CHAPTER – III

CHALLENGES FOR CRIMINAL JUSTICE SYSTEM IN DEALING WITH CROSS-BORDER COPYRIGHT INFRINGEMENT IN CYBERSPACE

In the previous chapter, the author has analyzed the problem of jurisdiction. The author has pointed out ‘jurisdiction’ as one of the basic challenges for the justice system while dealing with cybercrimes, including copyright infringement in cyberspace. The author has also dwelled upon application of principles of jurisdiction to cyberspace. The previous chapter further deals with various lacunae in Indian laws applicable to cyberspace and self-centric decisions by various courts. In this chapter, the author has analyzed differences in Constitutional and other legal philosophy as one of the challenges in dealing with cross border copyright infringement.

3.1 INTRODUCTION

There is no homogeneity in systems, rules, basic principles and guarantees (Constitutional and other) provided by justice systems across the world. There is a diversity of laws, rules and basic guarantees and jurisprudential understanding about the basic principles and standards of prosecution followed in different criminal justice systems. The systems, principles and basic guarantees are developed and implemented in a particular sovereign State or group of States. On the one hand, territorial (single or group) philosophical understanding is the basis of guaranties provided and principles to be followed and on the other hand cyber space does not recognize any territorial limitation. The de-territorial nature of cyberspace has posed multiple challenges before the criminal justice systems in dealing with cross-border copyright infringements.
Apart from others, common law (adversarial)\textsuperscript{192} and civil law (inquisitorial)\textsuperscript{193} are two basic models of criminal justice system, followed in major parts of the universe. The main adversarial jurisdictions are the United Kingdom, US and India whereas majority EU community follows adversarial system. The basic principles, guarantees of the common law system and civil law systems are different and sometimes conflicting.\textsuperscript{194} These diverse and sometimes conflicting principles and guarantees have been working effectively since ancient times, because they are applied in their respective territory or group of territories. The question of conflict or cross territorial offences was rare. The principles and guarantees are justified in respective territories because their understanding, working and structure of the systems are different from each other. Therefore, the principles and guarantees are respected as civilized principles in these countries.

As discussed earlier, the cyberspace is a de-territorial space; and cross-territorial offences in cyberspace are easy and multifold. Almost every act has a potential to be a multi-territorial offence. In maximum instances, the accused may not come to know that act is subject to multi-territorial jurisdiction. In other (traditional) types of crime, the accused at least has an idea that it may affect some of the jurisdiction(s). The cross-border jurisdictions and cognizance of offences are justified on the foreseeability metrics. The traditional act has a potential hardly to affect one or two sovereign territories at the most. The act in cyber space at a time can affect all or multiple countries. The dilemma of the cyber crime is that an individual actor governed by State-based domestic laws is able to transcend borders because the internet renders geographical distance meaningless. An individual actor requires almost the same effort, time and resources to commit an offence in own territory or

\textsuperscript{192} Adversarial systems belonging to the so-called common law countries where the law has its origin in English common law (Therefore: England and Wales, the United States and all other countries that were once colonized by the British follow adversarial system). See, Chrisje Brants, \textit{Comparing Criminal Process as Part of Legal Culture}, in COMPARATIVE CRIMINAL JUSTICE AND GLOBALIZATION, 59 (David Nelken ed., 2011).

\textsuperscript{193} Main inquisitorial jurisdictions are France, Belgium, Italy, the Netherlands and Germany.

\textsuperscript{194} Though the common law and civil law systems share a common tradition, they have significant differences among them. For example, the English model places greater reliance on oral testimony and argument than American courts, which have curtailed it in favour of written briefs and documentary evidence. See, \textit{Advantages and Dis-advantages of the Adversarial System in Civil Proceedings}, http://www.lrc.justice.wa.gov.au/_files/P92_Consultation_Papers_vol1.pdf (last updated Aug., 19. 2014).
multiple territories. Therefore, there is a need to analyse conflicting areas of adversarial and inquisitorial criminal justice systems.

The analysis of the conflicts and challenges before criminal justice systems is more relevant because the infringement of the intellectual property rights, including copyrights, is a regular phenomenon in cyberspace.

There rarely was any direct conflict between adversarial system and inquisitorial system in pre-cyberspace era. In future, however, multi jurisdictional offences would be more in number than territorial offences. In the light of the above discussion, there is a need to analyze: a) Impact of conflicting ideologies and procedures on the rights of an accused; b) Whether these types of violations of rights and guarantees are in accordance with the legal and constitutional philosophy; c) Challenges before the adversarial criminal justice system in dealing with cross-border copyright infringements in cyberspace.

The problem of conflict between principles and doctrines is more acute and sharp when the judiciary strictly adheres to its own territorial system. In numerous cases, especially when it had sought to justify the invalidation of a Government practice based on the ground of the Fifth Amendment of its Constitution, the United State’s Supreme Court solemnly intoned that “ours is the accusatorial as opposed to the inquisitorial system”. Justice Steven (dissenting) in Moran v. Burbine opined that it is important to follow the spirit of our accusatorial system. While he conceded that requiring the police to inform a suspect of a lawyer’s call would decrease the likelihood of obtaining confessions, he described this as “necessary to preserve the character of our (American) free society and our (American) rejection of an inquisitorial system”. The adversarial system places a premium on the individual rights of the accused, whereas the inquisitorial system places the rights of an accused secondary to the search for truth.

In order to supervise the protection of the rights of an accused, the judiciary shall be independent, objective and impartial. This means in particular that a judge or a judicial officer has to be institutionally and substantively independent of the prosecution.\textsuperscript{199} Institutional and substantively independent judicial department from the prosecution is one of the pre-requisites for effective protection of human rights from departmental bias (natural justice) or abuse of power by prosecution department. This view is further supported by the theory of separation of powers. A separate and independent judiciary will be in a better position to issue a writ of habeas corpus or other writs, if powers are misused. Therefore, separation of powers between investigation and judicial departments is a pre-requisite of rights granted under Article 9 (4) of ICCPR and Article 5 (4) of ECHR. Further, the right to have an independent judicial department which is independent and separate from investigation and prosecution is one of the implied rights granted in the adversarial system. This right is not preserved in cases of extradition of the accused from adversarial system or prosecution of accused in an inquisitorial system.

In view of the above discourse, therefore, there is a need to analyze the different principles, standards and procedures followed in inquisitorial and adversarial systems and its impact and implications on the rights of the accused and the basic principles\textsuperscript{200} on the one hand and the problems posed by cyberspace for criminal justice systems on the other.

The objectives of this sub-chapter are as follows:

To analyze the basic principles and guarantees followed in Inquisitorial Criminal Justice System and Adversarial Criminal Justice System.

To critically analyze problems posed by cyberspace for adversarial criminal justice systems in protecting copyright infringements from inquisitorial systems.

To recommend appropriate solutions to the above mentioned problems.


\textsuperscript{200} For analysis of different principles and standards, the author has considered the basic principles and standards followed in an inquisitorial and adversarial system rather than comparing with a particular country.
3.2 CONFLICTING PRINCIPLES FOLLOWED IN COMMON LAW AND CIVIL LAW SYSTEMS: A CHALLENGE IN DEALING WITH CROSS-BORDER COPYRIGHT INFRINGEMENT IN CYBERSPACE

In an adversarial system, the parties, acting independently and in a partisan fashion, are responsible for uncovering and presenting evidence before a passive and neutral trial judge or jury.\textsuperscript{201} In an inquisitorial system, the ultimate responsibility for finding the truth lies with an official body that acts with judicial authority and gathers evidence both for and against an accused.\textsuperscript{202} In an adversarial system, parties are given equal and appropriate chance to establish evidences or to prove or disprove their allegations or stand. The parties are equal and opposite in an adversarial system whereas they are not equal and opposite (in the sense of adversarial system) in an inquisitorial system. The roles and structure of agencies of justice system are different in both the systems. The adversarial system contains strict rules of evidence and procedure as well as its own rules of etiquette.\textsuperscript{203} In an adversarial system, it is assumed that strict adherence to rules will result in finding the truth. In an inquisitorial system, because lawyers play a more secondary role, there is less need for the kind of formal rules of evidence which are used in an adversarial system to ensure that each side plays by the same rules.\textsuperscript{204}

To analyze Common Law and Civil Law Systems the following philosophical understanding is considered:

**Role of Judge**

In an adversarial system, the decision of a judge is oriented and guided by revelations of both the parties. In an Inquisitorial System, the judge himself searches for the


\textsuperscript{203} HEILBRONN, LATIMER, NIELSEN etc., *INTRODUCING THE LAW* 456 (7th ed., 2008).

