '*Sting*' in 1973 which depended on a plot incubated by two men to trap a third individual into carrying out a wrongdoing.[4] The expression 'Sting' is also illustrative of media's power in a democratic set-up and how it can be both potent and venomous for the public at large; potent by exposing the evils, and

* The Authors are currently 3rd year B.A. LL.B. (Hons.) students at Dr. Ram Manohar Lohiya National Law University, Lucknow.

[1]Roshan John, *Legality of Sting operations*, LAW WIRE www.lawinfowire.com/articleinfo/legality-sting-operations, last visited 11 June 2017.

[2] Roy Greenslade, *Journalism: To Sting or not to sting?*, THE GUARDIAN, (June 2, 2013) https://www.theguardian.com/media/2013/jun/02/sleaze-journalist-sting-debate.

[3]*SPECIAL REPORT: Local Police Crackdown on Adults Buying Booze for Minors*, K.E.S.Q., (May 18, 2004), https://web.archive.org/web/20090115202841/www.kesq.com/Global/story.asp?S=1878103&nav=9qrxNETb.

[4]Sherman v. United States, 356 U.S. 369 (1958).

venomous by infringing the fundamental right to privacy of an individual or potentially entrapping someone into accepting a bribe and thereby, causing corruption.[5]

A few nations like US, UK and Canada have perceived sting operations completed by legal enforcement agencies as lawful techniques for gathering evidence.[6] However, there are no directions regarding the test for legality of sting operations in India and there is no nexus in decisions given by various courts, which requires an earnest need to address the issue.

Sting Operations: Positive or Negative

Despite the fact that the freedom of press is not ensured in our constitution unequivocally, a few interpretations by the apex Court have held it as a basic part of our constitution.[7] However, this freedom is not absolute and there are some sensible limitations.[8] In the technological age, the electronic media has assumed control over the print media, and a huge number of individuals have access to and can be strongly influenced by the information published by media.

Media has an incredible role to play as the fourth pillar of democracy.[9] This is based on a simple equivalence relationship i.e. corruption cannot breed within the sight of transparency. The role of media involves uncovering callous and degenerate public servants to the eye of the omnipotent public in a democratic set-up and hence, undoubtedly, media is in its legitimate space while utilizing apparatuses of investigative journalism to make people familiar with the hideous underbelly of the society.[10] However, occasionally, media, in its endeavors to secure efficient administration, over-reaches its assigned obligation of disseminating information and clashes with the judicial functions of law enforcement.

On the premise of purpose, there can be a delegation of string operations as positive or negative. The positive are the ones in light of a legitimate concern for the overall population and planned to penetrate the cover of the government's working procedure.[11] The negative ones don't profit the general public, but are a sensationalized endeavor to build the viewership

[5]Pramod Nair, *A Sting in the Tale*, (2014) 49(22) E.P.W.
[6]Sorrells v. United States, 287 U.S. 435 (1932) 441, 451.
[7]Indian Express v. Union of India, A.I.R. 1986 S.C. 515; Romesh Thapar v. Union of India, A.I.R. 1950 S.C. 124.
[8]The Constitution of India, art 19(2) (1950).
[9]Sakal Papers Ltd v. Union of India, A.I.R. 1962 S.C. 305.
[10]Court on its own motion v. State,(2008) 146 D.L.T. 429.
[11]*Ethics of Media Sting Operations*, I.A.S. G.S., (April 5, 2017), www.iasgs.com/2017/04/ethics-of-media-sting-operations.

in the era of 'breaking news' by encroaching the privacy or sanctity of an individual or a body.[12]

The Judicial Perspective vis-à-vis Sting Operations in India

In India, it was '*Tehelka*' that foreshadowed the act of sting operations and increased its following, prominence, and circulation to gigantic levels through these operations.[13] The sting recordings of March 2001 demonstrated a few defense authorities, and government officials from the ruling party accepting bribes, which resulted in immediate administrative action that led to their ousting.[14]

India neither has a particular law administering the lawfulness of sting operations nor a judicial pronouncement laying down the guidelines for the regulation of sting operations. Besides the Cable TV Regulation Act[15], which lays down the guidelines for the channels airing programmes, the Pre-natal Diagnostic Techniques Act is the sole authority that talks about sting operations and maintains the legitimacy of the same for the purpose of the Act. The Courts have decided every matter so far on the actualities of the case.

There are no hard and fast rules to determine the different conditions under which the sting operation will be a legal method of obtaining evidence or a method against law. The Courts, while dealing with different situation have not been able to come to a consensus and there is no nexus between the decisions of various courts on similar situations pertaining to sting operations. The Courts on several occasion have held Sting operations to be a legal method of obtaining evidence[16], while on some occasions have held them to be an inducement to crime[17] or an invasion of the fundamental right to privacy[18].

- **Sting Operations as:**

A. Legal Action

[12] *Id.*
[13] Luke Harding, *Website Pays Price for Indian Bribery Expose*, THE GUARDIAN, (January 6, 2003), www.theguardian.com/technology/2003/jan/06/newmedia.india.
[14] Celia Dugger, *The Sting that has India Writhing*, N.Y. TIMES,(March 16, 2001), www.nytimes.com/2001/03/16/world/the-sting-that-has-india-writhing.html.
[15] Cable Television Networks (Regulation) Act (1995).
[16] Raja Ram Pal v. Hon'ble Speaker, LokSabha (2007) 3 S.C.C. 184; R.K. Anand v. High Court of Delhi, (2009) 8 S.C.C. 106.
[17] Rajat Prasad v. C.B.I., (2014) 6 S.C.C. 495.
[18] Labour Liberation Front v. State of A.P., (2005) 1 A.L.T. 740.

The role of sting operations in deliverance of justice in India cannot be undermined. Media, as the fourth pillar of democracy, has a great role to play in a transparent democratic society driven by certain people with power elected by the public itself or chosen through open public service examinations. These officials get the much necessary autonomy in their work. However, complete detachment from the public interest, and furtherance of individual interest through their discretionary powers or actions behind closed doors, warrant regular check-up.

In *SP Gupta v Union of India*[19], "*No democratic Government can survive without accountability and the basic postulate of accountability is that people should have the information about the working of the Government.*" The public entrusts the media with the task of acting as a regulatory mechanism for these power-holders. Though the Indian constitution does not expressly guarantee the freedom of press as a fundamental right, various interpretations of the apex court under Article 19(1) (a) have enshrined it as a basic constituent of right to freedom of speech and expression.[20] The media, therefore, has a right to impart and disseminate information in public interest in correspondence to the public's right to know about the public acts performed by the public officials and the sting operations, aim at, nothing more than public interest.[21]

In various cases, the media made a special effort in public interest to get the haughty crooks penalized for their blameworthy activities.[22] "*I thank god and the media for helping me out in this long battle"*, these words of the victim's mother, in *Nitish Katara*[23] murder case indicate the role played by the sting operations.[24]

In the disputable cash-for-queries swindle, the Delhi High Court endorsed the legality of the sting operations directed to uncover the misconduct of the Parliamentarians that led to the ousting of 11 members from their term in the office.[25] The single judge bench of the Delhi High Court opined that such a privilege spilled out of the fundamental duty to treasure the

[19] A.I.R. 1982 S.C. 149.
[20] Bennett Coleman v. Union of India, A.I.R. 1973 S.C. 106; Sakal Papers v. Union of India [1962] 3 S.C.R. 842.
[21] State of U.P. v. Raj Narain, A.I.R. 1975 S.C. 865.
[22] Manu Sharma v. State, (2010) 6 S.C.C. 1; Sanjeev Nanda v. State, (2007) Cri.L.J. 3786.
[23]Vikas Yadav v. State of U.P. (2016) 9 S.C.C. 541.
[24]*Nitish Katara case*: *SC upholds conviction of Vikas Yadav, Vishal Yadav*, THE INDIAN EXPRESS, (October 3, 2016), http://indianexpress.com/article/cities/delhi/nitish-katara-murder-case-sc-upholds-conviction-of-vikas-vishal-yadav/.
[25] Raja Ram Pal v. Hon'ble Speaker,*Lok* Sabha (2007) 3 SCC 184.

noble ideals that inspired our struggle for freedom as under Article 51A (b)[26], and making a pure and autonomous India is one such ideal.[27]

The apex court in *RK Anand*[28] deferentially removed itself from meddling with the autonomy of media by dismissing the request to set down rules for sting operations stating that this would be a transgression of the media's privilege of the freedom of expression ensured under Article 19(1) of the Constitution. Therefore, the call for accepting sting operations as a legal method of obtaining evidence is merely an extension of the right to freedom of press as ensured through judicial activism in India. Therefore, obliteration of the concept of liberty of press through a proscription on sting operations by media due to isolated incidents of misuse of the power vested in the media is not a way out.

I. Entrapment or Inducement to Crime

A sting operation has genuine legal ramifications. In the event that it uncovers the defilement of a public servant, the columnist in charge of it wins ubiquity. If not, it leaves him vulnerable to criminal accusations.[29]

When a particular journalist goes undercover and plays to be a part of the scheme of things while trying to uncover the corruption in a particular department, he is simply resting on the allegations on and image of the public officials working in that department. Even if they were not involved in corruption before, this might be their first encounter with a person trying to bribe them and with such a lucrative offering at hand, they might accept the bribe; which will lead the media to the conclusion that the ghosts of corruption already haunted such department, even if they did not. You cannot hold a person guilty for a crime that he would not have committed, had he not been encouraged to do so.

A sting operation aired by *'Live India'*, demonstrated Ms. Uma Khurana, a teacher, purportedly compelling a young student into prostitution.[30] In the mayhem that took after, a few people physically assaulted her and even tore her clothes. The Court took suomotu cognizance of the matter and started proceedings where the Court discovered that the accused

[26]The Constitution of India, Art 51 (1950).
[27]Aniruddha Bahal v. State, (2010) 172 D.L.T. 269.
[28] R.K. Anand v. High Court of Delhi, (2009) 8 S.C.C. 106.
[29]Madhubhushi Sridhar, *A Sting Without Public Interest is a Crime*, THE HOOT, (July 30, 2014), http://www.thehoot.org/media-watch/law-and-policy/a-sting-without-public-interest-is-a-crime-7672.
[30]*Fake Sting: Uma Khurana Withdraws Defamation Case*, THE TIMES OF INDIA (October 22, 2008), http://timesofindia.indiatimes.com/city/delhi/Fake-sting-Uma-Khurana-withdraws-defamation-case/articleshow/3629666.cms.

was innocent and a piece of the sting operation had been arranged dramatically.[31] The court, relying on the decision in *Keith Jacobson v. United States*[32], held that media in its endeavors to reveal truth in public interest ought not to go too far by turning to entanglement of any individual.[33] The US Supreme Court had held that "*in their zeal to enforce law, law protectors must not originate a criminal design, and then induce commission of the crime so that the government may prosecute."*[34]

The Supreme Court in *Rajat Prasad v. C.B.I.*[35] held the journalist, who conducted the sting operation, guilty of abetment to bribery by stating that where a man draws another to acknowledge a payoff while covertly video recording the demonstration, it is ensnarement, which could be legitimate or criminal, relying upon the goal and thought process of the bribe supplier.

If the allegations are baseless, the sting operations might as well serve as entrapment for the honest public officials. The question is one of public morality i.e., firstly, you induce a person into committing a crime by promising him a reward for breaking the law and then hold him guilty for accepting the bait. Scholars have suggested, every now and then, that the public officials are subject to wider scrutiny of the media in general interest and, therefore, there should be no entrapment charges on media for sting operations conducted against them. The term 'public servant' finds its definition in the Prevention of Corruption Act.[36] However, one more aspect that requires contemplation is whether a sting operation is permissible when the public servant is not acting during the course of his duty; bringing in, the question of invasion of an individual's privacy.

II. An Invasion of Privacy

Despite the fact that the right to privacy had not been specifically revered in the Indian Constitution, the development of Right to Life under article 21[37] has given a sanctuary to Right to Privacy through different points of reference set by various case laws which have ceaselessly expressed it as an imperative element for a cheerful life.[38]

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[31] *Supra* note 10.
[32] 503 U.S. 540 (1992).
[33] *Supra* note 10.
[34] *Supra* note 32.
[35] (2014) 6 S.C.C. 495.
[36] Prevention of Corruption Act, § 2(c) (1988).
[37] Constitution of India, art 21 (1950).
[38]Kharak Singh v. State of U.P., A.I.R. 1963 S.C. 1295; Govind v. State of M.P., A.I.R. 1975 S.C. 1378.

