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EDITOR'S NOTE

"If you want to change the world, pick up your pen and write"

- *Martin Luther*

In this day and age, where 'fake news' had become the anthem of the day, it is up to the academic communities to rally together to protect the sanctity of academia. A journal article not only expounds upon the present situation, but also does it in a legitimate way, focusing upon facts while providing an objective criterion for reaching any conclusions. As such, this is what an academic publication should be- replicable, reliable and valid.

As a fledgling law journal, only in its 11th volume of publication we strive to stick to our core values- diversity and open discussion from all aspects of law, whether of national or international importance. Legal academia plays an important part in this ever-changing and dynamic field of law- it helps us understand the impact that even the smallest policy change may have upon the day-to-day lives of the people.

An academic journal is a culmination of several people's efforts, the effort that goes into writing a paper, the effort that goes into shortlisting the papers, and finally the editing that goes into making sure that the ideas of the author are being expressed in the best possible way.

The hard work of everyone who has contributed to making this issue come to fruition must be acknowledged. I would like to thank the members of the Editorial Board, who have all devoted substantial time and energy to reviewing and editing the articles. We are also particularly grateful to our Faculty Editor, Dr. Anil R. Nair, for his open door policy, and his unending support to the journal. Further, the commitment and assistance of the Faculty Advisory Board and the mentorship of our beloved Vice-Chancellor, Dr. Rose Varghese is greatly appreciated.

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THE WTO AS A FORUM FOR COMBATING OVERFISHING: ANALYZING THE NEGOTIATIONS ON FISHERIES SUBSIDIES

Aishwarya Narayanan*

ABSTRACT

The problem of overfishing and overcapacity has led to the severe depletion of our marine resources over the years. The problem has been further aggravated by providing fisheries subsidies by the Governments, that permit increase in fleet capacity even in the absence of profitable yields, thus providing fishermen with no incentive to regulate their catch and embrace sustainable practices. After the Doha and Hong Kong Ministerial Declarations, the Negotiating Group on Rules have become the forum for negotiations on a distinct discipline on fisheries subsidies within the ambit of the World Trade Organization. Despite broad agreement on the need to regulate fisheries subsidies, there has been negligible progress in negotiations. This article traces the fisheries subsidies negotiations and suggests that focus on a developing countries concern is integral to the adoption of any regime regulating the fishery subsidies.

INTRODUCTION

Since time immemorial oceans have been a source of vast resources for mankind. Of the various resources that the oceans have to offer, the fish has

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perhaps made the most important contribution to the development of human condition. The great Jewish philosopher Maimonides[1] once said, "*Give a man a fish, and you feed him for a day; teach a man to fish and you feed him for a lifetime*". The veracity of this statement cannot be overlooked in the modern context, as fish and fisheries have provided millions around the world with a source of nourishment, livelihood, employment and sustenance.[2] It was initially believed that the sea and its resources are inexhaustible,[3] and thus can be endlessly exploited without any adverse consequences. The realization that fish are in fact a finite resource, is a fairly recent one.[4]

The belief in the inexhaustibility of ocean resources gave rise to the idea that oceans are the common heritage of mankind[5], and accessible to all nations without restriction. However, with the steady depletion of fish and other marine resources, the need for proper management of the oceans was increasingly felt and recognized.[6] Today, the state of marine resources is such that almost 57% of fish stocks are fully exploited and another 30% are

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[1] Kenneth Seeskin, *Maimonides*, The Stanford Encyclopaedia of Philosophy (Spring 2014 ed.), available at http://plato.stanford.edu/archives/spr2014/entries/maimonides/last seen on 13/09/2016.

[2] See *Oceans, Fisheries and Coastal Economies*, The World Bank,available at http://www.worldbank.org/en/topic/environment/brief/oceans last seen on 13/09/2016.

[3] Hugo Grotius, in *Mare Liberum (The Free Sea)* (1609) stated the sea is fluid and ever-changing, so it cannot be possessed; it is inexhaustible, so it cannot be used. *See* David Armitage, *Grotius & the Freedom of the Seas*, Online Library of Liberty, available at http://oll.libertyfund.org/pages/grotius-the-freedom-of-the-seaslast seen on 13/09/2016.

[4] Ekaterina Anyanova, Rescuing the Inexhaustible… (The Issue of Fisheries Subsidies in the International Trade Policy), 3 Journalof International Law and Technology 147, 153 (2008).

[5] Article 136, United Nations Convention on the Law of the Sea, 1982.

[6] Montserrat Gorina-Ysern, World Ocean Public Trust: High Seas Fisheries After Grotius – Towards a New Ocean Ethos, 34 Golden Gate University Law Review 645, 658 (2004).

over-exploited, depleted or recovering.[7] Overfishing, overcapacity, pollution, coastal development, lack of efficient fisheries management, absence of a proper legal enforcement regime and destructive fishing practices are some of the reasons behind the chronic condition of the world's fisheries.[8] However, another latent factor, which is often ignored, is the large-scale government subsidies provided to the fishery industry.[9] Negotiations for the establishment of a proper legal regime to regulate the grant of fisheries subsidies are underway at the World Trade Organization.[10] Fisheries subsidies present a unique area of intersection between environment, trade and sustainable development.[11] It is now widely accepted that subsidies which directly lead to overfishing and overcapacity are harmful and liable to be prohibited.[12]Despite this broad agreement, several differences as to the substantive and technical provisions of the proposed agreement to regulate fisheries subsidies continue to remain.[13]

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[7]*The State of World Fisheries and Aquaculture: Opportunities and Challenges*, Food and Agricultural Organization, available at http://www.fao.org/3/a-i3720e.pdflast seen on 13/09/2016.
[8]Supra 2.
[9] Prof. W.E. Schrank, FAO Fisheries Technical Paper 437: Introducing fisheries subsidies, 16 (2003).
[10] For a brief overview of the negotiations, see *Negotiations on Fisheries Subsidies*, World Trade Organization, available at https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htmlast seen on 13/09/2016.
[11] Alice L. Mattice, The Fisheries Subsidies Negotiations in the World Trade Organization: A "Win-Win-Win" for Trade, the Environment and Sustainable Development, 34 Golden Gate University Law Review 573, 276 (2004).
[12]*Introduction to Fisheries Subsidies in the WTO*,World Trade Organization, available athttps://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htmlast seen on 13/09/2016.
[13] Ibid.

This article has two parts. The first traces the history and evolution of the law governing fisheries. The second focuses exclusively on the question of fisheries subsidies and the on-going negotiations at the WTO in this regard.

THE NOTION OF SOVEREIGNTY AND JURISDICTION OVER THE SEA

Open access to the Sea

As mentioned previously, it was initially believed that the sea is inexhaustible and cannot be possessed by anyone. As a corollary to this, it was also believed that no individual nation could exercise exclusive jurisdiction over the sea.[14]Since the sea itself was under the control of no single nation, it naturally followed that open fishing in the high seas was accepted as the norm, and no nation was permitted to control fishing in the high seas except by agreement with other states.[15] A departure from this approach was first observed in 1958 when the United Nations Convention on the Law of the Sea (UNCLOS – I) recognized the distinction between territorial sea and high sea. However, it failed to demarcate the maximum breadth of the territorial sea.[16]UNCLOS – II in 1960 also failed to result in

[14]Supra 3. In the context of the claims of the Portuguese to the right to establish exclusive trade in the East Indies, Grotius maintained that there does not exist any exclusive right to trade and the right of navigationcould not be appropriated by anyone to the exclusion of others.

[15] Julie R. Mack, International Fisheries Management: How the U.N. Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing of the High Seas, 26 California Western International Law Journal 313, 331 (1996).

[16]*Background to UNCLOS*,Continental Shelf Programme, available at http://www.continentalshelf.org/about/1143.aspxlast seen on 14/09/2016.

any international agreements or establish the limits of territorial waters.[17] It was the adoption of UNCLOS – III in 1982 that brought clarity on this issue.

Delimitation of Maritime Zones

Perhaps the most significant contribution of UNCLOS – III to international law is its clear delimitation of maritime zones. While establishing the sovereign rights of coastal states[18], it explicitly lays down the numerical limits of the breadth of the territorial sea[19] and the exclusive economic zone[20], beyond which lie the high seas over which no nation can validly claim sovereignty[21]. The establishment of sovereignty is accompanied by the vesting of rights and obligations of coastal states in granting the exclusive right to exploit natural resources falling within its EEZ[22], while also paying due regard to the need for conservation of marine resources[23]. The coastal state was also permitted to allow other states to access the surplus from its allowable catch in its EEZ in the event that it lacked the capacity to exploit the same.[24] The principle that nationals of all states have the right to fish on the high seas was retained.[25]

Straddling and Migratory Stocks

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[17]Ibid.
[18] Article 2 established the jurisdiction of the coastal State over the territorial sea whereas Article 56 establishes its jurisdiction over the exclusive economic zone.
[19] Article 3, UNCLOS, 1982. The territorial sea may extend to upto 12 nautical miles from the baseline.
[20] Ibid, Article 57. The EEZ may extend to upto 200 nautical mile.
[21]Ibid, Article 89.
[22]Ibid, Article 56.
[23]Ibid, Article 61.
[24]Ibid, Article 62.
[25]Ibid, Article 116.

While UNCLOS – III was laudatory in establishing the jurisdiction of coastal states over fish in their EEZs, it failed to address the problem of certain species of fish that traverse across EEZs and jurisdictional limitations of several states.[26] It did provide for cooperation *directly or through international organizations* for the *conservation and optimum utilization* of such species.[27] Concrete steps to realize this objective were taken in 1995 with the adoption of the Fish Stocks Agreement[28]. The Fish Stocks Agreement sets out principles for the conservation and management of such fish stocks and establishes that such management must be based on the precautionary approach and the best available scientific information.[29]It further strengthens and emphasizes the duty of states to cooperate in the efficient conservation and management of such marine resources as the Agreement deals with.[30] This duty to cooperate primarily attempts to reconcile the interests of coastal states, that exercise jurisdiction over their EEZs, with those of the 'distant water fishing nations'[31], that fish in the high

[26] Tim Eichenberg & Mitchell Shapson, *The Promise of Johannesburg: Fisheries and the World Summit on Sustainable Development*, 34 Golden Gate University Law Review 587, 598 (2004).
[27] Article 64, UNCLOS.
[28] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stock, 1995.
[29]*Oceans and Law of the Sea*,United Nations Division for Ocean Affairs and the Law of the Sea, available at http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htmlast seen on 14/09/2016.
[30] Ibid.
[31] The distant water fishing nations are often landlocked states, or states having limited access to coastal waters (like China) that have the fleet capacity to fish in the high seas and must usually rely on the high seas for fishing.

seas.[32] It is precisely this balancing act which lies at the heart of international fisheries regulation[33].

INTERNATIONAL FRAMEWORK FOR THE REGULATION OF FISHERIES

The realization that fish are in fact, a finite and exhaustible resource was followed by the acknowledgement that an efficient system for the conservation and management of fish would be necessary to ensure the sustainability of the resource in the long run. Given the alarming rate of overconsumption of fish stock, the need for a proper system for the management of fisheries could no longer be ignored. UNCLOS – III imposed upon coastal states the obligation to conserve and manage living marine resources based on the best scientific evidence available, on the determination of allowable catch and keeping in mind the principle of optimum utilization.[34]Soon it was realized that the current regime for the conservation of marine resources was inadequate, mainly because of lack of sufficient cooperation between States, inadequate management of the high seas, overcapitalization in the fishing industry, and problems of unregulated fishing and unreliable databases, amongst others.[35]Thus, there was a multitude of problems that needed to be addressed at the earliest possible.

Regional Fisheries Management Organizations

[32]Supra 15.
[33] Ibid.
[34] Liza Gall & Michael Shewchuk, Sustainable Fisheries and the 1982 UN Convention on the Law of the Sea, UNITAR/DOALOS Briefing (2007).
[35] Ibid..

While UNCLOS – III encouraged states to cooperate in managing straddling stocks and highly migratory fish stocks, it did not set international guidelines for developing or operating these organizations.[36]Several Regional Fisheries Management Organizations were formed in furtherance of this direction, however, in the absence of strong enforcement provisions they failed in adequately managing fisheries on the high seas.[37] Failure to enforce cooperation amongst members, inapplicability of RFMO rules to non-members, excessive reliance on flag-state responsibility and a general lack of guidance on penalties and enforcement mechanisms made the system largely ineffective.[38] Moreover, the absence of guidelines as to the specific penalties to be imposed by coastal states on finding violations within their EEZs further weakened the existing system.[39]

The Fish Stocks Agreement sought to mend the loopholes created by UNCLOS – III. It places the RFMOs at the centre of its enforcement mechanism, and utilizes regional organizations to implement principles that are applicable on an international level.[40]The duty imposed in states to cooperate is fulfilled by joining and adhering to the measures imposed by regional organizations.[41] It provides that any state with a 'real interest' in the fishery concerned may become member of a regional organization, and only

[36]Supra 15.
[37] Ibid.
[38] United Nations Division for Ocean Affairs and Law of the Sea, The Law of the Sea: The Regime for High-Seas Fisheries: Status and Prospects31 (1992).
[39] Gerald Moore, Enforcement Without Force: New Techniques in Compliance Control for Foreign Fishing Operations Based on Regional Cooperation, 24 Ocean Development and International Law197, 200 (1993).
[40]Supra 15..
[41] Article 8, Fish Stocks Agreement, 1995 (FSA).

members of the organization shall have access to its fishery resources.[42] In addition, the Agreement has heightened the duty placed upon the flag state to investigate alleged violations,[43] provides all members with the right to board and inspect vessels of other states,[44] and permits the port state to prohibit landing of a vessel if it finds a violation[45]. Thus, despite the Fish Stocks Agreement *prima facie* making significant progress from the UNCLOS regime, it has failed to make a real impact. Legal controversies arising out of unilateral state action have also diluted its positive impact.[46]

Reasons for the failure of the International System

The lack of a proper enforcement mechanism has been one of the major reasons for the failure of the international system for the regulation of fisheries. However, before analysing the feasibility of different solutions to the problem, it is necessary to appreciate the sheer magnitude of the problem itself. At present, almost 80% of the world's fisheries are either completely depleted or about to be depleted.[47] The main causes for depletion are overfishing driven by overcapacity, accompanied by unregulated fishing,

[42] Ibid.
[43]Ibid, Article 19.
[44]Ibid, Article 22.
[45]Ibid, Article 23.
[46] In 1995, Canadian authorities intercepted and boarded a Spanish-flagged vessel *The Estai* for illegal fishing within Canadian waters in violation of Canadian law. Spain dragged Canada to the International Court of Justice claiming that Canada had violated the right of navigation and freedom of fishing on the high seas. Canada argued that the ICJ lacked jurisdiction on the matter due to the inclusion of a Reservation in its Declaration accepting the compulsory jurisdiction of the ICJ. The Court accepted Canada's argument and held that it lacked the jurisdiction to hear the matter. See *Fisheries Jurisdiction Case* (*Spain v. Canada*) I.C.J. Reports 1998, 432 (04/12/1998).
[47]Supra 12.

loss of natural habitat, increasing pollution levels, employment of destructive practices etc.[48] The problem of illegal, unregulated and unreported (IUU) fishing has increased manifold and contributes significantly to the overfished conditions of our fisheries.[49] The drawback of pursuing biological, environmental or purely managerial solutions to the issue is that the problem with fisheries is inherently economic in nature, and requires economic solutions.[50]The reality is that there are more boats in the water than fish to catch.

Suggestions to ensure compliance with fisheries regulations have ranged from imposing state responsibility instead of mere individual responsibility for violators,[51] to imposing trade sanctions as a penalty in case violations are established,[52] to establishing a system of bilateral incentives to promote sustainable fisheries compliance[53]. While all these theories deserve merit,

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[48]Supra 2.

[49]Supra 7.

[50]Supra 4. The author argues that the measures like imposition of allowable quotas, prohibition on fishing certain species and protection during spawning season have failed to address the problem of overfishing precisely because the problem is caused by economic overexploitation.

[51] The present legal framework allows the flag state to impose penalties on violators who are individuals, and penalties imposed on individuals provide no incentive for the flag state to strengthen its compliance and enforcement mechanism. State responsibility for violations committed by its nationals would be a better long-term solution to the problem. SeeAndrew Serdy, *Accounting for Catch in Internationally Managed Fisheries: What Role for State Responsibility?*,15 Ocean and Coastal Law Journal 23, 28 (2010).

[52]The existing enforcement mechanism available under the WTO could be utilized to penalize violators in fisheries issues. The WTO has in the past recognized that imposition of environmental conditions by nations can be a valid trade concern. SeeZachary Tyler, *Saving Fisheries on the High Seas: The Use of Trade Sanctions to Force Compliance with Multilateral Fisheries Agreements*,20 Tuanle. Environmental Law Journal 43, 52 (2006).

[53]The present system of imposing sanctions on states known to permit convenience flagging does little to discourage states which actually benefit from unregulated fishing. In such

they are in and of themselves insufficient to deal with the problem of overfishing and overcapacity that plagues the fisheries of the world. One of the crucial driving forces behind the continuing perpetration of what should now be an unyielding and unsustainable industry is the provision of government subsidies to the fishing industry.[54] It has now been established that fisheries subsidies have an important role to play in promoting and encouraging overfishing by creating overcapacity.[55] Addressing the question of fisheries subsidies requires the adoption of a multi-faceted, inter-regime approach.[56]

UNDERSTANDING THE ROLE OF FISHERIES SUBSIDIES

As mentioned previously, the sheer magnitude of the fisheries subsidies problem is enormous in economic terms. It is estimated that a sum of nearly US$ 25-29 million is spent on global fisheries subsidies.[57] The global net loss of wealth over the past three decades due to fisheries is estimated to be around US$ 2.2 trillion.[58] In addition to the provision of subsidies, the general weakness and mismanagement of national and international systems

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cases, an opportunity to improve their reputation on the world stage might serve as a better incentive to ensure compliance. See Lacee Curtis, *Catching Less Fish with More Honey: Introducing Incentives for Sustainable International Fishing Compliance*, 16 Vermont Journal of Environmental Law 206, 223 (2014).

[54]Supra 7.

[55] Ibid.

[56] Margaret A. Young, *Toward a Legal Framework for Regime Interaction: Lessons from Fisheries, Trade and Environmental Regimes*, 105 Proceedings of the Annual Meeting (American Society of International Law) 107 (2011).

[57] UR Sumaila et al., *A bottom-up re-estimation of global fisheries subsidies*, Springer Journal of Bioeconomics (2010) available at http://oceana.org/sites/default/files/Bottom-Up_Re-estimation_Sumalia_2010.pdflast seen on 15/09/2016.

[58] World Bank & Food and Agriculture Organization, The Sunken Billions: The Economic Justification for Fisheries Reform73 (2009).

has caused overfishing which has resulted in the sharp and alarming decline of fishing resources.[59] However, despite the presence of sufficient evidence linking the grant of subsidies to overfishing and overcapacity, the issue remains a particularly sensitive one.[60]

The Purpose of Subsidies

Despite a broad understanding of what the term 'subsidy' refers to, there is no single accepted definition of the term with respect to fisheries subsidies.[61] The only available legally binding definition of subsidies is found in the WTO Agreement on Subsidies and Countervailing Measures(ASCM) which requires financial contribution[62] by the government towards a specific industry[63]which confers a benefit on the concerned firm or individual. However, there are doubts as to whether such a definition can be successfully applied to the fishing industry, given that the definition merely serves the

[59] United Nations Environment Program, Fisheries Subsidies: A Critical Issue for Trade and Sustainable Development at the WTO: An Introductory Guide 182 (2008).
[60]Supra 9.
[61] The term 'subsidy' refers to government policies in aid of one or more industries, usually carrying a financial benefit to the industry. The range of possible definitions extends from the narrow financial aid furnished by a state or public corporation in furtherance of an undertaking or the upkeep of a thing to the extremely broad government action (or inaction) that modifies (by increasing or decreasing) the potential profits earned by the firm in the short-, medium- or long-term. SeeW.E. Schrank & W.R. Keithly, The Concept of Subsidies, Marine Resources Economics 151, 155 (1999).
[62] Article I of the ASCM stipulates financial contribution to be in the form of a direct or potential direct transfer of funds, government revenue which is otherwise foregone or not collected, provision by the government of goods and services other than general infrastructure or the payments by the government to a private entity to perform any of these functions.
[63] Article II, ASCM.

operational purpose of setting a standard for maintaining fair international trade.[64]

Definitional concerns aside, there are strong economic justifications for providing subsidies in the first instance. These include the infant-industry argument, where the government provides initial funds to a domestic industry to enable it to develop in the face of external competition; offering temporary subsidy protection to a firm facing financial difficulties to prevent spill-over into other areas of the economy; or to use subsidies as incentives for firms to behave in an environmentally-friendly manner.[65] However, the continuation of subsidies which may have once served a useful purpose makes them entrenched to the extent that they now primarily serve the interests of participants in the industry receiving the subsidies.[66] In other words, the continuation of subsidies beyond their useful period makes them nearly impossible to eliminate at a later time. Thus, subsidies which were initially provided to help the industry get started might become necessary to sustain an inefficient industry.[67]

The Harmful Effects of Fisheries Subsidies

Like other subsides, fisheries subsidies distort international trade by providing an unfair advantage in the marketplace, particularly to large-scale fisheries and those in developed countries, over small-scale fisheries and

[64]Supra 9.
[65] Chen-Ju Chen, Fisheries Subsidies and Current Regulations under International Law5, 32 in Fisheries Subsidies under International Law (2010).
[66]Supra 9.
[67] Ibid.

those in developing countries.[68] The linkage between fisheries subsidies and sustainability is more indirect. The critical link is that fishing subsidies result in overcapacity that ultimately leads to overexploitation of fish resources.[69] The continued provision of the subsidy enables the receiver (the fishing industry) to increase its capacity by expanding its fleet as well as upgrading to more efficient fishing technology.[70] While in a free market, reduction in the amount of catch would discourage further investment, the provision of subsidies eliminates the warnings of a reducing resource-base by guaranteeing returns as a cost-reducing and revenue-enhancing mechanism even when the industry becomes inefficient.[71]Not only do fishery subsidies encourage more investment in a fast-depleting field, they also slow down the exit of capital and manpower from an already over-exploited industry.[72] In the absence of effective management, the problem becomes even more acute as fishermen are tempted to continue fishing while underreporting the catch.[73]The case of the dramatic depletion of the Canadian Newfoundland cod fishery resulting in the moratorium on commercial fishing in the region

[68] European Parliament Directorate-General for Internal Policies, *Global Fisheries Subsidies: Note* (2013).
[69] U.R. Sumaila et al., The World Trade Organization and global fisheries sustainability, 88 Fisheries Research 1, 6 (2007).
[70]Supra 9.
[71] United Nations Environment Programme, Fisheries Subsidies and Overfishing: Towards a Structured Discussion19 (2001).
[72] Ibid.
[73] Ibid.

is perhaps the most striking example of how subsidies lead to increase in capacity, which ultimately results in the depletion of fish stocks.[74]

Fisheries Subsidies and Trade

As has been mentioned previously, fisheries subsidies have a deleterious impact on both trade and the environment. While the impact of subsidies on sustainability are a pressing environmental concern, in and of themselves they are insufficient to constitute a valid trade issue.[75] It is the economic impact of subsidies that gives rise to unfair competition and its resultant distortion of international trade that provides the grounding to incorporate within the realm of international trade an issue which is essentially and inherently environment-centric in nature.[76] The focus on the trade aspect of fisheries subsides permits its inclusion within the ambit of the WTO which is already possessed of policing powers and a reasonably efficient enforcement mechanism.[77]

FISHERIES SUBSIDIES NEGOTIATIONS AT THE WTO

WTO and the Environment

The WTO has always held itself open to addressing environmental concerns. The founding instrument of the WTO explicitly recognizes the need to

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[74] The provision of heavy subsidies by the Canadian government resulted in the extensive expansion of the fishing fleet. This resulted in depletion of the cod fish stocks which caused the financial ruin of the enhanced fleet. The Canadian government was forced to intervene again with support programs and assistance to reduce the number of fishermen and provide them with viable alternative sources of livelihood. See Supra 4.
[75] Supra 71.
[76] Supra 69.
[77] Supra 9.

protect and preserve the environment while seeking to achieve the objective of sustainable development.[78] The creation of the WTO Committee on Trade and Environment reflected an effort by the WTO to be more sensitive to the environmental implications of trade as well as the trade implications of environmental policy.[79] The Appellate Body of the WTO also acknowledged in *US – Shrimp* that under WTO rule, member nations have the right to take trade measures to protect the environment.[80] Thus the presence of fisheries subsidies, which is not merely an environmental issue but also has adverse implications on trade, on the WTO agenda is neither alien nor unjustified.

The Mandate for the Negotiations

The topic of fisheries subsidies was one of the economic sectors discussed by the CTE in context of environmental benefits of subsidy removal.[81] In the late 1990s discussions were mostly centred upon establishing linkages between subsidies, overcapacity and overfishing.[82] It was only at the Doha Ministerial Conference of 2001 that an explicit agreement was reached to '*clarify and improve WTO disciplines on fisheries subsidies, taking into*

[78] The Preamble to the Marrakesh Agreement Establishing the World Trade Organization, 1995 reads '…seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'.
[79] Supra 71.
[80] Appellate Body Report, *United States – Import Prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R (06/11/1998). The United States had imposed a ban on import of shrimp harvested with technology that may adversely affect certain species of sea turtles. In a case brought before the Dispute Settlement Body by Malaysia et al., the Appellate Body stated that the measure adopted by the US serves a legitimate environmental purpose under Article XX(g) of the GATT. However, it ruled against the US because it held that the imposition of the measure was done in an arbitrary and discriminatory manner.
[81] Supra 71.
[82] Ibid.

account the importance of this sector to developing countries'.[83]The Hong Kong Ministerial Declaration of 2005 further noted that '*…there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing…*'.[84] In furtherance of the Doha mandate, discussions relating to fisheries subsidies are carried out by the Negotiating Group on Rules.[85]

Initial Stages of the Discussion

The initial stages of the discussion on fisheries subsidies revolved around two conflicting positions. On the one hand, a group of countries calling themselves the 'Friends of Fish' (Australia, Iceland, New Zealand, Norway, Peru, Chile, the Philippines and the United States) firmly supported the inclusion of a fisheries subsidies discipline within multilateral trade negotiations.[86] These members sought the elimination of subsidies that contribute to fisheries overcapacity since they distort trade and hamper sustainable development.[87] They advocated that the WTO, with its expertise on subsidies, binding rules and strong enforcement mechanisms, was the appropriate forum to deal with the issue of fisheries subsidies.[88]

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[83] Paragraph 28, Doha Ministerial Declaration, Fourth WTO Ministerial Conference, 2001.
[84] Paragraph 9, Annex D, Hong Kong Ministerial Declaration, Sixth WTO Ministerial Conference, 2005.
[85] For a brief overview of the rules negotiations, see *WTO, The Rules Negotiations*, World Trade Organization, available at https://www. wto.org/english/tratop _e/rulesneg _e/rulesneg_e.htm last seen on 18/09/2016.
[86]Supra 68.
[87]Supra 11.
[88] Ibid.

On the other hand, heavy-fishing nations like Japan, Korea and Taiwan argued that discussions on fisheries subsidies should be limited to strengthening the existing ASCM on the trade-distorting effect of fisheries subsidies.[89] Further, they questioned whether the WTO was the appropriate forum for dealing with fisheries subsidies, which they stated should be discussed in the context of improving fisheries management regimes.[90]Moreover, they denied that there was any direct link between fisheries subsidies and overfishing.[91] These members were also opposed to the development of a separate discipline within the WTO to address issues relating to fisheries subsidies.[92]

By the Hong Kong Ministerial, there was broad agreement over the need to regulate certain types of harmful subsidies (*i.e.*, those that contribute to overcapacity and overfishing or support IUU fishing) as well as the need to introduce a new set of rules to deal with fisheries subsidies.[93] The Hong Kong mandate shifted the focus of the negotiation from identifying the scope of the Doha mandate to identifying the types of fisheries to be prohibited.[94]

Approaches to the Prohibition on Subsidies

[89]Supra 68.
[90]Supra 11.
[91] Marc Benitah, *Ongoing WTO Negotiations on Fisheries Subsidies*, ASIL Insights, available at https://www.asil.org/insights/volume/8/issue/12/ongoing-wto-negotiations-fisheries-subsidieslast seen on 18/09/2016.
[92]Supra 11.
[93] Youngjeen Cho, *Revisiting WTO Fisheries Subsidies Negotiations*, 6 Beijing Law Review 9, 12 (2015).
[94]Supra 68.

