

# Constitutional Trends leading to new Business Avenues - A Case Study Approach

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## Introduction

India is a democratic state, having a parliamentary system of government, making it a federal system of governance. The parliament comprises of two houses i.e. the Lok Sabha and the Rajyasabha. The Indian constitution was adopted by the constituent Assembly on 26<sup>th</sup> November 1949 and came into effect on 26<sup>th</sup> January 1950. The 26<sup>th</sup> of January is celebrated as the Republic Day. The glory of justice and the majesty of law are created not just by the constitution – nor by the courts – nor by the officers of the law – nor by the lawyers – but by the men and women who constitute our society – who are the protectors of the law as they are themselves protected by the law. Robert Kennedy.<sup>1</sup>

## History of the Constitution

Prior to the adoption of the constitution, The Regulation Act, 1773 was passed. This was an Act passed by the British to regulate the functioning of the East India Company in India. In the year 1774 the supreme court of India was established as the Apex court at Fort William in Calcutta. In the year 1784 the Pitt's India Act was passed, this Act brought the Indian affairs directly under the control of the British government. The Charter Act, 1833 made the East India company, purely an administrative body. Later in the year 1947 the Indian Independence Act was passed. This Act declared India independent and a sovereign state. During this period the viceroy and all governors were appointed as head of the state. Today, the Council of ministers owes its legacy to the executive council.<sup>2</sup>

## Constitutional Trends till date

In the year 1956, India witnessed the introduction of the Union territories and the different Indian states were recognized by their language. The complexities of state boundaries were systematized. In the year 1976 the 42<sup>nd</sup> amendment included the word 'Socialism' and 'Secularism' in the constitution.<sup>3</sup> Thereby 'Equality in

<sup>1</sup> Robert Kennedy , [https://www.brainyquote.com/quotes/robert\\_kennedy\\_745964?src=t\\_law](https://www.brainyquote.com/quotes/robert_kennedy_745964?src=t_law)

<sup>2</sup> <http://legislative.gov.in/sites/default/files/coi-4March2016.pdf>

<sup>3</sup> <https://www.thebetterindia.com/130232/constitutional-amendments-india-constitution/>

Economy' was promoted. India is known as a secular state not controlled by any religion. In the year 1978 the Right to property was deleted from the list of Fundamental Rights namely Article 19(1)(f). The reason being that the government could not proceed with its land reforms agenda. The Janata Party passed the 44<sup>th</sup> amendment wherein Article 19(1)(f) and part of Article 31 was deleted from the constitution. Article 31(1) was transferred to Chapter IV, Part XII of the constitution in the form of Article 300A. Thereby Right to Property became a constitutional Right and not a Fundamental Right.

### **Intellectual Property Right as a Constitutional Right**

One may wonder what Constitutional Rights is? They are those rights given by the constitution and are available to all the citizens. They are provided by the constitution of the country. They are implemented based on circumstances and conditions. A person can file a suit in the civil court for the violation of constitutional rights. One important amendment to the constitution was the 44<sup>th</sup> amendment wherein Article 300A - "No person shall be deprived of his property save by the authority of law" was inserted as a constitutional right.

Intellectual Property is a form of property bestowing certain rights on the owner of these rights. Thereby they are governed by Article 300A of the constitution of India. There are various branches of Intellectual Property Rights. Namely being the Patents, Copyrights, Geographical Indications and Designs Act. In the Entertainment Network India Ltd (ENIL) v Super Cassette Industries Ltd (ISCIL)<sup>4</sup> the court held the following:

The ownership of any copyright like ownership of any other property must be considered having regard to the principles contained in Article 19(1) (g) read with Article 300A of the Constitution, besides, the human rights on property. But the right of property is no longer a fundamental right. It will be subject to reasonable restrictions. In terms of Article 300A of the Constitution, it may be subject to the conditions laid down therein, namely, it may be wholly or in part acquired in public interest and on payment of reasonable compensation. The Supreme Court recognized Intellectual Property as a property under Article 300 A of the constitution and making it constitutional rights and not fundamental right. The grant of compulsory license of the respondent was set aside. The respondent was restrained to refrain from infringing the copyright of the appellate. The Copyright board was asked to reconsider the issue of compulsory license against the appellate. Copyright is a form of property, incorporeal and intangible possessing certain rights.