Furthermore, a nine-judge bench of the Supreme Court, in a recent judgment, pointed out that privacy is an essential element of life and personal liberty and is a part of the fundamental right guaranteed under Article 21 of the Constitution in its spirit.[39] The autonomy of an individual's existence should not be meddled with; neither by state nor by any other entity. Sting operations in public interest, have been acknowledged as a lawful technique to uncover wrongdoings on various events. However, one of the essential motivations to carry out these operations is to expand the TRP evaluations or to 'intrigue the general population' as opposed to 'public interest'.

There have been quite a few instances where media has encroached upon the right to privacy of an individual exposing his private life to the scrutiny of general public. The production of what a Mumbai newspaper asserted were photos of Kareena Kapoor and ShahidKapur sharing intimate moments, the revelation of Shakti Kapoor's casting couch controversy, and the video of Swami Paramahamsa in a compromising position with a Tamil actress, that ended her career, have all collectively added to the outcry for a more characterized right to privacy in the nation.[40]

Grave mishandling of innovative progress and the unhealthy rivalry in the field of news coverage has brought about the pulverization of the standard sense of duty expected in the noble profession.[41] Wiretapping or telephone tapping, a part of sting operations, was held to be a gross violation of privacy, and as such regulated, both under a legislation[42] and guidelines laid down in a judicial pronouncement[43].

The right to express freely, which is the backbone of media, has been subject to abuse and the question of privacy in contrast to expression remains unanswered, with no legislation to regulate and balance the two rights.

REPERCUSSIONS OF STING OPERATIONS ON FAIR TRIAL

The role of media has been in question, every now and then, in relation to running media trials before the actual hearing of a case in the court of law. Media trials become more influencing, particularly, when they happen because of a sting operation. The broadcast of sting operations happens in such a manner that a prejudice is set in the minds of the public.

[39] K.S. Puttuswamy v. Union of India, 2017 S.C.C. OnLine 996.
[40]Shoma Chatterjee, *Sting Operations and the Ethics of Journalism*, KERALA MEDIA ACADEMY, <http://mediamagazine.in/content/sting-operations-and-ethics-journalism.
[41]Labour Liberation Front v. State of A.P., (2005) 1 A.L.T. 740.
[42] The Telegraph Act (1885).
[43] P.U.C.L. v. Union of India, A.I.R. 1997 S.C. 568.

The video object produced by stings circulates all around and influences a variety of environments, including judiciary. As soon as a sting operation takes place, media transforms itself into a public court. As per the Indian Criminal Law, a person is innocent until his guilt is proven in the court of law. Media trials completely ignore this ideal notion and the person against whom the sting operation is conducted is exhibited as the convict. Running a parallel trial also adds pressure on lawyers; who end up not taking such cases.

Trial run by media does not only add prejudice against the accused but also does severe damage to the person's reputation, even after his acquittal. A classic example of this would be Uma Khurana's case[44] where the court found that the sting operation was false. Though the accused was acquitted but the media trial following the sting, resulted in her termination and she was assaulted by the protesting mob.[45] This case demonstrates how sting operations can victimize an innocent and cause damage to one's reputation.

Delhi High Court, in a recent case, has made an observation stating, "Media trials do tend to influence judges. Subconsciously a pressure is created and it does have an effect on the sentencing of the accused/convict".[46] Various courts and law commissions all around the world have seconded this view.[47] The Supreme Court too, in various cases, has observed that the media publication of a sub-judice trial tends to induce the judges subconsciously.[48] There has also been an instance where the Apex Court passed an order restraining media from publishing about the pending trial of a civil case in order to prevent any prejudice.[49]

The concept of fair trial becomes enormously crucial in case of criminal law because it deals with community at large. Apex Court in has categorically explained the concept of fair trial. The court in this case held, "*It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. It will not be correct to say that it is only the accused who must be fairly dealt with. Each one has an inbuilt right*

[44]I.L.R. (2008) 2 Delhi 44.
[45]*Fake sting: Uma Khurana withdraws defamation case*, THE TIMES OF INDIA, http://timesofindia.indiatimes.com/city/delhi/Fake-sting-Uma-Khurana-withdraws-defamation-case/articleshow/3629666.cms, last visited September 25, 2017.
[46]*Media Trials Tend to Influence Judges: Delhi HC on India's Daughter Documentary*, FIRST POST, (March 12, 2015), www.firstpost.com/india/media-trials-tend-influence-judges-delhi-hc-indias-daughter-documentary-2149773.html.
[47] 200th Law Commission Report on Media Trial, 51-57.
[48] P.C. Sen (In Re), A.I.R. 1970 S.C. 1821.
[49] Reliance Petrochemicals Ltd. v. Proprietors of Indian Express, (1988) 4 S.C.C. 592.

to be dealt with fairly in a criminal trial. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated."[50]

The Constitution of India guarantees the right to a free and fair trial.[51] When media broadcasts sting operations, the prejudice against the accused violates his right to fair trial. This fundamental right comes in clash with Right to Freedom of Speech and Expression, which is also a fundamental right.[52] In such cases, it becomes the duty of the courts to develop progressive measures so that both the rights get appropriate space in the constitutional system.

It is the media's responsibility, which executes such trials. A journalist should not approach the affair in the question with an attitude of a prosecutor. While dealing with matters that are sub-judice, the media should have a fair, broad-minded, and balanced attitude.[53]

THE QUESTION OF ADMISSIBILITY OF EVIDENCE OBTAINED THROUGH STING OPERATIONS

The debate on admissibility of evidences obtained through acts like sting operations is largely political than solely evidential.[54] It is said that, "*It matters not how you get it; if you steal it even, it would be admissible in evidence*".[55] Common law seems to be following this principle while examining admissibility of evidence obtained through illegal means. Evidence stays to be admissible even in cases of *agent provocateurs*[56] and invasion of privacy.[57]

However, it is regularly contended that the evidence procured by a sting has been gotten by actuation and consequently, inadmissible. Nonetheless, others trust that when evidence is convincing, it ought to be permissible; and little heed should be paid on the methods through which it was secured. Some argue that sting operations should only be allowed and be admissible in a proceeding if media has received prior approval for the conducting the same. However, such a setup will render media as some kind of vigilance agency for the courts.

[50]Zahira Habibullah Sheikh v. State Of Gujarat, (2006) 3 S.C.C. 374.
[51] The Constitution of India, art 21 (1950).
[52] The Constitution of India, art 19(1) (1950).
[53]Press Council of India, *Norms of a Journalist Conduct*, PRESS COUNCIL OF INDIA,http://presscouncil.nic.in/OldWebsite/NORMS-2010.pdf (last visited September 28, 2017).
[54] David Anthony Brooke, *Confessions. Illegally/ Improperly Obtained Evidence and Entrapment Under the Police and Criminal Evidence Act 1984: Changing Judicial and Public Attitudes to The Police and Criminal Investigations*, Thesis submitted for the Degree of Ph. D. University College, London 1999.
[55] R. v. Leatham, (1861) 8 Cox C.C. 498.
[56] R. v. Sang, [1980] A.C. 402, H.L.
[57] R. v. Khan (Sultan), [1997] A.C. 558, H.L.

This would not only be equivalent to pre-censorship of broadcasting of court procedures but also curtail media's right to freedom of speech and expression warranted under Article 19(1) of Indian Constitution.[58]

The status remains to be foggy, as courts have also given clashing elucidations. As per the general guideline, evidence is overlooked when it is secured by charming the charged into executing a wrongdoing.[59] Nonetheless, Indian courts have disregarded the above stated principle having in mind the larger public interest.[60] Evidence collected by a sting operation is an extra-judicial statement given to a third party in specific circumstance, which makes it admissible.[61] Truth be told, the announcements made through sting operations are more convincing than other additional legal explanations since they are recorded, which makes them practically verifiable.[62] However, the Apex Court has taken a contradictory view by holding that tape-recorded statements represent inducement and are therefore, inadmissible.[63] Consequently, there is an absence of well-defined law and courts' interpretation becomes the final law.

It is suggested that in cases where evidences are supposedly procured by illegal means, courts should only exercise discretionary powers when such illegality has influenced reliability of the evidence, thereby, affecting fairness of the trial.[64] While securing the uprightness of the criminal justice system is certainly a rationale for not admitting the evidence obtained through sting operations, the courts have held in numerous judgments that this discretionary power should not be used to discipline the procurer. Further, courts are not supposed to balance the reliability of such evidence with their onus of protecting the right to a fair trial.[65]

Sting operations are a tool that aids in dispensing justice. Although, under the shade of journalism, this tool could be used for personal and political benefits but that should not prevent courts from reaping the benefits it offers. The courts have a responsibility of ensuring the fairness of proceedings, and it will not be possible if the court does not hear all relevant

[58] R.K. Anand v. National Capital Territory of Delhi, 2009 S.C.C. OnLine C.A.T. 1818
[59] R. v. Sang,(1979) 2 All E.R. 1222.
[60]Sri Bhardwaj Media Pvt. Ltd.av. State, W.P. (Crl.) Nos. 1125 and 126/2007.
[61]Piara Singh v. State of Punjab, (1977) 4 S.C.C. 459; Barindra Kumar Ghose v. Emperor, I.L.R (1910) 37 Cal. 467.
[62] Indian Evidence Act, § 24 (1872).
[63]State of Haryana v. Ved Prakash,1994 Cr.L.J. 140 (SC).
[64] Adrian Keane, James Griffiths & Paul McKeown, *The Modern Law of Evidence* 52 (8th edn., Oxford University Press 2010).
[65]*Id.*

evidence which either sides puts forward.[66] Thus, while examining the admissibility of sting operation as an evidence, the court should look if the sting operation has an intention of greater public good or not. This demands balance with the defendant's right to a free and fair trial. There cannot be a rigid law on the admissibility of evidence procured through sting operation because if one approach hinders justice dispensation mechanism, the other could violate one's right to free and fair trial. Therefore, the courts should follow a middle path while providing their valuable interpretations. Moreover, while interpreting the facts of a case, the courts ought to take into consideration the seriousness of the crime committed. This would depend on facts of a case and would vary from case to case.

CONCLUSION

Sting Operations have been an incredible instrument in uncovering wrongdoing and defilement in the public arena. We have seen various situations where sting operations have assumed a noteworthy part in securing justice for all. Be that as it may, a line is required to be drawn between sting operations that assault privacy and those which reveal debasement and like others with a particular objective to secure the very soul of the Constitution of India. In any case, in the present circumstances where political corruption is at its apex, it is difficult to essentially discover which sting operations are politically invigorated, which are truly proposed to filter the social order, or which are truly the results of fabricated broadcast bolstered by different political gatherings, their corporate benefactors.

A set of accepted rules and effective regulation is required. It is henceforth recommended that a sovereign quasi-judicial organization should be established that has forces of both censure and execution. It is also suggested that a law should be enacted to avoid media from meddling into the privacy of individuals. A set of guidelines[67] relating to broadcasting of sting operations have been provided. Since, there is no immunity provided by law, journalists ought to adhere to the guidelines to prevent any liability.

Since, there is no law that deals with admissibility of evidence procured by a sting operations, courts need to give less recognition to Factum of Entrapment and alluring the suspect into conferring an offense when weighed against admissibility of evidences. More accentuation ought to be laid on the way the crime has been committed which would have been committed anyway even if inducement was not there.

[66] R. v. Quinn, [1990] Crim. L.R. 581, C.A.
[67] *Supra* note 53.

Sting operations are every now and again guarded on the ground that the media has a commitment to put the unscrupulous criminals in the sight of people when the law-enforcement agencies are unwilling to do so. However, without a strong arrangement of standards and regulations, these operations can similarly change into a race to build greater viewership ratings.

SECTION 498-A: SWINGING BETWEEN EXTREMESTO FIND THE PERFECT BALANCE?

