LAW MANTRA THINK BEYOND OTHERS
(International Monthly Journal, I.S.S.N 2321 6417)
Journal.lawmantra.co.in www.lawmantra.co.in

MANUAL SCAVENGING: SCOURGE OF SOCIETY

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Introduction:

'Manual scavenging' or *'carrying night soil'* is one of the most degrading, dehumanizing and shameful practices that the democratic India has faced. Manual scavengers are persons engaged in manually carrying human excreta. This article would intend to penalize the discrimination based on caste system which has been prevalent in a country like ours for ages. On a bare perusal of recent facts, it is evident that around 1.3 million Dalits in India, mostly women, make their living through manual scavenging - a term used to describe the job of removing human excrement from 'dry latrines', that is latrines without modern flush system and sewers using basic tools such as thin boards, buckets and baskets, lined with sacking, carried on the head. From the Official statistics of the **Union Ministry of Social Justice and Empowerment** for the year 2002-03, there are 676009 identified manual scavengers in the country and among them 95 percent are Dalits. The Census of 2011 identifies 27 lakh dry toilets in use and around 2-3 lakh people are still involved in manual scavenging. The act of manual scavenging is not only hideous; it is abysmal and strikes morality and dignity at its root. It is abominable and a mockery of human rights. Manual scavenging in India involves the issue of degradation of humans into subhuman beings. Our society poses a threat on human existence as the system of laws which forbid such inhuman acts cannot deter them. Additionally, continuation of all types of manual scavenging affects the environment and makes the sanitary system meaningless. Furthermore, the manual scavengers are not only exploited, but also subjected to many viral and bacterial infections, like campylobacter infection, TB, cryptosporidiosis, hand, foot and mouth disease, meningitis (viral). I would present the demanding laws and regulations that would acknowledge rights of the lower castes and the less fortunate. The article would demand reformation of millions of scavengers who are treated less like humans and more like degraded beings

Manual scavenging mirrors the ignorance of society in dealing with such an evil practice which engulfs the society every day. We have to question ourselves as to why even sixty five years after independence we are debasing ourselves by encouraging this inhuman practice. Our country turns a deaf ear to the relentless teachings of Gandhi and goes on with this abhorrent act of manual scavenging with impunity symbolizing a blot on humanity.

However, we are looking at millions of people, especially the Dalits who continue to suffer from this heinous practice. For how long will a country powered by technology and advanced equipment fall prey to such a regressive practice? India cuts a sorry figure by depicting age old concepts of caste and being chained by the shackles of untouchability. Though we have laws, the implementation is next to nil and it seems that India has willingly yielded. Equality before law fails to function as this obnoxious practice lives on, claiming the dignity of many. A country powered with technology and having an economic power status still sees Bhangis(Gujarat), Pakhis(Andhra Pradesh) and many more like them

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carrying the human excreta on their head. This depicts that India is still chained by castes and jatis.

Through this article, I would like to trace out the enactments and other steps, which have been taken by our government, in order to restrict such a miserable practice. The lacunae in implementation of **'The Employment of Manual Scavengers and construction of dry latrines (prohibition) Act, 1993'** coupled with lack of political urge, has proved to be a decisive factor in the existence of this menace. For the sake of clarity in this article, firstly, the article depicted how the vulnerable classes in our society have been aggrieved by this futile social practice. *Secondly*, I have analyzed the social as well as the environmental issues involved in *'Manual scavenging'*. *Thirdly*, the current legal regime which prohibits such unhealthy practices and judicial pronouncements in this context will be elaborated. *Finally*, the article would be concluded with the shortcomings of the new Act as well as a series of recommendations.

Legality of manual scavenging:

In the year 1993, **The Employment of Manual Scavengers and construction of dry latrines (prohibition) Act, 1993** was passed. The legislation which was enacted roughly 20 years ago looked at eradicating one of the most inhumane practices of manual scavenging from India. In the year 2013, T***he Prohibition of Employment As Manual Scavengers and Their Rehabilitation Act, 2013*** received an assent from the President of India on 18th September 2013 with the view to eradicate the most archaic form of inhumanity. The Act aims not only to prohibit manual scavenging but also to introduce legislative interventions for the rehabilitation of the scavengers.

Judicial Pronouncements:

A three judge bench in the writ petition, **Safai Karamchari Andolan And Ors. vs Union Of India And Ors**, a decision of the Supreme Court has directed all the States and the Union Territories to implement the Act in good spirit and prevent the human civilization from the wrath of this practice. It was held in the writ petition filed by the Safai Karamchari Andolan, on 27th March 2013. Chief Justice P Sathasivam, Justice Ranjan Gogoi and Justice N V Ramana ordered certain regulations to abolish the practice of manual scavenging, seeking for enforcement of fundamental rights guaranteed under Articles 14, 17, 21 and 47 of the Constitution of India. In the petition, it was alleged that the 'manual scavengers are considered as untouchables by other mainstream castes and are thrown into a vortex of severe social and economic exploitation.'

International Conventions:

In line with the Indian legislations, there are certain International Conventions to which India is a party, which prohibit manual scavenging. They are:

- Universal Declaration of Human Rights (UDHR),
- Convention on Elimination of Racial Discrimination (CERD) and
- The Convention for Elimination of all Forms of Discrimination against Women (CEDAW).

Drawbacks of the Act and certain recommendations,

The Act aiming to eliminate manual scavenging should not be just another enactment on paper. The law prohibiting such a heinous act should also look at the social stigma attached as well as the deep rooted social problem attached with the term 'scavengers'. It should not only ban such an act but also find solutions so as to banish the problem as well as restore the human dignity which every human being is deserving of. A grave human rights violation, such as this should not be neglected because any defiance shall defeat the purpose of the law. A dignified livelihood, safety measures and easy mechanism to get their legitimate due under the law shall be the aim of the Act. Therefore, manual scavenging in any form shall not be entertained, keeping in view the legislations. Though the Act provides prohibition of manual scavenging and rehabilitation of manual scavengers, the forum for carrying out survey remains arbitrary and in the hands of lesser qualified authorities. An overview of section 4(1) of the Act gives the power to local authorities to conduct survey of insanitary latrines, whereas, in my opinion, the power should be given to more qualified professionals. According to explanation given in section 2(1)(b), the whole spirit of the Act is nullified by the insertion of the condition when manual scavenging can be done. The Act should blatantly abolish manual scavenging and not provide circumstances where under judicious care it can be carried out. No amount of security, gear or monetary consideration can make up for the social stigma caused to the scavengers. If the Act allows manual scavenging under certain circumstances, the very idea of the Act does not stand the test of stringency which it promises. Every human being is privileged to be born the way they are and it is the innate duty of the law to protect their rights and also their dignity. No country can flourish if one section of the society is still languishing and living a life of ignominy. If the county is to progress, it has to take care of all its citizens, irrespective of their social status and the 'tag' attached to their being. The act also ignores the topic of 'open defecation', which is a growing concern, which needs to be addressed, which the Act has departed from. The growing concern of the hour is to protect every individual, give them their share of moral and social due and recognize their rights. A country where the citizens are given paramount importance shall never cease to be a civilized nation. As the act reads that promoting citizen's fraternity, assuring their dignity as well as the right to live with dignity as enshrined in the Constitution shall be the duty of the Act and that the state is bound to protect the weaker sections of the society as well assure a life without any undertones of caste system or any other form of 'dehumanizing' activity.