In the year 2009, in the Bajaj Auto Limited v TVS Motors Company Limited<sup>5</sup> the Supreme Court ordered all the courts to have speedy disposal of law suits with respect to intellectual property rights. In this case there was a two year dispute with respect to infringement of patent over the use of twin-spark plug

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<sup>4</sup> AIR 2004 Delhi 326, 112 (2004) DLT 549

<sup>5</sup> JT 2009 (12) Sc 103

technology. The Supreme Court laid the stand that Intellectual Property cases to be settled within a period of four months from the date of filing the suit.

In another case K.T. *Plantation* (2011) it was held that property is not only confined to land but has in its ambit intellectual property rights. A term recognized under Art 300A of the constitution.

### **Intellectual Property – A Territorial Right**

Intellectual property is known globally and has a high market value in the global scenario. The question arises whether an Indian registered IPR has global protection. This is a common doubt raised and most of the companies are unaware of the fact. In *Toyota Jidosh Kabushiki Kaishav v M/s Prius Auto Industries Ltd*, the Hon. Supreme court laid down the following:

- The Intellectual Property is territorial. This further defines property rights confined territorial.
- The rights granted by Intellectual Property Laws are not “Global rights.”

The business companies have to prove that they have a “Goodwill”, “Good Reputation” in the Indian market so as to sustain their Trademark property in India.

### **Property includes Domain name**

Earlier people conducted business by having a set-up or a premise. They operated in an office or a factory. Today the scenario has changed drastically. A person can conduct his business by sitting at home. All he needs is a laptop/computer with internet connectivity. The person can create a domain name of his company. The word “property” includes a domain name and is subject to restrictions. In the case *Yahoo!, Inc v Akash Arora & Anr.*<sup>6</sup> Here they were two domain names namely ‘Yahoo.com’ and ‘Yahooindia’ dealing in similar services.

The Delhi High court observed that if the defendant does business in the name of a similar reputed business organization then the defendant will be held liable.

Giving a new definition to the word property as it includes Domain name.

### **Software as a form of Property**

Software is a program which performs a particular function on the computer. It is an intangible asset performing different types of function and gaining a lot of financial value for any individual. In the case of *Tata Consultancy Services v State of Andra Pradesh*<sup>7</sup> the Supreme Court clarified the ambiguity whether the sale of software is similar to the sale of a book. The court held that both the software and the book have the same rights and are covered under the name ‘Property’.

<sup>6</sup> 78(1999) DLT 285.

<sup>7</sup> 2006 (33) PTC 652 (SC)]

## Conclusion

As we have seen the various constitutional amendments over the past years. Today intellectual property laws are a subject matter of 'Property' defined under Article 300A of the Indian constitution. There are restrictions imposed on them and this is in the form of 'Compulsory Licensing'. Though the laws bestow monopoly rights on the IPR holder for a certain period of time yet the government has the right to withdraw this right in the interest of the public at large. Compulsory Licensing are those rights wherein there is authority bestowed on a third party to make use of the patent or copyright without the permission of the author. Under the Indian Patent Act, 1970 anyone interested in the invention can issue an application to the controller of patents to issue compulsory license for that patent.<sup>8</sup> The controller will scrutinize based on the following grounds:

- To see that the time period of three years have passed from the date of grant of patent.
- The licensee to make full use of the invention.
- To see that the invention is used to the advantage of the public.

India issued its first Compulsory License in the year 2012 in the case of Natco Pharma, an Indian generic company, for Bayer's blockbuster anti-cancer drug Nexavar (Sorafenib).<sup>9</sup> This enables the government to make important medicines available to the public at affordable prices. The respondents have to prove to the court that there is a need of the medicine to the general public.

The author concludes that intellectual property as a form of property is subject to restrictions and can be withdrawn under the Act. The author suggests the following to budding entrepreneurs:

- To have a original Trademark and not a copy on an existing well know trademark as this would enable the entrepreneurship to build his own intellectual property.<sup>10</sup>
- To have a trademark which is invented by him, thereby giving his business an identity by itself.
- Just by registering a Trademark does not symbolize that the trademark is in use. The mark must be business wise exploited.<sup>11</sup>
- A registration of intellectual property in India does not mean one has global protection.

<sup>8</sup> Section 84 The Indian Patent Act, 1970.

<sup>9</sup> <https://www.bananaip.com/ip-news-center/patents-lee-pharma-v-astrazeneca-an-unfinished-story/>

<sup>10</sup> Wagh Rajalskhmi Dr., "TECHNOLOGICAL PROGRESS IN BRANDING – A CASE STUDY AND CYBER MANAGEMENT" (2014) , <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.678.411>