*Saif Rasul Khan**

INTRODUCTION

The Indian legal framework is extremely robust. The judiciary has, over time, expanded and enveloped numerous rights and have afforded protection to citizens ensuring well-being for all. Women's right is one such field which has developed over time and there is a momentum globally to pursue the rights of women and guarantee they are treated in an equal manner as the male counterparts and as equal citizens of the world. In India, the women's right movement has achieved great strides and the judiciary has facilitated and supported the process. One such area of concern is marital discord and, in particular, the ill practice of demanding and giving dowry. Dowry continues to remain a major social evil which creates life threatening consequences for women. Many women lose their lives, their homes and the sense of identity as a human being due to the relentless harassment and torment meted out by the husband and his families. This malicious practice has taken numerous lives and unfortunately continues to be practiced in the name of a customary tradition. To address this issue and curb the practice, Section 498-A was inserted in the Indian Penal Code, a code of the British regime of 1860. Though the Section was added to address and assist women in their trials in marital homes due to dowry, it has been observed that the section has been misused by some to create trouble and bring shame to the husband and his families by filing vexatious and false cases. This is a genuine legal issue and one which has been pondered over by the judiciary in-depth with far reaching consequences.

Section 498-A was inserted in the Indian Penal Code in 1983, and is an offence arising from a matrimonial discord in a marriage. The word marriage is defined in the Oxford Dictionary as, '*Marriage is the legally or formally recognized union of a man and a woman as partners in a relationship.'*[1] It is a social institution where husband has the primary responsibility to maintain and care for his wife without neglect. Nonetheless, in the pious institution of marriage a stigma called 'dowry' still exists today. This malicious practice degrades the status of women and reduces them to objects, value of which surges with bigger dowry. Such social evil results in women being ill-treated, harassed, killed, divorced for the simple reason

* The Author is a post-graduate student at Gauhati University, Assam.

[1]Oxford Dictionary, Marriage, (Mar. 11, 2018, 8:19 PM), https://en.oxforddictionaries.com/definition/marriage.

that they failed to provide any dowry or did not meet the continued illegal demands of the husband or his relatives.

The term Dowry is defined in the Dowry Prohibition Act[2] under Section 2 and it reads as thus;

"any property or valuable security given or agreed to be given directly or indirectly-
(a) by one party to a marriage to the other part to the marriage; or
(b) by the parents of either party to the marriage or by any other persons, to either party to the marriage or to any other person;
at or before or any time after the marriage in connection with the marriage of the said parties but does not include dower or mahr in the case of person to whom the Muslim Personal Law (Shariat) applies.".[3]

SECTION 498-A OF THE INDIAN PENAL CODE

Section 498-A of the Indian Penal Code (I.P.C.), which defines the offence of matrimonial cruelty, was inserted into the Indian Penal Code by an amendment in 1983[4]. Offenders are liable for imprisonment as well as a fine under the Section and the offence is non bailable, non-compoundable and cognizable on a complaint made to the police officer by the victim or by designated relatives. By the same Act, Section 113-A has been added to the Indian Evidence Act to raise presumption regarding abetment of suicide by married woman.[5] The main objective of Section 498-A of the I.P.C. is to protect a woman who is being harassed by her husband or relatives of husband.

MEANING OF CRUELTY: JUDICIAL DECISIONS

It was held in *Kaliyaperumal v. State of Tamil Nadu*[6], that cruelty is a common essential in offences under both the Sections 304B and 498-A of I.P.C.. The two Sections are not mutually inclusive, but both are distinct offences and persons acquitted under Section 304B for the offence of dowry death can be convicted for an offence under Section 498-A of I.P.C.

[2] The Dowry Prohibition Act, 1961, Act No. 28 of 1961 (India).
[3] *Id.*
[4] The Criminal Law (Second Amendment) Act, 1983, Act No. 46 of 1983 (India).
[5] Section 113-A of Indian Evidence Act, Presumption as to dowry death- *"When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death."*
[6] Kaliyaperumal v. State of Tamil Nadu, Appeal (crl.) 1358 of 2002.

The meaning of cruelty is given in explanation to Section 498-A. Section 304B does not contain its meaning, but the meaning of cruelty or harassment as given in Section 498-A applies in Section 304-B as well. Under Section 498-A of I.P.C. cruelty by itself amounts to an offence whereas under Section 304-B the offence is of dowry death and the death must have occurred during the course of seven years of marriage. But no such period is mentioned in Section 498-A.

In the case of *Inder Raj Malik* v. *Sunita Malik,*[7]it was held that the word 'cruelty' is defined in the explanation which inter alia says that harassment of a woman with a view to coerce her or any related persons to meet any unlawful demand for any property or any valuable security is cruelty. Cruelty by vexatious litigation; deprivation and wasteful habits; persistent demands; extra marital relations; harassment for non-dowry demands; non-acceptance of baby girl r taking away children; false attacks on chastity of the woman etc. constitute the various kinds of cruelty.

The presumption of cruelty within the meaning of Section 113-A, Evidence Act, 1872 also arose making the husband guilty of abetment of suicide within the meaning of Section 306 where the husband had illicit relationship with another woman and used to beat his wife making it a persistent cruelty within the meaning of Explanation (a) of Section 498-A.[8]

PETITION FILED TO CHANGE THE NATURE OF SECTION 498-A

Dr. Anupama Singh, on behalf of many people who share her concerns, has filed a petition that alleges the misuse of Section 498-A of the Indian Penal Code. The primary demand is that Section 498-A should be made non-cognizable, bailable and compoundable.[9] This has resulted in furore and has raised apprehension among leading women's organizations in the country. The petition claims that the law is being misused by women to torture men and his family hiding under the veil of domestic violence and with the aim to seek revenge.

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[7] Inder Raj Malik v. Sunita Malik, 1986 Cri.L.J. 1510.

[8] *Id.*

[9] T.K. Rajalakshmi, *Women's organisations rise up against a petition that seeks an amendment to Section 498A of the Indian Penal Code, Oppressor's Case*, FRONTLINE Mar. 26-Apr. 08, 2011, (Mar. 14, 2018, 9:14PM) http://www.frontline.in/static/html/fl2807/stories/20110408280709600.htm.
The petition claims that "there are several cases of dowry death wherein the supposedly 'dead victims' have come back alive, and several cases where the same women have repeatedly alleged charges under this law in each of her repeat marriages".

The petitioner has contended that Section 498-A is being widely misused, valiantly abused, and used with concealed motivations by dishonest people. The exploitation, according to the petitioner, has resulted in harassment and torment, including atrocities perpetrated on senior citizens, children, women (including pregnant women) and men. The petition portrays complainant women as veritable Delilah's and Jezebels.[10]

The Petitioner believes that there is sufficient evidence to corroborate the misuse. Most common forms include extortion of large sums of money, bargaining tool for women to negotiate with men and their families, to alienate the husband and use of member against the family to gather control over the resources and finances, etc. among others.

The petition further focusses on the state of women with regard to the law. Since under Section 498-A the law presumes the accused as guilty until proven guilty, the word of the women is taken as the gospel truth with no objections. The husband and his family hardly get an equal say in the matter and have already faced mistreatment, disgrace and shame before the matter goes into trial.[11]The petition states that numerous innocent families have been implicated in false cases as a complaint is enough to arrest the husband, in-laws and anyone else. This has resulted in creating an unequal and bigoted practice which goes against the very norms of equality.

MALIMATH COMMITTEE

The recommendations of the Malimath Committee on Criminal Justice Reforms (2003) suggested that Section 498-A should be made bailable and compoundable (the case can be withdrawn and settled by mutual agreement between the parties). Justice Malimath states, *"a less tolerant and impulsive woman may lodge an FIR even on a trivial act. The result is that the husband and his family may be immediately arrested and there may be a suspension or loss of job. The offence alleged being non-bailable, innocent persons languish in custody. There may be a claim for maintenance adding fuel to fire, especially if the husband cannot*

[10]*Id.*

[11]*Id.* The law, the petitioner says, is being misused "to enable divorce so as to revive any pre-marital relationship that the wife has had as she may have unwillingly given her consent for marriage to satisfy her parents"; "to deny custody of children to the husband and his family"; and to inflict "sufferings on husband and his family to settle scores and to wreak vengeance, thereby posing a grave threat to the very existence of a peaceful family unit in society".

pay."[12]The report realizes and appreciates the difficulties in logistics, particularly when it applies to women who solely depend on alimony or maintenance from the husband.[13]

Fascinatingly, in its 600-page report, the Committee failed to address the concerns of violence against women, much less any substantial explanation of Section 498-A. The committee did not consider it necessary to gather the views and opinions of either victims of matrimonial cruelty or of interested stakeholders. Furthermore, the report had virtually no reference to substantiate the allegation of misuse of Section 498-A. Thus, the relevance of this report, particularly with reference to 498-A is questionable.

MISUSE OF SECTION 498-A

Section 498-A was drafted keeping in mind the need for protection to be afforded to women who suffer various forms of cruelty, dowry, harassment, abuse etc. in their matrimonial relations. However, there have been instances when the section has been violated by women making frivolous allegations against their husbands and his family with the aim of getting rid of the husband or the family and to bring shame and condemnation in the public eye. The women who are aware of the nature of this offence being both cognizable and non-bailable, misuse it to ensure that the husbands and their families are put behind bars as soon as the complaint filed by the woman. The Apex Court as well as various High Courts have taken notice of this allegation. Similarly, the Parliamentary Committee on Petitions (Rajya Sabha) have taken note of this issue.

In 2003, Justice J.D. Kapoor, Delhi High Court Judge and author[14], stirred a controversy with his judgement in the Savitri Devi case[15]. In the case of *Savitri Devi v Ramesh Chand &*

[12]Saurav Datta, What Powers The "Section 498A Misuse" Bandwagon? DNA, Jul. 05, 2014. (Mar. 14, 2018, 9:29PM) http://www.dnaindia.com/india/standpoint-what-powers-the-section-498a-misuse-bandwagon-1999791.

[13] Shankar Gopalakrishnan, Recommendations of the Malimath Committee on Reforms of Criminal Justice System, People's Union for Civil Liberties (Tamil Nadu & Pondicherry), May 2003 (Mar. 14, 2018, 9:37PM), http://www.pucl.org/Topics/Law/2003/malimath-recommendations.htm.
"There is a general complain that Section 498A of the I.P.C. regarding cruelty by the husband or his relatives is subjected to gross misuse and many times operates against the interest of the wife herself. This offence is non-bailable and non-compoundable. Hence husband and other members of the family are arrested and can be behind the bars which may result in husband losing his job. Even if the wife is willing to condone and forgive the lapse of the husband and live in matrimony, this provision comes in the way of spouses returning to the matrimonial home. This hardship can be avoided by making the offence bailable and compoundable."

[14]JUSTICE J.D. KAPOOR, LAWS AND FLAWS IN MARRIAGE: HOW TO REMAIN HAPPILY MARRIED (2002).

[15] Savitri Devi v Ramesh Chand & Ors., 2003 Cri.L.J. 2759.