\textsuperscript{204} KATE MALLESON, *THE LEGAL SYSTEM* (3rd ed., 2007).
information before taking his decision.\textsuperscript{205} The judge in Civil Law System is more active, he himself directs proceedings; interrogates the witnesses and designates some experts, if needed, to get the elements of proof.\textsuperscript{206} In addition, judges in an inquisitorial system are involved in the investigation of the case as examining magistrates.\textsuperscript{207} The judicial police, controlled by judicial department are involved in investigation. The judicial police are required to gather evidence for and against the accused in a neutral and objective manner, as it is their duty to assist the investigation and the prosecution in discovering the truth.\textsuperscript{208} For example, in France, the juge d’instruction (translated as ‘investigating magistrate’) conducts the investigation, supervises the work of the police, finds and questions witnesses and suspects, orders searches and finds out evidence.\textsuperscript{209} In this regard, inquisitorial process could be termed “judicial prosecutions” in contrast to party prosecutions in common law systems.\textsuperscript{210}

The role of a judge in Common Law tradition is passive and neutral. The logic behind the neutrality of judges in common law tradition or adversarial system is that, according to their understanding, the truth will automatically emerge out of discussion, deliberations and equal opportunity to both the parties. In other words, the underlying assumption of the adversarial process is that the truth is most likely to emerge as a by-product of the vigorous conflict between intensely partisan advocates, generally attorneys, each of whose goal is to win.\textsuperscript{211} In this system, neutrality and


\textsuperscript{207} KATE MALLESON, \textit{THE LEGAL SYSTEM} 32 (3\textsuperscript{rd} ed., 2007).

\textsuperscript{208} Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs Vol No. 1 (March 2003). P. 33.


\textsuperscript{211} JOHN S. DEMPSEY, INTRODUCTION TO PRIVATE SECURITY, 92 (1\textsuperscript{st} ed., 2011).
passiveness of a judge is recognized as one of the basic principles governing the system.\textsuperscript{212}

\textbf{Role of parties/litigants and rights of an accused}

As discussed above, in an adversarial system, the decision of a judge is guided by both the parties. Each party tries to guide and orient the judge to its advantage. The principle of contradiction is followed in an adversarial system. In litigation, each party tries to raise some doubts on the revelations made by the opposite party. In contradiction process, examination in chief, cross examination and re-examination are normally followed as standard procedures for searching for the truth. Examination in chief, Cross examination and Re-Examination\textsuperscript{213} are not only a part of the process, but are also treated as rights and basic principles needed to be followed. It is also recognized as a principle of natural justice.\textsuperscript{214}

However, in an inquisitorial system, there is no cross-examination, and the defence is not expected to do its own research “a de-charge”.\textsuperscript{215} Further, the role of the parties is restricted to suggesting the questions that may be put to the witnesses.\textsuperscript{216} It is undertaken entirely by the prosecutor and/or investigative judge.\textsuperscript{217} Apart from above, the following are the basic differences in the inquisitorial and adversarial systems:

\begin{itemize}
  \item It is further supported by natural justice principle i.e. no one shall be judge in his own cause.
  \item According to Section 137 of Indian Evidence Act, 1857: Examination-in-chief means “The examination of witness by the party who calls him shall be called his examination-in-chief”; Cross-examination means, “the examination of a witness by the adverse party shall be called his cross-examination” and Re-examination means “the examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.”
  \item However, in number of exceptional cases, the Supreme Court of India has upheld the proceeding without the right of cross-examination. For example, in Hira Nath Mishra v. Principal, Rajendra Medical College (AIR 1973 SC 1260), there was a complaint against male students that they entered quite naked into the compound of the girls’ hostel late at night. The male students were rusticated from college without providing them right of cross-examination. The Supreme Court of India in this case observed that “the girl students would not have ventured to make their statements in the presence of miscreants because if they did, they would have most certainly exposed themselves to retaliation and harassment thereafter.” The court further pointed out that the college authorities are in no position to protect the girl students outside the college precincts.
\end{itemize}

\textsuperscript{212} ROELOF. HAVEMAN, OLGA KAVRAN, JULIAN NICHOLLS, SUPRANATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS 158 (1\textsuperscript{st} ed., 2003).

\textsuperscript{213} Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs Vol No. 1 (March 2003) P. 33

\textsuperscript{214} ROELOF. HAVEMAN, OLGA KAVRAN, JULIAN NICHOLLS, SUPRANATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS 158 (1\textsuperscript{st} ed., 2003).
3.3 BURDEN OF PROOF AND STANDARD OF PROOF: A CHALLENGE BEFORE ADVERSARIAL CRIMINAL JUSTICE SYSTEM IN DEALING WITH CROSS-BORDER COPYRIGHT INFRINGEMENTS IN CYBERSPACE

In an adversarial system, the highest standard of proof is followed for proving the guilt. In this system, the public prosecutor needs to establish the guilt against the accused in the court beyond a reasonable shadow of doubts.218 The State appoints the public prosecutor and he is responsible to conduct prosecution on behalf of the State.219 While it is the responsibility of the public prosecutor to see that the trial results in conviction, he need not be overwhelmingly concerned with the outcome of the trial.220 The accused is normally not responsible to prove anything. He can defend allegations made against him by the prosecution side. In the Accusatorial System, the onus of proving the guilt of the accused is put on the police and prosecution whereas the burden of proving the innocence is placed on the accused in the inquisitorial system.221 In an adversarial system, even if there exists the slightest doubt (reasonable), no matter how trivial it is, the benefit will go to the accused.222

The requirement of the proof ‘beyond reasonable doubt’ is also recognized expressly under Article 66 of Rome Statute of International Court, 1998. The Indian and the United Kingdom courts regarded it as one of the basic principles which need to be followed in a criminal justice system. Whereas American courts, in a number of cases, not only recognized requirement of proving guilt ‘beyond reasonable doubt’ as a part and parcel of criminal procedure but also as one of the requirements of ‘Due Process’. The American courts, in a number of cases, refuse to extradite the criminal in violation of the Due Process Clause of the American Constitution. Since there will be

probability of violation of Due Process, the whole proceedings of extradition will not only be considered illegal but will also be considered null and void.

As discussed earlier, in numerous cases, the US courts have clarified the nexus between Due Process and Doctrine of Proof Beyond a Reasonable Doubt. In *Re Winship*, the USA court held that the Due Process Clause protects an accused “against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged.” Further, in *Winegeart v. State*, after jury trial, defendant-appellant Steve Winegeart was convicted of the crime of burglary. The court primarily relied on *Cage v. Louisiana*, reversed and remanded for a fresh trial. The court, in this case, held that the “moral certainty” language in the trial court’s reasonable-doubt instruction may have permitted the jury “to find the defendant guilty based upon a degree of proof below the ‘beyond a reasonable doubt’ standard . . . required by the Due Process Clause” (Emphasis added).

The court of United Kingdom, in *Woolmington v. Director of Public Prosecutions*, held that the presumption of innocence is the “golden thread” that holds the criminal law together, and that it must be given the highest accord. According to the court, in order to prove the charge, the Crown must prove both that the accused murdered his wife, and that also he intended to do it beyond all reasonable doubts. In this case, the House of Lords accepted the explanation of the trial judge to jury that “proof beyond reasonable doubt required a clear conviction of guilt and not merely a suspicion, even a strong suspicion”. In United Kingdom, the proof beyond a reasonable doubt is one of the basic procedural requirements followed for a long time.

The rules regarding proof and burden are laid down in Chapter VII of the Indian Evidence Act, 1872. The rules relating to burden are contained in Sections 101, 102 and 103 of the Indian Evidence Act, 1872. The requirement of the proving beyond reasonable doubt is not expressly stated in the Indian Evidence Act, 1872. In *Dadu @
Justice Pasayat held that in a criminal case, normal rule is that the prosecution has to establish its case beyond reasonable doubt. The court further held that proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. The court also concluded that to displace the presumption, the evidence of prosecution must prove beyond reasonable doubt, not beyond the shadow of any doubt that the person accused is guilty of the offence charged. However, the court in *Iqbal Moosa Patel v. State of Gujarat*,\(^{229}\) held that “it is true that under our existing jurisprudence in a criminal matter, we have to proceed with presumption of innocence, but at the same time that presumption is to be judged on the basis of conceptions of a reasonable prudent man. Smelling doubts for the sake of giving benefit of doubt is not the law of the land.” The court further held that exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence.\(^ {230}\) Though the court in India is silently lenient about the requirement of proof beyond reasonable doubt, definitely it does not lean towards preponderance of probability or inner satisfaction of the judge as followed in an inquisitorial system.