The discussions surrounding the types of subsidies to be prohibited saw a conflict between the 'top-down' approach and the 'bottom-up' approach. The 'top-down' approach was supported by the Friends of Fish who argued for a general and comprehensive list of prohibited subsidies subject to a limited set of narrowly-defined exceptions.[95] Japan and allied members supported a 'bottom-up' approach which argued against a general prohibition of subsidies and instead restricted the prohibitions to a narrowly-defined set of programmes which are proved to have led to overcapacity and overfishing.[96] In addition to this, some members have also suggested a 'traffic light approach' wherein there will be three classes of subsidies: red for prohibited subsidies, amber for subsidies which may be subject to complaint on the basis of proof of adverse effects, and green for permitted subsidies.[97] In addition to this, the needs and concerns of developing countries must also be addressed.

Progress of the Negotiations

Despite broad agreement on the need to establish a regime for the regulation of fisheries, there has been negligible progress on the negotiations. There are wide differences amongst members on the definitions of some of the basic

[95]Ibid.
[96] Ibid.
[97]Supra 91. There are differences as to the exact composition of the three categories in proposals submitted by members. However, it is largely agreed that subsidies that contribute to overcapacity should be prohibited, while those that reduce overcapacity should be permitted. There is some difference on opinion as to the burden of proof to be satisfied to show the adverse effect of a subsidy.

terms involved, with little convergence even on technical matters.[98] The main basis for discussions is the draft text prepared by the Chair of the Negotiating Group in 2007, which consists of a prohibition, general exceptions, special and differential treatment, general disciplines (related to adverse effects) and fisheries management.[99] The text was introduced as Annex VIII to the ASCM, which implies that the fisheries subsidies agreement must not be contrary to or beyond the scope of its parent agreement.[100] The Chair's text provides for a positive list of prohibited subsidies which are subject to certain exceptions conditional to the fulfilment of fisheries management requirements, and subject to a peer review process conducted by the FAO.[101] The draft prohibited subsidies for vessel acquisition, transfer of vessels to a third country, operating costs, port infrastructure for fisheries activities, income and price support, subsidies for IUU fishing and subsidies that promote destructive fishing practices.[102] Members are essentially divided over the types of subsidies that they consider to be harmful.[103] Perhaps the most controversial amongst these has been the inclusion of fuel subsidies within operating costs, which some

[98] WTO Negotiating Group on Rules, Communication from the Chairman dated 21/04/2011 (TN/RL/W/254).
[99] WTO, Draft Consolidated Chair Texts of the AD and SCM Agreements dated 30/11/2007 (TN/RL/W.213).
[100] Supra 93.
[101] Supra 98.
[102] Article II of the proposed text.
[103] There is convergence over the need to prohibit subsidies that encourage IUU fishing and destructive practices. There is in principle agreement that subsidies for the construction of new vessels contribute to overfishing and should be prohibited. However, there are wide differences over income and price supports as well as personnel costs which some members believe constitute useful subsidies.

members feel is an intrusion into domestic fuel pricing and taxation policies.[104] Further, there are doubts as to whether the prohibited subsides, violate the basic definition of a subsidy as well as the specificity requirement under the ASCM.[105]

An attempt in 2008 to circulate a revised text to negotiators failed due to lack of convergence on even basic issues, and instead resulted in a Roadmap that identified the main questions to be tackled.[106] A further similar attempt in 2011 resulted in the preparation of a comprehensive Report by the Chairperson of the Trade Negotiations Committee that highlights the various stances on major issues and points out the areas of convergence and divergence.[107] In essence, there has been little to negligible progress in the negotiations on fisheries subsidies since the preparation of the Chair's text in 2007.[108]

Developing Country Concerns

Both the Doha and the Hong Kong mandates placed an emphasis on taking into account the special needs and interests of the developing country members. Given the importance of the fisheries sector to nutrition, livelihood and poverty reduction in the developing world, S&DT provisions have been

[104]Supra 98.
[105]Supra 93. The problem with the inclusion of 'port infrastructure' in subsidy is particularly acute. It has been argued that ports are either part of 'general infrastructure' or do not satisfy the specificity requirement to constitute a subsidy.
[106]Supra 12.
[107]Ibid.
[108]Supra 98.

the focus of a lot of discussion.[109] Large developing countries including India have been vocal in their support for a comprehensive S&DT regime.[110] The Chair's text completely exempts Least Developing Countries from the application of the prohibition regime, while giving broad exemptions to other developing country members, conditional upon the fulfilment of fisheries management criteria.[111] Perhaps the most controversial of these exemptions is the one relating to 'subsistence fisheries'[112] proposed by the Chair.

The first among the many controversies surrounding the issue is whether the category of 'developing country' is too broad and should be further divided into narrower categories to exclude the major fishing nations from its scope.[113] The suggested criteria for differentiation include individual catch, fishing capacity or the use of a *de minimis* standard.[114] A corollary to this is whether Small and Vulnerable Economies (mostly small island nations which depend upon fishing as a primary source of income) should be considered as a distinct category and provided a complete exemption from prohibitions.[115] Another issue which has been raised is whether there should

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[109] Centre for WTO Studies Discussion Paper No. 7, Debashis Chakraborty & Animesh Kumar, *Implications of Fishery Sector Subsidies: A Review of Issues in Light of WTO Negotiations* 73 (2010).
[110] Supra 68.
[111] Article III of the proposed text.
[112] The exemption provided by the Chair's draft applies to fisheries wherein the activities are carried out on their own behalf by fishworkers, on an individual basis; the catch is consumed principally by the fishworkers and their families and the activities do not go beyond a small profit trade; and there is no major-employer-employee relationship.
[113] Supra 98.
[114] Ibid.
[115] Yenkong Ngangjoh Hodu & Xuan Gao, *Implications of Concluding the WTO Doha Round Fisheries Subsidies Negotiations on SVEs*,1 Manchester Journal of International Economic Law 93, 104 (2009).

be a classification between different types of fisheries.[116] There is significant confusion over whether the bottom tier of fisheries in such a classification should be merely 'subsistence' (*i.e.*, only restricted to the family) or 'artisanal' or 'small-scale' (*i.e.*, commercial to a limited extent).[117] Moreover, even developed members have demanded flexibility in providing subsidies to their small scale fisheries.[118] Further, there are questions as to whether developing members should be allowed to provide subsidies for high seas fisheries in addition to those within their EEZs.[119]

India has proposed the categorization of fisheries on the basis of socio-economic criteria like low income and lack of resources.[120] It has further proposed that only the basics of fisheries management should be incorporated into the final discipline and provides members with the room for implementation on a case-by-case basis.[121] India has also argued for the subsidization of high seas fisheries since developing countries are latecomers to the field and would require time to catch up with the developed countries.[122] It has also called for the exemption of support provided to small and marginal fishermen.[123]India would aim to maximize access to S&DT

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[116]Supra 98.
[117] Ibid.
[118] See M. Hopper and G. Power, *The Fisheries of an Ojibwa Community in Northern Ontario*, 44 Arctic 267, 295 (1991).
[119]Supra 98.
[120] WTO Negotiating Group on Rules, Communication from Brazil, China, India and Mexico dated 11/02/2010 (TN/RL/GEN/163).
[121] Ibid.
[122] WTO Negotiating Group on Rules, Submission by India, Indonesia and China dated 19/05/2008 (TN/RL/GEN/155/Rev.1).
[123] Amiti Sen, *Fisheries subsidies: India wants WTO to provide relief to small fishermen*, The Hindu BusinessLine(03/07/2016) available at http://www.thehindubusinessline.com/

while opposing the creation of further divisions within the category of 'developing countries'.

CONCLUSION

The topic of fisheries subsidies has been on the WTO discussion agenda for more than a decade. However, negotiations have made little to no progress, and as per the conclusion drawn by the Chairperson in his 2011 Report, the future does not look promising.[124] He ascribes the deadlock in the negotiations on the tendency of members to place blame on others and show little to no change in their stances adopted over the years.[125] Another major roadblock to achieving any success in the negotiations is the 'all-or-nothing' nature of the Doha Round, which requires a 'single undertaking' in the form of consensus on all areas of negotiations.[126] This implies that success in the negotiations on fisheries subsidies would be dependent on success in the other areas of negotiations. Further, the negotiators' attempt to strike an all-inclusive deal on fisheries subsidies has made the project more ambitious than realistically possible.[127] Sameness and homogeneity has been assumed at the level of clubbing all developing countries together and treating all fisheries in the same manner.[128] Classifying fisheries into domestic and

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economy/policy/fisheries-subsidies-india-wants-wto-to-provide-relief-to-small-fishermen/article8804159.ece last seen on 20/09/2016.

[124] Supra 98.

[125] Ibid.

[126] Supra 68.

[127] U.R. Sumaila, *Is an all-or-nothing WTO fisheries subsidies agreement achievable?*, International Centre for Trade and Sustainable Development, available at http://www.ictsd.org/bridges-news/biores/news/is-an-all-or-nothing-wto-fisheries-subsidies-agreement-achievablelast seen on 20/09/2016.

[128] Ibid.

international might provide the impetus for states to undertake corrective national measures to avail of benefits available at the international level.[129]

Many delegations look forward to completing a deal on fisheries subsidies by the 11th Ministerial Conference in 2017.[130] However, given the current state of affairs, such an outcome appears to be impossible.[131] What is needed is a drastic change in the outlook to allow the negotiations to proceed in a useful direction. Rather than focusing on 'what' should be prohibited, the focus should shift to 'who' the prohibition applies to. Since there is in principle agreement that certain types of subsidies should be prohibited, the focus should be on the level of responsibility placed upon different countries. Clarifying the categorization of member states and fisheries covered is the first step in building a discipline on fisheries subsidies. Thus, the structure of the discipline must be altered to place this categorization at the heart of the discipline instead of providing for a broad prohibition. The regime of prohibitions and exceptions must be contingent upon the category within which a particular member state falls. No regime relating to the regulation of fisheries subsidies can be complete without the cooperation and participation of the developing world. The Doha and Hong Kong mandates clearly state the importance of taking into account the needs of developing countries in dealing with the issue of fisheries subsidies. It is suggested here that this

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[129] Ibid.

[130] *WTO members affirm interest in new international fisheries subsidies rules, but differ on way forward*, WTO, available at https://www.wto.org/english/news_e /news16_e/rule _06jul16_e.htmlast seen on 20/09/2016.

[131] *"Clear interest" in securing outcomes in rules negotiations for 2017 Ministerial*, WTO, available athttps://www.wto.org/english/news_e/news16_e/rule_25may16_e.htmlast seen on 20/09/2016.

distinction between member states must lie at the heart of the discipline on fisheries subsidies.

ARTICLE 370: AN EXAMPLE OF ASYMMETRICAL FEDERALISM?

Sonia Dasgupta *

ABSTRACT

In an asymmetric system, the constituting units of a federation have unequal powers in the political, fiscal and administrative spheres. Asymmetric federalism can either be de facto or de jure. Kashmir has been upheld as an example of a de jure asymmetrical arrangement in India due to the existence of Article 370. The inquiry that formed the mainstay of this paper was whether Jammu and Kashmir indeed is an example of asymmetrical federalism. The conclusion that has been reached is that while de jure asymmetry has been established in the drafting of A.370, the operationalization of the provision has not reflected the spirit of asymmetry.

INTRODUCTION

Federalism has historically been employed as a convenient tool to assimilate different polities and societies into one cohesive political unit. In the words of the eminent federal theorist Ronald Watts, federations are *"the closest institutional approximation to the multinational reality of the contemporary world".*[1] Espousing the motto of unity in diversity, the idea of federalism, as commonly envisaged, contemplates two-tiered governance with elements of

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[1] Ronald Watts, *Comparing Federal Systems in the 1990s*, 7 (1[st] edn., 1997).

both self-rule and shared-rule.[2] While shared-rule refers to the control exercised by the "central" government, self-rule represents the limited autonomy that the federal unit enjoys in the federation. The popularity of federalism in contemporary times has been catalysed by a dual desire for larger political units to raise the standard of living of the people and augment influence in the international arena; and for smaller units to increase the accountability of the government to individual citizens and to preserve identities linked to language, culture, religious ties and social practices.[3]

Charles Tarlton defined the contours of asymmetrical federalism in 1965[4], describing it as an arrangement wherein component units do not share conditions and concerns common to the federal system in its entirety.[5] Although Tarlton has been credited with having coined the term "asymmetrical federalism", the idea has persisted since the beginning of federal theory itself.[6] Essentially, in an asymmetric system, *"there is a differentiation of status and rights sanctioned between component units*

[2] Michael Stein, *Review of Comparing Federal Systems by Ronald Watts*, 34 Canadian Journal of Political Science 658, 659 (2001), available at: https://www.jstor.org/stable/pdf/3233026.pdf?_=1460743000920, last seen on 15/03/2017.
[3] Supra 1, at 4.
[4] Charles D. Tarlton, *Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation*, 27(4) The Journal of Politics 861, 861 available at: http://www.jstor.org/stable/2128123, last seen on 15/03/2017.
[5] Ibid.
[6] Esther Seijas Villadangos, *Asymmetry as an Element of Federalism: A Theoretical Speculation Fifty Years Later—Readdress the Spanish Case,* 679 (rev. edn., 2013).

within the undiminished system"[7] and the constituting units have unequal powers in the political, fiscal and administrative spheres.[8]

Asymmetrical federalism has been applied in the Indian context as well, although the literature on this appears to be somewhat divisive. Jammu and Kashmir, Mizoram and Nagaland have been upheld as examples of this arrangement by virtue of constitutional provisions that guarantee them a special status. A.370 of the Indian Constitution, clearly demarcates a qualified autonomy for Jammu and Kashmir under which the legislative competence of the Union is restricted and the residuary powers vest with the State legislature.[9] However, scholars have argued that this is not a real asymmetrical arrangement since A.370 was meant to be only a temporary provision and the conferral of this status was not to preserve the minority identity of the people of the region.[10]

In this context, the federal asymmetry in the Indian schematic will be examined with a special emphasis on Jammu and Kashmir as an example of the phenomenon. I have held in this paper that though formally de jure asymmetry has been established in the drafting of A. 370, the operationalization of this provision has not truly reflected the spirit of federal

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[7] Robert Agranoff, *Federal Asymmetry and Intergovernmental Relations in Spain*, 17 Asymmetry Series IIGR 1, 2 (2005) available at: http://www.uquebec.ca/observgo /fichiers/89576_spain.pdf, last seen on 15/03/2017.

[8] M. Govinda Rao and Nirvikar Singh, *Asymmetric Federalism in India*, UC Santa Cruz International Economics Working Paper Series 3, Working Paper Number 4-8, University of California, Santa Cruz (2004), available at http://www.nipfp.org.in/media /medialibrary/2013 /04/wp04_nipfp_006.pdf, last seen on 15/03/2017.

[9] Art. 370, the Constitution of India.

[10] Louise Tillin, *United in Diversity? Asymmetry in Indian Federalism*, 37(1) Publius 45, 46 (2007), available at http://www.jstor.org/stable/4624781, last seen on 15/03/2017.

asymmetry. For purposes of convenience, this paper is divided into two parts: while the first part deals with the introductory theoretical underpinnings associated with the concept, the second part is analytical in nature, setting out to establish the conclusions of the paper.

THEORETICAL BACKGROUND

Asymmetrical federalism embraces a multinational model of securing political rights in a culturally diverse landscape. In navigating the theoretical foundations of asymmetrical federalism, first, the various definitions of the concept and the benefits and consequences associated with such an arrangement will be discussed. Then, the pre-conditions and the typologies of asymmetry in federations will be looked into.

Although it is contended that Jonathan Livingston had alluded to the idea in his cause celebre 'A Note on the Nature of Federalism'[11], the term was first coined by Tarlton who first defined the conditions of symmetry in federalism and then conceived asymmetry in diametrically opposite terms. He stated that while symmetry refers to the extent to which the constituent units share in common conditions and concerns, in asymmetry, the units don't share this shred of commonality: "*In the model asymmetrical federal system each component unit would have about it a unique feature or set of features which*

[11] Jonathan Livingston, *A Note on the Nature of Federalism*, 67(1) Political Science Quarterly 81, 81 (1952) available at: http://www.jstor.org/stable/2145299, last seen on 15/03/2017.

would separate in important ways, its interests from those of any other state or the system considered as a whole."[12]

However, Tarlton was disenchanted with the politics of recognition, observing that "*increased coordination and coercion from the centralizing authorities in the system 'was' appropriate"*[13] He further cited that asymmetry in federalism was antithetical to the idea of stable governance: "*The elements of similarity among component units of a federal system must, if that system is to function at an optimum level of harmony, predominate over existing elements of diversity."*[14] However, it is to be noted that he erred in assuming that asymmetry ushered in dissent, rather than acknowledging that it is only a reflection of difference. Asymmetry is usually conceived so that it can ensure wholesome political stability in a federation.

Tarlton's preliminary conceptualisation is refined in the subsequent authors' works, especially in Watts' and Burgess' who strip the concept to its essentials. Burgess deems asymmetry in federalism to be a long standing tradition that has only recently attracted the formal notice of academicians. According to him, asymmetry can be perceived as both a boon and a bane. While it may be construed to help sustain the federal structures, it may also seek to subserve the integrity of the federation.[15] Watts' seminal work on federalism outlines the preconditions and the outcomes of asymmetrical

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[12] Supra 4.
[13] Ibid.
[14] Ibid.
[15] Micheal Burgess, *Comparative Federalism: Theory and Practice*, 209 (rev. edn., 2006).

federalism. Both, in contributing significantly to the literature on asymmetry, insist on it being crucial to preserving the diversity of the federal state.

Pre-Conditions of Asymmetry

Burgess identifies five specific conditions that give rise to an asymmetrical arrangement in a federation. These conditions are empirical criteria: they are what actually exist. These conditions correlate to Livingstone's theory on how federalism should ideally be studied through the prism of the society and that the over emphasis on law and political science is misplaced, since it paints an incomplete picture.[16] Burgess lists out the five pre-conditions under the two broad heads of socio-economic and cultural-ideological[17]:

- Political Cultures and Traditions: These are those ideologically ingrained mores that have a profound bearing on the political structures of the region. For example, certain federations engage in the practice of citizen welfare schemes across the board, regardless of the individual's regional affiliations. This condition owes its origin to the political culture that would prevail in that region.
- Social Cleavages: These include cultural factors like religion, language and ethnicity. This condition is somewhat reflected in the Indian context, wherein language and religion have had a profound impact on shaping the structure of the federation.

[16] Supra 11.
[17] Supra 15.

- Territoriality: Territoriality refers to spaces and how politics is affected by such spaces and the relationship between different expanses. Spaces closely interact with the social cleavages that have been mentioned above to give rise to examples such as Quebec and Jura in Canada and Switzerland respectively.
- Socio-Economic Factors: This element is a reference to economic disparities that may prevail between the regions in a federal set-up and the unique needs that arise from such differences.
- Demographic Patterns: The allusions in this head are two-fold. While at one level, it seeks to establish an asymmetry on the basis of factors such as immigration, labour market structures and fertility rates, it also comments on the situation of unequal representation arising from the demographic patterns.

Asymmetrical Outcomes

Outcomes refer to the degree and kind of asymmetry that one is presented within a federation. Watts drew a distinction between political and constitutional asymmetry, which are also known as *de facto* and *de jure* asymmetry respectively.[18]

De Facto Asymmetry

This is common to all federations,[19] and includes the differences in wealth, size, resources, population and political influence amongst the regional units.

[18] Supra 1.
[19] Supra 10.

Duhachek noted that this disparity in power ingredients was only normal and observed that there was *no federal system in the world in which all the component units are even approximately equal in size, population, political power, administrative skills, wealth, economic development, climatic conditions, predominance of either urban or rural interests, social structures, traditions, or relative geographic locations*[20]

De facto asymmetry can be found in overwhelmingly in Canada, wherein the combined population of Quebec and Ontario constitutes about 62 per cent of the total population of ten provinces.[21] Similarly in Germany, three units, namely Bavaria, North Rhine-Westphalia and Baden-Wurttemberg, contain about 50 per cent of the total population.[22] These kinds of discrepancies may lead to two kinds of consequences. The more powerful constituencies may be dissatisfied if their financial input to the federation is not commensurate with the benefits they receive from it. Similarly the powerlessness of the smaller units may also translate into resentment with and resistance to the federal structure.[23]

However, although this kind of asymmetry is common to the Indian context, with some states being larger, wealthier and exerting a greater political pull, it has not contributed to its instability. The greater political influence may be reflected in the representation to the Parliament, where the representation is contingent on the size and demography of the state.

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[20] Supra 15.
[21] Ibid.
[22] Ibid.
[23] Ibid.

De Jure Asymmetry

In this form of asymmetry, certain regions and units are formally given a different status under the Constitution and legal processes. While de jure and de facto asymmetry don't necessarily go hand in hand, de facto asymmetry sometimes does tie up with it. As Swenden observed, *de facto asymmetry frequently leads to the entrenchment of some formal asymmetric institutional devices.*[24]

There are essentially three approaches to institute constitutional asymmetry: the regional autonomy may either be reduced or increased or an option may be granted to the constituent states to opt out of a formally symmetrical arrangement. Examples of constitutional asymmetry include the European Union, Belgium and Russia. A.370 in the Indian Constitution that accords a special status to Kashmir is also upheld as an illustration of de jure asymmetry. This idea of asymmetry seeks to protect cultural pluralism in the federal society and to half-way meet the national minority groups' clamour for greater recognition as a nation.

There are two competing ideations of de jure asymmetrical federalism: normative and functional. While the normative argument hinges on the moral desirability of politically recognising the culturally disparate diaspora, the functional argument states that the model should be adopted since it would be the one that works best in the given situation. The normative conceptualisation of asymmetrical federalism pivots around a distinction

[24] Wilfried Swenden, *Federalism and Regionalism in Western Europe: A Comparative and Thematic Analysis*, 63 (rev. edn., 2006).

between nationality-based units and constituent units that are mere regional divisions or part of the majoritarian group. According to Kymlicka, while the former category craves greater autonomy and power, the latter would actually seek to relinquish more of its rights to the Union. The existence of both these competing claims in a single federation forms the crux of the normative argument.[25] Theorists have argued that both these types of units cannot be dealt with in a similar fashion, hence asymmetry. As the Spanish scholar Requejo postulated, *"to equate national minority communities with mere regions or treat them exactly the same as federal subunits that are controlled by members of the national majority is intrinsically in-egalitarian both in substantive and procedural terms."*[26] However, this runs in the face of the traditional arguments put forth in the defence of federalism: the protection of equality of the individual states. Additionally, another point of criticism that has been brought forth is that this model of federalism encourages secessionist tendencies. However, scholars have assured that recognising the multiple stakes instead contributes to stability.

The functional conceptualisation insists that asymmetry has been crucial to the survival of countless federations, including, but not limited to, India, Belgium, Canada and Spain.[27] Having argued that the over-emphasis on the American model of federalism, with its reliance on constitutional symmetry was misplaced, Stepan postulated that the asymmetric model had worked

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[25] Will Kymlicka, *Politics in the Vernacular, Nationalism, Multiculturalism and Citizenship*, 95 (1st ed., 2001).
[26] Sujit Choudhury, Madhav Khosla & Pratap Bhanu Mehta, *The Oxford Handbook on Indian Constitution*, 540 (1st ed., 2016).
[27] Supra 10.

special wonders in India in "holding it" together with its creative and flexible mechanisms which have facilitated the reimagining of state borders.[28]

Asymmetry in India

While de facto asymmetry is present in India in abundance, as evidenced by the population-based representation to the Parliament and the obvious disparities in wealth and power[29], the Constitution has formally carved out a special status for certain states and regions such as Articles 370 (Kashmir), 371A (Nagaland), 371G (Mizoram) and the fifth and sixth schedules.[30] While on the one hand scholars suggest that the Indian federation was designed to be asymmetrical from the get go which allowed for the reorganisation of states on linguistic lines, on the other hand, others have suggested that this asymmetry sprung as a by-product when there were two kinds of units that were incorporated into the new India.[31] While initially the British Indian units had less autonomy over their matters and the princely states were quasi sovereign, it was smoothened over subsequently until special status was granted to only specific parts.[32] However, not all Indian states were created on an asymmetrical basis: the states that were created in the 1950s were the result of a symmetric reform that recognised the states' right to manage their own affairs.[33] Further, since the degree of

[28] Stepan, Alfred, *Federalism and Democracy: Beyond the US Model*, 10(4) Journal of Democracy 19, 20 (1999), available at https://muse.jhu.edu/article/16996, last seen on 15/03/2017.
[29] Supra 10.
[30] Supra 27.
[31] Supra 10.
[32] Ibid.
[33] Supra 27.

representation to the Council of States is contingent on the population of the states, asymmetric territories do not wield a disproportionate influence on legislations that concern the entire country, hence curbing any resentment that may arise from an asymmetric set-up.[34]

KASHMIR AS AN EXAMPLE OF ASYMMETRY IN INDIA

This section will analyse the validity of the claims that hail the special status guaranteed to the state of Jammu and Kashmir in Article 370 of the Constitution symptomatic of India's de jure asymmetric arrangement. This claim has been contested by Louise Tillin, who puts forth the view that the Article is a mere farce and does not propagate asymmetry in any manner. This part will first outline a brief sketch of Jammu and Kashmir's political history since a constitutional comment cannot be divorced from the political realities. It will then attempt to answer the question if the state of Jammu and Kashmir can really be upheld as an example of constitutional asymmetry.

A Brief Political History of Jammu and Kashmir

The state of Jammu and Kashmir has been fraught with delicate and complex situations, since its incorporation to the Union of India in 1947, triggering off a 69-year-old dispute that has since escalated to be the subject of three wars. Today India controls the Kashmir Valley, Jammu and Ladakh. The fact that the valley is predominantly Muslim, and Jammu, Hindu assumes great relevance in the rhetoric advanced by both India and Pakistan.

[34] Ibid.

- Akbar conquered Kashmir in 1589, and was the harbinger of the Mughal rule that was to last for 166 years. This was followed by the rule of Afghan and Sikh dynasties that brutalised the valley further. Following the demise of Raja Ranjit Singh, the Raja of Jammu, Gulab Singh, ascended the throne as the ruler of the Muslim-majority Kashmir in 1846 by paying the British government a sum of about seven and a half lakhs, hence heralding the Dogra Rule that would continue until 1947.[35]

- India and Pakistan attained independence from the British rule in 1947. Gulab Singh's grandson, Hari Singh, was on the throne, and Rai Bahadur Pandit Ramchandra Kak was the Prime Minister. Lord Mountbatten urged the Maharaja to taka a stance and accede to either of the newly-formed dominions; however the Raja seemed reluctant, but agreed to accede to India in face of the security threat that the land was besieged under, with Operation Gulmarg underway.[36] Earlier, the state proposed to enter into standstill arrangements with both the dominions: they were wary of the Congress because of the support it lent Sheikh Abdullah when he was attempting to destabilise the state government and at the same time, the Hindu leadership of the state wanted no part of Pakistan. The state acceded to India in 1947 only in matters of defence, foreign affairs and communications, and was the only state to have negotiated the terms of its accession. The Instrument of Accession was accompanied by

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[35] Muhammad Ali Siddiqi, *COVER STORY: The Kashmir Dispute: 1947-2012 by A.G. Noorani*, The Dawn, (15/06/2014), available at: http://www.dawn.com/news/1112700, last seen on 15/03/2017.
[36] Jasbir Singh, *Roar of the Tiger*, 4 (rev. ed., 2013).

a document that the Governor General ratified, stating, that *as soon as law and order have been restored in India and her soil cleared of the invader, the question of the state's accession would be decided by a reference to the people*.[37] The White Papers on Jammu & Kashmir published by the Government of India in 1948 similarly claimed that A.370 was merely a temporary provision, to prevail up until the will of the people could be discerned.[38] This suggests that the secession was merely temporary and might be reversed on ratification. India appealed to the United Nations which resulted in the non-binding United Nations Security Council Resolution 47, which called for peace in the region and a plebiscite to decide on the question of Kashmir.[39]

- The negotiations between Kashmir and India were underway in respect of A. 370 (A. 306A of the draft constitution) and the Constitution, with this Article, came into force on 26th January, 1950. As per the Constituent Assembly debates, A.370 could not continue post the State Constituent Assembly's decision on the Constitution and the kind of federal jurisdiction it envisaged.[40]

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[37] Matthew J Webb, *The Right of Kashmir to Secede: A Critical Examination of Contemporary Theories*, 34 (rev. edn., 2010).
[38] A.G. Noorani, *A. 370: A Constitutional History,* (rev. ed., 2011).
[39] Shamshad Ahmed, *The Kashmir Policy*, The Dawn, (05/08/2004), available at: http://www.dawn.com/news/1066295/dawn-opinion-05-august-2004#1, last seen on 15/03/2017.
[40] "S*o the provision is made that when the Constituent Assembly of the state has met and taken its decision both on the Constitution for the State and on the range of federal jurisdiction over the State, the President may on the recommendation of that Constituent Assembly issue an order that this article 306A shall either cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified by him. But*

- The Delhi Agreement[41] was entered into between Sheikh Abdullah and Jawaharlal Nehru in 1952 and it attempted to decide the scope and breadth of the relationship between the Centre and the state, until a plebiscite could be held.[42]

- In 1953 Sheikh Abdullah was removed from power and imprisoned, in a manner that is now considered to be illegal. Consequently, the post of Sadr-i-riyasat (State President, as was negotiated in the Agreement) was abolished. From 1953 to 1975 chief ministers of the state were nominees of Delhi, throned as per Governor B.K. Nehru, by means of rigged elections.[43]

- Sheikh Abdullah signed an accord with Indira Gandhi in 1975 and assumed the post of the Chief Minister.