Reflections upon the Heirloom of Citizenship of India

Framework:

Prior to the independence in 1947, India was a part of the British realm. Between January 1949 to January 1950, Indians were subject to British rule by virtue of Indian Independence Act[1]. Post independence era called for the issues of citizenship to be addressed with adequate legitimacy. The Constituent Assembly took more than two years to arrive at a final decision with respect to provisions dealing with the Citizenship of India. This was mainly due to some special problems created by the partition of India along with the presence of a large number of Indians abroad. Between the periods of 1947-1949, millions of people had crossed and re-

[1] I.I. Act, § 18(3) (1947)

crossed the frontiers that separate India from Pakistan, in order to make final choice of their nationality.[2] This was instantaneously headed by the enactment of various edicts.

Major Legislations Administering The Principles of Citizenship In India:

1. Constitution of India, 1950.
2. The Citizenship Act, 1955.

Constitution:

According to Black's Law Dictionary[3], citizen means "a member of a free city or jural society, possessing all the rights and privileges which can be enjoyed by any person under its constitution and government, and subject to corresponding duties." "Citizen", in relation to a country, means a person who under the citizenship or nationality law for the time being in force in that country, is a citizen or national of the country. The provisions of Citizenship in India are enshrined in Part II of the Constitution of India, within Articles 5-11.

Article5: Citizenship as on the date of commencement of our Constitution- It paved way for citizenship rights for every person who has his domicile in the territory of India and (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for not less than five years preceding the commencement.

Article 6 and Article 7 deal with two categories of persons. On one hand, Hindus and Sikhs who were born and domiciled in that part of India which became Pakistan and who migrated to India, had to be given the citizenship of new India. On the other hand, Muslims who left India to become citizens of Pakistan had to be excluded. These articles were incorporated by the framers of Constitution keeping in mind the mass migration that took place as an aftermath of partition. The emigrants from Pakistan were divided into (i) those people who emigrated from Pakistan when the permit system[4] was introduced and (ii) those people who came after that date. (July 19, 1948).

Article 8 provides for the Rights of Citizenship of certain persons of Indian Origin residing outside India. i.e. Notwithstanding anything in Article 5, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefore to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in

[2] Dr. M V Pylee, An Introduction to the Constitution of India, 5E- M V Pylee – Google Books, GOOGLE BOOKS, (Mar. 15, 2015, 1:00 PM), https://books.google.co.in/books?id=zps_kbj-9nsC&pg=PA91&dq=citizenship+under+constitution+of+india&hl=en&sa=X&ei=sOwHVeu9II-JuwSn9YHwAQ&ved=0CBwQ6AEwAA#v=onepage&q=citizenship%20under%20constitution%20of%20india&f=false

[3] Black's Law Dictionary (2nd ed. 1910), Available Online.

[4] Pakistan (Control) Ordinance (XVI of 1948) & The Permit system rules,1948. This Ordinance was replaced by the influx from Pakistan (Control) Act, 1949. The 1949 Ordinance was repealed by an Ordinance in 1952, and then the influx from Pakistan (Control) Repealing Act, 1952 repealed the 1952 Ordinance.

the form and manner prescribed by the Government of the Dominion of India or the Government of India.

Article 9 states that any person voluntarily acquiring citizenship of a foreign State shall not be a citizen of India after acquiring the foreign citizenship. Hence, no person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State. Article 10 ensures the continuance of the rights of citizenship subject to the provisions of any law that may be made by Parliament. Article 11 confers vast powers in the hands of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

Rule of Single Citizenship in India:

The Constitution of India has established a single[5] and uniform citizenship for the whole of the country. It implies that all Indian citizens owe allegiance to the Union of India collectively. Any and every citizen, irrespective of his birth or residence, is entitled to enjoy civil and political rights throughout India in all states and union territories.[6] The Constitution of India does not recognize State citizenship and as such there is no distinction between the citizens of two or more states.

In federal functionaries, for example, USA, each person is not only a citizen of USA but also of the particular state to which he belongs. Thus, he owes allegiance to both and enjoys dual sets of rights—one set conferred by the national government and another by the state government. India follows the system of single citizenship. Hence, the claim of fundamental as well as other legal prerogatives is common to all citizens. As a result, the citizens of India are clothed with universal rights and privileges. However, there is one exception to this rule in relation to Kashmir. No one but a permanent resident of Kashmir[7] can acquire landed property in Kashmir. But it is a purely temporary provision which is expected to be abolished when Kashmir is fully integrated to the Union of India.

It is humbly submitted that neither the Constitution of India nor the Indian Citizenship Act, 1955 recognize dual citizenship. However, the Citizenship (Amendment) Act, 2003 and the procedural Citizenship (Second Amendment) Rules, 2004 provide for Overseas Citizenship of India (OCI) which grants special status to eligible foreign nationals of Indian origin (subject to certain restrictions). The OCI is often referred to as twin nationality but it does not actually confer nationality of India.

Overseas Citizenship of India (Oci)

From December 2005, the Indian Government implemented the law regarding registration of eligible foreign nationals as Overseas Citizenship of India (OCIs). Eligible foreign nationals include, certain Persons of Indian Origin and individuals whose parents or grandparents migrated from India after 26th January, 1950 and their minor children. This is subject to the applicant being a citizen of a country which allows dual citizenship in some form or the

[5]Citizenship of India ,*Procedure For Applying Online For Indian Citizenship*, INDIANCITIZENSHIPONLINE, (Apr. 19, 2015, (9:50 AM)
http://indiancitizenshiponline.nic.in/Ic_GeneralInstruction_4_1.pdf
[6] Pragati Ghosh, *Essay on Single Citizenship In India*, SHAREYOURESSAYS.COM, (Mar 15, 2015, 5:15 PM), http://www.shareyouressays.com/93095/essay-on-single-citizenship-in-india
[7] Constitution of India, Art. 370

other. This provision is extended to such citizens of all countries other than those who had ever been citizens of Pakistan and Bangladesh.

The following categories of individuals may apply for OCI registration:
(a) Any person of full age and capacity –
i) Who is a citizen of another country, but was a citizen of India at the time of, or at any time after, the commencement of the Constitution; or
ii) Who is citizen of another country, but was eligible to become a citizen of India at the time of the commencement of the Constitution; or
iii) Who is a citizen of another country, but belonged to a territory that became a part of India after the 15th day of August, 1947; or
iv) Who is a child or a grand-child of such a citizen; or
b) A person, who is a minor child of a person mentioned in clause (a)

Provided that no person, who is or had been a citizen a citizen of Pakistan, Bangladesh or such other country as the Central government, may by notification in the Official Gazette, specify shall be eligible for registration as an Overseas Citizen of India.
Registration as an OCI is a onetime process that grants all the benefits that are available to PIO Card holders with some additional benefits. These are inclusive of a lifelong multi-entry, multi-use visa to visit, reside or work in India and are not faced with travel restrictions within the country or employment visa requirements that apply to PIOs. An OCI is not required to register with a Foreigners Regional Registration Office (FRRO) for any length or duration of stay in India. An individual registered as an OCI for 5 years and who has lived in India for one year is eligible to gain "full" Indian Citizenship. To avail of "full" Indian citizenship, a foreign national will have to relinquish his foreign nationality.