Ors.[16]the court held that there was clear misapplication and manipulation of the provisions[17] to such an extent that it was striking at the foundation of marriage itself and evidenced to be detrimental for well-being of society at large.[18] The court stated that authorities and legislators should evaluate the state of affairs and legal provisions to avert desecration of the Section. Justice Kapoor, perhaps playing both a judge and marriage counsellor, asserted that Section 498-A was responsible for bringing about a social catastrophe and wreaking havoc on the idea of a family. The police, the nit-picker for unpredictability and imperiousness that it is, also came in for strong criticism, especially in its incompetence in conducting cases of domestic disputes, abuse or marital violence.[19]

In Arnesh Kumar[20], Justice Chandramauli Kr. Prasad's forwarded the rationale and continued from where Justice Kapoor had finished. Citing numerous statistics[21] and data, Justice Prasad held that, *"The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than a shield by disgruntled wives,"*[22]. He further ruled that the police cannot routinely arrest an accused in a dowry case before judicially investigating it and directed all the state governments to instruct its police officers to refrain from automatic arrests without studying and analysing

[16]*Id.*
[17]*Id.* "Once a complaint is lodged under Sections 498A/406 I.P.C. whether there are vague, unspecific or exaggerated allegations or there is no evidence of any physical or mental harm or injury inflicted upon woman that is likely to cause grave injury or danger to life, limb or health, it comes as an easy tool in the hands of Police and agencies like Crime Against Women Cell to hound them with the threat of arrest making them run here and there and force them to hide at their friends or relatives houses till they get anticipatory bail as the offence has been made cognizable and non-bailable."
[18]*Id.* "These provisions have resulted into large number of divorce cases as when one member of the family is arrested and sent to jail without any immediate reprieve of bail, the chances of salvaging or surviving the marriage recede into background and marriage for all practical purposes becomes dead."
[19]*Id.* "These provisions have tendency to destroy whole social fabric as power to arrest anybody by extending or determining the definition of harassment or cruelty vests with the lower police functionaries and not with officers of higher rank who have intellectual capacity to deal with the subject."
"For ages the cruelty, desertion and adultery have been ground for divorce which were to be proved in civil courts. Now the police and that too its lower functionaries have been made the decision-making authority to conclude whether the harassment or the cruelty as brought out in the statement of the complainant wife is sufficient to put all the relatives including school going minor brothers and sisters of the husband behind the bar. Such was neither the intention nor the object of the legislation."
[20]Arnesh Kumar v. State of Bihar &Anr., Crl. No.9127 of 2013.
[21]*Id.*"Crime in India 2012 Statistics" published by National Crime Records Bureau, Ministry of Home Affairs shows arrest of 1,97,762 persons all over India during the year 2012 for offence under Section 498-A of the I.P.C., 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in 2012 were women i.e. 47,951 which depicts that mothers and sisters of the husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under Indian Penal Code. It accounts for 4.5% of total crimes committed under different sections of penal code, more than any other crimes excepting theft and hurt. The rate of charge-sheeting in cases under Section 498A, I.P.C. is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads. As many as 3,72,706 cases are pending trial of which on current estimate, nearly 3,17,000 are likely to result in acquittal."
[22]*Id.*

the allegations and coming to a sensible conclusion. A list of recommendations was enumerated to prevent the misuse of Section 498-A, including the system of check lists, non-compliance leading to contempt proceedings against the police officer etc. among others.

Advocate and women rights activist Abha Singh hailed the judgement of the Supreme Court and said that the Hon'ble Court has given an accurate statement in saying that Section 498-A is being misused. Describing it as a landmark judgment, Singh said: *"The Supreme Court has given the correct statement that Anti-Dowry Act Section 498-A is being misused. Police must first investigate cases properly, and then, make an arrest. It is a landmark judgment."*[23]

In *Kans Raj vs. State of Punjab*[24],a three-judge bench of the Supreme Court observed that, *"for the fault of the husband the in-laws or other relatives cannot in all cases be held to be involved. The acts attributed to such persons have to be proved beyond reasonable doubt and they cannot be held responsible by mere conjectures and implications. The tendency to rope in relatives of the husband as accused has to be curbed."* The Court held that no relative shall be subjugated and illtreated by virtue of Section 498-A merely because of suspicion without substantial evidence to support the allegations.

The Hon'ble Supreme Court, in *Sushil Kumar Sharma vs. Union of India And Ors.*[25], observed the same. The judgment stated that the object[26] of Section 498-A has been diluted and have been utilized with oblique motives[27]. There is a need to find a rational solution and identify remedial measures[28] which may be taken to revert the misuse.

[23]Business Standard, Abha Singh Calls SC Decision on Section 498Aa Landmark Judgement, Jul 03, 2014 (Mar 15, 2018 11:24 AM), http://www.business-standard.com/article/news-ani/abha-singh-calls-sc-decision-on-section-498a-a-landmark-judgement-114070300541_1.html.
[24] Kans Raj v. State of Punjab, AIR 2000 SC 2324.
[25] Sushil Kumar Sharma v. Union of India, JT 2005 (6) SC 266.
[26]*Id.* "As noted the object is to strike at the roots of dowry menace. But by misuse of the provision a new legal terrorism can be unleashed. The provision is intended to be used a shield and not assassins' weapon."
[27] Id. "The object of the provision is prevention of the dowry menace. But as has been rightly contented by the petitioner that many instances have come to light where the complaints are not bonafide and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the ignominy suffered during and prior to trial. Sometimes adverse media coverage adds to the misery."
[28]*Id.* "The question, therefore, is what remedial measures can be taken to prevent abuse of the well-intentioned provision. Merely because the provision is constitutional and intra vires, does not give a license to unscrupulous persons to wreck personal vendetta or unleash harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. Till then the Courts have to take care of the situation within the existing frame work."

LAW COMMISSION REPORT ON MISUSE OF SECTION 498-A

The Law Commission of India made an exhaustive examination of Section 498-A via its Report No. 243[29]. The Commission had pursued the matter of researching and analysing the said subject in pursuance of the Home Ministry and considering the observations made by the Hon'ble Supreme Court in Preeti Gupta's case[30] in the wake of complaints of misuse of the Section[31].

The Commission made a comprehensive inquiry into the said matter and made certain recommendations. They are as follows, enumerated under summary recommendations.[32]

i. Misuse of Section 498-A in many cases has been judicially noticed by the apex court as well as various High Courts. This has also been taken note of by Parliamentary Committee on Petitions (Rajya Sabha). However, misuse (the extent of which is not established by any empirical study) by itself is not a ground to abolish Section 498-A or to denude the Section of its teeth. The social objective behind the Section and the need for deterrence should be kept in view while at the same time ensuring that the complaints filed with false or exaggerated allegations out of ulterior motives or in a fit of emotion should be curbed.

ii. The need to spread awareness of the provision and available remedies especially in rural areas both among women and men is necessary and in this regard the District and Taluka Legal Services Authorities, the media, the NGOs and law students can play a meaningful role.

iii. All endeavours shall be made for effecting reconciliation at the earliest with the help of professional counsellors, mediation and legal aid centres, retired officials/medical and legal professionals or friends and relations in whom the parties have faith. An

[29] Justice P.V. Reddi, Former Judge, Supreme Court of India, Chairman, LAW COMMISSION OF INDIA, Section 498A I.P.C., Report No.243, AUGUST 2012.
[30] Preeti Gupta v. State of Jharkhand, AIR 2010 SC 3363.
[31] *Id.* "The Court observed that the courts are receiving a large number of cases emanating from section 498-A of the Indian Penal Code. It is a matter of common experience that most of these complaints under section 498-A I.P.C. are filed in the heat of the moment over trivial issues without proper deliberations. The courts come across a large number of such complaints which are not even bona fide and are filed with oblique motive. At the same time, rapid increase in the number of genuine cases of dowry harassment is also a matter of serious concern. Unfortunately, at the time of filing of the complaint the implications and consequences are not properly visualized by the complainant that such complaint can lead to insurmountable harassment, agony and pain to the complainant, accused and his close relations."
The Court directed the Registry to send a copy of this judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society.
[32] *Supra* note 29, at para 19.

action plan must be drawn up for forming the panels in every district as well as extending necessary help to the aggrieved women. The I.O. should refrain from participating in the conciliation process.

iv. The law on the question whether registration of FIR could be postponed for a reasonable time is in a state of uncertainty. Some High Courts have been directing that FIR shall not be registered under S, 498-A (except in cases of visible violence, and the like) till the preliminary investigation is done and reconciliation process is completed. The issue has been referred to a larger Bench of Supreme Court recently. In this regard, the police must follow the law laid down by the jurisdictional High Court until the Supreme Court decides the matter.

v. The offence under S, 498-A shall be made compoundable, with the permission of Court and subject to cooling off period of 3 months, as already recommended by this Commission in 237thReport. The preponderance of view is to make it compoundable.

vi. The offence should remain non-bailable. However, the safeguard against arbitrary and unwarranted arrests lies in strictly observing the letter and spirit of the conditions laid down in Sections 41 and 41-A of Cr.P.C. relating to power of arrest and sensitizing the Police on the modalities to be observed in cases of this nature. The need for custodial interrogation should be carefully assessed. Over-reaction and inaction are equally wrong. Police should take necessary steps to ensure safety of the complainant and to prevent further acts of harassment.

vii. The Home Ministry's Advisory dated 20th October 2009 on the subject of "Misuse of Section 498-A of I.P.C." as well as the guidelines / additional precautions set out in paragraph 14 of this Report should be compiled and at a conference of DGPs specially convened for this purpose by the Home Secretary, they must be apprised of the need to follow the said principles and guidelines and to issue circulars / standing orders accordingly. There should be a monitoring mechanism in the police Dept. to keep track of S, 498-A cases and the observance of guidelines.

viii. Without prejudice to the above suggestions, it has been recommended that as set out in paragraph 16 above, sub-Section (3) shall be added to Section 41 Cr.P.C. to prevent arbitrary and unnecessary arrests. The legislative mandate which is not materially different from the spirit underlying Sections 41 and 157 Cr.P.C. should be put in place in the interests of uniformity and clarity.

ix. The compensation amount in Section 358 of Cr.P.C. shall be increased from one thousand rupees to fifteen thousand rupees and this proposed change is not merely

confined to the Section under consideration.

x. The women police stations (under the nomenclature of Crimes Against Women Cell) should be strengthened both quantitatively and qualitatively. Well trained and educated lady police officers of the rank of Inspector or above hall head such police stations. CWCs should be established in every district with adequate trained personnel. Panels of competent professional counsellors and respected elders / professionals who can counsel and conciliate should be maintained by SP/SSP for every district. There shall be separate room in the police stations for women complainants and the accused women in S, 498-A related cases.

xi. Hostels or shelter homes for the benefit of women who would not like to go back to marital homes should be maintained in cities and District headquarters with necessary facilities. The assistance given to them shall be treated as a part of social welfare measure which is an obligation of the welfare State.

xii. The passport of non-resident Indians involved in Section 498-A cases should not be impounded mechanically and instead of that, bonds and sureties for heavy amounts can be insisted upon.

xiii. Above all, the need for expeditious disposal of cases under Section 498-A should be given special attention by the prosecution and Judiciary.

The Report also emphasized on the State's obligation to take care of estranged women in distress.[33] The report stated that sufficient attention should be bestowed by the states and Union Territories in giving required aid and assistance to the hapless women who having gone to the Police Station with a genuine grievance and in a state of distress do not venture to go back to marital home or even unable to stay with relatives. The report highlighted the grim status of women, particularly of those who have no support system and are forced to fight a lone battle. Furthermore, there is a need for medical attention, housing, counselling services, crisis centres attached to Women Police stations to be afforded to women in such times of distress. The report stated at present, even in cities, there is no facilities available to such women, there are no Hostels and Shelter Homes worth mentioning which are catering to the welfare of victimized women. The Commission accentuated on the accountability of the state to meet the needs of victimized women and provide them the requisite assistance, cooperation and support. The report stated that, the States should consider this problem on a priority basis

[33] *Ibid*, para 18.

and initiate necessary steps to alleviate the suffering of women in need of help as a part of the welfare goal ingrained in our Constitution.[34]

VOICE OF THE MEN'S RIGHTS GROUP

Save Indian Family Foundation[35], an organization working on men's rights, opposed the move to make dowry law compoundable; instead demanded that the Section be made a bailable one. According to the organization, misapplication of dowry laws is not a recent phenomenon and the judiciary of India is completely accountable for the mounting misappropriation of dowry law and the consequential exploitation of innocent men in the process. The President of the organization Mr. Rajesh Vakharia alleged that the Government and the Judiciary have failed miserably in protecting the fundamental human rights of innocent men in the face the trauma of vexatious cases[36]. The rights and basic freedoms are immediately curbed, and men are condemned for life, even if they are not guilty.

The Organization states that there is an absolute disregard to procedure to be followed in such cases and they instead harass the husband and his family. The President cited certain instances which depicted the plight of the innocent husbands and threw light on the futility of Section 498-A.[37]

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[34] *Id.*

[35] SIFF is a prominent Men's Rights Organization in India. It fights for men's human rights and seeks to protect men and their families from Govt sponsored undemocratic social experiments. SIFF's Mission is to expose and create awareness about large scale violations of Civil Liberties and Human Rights in the name of women's empowerment in India. SIFF works for ending Male Disposability in India and the world. Most of the common men are so much brainwashed by the society that they fail to see that Males are Disposable Gender and deaths of men often does not count for the societies across the world.