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before he issues any order of that kind the recommendation of the Constituent Assembly will be a condition precedent. That explains the whole of this article.

The effect of this article is that the Jammu and Kashmir State which is now a part of India will continue to be a part of India, will be a unit of the future Federal Republic of India and the Union Legislature will get jurisdiction to enact laws on matters specified either in the Instrument of Accession or by later addition with the concurrence of the Government of the State. And steps have to be taken for the purpose of convening a Constituent Assembly in due course which will go into the matters I have already referred to. When it has come to a decision on the different matters it will make a recommendation to the President who will either abrogate article 306A or direct that it shall apply with such modifications and exceptions as the Constituent Assembly may recommend."

Constituent Assembly of India Debates (Proceedings), Vol. X, October 17, 1949.

[41] The Delhi Agreement, 1952.

[42] Supra 39.

[43] B.K. Nehru, *Nice Guys Finish Second*, 614 (rev. edn., 1997).

Is Kashmir an Example of Asymmetric Federalism?

The literature on this issue is divisive: while one set of scholars claims that A.370 is unequivocally reflective of the asymmetrical autonomy that has been granted to it, the other argues that Kashmir cannot be upheld as an illustration of an asymmetrical arrangement since A.370 was merely a temporary provision and the Article was not intended to safeguard the minority identity of the people living there, but was merely to serve as a stop-gap measure until certain political situations could be tided over.[44]

It is submitted that both these views are extreme positions and untenable with the current scenario. The ground realities that persist in Kashmir make it a far cry from a self-determining unit within the federation. However, the existence of A.370 cannot be ignored either: having survived numerous regimes and all these years, it has gained the tinge of permanency.[45] This provision, after all, is what allows Kashmir to have its own Constitution and flag, hence distinguishing it from all the other states in the country. The current position in Kashmir, with respect to asymmetrical federalism, would hence be a middle ground: while A.370 does formally accord the state with some modicum of autonomy, in the subsequent years, the operationalizing of this provision has not reflected the spirit of asymmetrical federalism. Hence, this paper concludes that any asymmetry that can be attributed to Article 370 can be construed as intentional, but not functional.

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[44] Supra 10.

[45] *Article 370 is permanent, rules J&K High Court*; The Hindu, (11/10/2015) available at http://www.thehindu.com/news/national/other-states/article-370-is-permanent-rules-jk-high court/article774 983_9.ece, last seen on 15/03/2017.

The legitimacy of Article 370 as an instrument of asymmetrical federalism

Louise Tillin has consistently claimed that any asymmetry in this provision is merely functional and not intentional.[46] Her arguments embody two broad claims: first, that it was only in the interest of political expediency that the special provision found a place in the constitutional design. Article 370 was meant to be an interim provision and it found mention in the Constitution under Part XXI, which dealt with Temporary, Transitional and Special Provisions.[47] Secondly, she argues that the differential autonomy granted to Kashmir was not for recognising or resolving ethno-political conflict and hence, should not be considered as an example of asymmetrical federalism.[48]

This line of argument aligns with the underpinnings of the original intent theory. However, critiques of the original intent theory emphasise that since constitutions are the result of political compromise, a single, collective will may be incapable of being isolated.[49] In contrast to the entrenched meaning ascribed to the Constitution by the original intent theory, the living tree theory hinges on the evolution of the Constitution with time and changing moral sensibilities. A constitution has been frequently conceived of as a dynamic thing: some originalists agree that parts of the constitution are *meant* to grow and evolve with the passage of time. Hence changes in the constitutional order are inevitable, and cannot remain fixed to the original

[46] Supra 10, at 52.
[47] Ibid.
[48] Ibid.
[49] Kenneth Thomas, *Selected Theories of Constitutional Interpretation*, Congressional Research Service, 2011.

intention of the drafters.[50] Tushnet, specifically stated that a constitutional order allowed for "constitutional change through gradual construction and transformation".[51] He further rejected a solely court-based approach to this change, instead insisting that both political parties and branches of government are intrinsic to a constitutional order and are capable of effecting "fundamental decisions made over a sustained period, and the principles that guide those decisions."[52]

To this end, although originally Article 370 was meant to be a temporary feature, in the current day and age, Article 370 is considered to be a fixture by both the judicial and political establishments, with calls for its abrogation largely proving to be empty rhetoric.[53] Politically, it is to be noted that Kashmiri representatives have frequently discussed the relevance and permanence of the provision. Omar Abdullah, the former chief minister of Jammu and Kashmir, observed that any attempt to reopen discussions on Article 370 would be tantamount to reopening Kashmir's accession to India.[54] While the ruling party has repeatedly demanded the abrogation of Article 370, the current Prime Minister has tempered the tone of this demand, suggesting that debates on the benefits of Article 370 must be

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[50] Vicki Jackson, *Constitutions as "Living Trees"?* 75 *Comparative Constitutional Law and Interpretive Metaphors*, Fordham Law Review 921, 922 (2006), available at http://scholarship.law.georgetown.edu/facpub/108/, last seen on 15/03/2017.

[51] Heinz Klug, *Review: The New Constitutional Order by Mark Tushnet*, 31(2) Journal of Law and Society 280, 281 (2004), available at http://www.jstor.org/stable/1410530, last seen on 15/03/2017.

[52] Ibid.

[53] *Omar Abdullah takes on Advani, slams BJP on Article 370*, NDTV (02/07/2013), available at http://www.ndtv.com/india-news/omar-abdullah-takes-on-advani-slams-bjp-on-article-370-527126, last seen on 15/03/2017.

[54] Ibid.

considered.[55] The judiciary too has commented on the nature of the provision with the Jammu and Kashmir High Court holding in 2015 that Article 370 was a permanent provision and could not be amended or repealed by the Parliament.[56] The Supreme Court, deciding on the applicability of the SARFAESI Act in the state, observed that, "*though the marginal note refers to Article 370 as only a temporary provision, it is in fact in current usage and will continue to be in force until the specified event in sub-clause (3) of the said Article takes place"*[57]

Hence, even though the drafters had intended for Article 370 to be a stop-gap measure, today it is veering towards permanence and is linked to the preservation of the distinct political identity of the Kashmiris. The argument that the provision was not based on the recognition that ethnic distinctiveness demanded a higher degree of autonomy, cannot strip the provision of its asymmetric nature: it only places it in a separate category. The provision does acknowledge territoriality: the self-definition of a group stemming from a sense of space. As Amitabh Matoo deftly summarises, "*Article 370 was and is about providing space, in matters of governance, to the people of a State who felt deeply vulnerable about their identity and insecure about the future. It was about empowering people, making people feel that they belong, and about increasing the accountability of public institutions and services.*

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[55] Rahul Srivastava, *Narendra Modi on Article 370: A BJP Denial and Strategy*, NDTV (02/12/2013), available at http://www.ndtv.com/india-news/narendra-modi-on-article-370-a-bjp-denial-and-a-strategy-543098, last seen on 15/03/2017.
[56] Ashok Kumar v. State of Jammu and Kashmir, SWP no.1290/2014.
[57] State Bank of India v. Santosh Gupta, Arising out of SLP (Civil) Nos.30884-30885 of 2015.

Article 370 is synonymous with decentralisation and devolution of power, phrases that have been on the charter of virtually every political party in India."[58]

Alternatively, even if the provision is considered to be temporary, Article 370 would in letter, still guarantee an asymmetrical arrangement; by virtue of the special powers the provision granted the state. Its time-barred nature would not take away the decentralised governance the provision attempted to secure. Hence, whatever the intentions were with regard to the time span within which the provision was to operate, the drafters always intended for Jammu and Kashmir to have qualified autonomy per the terms of the Instrument of Accession.

Operationalisation of Article 370 does not reflect the spirit of asymmetrical federalism

Although in letter the provision provided for an asymmetrical arrangement, the application of the Article has not been in consonance with the spirit of asymmetrical federalism. Guarantees of greater autonomy have been diluted, with the erosion of Article 370 and the imposition of the Armed Forces Special Protection Act, 1990 on the state for the last 27 years.

Erosion of A.370

The lack of autonomy can be best exemplified by the erosion of A.370, which was the result of five months of parley between Abdullah and Nehru[59].

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[58] Amitabh Matoo, *Understanding Article 370*, The Hindu (18/11/2016), available at http://www.thehindu.com/opinion/lead/Understanding-Article-370/article11640894.ece, last seen on 15/03/2017.

Article 370 essentially guaranteed the following: First, it excluded Jammu and Kashmir from those provisions of the Constitution that laid down schemes for the governance of the states.[60] The State was to have its own Constitution. Secondly, the Parliament was competent to make laws pertaining only to those matters in the Union List and the Concurrent List which, in consultation with the State Government, were declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of Kashmir to India as the matters in respect of which India could make laws. This was to be allied with the Instrument of Accession after "concurrence" with the State Government.[61] The Centre could legislate on any other matter in the above-mentioned lists with the consensus of the State Government, through a presidential order.[62] Further the residuary power vested with the state and not with the Union as is the norm. If the Parliament wished to extend other constitutional provisions, it could only be done with the "prior concurrence" of the State Government, through a presidential order.[63] This concurrence too was provisional and had to be ratified by the State Constituent Assembly.[64] The concurrence could also only be given until the Constituent Assembly was convened. As per the

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[59] A. G. Noorani, *Article 370: Law and Politics*, Volume No. 17, (Issue No. 19) The Frontline, (2000), available at http://www.frontline.in/static/html/fl1719/17190890.html, last seen on 15/03/2017.
[60] Art. 370(1)(a), the Constitution of India.
[61] Art. 370(1)(b)(i), the Constitution of India.
[62] Art. 370(1)(b)(ii), the Constitution of India.
[63] Art. 370(1)(d), the Constitution of India.
[64] Art. 370(2), the Constitution of India.

last clause, the provision could be repealed or modified only on the recommendation of the State Constituent Assembly.[65]

The limited nature of the Presidential orders that could be issued under this provision was remarked upon when Nehru stated, *"It is not a perfectly clear matter from a legal point of view how far the President can issue notifications under A. 370 several times".*[66] Elaborating on the line of thought, Dr. Rajendra Prasad commented on how the "*competence of the President to have repeated recourse to extraordinary powers conferred on him"*[67] was an illegal course. He further added, any "*provision authorising the executive government to make amendments in the Constitution"*[68] was incongruous and aligned with Ayyangar to conclude upon the *finality of a single order*.[69]

However by 1964, the Home Minister Gulzari Lal Nanda remarked in the Lok Sabha, "*The only way of taking the Constitution (of India) into Jammu and Kashmir is through the application of A. 370…it is a tunnel. It is through this tunnel that a good deal of traffic has already passed through and more will*." [70] Nehru summed it up by saying, "…*only the shell is there. Article 370, whether you keep it or not, has been completely emptied of (its) contents. Nothing has been left in it.*[71]

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[65] Art. 370(3), the Constitution of India.
[66] Supra 35, at 8.
[67] Ibid.
[68] Ibid, at 9.
[69] Ibid, at 10.
[70] Ibid, at 2.
[71] Ibid.

The erosion of A. 370 was also reflected in the cases that came up before the Supreme Court. There have been merely three cases that have come up under A. 370, the first one being in 1959. In *Prem Nath Kaul v. State of Jammu & Kashmir*,[72] it was recognised that the Constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provision of Article 370 (1) is made conditional on the final approval by the said Constituent Assembly in the said matters… the Constitution-makers were obviously anxious that the said relationship should be finally determined by the Constituent Assembly of the State itself.[73]

However, this view endorsed by the Supreme Court took a radical flip in *Sampat Prakash v. State of Jammu & Kashmir*[74] and ruled to the contrary without even referring to the previous case. The court held that Article 370 could be used to pass orders despite the fact that the State's Constituent Assembly no longer existed.

Hence A.370 was eroded to the extent it almost neutralised the autonomy that was promised to it by means of the provision. For example, the Parliament had to amend the Constitution four times to extend the state of emergency that was imposed in Punjab on May 11, 1987. However in the

[72] Prem Nath Kaul v. State of Jammu, 1959 AIR 749.
[73] Ibid.
[74] Sampat Prakash v. State of Jammu & Kashmir, 1969 AIR 1153.

case of Jammu and Kashmir, mere executive orders sufficed to achieve the same from 1990 to 1996.[75]

Further, the orders passed under A.370, altered the basic structure of the Kashmiri Constitution. The head of state (Sadr-i-riyasat) was replaced by a Governor who was to be appointed by the centre.[76] A. 356 that provides for President's rule was applied, despite Section 92 of the Kashmiri Constitution that provided for Governor's rule.[77] An order promulgated in 1975 deemed that the state could not alter the state constitution on matters in relation to the Governor, the election commission and the composition of the upper house of the state legislature.[78] This high-handed imposition was justified in the recent case of *State Bank of India* v. *Santosh Kumar*, in which the Supreme Court was deciding on the applicability of SARFAESI in the state. The bench observed that Kashmiri laws and legislations would always be inferior to Indian law, since it has surrendered its sovereignty to the Union, and its sovereignty does not exist beyond the Indian Constitution.[79]

Since the passage of the Constitution, 47 presidential orders have been passed through what was meant to be a temporary provision for the President to exert extraordinary powers. Noorani questions the legality of this and terms this as "constitutional abuse",[80] pointing out that after the formation of the Constituent Assembly, the State Government lost all its rights to accord

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[75] Supra 43.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] State Bank of India v. Santosh Kumar, Arising out of SLP (Civil) Nos.30884-30885 of 2015.
[80] Supra 43.

its concurrence with the Government of India. After the Assembly dispersed without commenting on the future of this provision, the only authority that could cede more power to the Union had gone. All the subsequent orders by the Indian government, giving more unto itself have hence been unconstitutional.[81]

The Implementation of the Armed Forces Special Powers Act, 1990 [82]

AFSPA, 1990, gives the army legal immunity as they undertake operations in troubled areas and has been prevalent in the state since 1990.[83] This has translated in a loss of internal autonomy, in addition to the gross human rights violations that have been perpetrated in the valley without any consequences.

Hence, the Kashmiri position reflects a half-hearted attempt at an asymmetrical arrangement. While the initial intention was to protect the terms of the bargain under which the state had acceded to India, somewhere the plot was lost. All that remains is a shell of a provision that does sanction a "special status" for Kashmir, whose operationalization in the last few years has completely negated the objectives of asymmetrical federalism. Neither has it protected the national identity inherent in the Kashmiris, nor has it fostered pluralism in the political landscape.

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[81] Ibid.
[82] Henceforth referred to as AFSPA, 1990.
[83] Naseer Ganai, *25 years on, AFSPA remains a dirty word in Jammu and Kashmir*, India Today (09/07/2015), available at http://indiatoday.intoday.in/story/afspa-disagreement-jammu-and-kashmir-armed-militancy-cmp-bjp-pdp/1/450142.html, last seen on 15/03/2017.

CONCLUSION

In conclusion, although A. 370 was meant to guarantee the autonomy of Jammu and Kashmir, it has been eroded to considerable effect, culminating in a mockery of the numerous parleys that were undertaken while Kashmir acceded to India. This has resulted in a truncated asymmetry in the region. So, although the provisions do exist on paper, constitutional abuse has rendered them immaterial.

It must be noted that the special status that was granted was not to encourage militancy or secession, but to devolve power to ensure popular participation in the running of the state. It can be argued that it was the erosion of A.370 that incited the separatist tendencies and not its creation. The majoritarian rule should turn to the conclave held in Srinagar in 1982, wherein all political parties, including the BJP affirmed that the special constitutional status of J&K under Article 370 should be preserved and protected in letter and spirit.[84] A throwback to the early sentiments of Prime Minister Nehru would be apt to conclude: Kashmir is perhaps the most difficult of all these problems between India and Pakistan. We should also remember that Kashmir is not a thing to be bandied between India and Pakistan but it has a soul of its own and an individuality of its own. Nothing can be done without the goodwill and consent of the people of Kashmir.[85]

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[84] Supra 59.

[85] Arundhati Roy, *They Can File Charges Posthumously Against Jawaharlal Nehru Too*, The Hindu, (28/11/2010), available at http://www.thehindu.com/news/national/they-can-file-a-charge-posthumously-against-jawaharlal-nehru-too-arundhati-roy/article918002.ece, last seen on 15/03/2017.

THE NATURE AND ENFORCEABILITY OF OPEN SOURCE LICENSE

Srishti Aishwarya*

ABSTRACT

This paper analyzes the nature of FOSS license and enforcement mechanisms. Part II of the paper lists FOSS components. Part III elaborates on licensing mechanisms. Part IV discusses the conflicts and risks the components of the FOSS entails. Part V elaborates on the mechanisms for enforcement of FOSS vis-à-vis copyright and contract law. Further, Part VI justifies the validity of FOSS with the help of theories of intellectual property and with the use of idea- expression dichotomy. The paper concludes that open source software plays an integral role in promoting innovation and that the licensing mechanism used for the same effectively protects and validates the open source software via amalgamation of contact and copyright law.

INTRODUCTION

The term open source- coined by Chris Peterson[1] - is used to indicate open source software that is "software that can be freely accessed, used, changed

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[1] Eric S. Raymond, *History of the Open Source Effort*, Online: Wayback Machine Internet Archive <http://web.archive.org/web/19981206185148/http://www.opensource.org/history.html>

and shared by anyone"[2] or free software that gives users the "freedom to run, copy, distribute, study, change and improve the software".[3] Such software is herein after collectively referred to as Free and Open Source Software ("**FOSS**").

This freedom arises from the nature of the software. Computers are capable of understanding only the binary inputs that are either "0" or "1". However, software is written in human readable language such as C++ or Java which is called source code. The source code in turn is compiled into machine language of binary inputs called object code, for the computer to understand.[4] By and large, software is given out just with the object code. This is the proprietary software[5] model which protects source code from disclosure. Open source software on the other hand gives out the source code

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[2] *Frequently Asked Questions*, Online: Open Source Initiative <http://opensource.org/faq#osd>. The definition of open source has been developed from the Debian Free Software Guideline formulated by Debian, producers of Debian GNU/ Linux system , which created the Debian Social Contract that provided that the Debian software will be 100% free software that is- it allows free redistribution, modification and derived work. It further states that free software would indicate inclusion of source code, integrity of author's source code, would not be in favor of discrimination against person/ groups/ field of endeavor. The Debian license is further required to not contaminate other software or be specific to Debian. See, Bruce Perens, *Debian GNU Linux, A Social Contract*, Online: Wayback Machine Internet Archives: http://web.archive.org/web /19990117080504/ http://www.debian.org/social_contract.html#guidelines

[3] *What is Free Software?* Online: GNU Operating System <http://www.gnu.org/philosophy/free-sw.html>

[4] Daniel Lin, Matthew Sag & Ronald S. Laurie, "Source Code Versus Object Code: Patent Implication for the Open Source Community" (2001) 18 Santa Clara Computer and High Technology Law Journal 235 at 238.

[5] "The term proprietary is developed from the latin word "properietas" which means property. Proprietary software is software that is generally owned by a corporation or individual where the source code of the software is not disclosed and comes embellished with ample restrictions as enumerated in the end user license agreement" at *Proprietary Software Definition*, Online: The Linux Information Project <http://www.linfo.org/proprietary.html>

of the software as well, which allows the user to utilize, dispense or amend the software.

However, the availability of the source code per se to everyone does not indicate extinguishment of the publisher's intellectual property rights in relation to the software. Hence, the user is restrained from modifying or redistributing the work even if source code is public, due to the effective control and intellectual property right of the publisher in the code.[6] To allow the usage of the source code, the mechanism of licensing is put in place. To obtain value from the exclusive rights, authors grant licenses. A license is "permission '.....' to commit some act that would otherwise be unlawful."[7] Preserving the rights of software users through license provisions is called "copylefting"[8] Copyleft is a legal construct formulated by the Free Software Foundation.[9] It uses copyright law, but reverses its usual purpose of restricting usage: "instead of a means for restricting a program, it becomes a means for keeping the program free".[10]

FOSS license, as argued by Richard Stallman provides the liberty and choice to use the program irrespective of the purpose of such usage. The license

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[6] Joseph Scott Miller, "Allchin's Folly: Exploding Some Myths About Open Source Software" (2001) 20 Cardozo Arts and Entertainment Law Journal (2002) 491at 496-497
[7] Black's Law Dictionary, 8th ed, *sub verbo* "license"
[8] *What is Copyleft,* Online: GNU Operating System <http://www.gnu.org/ licenses/copyleft. en.html>
[9] *Ibid*
[10] Richard Stallman, *The GNU Project*, Online: GNU Operating System <http:/ /www.gnu.org/gnu/thegnuproject.en.html>

allows the user to modify the program (which necessitates availability of source code) and distribute and redistribute copies of software.[11]

In *Jacobsen v Katzer*, the FOSS was described in the following terms:

> Open source software projects invite computer programmers to view software code and make changes and improvements to it. [Such collaboration is time and cost effective as] software programs can often be written and debugged faster and at lower cost than if the copyright holder were required to do all of the work independently. [In consideration and as return of such collaboration], the copyright holder allows users to copy, modify and distribute the software code subject to conditions that serve to protect downstream users and to keep the code accessible.[12]

FOSS, thus can be summed up as computer program or software issued with a license requiring the concerned users to comply with conditions stipulated under the license which includes allocation of the source code along with the software and the liberty to modify the source code.[13]

This paper analyzes the nature of FOSS license and the mechanism to provide validity to FOSS license. Part II of the paper lists the components of

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[11]*Supra*, note 3. Open Source provides a similar definition including: "free redistribution, inclusion of source code, allowance for modified and derived work, integrity of author's source code, no discrimination against persons/ groups/ fields of endeavor, right to distribute/ redistribute license; the open source license is required to not restrict other software or be specific to a product and should be technology neutral," *The Open Source Definition Annotated*, Online: Open Source Initiative <http://opensource.org/osd-annotated>

[12] Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008)

[13]Jeffery W. Seifert, United States Congressional Research Service, *Computer Software and Open Source Issues: A Primer* (2003) R L31627

the FOSS, followed by Part III which elaborates on licensing mechanisms used for the same. Part IV discusses the conflicts and risks the components of the FOSS entails. Part V seeks to elaborate on the mechanisms for enforcement of FOSS vis-à-vis copyright and contract law. Further, Part VI justifies the validity of FOSS with the help of theories of intellectual property and by contemplating the nature of the software using the idea-expression dichotomy. The paper concludes that open source software plays an integral role in promoting innovation. And the licensing mechanism used for the same effectively protects and validates the open source software via amalgamation of contact and copyright law.

COMPONENTS OF THE FREE AND OPEN SOURCE SOFTWARE

As discussed by the Open Source Initiative, FOSS has the following components[14]:

- Free Redistribution: License shall not restrain selling[15] or giving away of software, however no royalty or other fees can be imposed under the license.

[14] *Open Source Definition Annotated*, Online: Open Source Initiative <http://opensource.org/osd-annotated>

[15] "Since 'free' refers to freedom, not to price, there is no contradiction between selling copies and free software. In fact, the freedom to sell copies is crucial: collections of free software sold on CD-ROMs are important for the community, and selling them is an important way to raise funds for free software development. Therefore, a program which people are not free to include on these collections is not free software" Richard Stallman, *The GNU Project*, Online: GNU Operating System <http://www.gnu.org/gnu/thegnuproject.en.html>

- Source Code: The program shall include source code or such shall be made available, and must allow distribution in source code as well as compiled form.
- Derived Works: The license is required to permit modifications and derived works and its distribution under the same terms as the license of the original software.
- Integrity of the Author's Source Code: The license may restrict source-code from being distributed in modified form only if the license allows the distribution of "patch files" with the source code for the purpose of modifying the program at build time. The license must explicitly permit distribution of software built from modified source code. The license may require derived works to carry a different name or version number from the original software.
- No Discrimination Against Persons or Groups: The license must not discriminate against any person or group of persons.
- No Discrimination Against Fields of Endeavor: The license must not restrict anyone from making use of the program in a specific field of endeavor.
- Distribution of License: The rights attached to the program must apply to all to whom the program is redistributed without the need for execution of an additional license by those parties
- License Must Not Be Specific to a Product: The rights attached to the program must not depend on the program's being part of a particular

software distribution. If the program is extracted from that distribution and used or distributed within the terms of the program's license, all parties to whom the program is redistributed should have the same rights as those that are granted in conjunction with the original software distribution.

- License Must Not Restrict Other Software: The license must not place restrictions on other software that is distributed along with the licensed software.
- License Must Be Technology-Neutral: No provision of the license may be predicated on any individual technology or style of interface.[16]

FREE AND OPEN SOURCE SOFTWARE: LICENSING MECHANISMS

Under the free and open source licensing mechanism, contributors, at their volition, submit the code to a project leader or organization that makes the collaborated code available to everyone under the copyleft licensing regime.[17] As Jon L. Phelps stated, "copyleft licenses utilize intellectual property law to keep the source and object code of the licensed software available to anyone who would like to use it".[18] The underlying

[16] *The Open Source Definition*, Online: Open Source Initiative <http://opensource.org/docs/osd>

[17] Josh Lerner & Jean Tirole, "The Scope of Open Source Licensing" (2005) 21:1 JLEO 20 at 21 [Lerner &Tirole]

[18] Jon L. Phelps, "Copyleft Termination: Will the Termination Provision Of The Copyright Act Of 1976 Undermine The Free Software Foundation's General Public License?" (2010) 50:2 Jurimetrics 261 at 261

principles of copyleft licensing is keeping the code open and free so as to allow creation, innovation and development of new works.[19]

FOSS is subjected to one of the three variants of copyleft licenses: strong (restrictive) or weak copyleft license or no copyleft at all (permissive). Permissive licenses are a regular feature in projects targeting the open source contributors community that is "when contributors stand to benefit considerably from signaling incentives or when the licensors are well-trusted".[20] Restrictive licenses on the other hand are usually used in the projects such as computer games, aimed at end users not conversant with coding. The restrictive terms are owing to the fear that the software may get hijacked by prospective developers and used for commercial purposes if the conditions of similar license are not imposed.[21]

Strong Copyleft License

A strong copyleft model requires that the distribution terms and conditions and freedom obtained under the FOSS license remains similar for the software product as it is transferred downstream[22] that is, if the software is

[19] R. Fontana, *A Legal Issues Primer for Open Source and Free Software Projects* (June 4th, 2008), Software Freedom Law Centre, Online: Software Freedom Law Centre < https://www.softwarefreedom.org/resources/2008/foss-primer.html>

[20] Josh Lerner & Jean Tirole, "The Economics of Technology Sharing: Open Source and Beyond" (2005) 19: 2 TJEP 99 at 108

[21] *Ibid*

[22] *GNU General Public License*, Online: GNU Operating System <http://www.gnu.org/copyleft/gpl.html>

licensed as a FOSS, the whole of the consequent derivative software developed on the basis of original ought to be licensed similarly.[23]

An example of strong copyleft license would be GNU General Public License ("GPL") that mandates the downstream licensee of FOSS to license any modified[24] version of the FOSS under the same license.[25] The conveyed or modified work under the GPL shall "keep intact all notices of the absence of any warranty"[26], provide a copy of the license along with program and carry a prominent notice of all modification carried out in the program.[27]

Weak Copyleft License

Under the weak copyleft license model, the FOSS licensed source code is allowed to be mixed with other code; the new added portion may be licensed under the different licensing regime including the proprietary one. However, the parts of the larger derivative work containing software licensed originally under FOSS license will continue to be governed by the concerned FOSS license.