Indian Non-Immigrant Visas

The movement of the faction of foreign nationals in India is regulated by several statutes, rules and regulations, with specific restrictions on the activities they can undertake in India. Most foreign nationals require visas with the exception of certain persons of Indian origin and visitors from Nepal and Bhutan, who enjoy significant freedom of travel into India.

On commencement of The Constitution of India on 26 January 1950, and after determining the initial body of Indian citizens through the constitutional provisions, the framers of the Constitution left the ground for the Parliament. Hence The Indian Citizenship Act, 1955 came into effect.

Acquisition of Indian Citizenship (IC)

The right to Indian citizenship and the qualifying criteria are established under the Constitution of India and codified in the Indian Citizenship Act, 1955. The Constitution of India only recognizes Indian citizenship and prescribes the manner in which Indian citizenship can be acquired. It can be acquired by birth, descent, registration (subject to discretionary procedures), naturalization, or by incorporation of territory[8]. The conditions and

[8] Foreigners Division, Ministry of Home Affairs, Government of India, *Indian Citizenship Ministry of Home Affairs*, INDIANCITIZENSHIPONLINE, (Mar. 17, 2015, 6:00 PM), http://indiancitizenshiponline.nic.in/acquisition1.htm

procedure for acquisition of Indian citizenship as per the provision of the Act of 1955 are elucidated below:

(1) By Birth (Section 3)

A person born in India on or after 26th January 1950 but before 1st July, 1987 is citizen of India by birth irrespective of the nationality of his parents. A person born in India on or after 1st July, 1987 but before 3rd December, 2004 is considered citizen of India by birth if either of his parents is a citizen of India at the time of his birth. A person born in India on or after 3rd December, 2004 is considered citizen of India by birth if both the parents are citizens of India or one of the parents is a citizen of India and the other is not an illegal migrant at the time of his birth.

(2) By Descent (Section 4)

A person born outside India on or after 26th January 1950 but before 10th December 1992 is a citizen of India by descent, if his father was a citizen of India by birth at the time of his birth. In case the father was a citizen of India by descent only, that person shall not be a citizen of India, unless his birth is registered at an Indian Consulate within one year from the date of birth or with the permission of the Central Government, after the expiry of the stated period. A person born outside India on or after 10th December 1992 but before 3rd December, 2004, is considered as a citizen of India if either of his parents was a citizen of India by birth at the time of his birth. If either of the parents was a citizen of India by descent, that person shall not be a citizen of India, unless his birth is registered at an Indian Consulate within one year from the date of birth or with the permission of the Central Government, after the termination of the stated period.

A person born outside India on/after 3rd December, 2004 shall not be a citizen of India, unless the parents declare that the minor does not hold passport of another country and his birth is registered at an Indian consulate within one year of the date of birth or with the permission of the Central Government, after the expiry of the stipulated period.

Procedure for acquiring Indian citizenship under the said proviso involves for sending an application for registration of the birth of a minor child to an Indian consulate under Section 4(1) and shall be accompanied by an undertaking in writing from the parents of such minor child stating that he does not hold the passport of any other country.

(3) By Registration (Section 5(1))

Indian Citizenship by registration can be acquired by: -

(i) Persons of Indian origin who are ordinarily resident in India for seven years before making application under section 5(1)(a) (throughout the period of twelve months immediately before making application and for six years in the aggregate in the eight years preceding the twelve months).

(ii) Persons of Indian origin who are ordinarily resident in any country or place outside undivided India under section 5(1)(b).

(iii) Persons who are married to a citizen of India and who are ordinarily resident in India for seven years (as mentioned at (a) above) before making application under section 5(1)(c).

(iv) Minor children whose both parents are Indian citizens under section 5(1)(d).
(v) Persons of full age whose both parents are registered as citizens of India under section 5(1)(a) or section 6(1) can acquire Indian citizenship under section 5(1)(e).
(vi) Persons of full age who or either of the parents were earlier citizen of Independent India and residing in India for one year immediately before making application under section 5(1)(f).
(vii) Persons of full age and capacity who has been registered as an Overseas Citizen Of India (OCI) for five years and residing in India for one year before making application under section 5(1)(g).

Note: A person shall be referred to as a Person of Indian origin if he, or either of his parents, was born in undivided India or in such other territory which became part of India after independence i.e. 15th August, 1947.

(4) By Registration (Section 5(4))

Any minor child can be registered as a citizen of India under Section 5(4), if the Central Government is satisfied that there are special circumstances justifying such registration. Procedure involves sending an application in relevant Form for grant of Indian citizenship by registration under section 5. It has to be submitted to the Collector/District Magistrate of the area where the applicant is resident. The application has to be accompanied by all the documents and fees payments as mentioned in the relevant Forms, along with a report within 60 days. Thereafter, the State Govt./UT Administration shall forward the application to the Ministry of Home Affairs (MHA), Government of India within 30 days. On examination of the application, the Ministry accept/reject the same. No correspondence can be made directly with the applicant. Each applicant whose case is found to be eligible after scrutiny of application is informed about the acceptance of his application through the State Government and he/she is then required to furnish a certificate of the renunciation of foreign citizenship issued by the mission of the concerned country, proof of fee payment as per SCHEDULE IV of the Act, and personal particulars in Form-V. Henceforth, a Certificate of Indian citizenship shall be issued to the applicant through the State Government.

(5) By Naturalization (Section 6)

Citizenship of India by naturalization can be acquired by a foreigner (not illegal migrant) who is ordinarily resident in India for twelve years (throughout the period of twelve months immediately preceding the date of application and for eleven years in the aggregate in the fourteen years preceding the twelve months) subject to other qualifications as listed in Third Schedule of the Act.
An illegal migrant as defined in section 2(1)(b) of the Act is a foreigner who entered India: (i) without a valid passport or other prescribed travel documents; (ii) with a valid passport or other prescribed travel documents but remains in India beyond the permitted period of time.

Identity Determinants in India

There are various ways of determining Indian Nationality.[9] They are:

1. NATIONAL POPULATION REGISTER (NPR) is issued by The Ministry of Home Affairs. This serves as a smart card. It is mandatory for all citizens to get enrolled under NPR. The NPR enrolment is also an effective way for utilization and implementation of benefits and services under government schemes. Additionally, it also bears an Aadhar Card number. A person who has already enrolled with Aadhar card issuing authority, i.e. UIDAI has to register under NPR.[10]
2. AADHAR Card is issued by Unique Identification Authority of India (UIDAI), under the Planning Commission. It strives to make Aadhar the National Identification Number. The card is mandatory for PDS, opening bank accounts, receiving pension etc.[11] Though Aadhar card is not a conclusive proof of identity in India, yet it is now a matter of compulsion for all Indian citizens to obtain one.
3. DRIVING LICENSE is issued by Regional Transport Offices (RTO's). Acts as a conclusive proof of one's identity in India. It also acts as a certifying card which authorizes the holder to drive motor vehicles on Indian roads.[12]
4. PAN CARD issued by Ministry of Finance (Compulsory). Equivalent to a National Identification Number. Main purpose, however, is to track Tax Payments, Loans/Sale/Purchase of Property[13]
5. RATION CARD issued by State Governments to people above the Poverty Line, below the Poverty Line and Antyodaya families. Not only does it work as an efficient source of one's identity in India, but also helps one in the purchase of essential commodities from fair price shops.[14]
6. PASSPORT issued by Ministry of External Affairs. It works as proof of identity as well as residence. It also serves as an authorization for an Indian National to travel abroad.[15]