[36] Press Release, *Men's Rights Group strongly objects move to make dowry law compoundable, demands bailability*, Mar. 21, 2015, Save Indian Family Foundation (Mar. 15, 7:23PM), http://www.saveindianfamily.org/press-release-mens-rights-group-strongly-objects-move-to-make-dowry-law-compoundable-demands-bailability/.
"The Government and courts should worry more about men avoiding women altogether than being worried about saving marriages by amending laws. Because, when it comes to protecting innocent men from abusive women in marriages and the resultant frivolous and vexatious litigation, the Govt. and the Judiciary score negative."

[37] *Id.* The first case cited was of one Mukul Srivastava (name changed) who travelled 9 times in a period of 3.5 months to attend his bail hearings from Chennai to Jaipur by flight spending close to INR 1 lakh for the travels. Additionally, he was made to stay in Jaipur for an extended period of 1.5 months jeopardizing his job and career. He was implicated by his wife in a false dowry case. He approached the court for bail and he was only given interim bail. Every 5 or 7 days, the interim bail was extended keeping him in a lurch wherein he was neither arrested nor completely safe even though he was cooperating in the investigation fully.
The other case cited was of Prakash Gupta (name changed) who was arrested by the Bihar police from Bangalore even though he had an anticipatory bail and he had to undergo the ordeal of police custody from Bangalore to Patna (where a false dowry case was lodged against him) before obtaining final bail.

Thus, Save Indian Family Foundation (SIFF) strongly condemned the indifference and insensitivity of the judiciary and reserved strong objections to Section 498-A being made compoundable. It pressed upon the need to make the Section bailable and non-cognizable.[38]

THE SUPREME COURT OF INDIA IN A CRITICAL POSITION

In a landmark move, in *Rajesh Sharma and others vs. State of Uttar Pradesh*[39], the Supreme Court of India has issued a set of directives related to the application of Section 498-A of the Indian Penal Code (I.P.C.), with a view to prevent the misuse of this provision in cases filed under it. There is a precedence for this ruling in *Arnesh Kumar vs. State of Bihar & Anr.*,[40] where the SC ruled that arrests should not to be made under this section in "a routine, casual or cavalier manner" because it concerns a non-bailable and cognizable offence.

A two Judge Bench of Justices AK Goel and UU Lalit observed that the noble purpose of Section 498-A is to ensure that cruelty in the hands of the husband or his relatives against the wife is addressed at the earliest to prevent such cruelty from escalating to a situation of suicide or murder of a woman. It also expressed concern on the misuse of the Section by disgruntled wives as a tool to harass and humiliate the husband and his families[41]. To this end, the court has defined specific guidelines for the police and other law-enforcing authorities to follow while dealing with cases filed under I.P.C.498-A.

The guidelines in Rajesh Sharma[42], as enumerated by the Court, states that a Family Welfare Committee shall be set up in each district under the aegis of the District Legal Services Authorities preferably comprising of three members with requisite qualifications. The members may come from diverse walks of life including paralegals, retired persons, and wives of working officers etc. who are debarred from being summoned as witness in a given matter. Every complaint must be forwarded to this Committee, who after sufficient study, interaction with the parties and review of the facts concerned, shall present a report to the

[38] *Id.*
[39] Rajesh Sharma & Ors. v. State of U.P., Criminal Appeal No. 1265 of 2017.
[40] Arnesh Kumar vs State of Bihar & Anr, Criminal Appeal No. 1277 of 2014 (@Special Leave Petition (CRL.) No.9127 of 2013).
[41] *Supra* note 39. "It is a matter of serious concern that large number of cases continue to be filed under Section 498A alleging harassment of married women. To remedy the situation, we are of the view that involvement of civil society in the aid of administration of justice can be one of the steps, apart from the investigating officers and the concerned trial courts being sensitized. It is also necessary to facilitate closure of proceedings where a genuine settlement has been reached instead of parties being required to move High Court only for that purpose."
[42] Rajesh Sharma & Ors. v. State of U.P., Criminal Appeal No. 1265 of 2017.

Authority concerned. Till this process is completed, there shall be no arrests made by the police. The Committees have one month to file the reports and based on that report, suitable action would be taken. However, if *"a bail application is filed with at least one clear day's notice to the public prosecutor/complainant, the same may be decided as far as possible on the same day"*. The order goes on to clarify that *"recovery of disputed dowry items may not by itself be a ground for denial of bail if maintenance or other rights of wife/minor children can otherwise be protected"*. Furthermore, the guidelines direct the lower Courts to exempt the Accused from appearing in person and allow him video conferencing facility. The exercise of impounding passports of the offending husbands or issuing a Red Corner Notice to NRIs would no longer apply.[43]

The latest directives of the Supreme Court are not only meant to curb misuse of the law but also prevent, as the bench says emphatically, the *"violation of human rights"*. The provisional ruining has brought with it condemnation and criticism. Many believe that the Court has struck the very heart of women's rights movement in India. Women's rights organizations, celebrated activists have questioned the rationale and reasoning of the Supreme Court, citing that such a ruling would aggravate the problem and dilute the strength of a woman and her rights to demand action against abusive husbands and relatives.

The Supreme Court has sought a report from the National Legal Services Authority by March 31, 2018 and has listed the matter for hearing in April 2018. The opinion of the National Legal Services Authority is sought regarding the directions enumerated by the Supreme Court and to suggest changes or alteration if needed, and review how far these are necessary and suitable in cases pertaining to Section 498-A.

ANALYSIS AND OBSERVATIONS

The effectiveness of the Section in authentic cases cannot be denied, but at the same time, cases of abuse of Section 498-A also cannot be ruled out. The Section under scanner is surely being misused by the citizens. The rationale behind the insertion of Section 498-A was a noble one and this has been grossly violated by the society. The complainant at times file false cases and exaggerates the matter to bring in more members of the family within the complaint to cause nuisance and harassment. According to statistics of the National Crime

[43] *Id*. The judgement laid down extensive guidelines to be followed in such cases and focused on finding a middle ground to ensure that the Section is no longer abused and undermined.

Bureau, Ministry of Home Affairs, in the year 2012 there was a rise in cases registered under the said Section and the rate of charge-sheeting stood as high as 93.6%, while the conviction rate was only 14.4%... out of 4, 66,079 cases that were pending in the start of 2013, only 7,258 were convicted while 38,165 were acquitted and 8,218 were withdrawn. The conviction rate of cases registered under Section 498-A I.P.C. was also a staggering low at 15.6%."[44] Thus, it can be deduced, though with not full corroboration, that in many cases such complaints are filed frivolously to pester the husband and the relatives. The fact that the Section is non-bailable adds to the misery for the husband and his family.

The provision of arrest under the said Section was scrutinized and the Supreme Court laid down extensive guidelines in Arnesh Kumar v. State of Bihar, elucidating on casual manner in which husband and relatives are arrayed as accused, arrested and remanded to judicial custody. The Supreme Court gave several directions which needed to be followed to check the arbitrariness involved in such cases. The Section should rather be made bailable to prevent innocent old parents, pregnant sisters, and school going children from languishing in custody for weeks without any fault of them. The debate regarding the compounding of the offence is not as crucial as perhaps amending the bail provision. If the offence is compounded, there is no guarantee that the number of frivolous and vexatious cases filed would come down. This is clearly visible by the example of the state of Andhra Pradesh which had make the said provision compoundable. It is seen that there been a drastic increase in the number of cases being filed, as women can now withdraw a case at a time of their choice. Thus, the recommendation of compounding the offence does not hold much water. There is also a need to balance the said Section and not make such provisions totally against a particular gender. Rather, such a Section must be gender neutral and address cases of abuse faced by husbands, however meagre the number of cases may be.

In the latest judgment, the Supreme Court has perhaps taken the Section to the other extreme. The directives in Arnesh Kumar did address numerous concerns of abuse against men but this ruling dampens the very spirit and movement of women's right in India. The period of one month given to the Committee is long enough to ensure that the accused coerce or abuse the woman further to ensure that no arrests are made. Further, in India, women have to struggle

[44]Arnesh Kumar v. State of Bihar & Anr, Criminal Appeal No. 1277 of 2014 (@Special Leave Petition (CRL.) No.9127 of 2013). Also cited in Rajesh Sharma & Ors. v. State of U.P., Criminal Appeal No. 1265 of 2017 (Supreme Court of India) by the amicus curiae.

to even file a F.I.R. considering the attitude of the police. Such directives only degrade their position to such an extent that it may result in more harm and subjugation.

Similarly, the concerns raised in Rajesh Kumar[45] by the Hon'ble Supreme Court also hold water but the effectiveness of establishing another 'middle-man' between the victims and the judiciary may damage the conditions further. The Court, it seems, has gone to the extreme end and goes against the very heart of women's rights in the country. The court has put precedence on protecting the family and its honour and the institution of marriage and marital responsibilities over women's rights. This is disturbing as it would be interpreted as normalizing and internalizing violence and in a way forcing women to desist from reporting such marital discords. The judgments also undermines the concept of formal reporting of such crimes by making the Family Welfare Committee an intermediary and conferring it with the powers to determine on the frivolity or perniciousness of a complaint.

Thus, in conclusion it can be said that the solution does not lie in taking away all the powers of the said Section and making it toothless but calls for a more effective use of the law. The law needs to be implemented for the reason of protecting the victims of abuse in marriage and not merely use as a tool for harassment. The real and actual cases must be separated from the frivolous ones and it is the duty of the police to investigate matters properly and thoroughly. Another essential point is to ensure speedy trial of 498-A cases, as this will not only ensure justice for the innocents that have been implicated in false charges, it will also lead to prompt redressal of the grievances of real dowry victims. The reduction in false cases will also reduce the burden on judiciary and expedite the processing of real cases. Thus, there can be a constant battle between the genders on such laws, but the test lies in truly realising the rationale and purpose of the Section, finding the correct balance, and not making a mockery of the law by its persistent abuse.

[45]Rajesh Sharma & Ors. v. State of U.P., Criminal Appeal No. 1265 of 2017.

REVISITING VICTIM COMPENSATION IN INDIA

*Vibha Mohan**

INTRODUCTION

> "*Law should not sit limply, while those who defy it go free and those who seek its protection lose hope*".[1]

The carriage of justice is often misconceived to halt at the signature on a judgment; however, the true destination lies at the lap of the victim. While it is the courts that preserve the sanctity of justice, it is the prerogative of the State to support the pillars of justice. Victimology related jurisprudence has debated extensively on where to place the ball of responsibility - whether the responsibility of the State ends merely by registering a case, conducting investigation, initiating prosecution and sentencing an accused or whether apart from pursuing these steps, the State has a further responsibility to the victim. Similarly, there is a dilemma whether the court bears a legal duty to award compensation irrespective of conviction. However, it remains that victims of a crime, including her/his kith and kin carry a legitimate expectation that the State will 'catch and punish' the guilty and compensate the aggrieved. Even in the event when the machinery of justice fails to identify the accused or falls short in collecting and presenting requisite evidence to ensure appropriate sentencing of the guilty, the duty of compensation remains.

The framework of justice in India has been largely oblivious to what would constitute true vindication to the victim. The ambit of justice has fixated to merely mean the conviction of the accused. This has excused systemic failures in terms of blotchy investigation, poor efforts of the prosecution, and questionable integrity of those who are involved in the process. Further, there is a lack of infrastructure to support or accommodate development in the process. This in turn affects the quality of justice offered to the victim.

Justice must be reformative for the purpose of the perpetrator and rehabilitative for the survivor. Therefore, it is a legitimate expectation that the victim must be given rehabilitative support including monetary compensation. Such compensation has been directed to be paid in

* The author is BBA LL.B. graduate from Symbiosis Law School, Pune.

[1]Jennison v Baker, (1972) 1 All ER 997; Justice V.S. Malimath, Report of the Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs,(2003), https://mha.gov.in/sites/default/files/criminal_justice_system_2.pdf. [hereinafter "Malimath Committee Report"].

public law remedy with reference to Article 21.[2] The Hon'ble Supreme Court has in numerous cases, to do justice to the victims, directed payment of monetary compensation as well as rehabilitative settlement where State or other authorities failed to protect the life, dignity and liberty of victims.[3]

The jurisprudence under Article 21 has gained momentum since the turn of the century and now extends to rehabilitating the victim or her/his family. However, the scope for remedy to the victim in terms of compensation was earlier limited under public law by way of writ jurisdiction. Therefore, there was a need to introduce a specific provision for providing compensation to the victim irrespective of the result of criminal prosecution. Accordingly, Section 357-A was introduced in the Code of Criminal Procedure, 1973[4] [hereinafter: **CrPC**].