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[23] Ravi Sen, Chandrasekar Subramaniam and Matthew L. Nelson, "Determinants of the Choice of Open Source Software License" (2008/2009) 25:3 JMIS 207 [Sen]

[24] Clause 0, Definition, "Modify: To 'modify' a work means to copy from or adapt all or part of the work in a fashion requiring copyright permission, other than the making of an exact copy. The resulting work is called a 'modified version' of the earlier work or a work 'based on' the earlier work", *supra* note 22

[25] *Supra* note 22. Also see *Common Development and Distribution License, Version 1.0*, Online: Open Source Initiative <http://opensource.org/licenses/CDDL-1.0>

[26] *Supra* note *22*, Clause 4, Online: GNU Operating System <http://www.gnu.org/copyleft/gpl.html>

[27] *Ibid*, Clause 5, GNU Operating System <http://www.gnu.org/copyleft/gpl.html>

GNU Lesser General Public License (LGPL)[28] and Mozilla Public License (2.0)[29] are prototypes of this model. This category is considered as the middle ground[30] between restrictive and liberal licenses.[31]

Another variant of weak copyleft license would be artistic license used in the Perl code[32], the license allows modification and the mingling of proprietary and open source code[33] provided a prominent notice is given of the change.[34]

Non- Copyleft License

The Non- Copyleft licensing model allows modification, redistribution of the FOSS and gives the liberty to license the whole of a derivative software program containing portions of FOSS under any licensing regime including the proprietary one.[35] X Window System, X11,[36] Berkeley Software

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[28] *The GNU Lesser General Public License*, Version 3.0, Online: Open Source Initiative: <http://opensource.org/licenses/LGPL-3.0>

[29] *Mozilla Public License*, Version 2.0, Online: Open Source Initiative: <http://opensource.org/licenses/MPL-2.0>

[30] Julien Ponge, The *Mozilla Public License, Version 2.0: A Good Middle Ground?* Online: Julien Ponge Blog <https://julien.ponge.org/blog/mozilla-public-license-v2-a-good-middleground/>

[31] Sen, *supra* note 23

[32] Perl License, *Various Licenses and Comments About Them*, Online: GNU Operating System <http://www.gnu.org/licenses/license-list.en.html#PerlLicense>

[33] Lerner & Tirole, *supra* note 17 at 23

[34] *The Artistic License*, Clause 3, Online: Perl Core Development <http://dev .perl.org/licenses/artistic.html>

[35] *Non Copy-lefted Free Software*, Categories of Free and Non Free Software, Online: GNU Operating System <http://www.gnu.org/philosophy/categories.html#Non-CopyleftedFree Software>

[36] *Summaries of New Features in X11R7.7*, Release Note for X11R7.7, Online: X.Org Foundation <http://www.x.org/releases/X11R7.7/doc/xorg-docs/ReleaseNotes.html# Summary_of_new_features_in_X11R7.7>

Development ("BSD") License[37] are examples of the non- copyleft license.[38] Under this licensing paradigm, the developers are not bound by the FOSS license for derivative work as long the credit is given for the original FOSS in the code. This license is the least restrictive vis-à-vis other variants of the FOSS license.[39]

Alternative variant of licenses is in form of the "opening up" of source code of some of the proprietary code by the commercial companies that is where the source code is made available to open source programmers. [40]

RISKS AND CONFLICTS UNDER THE COPYLEFT REGIME

The nature and components of FOSS license generates various enforceability problems raising concern over effectiveness of FOSS license/ copyleft. This section elucidates certain risks and conflicts associated with the nature of free and open source software and copyleft provisions that shadow its efficacy.

Intellectual Property Misuse Doctrine

The intellectual property misuse doctrine originated in the context of patent misuse, and eventually got extended to even copyright claims.[41] The doctrine, developed from a public policy point of view, requires that the

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[37] *Original BSD License*, Various Licenses and Comments About Them, Online: GNU Operating System <http://www.gnu.org/licenses/license-list.en.html#OriginalBSD>

[38] *Categories of Free and Non Free Software*, Online: GNU Operating System <http://www.gnu.org/philosophy/categories.html>

[39] Sen, *supra* note 23

[40] Lerner & Tirole, *supra* note 17 at 23

[41] Lasercomb Am., Inc. v. Reynolds, 911 F.2d (4th Cir. 1990), Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Services (Lifetime Television) 746 F. Supp. (S.D.N.Y. 1990)

inventor be granted restricted monopoly. In the event that the patentee widens the ambit of monopoly inequitably and contrary to public interest, she may not be able enforce the patent or the license on account of patent misuse.[42] The aforesaid doctrine may impede the enforcement of FOSS license.

Though the courts have not yet applied the intellectual property misuse doctrine in case of copyleft, but have applied it in case of grant back, used in patent cases. Grant back provision requires licensee to provide licensor a license or ownership in the creation or improvement made by licensee.[43] Similar to grant back except more expansive, copyleft makes the licensee disclose the improvement made not just to the licensor but to the world at large.[44] Grant back, with regard to improvements, per se is considered legitimate by the court[45] but when it is extended to the work extraneous to the original one; courts consider it to be patent misuse as it's deemed to be unwarranted extension of monopoly.[46] Drawing parallel from the grant back intellectual property misuse scenario, it can be argued that as is the case with restrictive license such as GPL, extraneous work by the licensee would be expected to be licensed under the same regime, as GPL requires the whole of

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[42] Jere M. Webb & Lawrence A. Locke "Intellectual Property Misuse : Developments in the Misuse Doctrine" (1991) 4 Harv J.L. & Tech 257

[43] *Grant Back Clause*, Online: Business Dictionary <http://www.business dictionary.com/definition/grant-back-clause.html>

[44] Christian H. Nadan "Open Source Licensing: Virus or Virtue" (2001-2002) 10 Tex. Intell. Prop. L.J. 349 at 368 [Nadan]

[45] Transparent-Wrap Machine Corp. v. Stokes & Smith Co. 329 U.S. 637 (1947)

[46] Duplan Corp. v. Deering Milliken, Inc., 444 F.Supp. 648, 699-700, 197 U.S.P.Q. (BNA) 342. 388 (D.S.C.
1977)

derivative work to be licensed in similar fashion. Expecting a licensee to provide the derivations and variations done by her under the FOSS licensing, would constitute intellectual property misuse.[47]

Code Forking, Third Party Hijacking and Viral Licensing

When source code of a FOSS splits into multiple projects that may compete with each other[48], it's called code forking[49] and may lead to fragmentation and uncertainty.[50]

FOSS is allowed to be altered and amended by anyone but is not supervised via any regulatory mechanism. The issue of code forking may, thus, be attributed to a lack of common entity to prescribe certain standards or have power over the common development issues pertaining to FOSS. This may lead to various versions of the software, causing confusion amongst consumers amongst other problems.[51]

Further, the unrestricted nature of FOSS license may cause the problem of third party hijacking- that shares a close bond with code forking. FOSS can be hijacked by commercial proprietary software vendors where they supplement open code with some proprietary code and make the entire code

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[47] David McGowan, "The Tory Anarchism of F/OSS Licensing" (2011) 78:1 U Chi L Rev 207 [McGowan]

[48] It may also happen that the part lifted from OSS is sold as proprietary software; it would come under the ambit of abusive code forking.

[49] Rod Dixon, *Open Source Software Law, Artech House Telecommunications Library* (Norwood: Artech House, 2003), at 23, also see Moshe Bar & Karl Fogel, *Open Source Development with CVS* (Arizona: Paraglyph Press, 2003)

[50] R. Viseur, Forks "Impacts and Motivations in Free and Open Source Projects" (2012) 3:2 IJACSA 117

[51] Natasha T. Horne, "Open Source Software Licensing: Using Copyright Law to Ensure Free Use" (2000-2001) 17 Ga. St. U. L. Rev. 863 at 867

private. Such proprietary code may run parallel to the FOSS, create confusion and possibly dominate the market .[52]

A flip side of the third party hijacking problem, is viral nature of the restrictive license like the GPL. If proprietary software is mixed with the open source software, it is bound to be distributed as open source software. This can affect proprietary software mixed with open source software adversely. Such license is at times therefore called the viral license owing to its infectious and infusing nature.[53]

It is avowed that software governance structure allowing FOSS to evolve and adapt can be adopted for software sustainability and prevent forking and third party hijacking. Further, the use of careful community management can keep a tab on the issue.[54] Contractual structures as discussed later may tender a solution to the problem of forking and third party hijacking but may not be entirely effective.[55] Contract law can however be supplemented by the copyright law to provide a solution.

Chaotic and Undirected Growth

FOSS developers are stimulated by a mix of internal factors such as intrinsic motivation, altruism along with extraneous factors in terms of expected

[52] Lerner & Tirole, *supra* note 17 at 26

[53] Greg R. Vetter, "Infectious Open Source Software: Spreading Incentives or Promoting Resistance?" (2005) 36 Rutgers L.J. 53

[54] Linus Nyman & Juho Lindman, "Code Forking, Governance, and Sustainability in Open Source Software" Technology Innovation Management Review (2013) Online: Technology Innovation Management Review <http://timreview.ca/article/644>

[55] Bruce Kogut & Anca Metiu, "Open-Source Software Development And Distributed Innovation" (2001) 17: 2 Oxf. Rev. Econ. Pol. 248

future returns, personal needs.[56] Professor Benkler, analyzes and divides the motivation of OSS developers into three categories: “monetary rewards (which can be substantial for service-type contracts), intrinsic hedonic rewards (a sort of "play ethic"), and social-psychological rewards (pleasure from increasing one’s status in the eyes of others through meaningful contributions to a project)”.[57]

It is argued that the development of code under an open source model can be frenzied and sans any sense of particular direction of the growth as the progress is contingent on the developers who do not have any fiscal motivation for enhancement and innovation of the code and are not subjected to any regulatory device.[58] The FOSS developers usually volunteer and contribute only in their free time.[59]

The lack of any regulatory regime and industry standards for the development of free and open source software leads to a disarrayed growth of the free and open source software.

THE ENFORCEABILITY PREDICAMENT OF FOSS LICENSING

A typical proprietary software license is in the form of a click wrap[60] or a shrink-wrap[61] license. The license serves as a gateway and assenting to them

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[56] Alexander Hars and Shaosong Ou, “Working for Free? Motivations for Participating in Open-Source Projects” (2002) 6: 3 International Journal of Electronic Commerce 25 at 26

[57] Yochai Benkler, “Coase's Penguin, or, Linux and the Nature of the Firm” (2002)112 YALE LJ. 369

[58] Richard P. Gabriel & William N. Joy, *Sun Community Source License Principles*, Online: Oracle <http://www.oracle.com/us/sun/index.htm >

[59] *Supra* note 51 at 867

[60] “A typical click wrap agreement requires the user to click on “Okay”, “I Accept” or “I Agree” button a pop window or dialogue box before using the software product”, Click wrap

allows entry in terms of usage of software. User is required to manifest assent via some affirmative action including clicking on "I Accept" before downloading software or tearing open the packaging in the case of a shrink-wrap license.[62]

Open source licensing provides for a simplified mechanism. Instead of clicking through a click wrap agreement or acceptance of a shrink-wrap agreement accompanying a software package, the open source licenses have the sole requirement of providing a notice in or along with the code. No explicit manifestation of consent from the user is needed to evince that licensee agreed to terms and conditions of the license. This simplified mechanism poses potential risk as the licensee may not actually be even seeing the license or agreeing to it, in the event it's seen.[63]

For instance, the BSD license states only one stipulation that is of retaining copyright notice and the list of condition of license.[64] GPL license requires the user to "keep intact" all notices, carry "prominent notices" of modification, and "conspicuously" place copyright notice.[65] Under the GPL license, there is no requirement to accept the GPL license per se to receive or

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Agreement, Online: Technopedia <https://www.techopedia.com/definition/4243/clickwrap-agreement>

[61] "A shrink wrap agreement is a end user license agreement enclosed with the software product and use of the same constitutes acceptance of agreement and puts it to effect", Shrink Wrap License, Online: Whatis.com <http://whatis.techtarget.com/definition/shrink-wrap-license>

[62] Nadan, *supra* note 44 at 362

[63] *Ibid* at 362

[64] *The BSD 3 Clause License*, Clause 1, Online: Open Source Initiative <https://opensource.org/licenses/BSD-3-Clause>

[65] *Supra*, note 22, Clause 4 and 5

run copies of the software, nevertheless any propagating or modification of the software would be deemed as acceptance of the GPL license.[66] Availability of FOSS license as a warning notice does not require the user to take any pro- active step to accept the license, and hence enforceability is a matter of major concern.[67]

It can be argued, that such notices may not actually be discerned. For instance, in case of BSD license, the notice may be placed in the middle of the code as there is no proscription against it or a requirement to do otherwise. Similarly in case of GPL, the copy of the license distributed with the code may be placed in an inconspicuous file that the licensee does not see. In such cases, user cannot be said to have manifested his assent to the terms of the license or even have notice of them, and thus cannot be bound by the license.[68]

Implication of a license is contingent on diverse factors such as the conduct of the parties, terms and conditions of the agreement along with reasonable expectations ensuing from it, stipulation with regard to equity and fairness, and the underlying policies of the intellectual property system."[69]

Though, a party cannot evade the terms of a contract under the pretext of not reading it before accepting, however this rule would not apply in the event "the writing does not appear to be a contract and the terms are not called to

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[66] *Ibid*, Clause 9

[67] David Marchese and Iain C. Baillie, *Business Licensing Agreements (Longman Commercial)*, (London: Sweet & Maxwell, 1994)

[68] Nadan, *supra* note 44 at 366

[69] Jay Dratler, Jr. & Stephen M. McJohn, *Licensing Of Intellectual Property (Commercial Law Intellectual Property Series)*, 9th Ed (New York: Law Journal Press, 2000) at § 3.04[1]

the attention of the recipient"[70]. In *Specht v. Netscape Communications Corp.*[71], the online offer of the agreement "did not carry an immediately visible notice of the existence of license terms or required unambiguous manifestation of assent to those terms." The court stated that the mention of the terms of license "on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms". The court ruling categorically stipulated that "reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility".[72]

The FOSS license is dependent on a mere notice which a user perhaps did not even see. Such scenario fits squarely within the fact situation stated in *Specht v. Netscape Communications Corp. 306 F.3d 17 (2d Cir. 2002)* The FOSS license may not be visible or be in between the code and thus not appear as writing of the contract, consequently the user would not be bound by it. The effectiveness and success of "notice" form of license is contingent and precariously based on the visibility and actual notice taken by the user of such license. The user cannot be held by a contract that he is not aware of.[73]

Open source code is unambiguously made available with the purpose of use, modification and distribution. Thus, if the licensee is using the code, she either has an implied license or is infringing. There are, nevertheless,

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[70] Marin Storage Inc v. Benco Trucking, 107 Cal. Rptr. 2d 645 (2001)
[71] 306 F.3d 17 (2d Cir. 2002)
[72] *Ibid* at 28
[73] Nadan, *supra* note 44 at 366

limitations with regard to both the implied license and imposition of infringement liability. Given that FOSS is a work of collaboration and includes works of various authors, the implied license cannot extend to those parts of the code received from others under as the author distributing the work cannot pass on more rights than she received[74]. The rights that were passed on to the distributor are subject to the limitation of FOSS license, the distributor cannot allocate those portions of code with lesser limitations.[75]

In any case, if due to the inconspicuous license notice mechanism of FOSS the licensee does not receive notice, it would be unjust to impose infringement liability on the licensee owing to the download and use of the code, which is actually the intended purpose of FOSS.[76]

A resolution to the issue of acceptance of FOSS licensing agreement can be to subject it to a clickwrap form, by having a code download site where users are made to pay heed to the license notice and click on "I Accept" or it's variant. Another approach would be to put a conspicuous notice on download page that the FOSS is subject to specified FOSS license. However, FOSS allows unrestricted copying and distribution, thus the license may bind the distributor's licensee but not licensee's licensee. Thus the downstream distribution and licensees would not be bound by unseen notice of FOSS license.[77]

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[74] Also See, the *nemo dat quod non habet* i.e. nemo dat rule which means that no one gives what he doesn't have. *Nemo Dat*, Oxford Dictionaries, Online: Oxford Dictionaries: <http://www.oxforddictionaries.com/definition/english/nemo-dat>
[75] Nadan, *supra* note 44 at 366
[76] *Ibid* at 367
[77] *Ibid* at 367-368

For making the FOSS licensing mechanism effective, this paper supports the contract mechanism and copyright law for the enforcement of FOSS license and the interplay of the two for the same.

Enforcement of FOSS License: Contractual Framework

The next imperative question the licensing mechanism of open source license raises is that of its enforceability. Many have averred that what FOSS license creates is a virtual contract that trickles down via a distribution chain.[78] This part of the paper considers the question of whether the FOSS license can be considered as a contract given that open code licenses provide a mere notice and there is a lack of any formal agreement.

Scholars have argued in favor of a contractual paradigm for protection of the interest of the parties to the contract via clear cut contractual rights. Such rights are deemed to increase transactional certainty and security with regard to enforceability and protection of the terms of FOSS license.[79]

Eben Moglen viewed FOSS licenses as a wide ambit permission granted to the licensee with certain conditions. He argued that the violation of copyleft is corrigible via "quiet initial contract" or through confidence building measures initiating FOSS compliance programs.[80]

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[78] Andr´es Guadamuz Gonz´alez, "Viral Contracts or Unenforceable Documents?" (2004) 26:8 E.I.P.R 331 at 331

[79] Robert A. Hillman & Maureen O'Rourke, "Rethinking Consideration in the Electronic Age" (2010) Online: Cornell Law Faculty Publications, Paper 1063 < http://scholarship.law.cornell.edu/facpub/1063> [Hillman]

[80] Eben Moglen, *Enforcing the GNU GPL* (2001), Online: GNU Operating System: http://www.gnu.org/philosophy/enforcing-gpl.en.html

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Using a contractual mechanism for FOSS license enforcement raises issues with regard to: (a) existence of a contract in the first place entailing concern over mutuality of intent for entering into a contract and consideration for the same and; (b) enforceability, in the event the contract is deemed to exist and the damage that can be awarded given there is no monetary consideration involved and sparing limitation on the usage of open code. Such concerns encompass the issue over lack of consideration, mutuality of intention to form the contract, privity of contract and the remedies available for breach of license.

It is often contended that given that FOSS developers/ licensors are not demanding financial gains or limiting the use, measuring consideration and damage may not be feasible, thus using the law of contract for enforceability poses difficulty.[81]

Robert A. Hillman and Maureen O'Rourke, argue that open source transactions fall within the ambit of contract. The rationale behind consideration, they contend, is enforcement of promises that augment the wellbeing of the society and serve as means of judicial enforcement, as what code developer seeks is integrity of the code and letting the society reap the benefit of the software and in the process bring social change.[82]

The U.S. Federal Court decision in *Jacobsen v. Katzer* is a prominent in this regard. Court in this case held that:

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[81] McGowan, *supra* note 47
[82] Hillman, *supra* note 79

> The lack of money changing hands in open source licensing should not be presumed to mean that there is no economic consideration, however. There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public licenses that range far beyond traditional license royalties. For example, program creators may generate market share for their programs by providing certain components free of charge. Similarly, a programmer or company may increase its national or international reputation by incubating open source projects. [83]

Thus, as far as consideration is concerned, the lack of the same in FOSS license cannot impede its enforcement.[84]

Further, the issue of mutuality of obligation is linked to the enforcement of FOSS license. It can be argued that the contract forms a unilateral offer in the form of a promise to not sue in the case modification or distribution of code abides by the limitation of license, and till the time the licensee does not make any variation, the offer has not been accepted. However, the better way of looking at it is to perceive formation of contract between the parties when the licensee acquires the software. The acquisition of the software ought to be considered as implied acceptance of the offer and creation of a contract.[85]

The original work and the FOSS license are owned by the author, licensee has conditional permission for the usage of code. It can be argued that

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[83] 535 F-3d 1373, 1376 (Fed. Cir. 2008) at 8
[84] Matthew D. Stein, "Rethinking UCITA: Lessons from the Open Source Movement", (2006) 58 ME. L. REV. 157
[85] Hillman, *supra* note 79

licensee passing on the code to another, raises concern over privity of contract. However, it is important to note that OSS license are non exclusive, transferable license, thus privity of contract should not be a matter of concern.[86]

However, even if contractual enforcement is used for FOSS license, remedies available in case of breach of such contract are a matter of concern. It is difficult to measure damage in case of breach given FOSS does not have monetary consideration and even the usage of the code is not constricted if it is in accordance with the terms of license. The FOSS authors are not motivated by monetary incentives or charge for their work; hence monetary damages may not be useful. [87] The often used remedy of specific performance too perhaps cannot be used over a bare license. The remedies in case of FOSS can be innovative in nature, which helps safeguard, protect and promote the open source license. The disputers therefore may be resolved by resorting to settlement agreement[88] allowing the use of intellectual property.[89]

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[86] Joseph Feller, *Perspectives on Free and Open Source Software*, Brian Fitzgerald, Scott A. Hissam & Karim R. Lakhani, eds (Cambridge: The MIT Press, 2007)

[87] David Ferrance, "Economic Interests And Jacobsen V. Katzer: Why Open Source Software Deserves Protection Under Copyright Law" (2009) 39 New Mexico L. Rev. 549 [Ferrance]. *Also see*, Michael R. Overly, "Legal Implications of Open Source Software", *The Open Source Handbook* (Pike and Fisher, Inc: Maryland, 2003)

[88] Free Software Foundation v. CISCO 08-CV-10764. Free Software Foundation had sued Cisco Systems for infringement of GPL. Eventually, party reached a settlement where Cisco appointed a director to ascertain compliance of its products with free software license and made financial contribution to Free Software Foundation, *Free Software Foundation Files Suit Against Cisco for GPL Violations* (December 11, 2008), Online: Free Software Foundation <http://www.fsf.org/news/2008-12-cisco-suit> and FSF Settles Suit Against

Last but not the least, FOSS license binds multiple parties and the enforcement of license will pose certain difficulties. Given the large number of parties and no formal requirement for signing the contract, it can be difficult to identify contracting parties. The parties may belong to separate jurisdictions governed by different laws of contract.[90] To counter the problems not absolved by the contract law, the next section of the paper discusses enforcement of open source license under the copyright law.

Enforcement of FOSS License: Copyright Law

For the effective and easy enforcement of FOSS license, it is submitted that copyright law can be put to use, especially in light of the shortcoming of the contract law that it tries to plug. As David Ferrance put forth that

> Enforcing open source licenses in copyright reduces transaction costs as there is no requirement for consideration, parties do not need to seek out one another and negotiate. Given that copyright law is [national in nature][91], and indeed enjoys some degree of international harmonization, authors and users alike avoid the need to determine the meaning of the license in numerous jurisdictions.[92]

Cisco (May 20, 2009), Online: Free Software Foundation <https://www.fsf.org/news/2009-05-cisco-settlement.html>

[89] Open Source Litigation, Online: Rosen Law and Einschlang Technology Law Offices <http://www.rosenlaw.com/pdf-files/Rosen_Ch12.pdf>

[90] Ferrance, *supra* note 87

[91] Richard Stallman, *Don't Let Intellectual Property Twist your Ethos* (2006) Online: GNU Operating System <http://www.gnu.org/philosophy/no-ip-ethos.html>

[92] Ferrance, *supra* note 87

Protection under copyright mitigates the concerns about damages as well. An example would be the case[93] in front of Bochum District Court in Germany. While dealing with defendant's failure to comply by the GNU Lesser General Public License (LGPL) in relation to software developed by the plaintiff, court held that the defendant's non- adherence with LGPL amounts to copyright infringement. Applying the license analogy, court held that damage can be claimed notwithstanding the fact that FOSS license is granted sans any cost.[94]

However, the protection to open code under copyright does not cover unrelated work or preexisting work. Copyright in a derivative[95] or collective work solely covers those components of such work that belong to the copyright claimant.[96] Copyright in a derivative work contains two sets of right, one owned by the original author in the original content and the copyright for the new contribution belonging to the new author. Ergo, the original work under the open code cannot possibly be protected entirely by the FOSS license for it might be proprietary in nature.[97] For instance, the restrictive FOSS license has the precondition of licensing the derivative work under the same license which may infect separate works which could be

[93] 20 January 2011 – I-8 O 293/09

[94] Tim Engelhardt & Till Jaeger eds, "Introduction to Software Protection under German Law" in *The International Free and Open Source Software Law Book*, Online: The International Free and Open Source Software Law Book <http://ifosslawbook.org/germany/>

[95] A derivative work is recasting, transformation, or adaptation of one or more preexisting works. Andrew LaFontaine, "Adventures in Software Licensing: SCO v. IBM and the Future of the Open Source Model" (2005-06) 4 J. on Telecomm. & High Tech. L. 449

[96] David Nimmer & Melville B. Nimmer, *Nimmer On Copyright*, (New York: LexisNexis, 2004) at § 10.01 N. 73.1

[97] *Supra*, note 95

proprietary in nature. Using copyright to protect such work added to a FOSS, would constitute copyright misuse as discussed earlier.[98]

Thus, as Christian H. Nadan averred, copyleft licenses perhaps cannot provide holistic protection as it would not include separate work of the licensee or other independent code and including such work in OSS can invalidate copyright in the entire OSS program at least provisionally. Copyright can be employed effectively if used within its potential limitation.[99]

Enforcement of FOSS License: Contract vis-a-vis Copyright Framework

In the case of *Jacobsen v Katzer*[100], the U.S. Federal Court used the contractual construct for the artistic license in question in the case, but did not dismiss the licensing aspect of the license. The court noted that "in exchange and in consideration for the collaborative work, the copyright holder permits users to copy, modify and distribute the software code subject to conditions that serves to protect downstream users and to keep the code accessible". Court further stated, "if the terms of the '…' license '….' violated are both covenants and conditions, they may serve to limit the scope of the license and are governed by copyright law. If they are merely covenants, by contrast, they are governed by contract law".

[98] Nadan, *supra* note 44
[99] *Ibid*
[100] 535 F-3d 1373, 1376 (Fed. Cir. 2008) at 7

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Contract and intellectual property law while working in collaboration with each other acts as a fulcrum that benefits the parties and the society.[101]

The test for determining whether FOSS license would fall under the ambit of contract or copyright is to examine whether the terms are conditions to a license or covenants to a contract.[102] Robert A. Hillaman and Maureen O'Rourke stated, in the event,

> Licensee also promises to abide by the copyleft term (licensee promises to distribute the software only upon revealing the source code) but ignores the term and distributes the software without revealing the source code, the licensor may also sue for breach of contract unless intellectual property law would preempt the claim.[103]

Before a party can be allowed to reap the benefits of copyright enforcement, it is required to firmly ascertain that the rights it claims were violated are copyright, not contractual rights.[104]

In *Jacobsen v Katzer*[105], the U.S. federal court upheld the validity of open source license and the infringement of copyright in open source code by using contractual framework. The judgment in Jacobsen was further corroborated by U.S. district court of Northern California in XimpleWare, Corp v. Versata Software, Inc. et al.[106] In Ximple Ware, the defendant copied

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[101] Hillman, *supra* note 79
[102] Ferrance, *supra* note 87
[103] Hillman, *supra* note 79 at 333
[104] Sun Microsystems, Ine v Microsoft Corp 909 F2d 1332 (9th Circuit 1990)
[105] *Supra*, note 100
[106] No. C 13- 05160 SI, Also see Sylvia F. Jacob, The Versata Case: Third Party Beneficiary Able to Bring Infringement Claim of Copyright Obligation in State Court, Online: ifrOSS

and distributed plaintiff's GPL license without the required copyright notice under the license, hence infringing the copyright. The district court quoted Jacobsen stating that "a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for infringement". The court held that the defendant had copied and distributed the FOSS in question without any authorization. This case reaffirmed enforcement and validity of the FOSS license.

In sum and substance, it can be averred that copyleft license provide double pronged protection to the open code via contractual restriction in form of the license terms and conditions and through the protection offered under the copyright law.[107] Ergo, open source software though plagued with myriad concerns, is given legal effect and prevented from misuse via contract and copyright law.

IN SUPPORT OF COMPONENTS OF OPEN SOURCE SOFTWARE

The next section of the paper supports the components of the open source code by drawing support from the doctrine of idea- expression dichotomy, the utilitarian and social planning theory of intellectual property, the instance of "tragedy of anti- commons."