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[9] Mail Today Reporter, *India's identity crisis: Between Aadhaar, passport, PAN and NPR, why are we still struggling to prove our identities?*, MAIL ONLINE INDIA, (Mar. 18, 2015, 4:00 PM), http://www.dailymail.co.uk/indiahome/indianews/article-2297714/Indias-identity-crisis-Between-Aadhaar-passport-PAN-NPR-struggling-prove-identities.html

[10] Department of Information Technology- National Population Register, *National Population Register- Home*, DITNPR, (Mar. 17, 2015, 9:16 AM), http://ditnpr.nic.in/

[11] Unique Identification Authority of India, Government of India, *UIDAI- Official Website*, UIDAI, (Mar.17, 2015, 11:30 AM), https://uidai.gov.in/

[12] Govt. of NCT Delhi, *Transport*, DELHI.GOV.IN, (Mar. 17, 2015, 12:00 PM), http://www.delhi.gov.in/wps/wcm/connect/doit_transport/Transport/Home/Driving+Licence/Necessity+of+Driving+Licence

[13] Government of India Ministry of Finance Department of Revenue Central Board Of Direct Taxes, https://www.tin-nsdl.com/download/pan/Notification96_2013.pdf, TIN-NSDL.COM, (Mar 17,2015, 1:00 PM), https://www.tin-nsdl.com/download/pan/Notification96_2013.pdf

[14] Ration Card, *Online Information On Ration Card*, Ration Card, RATIONCARD.ORG (Apr. 15, 2015, (7:38 PM) http://www.rationcard.org/

[15] Proof of Address, *List of Acceptable Documents*, PASSPORTINDIA, (Apr. 15, 2015, 8:00 PM) http://www.passportindia.gov.in/AppOnlineProject/popuponline/AttachmentAdvisorSub?subDocID=7001&confirmDOB=

7. VOTERS' ID CARD issued by Election Commission is another major source of identity determinant in India. It makes one eligible to vote in Indian elections after attaining eighteen years of age.[16]

Non-Resident Indian (NRI)

For the purposes of the Income Tax Act, "residence in India" requires stay in India[17] of at least 182 days in a calendar year or 365 days spread out over four consecutive years. Strictly speaking, the term non-resident refers only to the tax status of a person who has not resided in India for a specified period for the purposes of the Income Tax Act[18]. The rates of income tax are different for persons who are "resident in India" and for NRIs. According to the Act, any Indian citizen who does not meet the criteria as a "resident of India" is a non-resident of India and is treated as NRI for paying income tax.

Person of Indian Origin (PIO)

The Government of India issues a PIO Card to a PIO after verification of his or her origin or ancestry and this card entitles a PIO to enter India without a visa. PIO Cards are extremely beneficial in the sense that they exempt holders from many restrictions that apply to foreign nationals, such as visa and work permit requirements, along with certain other economic limitations. The authorities consider anyone of Indian origin up to four generations removed to be a PIO, with the exception of those who were ever nationals of Afghanistan, Bangladesh, Bhutan, Nepal, Pakistan, or Sri Lanka and Iran. The spouse of a PIO can also be issued a PIO card though the spouse might not be a PIO provided the latter category includes foreign spouses of Indian nationals, regardless of ethnic origin, so long as they were not born in, or were ever nationals of, the aforementioned prohibited countries.

Indian Diaspora

The Indian Diaspora is a generic expression that is used to depict the status of people who migrated from territories that are currently within the territorial borders of India. It is inclusive of their descendants as well. The Diaspora[19] is currently estimated to add up to over twenty million. Consisting of "NRIs" (Indian citizens not residing in India) and "PIOs" (Persons of Indian Origin who have acquired the citizenship of some other country), the Diaspora covers every plausible part of the world. It numbers more than a million each in eleven countries, while as many as twenty-two countries have concentrations of at least a hundred thousand ethnic Indians.

Indian Diaspora is a geographically diversified Diaspora, which is spread in as many as 110 countries. The characteristics of this diversified assemblage vary as well. It varies to such an extent that we even call some countries as 'old Diaspora' countries and 'new Diaspora'

[16] Election Commission of India, *FAQs- Electoral Rolls*, ECI, (Apr. 5, 2015, 8:30 PM) http://eci.nic.in/m/Elecroll.html
[17] 43 I.T. § 6 (1961)
[18] The Economic Times, *India's Identity Crisis: Difference Between UID and NPR*, ECONOMICTIMES.INDIATIMES.COM (Mar. 18, 2015, 8:00 PM), http://economictimes.indiatimes.com/slideshows/economy/all-you-want-to-know-about-uid-npr/difference-between-uid-npr/slideshow/18832339.cms
[19] The Indian Diaspora, *The Indian Diaspora*, INDIANDIASPORA (Mar 18, 2015, 3:00 PM) http://indiandiaspora.nic.in/

countries. Major countries that are placed in the old Indian Diaspora are Malaysia, Mauritius, Trinidad and Tobago, Fiji, Guyana, and Suriname. On the other hand, the prominent countries with the new Diaspora are all the developed countries like – USA, UK, Canada, Australia and New Zealand. A substantive number of Indians also live in the Gulf region. Most of the Gulf migration from India took place from the State of Kerala. The common thread between all the three groups of Indian emigrants is that they are industry migrants. The skilled and highly skilled labour went to the developed countries like the USA, UK, Canada, Australia, and New Zealand and formed a part of new Indian Diaspora. The lower skilled, semi-skilled and un-skilled labour went to the Gulf region. The old Diaspora is replaced in other countries because of the colonial policies of slave trade and indenture labour system.

Escalation of Indian Diaspora Policies:

The Diaspora is very special to India. Members have retained their emotional, cultural and spiritual links with the country of their origin. It is to nurture the ties for serving mutual benefits that the Government of India, established a High Level Committee under the chairmanship of Dr. L.M Singhvi, with the mandate to make an in-depth study of the problems and difficulties, the hopes and expectations of the overseas Indian communities This strikes a joint chord in the hearts of populace of India. The Committee with the active cooperation of NRIs and PIOs has submitted the report on 8th January, 2002.

The High Level Committee in its recommendations suggested formation of an organization on the lines of Planning Commission to look after the affairs of Overseas Indians. It was further decided that a full- fledged Ministry of Overseas Indian Affairs headed by Shri Jagdish Tytler, Minister of State with Independent Charge to deal with affairs related to Overseas Indians.

Mandate of the Committee: In view of the vital contribution that is being made by NRIs and PIOs to the societies where they reside, they are well situated to play a progressively greater role in strengthening ties between India and those countries, besides also making a contribution to India's development. At the same time, the Government of India has an obligation to safeguard the welfare of Indians living abroad and to put in place rules and procedures conducive to facilitating their links with India. For this purpose, Government has formulated the terms of reference for the work of the High Level Committee on the Indian Diaspora which is required to review, study and examine the status of PIOs and NRIs in the context of constitutional provisions, laws and rules applicable to them both in India and countries of their residence.