History and Development of Compensation as a criminal remedy

Restitution has been employed as a punitive measure throughout history. Ancient societies never conceptually separated the realm of civil and criminal law, but mechanically required the offender to reimburse the victim and/or the family for any loss caused by the commission of the offence. However, the primary purpose of such restitution was misplaced since it was meant to protect the offender from violent retaliation by the victim or the community as opposed to compensating the victim.[5] It was a bargain afforded to the offender to 'buy back' the peace he had broken.

With the passage of time, principles of law gradually demarcated the allocation of punishment in the case of civil tort and criminal offences. Compensation was then incorporated as a victim's right in civil law as opposed to a remedy in the case of a crime. Thus, criminal law was rid of the burden of compensation to rehabilitate victims since the position of law was that criminal justice was either reformative or retributive for the purpose of the offender, as opposed to being rehabilitative with regard to the victim. This conventional position has in recent times undergone a notable change, as societies world over

[2] The Constitution of India, 1950, https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text. [hereinafter "Constitution"].
[3]KewalPati v State of U.P (1995) 3 SCC 600; Supreme Court Legal Aid Committee v State of Bihar (1991) 3 SCC 482; Railway Board v Chandrima Das (2000) 2 SCC 465; Nilabati Behera v State of Orissa (1993) 2 SCC 746; Khatri (1) v State of Bihar (1981)1 SCC 623.
[4] Code of Criminal Procedure Act, 1973 [hereinafter "CrPC"].
[5]Dilip S. Dahanukar v Kotak Mahindra Co. Ltd. and Anr. (2007) 6 SCC 528; Victim Restitution in Criminal Law Process: A Procedural Analysis, (1984) 97 Harvard Law Review, p. 931 – 946.

have increasingly felt that the legislatures and the courts alike were neglecting victims of the crimes.

However, a scheme based on restitution by the offender to the victim is particularly problematic because it is imperative for the offender to be apprehended and convicted, and it is also necessary for the victim to be able to afford the resources for the same. Such a scheme also gives rise to a probability where the victim is denied compensation since the offender is a debtor and cannot raise money in prison.[6]

Thus, the best method seems to be to have a State Fund from which the victims are immediately compensated after the crime. If and when the offender is convicted, he may be ordered by the court to restitute a certain amount to the State.[7] This is to ensure that the victim is not affected either by the offender's inability to pay, the long delays in the criminal process, or an acquittal because of lack of evidence.

Therefore, legislations have been introduced by several States including Canada, Australia, England, New Zealand, Northern Ireland and the USA providing for restitution by courts administering criminal justice.

History and Development of Victim Compensation in India

The history of penal law in India can be traced to the times of colonisation and the era of British rule. The very first trace of restitution in Indian law can be found in sub-clause (1)(b) of Section 545 in the Code of Criminal Procedure of 1898, which provided that courts may direct:

> *"payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by such person in a civil court".*

The Law Commission Report and Section 357 of the CrPC

The 41st Report of the Law Commission of India was submitted in 1969. This discussed Section 545 of the Code of Criminal Procedure of 1898 extensively. The report stated that the significance of the recoverability of compensation should be enforceable in a civil court akin

[6] M. Novak, Crime Victim Compensation – The New York Solution, (1971), 35 Alb L. Rev., p.717.
[7] Fresneda v State (1977) 347 So.2d 102; People v Becker (1957) 349 Mich. 476; State v Elits (1980) 94 Wash.2d 489.

to the public remedy available to tort. The gravity of compensability was earlier demarcated by the use of the word "*substantial"* which excluded cases where nominal charges are recoverable. However, the Law Commission debated against the demarcation since the discretion to apply the provision in cases was used scarcely by the courts in directing compensation for victims.

On the basis of the recommendations made by the Law Commission in the above report, the Government of India introduced the Code of Criminal Procedure Bill, 1970, which aimed at revising Section 545 and re-introducing it in the form of Section 357 as it reads today. The Statement of Objects and Reasons underlying the Bill was as follows:

> "*Clause 365 (now Section 357) which corresponds to Section 545 makes provision for payment of compensation to victims of crimes. At present such compensation can be ordered only when the court imposes a fine; the amount is limited to the amount of fine. Under the new provision, compensation can be awarded irrespective of whether the offence is punishable with fine or fine is actually imposed, but such compensation can be ordered only if the accused is convicted. The compensation should be payable for any loss or injury whether physical or pecuniary and the court shall have due regard to the nature of injury, the manner of inflicting the same, the capacity of the accused to pay and other relevant factors*."

The CrPC consequently incorporated the changes proposed in the said Bill of 1970. In the Statement of Object and Reasons it stated that Section 357 was "*intended to provide relief to the poorer sections of the community*" whereas, the amended CrPC empowered the court to order payment of compensation by the accused to the victims of crimes "*to a larger extent*" than was previously permissible under the Code.

Section 357 brought about significant changes in the framework. The approach to demarcation was shifted with the exclusion of the word "*substantial*". Further, two new subsections were inserted. Subsection (3) provides for payment of compensation even in cases where the sentence does not impose a fine, while subsection (4) outlined the jurisdiction and powers of courts with respect to the section. It states that an order awarding compensation may be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

Other Provisions in the CrPC

While discussing the law of victim compensation, it is necessary to also address other aspects of what would be construed as compensation to the aggrieved. This requires a perusal of other provisions in the CrPC such as Section 358.

Section 358 addresses an *unconventional interpretation* of who is a 'victim' and what would constitute 'compensation' for that purpose. In the context of strictly defining a victim, the Supreme Court has observed that -

> *"The term 'Victimization' is defined neither by the Central Act nor by the Bombay Act. Therefore, the term 'Victimization' has to be given general dictionary meaning. In Concise Oxford Dictionary, 7th Edn., the term 'Victimization' is defined at Page 1197 as follows :*
>
> *make a victim; cheat; make suffer by dismissal or other exceptional treatment."*[8]

Section 358 provides for compensation to anyone who would be a victim of an arrest that is without reason. It states that in such a case, the Magistrate may award compensation to the extent of ₹1,000/- to the person who is a victim of such an arrest. However, according to this section, it is necessary for a direct connection to exist between the arrest and the complainant. In order to attract this provision, the arrest must have been caused by the informant without any sufficient grounds.

Similarly, Section 359 deals with instances where a complaint for a non-cognizable offence is made to a court, and the accused is convicted by the court. It provides that a Court of Session, an Appellate Court, or the High Court while exercising their revisional jurisdiction can order payment of costs in such situations. In addition to the penalty imposed, the court may also order the accused to pay to the complainant, either in whole or in part, the cost which is incurred by the complainant in the prosecution. Further, the court is also empowered to sentence the accused to a simple imprisonment for a period not more than thirty days in the event he fails to make the payment.

The CrPC also takes into account instances where the accused may be victim to false allegations. In light of the same, Sections 237 deals with compensation to such peculiar

[8]Colour-Chem Ltd. v A.L.Alaspurkar&Ors. (1998) 3 SCC 192.

victims. Section 237 empowers the Court of Session to take cognizance of an office in accordance with section 199 (2) of the CrPC. Further, according to subsection (3) of the same provision

> "*If, in any such case, the court discharges or acquits all or any of the accused and is of opinion that there was no reasonable cause for making the accusation against them or any of them, it may, by its order of discharge or acquittal, direct the person against whom the offence was alleged to have been committed (other than the President, Vice-President or the Governor of a State or the Administrator of a Union Territory) to show cause why he should not pay compensation to such accused or to each or any of such accused, when there are more than one*".

If the court should consider that there is a lack of reasonable ground for the allegation, it is empowered to order the complainant to pay compensation of an amount not exceeding ₹1,000/- to the victim of false accusation, after recording reasons for the same. Similar powers are vested under Section 250 of the CrPC which empowers the Magistrate to order the complainant to provide compensation to the person against whom baseless allegations were made.

Analysis of Section 357

The parent of Section 357 of the CrPC was Section 545 of the 1898 Criminal Procedure Code. The scope and application of this Section however extends to any order for compensation passed either by the trial court, Appellate Court, or by the High Court, or Court of Session while exercising their revisional jurisdiction. The Hon'ble Supreme Court is also empowered to order compensation under this provision.

The applicability of this Section is limited in application to four defined instances. Such compensation may be afforded to the complainant for meeting the expenses incurred during prosecution. It can also be recovered in the aforementioned competent courts by any person who has suffered loss or injury by the offence. The courts so empowered, can award such compensation to a person entitled to recover damages under the Fatal Accidents Act, when there is a conviction for causing death or abatement thereof. The scope of Section 357 extends to instances of injury to property since courts can order compensation to a *bona fide* purchaser of property, which has become the subject of theft, criminal misappropriation, criminal breach of trust, cheating, or receiving or retaining or disposing of stolen property,

and which is ordered to be restored to its rightful owner. Subsection (3) of Section 357 further enables the court to order the payment of compensation even in cases where the punishment prescribed does not include payment of fine.

Criticism of Section 357

The biggest flaw in the jurisprudence of Section 357 is that it is triggered only upon successful conviction. It functions on the assumption that the accused must be identified, prosecuted and convicted. It does not accommodate cases where the person is not pronounced guilty, or in those cases where Closure Reports or Summary Reports are filed by the Police, disclosing the commission of the offence, but that such an offence has not been committed by the accused who is sought to be prosecuted, or that the accused has not yet been identified. In such instances, the courts cannot rely on Section 357 to order compensation to the victim.

Further, this provision places the entire onus of disbursement of compensation on the convicted person in which case, the quantum of compensation awarded to victim depends on the financial position of the convict, as opposed to dividing the liability between the State and the offender where the victim will enjoy the security of compensation. The provision does not provide for apportionment of liability towards the State, and to what extent the State would pay compensation. Moreover, subsection (2) of Section 357 further states that no disbursement of compensation shall be made, if the order imposing fine is subject to an appeal, until either on the expiry of period of limitation or when the appeal is finally disposed of. This results in financial inconvenience to the victim who may incur immediate expenditure for recovery from the offence. The provision does not contemplate a contingency where under emergency situations; interim compensation might be required by the victim. Further, the provision does not outline the timeline for payment of compensation.

Contrary to the limitation of Section 357, Section 357A provides a fresh perspective addressing the lacuna in allocating responsibility to the State. It obligates state governments to draw up victim compensation schemes. It defines the role of the District Legal Services Authority [hereinafter: **DLSA**] to decide the quantum to be awarded every time either a recommendation is made by the court for compensation or an application is made under the state scheme by the victim. It also provides for compensation and measures of rehabilitation where the order of compensation passed by the courts is inadequate. An application for

compensation under Section 357A can be made even when the offender has not been traced or identified or in the absence of a trial.

In terms of interim assistance, the DLSA is obligated under Section 357A to make provisions for immediate medical assistance, and such other relief, as the appropriate authority deems fit.

However, the only drawback of Section 357A is that it is imperative for states to notify a scheme, and allocate budget so that applications may be processed effectively and victims are given compensation expeditiously.

Victim Compensation and Interplay with Fundamental Rights

The 154th Law Commission Report on the Code of Criminal Procedure[9] devoted an entire chapter to "Victimology" in which the growing emphasis on victim's rights in criminal trials was discussed extensively.

It noted that the interest of criminologists, penologists and reformers of the criminal justice system had gradually been directed to victimology, the control over victimization, and the protection of the various victims of crimes. It highlighted that crimes often entailed substantive harm to people, and this harm was graver than just the symbolism of its apparent effects in the social order. Consequently the report also addressed the needs and rights of victims and that they should be prioritized in the hierarchy of the process of justice in dissecting a crime. Compensation was proposed as a recognized method of protection that offered immediate support to the victim. Such compensation could also be extended to the family of the victim in certain instances.