<http://www.ifross.org/en/artikel/versata-case-third-party-beneficiary-able-bring-infringement- claim-copyleft-obligation-state>

[107] *Supra*, note 78

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Idea- Expression Dichotomy

Softwares are generally treated as blackbox[108] whereas the information about its functionality governed by source code is unknown. Copyright in software thus protects everything in that black box.[109]

By protecting the source code, the copyright owner in the software gets the monopoly on the functional structure of the program "which constitute the ideas underlying the program" [110]. For instance, if we draw parallel from the patent law, it requires full disclosure of the ideas and principle behind the patentable good in question. Copyright law on the other hand allows the functional elements of the work to stay concealed. As Wee Loon averred,

> it is incongruous that patent law, which protects novel and inventive ideas and principles, should compel full disclosure of the idea or principle in the claims and specifications so as to allow the public access to such information; while copyright law which protects works, '…….' [satisfying] only the less stringent requirement of originality, should allow the functional elements of the works to be hidden from the public's study. [111]

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[108] "Black box model: A software or hardware development method in which the developer is able to input to and receive output from the product but has no access to its internal workings," *Black Box Model*, Online: The Free Dictionary <http://www.the freedictionary.com/black+box+model>

[109]Brett Frischmann & Dan Moylan, "The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and its Application to Software" (2000) 15:3 Berkeley Tech. L.J. 865

[110] Ng- Loy Wee Loon, "Reverse Engineering of Computer Programs: Rethinking its Prohibition" (1994) 6 S.Ac.L.J. 131 at 134

[111] *Ibid* at 134

Utilitarian and Social Planning Theory

In *Twentieth Century Music Corp. v. Aiken*, the court while elaborating the twofold rationale behind copyright stated that though,

> creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability '…'. The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.[112]

The FOSS perhaps can be corroborated further using the theories of intellectual property. The utilitarian theory of intellectual property emphasizes on maximizing net social welfare and creating a balance between creation of work with exclusivity vis a vis side effect such exclusivity has on wide spread enjoyment of such work. FOSS by giving the license to innovate and create new work based on the existing one, supports development of code and thus maximizes net social welfare[113].

Furthermore, the Social Planning Theory suggests that the intellectual property rights should be fostered in a way to promote the achievement of a just and attractive society. It further advocates increasing the size of public

[112] 422 U.S. 151 (1975)
[113] William Fisher, "Theories of Intellectual Property" Stephen R. Muzner ed, in *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001)

domain available for creative manipulation. Again, FOSS by providing the source code, unlocks an open field for development[114].

The Tragedy of Anti-Commons

Limitation of usage imposed by copyright law has led to the tragedy of the anti-commons, the right under copyright law meant to promote work in the area of copyright protection, may limit such growth owing to restrain on access. The transaction cost for innovation and research is contingent on access to information, material and tools protected by intellectual property rights that involves cost and time, which in turn impedes innovation, development and creation of knowledge.[115] FOSS addresses this problem by making the information in form of code freely available and accessible, thus promoting innovation and development of code.

CONCLUSION

Lessig once noted that "open code is the only strong idealism" that evinces the value in commons. "It is the only place where we can prove that balance and the commons does something good- for innovation, for creativity for growth."[116]

Creating a balance between promoting innovations and fulfilling the demands of software developers and users form an imperative character of contemporaneous software policy. Open source software allows developers

[114] *Ibid*
[115] Joseph Savirimuthu, "Open Source, Code and Architecture: It is the Memes Stupid" (2005) 19 Int'l Rev. L. Computers & Tech. 341
[116] *Supra*, note 86 at 359

to innovate. The advocates of the open source software, however, believe that incentives are not a requisite for innovation as the developers are steered by intrinsic motivation and freedom to develop the code. The focus should therefore be on maintaining non- proprietary nature of software.[117] It is important to note, that open source does not indicate free software in the sense of zero price,[118] but the freedom of sharing, innovating and developing software by providing the source code. Open source code can make money through various mediums such as by selling the hardware, and giving away the software like IBM vends server loaded with Linux operating system[119]; by using the dual licensing model where software can be obtained under free software license of proprietary model[120] as is the case with MySQL software[121].

What open source code strives to do through use, copying, distribution and variation is to stretch the periphery of freedom for software development. As Richard Stallman stated free and open source software "promotes social solidarity- that is, sharing and cooperation. They become even more important as our culture and life activities are increasingly digitized. In a world of digital sounds, images, and words, free software becomes

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[117] John R. Homas, "Intellectual Property, Computer Software and the Open Source Movement" in John V. Luong eds, *New Intellectual Property Issues* (New York: Nova Science Publishers, 2007), at 57-73

[118] *Why Free Software is better than Open Source*, Online: GNU Operating System <http://www.gnu.org/philosophy/free-software-for-freedom.en.html>

[119] Robert W. Gomulkiewicz, "Entrepreneurial Open Source Software Hackers: MySQL and Its Dual Licensing" (2004- 2005) 9 Computer L. Rev. & Tech. J. 203

[120] Elena Blanco, "Dual Licensing as a Business Model", Online: OSS Watch <http://oss-watch.ac.uk/resources/duallicence2>

[121] *Commercial License for OEMs, ISVs and VARs*, Online: My SQL <http://www.mysql.com/about/legal/licensing/oem/>

increasingly essential for freedom in general[122]". The component of FOSS promotes the same. However, the constituent of the free and open source software does not restrain the legal effect and validity of the open code. FOSS through its licensing mechanism uses the traditional contractual and copyright mechanism for enforcement. Voluntary dispensing and contribution of intellectual property is catching up.[123] In the coming times, the fostering of fast and steady growth of free and open source software cannot be ruled out. Thus, with time open code's legal validity would be further strengthened, and corroborated through development of case law on the subject hinging on the copyright and contractual framework.

[122] Richard Stallman, *Why Open Source Misses the Point of Free Software*, Online: GNU Operating System: <http://www.gnu.org/philosophy/open-source-misses-the-point.html>
[123] Melvin Simensky & Lannin G. Bryer, *The New Role of Intellectual Property in Commercial Transactions*, (New York: John V & Sons Inc, 1996)

SEEKING THE REMEDY OF DIVORCE IN CASES OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE: A MERE PRIVILEGE OR A MATTER OF RIGHT?

Priya Garg*

ABSTRACT

Law Commission of India has suggested that irretrievable breakdown of marriage be provided for as a standalone ground for any party to a irreparably broken marriage to seek the relief of dissolution of martial ties. This is because irretrievable breakdown of marriage as a ground for divorce serves such functions and meets such objectives which could not be served or met in absence of such ground. However, despite several such suggestions, be it by the Law Commission or by law courts, the relevant personal laws continue to remain unameded. Amidst this inaction by the Legislature, party who seeks to dissolve marriage on the ground of irretrievable breakdown of marriage, tries to seek this relief from courts as a matter of 'privilege' instead of it being claimed as a matter of 'right'. This is because usually the aggrieved party tries to evoke the inherent or extra-ordinary powers of the High Court or the Supreme Court in such cases. However, in this paper, the author adopts a unique line of reasoning which shall go on to assert that if such reasoning is adopted, it would emerge that even in absence of irretrievable breakdown of marriage as a separate ground to seek divorce,

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such relief could be claimed as a matter of right by evoking the writ jurisdiction under Articles 226 or 32. In presenting this line of argument, the author also suggests a new possibility of interpreting the term 'law' under Article 13 of the Indian Constitution. Hence, the discussion in this Article becomes crucial from the perspective of both Family law and Constitutional law.

INTRODUCTION

Irretrievable breakdown of marriage is a situation when the marriage becomes virtually dead beyond any hope of being repaired, when the mutual animosity of the spouses replaces the feelings of love and warmth between them.[1]

Under the Hindu Marriage Act, 1955 (hereinafter, the Act), irretrievable breakdown of marriage has not been provided for as a separate ground for seeking divorce.[2] However, it is essential, primarily due to three reasons that this becomes an independent ground to dissolve the marriage. Firstly, in a marital dispute before the Courts of law, mostly the parties exchange accusations at each other which makes the battle a muddle. However, if this new ground is introduced, then there would be no need for the parties 'to wash their dirty linen in public'.[3] Secondly, this ground does not require any spouse to establish any of the faults recognized, under Section 13 of the Act,

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[1] See 217th Law Commission of India Report, *Irretrievable Breakdown of Marriage: Another Ground for Divorce*, (2009), available at http://lawcommission ofindia.nic.in/reports/report217.pdf.
[2] See S. 13, The Hindu Marriage Act, 1955.
[3] http://lawcommissionofindia.nic.in/51-100/report71.pdf 15

against the other spouse. As a result, spouses can seek divorce even when none of the faults under Section 13 of the Act can be attributed to either party.[4] Lastly, in case of existence of such separate ground, any of the marital faults recognized as grounds for divorce under Section 13 of the Act on the part of any of the spouses shall not bar him to approach the Court to seek divorce.[5]

There have been numerous cases where courts have found themselves powerless to dissolve the marriages which have broken down irretrievably.[6] Consequently, in some cases, courts have suggested the Legislature amend the Act to include 'irretrievable breakdown of marriage' as a separate ground of divorce.[7] The Law Commission of India also emphasized upon the need to introduce this additional ground for dissolution of marital ties.[8]

Despite this, the law remains unaltered. The only recourse that the parties have been able to find in cases of irretrievable breakdown of marriage are a) to argue this ground as a means to establish any other recognized grounds provided for under Section 13 to seek divorce,[9] or b) to seek divorce from the

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[4] See 71st Law Commission of India Report, *The Hindu Marriage Act, 1955- Irretrievable Breakdown of Marriage as a Ground of Divorce*, (1978), available at http:// lawcommissionofindia.nic.in/51-100/report71.pdf.
[5] Ibid, at 15.
[6] Vijender Kumar, *Irretrievable Breakdown of Marriage : Right of a Married Couple*, 5:1 Nalsar Law Review, 15, 21-22 (2010), available at https://www.nalsar.ac.in/pdf/Journals/Nalsar%20Law%20Review-Vol.%205.pdf, last seen on 23/01/2017.
[7] Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675; Ms. Jorden Diengdeh v. S. S. Chopra, AIR 1985 SC 935; See Ram Kali v. Gopal Das, (1971) I.L.R. 1 Delhi 10 (F.B.); Blunt v. Blunt, (1943) All. E.R. 76, 78 (H.L.).
[8] Supra 1 & 4.
[9] V. Bhagat v. D. Bhagat, AIR 1994 SC 710.

Apex Court in its exercise of its extra-ordinary powers granted to it under Article 142 of the Indian Constitution.[10] However, there are many limitations to seeking a remedy under Article 142. First, such a relief can only be sought from the Supreme Court.[11] Second, since it is an extra-ordinary power meant to be exercise sparingly, the Court would be hesitant to exercise it, unless the petitioner can present the rareness of his case.[12] Third, seeking remedy under Article 142 is a matter of mere privilege and not that of right for the petitioner.[13]

Amidst these circumstances, the author suggests a new line of argument involving a hitherto unexplored approach towards interpreting Article 13[14] of the Constitution. This may ensure that the spouse, who is unilaterally seeking divorce in instances where the marriage has irretrievably broken down, can claim it as a matter of right and that such relief can be sought from both the Supreme Court and the High Court.

Therefore, this article aims to add to the discourse of not only Family law, but also that of the Constitutional law.

However, the author takes it for granted that the personal laws which have been codified into the statutes are 'law' under Article 13 and, hence, can be

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[10] Hereinafter, the Constitution.
[11] Supra 6, at 30.
[12] Ibid.
[13] Ibid.
[14] "*Laws inconsistent with or in derogation of the fundamental rights.. (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.*".

subject to judicial review.[15] Further, the author approaches the issue of omission by the State to provide for the contingency of irretrievable breakdown of marriage only for those marriages which have been solemnized under the Hindu Marriage Act, 1955. These are perfectly valid marriages, which are neither void nor voidable under Sections 11[16] and 12[17] of the Act. Additionally, the author does not approach this issue for the need to have irretrievable breakdown of marriage as a ground for divorce from a theoretical perspective;[18] instead the issue has been analyzed purely from the perspective of Constitutional law.

THE PROPOSED NEW ARGUMENT TO SEEK RELIEF AS A MATTER OF RIGHT

The author suggests that a spouse in a virtually dead marriage can seek the relief of divorce under Article 32[19] of the Constitution by arguing that denial of such relief by the State, despite the irretrievable breakdown of marriage, violates his rights guaranteed under Article 21[20] of the Constitution.[21]

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[15] Anil Kumar Mahsi v. Union of India, 1994 SCC (5) 704; Madhu Kishwar v. State of Bihar, 1996 SCC (5) 125*;* Githa Hariharan v. Reserve Bank of India, AIR 1999 SC 1149; Danial Latifi v. Union of India, 2001 AIR SCW 3932; John Vallamattom v. Union of India, AIR 2003 SC 2902 (Therefore, it is only those personal laws which continue to remain uncodified regarding which the Courts refuse to analyze the law as per Article 13 of the Indian Constitution).

[16] S. 11, The Hindu Marriage Act, 1955 (Section 11 provides for circumstances in which marriage solemnized after the commencement of this Act shall be null and void).

[17] S. 12, The Hindu Marriage Act, 1955 (Section 12 provides for the grounds on the basis of which the marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity).

[18] Supra 4, at 11, 12.

[19] Art. 32, the Constitution of India (Right to approach the Supreme Court to seek the writ remedy for violation of fundamental rights by the State).

[20] Art. 21, the Constitution of India (Protection Of Life And Personal Liberty).

Till date, the argument, that the denial of relief of divorce in cases involving irretrievable breakdown of marriage violates Article 21 of the petitioner spouse, has been reported to have been made only once.[22] In 2010, esteemed lawyers such as Mr. Harish Salve and Mr. Mukul Rohatgi argued against Section 13-B of the Act, stating that denial of the remedy of dissolution of marriage despite its irretrievable breakdown violates the Article 21 and Article 14 rights of the petitioner spouse as Section 13-B poses a hindrance in the path of the aggrieved spouse from seeking divorce by requiring him/her to mandatorily seek the consent from the other spouse to dissolve the marriage if none of the grounds stated under Section 13 of the Act can be availed for such dissolution.[23]

The literature review of the author reveals that till now it has not been argued that 'omission' by the State to provide for irretrievable breakdown of marriage as a separate ground of divorce under Section 13 of the Act violates the spouse's/spouses' fundamental rights under Article 21. This is suggested by this author and there is a trick involved in such line of argumentation.

In order to seek a declaration that a law is unconstitutional for its violation of fundamental rights, there needs to be some provision in existence whose

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[21] The presentation of such a petition would be possible even if one of the spouses does not join in the filing of the petition, or even opposes it.

[22] *Shinde's Daughter Moves SC For Divorce*, The Times of India (17/01/2009), available at http://timesofindia.indiatimes.com/india/Shindes-daughter-moves-SC-for-divorce/articleshow/5346113.cms, last seen on 23/01/2017; Krishnadas Rajagopal, *Citing Own Case, Shinde Daughter Questions Law On Divorce*, The Indian Express (17/12/2009), available at http://indianexpress.com/article/news-archive/web/citing-own-case-shinde-daughter-questions-law-on-divorce/, last seen on 23/01/2017 (The case is not reported to have been decided).

[23] Ibid.

effect should amount to such violation. However, under Section 13 *per se* there exists no restrictive provision, similar to that under Section 10[24] of the Indian Divorce Act,[25]that can be challenged on the ground that such individual provision violates the rights of an individual under Article 21 by compelling him to stay in the marital relationship despite its irretrievable breakdown.[26] This can, perhaps, explain the reason behind not challenging the absence of irretrievable breakdown of marriage as a ground for divorce on the ground that such absence *simplicitor* amounts to violation of the Right to Life guaranteed under Article 21 (Right to Live with Dignity and Right to Personal Liberty) of the petitioner spouse/spouses.

However, the author suggests that a writ can be filed by an aggrieved spouse, either under Article 32 or under Article 226 on the ground that it is due to 'the combined or the cumulative effect' of Sections 5[27], 13[28] and 13B[29] of the Act that the fundamental right of the petitioner spouse stands violated and that these provisions ought to be declared unconstitutional. This is because the State by way of Section 5 provides 'power' to the parties to enter into the legally enforceable relation of marriage and Sections 13 and 13B together provide an exhaustive list of ways through which an exit from the legally enforceable bond of marriage can be obtained; and the grounds provided

[24] Section 10 is a provision discriminatory against women. It imposes a more stringent requirement for women to claim divorce as that imposed for Christian men.
[25] S. 10, The Indian Divorce Act, 1869.
[26] See, Ammini E.J. v. Union of India, AIR 1995 Ker 252; Pragati Varghese v. Cyril George Varghese, AIR 1997 Bom 349.
[27] S. 5, The Hindu Marriage Act, 1955.
[28] S. 13, The Hindu Marriage Act, 1955.
[29] S. 13B, The Hindu Marriage Act, 1955.

under Sections 13 and 13B fail to allow the aggrieved spouse to secure for himself as well as for his spouse the freedom from a dead marital union. Therefore, it is due to the combined effect of the above-stated three provisions that the fundamental right of the aggrieved spouse stands violated.

LEGAL SOUNDNESS OF THE PROPOSED LINE OF ARGUMENTATION

This Section elaborates upon the above-proposed line of argument in terms of its soundness in law.

Omission amounts to the violation of Article 21 rights

First, it is crucial to note that when an aggrieved spouse approaches the Court by filing a writ petition to seek the remedy of divorce or any other suitable remedy, for which he shall argue that Sections 5, 13 and 13B of the Hindu Marriage Act are unconstitutional, then unlike other cases where divorce is sought, the petition's claim for remedy shall not be against his own spouse (i.e. a private person). Instead, such petition shall be strictly against the State for its omission to provide within the Act the important ground of irretrievable breakdown of marriage thereby disabling the spouses to deal with the contingency of the failure of their marriage.

It is first important to understand the scope of Right to Live with Dignity and Right to Personal Liberty before delving into the argument that omission by the State to provide for irretrievable breakdown of marriage as a ground for divorce amounts to the violation of Right to life of at least one of the spouses to marriage.

SEEKING THE REMEDY OF DIVORCE

'Life' and 'personal liberty' include within its ambit even those rights which are enumerated in Article 19 as well as others "which would go to make a man's life meaningful, complete and worth living".[30] Several observations of the Supreme Court indicate that the right guaranteed under Article 21 is a right to 'full enjoyment of life' maintaining the quality of life and dignity of the individual in all respects.[31]

When a marriage breaks down without any scope of its salvage and if the spouses are compelled to stay tied to such marital union, there are two possibilities that may arise. First, the spouses may continue living together. This can happen due to reasons such as societal pressure, economic factors, upbringing of children etc. In such cases, the parties staying in a dead marital cord frequently hurl accusations, insults, taunts at each other.[32] They feel compelled to live under the same roof with a person they dislike. This unhealthy environment may encourage immoral behavior.[33] The home becomes a cold or fiery place instead of being the place of peace or love or a place to socialize. In such circumstances, Court's refusal to come to the rescue of the parties simply because their case does not fall within any of the grounds provided for under Section 13 shall make the petitioner lead life against his own will in favour of the will imposed by an authoritarian law.[34] It will be an oppressed life. The aggrieved spouse(s)

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[30] cited in Ammini E.J. v. Union of India, AIR 1995 Ker 252.
[31] argued in Ammini E.J. v. Union of India, AIR 1995 Ker 252.
[32] See Pragati Varghese v. Cyril George Varghese, AIR 1997 Bom 349 (when such abuses/accusations etc are such that they do not qualify as cruelty for the purposes of Section 13 of the Act).
[33] Supra 4, at 17.
[34] See supra 32; Mary Sonia Zachariah v. Union of India, II (1995) DMC 27.

will not get to choose another partner in life and to enjoy the pleasures of the marital life once again.[35] It will be a life curtailed in various fields of human activity.[36] On the whole, such a life can legitimately be treated only as a life imposed by a tyrannical or authoritarian law on a helpless couple, who are bound till death. Such a life can never be treated as a life with dignity and liberty.[37]

Further, the second situation that may arise is that the parties start living separately despite staying tied to the legal knot of marriage. Even in such voluntary cases of physical separation, Article 21 (Right to Personal Liberty and Right to Live with Dignity) shall stand violated. This is because even in that case the parties stay mentally tied to a dead relation of marriage. They will lack the basic human liberty to choose another partner in life and to enjoy once again all the pleasures that the marital life has to offer, be it the human's fundamental need for companionship or the physiological need for physical relations. The parties may feel compelled to live an immoral life and may hence lose human dignity in their own eyes. They may lose several virtues in their character which would again degrade their human dignity in their own eyes. It is oppressive of a State to

[35] See Ibid.
[36] See supra 1, at 19.
[37] Further, it may be possible that despite such bickering etc either of the spouses refuses to end their marriage by way of mutual consent divorce as provided for under Section 13B. Such a refusal to cooperate may be grounded in feelings of fear about an uncertain future, pressure from family, fear of social stigma, revenge, or due to refusal to accept that the marriage is virtually dead even when it has. Therefore, in such cases, the State is required to play a paternalistic role to relieve the parties from their miseries and sufferings and from the consequences of their wrong or selfish decisions

make such a law which compel a human to live such a life that his moral character and his dignity in his own eyes stand degraded.

Therefore, the right to life guaranteed by the Constitution includes the right to seek dissolution of marriage if its existence is an unbearable suffering.[38]

Such omission fails the substantive due process test

Under the Constitution, any right under Article 21 can be violated if the infringement is backed by a statutory act.[39] However, at present, any law which violates a person's rights under Art. 21 is not *ipso facto* justified merely because it is backed by a legislation. This is because the law so enacted is required to be a just law.[40] Therefore, now the substantive due process has been incorporated in respect to Article 21.[41] This implies that a law is constitutional when the objective it seeks to achieve is proportional to the restriction that it imposes upon any fundamental right.[42]

Under the Hindu Marriage Act, 1955, there is an absolute bar upon the parties to seek divorce solely upon the grounds of irretrievable breakdown

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[38] Argument made in Mrs. Pragati Varghese case, supra 32; Ram Kali case, supra 7 ("*it would not be practical and realistic, indeed it would be unrealistic and inhuman, to compel the parties to keep up the façade of marriage even though the essence of marriage between them has completely disappeared and there are no prospects of their living together as husband and wife*").

[39] See Art. 21, the Constitution of India.

[40] Mithu v. State of Punjab, (1983) 2 SCC 277; Basantibai v. State of Maharashtra, AIR 1984 Bom 366; In Re: Ramlila Maidan Incident Case v. Home Secretary, (2012) 5 SCC 1; Selvi v. State of Karnataka, (2010) 7 SCC 263; Shaikh Zahid Mukhtar v. State of Maharashtra, Writ Petition No. 5731 of 2015 (Bombay High Court, 06/05/2016).

[41] Ibid.

[42] V.N. Shukla's Constitution of India, 172-76 (M.P. Singh, 11th ed., 2008).

of marriage.[43] The two broad reasons that are given in favour of such omission are, first, that in cases where irretrievable breakdown of marriage allows one spouse to terminate the marriage at will without any specific fault of the other spouse, it would be unjust or harsh for the other spouse and second, that providing for such a ground shall be contrary to the principle that no man can take advantage of his own wrong.[44] The latter argument arises because irretrievable breakdown of marriage allows a spouse to claim the relief of divorce even when he has committed any marital wrong stated under Section 13 of the Act.[45] However, as also argued by the Law Commission of India in its report, both such arguments "can only result in insertion of this provision in the relevant legislation with certain safeguards while providing for this additional ground as a means to seek divorce" and they cannot justify an absolute omission of such separate ground to seek divorce.[46] Therefore, the State could have instead imposed restrictions by way of procedural requirements, such as requirement for the parties to stay separate for a certain minimum number of years prior to seeking divorce on the ground of irretrievable breakdown of marriage,[47] or that only in extra-ordinary cases the spouse who has himself committed a marital wrong could seek the relief of divorce, etc. Further, regarding the argument that the Act should not allow any man to take advantage of his own wrong, it can also be highlighted that such a

[43] See, S. 13, Hindu Marriage Act, 1955.
[44] Supra 4, at 15.
[45] Supra 4, at 15.
[46] Supra 4, at 15.
[47] Supra 4, at 2, 11, 13.

thing has already been permitted in the HMA due to the insertion of Section 13 (1A).[48] The Section provides that 'either party' to a marriage may present a petition for the dissolution of the marriage stating that there has been no restitution of conjugal rights between the parties to the marriage for a period of one year or upward after the passing of a decree of restitution of conjugal rights (RCR). Resultantly, even the party who disobeyed the decree of RCR can seek divorce despite committing a wrong himself.[49]

The last argument that can be raised in favour of such omission is that if the Court shall allow the relief of divorce just upon the basis of the proof of irretrievable breakdown of marriage, then parties may not try to resolve their disputes and may consciously or inadvertently cause such breakdown of marriage.[50] The counter-argument to this is that even with respect to this apprehension, the procedural restriction or otherwise can be provided under the law while making irretrievable breakdown of marriage as a ground. For instance, Section 13 uses the phrase "*any marriage solemnized.. **may**, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce*."[51] This means that despite the establishment of grounds stated under Section 13 of the Act by the parties, the discretion vests with the Court to decide if the relief of divorce ought to be granted. Similar provision can be also made while making irretrievable breakdown of marriage as a ground for divorce.

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[48] Supra 4, at 16.
[49] Ibid.
[50] See Evans v. Evans, 161 E.R. 466 – 467.
[51] S. 13, Hindu Marriage Act, 1955.

Therefore, it goes on to establish that a complete omission to provide for this ground to seek divorce is oppressive, harsh, unjustified and unreasonable,[52] and that it is harmful not only to the interest of the spouse seeking divorce on this ground, but also that of the other spouse, children born out of such marriage,[53] the spouses' families, and even society at large. Omission to provide for such ground has been stated to be a policy against public interest.[54]

Therefore, the infringement caused by Sections 5, 13 and 13B fail to satisfy the substantive due process test.

The cumulative effect of different provisions can be subjected to the touchstone of fundamental rights

Although the 'cumulative effect of several provisions amounting to violation of fundamental rights even when individual provision *per se* does not amount to such violation' line of argument has been taken w.r.t Article 32 and 226 of the Constitution has not been used yet, nevertheless, such an approach is legally sound.

This is because the power of judicial review provided for under Article 13 of the Constitution states that "*the State shall not make **any law** which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall..be void*". The term 'law' has not been

[52] See supra 4, 16, 19.
[53] Michael F. Farrel, *No Fault Divorce: A Time for Change*, 7 Suffolk University Law Review 86, 107 (1972-73).
[54] Speech delivered at the inaugural session of the seminar on Hindu Marriage Act and Special Marriage Act, ILI, New Delhi, (1978); the Supreme Court in Savitri Pandey v. Prem Chandra Pandey, AIR 2002 SC 591.

defined under Article 13(3)(a)[55] in its definitional sense because the definition given of the term under Article 13(3)(a) contains an illustrative list to indicate that law includes different forms of delegated legislations as well. Therefore, the debates and ambiguities surrounding the term 'law' under Article 13 (3)(a) hitherto have only revolved around two broad issues. First, if term law includes constitutional amendments; and second, if the term law also includes different forms of delegated legislations (eg., rules, by-laws, administrative orders). Therefore, till now, no controversy has arisen regarding the meaning of the term 'law' under Article 13 in the sense that if the term law implies a single provision within a statute or any delegated legislation taken 'at a time', or whether it can also mean multiple provisions within a given statute or a by-law interpreted together, or whether it can also mean a cumulative effect of provisions across any two or more statutes, two or more statutes and rules taken together, two or more different by-laws to check if some fundamental right is violated.

Oxford dictionary defines law as "*the whole system of rules that everyone in a country or society must obey*".[56] Black's law dictionary defines law as "*the regime that orders human activities and relations through systematic application of the force of politically organized society or through social pressure backed by force, in such a society; legal system*."[57] This implies that the term law under Article 13(2)[58] can also include multiple laws taken all at a time to test their cumulative effect on the touchstone of fundamental rights

[55] Article 13, the Constitution of India.
[56] A.S. Hornby, *Oxford Advanced Learner's Dictionary*, 726-27(6th ed., 2000).
[57] *Black's Law Dictionary*, 889 (Bryan A Garner and Henry Campbell Black, 7th ed.,1999).
[58] Article 13, the Constitution of India.

even when individually neither of them contravene any fundamental right. If this broad interpretation of term law under Article 13(2) is adopted, then the argument that the cumulative effect of Sections 5, 13 and 13B of the Act amounts to violation of fundamental rights stands legally justified.