It is true that the requirement of proof beyond a reasonable doubt is not expressly recognized as a part of one of the Constitutional requirements or a part of Fundamental Rights in India. But the due process, as interpreted by the Supreme Court of India under Article 21\(^ {231}\) of the Constitution, includes procedural and substantive due process. The courts in USA expressly recognized proof beyond a reasonable doubt as part and parcel of Due Process. Now the basic question in India about the due process or procedure established by law as to what is ‘fair, just and reasonable’. Whether applying rule of ‘preponderance of probability’ in criminal cases is fair, just and reasonable or not? Ultimately, it is the perception of the judge which is the deciding factor as to what is fair and whether it includes proof beyond a reasonable doubt. The last two –three decades’ experience shows that the Indian

\(^{228}\) *Millu Munda v. State of Orissa* 1996 CriLJ 154
\(^{231}\) In *Maneka Gandhi v. Union of India* (AIR 1978 SC 597) and *R.C. Cooper v. Union of India* (AIR 1970 SC 564) the Supreme Court of India held that procedure established by law includes procedure which is fair just and reasonable. Further, justice Krishna Iyer in *Sunil Batra* (AIR 1978 SC 1675) Case held that though the Constitution had no “due process” provision, yet after the *Maneka Gandhi* (AIR 1978 SC 597) judgment the consequence was the same.
Supreme Court and High Courts have interpreted the procedure established by law in India on the lines of ‘due process’ clause in USA. The same line of approach is expected from Indian court if the issue of nexus between proof beyond a reasonable doubt and due process is raised in courts of law. Further, it needs to be noted that in exceptional cases, burden of proof is shifted on the accused person to balance the rights of the victim/society at large and the rights of the accused. The rule is shifted in instances of crimes shaking the conscience of the society.\(^{232}\) The above exceptions, however, cannot be made the rule in cyber crimes and copyright infringements.

Inquisitorial system is commonly followed in Europe. In this system, no formal burden and standard of proof is imposed, as the judge himself is responsible for finding and presenting evidences.\(^ {233}\) The established criminal justice jurisprudence expects the standard of proof required in inquisitorial system to be the inner satisfaction and conviction of judge and not ‘beyond reasonable doubt’.\(^ {234}\) The standard is also known as preponderance of probability or balance of probability. While commenting upon the balance of probability standard in \(Re\ H\) (Minors) \((Sexual\ Abuse:\ Standard\ of\ Proof)\) [1996] AC 563 and SoS for the Home Department \(v\) Rehman [2003] 1 AC153, the House of Lords held that “the balance of probability standard means that the court must be satisfied that the event in question is more likely than not to have occurred.”\(^ {235}\)

### 3.3.1 Conclusion

As discussed earlier, the working and principles followed in the inquisitorial and adversarial system are different and sometimes conflicting. The expected role of a judge in both the systems is different. In an adversarial system, the judge is a neutral umpire. The parties to the litigations are active. The neutrality of the judge is treated as one of the basic features of an adversarial system. It is a part of due process, natural justice principle and fair hearing. The judge in inquisitorial system, which covers most of the European countries, is active. In instances of cyber crimes and copyright

---

\(^{232}\) See, Section 113A, 113B, 114-A of the Indian Evidence Act, 1872. See also, Section 111A, 107 and 108, Section 110 of Indian Evidence Act, 1872.


infringements, if an accused from adversarial system is tried in an inquisitorial system, his right to be tried by a neutral and passive judge is violated. The adversarial system countries may not allow or be willing to extradite their own citizens in violation of the above mentioned rights. The role of the parties in both the systems is different.

Further, in an adversarial system the formal burden of proof lies on the prosecution. The criminal allegations shall be proved beyond all reasonable doubts. In an inquisitorial system no formal standard of proof is set, but definitely it is not beyond reasonable doubt. The standard followed in inquisitorial system is inner satisfaction and conviction of a judge. The proof beyond reasonable doubt is not only the principle of fair play but also one of the requirements of the Due Process. The Due Process is a part of fundamental rights in America. The Due Process requirement is also interpreted under Article 21 of the Constitution of India. The requirement of proof beyond all reasonable doubts is not expressly recognized under Article 21 of the Constitution, but is followed in criminal justice system. As discussed earlier, now the court has held that there is no difference between ‘Due Process of America’ and ‘procedure established by law’ in India.\(^\text{236}\) There is a very high probability of recognition of standard of proof beyond all reasonable doubt as part of the procedure established by law under Article 21 of the Constitution of India. According to the prevailing jurisprudential understanding, the fundamental rights are available against the State. In other words, the State shall not take any action in violation of fundamental rights. The extradition of the criminal is an executive process and the executives are part of the state.\(^\text{237}\) It means that though America wants to co-operate with the inquisitorial system, it cannot extradite any person from its jurisdiction. As discussed earlier, there is a very high probability of interpretation of proof beyond reasonable doubt as part of the procedure established by law under Article 21 of the Constitution of India. Therefore, extradition of a person to a country observing inquisitorial system would violate his Constitutional guarantee of due process i.e. proving the criminal charges, including copyright infringements beyond all reasonable doubts. As discussed earlier, philosophy of Constitution and Constitutional law do

\(^{236}\) Justice Krishna Iyer in *Sunil Batra Case* (AIR 1978 SC 1675) held that though the Constitution had no “due process” provision, yet after the *Maneka Gandhi Case* (AIR 1978 SC 597) judgment the consequence was the same.

\(^{237}\) See, Article 12 of the Constitution of India.
not allow the State to violate fundamental rights of any person. Therefore, conflicts in
the principles of the criminal justice systems (i.e. role of judge and standard of proof)
are one of the challenges in co-operation before the adversarial criminal justice
system.

3.4 **RIGHT AGAINST SELF–INCrimINATION: A
CHALLENGE IN DEALING WITH CROSS-BORDER
COPYRIGHT INFRINGEMENT**

The right against self-incrimination is one of the paramount rights in various
jurisdictions. The said right is given the status of a fundamental right in many
adversarial jurisdictions, whereas in some of the inquisitorial jurisdictions the right
against self incrimination is partially protected. Modern Constitutions do not allow the
State to violate fundamental rights through legislative or executive actions.238 The
challenging question before the adversarial systems is: whether the State is
empowered to extradite an offender to the requesting State (inquisitorial) where right
against self-incrimination is not fully protected? The right to silence and privileges
against self-incrimination in an adversarial system (i.e. US, India), and in an
inquisitorial system is discussed and analyzed in this chapter. The discussion and
analysis is intended to highlight the challenge posed by cyberspace to criminal justice
systems with regards to right against self-incrimination and probable solution to it.

In the US, it was argued that protection against self-incrimination is so fundamental
that a refusal to the said right is denial of the due process provided in the Fourteenth
Amendment of the US Constitution.239 In Rogers v. Richmond,240 the US Supreme
Court stated that “ours is an accusatorial and not an inquisitorial system-a system in
which the State must establish guilt by evidence independently and freely secured and
may not by coercion prove its charge against an accused out of his own mouth”. In an
adversarial system, accused or suspect has an absolute right to remain silent with
respect to anything which could incriminate him or her.241 In the US, right to silence

---

238 See, Article 13 of the Constitution of India.
239 See, RONALD A. BANASZAK, FAIR TRIAL RIGHTS OF THE ACCUSED: A
241 Article 20(3) of the Constitution of India.
is granted under 5th Amendment to the US Constitution. According to it, no adverse or appropriate inference of guilt can be drawn, on the basis of silence of the accused.