In recent years, the government of India, along with a number of state governments, has been making efforts to reach out to the Indian Diaspora. While India started a Ministry of Overseas Indian Affairs, state governments with a substantial Diaspora have also set up separate departments to look into some of the demands and concerns of Non Resident Indian's (NRIs). Indian cities benefited from remittances and FDI from a large number of their people present in the U.S., U.K., Canada, the Gulf region and Southeast Asia. Remittances in India reached $70 billion in 2013 according to World Bank estimates, which accounts for over 4 percent of the country's GDP[20].

[20] Tridivesh Singh Maini and Sridhar Ramaswamy, *The Need for Introspection in India's Diaspora Policy*, THE DIPLOMAT, (Mar. 18, 2015, 3:30 PM),

The Call for Reflection into India's Diaspora Policy:

Even though there has been positive change, a number of problems still persist. First, there is often a perception that the Indian government gives greater importance to the more affluent sections of the Diaspora, consisting of businessmen and white collar job officials. The second problem with India's Diaspora policy is that while NRIs are given attention, individuals who migrated from India generations ago (PIOs), are not given much attention. For instance, the PIOs in Myanmar from have migrated from states such as Bihar, Tamil Nadu and Punjab. A number of these PIOs are stateless and are vehemently keen to connect with their roots. Third, the quandary still remains that whether Indian migrants from Nepal, Sri Lanka and other neighboring countries can be clubbed as Diaspora or not as they equally participate in the remittance process to India. Lastly, the ill-treatment and the harassment faced by the members of Indian Diaspora continue to be the most common grievance till date.[21]

India could move forward and initiate a strapping beginning by either considering granting these PIOs citizenship, or by granting any other right that makes them socially and politically involved with their home country. With such a pool of emigrants, India could tap its Diaspora for better relations with these countries across the globe.

Present Trend of Immigration in India

Even though India seems to be a booming economy, it is not free from its set of drawbacks that hinder optimum growth. Improvement in the education system, trading and infrastructure are seen as the most essential catalysts to India's growth. In the meantime a large portion of India's population remains uneducated and unskilled. For that reason it is important and pertinent to note that immigration in fields employing unskilled and industrial labor will not be readily permitted as these industries form an important source as the uneducated or under-educated sections of India depend on such jobs. On the other hand, the demand for visas from highly skilled, qualified professionals and entrepreneurs is on the rise as Indian consular posts in the U.S. have outsourced visa processing seemingly, in an attempt to effectively process the larger volumes of applications.

Turning to the lot already settled in India, there seems to be no restrictions on the duration of residence with a spouse who is on a long term employment visa. However, it is important to note that if an accompanying spouse wishes to be employed in India or conduct any other activities which would require a visa; he/she will need to obtain an independent visa.

Future of Immigration in India

Present immigration laws in India do not place any shackle of restrictions on the inflow of people with visas[22]. India, being one of the fastest growing economies in the world is well acknowledged for its hospitality and open-door policies. Even with a population of more than

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http://thediplomat.com/2014/10/the-need-for-introspection-in-indias-diaspora-policy/

[21]The High Level Committee Report, *Consular and Other Issues*, INDIANDIASPORA, (Apr. 27, 2015, 9:15 PM)
http://indiandiaspora.nic.in/diasporapdf/chapter27.pdf

[22] Poorvi Chothani, *The Future of Indian Immigration*, LEGALSERVICEINDIA.Com, (Mar. 18, 2015, 9:45 PM)
http://www.legalserviceindia.com/article/l238-Future-of-Indian-Immigration.html

a billion, India welcomes migrants who are not only willing to invest their money in the markets but also welcomes highly qualified professionals.

Studies[23] show that in the last couple of years, however, the total number of overseas Indians has been shrinking, a trend that has been generally attributed to the global financial crisis, a devaluing rupee and changes to immigration laws in top host nations. New immigrants in the country, comprising for the most part those on temporary stays or people with long term business plans tend to congregate in well urbanized areas. In addition to that, the Indian immigration laws need to be modified to address the status of unlawful residents in the country, as there are a number of refugees and asylums seeking shelter in India even though Indian statutes consider all foreign nationals who enter India without visas as illegal migrants.

The pattern of immigration can be traced in the following phases. The 1990's primarily covered personnel establishing businesses for large multi-national corporations and PIOs. Subsequent trends indicated that large numbers of PIOs, after gaining citizenships in other countries, were deciding to work as high level professionals/businessmen in India. Recent trends indicate that the profile of those coming to India, especially since late 2004 includes young professionals. The last trend is expected to continue while the demand to qualify as PIO's and OCI's is likely to increase manifold. It is expected that India will be the most populous country by 2050, with a largely young and thus mobile population. Given India's expanding middle class and continuing poverty, international labor, highly skilled migration, and illegal migration are likely to grow.

Standard Essential Patents and Frand Litigation

Standards mean a set of specifications and procedures which are established so as to provide functionality and compatibility to products existing in the same industry.[24] They are in the form of published documents, usually by institutions which are formed to develop and implement such standards. Standards can exist in a wide variety of areas such as food safety, environment management, IT security etc. Similarly, patents which protect a technology essential to a standard are known as Standard Essential Patents ("SEPs"). For example, SEPs exist for a technology used in specifications of a construct of a USB or a Compact Disc or the rotor blade of a wind mill, or a technology used in a chip incorporated in a Smartphone.

The rationale behind declaring a patent as SEP is to maintain compatibility of products from different producers and ensures quality and safety of products as once a patent is declared as SEP, it becomes mandatory to implement such a patent in a product in order to maintain its inter-operability with other products in the market. Increased interoperability may be translated into greater utility of products and an increased choice of complementary products at lower prices.[25]

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[23] World Education News & Reviews, *Indian Study Abroad Trends: Past, Present and Future*, WENR.WES.ORG/ (Apr. 29, 2015, 7:06 PM)
http://wenr.wes.org/2013/12/indian-study-abroad-trends-past-present-and-future/

[24] ETSI, "*What are Standards?*", Accessed February 20, 2015.
http://www.etsi.org/standards/what-are-standards.html.

[25] WIPO, "Standards and Patents", Standing Committee on Law of Patents, Thirteenth Session (2009).

After standardisation of a patent, the SEP holder may license it to other players for its implementation in their products. A current patent battle which is ensuing between the SEP holders and the SEP implementers in various countries, originates at this point. When SEPs are widely adopted it becomes difficult for the implementer to shift to a different technology due to lack of cost effectiveness, and thus it is likely that the SEP holder may abuse its dominant position to set unreasonable royalty rates and impose terms contrary to anti-trust laws.

The Setting of standards and their Licensing : What is FRAND?

Some technologies become standard because they are widely used in an industry, such as Adobe PDF and Java (*de facto* standards), while some technologies are implemented by organisations which are created for the purpose of developing, coordinating and interpreting the technology standards. Such organisations are called Standard Setting Organisations("SSOs").They are membership-driven bodies at international, national or regional levels, comprising experts from competing companies, governments, academia and civil society, who develop standards in response to priorities determined by public and private-sector members. SSOs establish rules[26] for rights to participate in the standards-development process, consensus based procedures for decision-making, the open availability of standards' specifications, and policies on patents' interaction with standards. Standards are then finalized through an approval process conducted through a consensus-based approach.[27] The Institute of Electrical and Electronic Engineers ("IEEE") and International Telecommunication Union ("ITU") are prominent SSOs in the cellular and Wi-Fi space. The Telecommunications Standards Development Society, India (TSDSI) is the first Standard Development Organisation which was established in India in 2013 with an aim to develop and promote India specific requirements in the field of telecommunications.