Alternatively, a narrow interpretation can be given to the term 'law' under Article 13(2)[59] to distinguish between the scope of the term 'law' and 'laws' under Article 13 since the Article uses both the terms. By that approach, there are two interpretations possible. One, that the term 'law' means "*Act of the legislature, as also the by-laws made thereunder*[60] and also the customs or usage having in the territory of India the force of law. This implies that for getting assessed on the touchstone of fundamental rights, the cumulative effect of an Act of the legislature and the by-laws made under it can be taken at a time. Hence, the cumulative effect of two different statutes or a statute on one hand and a by-law under some other statute on the other or a by-law under one statute and that under the other statute could not be assessed to determine if such a cumulative effect amounts to violation of any of the fundamental rights. Second, a further narrower interpretation of the term 'law' for the purposes of Article 13(2)[61] can mean that the term includes only a statute taken at a time, or any of the delegated legislations taken one at a time. And the basis of such a narrow interpretation could be the reading of the definition of the term 'law' given under Article 13(3)(a)[62]. Article 13(3)(a) reads that "law" "*includes any Ordinance, order, bye-law, rule,*

[59] Article 13, the Constitution of India.
[60] See H.G.E. Corporation v. Superintendent of Orissa Excise, AIR 1966 Pat. 248.
[61] Article 13, the Constitution of India.
[62] Article 13, the Constitution of India.

regulation, notification, custom or usage having in the territory of India the force of law."[63] Therefore, it can be read to mean that the term law under Article 13(2)[64] has been used only in its singular sense i.e. an ordinance/order/statute/by-law/rule/regulation/notification/custom/usage, taken one at a time. The implication shall be that the State cannot enact any statute/ordinance//order/statute/by-law/rule/regulation/notification/custom/usage, taken one at a time that amounts to violation of fundamental rights.

However, both these narrow approaches to define the term 'law' for the purpose of Article 13(2) are highly technical. This is because it is only by adopting the broader approach i.e. the interpretation that the term law under Article 13(2) includes 'laws' that the legislative intention behind enacting Article 13 to shield the fundamental rights from the legislature's sword shall remain better safeguarded. Further, the *Maneka Gandhi case*,[65] the interpretation which was also adopted under the *case of PUDR*,[66] stated that fundamental rights should be given their expansive meaning. The natural corollary of this shall be that the term 'law' under Article 13 should be given a broader meaning to include 'laws' so that cumulative effect of any two or more different statutes or/and delegated legislations could be taken into consideration to decide if the fundamental right stands violation due to operation of such multiple statutes or by-laws.

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[63] Article 13, the Constitution of India.
[64] Article 13, the Constitution of India.
[65] 1978 SCR (2) 621.
[66] 1983 SCR (1) 456.

However, even if either of the narrow interpretations of the term 'law' is adopted, then also the argument that the relief of divorce can be sought on the ground that the cumulative effect of Sections 5, 13 and 13B[67] amounts to violation of fundamental right even when such provisions on their own do not lead to such contravention, stands because all of these provisions belong to the same statute[68]. Further, it cannot be disputed that the term law is wider than the term 'provision'. The argument that the cumulative effect of several different provisions amounts to violation of fundamental rights wherein though the individual provision on its own does not contravene the fundamental rights would not have been perhaps legally possible only had Section 13(2)[69] used the term 'provision' as it does under Article 15(3)[70] or Article 15(4)[71] etc as opposed to the term 'law'.

Therefore, the argument herein suggested by the author, that omission by the State to provide for irretrievable breakdown of marriage as a ground of divorce amounts to contravention of fundamental right under Article 21,[72] holds true irrespective of whether that narrow or broad interpretation of the term 'law' is taken.

Further, in present times, the direct and inevitable effects test, instead of the older subject matter test, is used to determine if any legislation under

[67] S. 5, 13, 13B, The Hindu Marriage Act, 1955.
[68] The Hindu Marriage Act, 1955.
[69] Article 13, the Constitution of India.
[70] Article 15, the Constitution of India.
[71] Article 15, the Constitution of India.
[72] Article 21, the Constitution of India.

challenge gets hit by Article 13[73] for its violation of fundamental rights.[74] Therefore, it seems more plausible today than it would have prior to the decision in the evolution of the effects test that we challenge numerous provisions at a time if their cumulative effect amounts to the violation of fundamental rights even if the same provisions at an individual level does not lead to such infringement.

Furthermore, logically speaking, such assessment of cumulative effect of different provisions at least within the same statute could be taken into consideration to determine if it hampers the enjoyment of fundamental rights because keeping two provisions as separate two provisions within the same statute is an instance of 'accident of drafting'. Therefore, it is no reason to leave it to the accident of drafting to determine which provisions can be challenged under Article 13[75] and which two provisions cannot be challenged, for they fall under two different headings.

Therefore, conclusively stating, the spouse could approach the High Court and the Supreme Court by presenting a writ petition arguing that the State has violated his/her fundamental right under Article 21[76] by not giving him the option to exit from the legal bond of marriage on the essential ground that the marriage has broken down.

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[73] Article 13, the Constitution of India.
[74] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[75] Article 13, the Constitution of India.
[76] Article 121, the Constitution of India.

THE COUNTER-ARGUMENT OF WAIVER OF FUNDAMENTAL RIGHTS CANNOT STAND

If the argument is presented before the Court that the cumulative effect of Section 5, 13 and 13B[77] in some cases lead to breach of fundamental rights, it may be possible that the State argues that the parties who are already deemed to be aware of the provisions of the Hindu Marriage Act, 1955 themselves choose to enter into the marital relations and to be governed by the Hindu Marriage Act, 1955. Therefore, they cannot later challenge the provisions under the Act on the ground that non-provision of irretrievable breakdown as a ground for divorce violate their fundamental rights. However, the author believes that such a contention shall not stand because this assertion is indirectly an assertion that the parties who agree to marry waive off their fundamental rights under Article 21. It is an established position of law that waiver of fundamental rights is not valid in the eyes of law.[78]

CONCLUSION

The grounds already made available under Section 13 of the Act to seek divorce are broadly interpreted to provide parties with the relief of dissolution.[79] Despite this, the significance of having irretrievable breakdown of marriage as an independent ground to seek divorce cannot be undermined.[80] However, despite the suggestions to the same by the judiciary

[77] S. 5, 13, 13B, The Hindu Marriage Act, 1955.
[78] Durga Das Basu, *Shorter Constitution of India*, 69-70 (13th ed., 2001).
[79] See supra 1, at 9.
[80] Supra 4, at 19-20.

as well as the Law Commission, the law remains unchanged. Amidst these circumstances, the judiciary cannot choose to assume merely an observer status. Therefore, the author suggests the possible line of argumentation that could be some day presented by some Counsel before the Court to seek relief for his client in cases where the marriage of such spouse has irretrievable broken down.

However, the relief that the court shall grant under Article 32[81] or 226[82], shall depend upon the facts of each case. The Court may not directly grant the relief of divorce. The Court may instead grant the relief of judicial separation or temporary separation with the permission to cohabitate, depending upon the circumstances. Further, if the Court once accepts that the cumulative effect of Sections 5, 13 and 13B amounts to violation of fundamental rights, then it shall be bound to declare the law as void for being unconstitutional. This is because Article 13(2)[83] uses the term 'shall' instead of the term can/may.[84] However, it shall be the discretion of the Court as to which date onwards or the happening of which event (say passing of suitable amendment by the legislature) the Court shall keep alive the validity of these provisions,[85] subject to the entertainment of individual instances when the aggrieved individual shall approach the Court by way of writ to seek the relief in cases of irretrievable breakdown of marriage, till the law remains

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[81] Article 32, the Constitution of India. 1950
[82] Article 226, the Constitution of India. 1950
[83] Article 13, the Constitution of India. 1950
[84] The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause **shall**, to the extent of the contravention, be void.
[85] Indira Sawhney v. Union of India, AIR 1993 SC 477.

unamended. The same line of reasoning can also be *mutatis mutandis* applied to base the petition of judicial separation[86] on the grounds of irretrievable breakdown of marriage and also for arguing the violation of fundamental rights guaranteed under the Constitution by not allowing the irretrievable breakdown as a ground for divorce in case of marriages solemnized under Special Marriage Act[87].

Such an approach by the Counsels, if supported by the Court, can also hasten the process by the legislature to amend the law in this direction.

[86] S. 10, The Hindu Marriage Act, 1955.

[87] Law Commission of India in its 217th report has rendered the opinion that irretrievable breakdown of marriage as a ground for divorce should be provided for under Special Marriage Act, 1954.

X-RAYING THE FREEDOM OF PASSAGE OF SPACECRAFT THROUGH THE AIRSPACE OF A FOREIGN STATE

Olatinwo Khafayat Yetunde*

ABSTRACT

Outer space is a free zone to be explored and used in the benefit and interest of mankind. This is an established principle in the international space regimes, particularly the Outer Space Treaty of 1967. To encourage the exploration of Outer space, Article 1 of the Outer Space Treaty provides for freedom of access to all areas of celestial bodies. The intention of this work is to analyze this freedom of access to determine whether a spacecraft of State A has the freedom to enter the airspace of state B during space activity. In other words, does the freedom of access include freedom of spacecraft overflight without prior consent, or would such over flight be deemed an act of trespass? A qualitative legal research methodology is adopted; and at the end of the work, appropriate recommendations shall be made based on the findings

INTRODUCTION

The right to, or simply put, the freedom of exploration and use of outer space as well as access to all areas of space environment is a well-established principle, laid down in Article 1 of the Outer Space Treaty 1967. It is

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mentioned repeatedly in almost all the space regimes particularly the Outer Space Treaty (with fifteen references).[1] Just like the provisions of the earlier Declarations[2] encapsulated in the provisions of the 1967 Outer Space Treaty, the exploration and use of outer space is accepted and encouraged by the space regimes. Article 1 of the Outer Space Treaty declares the outer space environment as the province of mankind and provides that *'outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law,* ***and there shall be free access to all areas of celestial bodies'*** (emphasis added).[3] The essence of the provision, obviously, is to encourage beneficial use of the space resources worldwide, so that the whole universe will enjoy any benefit accruing from the exploitation of outer space achievable through unrestricted access, strong and irrefutable commitment and adherence of the provision by every single member of the International community.[4] However, what is confusing about the provision on freedom of access is whether a spacecraft has the unfettered freedom to enter into the airspace of another state without prior consent in its space activities?

FREEDOM OF PASSAGE IN THE AIR AND SEA

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1 See also the Moon Treaty.

2 Declaration on Legal Principles Governing the Activities of State in the Exploration and Use of Outer Space, 1963.

3 See also the Preamble and Article 4 of the Moon Treaty.

4 See UN General Assembly, Press Release, *Fourth Comm. Of the Special Political and Decolonisation debate on "Peaceful Use of Outer Space",* UN Doc GA/SPD/323, www.un.org/press/en/2005/gaspd323.doc.htm, last seen on 11/02/2016.

X-RAYING THE FREEDOM OF PASSAGE OF SPACECRAFT

The drafters of space laws were quite particular and obviously very much concerned with the freedom of access to all areas of outer space that they were blinded and unmindful of an important aspect of space travel. Unlike space law, air law is explicit in its provision with respect to the flight of an aircraft over the territory of another state.[5] From the conception of Sovereign right over airspace[6] and prior national authorization for flyover in the Paris Convention,[7] to the Chicago Convention, which regulates the nonscheduled flights of private aircraft and the schedule flights of commercial passenger and cargo services i.e. civil aircraft.[8] Article 5 of the Chicago Convention provides that each contracting State agrees that all aircraft (not engaged in scheduled international air services) of the other contracting states have the right to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of the state flown over to require landing.

This is not so for scheduled (commercial) International air service, as they may only be operated over or into the territory of a contracting state except with special permission or other authorization of that state[9] and the same goes for a state aircraft, that is, aircraft used in military, customs and police

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5 As far as air travel is concerned.
6 Article 1.
7 Article 15.
8 Article 3. See William Slomanson, *Fundamental Perspectives on International Law*, 327-329 (6th ed., 2011).
9 See Article 6.

services, as it needs express authorization by special agreement to fly over or land on the territory of another.[10]

The same can be said of the United Nations Convention on Laws of the Sea (UNCLOS) 1982 as regards the right of innocent passage within territorial waters of a foreign state without prior consent. Just like the Chicago Convention, UNCLOS affirms territorial sovereignty of a state beyond its land territory and internal waters and in the case of an archipelagic[11] state, its archipelagic waters, to an adjacent belt of the sea described as the territorial sea, as well as the air space over the territorial sea, its bed, and subsoil.[12]

Article 17 of the same section provides that 'Subject to this convention, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.' Accordingly, passage identified under this Article means any passage through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters or proceeding to or from internal waters or a call at such roadstead or port facility which passage is meant to be continuous and expeditious.[13]

Article 19, emphasizes on the fact that passage must be innocent by identifying, exhaustively, circumstances when passage would not be innocent but rather prejudicial to the peace, good order or security of the coastal state, which is not what the law intends to promote.

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[10] Article 3 (c).
[11] See Article 46 on the use and meaning of Archipelagic.
[12] Section 1 (2) (1,2, & 3).
[13] See Article 18.

ATTITUDE OF SPACE LAW ON SPACECRAFT OVERFLIGHT

There is no one single provision in respect of space object travel through the airspace of a foreign State in the Outer Space regimes. The provision of the Chicago Convention is applicable to aircrafts and not spacecrafts or space objects. What is then is the implication of a space craft that finds itself inevitably in the airspace of another state? Obviously, whether for the purpose of research, launch or tourism, space object travel is mostly initiated (launched) from the earth,[14] it then travels through the launching state's airspace and *seldom,* in the airspace of another launching state before getting to outer space (destination).

Spacecrafts or space objects falling back to the Earth's surface, whether intentionally or not, have found their way into the airspace of another state and most times occasion damages at the surface of the Earth of that state which it had no prior consent to fly over or in. Does this amount to trespass,[15]or is it legal for a space object to travel through foreign airspace during launch or re-entry? This issue no doubt averts minds to the issue of spatial delimitation but in the absence of such demarcation, the implication of the presence of a spacecraft in a foreign airspace is ambiguous.

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[14] Sea launch as also been introduced for safety reasons, cost effective, and assurance of the satellite landing at the right spot in the geostationary most especially for commercial satellite. The sea launch was first experienced in 1999 and so far more than 31 satellites have been launched in space from the sea. See Online article-Appendix A: Sea Launch System Components and System Integration' <http://fas.org>spp>launch>APPDX-A1and Jeff Foust *Boeing seeks to block sea launch sale* Space News April 5, 2016<http://spacenews.com/boeing-seeks-to-block-sea-launch-sale/ >accessed 09 May 2016. See Armel Kerrest, *Launching Spacecraft from the Sea and the Outer Space Treaty: The Sea Launch Project* (1998) 23 Journal of Air and Space Law Pg 16-21.

[15] Just as argued by Canada against Russia in *Cosmos 954 incident.*

Experience has shown the possibility of a space object finding itself in the airspace of another state as seen in the two Russia/US-Canada cases. Often times, the passage is not noticeable but where damage is caused in the state of passage during re-entry, issues of trespass may arise, particularly where there is no prior consent through any bilateral agreement or as the case may be, the state flown over is not put on notice of the emergency landing which is inevitable.[16] The Cosmos 954 incident saw Canada claiming damages for trespass, direct and indirect damage as a result of the damage to Canada's territory, caused by Russia's Cosmos while re-entering the earth.

During negotiations, the issue of trespass raised by Canada was dealt with flimsily even though compensation was received for the damage caused. Again, in 1984, the US space shuttle 'Challenger' on its way back to landing on US territory, crossed the US-Canada air border. Incidents of spacecraft over flight also include those of the Soviet Union's space probes which passed through the airspace of land adjacent to its territory in the 1960's and in 2015, a Russian space craft passed through the airspace of Turkey with no legal consequences arising from the passage.

From the inception of space travel, it is observed that few incidents of passage have been seen to have occurred, and this is only identified in the event of an accident or where fragments of a space object are seen within the foreign territory. Gorove pointed out that 'the principle of the freedom of

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[16] Where the Soviet Union was only notified of the United States Spacecraft overflight few hours before the overflight took place in 1990. UN DOC. A/AC.105/635/Add.1 15th March 1996. Andei D.T, *Passage of Space Objects through Foreign Airspace: International Custom?*, (1997) Vol 25 (1) Journal of Space Law.

exploration and use of outer space, a cardinal principle of the 1967 Outer Space Treaty, in a sense implies the freedom to go into outer space and also the freedom to return to earth from outer space. Because of the very limited number of space flights that might have traversed through the airspace of foreign states, the exact nature and scope of this freedom has so far not been determined by international customary law'.[17]

From the incidents available, except for Canada in the Cosmos 954 incident, most of the spacecraft overflights in foreign territories have not been the subject of serious disputes/negotiations forming precedent on the law of passage of spacecrafts through the airspace of a foreign territory. Does the absence of its legal challenge reveal a general acceptance of such act by the world community as to form customary international law?

The concept of customary international law as defined earlier suggests general and accepted practice which to this work does not include silence or inaction, i.e., the fact that the act of such passage has not been constantly challenged does not mean such an act is deemed to attract general acceptance as to formed rules of customary law on the right of innocent passage of spacecrafts in foreign territory.

The debate on this issue has largely remained academic. Space law writers and some states have offered various views as to the legal implications of

[17] Stephen G, *Aerospace Plane: New Policy Issues for Space Law*, (1989); 31 Proceedings Colloquium on the Law of Outer Space 283; See also Stephen G, *Aerospace Object: Legal and Policy issues for Air and Space Law*, (1997) 25 (2) Journal of Space Law. Pg 101-112.

such passage through foreign airspace. Andrel Terekhov, in his write up,[18] is of the view that no customary law has emerged as to the acceptance of space object passage through foreign air space, especially with regard to a deliberate entry of an operational space object into the airspace of another state for the purpose of take-off or landing. Supporting this view are Haanappel,[19] Kopal,[20] Cheng,[21]the governments of Ukraine, Rwanda, Finland and Turkey in their responses to the UN questionnaire on the issue.[22] On the other hand are Lachs and Gorove. Lachs opines that

> "On the first day a manmade vehicle reached outer space a legal question arose concerning its passage through the air space of other countries. On many occasions, the object moved through the airspace of the launching state, but it may have travelled over other lands. These were never asked for permission to cross their airspace and never protested against the journey through it. Thus one might

[18] Andrei D.T, *Passage of Space Objects through Foreign Airspace: International Custom*, (1997) 25 (1) Journal of space Law 1-16.

[19] Haanappel P.P.C, the *Aerospace Plane: Analogies with Other Modes of Transportation*, (1990) 32, Colloquium on Law of Outer Space Pg.342.

[20] Kopal V, Some *Considerations on the Legal Status of Aerospace Systems*, (1994) 22 Journal of Space Law 64.

[21] Cheng B, *The Legal Regimes of Air and Outer Space: The Boundary Problem. Functionalism versus Spatialism: the major Premises*, (1980) 5 ANNALS of Air and Space Law 357.

[22] In their answers to question (7) on whether there are precedents with respect to the passage of aerospace objects during take-off and/or re-entry into the Earth's atmosphere and does international customary law exist with respect to such passage? See UN Doc A/AC.105/635/Add.11, 26 January 2005.

assume that a customary law has developed of innocent passage into outer space''[23] (emphasis provided)

Interestingly, Gorove derogated from his earlier posit cited above and confessed to the fact that it is not possible for him to list the factors which necessitated his altered position. He then stated that 'if the primary function of the aerospace object was to operate as a spacecraft, then air law would not be applicable to it except in situations in which the craft returns in a non-accidental situation to a non-launching State, and that it should be governed by outer space rules. As long as the object's primary function was to operate as a space craft – it's safe passage to and from outer space has now attained the status of international customary law'.[24]

Gorove's recent stance is no doubt traceable to the issue of the lack of a legal boundary between air and outer space identified with space issues. There is even the possibility that a state flown over is not even aware that a spacecraft had passed through its airspace, this is because the state is not even aware of the limit and extent of its sovereignty over its airspace. Aside from this, would a bar to such passage not negate the intention of the space regimes in their provisions for freedom of exploration and use of outer space? If

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[23] Manfred L, *Freedom of the Air – The way to Outer Space' in 'Air and Space Law: De Lege Ferenda, Essays in Honour of Henri A. Wassenbergh*, (T.L. Masson-Zwaan & P.M.J. Mendes de Leon, eds., Nijhoff. 1992).

[24] Stephen G, *Aerospace Object: Legal and Policy Issues for Air and Space Law*, Pg110. See also Malenovsky E, *To the Problems of the Right of Free Passage Through the Airspace of other States During the Takeoff and Return Phases of The Space Flight* (1982) 25 IISL Proceeding (Paris, Colloquium) Pg131-134 & Meredith P.L, *The Legality of Launch Vehicle Passage Through Foreign Airspace*, (1985) 54 (4) Nordic Journal of International Law. Pg 19-32.

research should determine that it is not possible for a spacecraft to travel to outer space without traversing a foreign airspace and to that effect, states are giving national prerogatives on such flight right, wouldn't excessive control and limited permission for such flight affect human activities in space and be contrary to the freedom of access?

Although there is no substantive international law provision or a conclusive and viable customary international law on the ***right of passage*** of a spacecraft through a foreign airspace in the existing space regimes and applicable international law, the Rescue Agreement nevertheless makes provision for the rescue and return of astronauts and the object launched into outer space found in a foreign territory, back to the launching state. This ten-articled-Agreement is purely 'prompted by sentiments of humanity.'[25] The Agreement appeals to the minds of member states (or member states in a position to assist) to render assistance, whenever it discovers or is informed of any accident or distress being suffered by the astronauts or personnel of spacecraft regarded as envoys of mankind[26] and space objects, as to the rescue and prompt return of the astronaut and or space object to the launching states or representative of the launching states. This search and rescue operation is to be under the direction of the contracting party and can be augmented by the launching state where such operation would be effective and substantive in achieving the safety of the personnel in distress.[27]

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[25] Preamble to the Agreement.
[26] See Article V, Outer Space Treaty.
[27] See Article 2.

In the case of a space object discovered on another territory, such state, upon request of the launching state, is expected to take steps to recover and return such space object to the launching state or hold it at the disposal of representatives of the launching authority. The launching authority is mandated to furnish identifying data prior to the return of the personnel or space craft and all expenses incurred in recovering and returning the space object is to be borne by the launching authority.[28]. However where such space object found is discovered to be of or has caused harmful interference in the foreign territory, the launching state is expected to take necessary steps to eliminate any danger such interference may pose, which is to be done under the direction and control of the foreign territory.

CONCLUSION

Aside from a similar provision in Article V,[29] reading the text of the Outer Space Treaty alone with reference to the issue of innocent passage of spacecraft in foreign airspace would make it evident that such passage is not even contemplated as far as space travel is concerned. Presumably, the freedom of access contemplated is within the space environment and not

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[28] See Canada v. United States (Cosmos 954) (supra).

[29] 'States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle. In carrying on activities in outer space and on celestial bodies, the astronauts of one State Party shall render all possible assistance to the astronauts of other States Parties. States Parties to the Treaty shall immediately inform the other States Parties to the Treaty or the Secretary-General of the United Nations of any phenomena they discover in outer space, including the moon and other celestial bodies, which could constitute a danger to the life or health of astronauts.'

during space travel. The Rescue Agreement on the other hand reveals otherwise. The combined provisions of article V and the Rescue Agreement on the presence of both astronauts and space objects in foreign territory suggest thus:

a) Obviously, a spacecraft would traverse a foreign territory's airspace
b) The passage of such spacecraft, as suggested in the agreement, shouldn't be a subject of dispute
c) Hopefully, the passage should be smooth without any mishap
d) In the event of any mishap, the state whose airspace is traversed is obligated, on the grounds of humanity, to rescue, recover and return the same safely and promptly to the launching state
e) The foreign state is only entitled to expenses made in the search and rescue mission.[30]

It is however tempting from the above, to conclude that there is an ***assumption*** of a right of innocent passage since a state is faced with an obligation to so assist in the event of the presence of space objects and spacecraft personnel on its territory unannounced and without prior notice of it being flown over. But again, can a right be found on assumption?

It is recommended that the outer space treaty should make provision on the status of spacecraft overflight in the airspace of a foreign territory. This is necessary in order to put a stop to the academic debate on an assumed existence of a customary international rule on the right of innocent passage of spacecraft in a foreign airspace. It is therefore necessary for a provision in the space treaties to lay down the correct status of such spacecraft as found in

[30] See Article VII of the Outer Space Treaty and the Liability Convention.

the Air laws and Sea laws. As it is, it is unclear whether such act can give rise to a claim of trespass as raised by Canada in COSMOS 945 or whether there is in fact a customary rule of innocent passage in respect of spacecraft flight.

IPR-ANTITRUST CROSSROADS: IS ESSENTIAL FACILITY DOCTRINE A SOLUTION?

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ABSTRACT

In a rapidly developing world economic scenario which is seeing globalization, complex world trade and liberalization, there is increasing importance given to consumer benefit, innovation and competitiveness. Competition law and Intellectual Property Rights can be seen as a manifestation of the same. Competition law aims at protecting and promoting market competition by regulating anti-competitive conduct and by reducing monopolies. Intellectual property rights protect creations of inventors by granting them exclusive control and, eventually, upholding their monopoly over their property. At the outset, Competition law and Intellectual property law seem to be at loggerheads. However, on delving into the subject matter, one realizes that the two laws complement each other. The essential facilities doctrine is one such approach in which the two laws work together. Under this doctrine, a person in a dominant position is supposed to provide access to those facilities considered to be essential to maintain a competitive market. The authors of this article aim to analyze the doctrine by applying it to IPRs while analyzing its several interpretations in countries across the world.

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INTRODUCTION

An intellectual property right is the right given to the creator over his creation. Intellectual property refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce.[1] "*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."*[2] Intellectual property is a legal advantage given to the owner in the form of a copyright, patent in exchange of his own business acumen.[3] The government grants the creator of IPR with the exclusive right to market the product and enjoy the profits derived from it. Another way this principle is upheld is when the government pays the creator so that his creation can be passed on to the public.[4] According to the WIPO intellectual property handbook, Intellectual property rights exist for two reasons:

- To give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations.
- To promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.[5]

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[1] World Intellectual Property Organization.
[2] Art. 27, Universal Declaration of Human Rights.
[3]Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451 (1992, 9th Circuit Court).
[4]Stevens Havell and Tanguy Van Ypersele, *Rewards versus Intellectual Property Rights,* The Journal of Law and Economics.
[5]*Concept of Intellectual Property*, WIPO, available at www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch1.pdf, last seen on 7/03/2017.

COMPETITION LAW

Competition law aims to protect competition in a free market economy. A free market economy is one where the natural forces of demand and supply govern the economy without external interference in the form of government control. Thus, the basis of free markets is considered to be competition between firms and it is considered to deliver efficiency and welfare. It is common knowledge that firms strive toward attaining profits, and hence if they are left alone without a regulatory body they are likely to collude in a way that is profitable to them but detrimental to the society. According to Adam Smith, they tend to form cartels and conspire to fix prices.[6] In India, the Competition Act of 2003 established the Competition Commission of India, a quasi-judicial body to protect free market from monopoly. Sec.3(1) prohibits enterprises to enter into any agreement which may have an appreciable adverse effect on competition. Sec.4 restricts enterprises from abusing their dominance in the relevant market.[7] The objective of this body is to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.[8]

UNDERSTANDING THE DISPUTE

The Anti-trust laws throughout the world have a common objective, i.e. to prohibit restrictive trade practices. Monopoly is one such practice that

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[6] *Adam Smith's Wealth of Nations*, (C. J. Bullock, Vol. X, 1909–14).
[7] The Competition Act, 2002.
[8] Ibid.

restricts free trade and is, thus, forbidden by the Act. In such situations, competition law restrains the dominant firm's behavior.[9]

However, what about the cases where monopolies are bestowed upon the owner by the government, i.e. Statutory Monopolies? The Intellectual Property Laws are an example of such statutes that provide protection to the monopolies. IPR provides an opportunity to the owner to use his product according to his choices up to a certain degree. For example, the Patents Act, 1970 grants the owner of a patent, the right to prevent others from producing the patented goods or applying the patented process for a period of 20 years; patents may be granted where a product or process is technically innovative.[10] The heart of his legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent.[11] Thus, the State grants him a right to exclude others. This exclusivity however does not necessarily lead to dominance in the relevant market. To find whether a product is dominant or not, it must be established that no or very less substitutes exist in the relevant market of that product.[12]

Section 3(5) of the Indian Competition Act allows the IPR owners to enter into those agreements that are otherwise restricted under Section 3(3) and 3(4) to the IPRs. However, Section 4 of the same Act, which prohibits abuse of dominance, does not carve out any such exception for IPRs and thus if an

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[9] Alison Jones and Brenda Sufrin, *EU Competition Law*, 365 (5th ed., 2014).
[10] S. 53(1), The Patents Act, 1970.
[11] Zenith Radio Corp v Hazeltine Research, Inc., 395 US 100, (1969, Supreme Court of the United States).
[12] Belaire Owners' Association v. Dlf Limited, Huda & Ors., Case No. 19 of 2010, (Competition Commission of India, 12/8/2011).