The right of silence is considered a part and parcel of the right of fair trial. According to US court the principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the very foundation of the administration of US criminal law.242 According to Craig R. Ducate, the requirement that Government establishes the guilt of accused persons beyond a reasonable doubt and without compelling them to produce incriminating evidence themselves—the foundation of the adversarial system is premised on the fundamental value in our society of protection the integrity of the individual.243

The US system provides opportunity to the accused to waive his/her basic rights, including fundamental rights or constitutional guarantees. The accused can also waive his right against self incrimination. In North Carolina v. Butler,244 the Supreme Court of US has made it clear that waiver of Miranda rights need not be in writing and need not take the form of an explicit statement. The question of knowing, intelligent and voluntary waiver of rights is decided based upon various circumstances. The US Court further clarified in Tague v. Louisiana245 that waiver of Miranda rights cannot be presumed from silence. In contrast, adverse inferences against the prosecution have been fairly common in the modern era when the prosecution has failed to call a witness or present evidence available to the prosecution, the existence of which has become known to the accused.246

Further, the IV amendment, of US Constitution has extended the said right to an unreasonable search and seizure. According to IV amendment “The right of the

242 Coffin v. US., 156 U.S. 432 (1985)
246 See, Dale A, Nance, Adverse Inferences About Adverse Inferences: Restructuring Juridical Roles For Responding to Evidence Tampering by Parties to Litigation, http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/NANCE.pdf visited on 21/06/13 (last updated June, 21 2013). See also, United States v. Mahone, 537 F.2d 922, 926-28 (7th Cir. 1976) (in this case the court approved use of an adverse inference from the government’s failure to call an arresting officer as a witness); United States v. Latimer, 511 F.2d 498, 502-03 (10th Cir. 1975) (In this case also the court approved the use of an adverse inference from the government’s failure either to present surveillance photographs or to explain their non-presentation).
people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall be issued, but upon probable causes, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized”. The US Department of Justice, as the United States Central Authority under the Treaty, has the authority to refuse to transmit the executed request to the requesting country to prohibit the requesting country from using the executed request as the basis for an adverse inference against the witness.247

3.4.1 Right against self-incrimination in India

The right against self-incrimination is a Fundamental Right under Article 20(3) of the Constitution of India.248 It is also protected as a statutory right under Section 315249 of the Criminal Procedure Code, 1973 (Cr. P. C., 1973). Article 20(3) of the Constitution of India is relevant on both the levels: at the level of investigation, when police are interrogating the accused and at the trial level. Subject to certain contentions, Section 94250 of Cr. P. C., 1973, empowers District Magistrate, Sub-divisional Magistrate or Magistrate of the First Class, to issue warrant for search and seizure. Section 96 of the Criminal Procedure Code, 1973, authorizes a court to issue a warrant. The court has deliberated on meaning and applications of these Sections in view of Article 20(3) of the Constitution of India in following cases.

247 See, MICHAEL ABBELL, OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES 238 (1st ed., 2010).
248 It says that “No person accused of any offence shall be compelled to be a witness against himself.”
249 It does not empower the court to draw any inference when the accused remains silent or refuses to answer the question put to him.
250 Section 94(1) of The Code Of Criminal Procedure, 1973 is as follows:
(1) If a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property, or for the deposit, sale or production of any objectionable article to which this section applies, or that only such objectionable article is deposited in any place, he may by warrant authorize any police officer above the rank of a constable-
(a) to enter, with such assistance as may be required, such place,
(b) to search the same in the manner specified in the warrant,
(c) to take possession of any property or article therein found which he reasonably suspects to be stolen property or objectionable article to which this section applies,
(d) to convey such property or article before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose of it in some place of safety,
(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or production of any such property or article knowing or having reasonable cause to suspect it to be stolen property or, as the case may be, objectionable article to which this section applies.
Meaning of ‘to be a witness’ in Article 20(3) of the Constitution of India

The court, in *M.P. Sharma v. Satish Chandra*,251 deliberated upon the meaning of ‘to be a witness’. In this case, full bench of eight judges gave a unanimous judgment. Followed by *M. P. Sharma v. Satish Chandra* in the *State of Bombay v. Kathi Kalu Oghad*252 (eleven judge bench) the majority reconsidered the meaning and interpretation of the above term and slightly modified it. The modified interpretation in *State of Bombay v. Kathi Kalu Oghad* is the law of the land till date. In *M. P. Sharma v. Satish Charndra*253 a report had been lodged by the Registrar of Joint Stock Companies, Delhi. The report was lodged against Dalmia Jain Airways Ltd. and others. On the basis of the report a search warrant was issued under section 96 (now section 93), of the Criminal Procedure Code, 1973. Followed by the search warrant, a search was conducted at 34 places and papers and goods were seized from various places. A petition was filed by the aggrieved persons in the Hon’ble Supreme Court of India under Article 32 of the Constitution of India. Among other things, violation of Article 20(3) was a prime contention before the court. It was contended that compulsory asking for production of self-incriminating documents is against protection provided by Article 20 (3) of the Constitution of India. Justice Jagannath Das, in this case, while delivering majority judgment held that the protection provided by IV Amendment of the Constitution of US shall not be extended to Article 20(3). He further said that when the framers deliberately chose not to write anything like the IV amendment to the Constitution of USA, the court could not read it as part of Article 20 (3) of the Constitution of India, by a process of expansive interpretation. The court held that “a person can ‘be a witness’ not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of dumb witness is ....or the like.”254 The legal provisions enabling the authority, including the courts, to direct the accused to give his specimen handwriting, thumb-impression, finger-print or palm-print or foot prints, for purposes of comparison with the same kind of things in the possession of the authorities and linked with the

---

perpetrator of the crime, led to conflicting decisions in the High Courts when their constitutionality was questioned.\textsuperscript{255}

In order to resolve the controversies led by the above case and other High Court cases, the 11 Judge bench of the Supreme Court reconsidered the interpretation of the Article 20(3) in \textit{the State of Bombay v. Kathi Kalu Oghad}.\textsuperscript{256} In this case, majority of eight judges led by Sinha C. J. felt it necessary to reformulate the principle laid down in \textit{M. P. Sharma v. Satish Chandra}.\textsuperscript{257} The Supreme Court of India proceeded with two basic premises: Firstly, “‘Furnishing evidence’ in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that—though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject—they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice”. Secondly, according to the court, it must be assumed that the Constitution-makers were aware of the existing law. Based upon the above premises, the court ruled that production of the document \textit{per se} does not violate the right protected under Article 20 (3) of the Constitution of India. The court further held that “self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge.”

Furthermore, in \textit{Nandini Satpathy v. P.L. Dani},\textsuperscript{258} Justice Krishna Iyer clarified that “to be witness against oneself”, is not confined to the particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer.” Justice Krishna Iyer


\textsuperscript{256} Bombay v. Kathi Kalu Oghad 1961 AIR 1808 1962 SCR (3) 10

\textsuperscript{257} M. P. Sharma v. Satish Chandra (1954) SCR 1077; AIR 1954 SC 300.

\textsuperscript{258} Nandini Satpathy v. P.L. Dani 1978 AIR 1025, 1978 SCR (3) 608
after quoting *Kathi Kalu Oghad* held that incriminatory evidence should have the tendency of incriminating the accused.

### 3.4.1.1 Meaning of compulsion under Article 20(3) of the Constitution of India

Chief Justice Sinha, in his majority judgment in *Kathi Kalu Oghad*, concluded that “compulsion is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted.” The court further held that the statement does not become involuntary according to Section 27 of the Indian Evidence Act, 1872 merely by reason that it is given during police custody. Therefore, the court confirmed validity of the Section 27 and held that evidence obtained under said Section is admissible unless the accused has proved that he was ill-treated.

The above analysis of the court shows that every accused has a right against self-incrimination. He can maintain complete silence, the police are neither empowered to compel the accused to furnish involuntary statement nor adverse or appropriate inference can be drawn from his silence with respect to self-incriminating questions.

### 3.4.1.2 Is Article 20 (3) a basic structure or an important fundamental right?

In India, the fundamental rights are not sacrosanct. The framers of the Constitution of India were cognizant over balancing the fundamental rights of individuals and interest of the society at large. They balanced the rights of individuals and the interest of the society on three different levels. Firstly, in a number of Articles, they have provided express reasonable restrictions. Secondly, they have incorporated the charter of social rights (chapter IV of the Constitution of India). Thirdly, they have kept enough scope for assuming implied restrictions of fundamental rights. The framers of the Constitution of India had not given special or lower status to any particular fundamental right, exception certain exceptions. The government was empowered to suspend all or any of the fundamental rights in an emergency. Now after 44th Amendment Act, 1978, the government cannot suspend Articles 21 and 20 (including

---

259 Bombay v. Kathi Kalu Oghad 1961 AIR 1808 1962 SCR (3) 10
261 For example according to Article 25 (1), Right of religion is subject to other fundamental rights. The framer of the constitution has preferred other fundamental rights over right of religion.
right against self-incrimination) even during the emergency.\textsuperscript{262} Though Article 20 is not expressly declared as a basic structure but is equated with Article 21 of the Constitution of India and both cannot be suspended even in an emergency. Further, clauses under Article 20 of the Constitution are supplementary and complementary to Article 21 of the Constitution of India.