The important conditions with respect to adoption of SEPs are that, firstly, the members must disclose, prior to the adoption of a standard, IP rights that would be essential to the implementation of a proposed standard and secondly, that members must commit to license their SEPs to third parties at fair, reasonable and non-discriminatory ("FRAND" or "RAND") rates. These policies have to be adhered to ensure the widespread adoption of standards, the very purpose for which a SSO is made. Therefore, licensing a SEP on FRAND terms is a voluntary contract between the SSO and the SEP holder.[28] However, the meaning of FRAND has not been defined by SSOs; it depends upon the nature of the transactions between the SEP holder ("licensor") and the SEP implementer ("licensee").

Determination of FRAND rates: *Microsoft v Motorola*

Due the vague nature of FRAND terms and lack of set principles to determine them, the licensing negotiations between the SEP holder and SEP implementer might not reach a consensus and such a situation has led to a number of patent litigations across the world.

[26] IEEE Standards Board Bylaws. Accessed February 19, 2015. http://standards.ieee.org/develop/policies/bylaws.html
[27] ITU, "Understanding Patents, Competition and Standardisation in Interconnected World", July 1, 2014.
[28] *Microsoft Corp. v Motorola Inc.*, 696 F 3d 872.

The FRAND royalty rates with respect to SEPs were determined for the first time by a United States Court in the case of *Microsoft Corp. v Motorola Inc.*[29] ("*Microsoft*") in 2013. The litigation related to two common industry standards developed by ITU (H.264 video coding standard) and IEEE (802.11 Wi-Fi standard). These standards are used in thousand of products such as computers, smart phones as well as X-box 360 game consoles.

In 2010, Motorola offered to license Microsoft its patents essential to the implementation of these standards. The ITU and IEEE rules specify that royalties for patents covering the said standards must comply with RAND requirements. A disagreement arose on the royalty rate that Motorola proposed and Microsoft sued Motorola for breach of contract arguing that the rates proposed by Motorola were highly unreasonable and violative of its RAND commitment. The Court ruled in favour of Microsoft setting the FRAND royalty rates for the SEPs in issue. The judgement provided by Justice Robart is considered as a landmark judgment as it resolved the highly contentious issue of FRAND rate determination and also provided a general framework for analysing RAND disputes in future.[30]

The analysis was mainly based on the following two considerations:

1. *Hypothetical Negotiation Setup:*

The hypothetical negotiation setup is based on the modified version of Georgia Pacific factors[31]. The setup confers that the negotiations between the licensor and the licensee occur prior to the date when the patent was adopted as a standard.[32]The purpose is to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before infringement began.[33]The rate is determined by considering the importance of SEP to the standard and the importance of SEP and the standard to the product at issue.

2. *Comparable Licenses and relative value of patented technology:*

The FRAND commitments provide that the licenses have to be given to the licensees free of any unfair discrimination[34], therefore a licensor cannot, without a reasonable objective, be selective about companies to whom it provides licenses or discriminate on the terms or royalty it charges, as it would distort competition between reasonable licensees. Therefore, similar licenses by the licensor with other companies should be shown as comparable licenses while determining the correct royalty rate. Also, the royalty associated with a particular patented technology should be commensurate with the actual value that the technology adds to the overall standard and to the product in which it is implemented.[35]

[29]*Id.*
[30] Jorge L. Contreas, *"So that's what RAND means?: A Brief report on Findings of Fact and Conclusion of Law in Microsoft v Motorola"*, PatentlyO, (April 27, 2013), http://www.patentlyo.com/patent/2013/04/so-thats-what-rand-means-a-brief-report-on-the-findings-of-fact-and-conclusions-of-law-in-microsoft-v-motorola.html.
[31]Georgia *Pacific Corp. v United States Plywood Corp*, 446 F.2d 295 (1971).
[32] *Ericsson v D-Link* ,(E.D. Tex. 6 August 2013); *Realtek v LSI*, Case No. 13-16070 (9th Cir. 2014).
[33]*In Re Innovatio IP Ventures LLC Patent Litigation* , 921 F.Supp.2d 903 (2013).
[34]*Supra Note 2.*
[35] *Supra Note 4*, ¶80, 104.

Therefore, the analysis has set a logical and consistent methodology to compute FRAND rate royalty. The opinion might be useful to other courts dealing with similar patent infringement suits and also in the process of negotiation between parties even before a matter is brought to a court.

FRAND rates were also determined in the case of *Innovatio IP Ventures*[36] where the company brought an action against numerous coffee shops, restaurants, hotels and other commercial entities for using its Wi-Fi standards illegally. It proposed a 6% benchmark royalty rate measured against the value of the end product incorporating wireless functionality, adjusted by a "feature factor" that reflected the contribution of the wireless component to the end product. However, this demand evidenced the instance of patent holdup and the reasonable royalty was found to be only $0.0956 per unit. The analysis was done based on Judge Robart's modified Georgia Pacific factors and was mainly based on factors relating to importance and technical contribution of patent portfolio to the standard and to the alleged infringer's accused products and comparable licenses.[37]

FRAND litigation in India

FRAND litigation arrived in India when Telefonaktibolaget LM Ericsson ("Ericsson"), which is one of the world's largest telecommunication companies and claims to have the largest number of cellular patents in the world, some of them being SEPs, sued the local Indian player Micromax[38] for using its patented technologies relating to several wireless technology standards such as GSM, EDGE and 3G without paying royalties. The negotiations between the parties had been unsuccessful for a period of three years. Ericsson demanded compensatory damages amounting to Rs. 1 billion and an *ex parte* and permanent injunction against Microsoft.

A single judge bench of Delhi High Court granted an *ex-parte* interim injunction[39], including measures for confiscation of Micromax's consignment at border by custom authorities. The Court also ordered Micromax to deposit money in the range of 1.25% -2% of sale price of affected as a condition precedent to the release of such products by Customs. As a countermove, Micromax filed a complaint in the Competition Commission of India ("CCI") alleging abuse of dominant position by Ericsson.

Ericsson filed a similar suit[40] before the Delhi High Court against Intex Technologies on the same grounds seeking a similar relief. Intex too proceeded and filed a CCI complaint against Ericsson.

The decisions in the above cases are still pending.

Major issues involved

1. *Patent holdup:*

[36] *Supra Note 9.*
[37] Rajiv Kr. Choudhry, "*Searching for FRAND in Frand valuations*", SpicyIP, (December 12, 2013), http://www.spicyip.com/2013/12/searching -for-frand-in-frand-valuations-part-2-3.html.
[38] *Ericsson v Micromax,* CS(OS) 442/2013 (March 6, 2013).
[39] *Ericsson v Micromax,* CS(OS) 442/2013 (12 November 2014).
[40] *Ericsson v Intex,* WP(C) 464/2014 (January 21, 2014)

Once a patent is adopted as a standard and achieves commercial acceptance, it becomes 'locked-in'. It is necessary for a manufacturer to use the same; otherwise his product would be incompatible with other companies' products and hence unmarketable. Such a situation strengthens the SEP holders' bargaining power because the licensee does not have alternatives to the same technology. Patent holdup occurs when a SEP holder takes advantage of a locked-in patent by trying to impose unreasonable royalty rates. Unless constrained by a SSO to comply with FRAND licences, the SEP holder can exploit the locked in position to obtain significantly higher royalties than it would have obtained before the patent was incorporated as a standard. However, even after committing to FRAND such a situation arises due to the vague nature of FRAND.