IPR owner violates it, then he might lose the privilege of exclusivity.[13] Merely holding an IPR does not confer unbridled powers to the owner. He can impose only 'reasonable restrictions which are necessary to protect his rights'.[14] So if in the garb of IPR, owner tries to put an unreasonable restriction, or a restriction not relating to protection of his right, he might lose his right of exclusivity. For example in *Shamsher Kataria*, the commission held that merely selling of the patented spare parts to independent car repairers, which are manufactured end products does not necessarily compromise upon the IPRs held by the Original Equipment Manufacturers(OEMs) in such products.[15] In this case, restriction on the independent suppliers to supply the spare parts of the cars was not 'necessary' to protect the IPR of the OEMs because the product was merely a finished product and not a technological or a trade secret.

Problems in sharing- A Pandora's Box

The most essential feature of Intellectual property is that it gives the owner a right to exclude others. Exclusivity is necessary to preserve incentives to create, the core operative device of intellectual property law in a market economy.[16] Innovations protected by intellectual property rights (or other legitimate competitive advantages) can and do lead to an economic

[13] Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors. Case No. 3 of 2011, (Competition Commission of India, 25/8/2014).
[14] S. 3(5), The Competition Act, 2002.
[15] Supra 13.
[16] A. BLipsky Jr. and J.G. Sidak, *Essential facilities*. Stanford Law Review, 1187 (1999).

monopoly over a relevant market.[17] A copyright might lead to legal dominance, but that does not guarantee an abuse of that dominance.[18] If the course of conduct of IPR owner is itself legitimate, then his desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws.[19] Hence, it is completely legitimate for an IPR owner to enjoy supra-competitive profits because the market power or the monopoly is solely a consequence of a superior product, business acumen, or historic accident.[20] Ideally, innovation by one company spurs innovation by rivals in an attempt to maintain their competitive position.[21] As Professor Areeda recognized, intentionally striving to acquire a legitimate advantage over rivals is the essence of competition.[22] If innovation did not carry the promise of potential economic return, there would, of course, be much less of it.[23] In *Data General Corporation*,[24] a U.S. court held thus- "*One reason why the Copyright Act fosters investment and innovation is that it may allow the author to earn monopoly profits by licensing the copyright to others or reserving the copyright for the author's exclusive use*." Hence, if there is a

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[17] P.D Marquardt and M Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson, and Hooks.* 70 Antitrust Law Journal, 847 (2003).
[18] D Lim, *Copyright under siege: an economic analysis of the essential facilities doctrine and the compulsory licensing of copyrighted works,*17 Albany Law Journal of Science and Technology (2007).
[19] Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield, 883 F.2d 1101 (1989, United States Court of Appeals, First Circuit.).
[20] United States v. Grinnell Corp., 384 U.S. 563 (1966, Supreme Court of United States).
[21] Supra 17.
[22] P Areeda, *Essential facilities: an epithet in need of limiting principles*, 58 Antitrust Law Journal, 841 (1989).
[23] Supra 17.
[24] Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, (1994, 1st Circuit Court, United States).

threat to incentive to innovate, there would be lesser competition, which would ultimately be detrimental to the consumer. If an access to IPR is easily provided, then, those who can be innovators will wait instead to be imitators and the dynamic process which would have generated new ideas will disappear; in the end, there will be little or nothing different to imitate.[25] For these reasons, the anti-trust laws ought to be very cautious while granting compulsory licenses of Intellectual properties.

Does this mean that the IPRs are completely immune from the scrutiny of anti-trust principles? What if the owners start abusing the privilege that has been given to them by intellectual property statutes? Many times, the anti-competitive effects of IPR are more than its pro-competitive factors, thereby undermining the objective of giving an IPR, i.e. consumer welfare.[26]

Problems with not Sharing

Economists have long debated whether competitive or monopolistic market structures best promote innovation. Joseph Stiglitz, the Chairman of the President's Council of Economic Advisors, testified as follows: "Some people jump from that to the conclusion that the broader the patent rights are, the better it is for innovation, and that isn't always correct, because we have an innovation system in which one innovation builds on another. If you get monopoly rights down at the bottom, you may stifle competition that uses those patents later on, and so . . . the breadth and utilization of patent rights

[25] W Cornish, G.I.D Llewelyn, and T Aplin, *Intellectual property: patents, copyright, trade marks & allied rights* (8th ed., 2013).
[26] Supra 24.

can be used not only to stifle competition, but also [can] have adverse effects in the long run on innovation. We have to strike a balance.[27]

According to Prof. Louis Kaplow,[28] "the patent statute was plainly not intended to bestow upon each patentee carte blanche in all its endeavors. For example, a patentee who negotiates a favorable royalty by holding a prospective licensee at gunpoint clearly will not be relieved from the proscriptions of either criminal or contract law. The question is whether one should view antitrust law any differently." At times, the conduct of IPR owners is so unreasonable that they forget the main purpose for which IPR was bestowed upon them, i.e. consumer welfare. It is only when the owner misuses his position that an anti-trust scrutiny is called for. A conflict between anti-trust and IP regime arises only when there is an abuse.[29] Consider a situation, where a licensee is ready to pay royalty to the patent owner, but the patent owner starts demanding royalty on products outside the scope of Patent.[30] The U.S. Supreme Court held that, "There are established

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[27] Debra A. Valentine, *Abuse of Dominance in Relation to Intellectual Property: U.S. Perspectives and the Intel Cases*, available at https://www.ftc.gov/public-statements/1999/11/abuse-dominance-relation-intellectual-property-us-perspectives-and-intel#N_7_, last seen on 08/03/2017.

[28] L Kaplow, *The patent-antitrust intersection: A reappraisal*, Harvard Law Review, 1813, (1984).

[29] Raju KD, *Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India*, available at http://www.esciencecentral.org/journals/interface-between-competition-law-and-intellectual-property-rights-a-comparative-study-of-the-us-eu-and-india-ipr.1000115.php?aid=26445 last seen on 12/03/2017.

[30] Supra 11.

limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee."[31]

Kinds of Abusive Conduct-

The various forms of disguised abuse that can be made out by the owners of IPRs in the following manner:-

Unlawful means to gain or protect IPR

Abuse in context of intellectual properties would arise when the IPR is gained through unlawful means.[32] In *Astra Zeneca*, the commission found the conduct to be abusive because the owner misrepresented certain dates to national patent offices and national courts in order to obtain extra patent protection, which it would otherwise not have been entitled.[33] In another case, holding of an unmeritorious copyright was also held to be abusive.[34] The television listings of the broadcasters had little literary merit and the dynamic efficiency considerations were weak, hence no protection must be extended to such copyrights.[35]

Leveraging IPR to Enter into other Relevant Market

The most common and damaging conduct is when the IP owner leverages his dominance in primary market to gain monopoly in secondary market. In *Xerox* case, where the patent owner refused to sell patented replacement

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[31] Supra 11 at page 136.
[32] In re Independent Service Organizations Antitrust Litigation (Xerox), 203 F.3d 1322 (2000, Federal Circuit Court).
[33] AstraZeneca v. Commission, [2010] E.C.R. I.I. 2805 (European Court of Justice).
[34] RTE, ITP v. Commission, [1995] E.C.R. I-743 (European Court of Justice).
[35] Supra 18.

parts for its high-volume copiers to independent service organizations, except to service copiers that they owned, the court held that the patent owner misused his dominance in the relevant market of photocopy machines to gain dominance over relevant market of replacement parts.[36] Similarly in *Volvo*[37] and *Shamsher Kataria,*[38] the courts have held that the car manufacturers cannot arbitrarily refuse to supply spare parts to independent owners, even though such parts are patented. If the anticompetitive effect of patentee's refusal to deal is "illegally extended beyond the statutory patent grant," then anti-trust scrutiny can take place.[39] In *Magill*, the refusal by the Copyright holders restricted a new-product of consumer benefit to emerge in the market. The court granted a license to Magill stating that these were '*exceptional circumstances'* which led to abuse of copyright.

Unreasonable Increase in Prices

Excluding a competitor by denying access to a patent might allow sellers to unreasonably raise the prices of the patented product. For example, in the *Shamsher Kataria* case, where the prices charged by the OEMs for the spare parts were found to be 35-50% more than independent repairers. It should also be noted that there should be no objective justification behind such conduct.[40] If there is such justification, the owner can get benefit of having pro-competitive factors such as promotion of technical, scientific and economic development. A dominant company has, at least in some cases, a

[36] Supra 32.
[37] AB Volvo v. ErikVeng, [1988] ECR 6211(European Court of Justice).
[38] Supra 13.
[39] Supra 32.
[40] United States v. Colgate & Co., 250 U.S. 300 (1919, Supreme Court of United States).

duty to supply, if a refusal will cause a significant effect on competition. As the effect on competition increases, it becomes harder to justify the refusal and accordingly, less weight should be given to the argument that in the long-term it is pro-competitive to allow a dominant company to decide with whom it will contract.[41]

ACCOMODATING MEASURES

There are several approaches through which the dispute can be resolved, which includes the following:-

Antitrust Immunity Approach

Several theories have been propounded to achieve a balance between the IP laws and Competition Laws. The first theory proposes a blanket restriction on giving access to the anti-trust laws into the Intellectual Property Rights.[42] It is merely an evasion of conflict. This approach is antitrust-immunity approach, which is based on the fear of devastating effect on innovation due to invasion by anti-trust laws. The supporters of this approach are of the view that antitrust laws pose a danger to the economic incentives that are provided by the IPRs and, thus, the two are completely antithetical to each other.[43] In addition to danger to economic incentive, the other reason behind aversion to provide access to IPRs is that, Intellectual Property is not same as any other property. For example, the owner of a Ferry service or a football ground owner can stop providing the services to those who do not pay as much as

[41] J T Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities.* 18 Fordham International Law Journal 437 (1994).
[42] Philip E. Areeda & Herber Hovenkamp, *Antitrust Law*, 650 (Supp. 1995).
[43] Supra 32.

demanded as measure to curb any more damage, but in case of IPs, once it is disclosed, it can be easily misappropriated, thereby causing an irreparable damage once and for all.[44] As soon as a patent, trade secret or a design is divulged in an open market, it will lose its economic significance for the owner. In *Image Technical Services, Inc. v. Eastman Kodak Co.,*[45] the court held that merely holding of a patented product is in itself a valid business justification for any immediate harm to consumers.

Ratio Test Approach

In order to curb this attitude of the IP owners, pro-competition proponents claim that the right to recover research and development investments and obtain a reward should not be boundless.[46] There must be a balance between loss caused to the society due to monopoly and the interests of the IP owner and thus the Ratio-test approach.[47] The ratio-test approach settles the conflict by striking a balance between the social benefits of allowing someone to have an intellectual property and the social cost of undermining of free competition.[48] An optimal patent life is until the social cost arising due to monopoly is less than social benefits arising out of patent. A balance between 'Patentee Reward' and 'Monopoly Loss' factors arising out of issue of an IPR. Access is to be provided if marginal increase in award is substantially more than marginal increase in monopoly loss.

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[44] Supra 16.
[45] Image Technical Services, Inc. v. Eastman Kodak Co.125 F.3d 1195 (1997, 9th Circuit Court).
[46] Supra 28.
[47] Ibid.
[48] Mark R. Patterson, *When is Property Intellectual?: The Leveraging Problem*, 73 S. Cal. Law Review 1133 (1999).

Use-Oriented Approach

In yet another Use-Oriented approach,[49] Patterson avoided the economic balancing mechanism as was proposed in the Ratio Test. A distinction was made between 'what is actually covered under IPR and what is not', that is to say, only inventions and expressions are protected but not the product themselves. For example, in *Xerox* case,[50] the plaintiff was demanding an access only to the product, i.e. the repair parts, but there was no threat to the 'design' of that part. Since the demand was for a product and not for any invention or expression, the IPR protection will not be extended. This approach, thus, protects an IPR on 'how it is made', but not 'what the product is'.

ESSENTIAL FACILITIES DOCTRINE

Origin

The term “essential facilities” is not officially used in cases or judicial documents in the U.S or E.U.[51] The concept of this doctrine stems from the landmark *Terminal Railroad Association* case. The rail road companies of St. Louis decided to form an organization that would operate the bridges and terminals to get across the river Mississippi. However, these bridges could only be accessed by the members of the association. This was held to be a violation of the Sherman Act by the court because the result of the geographical and topographical situation peculiar to the locality is that it is

[49] Ibid.
[50] Supra 32.
[51] Sebastian J Evrard, *Essential facilities in the European Union: Bronner and beyond*, 10 Columbia Journal for European Law. 491 (2004).

impossible for any rail road company to pass through or enter St Louis without using the facilities entirely controlled by the RR terminal co.[52] The term "essential" connotes a level of distinctiveness and "facilities" portrays a structure or an asset that hold some amount of monopoly power and proprietorship due to its unique properties. Thus, the underlying principle of the essential facilities doctrine is that a dominant player or a monopolist must not be in exclusive control of such facilities that are considered essential or indispensable for the survival of other competitors. He must provide access to the same if considered to be feasible. This has been analysed and explained below through the landmark case laws in different regions that have shaped and helped in the evolution of the essential facilities doctrine.

United States and Anti-trust laws

In the United States, Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. In addition to this, the essential facilities doctrine is also used as an exception to the application of Intellectual property laws.[53] The US courts adopt a narrow approach towards the interpretation of the essential facilities doctrine.[54] The reason behind this particular premise is that the U.S. courts and companies are influenced by the economists from the Chicago school who propound that competition law

[52] United States v. Terminal Railroad Assn. of St. Louis, 236 U.S. 194, 35 S. Ct. 408, 59 L. Ed. 535 (1915, Supreme Court of United States); Terminal RR Assn. v. US, 266 U.S. 17, 45 S. Ct. 5, 69 L. Ed. 150 (1924, Supreme Court of United States).

[53] Sergio Baches Opi, *The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the European Union and the United States: Are Intellectual Property Rights Still Sacrosanct?*, 11 (2) Fordham Intellectual Property, Media and Entertainment Law Journal, 410 (2001).

[54] Supra 22.

should work without any concern to the sociopolitical issues affecting the market. Its main and only regard must be the efficient working of the market and nothing else.[55] The Supreme Court has decided cases keeping these principles in mind.

MCI Communications v. AT&T Co.[56]

The Seventh Circuit Court of Appeals applied the essential facilities doctrine and directed the monopolist telecommunications provider to provide access to its local service network to competitors in long-distance services.

Data General Corp. v. Grumman Systems Support Co.

A competitor service provider required access to the copyrighted diagnostic software produced by the system manufacturer. The claim was rejected because the court concluded that the facts did not support the allegation that the facility was "essential".[57]

The Department of Justice Antitrust Division and the Federal Trade Commission state that the use of market power by an intellectual property holder will be treated no differently than that of other monopolists.[58] A strict interpretation towards antitrust law is adopted since it is divergent from the conventional rules. The US courts have embraced a set of tests that parties

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[55] Mercer H. Harz, *Dominance and Duty in the European Union: A Look through Microsoft Windows at the Essential Facilities Doctrine*, 11 Emory International Law Review. 189 (1997).
[56] 708 F.2d 1081, 1132-33 (1983, 7th Circuit Court).
[57] Supra 24.
[58] U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of intellectual Property* (1995).

must meet before a court can direct a monopolist to grant access to the essential facility. A party must prove four factors:

1) Control of the essential facility by a monopolist
2) An inability of any sort on behalf of the competitor to duplicate the asset
3) The denial of the use of the facility to a competitor
4) The feasibility of providing the facility to competitors.[59]

European Union and Competition Law

Under European law, the essential facilities doctrine has been based on Article 82 of the EC Treaty. Art. 82 prohibit the abuse by dominant undertakings in a common market.[60] The development of the Essential facilities doctrine in Europe was through a series of decisions rendered by the European Court of Justice. First, the principle was implemented in cases such as Commercial solvents and Bronner that involved physical properties. Its application was later extended to exclusive privileges involving intellectual property rights. To understand the doctrine from the point of view of the European Union, it is necessary to understand and trace certain landmark cases.

Commercial Solvents v Commission

The first European case involving a refusal to supply was Commercial Solvents v. Commission in 1974.[61] Commercial Solvents was a company which had a dominant position in the production and sale of raw material

[59] MCI Communications v. AT&T Co. 708 F.2d 1081, 1132-33 (1983, 7th Circuit Court).
[60] Article 82, Treaty Establishing the European Community.
[61] Commercial Solvents Corp v Commission, [1974] E.C.R. 223 (European Court of Justice).

required for manufacturing ethambutol. It was also supplying the same material to another company, Zoja which manufactured ethambutol. However, in 1970, Commercial Solvents decided to manufacture ethambutol itself and hence decided to stop supplying Zoja with the raw materials. The European commission held that refusal to supply could amount to abuse of dominant position in certain circumstances. In the present case, commercial solvents was responsible for abusing its dominant position by ceasing to supply Zoja simply because it wanted to enter the downstream market itself. This decision was also upheld by the European Court of Justice. According to the ECJ:

"An undertaking which has a dominant position in the market in raw material and which with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position".[62]

Apart from the fact that this case was a first regarding Art. 82, it is important for another reason. It is not just the refusal to deal that is prohibited but also any refusal that would eliminate even one competition.[63] In United Brands v Commission, United Brands was the distributor of Chiquita bananas. They cut off supplies to Olesen, a Danish ripener and distributor simply because

[62] Ibid at para 25.
[63] Ibid.

Olesen began to advertise bananas of a competing brand. This was held to be an abuse of dominant power.[64]

E.U.'s application of EFD to IP

The Magill Case

In Magill, three television stations broadcasting in Ireland and Northern Ireland refused to license their copyright on the information contained in their program listings to the Irish publisher Magill TV Guide Ltd. Magill tried to publish a comprehensive weekly television guide by requesting the program listing from all the three television stations. This was perceived as competition by the broadcasters. They obtained injunctions in the Irish courts to restrain Magill from publishing the guide. In 1986, Magill lodged a complaint with the Commission against the three broadcasters' refusal to license their copyrights. In 1988, the Commission held that the broadcasters were abusing their dominant position and directed them to grant a license to Magill.[65] The broadcasters appealed to Court of first instance and then the ECJ. The decision was upheld by both of them.

The difference was drawn by CFI between the mere existence of an IPR and the exercising of the same. The existence of an IPR in itself is not an abuse as long as it is not used to destroy the principles of prohibiting abuse by dominant players in the same market.[66] In this case it was held that the broadcasters prevented Magill from producing their guides for which there

[64] United Brands v EC Commission, [1978] E.C.R. (European Court of Justice).
[65] RTE v. Commission, [1991] E.C.R. 485 (European Court of Justice).
[66] Ibid at ¶ 71.

was ample consumer demand. This was held to be working contrary to Art. 82. However, the ECJ did not rely solely on this distinction alone as it would result in an extremely strict application of the laws. This would also, in a way, render the existence of Intellectual Property useless. It came up with three exceptional circumstances that would result in the broadcaster's refusal to supply being a violation of Art. 82.

1. There was no potential substitute for a weekly television guide offering information on the week upcoming programs, despite a specific, constant and regular consumer demand. The broadcaster's refusal to provide basic information for compiling a weekly guide prevented the emergence of a new product. This new product would have the capacity to compete with the broadcasters' products. The prevention of emergence of a new product is important for the same reason that it has higher chances of providing tougher competition and better facilities to the consumer as compared to a similar/same product.[67]

2. No business justification existed for the refusal and finally, the broadcasters had reserved for themselves a monopoly in the secondary market of weekly television guides by excluding all competition.[68]

3. The broadcasters had reserved for themselves a monopoly in the secondary market of weekly television guides by excluding all competition.

[67] Supra 34 at ¶ 52-54.
[68] Supra 34.

This judgement was however viewed as extreme due to the fact that ECJ did not come up with a comprehensive legal doctrine regarding refusals to license.

The case of IMS Health

The IMS case provided a much needed opportunity for the Court to establish a clear principle on essential facilities in the context of intellectual property rights. IMS was providing information to the pharmaceutical industry on sales of pharmaceutical products in Germany. It developed a map of Germany segmented into "bricks" or geographical reporting units, and known as the "1860 Brick Structure," which, under German law, is covered by copyright. NDC Health Corporation attempted to develop its own brick structure, but discovered that customers insisted on using the 1860 Brick Structure. NDC had participated in its elaboration, and would incur costs in using data prepared with another segmentation. As a result, they would have had to offer a product based on its own structure at a price so low as not to be viable. It got the Commission to issue an interim decision ordering IMS to grant a license of the brick structure. IMS obtained an interlocutory order from the CFI suspending the Commission's decision. At the same time, IMS sued before a German court which made a reference to the ECJ under Article 234 of the EC Treaty, requesting guidance on the application of the Magill doctrine. As per Magill, the essential facilities doctrine would apply only if the owner of such a facility in one relevant market leverages his position to enter into another market. So, there was a requirement of two separate markets. Taking a lead from this principle, IMS contended that Art. 82 does not require an IPR owner to license it to compete with other players in the

same market. However, the European Commission contrarily said that there is no requirement of two separate markets. The ratio of Magill's judgement did not emphasize on the existence of two markets. IPR is indispensable in order to permit competition with the right owner on the market on which it carries on business. While rendering the judgement, ECJ dealt with two issues:

- Regarding the indispensability requirement, it observed that the national courts have the power to determine whether the product or service at issue is indispensable to an undertaking in order to carry on business in the relevant market.
- Secondly it addressed the issue of when a refusal to license by a dominant firm that owns an indispensable product constitutes an abuse. The right to reproduction is a part of the rights granted along with the IPR therefore the refusal to license cannot, in itself, constitute an abuse of a dominant position. However, the exercise of an exclusive right may, in exceptional circumstances, give rise to abusive conduct prohibited by Art 82. In the present case, the ECJ identified an abuse of dominant power because:

a) The undertaking which requested the license intended to offer, on the market for the supply of the data in question, new products or services not offered by the copyright owner and for which there is a potential consumer demand.

b) The refusal is not justified by objective considerations.

The term objective justification was not elucidated by the court. Two meanings can however be inferred. First, a refusal can be said to be objectively justified when the pro-competitive advantages of the refusal outweigh the negatives.[69] For example, if refusal to license the patented product aids the promotion of technical development, it is an objective justification of the refusal. Second, "objective justification" must be assessed not from a competition policy point of view but from that of the owner of the facility. Temple Lang argues that "the basic principle is that if a reasonable owner of the facility who had no interest in any downstream operation would have a substantial interest, acting rationally, to refuse access, the owner is entitled to do so."[70]

c) The refusal is such as to reserve to the copyright owner, the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition in that market.[71]

CONCLUSION

After the study of European and the United States' cases, a conclusion at which one can arrive is that both Antitrust and IP laws should co-exist in order to protect interests of all the stake holders. As of now, the dispute has not yet knocked on the doors of Indian courts too many times. Under both Monopolistic and Restrictive Trade Practices Act as well as the Competition

[69] Supra 51 at Pg.17.
[70] John Temple Lang, *The Principle of Essential Facilities in European Community Competition Law- The Position since Bronner*, 1 Journal of Network Industries 385 (2000).
[71] IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, [2004] E.C.R. I. 5039 (European Court of Justice).

Act, the Indian courts have said that the IP owners can escape antitrust laws only if they use it 'reasonably'. What is reasonable and what is not depends upon how much social cost is to be borne by the society in exchange of social benefits it gains from providing protection to IP owners.

Essential facilities doctrine provides a nuanced approach in order to calibrate these costs and benefits. Anyone who opines that this doctrine is antithetical to IPR regime is not entirely right. The doctrine does not impose a 'general duty' to share. A facility is essential only when it is critical to the 'market place' and its duplication is not viable either technically, legally or economically. At the same time, no such practical alternatives must be available to the facility. All these factors are indicative of the social cost that the society has to bear in order to allow the IP owner to exercise his right. However, once all these conditions are satisfied, the social costs eclipse the social benefits and the protection afforded by IPR is gone.

The Essential Facility Doctrine is not a one-way process as it also keeps in mind the uniqueness of IPRs and puts several safeguards to protect this uniqueness before granting the access. The doctrine does not apply if the IP owner has to bear huge costs in exchange of petty benefits to the society. If an IP owner is forced to deal, there should be 'substantial' benefit to both the society as well as competition. Also, the doctrine does not protect the interest of just one competitor. It takes into consideration the interest of the whole market place.

The doctrine appears to be the best suited solution to settle the conflict till date. Although it is still in its evolutionary stage, at least in India, the doctrine should be applied on a case to case basis. This will provide the

authorities the liberty to delve into the depths of each case and study the real intentions of the IP owner and the person seeking the access.

PHOTOCOPYING OF COPYRIGHTED MATERIAL IN LIGHT OF THE DELHI UNIVERSITY PHOTOCOPY CASE

Sayali Naresh Pol*

ABSTRACT

The primary theme of this article is to examine the decision given by the Division Bench of the Delhi High Court in the Delhi University Photocopy case. Presently, the dispute between fair dealing and the rival stakes of the copyright holders has become even more vigorous because of the controversy that has been created as a result of the legal action taken by three prominent publishers against a photocopy shop located at the core of Delhi University. The article analyses the Indian position with regard to photocopying of copyrighted works for educational purposes in light of the decision given in the The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services case. The article will also demonstrate how the Court has erred in its judgment and how the same would deprive the publishers of the revenues which they would otherwise have been entitled to obtain.

INTRODUCTION

It has become exceedingly effortless to make photocopies of printed material since the advent of the photocopying machine in the year 1954. Copyright owners are indeed startled by the advancements in technology that reduces

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the burden of photocopying their works. There has been a debate since the 1960s over the need to balance the competing interests of the copyright owner vis-à-vis the user's right of access, and to thus come up with a legal solution to resolve this the conflict between the two.[1]

A case was filed in the Delhi High Court by three international publishers and their Indian counterparts, Oxford University Press, Cambridge University Press, and Taylor and Francis, against Rameshwari Photocopy Service (Defendant No.1) and the University of Delhi (Defendant No.2) for the grant of permanent injunction.[2] The principal objection raised was that photocopying the course packs' bound volumes which contained parts from various textbooks violated the copyright of the plaintiffs. Accordingly, in October 2012, the Court issued a temporary injunction, thereby preventing the photocopy shop from selling the course packs until the final disposal of the case.

ARGUMENTS ADVANCED

Defendant No. 1 denied the allegations of copyright infringement and stated that its actions come within the purview of the fair use exception available under Section 52(1) (a) and (h) of the Copyright Act, 1957. Defendant No. 1 also stated that the syllabus is determined by the University and the same includes suggested readings of some chapters from various books and since these books are priced very highly, the students are unable to spare the cost

[1] Henry P. Tseng, *Ethical Aspects of Photocopying as They Pertain to the Library, the User and the Owner of Copyright*, 72 Law Library Journal, 86, 86 (1979), http://heinonline.org/HOL/LandingPage?handle=hein.journals/llj72&div=16&id= &page=, last seen on: (12/03/2017).

[2] The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services, (2016) SCC OnLine Del 5128.

of the same. It was also further contested that a fixed number of the abovementioned books are accessible in the University's library for reference purpose but the same cannot cater to the needs of all students, because of which Delhi School of Economics, University of Delhi prepared master copies of the books which are then used for photocopying. The Defendant photocopier also rejected the Plaintiffs allegation by stating that they're not commercially exploiting the author's copyright.

The Defendant No. 2, on the other hand, petitioned that Section 52(1) (a) and (h) give allow for making copies for use in research and classroom by students and teachers. The defendant university also stated that since the books are overpriced, photocopying of the books becomes crucial. The Plaintiffs, on the other hand, contested that if the defendant university obtains a licence for course packs from the Reprographic Rights Organization then the students won't have to pay more than what they are already paying to the Defendant No. 1. The plaintiffs also alleged that the said course packs contained only the material from the plaintiffs' publications and nothing more. It was further contended that the profit motive behind the alleged misconduct is indisputable since Defendant No. 1 is commercially competing with the plaintiffs by charging 40/50 paise per leaf which was more than the existing market rate of 20/25 paise per leaf. The plaintiffs also narrowly interpreted Section 52(1)(i) in alleging that the same is not applicable in the present case as the reproduction was not made by a teacher or a pupil in the course of instruction. The plaintiffs also maintained that Section 52(1)(g) prior to the Copyright (Amendment Act), 2012 which is equivalent to Section 52(1)(h) post-amendment substituted the

words "intended for the use of educational institutions" with "intended for instructional use" and that Section 52(1)(h) alone is applicable to the case at hand. The plaintiffs also claimed that if Section 52(1)(i) was interpreted in a manner so as to allow the teacher to make copies for the purpose of instruction there would be no need of Section 52(1)(h) and that the defendants actions contravene Section. 14(a)(i) and (ii) which deals with the rights granted by a copyright for reproduction of literary, dramatic, and musical works. The plaintiffs further demanded that photocopying in the field of education cannot be allowed because it is the only market for the textbooks and the same would have a detrimental effect on the publishing business.