The above logic shows that Article 20 is one of the important Articles. Therefore, it can be declared as a part of ‘basic structure’ by judiciary in near future. The declaration of Article 20 of the Constitution of India as a basic structure would make it sacrosanct and beyond the amending powers of the Parliament.

Under Indian Criminal Justice System, in some of the sensitive offences, burden is shifted on the accused. The shifting of the burden upon the accused is always subject to judicial scrutiny. The judicial scrutiny can be done on the touchstone of twin principles: anti-arbitrariness contained in Article 14 and fair trial contained in Article 21, and presumptions made against him have to be reasonable inferences drawn from proved facts.\textsuperscript{263} According to Udai Raj Rai, in any case, some such presumptions cannot be used to build up a theory against accused’s right of silence.\textsuperscript{264} As analyzed earlier in \textit{Kalu Kathi}\textsuperscript{265} case, the court answered the question of compelling the accused to give specimen handwriting, thumb impressions and signatures and stated that the right of the accused against self-incrimination is not violated in the above instances. According to the court, “self incrimination must mean conveying information based upon the personal knowledge of the person” and covers only “personal testimony which must depend upon his volition.”

The above mentioned right is in consonance with the philosophy of adversarial trial. Protection of right against self-incrimination is compulsion on sovereign State in an adversarial system. According to jurisprudential understanding of the adversarial system of criminal trial, “a sovereign State... has no right to compel the sovereign...

\begin{itemize}
\item \textsuperscript{262} See Article 359 of the Constitution of India.
\item \textsuperscript{263} See, UDAI RAJ RAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT 291 (1\textsuperscript{st} ed., 2011).
\item \textsuperscript{264} UDAI RAJ RAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT 291 (1\textsuperscript{st} ed., 2011).
\item \textsuperscript{265} State of Bombay v. Kathi Kalu Oghad 1961 AIR 1808 1962 SCR (3) 10
\end{itemize}
individual to surrender his right to self defense.\textsuperscript{266} This right is further supported by ancient common law legal maxim: \textit{“Nemo debet prodere se ipsum”}.\textsuperscript{267} In a criminal trial, the State is powerful. The State has independent investigation machinery and prosecution to prove its side. The accused may not have any resources to prove his side. This and other rights incorporated in an adversarial criminal justice system puts criminal and State almost on the same footing. It is also pertinent to note that right of fair trial is also recognized under a number of international instruments.\textsuperscript{268}

3.4.2 Right to silence and adverse inferences in an Inquisitorial Criminal Justice System

In an inquisitorial system, the defendant does not have an absolute right to remain silent.\textsuperscript{269} The researcher has considered the following examples to explain the partial right to silence in inquisitorial jurisdictions. In New South Wales (Australia), partial right of silence is granted. According to Section 20 of New South Wales Act, 1995, “the judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence”. Section 89\textsuperscript{270} of New South Wales, Evidence Act, 1995

\begin{footnotesize}
\begin{enumerate}
\item See, Gautam Swarup, \textit{Article 20 (3) of The Constitution of India and Narco Analysis – Blending The Much Awaited}, http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=gautam_swarup
\item \textit{i.e.} ‘no one can be required to be his own betrayer’.
\item Such as Article 14 of ICCPR, and Article 6 of ECHR; Article 21 ICTY; Article 20 ICTR statute. Under Article 21 ICTY (4g), right not to be compelled to testify against himself or to confess guilt is protected.. According to Article 11.1: Universal Declaration of Human Rights, 1948: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”. The International Covenant on Civil and Political Rights, 1966 (to which India is a party) states in Article 14(3)(g) that the accused shall “not to be compelled to testify against himself or to confess guilt.” The European Convention for the Protection of Human Rights and Fundamental Freedoms states in Article 6(1) that every person charged has a right to a ‘fair trial’ and Article 6(2) thereof states that “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”
\item THOMAS J. GARDNER, TERRY M. ANDERSON, CRIMINAL EVIDENCE: PRINCIPLES AND CASES 34 (7th ed., 2010).
\item Section 89 of Evidence Act, 1995 deals with Evidence of silence. According Section 89: (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused: (a) to answer one or more questions, or (b) to respond to a representation, put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.
\end{enumerate}
\end{footnotesize}
deals with Evidence of silence. The section is amended by Evidence Amendment (Evidence of Silence) Act, 2013. Section 89 of Evidence Act, 1995 deals with Evidence of silence. According to clause 1 of Section 89, in a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed to give or refused: (a) to answer one or more questions, or (b) to respond to a representation, put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence. Sub-section (3) is an exception to sub-section (1) of section 89 of the Evidence Act, 1995. According to sub-section (3), sub-section (1) does not prevent the use of the evidence to prove that the party or the other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding. Further, according to sub-section 4 of Section 89, “inference” includes (a) an inference of consciousness of guilt, or (b) an inference relevant to a party’s credibility.

Similarly, the Court of state of Queensland in Weissensteriner v. Queen held that in case evidence establishes a prima-facie case, an adverse inference can be drawn. The European Court of Human Rights in Murray v. United Kingdom (in an appeal from Ireland) held that two conditions should be satisfied for drawing appropriate inferences from the silence of the accused, namely (i) that the prosecution must firstly establish prima-facie case and (ii) that the accused should be given an opportunity to call his Attorney when he is being interrogated during investigation or being questioned during trial. It is pertinent to note here that European Human Rights Court in Murray v. United Kingdom has not permitted to draw an adverse inference. The court expects that the judge in criminal justice system shall draw ‘appropriate

---

(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
(3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.
(4) In this section “inference” includes:
(a) an inference of consciousness of guilt, or (b) an inference relevant to a party’s credibility

inference’ rather than ‘adverse inference’. The ‘appropriate inference’ may include inference as to whether the person is guilty or innocent. Further, in Murray (John) v. UK, the court concluded that the above right is not an absolute right. It has held that: “Whether the drawing of adverse inferences from an accused’s silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight to be attached to them by national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.”

In R v. Argent, Lord Bingham set out the six formal conditions that must be satisfied before an adverse inference can be drawn:
1. There must be proceedings against a person for an offence;
2. The alleged failure to mention a fact at trial must have occurred before charge, or on charge;
3. The alleged failure must have occurred during questioning under caution.
4. The questioning must have been directed to trying to discover whether or by whom the alleged offence was committed;
5. The alleged failure of the accused must have been to mention any fact relied on in his defence in those proceedings;
6. The alleged failure must have been to mention a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned.

The above mentioned ‘circumstances’ include, when relevant, time and day, defendant’s age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice.

Apart from the above, Section 34 read with Sections 35 to 37 of the Criminal Justice and Public Order Act, 1994, permitted drawing adverse inference in the criminal

---

justice system of United Kingdom.\textsuperscript{277} According to Section 34 of the said Act, a court or jury while determining whether the accused is guilty of the offence charged, may draw such inferences from the silence as appear to be proper to a court or jury. Section 35 of the Criminal Justice Order Act, 1994, permits inference to be drawn if the defendant is silent at the trial. However, this Section prevents an inference from being drawn when it appears to the court that “the physical or mental condition of the accused makes it undesirable for him to give evidence.”\textsuperscript{278}

\subsection*{3.4.2.1 Conclusion}

As analyzed above, the right against self-incrimination is one of the basic principles followed in adversarial criminal justice system including USA and India. The right or privilege against self-incrimination is protected as one of the fundamental rights in India and US. The right against self-incrimination or right of silence is not fully protected or recognized in inquisitorial systems, including most of the European systems. As analyzed earlier, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Section 34 of the Criminal Justice and Public Order Act, 1994 UK, Section 89 of New South Wales, Evidence Act, 1995, etc., permit court to draw ‘adverse’ or ‘appropriate’ inference in appropriate criminal cases. Further, inquisitorial courts and European Court of Human Rights recognised the limitations in drawing ‘adverse’ or ‘appropriate’ inferences in \textit{Murray (John) v. UK},\textsuperscript{279} and \textit{R v. Argent},\textsuperscript{280} etc.