In the cases of *Micromax* and *Intex* the CCI[41] noted, "*hold-up can subvert the competitive process of choosing among technologies and undermine the integrity of standard-setting activities. Ultimately, the High costs of such patents get transferred to the final consumers.*"

Further, in such cases the licensor binds the licensee by a non-disclosure/confidentiality agreement[42] with respect to the terms of the license which restrains the other licensees from acquiring knowledge of the royalty rates imposed on such previous licenses. This acts as an impediment in the conduct of licensing negotiations between the parties and thus leads to major competition concern[43] in FRAND litigations.

The patent remedies to a patent holdup situation mainly lie in determination of a reasonable royalty by the courts and providing the parties and opportunity to negotiate a post trial license before judicially crafting an ongoing damages award.[44] The post trial damages shall take into account the changes in the parties' bargaining positions and the resulting change in economic circumstances, resulting from the determination of liability.[45]

2. *Royalty base:*

The reasonableness of a royalty amount depends on the correct selection of the royalty base. The SEP holders tend to impose the royalty rate on the net sale price of the final product rather than only on the component which comprises the infringed patent. This means even if SEP is used in a single component of a multi component product, the implementer would be liable to pay the royalty on the components which do not include the SEP. In such cases, the whole idea of FRAND diminishes as calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product.[46]

Thus the courts have considered 'smallest saleable patent practicing unit' ("SSPPU")[47], in a multi component product, as a proper royalty base for determining FRAND royalty rate. In *Virnetx Inc. v. Cisco Systems*[48], the Federal Circuit held that the royalty base must be closely

[41] *Micromax v Ericsson*, Case No. 50/2013, Competition Commission of India, (November 12, 2013)
[42] *Id*
[43] *Broadcomm Corp v Qualcomm Inc*, 501 F.3d 297, 314 (3d Cir. 2007).
[44] *Paice LLC v Toyota Motor Corp*, 504 F.3d 1293, 1315 (Fed. Cir. 2007).
[45] *Telecordia Techs., Inc. v. Cisco Sys., Inc*., F. Supp.2d (D.Del. 2009).
[46] *LaserDynamic Inc. v Quanta Computer USA Inc*, 694 F.3d 51 (2012).
[47] *Id.*
[48] No.13-1489 (Fed. Cir. 2014).

tied to the claimed invention rather than the entire value of the product. The SSPPU has been widely accepted as an appropriate base in various patent damage cases.[49]

Contrary to the SSPPU approach, the SEP holders evaluate the royalty rate on the basis of Entire Market Value Rule ("EMVR"). EMVR is an exception to the general rule of calculating the royalty on SSPPU. The EMVR Rule permits recovery of damages based on the value of the entire apparatus containing several features, where the patent-related feature is the basis for customer demand.[50] In *CSIRO v. Cisco Systems Inc.*[51], the court held that, *"Basing a royalty solely on chip price is like valuing a copyrighted book based only on the costs of the binding, paper, and ink needed to actually produce the physical product. While such a calculation captures the cost of the physical product, it provides no indication of its actual value."* Therefore, in cases where a technology is implemented by a single component and that technology may have more value than the component itself and it is a factor which drives the consumer demand, using the end-user product as the royalty base would be justified.

3. *Royalty Stacking:*

Royalty stacking is the situation where royalties are layered upon each other leading to a higher aggregate royalty. This happens when different SEP holders impose similar royalties on different components of same multi component product, leading the royalties to exceed the total product price. The court noted in *Microsoft* that 92 different entities had 350 SEPs for 802.11 standard, which is a Wi-Fi standard developed by IEEE for high speed wireless local area networking.[52] If each of these entities sought royalties similar to Motorola's request of 1.15% to 1.73% of the end-product price, the aggregate royalty to implement the 802.11 standard, which is only one feature of the Xbox product, would exceed the total product price.[53] It is argued that royalty stacking could be tackled by way of cross licensing, patent pools and repeat play reputation. However, such methods might lead to a plethora of competition concerns.

This concern was raised by the CCI in the cases of *Micromax* and *Intex* wherein the Delhi High Court had ordered[54] Micromax to pay the royalty to Ericsson on the basis of net sale price of the phone rather than the value of technology used in the chipset incorporated in the phone which was said to be infringed. Micromax alleged that due to this royalty for use of same chipset in a smart phone is more than 10 times the royalty for ordinary phone, while the chipset gives no additional value to a smart phone, then it gives to an ordinary phone and that such misuse of SEPs would ultimately harm consumers. CCI noted that "*For the use of GSM chip in a phone costing Rs. 100, royalty would be Rs. 1.25 but if this GSM chip is used in a phone of Rs. 1000, royalty would be Rs. 12.5. Thus increase in the royalty for patent holder is without any contribution to the product of the licensee. Higher cost of a smartphone is due to various other softwares/technical facilities and applications provided by the*

[49] *Wi-Lan v Alcatel-Lucent* Case No. 6:10-CV-521(E.D. Tex. 28 June 2013); *Golden Bridge Technology v Apple Inc.* (N.D.Cal. 18 May 2014).
[50] *Cornell v Hewlett Packard*, 609 F. Supp. 2d 279 (2009).
[51] (E.D. Tex. 23 July 2014).
[52] IEEE 802.11 Standard. Accessed March 10, 2015. http://standards.ieee.org/getieee802/download/802.11-2012.pdf.
[53] *Supra Note 5 at 213.*
[54] *Supra Note 16.*

manufacturer/licensee for which he had to pay royalties/charges to other patent holders/patent developers. Charging of two different license fees per unit phone for use of the same technology prima facie is discriminatory and also reflects excessive pricing vis-a-vis high cost phones."

4. *Availability of Injunctive relief:*

Threat of injunction becomes a powerful weapon when used by a SEP holder for enforcing its royalty rates, as in such a case an SEP implementer would think that accepting an unreasonable royalty would be less risky than curbing an action of infringement.[55] The use of injunctive relief[56] against willing licensees is prima facie breach of FRAND commitment as the FRAND royalty rates by itself are an adequate remuneration to the SEP. Such an action is also considered to be abusive of dominant position and hence a violation of competition laws.[57] Therefore, an injunction should only be claimed when the licensee is unwilling to pay the judicially determined FRAND royalty or where monetary compensation is not an adequate remedy. Recently, the Delhi High Court granted an ex-parte interim injunction[58] against Chinese cell phone manufacturer Xiaomi due to a plea by Ericsson over the infringement of its SEPs, wherein it was prevented from selling, advertising, manufacturing or importing the devices in question. The Court based its decision on the fact that Xiaomi had failed to respond to Ericsson's repeated communication attempts. The question which arises now is if an alternative remedy in the form of damages is available, then whether injunction should be granted in such a case.[59]

The underlining principle behind granting of injunction is that a party must suffer an irreparable damage if the same is not granted. The law on injunction in India is based on the principles of equity. In the said case, the remedy available to the SEP holder is in the form of royalty. The only thing which is to be determined is whether the quantum of the same is adequate. Further, the moment a SEP holder indulges in setting up a SSO, he inevitably accents to license the technology on FRAND terms. Hence, even if the royalty is lower, the said is not an irreparable injury and hence, it is a humble submission that grant of the same by the court has to be reconsidered.