The report traced the foundation of the principles of victimology to Indian constitutional jurisprudence. Part III of the Constitution which consists of fundamental rights and Part IV which deals with Directive Principles of State Policy, form the bulwark for "*a new social order in which social and economic justice would blossom in the national life of the country"*[10]. Further it also mandates inter alia that the State shall make effective provisions for "*securing the right to public assistance in cases of disablement and in other cases of undeserved want*".[11] Similarly, Article 51-A makes it a fundamental duty of every Indian

[9] 154th Law Commission Report (1996), http://lawcommissionofindia.nic.in/101 /Report154Vol1.pdf.
[10] Art.38, Constitution.
[11] Art. 41, Constitution.

citizen, inter alia *"to have compassion for living creatures'* and to *'develop humanism".* The Law Commission interrupts to assert that if the jurisprudence of these Articles are '*emphatically interpreted'* and '*imaginatively expanded'* they can form the constitutional underpinnings for victimology.

The Law Commission also disappointedly noted that the scope for victim compensation afforded in Indian criminal law is limited. However, Section 357 of the CrPC is the point of redemption of Indian law since it incorporates victim supportive jurisprudence by empowering courts.

Findings of the Malimath Committee Report

In order to revisit the machinery of criminal justice in India, in 2003, the Committee on Reforms of Criminal Justice System was constituted under the Chairmanship of Justice V.S. Malimath. The Malimath Committee Report made observations regarding the history of the criminal justice system and how it was apparent that it mostly protected the '*power, the privilege and the values of the elite sections in society'.* It evaluated the way crimes are defined in the modern era. The administration of the system demonstrated that there is an ingredient of truth of such a narrow perception.

The primary assumption in the functionality of a criminal justice system is that it is the prerogative and dominant function of the State to protect all citizens from harm to their person and property. The State is believed to actualize this by '*depriving individuals of the power to take law into their own hands and using its power to satisfy the sense of revenge through appropriate sanctions.'*

The Committee Report argued that the State itself becomes a victim when a citizen commits a crime, and as a consequence undermines its authority and contravenes norms in society. It is this victimization that shifted the focus of attention from the real victim who suffered the actual injury to the offender and how he is handled by the State. It was this failure of the State to adequately protect the interests of its citizens that led to the transformation of torts to crimes.

With respect to the criminal, the Report noted that criminal justice has matured to comprehend the intricacies of the vehicle of crime: the criminal and the process of ascertaining his guilt, proving it in a court of law and punishing him. Civil law dealt with the

monetary and other losses suffered by the victim. Since victims were marginalized and vulnerable, the State stood forth in the shoes of the victim to prosecute and punish the perpetrator.

With respect to the rights of the victim, the Report pondered -

> *"6.7.2. What happens to the right of victim to get justice to the harm suffered? Well, he can be satisfied if the State successfully gets the criminal punished to death, a prison sentence or fine. How does he get justice if the State does not succeed in so doing? Can he ask the State to compensate him for the injury? In principle, that should be the logical consequence in such a situation; but the State which makes the law absolves itself."*

The principle of compensating victims has been recognized more often as a token relief than as a punishment to the offender, or substantial remedy to the victim offered by law. However, provisions in the procedural law of crime in India provides for sentence of fine imposed both as a sole punishment and as an additional punishment according to the wisdom of the court.[12] However, this provision is only invited when the perpetrator is convicted of the charges he is accused of.

In 2008, significant amendments were made to the CrPC that focused on the rights of victims in criminal trial, particularly relating to sexual offences. Although the amendments left Section 357 unaffected, they introduced Section 357-A[13] which empowers the court to direct the State to pay compensation to the victim in cases where '*the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated*'.[14]

Section 357A subtly recognizes compensation as one of the methods to protect the interest of victims. The provision was incorporated on the recommendation of the 154th Report of the Law Commission. The focus of the provision is on the rehabilitation of the victim even if the accused is not tried. In such instances, the victim is required to make an application to the State or District Legal Service Authorities as the case may be, for the purpose of

[12] Sec. 357, CrPC.
[13] Inserted by Code of Criminal Procedure Amendment Act (2008).
[14] Sec. 357A, CrPC.

compensation. The jurisprudence of this provision and the obligation of courts have been defined by the Hon'ble Supreme Court:

> "*While the award or refusal of compensation under Section 357 of Code of Criminal Procedure, in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation*."[15]

Role of the Government

The theory of State responsibility pins the blame of crime on the State as having failed to protect the public against crime. It propounds that compensation is therefore a consequence of such failure.[16] Although modern jurisprudence accounts for individual deviance as being no fault of the State,[17] it supports the factum that the State must assist the vulnerable as a matter of public policy.[18]

The central government has adopted measures to realise the accessibility of compensation to victims. The Criminal Law (Amendment) Act, 2013 was enacted on 2nd April, 2013 to address the inadequacy in law relating to sexual offences of women and children. It led to the creation of a dedicated fund known as the Nirbhaya Fund. As per guidelines issued on 25th March, 2015, the Ministry of Women and Child Development is the nodal Ministry to appraise and recommend the proposed schemes under Nirbhaya Fund, it also reviews and monitors the progress of sanctioned schemes in conjunction with the related Ministries/Departments.

The central government also set up the Central Victim Compensation Fund Scheme [hereinafter: **CVCF**] vide the notification dated 14th October, 2015 by the Ministry of Home Affairs.[19] The CVCF aims at supporting and supplementing existing victim compensation schemes notified by states and union territories and reducing the disparity in the quantum of

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[15] AnkushShivajiGaikwad v State of Maharashtra (2013) 6 SCC 770.
[16] A. Goldberg, Equality and Government Action, (1964), 39 NYU L REV p.205-224.
[17] J. Culhane, California Enacts Legislation to Aid Victims of Criminal Violence, (1965), 18 STAN L REV, p.266- 272.
[18] B. Jacob, Reparation or Restitution by the Criminal Offender to his Victim: Applicability of an Ancient Concept in the Modern Correctional Process, (1970) , 61 The Journal of Criminal Law, Criminology, and Police Science p.152-167.
[19] Central Victim Compensation Scheme Guidelines, Ministry of Home Affairs, 2015, http://mha.nic.in/sites/upload_files/mha/files/CVCFFuideliness_141015.pdf.

compensation notified thereof. It defines the scope for budgetary allocation and provides for accounting and audit. It also opens public participation by inviting funding.

The Ministry of Women & Child Development has also launched the 'One Stop Centres' [hereinafter: **OSC**] Scheme, to be piloted with one Centre in each state. The objective of the OSCs is to provide an integrated range of services including medical, legal and psychological support under one roof to women and girls who face violence. The Scheme also envisages that a lawyer and police facilitation officer associated with the OSC will support the woman during recording of her statement under Section 164 (5A) of the CrPC.

All states and union territories have notified victim compensation schemes.[20] However, the schemes in each state operate differently. For instance, the Mizoram (Victim of Crime Compensation) Scheme, 2011[21] states compensation would be given to the victim and his/ her dependants in the event of loss of property worth more than ₹1,00,000/- and in the event of death or permanent incapacitation of the victim who was the sole breadwinner of the family through the act of crime, whereas the Himachal Pradesh (Victim of Crime) Compensation Scheme, 2012[22] provides for certain cases, where the compensation shall not be paid at all.

The method of disbursing compensation proposed in each state scheme is also very different. According to the Karnataka Victim Compensation Scheme,[23] the compensation amount should be paid through cheque, while the Himachal Pradesh Scheme provides that the compensation amount awarded should be made to the bank account of the applicant. Further, there is no consistency in category of offences for which the compensation is approved. In light of such disparity, it is important to echo the wisdom of the Supreme Court observing the need for uniformity in the manner of awarding compensation under the Victim Compensation Scheme.[24]

Issues regarding implementation

There are several problems that plague the implementation of the law as envisioned under Section 357A. This is primarily because of the allocation of responsibility between the state government for legislation, the DLSA and other instrumentalities for implementation. Most

[20] Index of Notification of Victim Compensation Scheme, Ministry of Home Affairs, 2013, http://mha1.nic.in/par2013/AnnexLSQNo203For220714.PDF.
[21]Gazette of Mizoram (Dec. 5, 2011).
[22]Gazette of Himachal Pradesh (Sept. 6, 2012).
[23] Gazette of Karnataka (Feb. 22, 2012).
[24]Laxmi v Union of India (2014) 4 SCC 427.

states tend to forego the notification of a dedicated Victim Compensation Scheme under Section 357A since they place reliance on other relief funds that compensate victims.

The primary problem in realizing nation-wide accessibility of victim compensation is the failure of states to notify a pragmatic and effective Victim Compensation Scheme under Section 357A. Further, there is a disparity in the quantum of compensation awarded by different states for the purpose of different crimes. There is a lacuna in terms of the specificity of grounds for compensation that has been left vulnerable to the flexibility of interpretation. In terms of disbursement, there is no clarity with regard to the stage when compensation can be awarded including interim compensation and the need to attend to recurring expenses by the victim.

In states where Victim Compensation Schemes have been notified, there is either a lack of awareness as to the existence of such schemes or a failure of the state machinery to provide compensation because of poorly planned budgetary allocation. This lack of awareness also results in a lapse because of limitation period for application. Further, courts also fail in their duty of ensuring that compensation is not just approved but also received by the victim by not following up on the application for compensation.

Victim Compensation in the International Context

International Covenants and General Assembly Resolutions have defined a model of victim compensation that is accepted by most States as an obligation towards their citizens. Thus, there has been a shift in the paradigm of justice, from ensuring successful sentencing to extending support to victims and their dependents in a rehabilitative capacity.

Instead of being limited to monetary compensations, legislatures and courts of various States have adopted laws to accommodate for restitution of the victim.[25]

International Obligations

The Republic of India is a signatory to several international human rights instruments such as the Universal Declaration of Human Rights [hereinafter: **UDHR**][26], International Covenant on Civil and Political Rights[27] [hereinafter: **ICCPR**], International Covenant on Economic,

[25] People v Lent (1975) 15 Cal. 3d 481.
[26] Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217 (III), (Dec. 10, 1948).
[27] International Covenant on Civil and Political Rights, (Dec. 16, 1966), S. Treaty Doc. No. 95-20, 6

Social and Cultural Rights[28] [hereinafter: **ICESCR**] and the Convention on Eliminating all forms of Discrimination against women and children[29] [hereinafter: **CEDAW**]. These conventions impose on India the obligation of offering an effective criminal justice system to its citizens. This includes the concept of legal remedy such as compensation.

International law has provided for reparation in various forms such as restitution and compensation. This has been defined through Conventions, Resolutions, Codification of customary practises and International case-laws. The remedy of compensation was a creation of the former Permanent Court of International Justice [hereinafter: **PCIJ**] in the case concerning the *Chorzów Factory*[30]*:*

> "*reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed*."[31]

This is the basis for the maxim *restitution in integrum* as a remedy to damage and injury. In the *Corfu Channel* case,[32] State responsibility for damage was extended to harm that is caused by collateral incidents. As long as the injury can be attributed to the action or instrumentality of a State, that State is liable for an internationally wrongful act.[33] Therefore causal link is the necessary element to establish responsibility to compensate. Further, Article 36 of the Articles of Responsibility of States for Internationally Wrongful Acts [hereinafter: **ARSIWA**] deals with compensation as a form of reparation for damages caused.[34] Article 27 of the ARSIWA also introduces a unique jurisprudence with respect to ascertaining liability and the responsibility to compensate. It propounds that circumstances do not prejudice the claim of compensation for material loss caused by a State. Whereas a State may not be held liable for the wrongfulness of its actions, it may still be obligated to compensate for damages

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I.L.M 368 (1976).

[28]International Covenant on Economic, Social and Cultural Rights, (Dec. 16, 1966), United Nations, Treaty Series, vol. 993, p.3 .

[29] Convention on the Elimination of All Forms of Racial Discrimination (Dec.18, 1979), United Nations, Treaty Series, vol. 1249, p. 13 [hereinafter "CEDAW"].

[30] Factory at Chorzów (Germany v Poland) (Order, Indemnity) 1928 P.C.I.J. (ser. A) No. 17 (Order of Sept. 13).

[31] Factory at Chorzów (Germany v Poland) (Order, Indemnity) 1928 P.C.I.J. (ser. A) No. 17 (Order of Sept. 13).

[32]Corfu Channel (U.K. v. Albania), (Merits) 1949 I.C.J. 4 (Apr. 9).