The above deliberation demonstrates that in an adversarial system, the right against self-incrimination is considered as a fundamental guarantee. This fundamental guarantee has got a Constitutional protection in India. The authority to draw ‘appropriate’ or ‘adverse’ inference is not only against the standard of ‘beyond reasonable doubt’ but is also against the right against self-incrimination. Further, it needs to be noted that the standard ‘beyond reasonable doubt’ is recognized as a part of ‘due process’, which is one of the fundamental rights in some of the adversarial jurisdictions, including US. Therefore, as discussed earlier, co-operation with

\textsuperscript{277} The United Kingdom is following maximum features of adversarial criminal justice system, but above feature of inquisitorial criminal justice system is added in Criminal Justice and Public Order Act, 1994.

\textsuperscript{278} See, http://www.cps.gov.uk/legal/a_to_c/adverse_inferences/#a01 (last updated May, 03, 2013).


\textsuperscript{280} \textit{R v. Argent} [1997] 2 Cr.App.R. 27
inquisitorial system, including extradition, would lead to violation of basic guarantee (fundamental rights) provided in the Constitutions of adversarial criminal justice systems, including India and US. It is also against a basic principle followed in an adversarial criminal justice system i.e. “Nemo debet prodere se ipsum”.

In this catch-22 situation, whether court can refuse to extradite a person if the requesting country permits its court to draw adverse inference? According to established jurisprudence, fundamental rights are guaranteed against the State. The State is not permitted to take any action against fundamental rights in an adversarial criminal system. Extradition is an executive action which cannot be in violation of fundamental rights. It means the established jurisprudence does not allow any court or other authority to extradite any person in violation of fundamental rights. Therefore, the court shall not permit extradition with the inquisitorial system of criminal trials.

Even the Parliament cannot make any law inconsistent with fundamental rights. In this situation, amendment to the Constitution of the State and providing exceptions to the right of silence is the only effective solution left with a sovereign State. The amendment of the Constitution is a difficult process and countries following adversarial criminal justice system may not be ready to compromise in respect of the said fundamental rights. The inquisitorial criminal justice systems also can amend their laws and allow right against self-incrimination; but like adversarial criminal justice systems, all the inquisitorial systems also may not be willing to effect a change in their legal system. Apart from willingness to change the existing legal system, there definitely exists a possibility of power politics; which may counter the willingness to change. The problem in co-operation would be more acute if Article 20 (3) would be declared as a part of basic structure of the Constitution of India. Above deliberations on the importance of Article 20(3) and its nexus with Article 21 show that there is a very high probability of declaration of Article 20(3) as a basic structure of the Constitution. In case it is so declared, it will be impossible for the Parliament to amend Article 20(3) of the Constitution of India. Therefore, the right against self-incrimination and “Nemo debet prodere se ipsum” are challenges posed before the adversarial criminal justice system, while co-operating with inquisitorial system.

---

281 i.e. ‘no one can be required to be his own betrayer’.
282 i.e. ‘no one can be required to be his own betrayer’.
(including maximum countries in European Community) in instances of transnational cyber crimes. In such a critical situation, establishment of harmonized international system is a solution which would solve this and other problems posed by cyberspace.

### 3.5 RIGHT OF CROSS-EXAMINATION: A CHALLENGE IN DEALING WITH CROSS-BORDER COPYRIGHT INFRINGEMENTS

As analyzed above, right to cross-examination is not available in an inquisitorial system. It means defence lacks adequate opportunity to test the evidences of the prosecution by cross-examination.283

In the US, the protection afforded by Confrontation Clause of the Sixth Amendment was recognized as fundamental when it was incorporated by the Court’s decision in *Pointer v. Taxis*.284 The court observed that face to face confrontation and right of cross examination are “essential to fair trial in a criminal prosecution”.285 According to a US court in *Kentucky v. Stincer*,286 the right to face to face confrontation serves much the same purpose as a less explicit component of Confrontation Clause that we have had more frequent occasions to discuss—the right to cross-examine the accuser; both “essur[e] the integrity of the fact-finding process”. The Supreme Court of US, in *Maryland v. Craig*,287 held that the right guaranteed by the Confrontation Clause includes not only a “personal examination” but also “(1) insures that witness will give his statements under oath—thus impressing him with seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of truth’; [and] (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.”288

---

283 See, Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs Vol No. 1 (March 2003). P. 34.
288 See also, Green 399 U.S. at 158, 90 S.Ct. at 1935.
The right of cross-examination is not only a statutory right but is also one of the basic natural justice principles. The Supreme Court of India, in *State of M.P. v. Chintaman Sadashiva Vaishampayan*, held that the rules of natural justice require that a party must be given an opportunity to adduce all relevant evidence upon which it relies and further that the evidence of the opposite party should be recorded in his very presence, and that he should be given an opportunity of cross-examining the witnesses examined by that party. If these principles are not followed, the trial will be treated as null and void in an adversarial system including India.

The natural justice principle is also interpreted under Article 14 & 21 of the Constitution of India. In *Nawabkhan v. State of Gujarat*, Justice Krishna Iyer had observed: “[N]ullity is the consequence of unconstitutionality and so without going into the larger issue and its plural division we may roundly conclude that the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of citizen is void and ab initio of not legal efficacy…. An order is null and void if the statute clothing the administrative tribunal without power conditions it with the obligation to hear, expressly or by implication. Beyond doubt, an order which infringes a fundamental freedom passed in the violation of *audi alteram partem* rule is a nullity”.

It needs to be noted that the principle *audi alteram partem* also includes the right of cross-examination.

---


290 In India, in number of cases, consistently the Supreme Court of India held that, whenever there is violation of rule of natural justice, the order would be null and void. See, Shridhar v. Nagar Palika Jaunpur, AIR 1990 SC 307; State of Orissa v. Binapani Dei, AIR 1967 SC 1269; R.B. Shreeram Durga Prasad v. Settlement Commission, AIR 1989 SC 1038 etc..

291 In *Delhi Transport Corporation v. DTC Mazdoor Union*, 1991 AIR 101, the Supreme Court of India held that “*the audi alteram partem* rule, in essence, enforce the equality clause in Art. 14 and it is applicable not only to quasi-judicial bodies but also to administrative order adversely affecting the party in question unless the rule has been excluded by the Act in question.” Similarly, in *Maneka Gandhi v. Union of India* 1978 AIR 597, the Supreme Court of India interpreted natural justice principles as part of the Art. 14 and Art. 21 of the Constitution of India. See also, CA Ashish Makhija, *Principles of Natural Justice*, http://www.hreat.org/impletter/PRINCIPLESOFNATURALJUSTICE.pdf (last updated Aug., 18, 2014); Shivraj S. Huchhnavar, *Principle of Natural Justice in Indian Constitution*, http://www.legalservicesindia.com/article/article/principles-of-natural-justice-in-indian-constitution-1519-1.html (last updated Aug., 18, 2014).

The right of cross-examination and face-to-face confrontation is given paramount consideration in an adversarial system like US and India. In the US, it is one of the fundamental rights and a part of ‘due process clause’, whereas in India a statutory right and a common law right which is followed as one of the natural justice principles.

3.5.1 Conclusion

Therefore, the question that arises is whether the Government of India is empowered to extradite the accused in an inquisitorial system in violation of right of cross examination. It is an established philosophy in India that the State cannot take away fundamental rights of an accused unless there is a compelling interest involved. Even the accused is not allowed to waive his rights in India. The doctrine of waiver is applied positively in America (accused is allowed to waive his/her fundamental rights) whereas the doctrine is applied negatively in India. It means, in India, an accused cannot waive his/her fundamental rights voluntarily. Any action of the State in violation of fundamental rights is treated as null and void. As rightly asserted by Mr. Nani A Palkhiwala, “The fundamental rights are the very heart of our constitution, taking them away would deprive the Constitution not only of its identity but of its life itself. Parliament, when it claims the right to amend the constitutional law, cannot set itself up as the official liquidator of the Constitution.”

Therefore, the Government cannot extradite the accused to inquisitorial jurisdiction where the right of cross-examination is not provided unless and until it is a compelling interest of the State. The co-operation with other States in instances of cyber crimes is not yet declared as a compelling interest of the State.

Further, courts in India also have stated the exceptions to the right of cross-examination. The offences in cyberspace are not yet recognized as one of the exceptions to the right of cross examination. Therefore, the action of the State

---

293 The concept of natural justice being flexible, in some situations, denial of cross-examination may, in itself, constitute denial of natural justice while it may not be so in other situations. See, Rohtas Industries v. Rohtas Industries workmen Sangh (1977) 2 SCC 153. See also, M.P. JAIN & S.N. JAIN PRINCIPLES OF ADMINISTRATIVE LAW, 342 (6th ed., 2013).
294 It is pertinent to note that above rights are diverted by both the legal system in exceptional cases.
(including extradition) in probable violation of fundamental rights or natural justice principle would be null and void. Guarantee of the cross-examination in adversarial system and absence of the said guarantee in inquisitorial system, including European countries, is one of the challenges for criminal justice systems.