Competition Issues

SEPs are *sine qua non* to technologies and SEP holders may use this situation to exploit other smaller players in the market, which may in turn lead to abuse of their dominant position by SEP holders. Article 82 of the European Union Treaty prohibits abusive behaviour. The same is also prohibited as per Section 4(1) of the Competition Act, 2002 prohibits abuse of dominant position by an enterprise or a group. The first question to determine whether an enterprise or group has indulged in a dominant behaviour of abusive nature is determination of relevant market which has not been in the Act. Under common parlance it may mean a place where buyers and sellers meet and exchange of the impugned goods and services take

[55] Fiona Scott Morton and Carl Shapiro '*Strategic Patent Acquisitions*' 2014 Antitrust Law Journal (II) 79.
[56] *eBay Inc. v MercExchange LLC*, 547 U.S. 388 (2006).
[57] *Apple Inc. v Motorola Inc* No. 2012-1548 (Fed. Cir. Apr. 25, 2014).
[58] *Ericsson v. Xiaomi Technology & Ors*, CS(OS) 3775/2014 (8 December 2014).
[59] SpicyIP, '*Delhi High Court Grants Injunction Against Xiaomi*', http://spicyip.com/2014/12/breaking-news-delhi-high-court-grants-injunction-against-xiaomi.html

place. The pertinent question to be considered here is whether or not the Competition Commission has the jurisdiction to adjudicate upon such cases in the first place. Section 3(5) of the Competition Act, 2002 lays down that the right of IPR holders shall be exempted from the provisions of the act meaning that IPR right holders shall have monopoly over their rights. The Preamble of the Act states that it is a welfare legislation which shall protect the right of the consumers by curbing anti-competitive and monopolistic practices in the market. In *Super Cassettes Industries v. Union of India*[60], the apex Court held that the Copyright Board did not have the mechanism to adjudicate upon the issues pertaining to abuse of dominance and hence, the commission was set up under the provisions of the then Monopolistic and Restrictive Trade Practice Act, 1966 and it was the apt forum to adjudicate upon such issues. The CCI for the first time in *Micromax v. Ericsson*[61] came down heavily on the abusive behaviour of Ericson and ordered enquiry by Director General by the same. The said complaint was filed by the complainant Micromax under Section 19(1)(a) of the Act.

It contended that Ericsson was violating the FRAND terms by charging differential royalty rates to different players in the market. Ericsson had compelled each player in the market to enter into a Non-disclosure Agreement such that no player could reveal the royalty rates to each other. The rates that were sought were very high and the same could not be paid under any circumstance. CCI also stated that as per Section 62, the provisions of the Act were in addition to and not in any derogation to any existing law. Hence, the Commission was within its rights to adjudicate on the same and no law such as the IPR ones or any pending litigation shall not bar the jurisdiction of the CCI.

The Courts across the world in cases such as the *Google Consent/Motorola Mobility case*, have adjudicated upon the issue of SEPs and the violation of FRAND terms by SEP holders. In *Broadcom v. Qualcomm*[62], the court in relation to Wi-Fi SEPs adjudicated that Qualcomm essentially formed a SSO to exploit royalty rates from its pools of SEPs. The Court held that if a SEP holder entered into formation of a SSO to just gain profits out of the same and falls back on its commitment, and then the same may be an anti-competitive conduct.

CCI in the cases of *Intex* and *Micromax* has held that the royalty rates demanded by Ericsson were in violation of the competition laws and also raised concerns about patent holdup and royalty stacking. They also went to the extent of determining the royalty rates which was a first for any Competition Commission in the world. The Commission in both these cases referred to Clause 6 of the ETSI IPR policy whereby each SEP holder is bound to furnish an irrevocable written undertaking on the granting of licenses on FRAND terms which are to be applied fairly and uniformly to similarly placed players. The Authority also stressed on the possibilities of patent hold-up and royalty stacking by the SEP holder. Once the patent holder of a SEP commits to licensing its patents to a SSO, the royalty which is to be claimed should be based in FRAND terms only.[63] CCI determined the FRAND rates, rejecting the claims of Ericsson that the same was purely contractual in nature. This is a first for any Competition Authority in the world.

[60] 1997 (94) ELT 302 All.
[61] *Supra Note 18.*
[62] *Supra Note 20.*
[63] "*FRAND: Challenge for competition authority*", http://www.oxfordjournals.org/content/7/3/523.abstract.

Ericsson further appealed this order of CCI on the Micromax case before the Delhi High Court which categorically stated that CCI did not have any jurisdiction to adjudicate on the issue though it asked the Director General to submit its report directly to the Court. The Court further fixed the royalty rates without any trial and asked Micromax to inform Ericson about imports in consonance with IPR Rules, 2008. This was appealed by Micromax before the Division bench, whereby it upheld the rates but emphasized that the order was not to be construed in favour of either party.

Therefore, under the said circumstances, it shall be prudent if adequate trial is given to both the parties and rates are determined by the Court without prejudice to any party and keeping in mind the interests of the end consumers at large.

Other Considerations

1. *Parallel Imports:*

Parallel importation is the import of patented goods outside the distribution channels contractually negotiated by the IP owner. For example, 'A' holds patent over a product 'X' in India and also in China. There is a difference in the prices at which the product is sold in both countries. If 'B', an Indian company, imports such a product from China in order to utilise the benefit of the price difference, such an import would be called as a parallel import. The rationale behind parallel imports is to obtain patented goods at a lower price by involving in price arbitrage and exploiting the price difference of the product in both countries. It is based on the doctrine of *international exhaustion*, which says that once the 'first sale' of a patented product is made by the patentee, then she exhausts the further distribution rights over such a product as such a sale is a sufficient reward for the patentee.

Section 107A(b) of The Patents Act, 1970 provides protection to parallel importers. Indian manufacturers import the components from neighboring countries such as China so that they can incorporate them in their products and sell the same at a lower price. These should be covered under the garb of parallel imports and the Indian importers shall be protected from the charge of infringement. If the same is true, then a conundrum arises as to whom should the SEP Holder sue. This depends on firstly, whether the product is patented, if yes, in which country and secondly, whether the exporter is duly authorised under the law to sell and distribute the product in the importing country. If parallel imports are taken into consideration and the SEP owner sues the exporter of the patented products also, then it might lower the burden on the Indian companies.

Conclusion

In retrospection, one can possibly say that a fine line between corporate autonomy on one hand and consumer interest on another ought to be maintained. The stand taken by Ericsson may not necessarily be wrong in light of the global scenario on the issue of SEPs. The law with respect to SEPs is unclear and judgements with respect to the same have differed from territory to territory. It has to be realised that SEPs are not used by the licensees due to a lack of choice of alternatives, but the same is done in order to maintain operability and compatibility between the symbiotic technologies. It is also to be considered that a global giant like Ericsson cannot be allowed to exploit its global position in markets such as that of India. To put things in perspective, even the holder of a single patent can be deemed to be a

dominant player in the relevant market. Further, the increasing number of interim injunctions granted by the Indian courts might put the parties in such a bargaining position where the SEP holder has an upper hand.

What has to be realised that a country such as ours cannot afford to lose its global image on the basis of lack of development of IPR jurisprudence. While companies must be mandated to pass their technology on the basis of FRAND commitments, it is also pertinent to note that rights of the patent holder are also to be safeguarded.