[33]Articles On the Responsibility of States for Internationally Wrongful Acts, with Commentaries, (2001) UN Doc A/56/10, art. 12; Report of the International Law Commission on the work of its Fifty-third session, UN Doc. A/56/10, New York, p. 59 (2001).

[34]Articles On the Responsibility of States for Internationally Wrongful Acts, with Commentaries, (2001) UN Doc A/56/10; Report of the International Law Commission on the work of its Fifty-third session, UN Doc. A/56/10, New York, p. 59 (2001).

caused.[35] This principle should be extended outside the realm of international dispute to afford compensation to victims regardless of conviction of the accused.

International criminal law also outlines principles of compensation for aggrieved victims. Article 75 of the Rome Statute[36] of the International Criminal Court [hereinafter: **ICC**] states that the ICC shall establish principles relating to reparations to, or in respect of, victims of the crimes that the ICC deals with in accordance with its jurisdiction.

On 16th December, 2005 the United National General Assembly passed a resolution adopting the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law"[37] [hereinafter: **Basic Principles**]. These principles deal with the rights of victims of international crimes and human rights violations. The Hon'ble Supreme Court of India quoted these principles in their draft form in *State of Gujarat v High Court of Gujarat*[38] approving of their jurisprudence and contribution to victim protection laws.

The Basic Principles provide a normative framework on the obligation of the State to provide remedy and reparations, defining the contours of State responsibility to provide compensation to victims for acts or omissions which can be attributed to failure of the State machinery. The Basic Guidelines and Principles lay down the following forms of reparation:

- Restitution: These are measures to restore the victim to her/his original situation before the violation of rights including restoration of liberty, identity, family life, citizenship, residence, employment, etc.

- Compensation: For any economically assessable forms of damage as proportionate to the gravity of the violation including physical or mental harm. This encompasses educational and social benefits, material damage, medico-psychological care, legal services, etc.

[35]CMS Gas Transmission Company v The Argentine Republic (2005) ICSID Case No. ARB/01/8; Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Reports, 1997.
[36] Rome Statute of the International Criminal Court, (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S. 90.
[37] UNGA Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147 (2006).
[38] (1998) 7 SCC 392.

- Satisfaction: These are measures to satisfy the victims of the efforts taken to redress the violation of human rights including verification of facts, searching missing persons, judicial and administrative sanctions, public apology, commemoration and tributes, etc. Satisfaction also includes the 'Guarantee of Non-Repetition'. This includes measures which contribute to effective control of security and military, protecting human rights defenders, reviewing and reforming laws etc.

International Practises

The trends in victim compensation followed by the United States of America and the United Kingdom are discussed below so as to facilitative a comparative understanding.

United States of America

Certain American laws have defined injury to include "mental harm"[39] and "emotional injury".[40] It has also been observed that most states pay for mental health counselling for individuals even though they have not suffered any physical or sexual injury.[41] However, many states continue to exclude "non-physical" injuries because their inclusion would facilitate fraudulent claims, and add to the costs of administration.[42]

The Victims of Crime Act 1992 does not provide for any compensation for pain and suffering.[43] The reasoning is that since the State is not the tortfeasor, it is not liable to compensate victims on that basis. However, in Tennessee, such compensation is payable only to victims of rape and crimes involving sexual deviancy "taking into account the particular circumstances involved in such crime".[44]

United Kingdom

Margery Fry, an eminent English Penal reformer deliberated on the access of effective remedies and the plight of victims in the 1950s.[45] This marked the establishment of victim

[39] Uniform Victims of Crime Act, 1992 (United States).
[40] California Government Code, 1994 (United States).
[41] 'Program Handbook II-1' National Association of Crime Compensation Boards,(1992), http://www.nacvcb.org/.
[42] Texas Criminal Procedure Code, 1994 (United States).
[43] Dill v Commonwealth (1990) 562 N.E.2d 468; D Greer, A transatlantic perspective on the compensation of crime victims in the United States, (1994) 85 J. Crim. L. & Criminology p.333.
[44] Tennessee Code Annotated, 1994 (United States).
[45] A. Logan, The International Work of Margery Fry in the 1930s and '40s. Women's History: The Journal of the Women's History Network, 23 ISSN 1476-6760.

compensation institutions in Britain. In 1964, a non-statutory program was set up where funds were sanctioned by the British Parliament annually. This acquired statutory legitimacy with the Criminal Inquiries Compensation Act, 1955. Subsequently, the Criminal Justice Act, 1982 required courts to make an order for compensation in every case of death, injury, loss or damage or record reasons for not passing such an order.[46]

Intertemporal Aspects of the Concept of Victim Compensation

Victimological jurisprudence in particular has focused the lens of its attention on sexual offences. This is particularly because of the nature of gender-related crimes and their tangible effects on the victim's life – be it medically, psychologically or socially. Since these offences require immediate attention and result in recurring offences, compensation schemes with respect to victims of sexual offences must be expedient and effective.

Generally, the pattern of crimes such as rape and other forms of sexual assault, such as acid attacks have been targeted against women who belong to the strata of society that is economically weak. While a sizeable number of cases are reported from rural areas, those unreported cannot be discounted.

The societal conditions in villages and small towns in India remain rigid, myopic and patriarchal. Most victims endure emotional trauma because of the lack of emotional support from friends and family. They have to instead deal with their angst by themselves. Therefore, most victims choose to drop out after braving through the incident and registering a First Information Report [hereinafter: **FIR**] but before the filing of the charge-sheet. In most cases, the victim turns hostile and refuses to cooperate with the police or other non-governmental organisations [hereinafter: **NGO**]. They even resort to recanting their testimonies under Section 164 of the CrPC.

It is significant to note that most women in rural areas are dependent on their families, either emotionally or financially, and require their support to institute a case and pursue prosecution. They fear the stigma attached to sexual offences like rape and acid attack and the manner which society would prejudice the respect of their families. Further, there are also instances where the family themselves prevent the victim from undertaking any legal action because of their hesitation to accept the offence and support the victim. Thus, most victims

[46] Delhi Domestic Working Women's Forum v Union of India and Ors. (1995) 1 SCC 14; Oxford Handbook of Criminology, p.1237-1238 (1994).

are left without any financial support from the family to fight the long drawn battle in courts. Although the National Crime Records Bureau offers no clarity on the number of drop out cases or the reasons for those drop outs, it is a well-known fact that it is on account of the socio- economic profile of the victim, that a majority of the charge-sheets suffer a still birth. Furthermore, in cases which require surgery, cosmo-dermotological reconstruction or even continued medical support, these victims do not have adequate finances and therefore have to reconcile with the pain of suffering and continued mental trauma.

While it is the obligation of the State to have to take initiative to protect and support the victim, it abandons the victim to shoulder the burden alone. There is no emergency infrastructure afforded to her, nor is there a compassionate hand to guide and urge her to carry on. It is but a fact that in India justice is definitely delayed and sometimes even denied. So, there is little to assure her of the conviction of the offender, let alone financial support in the form of compensation. This also applies to cases of sexual assault against children whose parents are not in a financial position to afford the litigation expenses, or to provide medical or psychological assistance to the nascent minds of young children.

Therefore, apart from constituting Legislative Committees to study contemporary jurisprudence, it is imperative for India to direct its efforts towards assimilating these practices either in the form of legislated law or as a practice adopted by the instrumentalities of the legal machinery. Instead of limiting victim compensation to a remedy in public law, its scope must be expanded to include restitution in more than just monetary terms. It must evolve to constitute an entire mechanism that will assist the victim in her endeavour of justice in the court, and in her efforts to steady herself and recover both medically and psychologically. It must encompass all stages of prosecution such as registration of FIR, filing charge sheet, investigation, pursuing the matter in court and post-prosecution rehabilitation of the victim. This will ensure that the victim will participate as an active stakeholder as opposed to merely being shrouded by the grim pain of victimization.

Gender related aspects of Victim Compensation

The UN Special Rapporteur for Violence against Women, Prof.RashidaManjoo has introduced a feminist perspective to the issue of responsibility of States while making

reparations to the victims.[47]According to the Report of the Special Rapporteur, the CEDAW places upon the State the duty to develop penal, civil, labour and administrative sanctions in domestic legislature to provide reparations to women subjected to violence.[48] The ambition of law must be to achieve transnational justice for gender sensitive reparations. In order to realise this, nations must continuously undertake efforts to involve women in legislative reforms through discussion and discourse. The nature of reparation must be rehabilitative and not merely compensative. It must attempt to return the victim to *status quo ante.*

There is a need for change in the gender perspective with respect to victim compensation since the experience of women as victims and their consequent collective participation in sharing experiences is more productive and cathartic as opposed to a male-centric discussion of violation.

Recommendations

Victim Compensation Schemes in India must be treated as an institution larger than Section 357 or Section 357A. It must envision a program that harmoniously ties criminal provisions, civil remedy, rehabilitative support, role of courts and State accountability.

The prevalent law in India must be reformed and redesigned to be in consonance with international standards. Further, it must engage and involve victims, not only for the purpose of recommendation, but also as a participant so as to reform the compensation scheme into an inclusive process that empowers the victim.

The best way to ensure effective implementation of the schemes under Section 357A would be to address the various issues in each provision of the CrPC with a focus on outcome. Further, in order to achieve success nation-wide, it is imperative for all states to collate recommendations and notify a uniform scale for deciding the grounds and the quantum of compensation. All states must also create awareness of the Victim Compensation Scheme and the procedure for application. Where there are multiple relief fund schemes available, States must recognise that these schemes operate to the benefit of victims, and therefore must not actively prevent victims from availing more than one scheme simultaneously. Further, where

[47] U.N.H.C.R, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, (2010) UN Doc A/HRC/14/22.
[48] CEDAW, art. 4 (d).

compensation is denied by the competent authority, a fluid redressal mechanism must exist which assists the applicant in their appeal.

The procedure for obtaining compensation under most schemes is extremely rigid. Requirements such as medical report may delay the disbursement of compensation that may be urgently required by the victim. Therefore the scope for interim compensation must be defined and provided for. Further, most schemes focus only on disbursement of compensation rather than following up on rehabilitative support, thus addressing only visible bodily injuries and permanent mental retardation while turning a blind eye to the psychological scars suffered by the victim. Moreover, most children realize they were actually abused at later stages of their lives where physical remnants of the assault have disappeared. Therefore, amnesty must be provided to those who have overstepped the limitation of time in law.

The coordination between the various limbs of justice i.e. the courts, the police, the DLSA and the State Legal Services Authority must be streamlined. Each instrument must inform and assist the victim in realizing compensation. Further, the courts themselves must make recommendations for compensation in cases its wisdom considers such assistance necessary.

Conclusion

Victim compensation as a concept in India is still nascent and shy to continuous development. While the courts no longer subscribe to the archaic approach of limiting victim support to monetary penalty imposed on the convict, there is much momentum to be gained so as to adequately assist victims from various backgrounds.

The development of victim centric jurisprudence must transcend legislative necessity, and afford participating instruments flexibility to respond to the diverse needs of a victim. Compensation must be actualised in the sense of realising rehabilitation for the victim. Therefore, a holistic Victim Compensation Scheme must encompass assistance through the process of prosecution, psychological support and rehabilitative measures to integrate the victim back into the norm of society. Apart from defining the role of various stakeholders, a successful victim compensation scheme must necessarily provide for transparency in the expenditure of the budget, and a mechanism for accountability. The State exchequer must be prepared for contingencies and be supportive of the expenditure incurred by the victim. There must be a channel for inviting and recording funds received from various international organisations and the public towards this purpose.

The law under Section 357 and Section 357A of the CrPC must witness a marriage of the State and the courts in functioning harmoniously to alleviate the plight of the victim. Further, it must evolve to accommodate instances where states have either failed to notify effective schemes or the scheme notified are ineffective in operation. The Legislature must realise that the outlook of the Law Commission may be limited to scholarly knowledge, and therefore integrate victims and other stakeholders in the process of making the law. While the scope of this article is limited to case-study and analysis of scholarly work, there is much to be learnt by actually recording data of applications, complaints and stories of victims.

The machinery of criminal justice in India must be reinvented to become a system that is curious to the nature of crimes, their effects on the victims and the stigma it bears in society, and alive to the developments of human rights jurisprudence internationally. As responsible citizens, we must constantly remind the consciousness of justice that it owes a sacrosanct obligation towards the rehabilitation of a victim.