3.6 CHALLENGE IN IMPLEMENTING THE PRINCIPLE OF EX-POST FACTO LAWS AND NULLUM CRIMEN, NULLA POENA SINE PRAEVIA LEGE POENALI VIS–A-VIS COPYRIGHT INFRINGEMENTS IN CYBERSPACE

The legality of the criminal law plays an important role in civil and common law criminal justice systems. The principle of legality is considered as one of the cornerstones in criminal justice system. Common law countries, from their side, connect this principle to the essence of the rule of law.297 As Albeit explained, throughout civil and common law traditions, legality revolves around the idea that public officials derive their power to prosecute, to convict and to punish only on the basis of previously defined crimes and criminal sanctions.298 The main reason for application of the legality principles is to restrict people in power from an arbitrary application of the law by limiting scope of intervention in the rights and liberty of the people. The prohibition on retrospective legislation (lex praevia), the obligation to define crime precisely and clearly (lex certa), as well as the obligation to interpret the statutory offences strictly (lex stricta): all these corollaries of legality are somehow designed to protect citizens against arbitrary government.299

The principle of ex-post facto laws is applied by the civilized States in their territories. In India, it is recognized as a fundamental right (Article 20 (1)). According to American jurisprudence, the principle of legality has two main tenets: one, it prohibits retroactive definition of criminal behaviour by judicial decision, and two, it requires statutory definitions of crime to be sufficiently clear and precise so as to enable

---

reasonable people to understand what conduct is prohibited.\textsuperscript{300} The second tenet of the principle of legality requires that a statute must define criminal conduct clearly enough so that people affected by statute will receive adequate notice of behaviour prohibited.\textsuperscript{301} The International law also recognized the general principle\textsuperscript{302} recognized by civilized nations as ‘third source’\textsuperscript{303} of international law.\textsuperscript{304} It means that in the absence of any International Convention and International Custom, these general principles need to be recognized as a source of international law. This view is further (indirectly) supported by practice followed in the extradition cases. In extradition cases, the accused is not extradited if the act is not punishable under national laws of both countries. The \textit{ex-post facto law} principle is also recognized by a common law maxim, \textit{Nullum Crimen, nulla poena sine praevia lege poenali} (IT means “No crime no Punishment without a previous penal law”).

The present philosophy followed under \textit{nullum crimen, nulla poena sine praevia lege Poenali} or \textit{ex-post facto laws} presumes supremacy of the law of the land or territorial sovereignty. The above principles are interpreted under the guise of individual protection from arbitrary sovereign authority. According to prevailing jurisprudence, \textit{Nullum Crimen, Nulla Poena Sine Praevia Lege Poenali} is applicable to a territory only. It other words, for punishing a person, the act shall be punishable in the sovereign territory. Further, the State shall not impose more punishment than provided under the territorial laws. As discussed earlier, the cyberspace is de-territorial in nature and no sovereign can confine the activities of a person in a sovereign territory. Furthermore, as discussed in chapter-II: “PROBLEM OF JURISDICTION IN CYBERSPACE AND ITS IMPACT ON INTERNATIONAL AND DOMESTIC LAWS”, the sovereign States are taking cognizance of the offence based upon the ‘accessibility principles’.\textsuperscript{305} It means the minimum guarantee

\textsuperscript{300} THOMAS J. GARDNER, TERRY M. ANDERSON, CRIMINAL LAW 12 (11\textsuperscript{th} ed., 2009).
\textsuperscript{301} THOMAS J. GARDNER, TERRY M. ANDERSON, CRIMINAL LAW 13 (11\textsuperscript{th} ed., 2009).
\textsuperscript{302} It is not clear under Article 38 of the Statute of International Court of Justice, 1945 as to what are the general principles and what are civilized and undivided nations. According to Dr. H. O. Agarwal [\textit{See}, DR. H. O. AGARWAL, INTERNATIONAL LAW & HUMAN RIGHTS 26 (15 ed., 2008)], ‘It is desirable that the International Law Commission should make a study and prepare a list of such principles.’
\textsuperscript{303} The first and second source recognized under Article 38 of the Statute of International Court of Justice, 1945, respectively are, International Conventions and International Custom.
\textsuperscript{304} See, Article 38 Para -1, Statute International Court of Justice, 1945
\textsuperscript{305} \textit{See}, Chapter –II “PROBLEM OF JURISDICTION IN CYBERSPACE AND ITS IMPACT ON INTERNATIONAL AND DOMESTIC LAWS”.
provided under above principles may not be available because other sovereign States may take cognizance and punish a person, though the act may not be punishable in their own territory. Does this mean that the person using cyberspace needs to know the laws of all sovereign States in addition to the law of his/her land?

The present sub-chapter is intended to analyze the doctrine of *nullum crimen, nulla poena sine praevia lege poenali* or *ex-post facto laws* and its application to the cyberspace on the one hand and challenges posed by cyberspace with regard to the said doctrines on the other.

### 3.6.1 Analysis of protection of *ex-post facto* laws in India

The protection against an *ex-post facto* laws is provided under Article 20(1) of the Constitution of India. According to the first clause of Article 20(1), no person is to be convicted of an offence except for violating a ‘law in force’ at the time of commission of the act charged as an offence. It means that if an act is not an offence on the date of its commission, law enacted in future cannot make it so. The second clause of Article 20(1) provides immunity from a greater penalty than what would have been incurred at the time of commission of the offence. Since the term ‘No person shall be convicted of any offence’ (emphasis added) and word ‘penalty’ is used in Article 20(1) of the Constitution of India, the immunity is not applicable to civil wrongs. The term ‘laws in force’ is further defined under Article 13(b) of the Constitution of India. According to clause (b) of Article 13 ‘laws in force’ includes laws passed or made by a Legislature or other competent authority in the *territory of India* before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. (emphasis added) Article 13 clearly indicates that the ‘laws in force’ have territorial application only. In other words, law passed or made outside of the territory of India is not a ‘law in force’ in India. It means that it does not have any

---

306. ‘Their own territory’ here means the sovereign territory where a person is staying or having nationality.

307. For further explanation on the said right see, PROF. M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 1055-1059 (5th ed., 2005).

308. It is important to note that the word offence is not defined under the Constitution of India. Therefore, definition provided under Section 3(38) of the General Clauses Act would be applied. According to section 2(38) of the General Clauses Act, ‘offence’ means any act or omission made punishable by any law for the time being in force.

force of law in the territory of India. Therefore, there was no question of providing immunity against such type of laws. The dilemma with regard to *ex-post facto laws* is that on one hand, Indian justice system does not recognize International law and laws of other sovereign states as ‘laws in force’ in India, and on the other hand, activities in cyberspace interact with the laws of almost all other sovereign states.

3.6.2 Protection of *ex-post facto laws* in European community

According to Article 7(1)\(^{310}\) of the European Convention on Human Rights and Fundamental Freedom, 1950, “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.” The Article has not expressly recognized the authority of the Parliament or supremacy of the Parliament in enacting law. The term ‘law’ used in this Article is general in nature. The framers of the Article would have used the term ‘written law’, ‘statutory law’ or ‘law enacted by legislators’. The European Court of Justice, in *S.W. v. The United Kingdom*,\(^{311}\) recognized the judicial law-making power under Article 7 of the European Convention on Human Rights, 1950. The court has held that in any system of law including criminal law, the element of judicial interpretation is inevitable. The court further held that indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition.\(^{312}\) The court in this case commented upon the difference between adversarial and inquisitorial system by recognizing the role of judiciary in criminal law making.

\(^{310}\)**ARTICLE 7: No punishment without law:**

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

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations. It is also important to note that clause (2) of Article 7 of the above Convention created an exception under which the prosecution and punishment is allowed if the act or omission is against the established principles of civilized society. Similar provisions are found in Article 38 of the statute of International Court of Justice.


The term ‘international law’ shall be applicable to offences against humanity or offences incorporated under universal jurisdiction.

In *S.W. v. The United Kingdom*,\(^{313}\) the European Court of Human Rights further held that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. The court further held that it should be construed and applied, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.\(^{314}\) Accordingly, as the court held in *Kokkinakis v. Greece*,\(^{315}\) Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy.\(^{316}\) It further needs to be noted that Prohibition of *ex post facto laws* is also recognized under International law.\(^{317}\)

As discussed in this sub-chapter, *nullum crimen, nulla poena sine lege* or principle of *ex-post factio laws* has territorial application. It means even though an act is punishable in another territory, it cannot be treated as a law in a sovereign territory. In other words, even if an act is punishable in one sovereign territory and not punishable in other sovereign territory, the accused cannot be held responsible in a

---


\(^{315}\) Kokkinakis v. Greece judgment of 25 May 1993 (Series A no. 260-A, p. 22, para. 52)


\(^{317}\) Prohibition of ex post facto laws is recognized under Article 11 and Article 10 of Universal Declaration, 1948. According to Article 11(2) (UDHR) “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute penal offence, under national or international law, at the time when it was committed., Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed., The principle is followed in extradition but it may not be followed by a particular country while punishing the criminal, though it is not punished in both the countries”.

87
territory on the basis that the act is punishable in some other sovereign territory. For example, as discussed earlier, in India ‘law in force’ under Article 13 “includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed.” It simply means for the purpose of *ex-post facto laws* (Article 20 of the Constitution of India) or *nullum crimen, nulla poena sine lege*, law means territorial law. It may happen that the legal system of sovereign state ‘A’ may permit certain activities in Cyberspace which may not be permitted (and hence not legal) in another sovereign State ‘B’. In that event, the State ‘B’ would launch prosecution against the citizen of State ‘A’ for copyright infringement in cyberspace. It would lead to denial of the fundamental rights of citizens of sovereign State ‘A’ and hence there cannot be any co-operation between sovereign State ‘A’ and State ‘B’.

Further, discourse on the nature of the cyberspace shows that the action on cyberspace cannot be circumscribed by physical boundaries of the sovereign territory. No legal entity or sovereign state has a capacity to control and confine offences on cyberspace to the territorial boundaries. The principle of *ex-post facto laws* is protected as a fundamental right in India and some other countries. As discussed in chapter no. II: “PROBLEM OF JURISDICTION IN CYBERSPACE AND ITS IMPACT ON INTERNATIONAL AND DOMESTIC LAWS”, sovereign states are taking cognizance based on ‘accessibility principle’. Therefore, implementation of ex-post facto laws is one of the challenges because of de-centralized nature of the cyberspace.

### 3.7 CYBERSPACE VIS-A-VIS TERRITORIAL SOVEREIGNTY, CONSTITUTIONALISM, RULE OF LAW AND LEGALITY OF LAW

Jurisprudentially, the doctrine of Constitutionalism, rule of law and legality of law is based upon the territorial sovereignty of the state. The constitutionalism, rule of law and legality of law principles are either developed, considered or followed from the long period in the territory of a sovereign state. In other words, the territorial law is invalidated on the touchstone of constitutionalism, rule of law or other principles of legality of law approved and followed in a particular territory. For example, legality of a law can be challenged on the grounds of violation of fundamental rights or other
principles in a territory. It was never challenged on the grounds of violation of principles followed in other sovereign territory. The cyberspace, because of its de-territorial nature, does not allow the territorial legalization of law. It means that the person may be punished in another country for an act committed in cyberspace even though the law is invalid in the country of his residence or nationality.

In a democratic society, people in a sovereign territory are considered as a source of law. The ‘popular sovereignty’ is limited by rule of law and constitutionalism. Actual exercise of power by sovereign Head or Parliament needs to pass through higher and basic principles recognized in a democratic country. The modern democratic states are far from the ‘innocent’ concept of ‘popular sovereignty’ with direct and immediate effect, modern democracies exemplify a heavily institutionalized version in which the linkage between ‘popular sovereignty’ and ‘actual power’ is mediated through layers of rules and procedures. In a civilized democratic state, ‘sovereign will’ is legitimized, ascertained and implemented within a framework created with the help of rule of law and Constitution and constitutionalism. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation.

Most of the Constitutions of the world regard people as the source of law. In McCulloch v. Maryland, chief justice Marshall said: “The government proceeds directly from the people; is ‘ordained and established’ in the name of the people;...In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit....It is the government of all; its powers are delegated by all; it represents all, and acts for all.” Further, in Marbury v. Madison Chief Justice Marshal once again pointed out that: “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such

---

319 Canada’s Supreme Court in its advisory on constitutionality of provincial secession, in Ref. re Secession of Quebec [1998] 2 Supreme Court Reps. 217 para. 67.
320 See, declaration (preamble) in the Constitution of Ireland, India, America, German, Poland, French etc.
322 Marbury v. Madison 5 U.S. 137.
government must be, that an act of the legislature, repugnant to the constitution, is void.”

The modern civilized nation works in the limits of Constitutional ideals and usually it works in consonance with national identity, cultural, social and political set up. As a matter of fact, the civil liberties which have been emphasized consequently by liberal discourse are often considered as the expressions of a particular national aim for individual and collective freedom. The social legitimacy of the law is inferred, enforced, affirmed, re-affirmed, empirically measurable and manifested through opinion polls, parliamentary elections, referenda, and so on. Inspired by the classical Lincolnian triad, we can discern three prerequisites for law to be legitimate: an output-prerequisite (law for the people), an input-prerequisite (law by the people), and an identity-prerequisite (law of people). The social legitimacy is affirmed when citizens see themselves as author and the subjects of the law at the same time. The social (territorial) legitimacy is pre-requisites by the collective identity of ‘autonomous society’. An ‘autonomous society’ is also one of the pre-requisites of the sovereign state. Stefanie Dierckxsens opined that “Law is legitimate then, not solely because it is de facto accepted by the citizens (social legitimacy), nor because it generates an efficient aggregation of private interests (regulatory dimension of legal legitimacy), nor because it is established in accordance with constitutional principles (protective dimension of legal legitimacy), nor because it is couched in a potentially symbolic document (symbolic dimension of legal legitimacy), but because it clearly reflects the normative self-understanding of the citizens in a community of law.”

Further, it needs to be noted that according to a majority of jurists, they (departments/Institutions) are but creatures of the Constitution, appointed to execute its provisions and, therefore, any attempt in all or any of the departments to exercise any power definitely, within its consequences may alter the nature of the instrument or change the condition of the parties to it, would be an act of the highest political

---

323 See also K. C. WHEARE, MODERN CONSTITUTIONS (1st ed., 1966).
usurpation.\textsuperscript{327} The above explanation on legality, validity and source of law demonstrated that the criminal law applicable to copyright infringements in cyberspace is expected to be territorial law. Therefore, ideologically, the state shall not impose territorial laws on persons doing activities on cyberspace, except that it is intentionally directed towards sovereign territory.

\section*{3.8 CYBERSPACE, TECHNOLOGICAL DEVELOPMENT AND END OF TERRITORY BASED LAWS AND PRINCIPLES}

The technological interference in social life posed various challenges. The cyberspace eroded the physical boundaries of the states. Central tenets of constitutional democracy, like fairness and due process, may be at stake\textsuperscript{328} because of emergence of the cyberspace. The nature of cyberspace does not support territorial law or territorial legal principles. Thus, de-territorial nature of cyberspace is a vanishing point for territory based laws and principles. Therefore, there is an urgent need to consider cyberspace as a different phenomena and there is a need for a new set of laws and legal principles in governing or regulating cyberspace.

In this chapter the author has discussed the challenges posed by cyberspace in dealing with cross border copyright infringement in cyberspace. In the next chapter the author has analyzed various challenges posed by hyper-linking in protecting copyrights on internet.

\footnotesize{\textsuperscript{327} South Carolina, Thomas Cooper, David James McCord, \textit{The Statutes at Large of South Carolina: Acts, Records, and Documents} - \url{http://books.google.co.in/books?id=wK44AAAAIAIAJ&pg=PA263&dq=A.%09Surrendering+sovereign+and+constitutional+power+for+vested+political+interest&hl=en&sa=X&ei=JmTNUekvkkbSbkgsBKhgJgO&ved=0CDEQ6AEwAA#v=onepage&q=A.%09Surrendering%20sovereign%20and%20constitutional%20power%20for%20vested%20political%20interest&f=false} (last updated Jun., 28, 2013)

\textsuperscript{328} Mireille Hildebrandt, \textit{Technology and End of Law}, in \textit{FACING THE LIMITS OF THE LAW} 450 (Erik Claes, Wouter Devroe and Bert Keirsbilck ed., 2009).}