LEGAL ISSUES INVOLVED

A bird's eye view of the case would reveal that there are only two issues involved, namely:

(1) Whether copying was permissible under the Copyright Act?

(2) Whether such copying amounts to fair use under the provisions of the Copyright Act?

JUDGMENT OF THE COURT

Decision of the Single Judge Bench

Justice Rajiv Sahai Endlaw held that copyright was a statutory right and that photocopying portions from books and distributing them to students for educational purposes did not amount to copyright infringement. It was held that the act of photocopying and making of course packs by the Delhi University is sheltered under the exception in Section 52(1)(i) of the

Copyright Act, 1957 as there was no actionable infringement. The Court held that the expression "to reproduce the work" under Section 14(a)(i) would include photocopying as well. The Court stated that supplying of copies of the book by the DU library would be proper as the principle of exhaustion, which is the genesis of libraries, educational institutions and field of resale of books, directly comes into picture.

Decision of the Division Bench:

Aggrieved by the decision of the single judge bench, an appeal was brought by the complainants to the Division Bench of the Delhi High Court which comprised of Justices Pradeep Nandrajog and Yogesh Khanna.[3] The Bench rejected the appeal while upholding and expanding the Single Bench's order. It held that photocopying of copyrighted material was permitted under the Copyright Act and that there could not be any caps on how much of a book could be photocopied if the same was warranted by the demands of the course. It thus promoted student's right to economical education.

The Division bench sent the matter back to the single judge bench to decide whether each of the supposed instances of copyright came within the gauntlet of the educational exception or not. The Publishers however filed an application seeking withdrawal of the suit on March 9, 2017.

ANALYSIS

The legal deductions in the judgment which form the real crux of the issue continue to be in favor of the University. The judgment centers on the

[3] Supra 2

interpretation of Section 52(1)(i) of the Copyright Act, 1957, which relates to photocopying for educational and teaching purposes, and whether this is legal. It gives an exhaustive list of exceptions and states that any use of copyrighted work not falling under this list would amount to copyright infringement.[4] In this background, the court seeks to explain two important questions:

1. The question arises as to how to determine whether there is fair use when the copyrighted work is used for educational purpose?

It is endorsed to read fair use into the statute in every action, especially when a person's result of labour is being utilized by somebody else.[5] The expression "fair use" is ordinarily understood to indicate a precise test in copyright law.[6] All over the world, courts contemplate four non-exhaustive determinants while testing if a particular use can be called a fair use or not.[7] These being: purpose of the use, amount and substantiality of the portion used, nature of the work and effect of the use on the prospective market.[8]

The Delhi High Court completely deviated from this test and constructed another one. The new yardstick for fairness of educational use is to check if the extent of the use is justified by its purpose. If yes, then it is legally

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[4] *"Fair Dealing" in Copyrights: Is the Indian Law Competent Enough to Meet the Current Challenges?*, Mondaq, available at http://www.mondaq.com/india/x/299252/Copyright/Fair+Dealing+In+Copyrights+Is+The+Indian+Law+Competent+Enough+To+Meet+The+Current+Challenges, last seen on 12/3/2017.
[5] Supra 2.
[6] Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539 (1985, Supreme Court of the United States).
[7] Campbell v Accuff-Rose Music, 510 U.S. 569 (1994, Supreme Court of the United States).
[8] 17 U.S.C., S. 17 (United States).

guarded and won't amount to copyright infringement. The court explained this by saying "so much of the copyrighted work can be used which is necessary to effectuate the purpose of the use, i.e., make the learner understand what is intended to be understood."

Therefore, the students can use the copyrighted work without any limitation and the same will be treated as fair use as long as they are doing it to learn what they need to.

This new requirement is unsound for various reasons. *Firstly*, it is subjective to the point that it is difficult to prove, self fulfilling and individual specific. Logically, every student has a different learning pace and curve. In such a scenario, it becomes difficult to determine when an individual has completed this process and eventually learned. Secondly, the question arises as to whether this end point really exists?, and *thirdly*, whether it is likely for every pupil to rely on the same, uniform texts as everybody else and individually reach that ideal tip? An important factor about variance in the classroom is the deep attentiveness, curiosity and understanding which only some students bring to the table and which rubs off on others over time. In something as fluid and communicable as learning, it would be impractical to tell when one can stop as there is conceivably no limit.

At the possibility of oversimplifying, this leaves the court with two options. *First*, to be opinionated and thereby introduce an irrational line of reasoning applicable to learning. For example, it could say that the pupil has reached the end result of learning once the syllabus is complete. This would be a disastrous perspective. *Secondly* and alternatively, it can think of education extensively, as it must. However, this would make the new requirement

completely self fulfilling. In case the court conceptualizes learning and education so widely, it would start with a foregone conclusion. Any use of copyrighted material by students to any length for educational and learning purpose would be viewed as just and the same would be protected.

This is not an issue per se. In fact, this end result, like the Single Judge Bench's decision, persists in giving students broad access to educational material. But, it does this by weakening the integrity of the concept of copyright and divesting the publishers of earnings that they have a right to as copyright owners. This leads to the second relevant question pertaining to the case

2. Whether the use of copyrighted work by students for educational purpose is detrimental to the publishers' interests?

The Division Bench fleetingly contemplated whether the students and teachers actions will be unfavourable to the market for these copyrighted work.

The court here pointed out that because the students would never have thought of buying the full books, they were never competitors in the publishers' market. This reasoning completely ignores the point of the publisher's case. In this scenario, the university was the prospective customer and not the student. The publishers did not intend to force the students into buying their books, an intention which the bench accepted. The publishers wanted the university to get a licence so that the students could

xerox the text they required.[9] They were of the opinion that a licence from the IRRO would solve the entire problem.[10] The court failed to acknowledge the financial burden on the publishers by interpreting the publishers' argument as one against the students rather than the university.

If such wide-reaching photocopying is allowed, then the Delhi University and other such universities would hardly think about investing money in buying these books. Immediately after the university buys a copy of an academic textbook, the students are free to photocopy the relevant sections in order to achieve their purpose of learning. This standard is low and ambiguous. Both the students and the university benefit from this. The university will have to pay a lesser amount. The publishers, on the other hand, are deprived of a lot of money.[11] By permitting photocopying of academic textbooks on such a wide scale, the court has freed the university from the burden of either getting a licence from the copyright societies or buying a fair number of books.

The factor of "nature of the work" in the standard fair use test which was rejected by the court is important in this case. When famous literature and movies are used in the classrooms for teaching and instruction, then the owners of these copyrighted works would barely notice as there are a lot of

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[9] Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (1996, 6th Cir.).

[10] Shamnad Basheer, *Breaking News: IRRO Registration Refused!*, SpicyIP, available at https://spicyip.com/2013/12/breaking-news-irro-registration-refused.html, last seen on 12/3/2017.

[11] *The New Copyright Law: Photocopying for Educational Use*, Jstor, available at https://www.jstor.org/stable/40225000?seq=1#page_scan///-tab_contents, last seen on 13/3/2017.

people who buy movie tickets and books for entertainment. So their main market remains uninfluenced and there would be no infringement of copyright.[12] The case of academic textbooks, on the other hand, is different as they have a restricted audience[13] because of the technical language and subject matter which in turn serves only people in specialized fields. If students and teachers, who predominantly form the publishers' audience, are allowed to photocopy the portions they need, then the same would have a negative effect on the market of the academic publishers. The court's logic here reflects how it has superficially comprehended the economics at play.

The students would have continued to derive this benefit even after the university took a licence. The publishers too would have got rewarded for their investment. In such a situation, the university would have been asked to pay to make sure that the students can access the academic material.

The University emerges as a winner in all this as it has in some way been able to wrangle a subsidy for the pupils. Barring the loss to the publishers, the rights of the copyright owners have also been hit by this decision.

CONCLUSION

The Copyright Act provides safeguards for educational purposes but the same should not be used in a way which is detrimental to the copyright holders. It would be advantageous if the courts come out with directions as to

[12] 17 U.S.C., S. 17 (United States).
[13] Namit Saxena, *Delhi HC's Fresh Air on Photocopying Law*, Deccan Herald, (29/09/2016), available at http://www.deccanherald.com/content/572994/delhi-hcs-fresh-air-photocopying.html, last seen on 10/3/2017.

the acceptable extent of copying. The law should dictate how much a pupil can claim and how much an author can allow.

The difficulty crops up while maintaining equilibrium between the interests of the copyright owners and the users interest. In this, organizations like Reprographic Rights Organization have a significant role to play as they open doors to inexpensive access to information. But there has to be a robust law in force for IRRO to function efficaciously in order to mutually save the interests of the users and the copyright holders. In truth, IRRO is the only licensing authority in the country in the area of literary works and it gives licences every year which cover magazines, books, etc for reprography as per law. If it is presented with organizational facilities, strength and substance then it can be victorious in shielding the rights of the copyright holders and the users. Thus, it is imperative to offer an unambiguous machinery to the IRRO by framing legislations to benefit users and copyright holders. Lastly, India is at the brim of a new age where occupations such as that of a writer or a researcher are taking the front line. Therefore in order to kindle the favourable transformation, the courts of India ought to ensure that the hardworking research organizations and authors are monetarily incentivized commensurate to their work. The judgment of the court in the case at hand is surely not in the same direction and will definitely further curb the already under-incentivised authors.

NATIONAL GREEN TRIBUNAL AND ITS DISPUTED JURISDICTION

Snigdha Gautam & Ramisha Jain*

ABSTRACT

Government officials and industrial tycoons can often be heard saying "What is the NGT up to? It is monopolizing powers and overstepping its jurisdiction." After the Stockholm Conference in 1972, India has been steadily taking progressive steps in the field of environmental protection, which has included the establishment of "Green Tribunals". India is the third country which has established a 'Green Tribunal' mechanism. This paper seeks to critically analyse the working of the National Green Tribunal (NGT). The NGT seeks to provide access to environmental justice. However, there is a growing concern that the tribunal is overstepping its jurisdiction and the resultant friction between the government, High Courts and the tribunal. Nevertheless, the NGT has been lauded for its efficacy. The object of this paper is to understand the reasons, merits and demerits of the tribunal over-stepping its jurisdiction and to make recommendations to strengthen the existing legal framework in order to ensure environmental justice and protection.

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INTRODUCTION

With the adoption of the Stockholm Declaration of 1972[1] and in the post Rio Conference[2] period, countries have taken up several initiatives to protect the environment, including the establishment of 'Green Tribunals' or 'Environmental Courts' to deal with environmental issues. These tribunals are quasi-judicial bodies formed to ensure speedy and efficient disposal of environmental disputes.

In India it was with the Bhopal gas tragedy[3] that a National Environment Tribunal was established in India with the objective of compensating those affected. However, the tribunal was ineffective and the National Environmental Tribunal Act, 1995 was repealed with the introduction of NGT bill, 2009.

The importance of environmental protection was realised and soon after the Stockholm Declaration, the Indian Legislature passed many legislations including the Indian Wildlife (Protection) Act, 1972, the Water (Prevention and Control of Pollution) Act, 1974, the Forest (Conservation) Act, 1980, the Air (Prevention and Control of Pollution) Act, 1981 and above all the Environment Protection Act, 1986. Articles 48-A and 51A were incorporated in the Indian Constitution via the forty second Amendment Act. Moreover,

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[1] Report of the United Nations Conference on the Human Environment, United Nations Conference on the Human Environment, Stockholm, 5-16 June, 1972, U.N. Document A/CONF.48/14/Rev.1 (June, 1972), available at: http://www.un-documents.net/aconf48-14r1.pdf, last seen on 2/06/2017.

[2] The Rio Declaration on Environment and Development (1992), United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June, 1992, U.N. Document A/CONF.151/26, available at: https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf, last seen on 2/06/2017.

[3] Union Carbide Corporation v. Union of India, 1989 SCC (2) 540.

the Supreme Court of India expanded the ambit of Article 21 of the Constitution to include the right to a clean environment as a Fundamental Right.[4]

The National Green Tribunal Act, 2010 established National Green Tribunal on October 18, 2010 for effective and expeditious disposal of cases relating to environmental protection including enforcement of statutory rights pertaining to the environment and granting relief and awarding compensation for damages to persons for matters connected therewith or incidental thereto. The objective was to ensure speedy environmental justice and reduce the burden of the High Courts and the Supreme Court. Out of the five NGT benches, New Delhi is the principal place of sitting of the tribunal, and the other four benches are in Pune, Kolkata, Bhopal, and Chennai.

The NGT has been equipped with the necessary expertise to handle environmental disputes. The composition of the NGT has been laid down in Section 4 of the Act. The Tribunal is headed by the Chairman, and also includes Judicial and Expert members. The qualifications for the same have been laid down in Section 5 of the Act.

The Jurisdiction of the NGT has been laid down in Section 14 and 16 of the NGT Act, 2010. The Tribunal has original jurisdiction over civil cases wherein the substantial question pertains to environmental law, for which the limitation period is of six months. Section 22 of the Act provides for an appeal to Supreme Court if any person who is aggrieved within ninety days from the date of communication of the award, decision or order of the

[4] M.C. Mehta v Union of India & Ors., (1998) 9 SCC 589.

Tribunal. An appeal may also be made on the grounds specified in Section 100 of the Code of Civil Procedure, 1908.

As per Section 19 of the Act, the Tribunal is not bound by Code of Civil Procedure, 1908, or the Indian Evidence Act, but guided by principles of natural justice.

COMPARISON OF NGT WITH TRIBUNALS IN USA, EU AND AUSTRALIA

Courts dealing with environmental protection are an exception in the USA and Europe - environmental litigation is generally covered by the traditional courts because of a reluctance to revamp the entire judicial sustem. Thus, for intermediate purposes 'Green Benches' were established to spread the workload and to manage complex environmental cases.

The United States Environment Protection Agency (EPA) was a brainchild of the then-President Richard Nixon which was established for the protection of human health and environment. The EPA's Appellate Board is an administrative tribunal that serves as the appellate adjudicator of administrative cases arising under the many environmental laws over which the EPA has jurisdiction. It hears appeals from decisions by the EPA Office of Administrative Law Judges. Despite the fact that states have their own Green Courts, traditional courts are used by the majority for environmental disputes.

According to Pring and Pring, "Sweden's Environmental Courts are an excellent example of first and second instance courts where the decision-makers include non-lawyer, scientific-technical experts, with full judicial powers" where "technical expertise is required because the Swedish system

assumes that the burden of investigation rests with the decision-making body, which takes an inquisitorial approach".[5]

The Indian 'Green Tribunals' based on the Australian Model are wider, more organised, efficient and effective as compared to the 'Green Courts' in USA and EU. The new Indian system cannot be regarded as a 'cookie cutter' or a 'one size fits all' model, however, it already represents a point of reference for other Asian democracies, in the perspective of an evolution of their system of environmental enforcement, and a challenge against the traditional reticence of Europe and USA towards 'green judges'.[6]

RISING CONCERNS WITH RESPECT TO JURISDICTION OF NGT

In spite of the fact that the NGT embarks on the beginning of a green era in India by directing much needed attention to environmental issues through a specifically set-up mechanism, it has been criticised by different environmentalists, lawyers and eminent persons. Some of the aspects on which it has been heavily criticised include lack of resources and its lack of judicial independence from the government. In light of recent cases, another addition to the list of criticisms is that NGT is overstepping its jurisdiction.

The NGT has overstepped its domain and there are several instances which evidence the same. Firstly, a decision that resulted in uproar - the ban on 10

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[5] G. Pring, C. Pring, *Greening Justice, Creating and Improving Environmental Courts and Tribunals*, The Access Initiative, available at moef.nic.in/downloads/public-information/Greening%20Justice.pdf, 2009, p. 56, last seen on 19/03/2017.

[6] L. Lavrysen, The role of National judges in environmental law, 2006, available at http://www.inece.org/newsletter/12/lavrysen.pdf, p. 6, last seen on 14/03/2017.

year old diesel cars across many cities.[7] To begin with, '10 year period' criterion in this order is debatable and moreover, is not a legal issue but a policy issue. The mere fact that a vehicle is 10 years old does not mean it is equivalent to scrap – a well maintained 10 year old vehicle is certainly better than a badly maintained 5 year old vehicle. It is not the running-period but the roadworthiness of a vehicle that should be taken into consideration. Moreover, in order to maintain the whole idea of separation of powers the Courts must stay out of such debateable policy issues no matter how grave the impact might be because it is neither their area of legitimacy nor competence. So technically, the NGT does not have the authority and legitimacy to order such a ban.

In the Vitthalwadi Riverbed Road case,[8] the realignment of a Metro route alongside the Mutha-river was considered. The NGT ordered that no encroachment and no construction was permitted in future inside the blue line of the river Mutha. However, the Supreme Court set aside the order of NGT staying the work.[9] The Petitioner had submitted that the NGT had no jurisdiction to hear the matter and the interim stay was liable to be set aside. A similar issue relating to the Noida Metro Project was brought to the notice of the court wherein the apex court had stayed the order of the NGT principal bench in Delhi. The matter is still pending, however it is an example of the

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[7] Lawyers' Environmental Awareness Forum (LEAF) v. State of Kerala, 2016 SCC OnLine NGT 163,
Vardhaman Kaushik v. Union of India & Ors. and Sanjay Kulshrestha v. Union of India & Ors., 2016 SCC OnLine NGT 526.

[8] Sarang Yadwadkar and Ors. v. The Commissioner, Pune Municipal Corporation and Ors, 2013 ALL (1) NGT Reporter (Delhi) 299.

[9] Commissioner Pune Municipal Corporation v. Sarang Yadwadkar And Ors, 2013 SCC OnLine NGT 3101.

hasty decision making of the Tribunal overstepping its jurisdiction.

Further, questions were raised about the way NGT had been unilaterally and questionably expanding its powers to include suo-motu powers despite the fact that it is a power granted to the High Courts under the Constitution.[10] In an affidavit filed before Supreme Court, the Ministry of Environment and Forests (MoEF) stated that the ministry refused to give the NGT suo motu powers and therefore it should follow the provisions of the Act.[11] The judicial over-reach question surfaced again when Madras High Court stated that the NGT was not a substitute for High Courts, and so it has to function within the ambit of the Act which does not contain provisions for suo motu proceedings.[12]

Despite prior rulings,[13] the NGT has conferred upon itself the power of judicial review. Relying on the Section 14(1) of the NGT Act which relates to civil disputes having 'substantial question relating to environment', the NGT has liberally expanded its jurisdiction. This is despite the fact that it is believed that the jurisdiction of the NGT should be considered in light of increased emphasis on the protection of the environment since it has been

[10] Tribunal on its Own Motion v. District Collector, Sivaganga District 2014 SCC OnLine NGT 1450; Tribunal on its Own Motion v. Union of India 2014 SCC OnLine NGT 1433; Tribunal on its Own Motion v. Union of India, 2014 SCC OnLine NGT 2352; Tribunal on its Own Motion v. Secretary, MoEF, 2013 SCC OnLine NGT 1086; Tribunal on its Own Motion v. State of Tamil Nadu, Municipal administration and Water Supply Department, 2013 SCC OnLine NGT 1105.

[11] Anubhuti Vishnoi, *No suo motu powers provided for you, MoEF tells Green tribunal*, Indian Express Daily, (2013), available at http://archive.indianexpress.com/news/no-suo-motu-powers-provided-for-you-moef-tells-green-tribunal/1160046/, last seen on 19/03/2017.

[12] P Sundarajan v. Deputy Registrar NGT (2015) 4 LW 23 at 27; Vellore Citizen Welfare Forum v. Union of India; 2016 SCC OnLine Mad 1881.

[13] Kalpavriksh v. Union of India, 2013 SCC OnLine NGT 1163.

declared a Fundamental Right under Article 21 of the Constitution by the Supreme Court. However, the NGT has used its jurisdiction to strike down legislations and orders. The Bombay High Court reiterated L. Chandrakumar's case,[14] that held that powers of High Court and Supreme Court under articles 226, 227 and 32 of the Constitution respectively are part of the basic structure of our Constitution. It was further stated that deciding validity of statute does not fall within the purview of statutory powers conferred upon the Tribunal. The jurisdiction of the NGT is limited to civil disputes as per Schedule I of the NGT Act, 2010 wherein a substantial question relating to the environment must be involved.[15] Moreover, the issue of validity of vires is outside the scope of jurisdiction available to such tribunals.[16]

The jurisdiction of the NGT was again in question when it went on to give a decision even though the Supreme Court was about to pronounce an order, imposing the pollution tax ranging from Rs 500 to Rs 1000 on the trucks entering Delhi.[17] The NGT had no powers to pass such directions and hence, Supreme Court overruled it. The NGT's order requiring the Indian Railways and Delhi Metro Rail Corporation (DMRC) to seek environmental clearances for their projects was also stayed by the Supreme Court.[18] Another instance of jurisdiction being in question was when the NGT tried to overrule the

[14] L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.
[15] Central India Ayush Drug Manufacturers Association v. State Of Maharashtra, 2016 SCC OnLine Bom 8813.
[16] Indian Oil Corporation Ltd. v. Nagpur Municipal Corporation and anr, 2012 (1) BCR 526.
[17] MC Mehta v. UOI, (2016) 4 SCC 269.
[18] Manoj Misra v. Delhi Development Authority and Pramod Kumar Tyagi v. Art of Living International Center & Ors., 2016 SCC OnLine NGT 114.

subordinate legislation in reality projects.[19]

CRITICAL ANALYSIS OF ACTIONS OF THE NGT

The whole idea of having 'Green Courts' was to give a platform for environmental issues to be discussed and decided in a manner that can ensure sustainable development. However, at present there is a strong perception that the NGT is overstepping its jurisdiction and is trying to take on government institutions. This perception can be highly damaging to the objective of effective delivery of environmental justice. However, it is not entirely founded on baseless grounds.

Over the last few years the NGT has been claiming powers, more than what it has under the statute. However, this is not the fault of the Tribunal entirely. The 2010 Act[20] as mentioned before, confers significant jurisdictional powers to the Tribunal but these powers are unclear and require clarification. For example, firstly, 'Substantial damage to the environment' needs to be quantified and secondly, public health should be defined in a tangible form so that there is a consistent and uniform approach followed by the Tribunal. In the present instance, the right to environmental protection has been applied by every judge according to their own subjective preferences. Therefore, even though the Act provides wide jurisdiction to Tribunal, it also restricts the scope of its jurisdiction only to matters involving substantial

[19] Vishwa Mohan, *Environment ministry questions jurisdiction of NGT in reality projects notification*, Times of India, (2017), available at http://timesofindia.indiatimes.com/india/environment-ministry-questions-jurisdiction-of-ngt-in-reality-projects-notification/articleshow/56741794.cms , last seen on 18/03/2017.

[20] National Green Tribunal Act, 2010.

questions relating to the environment.[21] Thirdly, the Tribunal has been given the power to make its own rules under Section 19 which again is ambiguous and is being used by it to draw the powers in order to render justice.

It is clear that merely establishing a Green Tribunal is not enough to protect the environment. Considering that the jurisdiction of lower and other courts (except the Supreme Court in matters of appeal) has come to an end, with the NGT coming into picture it makes even more important for the NGT to have a wide jurisdiction. Thus, raising questions on the so called 'frivolous' cases is immaterial because technically there is no other court to do so. For example, the order against nailing of bus stop signs onto trees by the Delhi Transport Corporation.[22] Out here questioning whether these issues fall under the ambit of 'substantial question relating to the environment' is irrelevant because technically, indirectly it is. This is where the need for proper legislation arises, because until unless the statute defines the power of Tribunals in such matter, Tribunals in the light of protecting environment will keep taking up such matters posing a threat to judicial set up in the country.

This serious conflict between the judicial capacity and overarching commitment to protect the environment, extends to the Tribunal taking up suo-motu matters. The NGT is in a very awkward position as on the one hand, it is expected to protect environment while on the other hand it cannot

[21] Section 14(1), National Green Tribunal Act, 2010.

[22] Kukreti, A. and Kukreti, A. (2017). NGT Issues Directions for Immediate Deconcretisation of Trees. [online] Delhi Greens Blog. Available at: http://delhigreens.com/2013/05/12/ngt-issues-directions-for-immediate-deconcretisation-of-trees/ [Accessed 11 Jul. 2017].

take up matters suo motu but will have to wait for litigants to approach the Tribunal with grievances. This is where the concept of national interest in environmental law fails. The Tribunal should be granted suo motu powers in matters of National interest or at least the power to consult with the Supreme Court or concerned High Courts and then take up the matter, as case may be. However, considering the burden on these courts, there is a need for the Tribunal to be able to handle environmental cases independently – which was incidentally a reason for their establishment.

The conflict between environment and development issues is also a serious concern. Every time the NGT tries to pull environmental law above the development of the country, it is heavily criticized for putting the democracy under threat by trying to override the doctrine of separation of powers. The question here is doesn't our country has diluted version of separation of powers where judiciary does the checks and balances. Then why is it that when NGT does the same, it is heavily questioned?

There is another challenge for the NGT ;- judicial review is a very important power that must be given to the NGT to manage environmental law-making problems. The NGT was set up because there was a need to provide relief to existing courts. Further, the Supreme Court felt that there was a need for expert opinions on environmental matters. The non-conferment of the power to review such laws to the NGT does not really make sense. The debate of whether the experts are competent or not, is entirely a different question, in fact ideally they should be. In exercising powers the NGT would be required to deal with, set aside or uphold the notifications and memorandums passed by the government. Without the power to look into the vires of legislations

and subordinate legislations the NGT would not be able to pass orders in the interest of justice. The NGT held that the scheme of the Act grants it the limited power of judicial review so as to decide any dispute, application and appeal before it.[23] Even though this point cannot be taken up because there is no statutory provision but it is definitely needed.

The NGT has given some remarkable decisions while trying to take up matters related to the environment, even though they are considered unnecessary by many - banning the sale of glass-coated manjha (thread used to fly kites) because it is non-biodegradable, being one such decision.[24] The NGT also played a pivotal role in trying to abate the alarming pollution in Delhi. The Tribunal took a very authoritative step by imposing a ban on construction and related activities in the region for a week. It even questioned the relevance of the Delhi government's order that shut down schools without any sound scientific reasoning. It laid down further directions to avoid burning of residue to control pollution.[25] However at the same time, the NGT has set a bad precedent while deciding the AOL Foundation case. In this case, the Tribunal went a step ahead of 'Polluter Pays' principle by allowing the foundation to go ahead with the festival, propagating 'Pay and Pollute' principle.

IDENTIFICATION OF ISSUES AND RECOMMENDATIONS

The NGT needs to be applauded for its efforts in bringing about change and to right the wrong done to the environment across the country. It ensures

[23] Wilfred J. v. Ministry of Environment & Forests, 2015 SCC OnLine NGT 169.
[24] Siddharajsinh Mahavirsinh Chudasama & anr v. State of Gujarat & Ors., 2017 SCC OnLine Guj 26.
[25] Supra, note 1.

speedy and efficient disposal of cases. However, in the recent times, the authority of the NGT is being challenged and questioned by those who seek to disturb the equilibrium. Thus, in order to protect our environmental democracy, judicial balance and justice the NGT needs to be strengthened. The issues being faced by the NGT and the corresponding recommendations are as follows:

- Improvement in infrastructure and access to justice: The jurisdiction of the local courts has been barred in cases pertaining to environmental issues, while at present the NGT has only 5 benches to cover the entire country. This makes environmental justice inaccessible to a large part of the population. Not everybody has the resources to travel to and support themselves in these big cities while engaging in expensive litigation and meeting the needs of their families. Hence, steps should be taken in order to make environmental justice accessible by either increasing the benches or reimbursing the travel and living expenses.

- Absence of realistic limitation period: The limitation period is restricted to three months which is extremely insufficient and once again leads to denial of justice. Right to clean environment is a fundamental right, so how can this right be simply overlooked because someone came to realise the implications of polluting activities a few years down the line? Hence, the Central Legislature must bring about an amendment in NGT Act, 2010 and extend the limitation period.

- Judicial review: As mentioned before, the claims of the MoEF that the NGT is widening its ambit of jurisdiction in the name of

'ancillary and inherent powers necessary in the interest of justice', can only be addressed if it is given power to adjudicate on issues where judicial review is required.26 The powers of judicial review are much needed to cure the loopholes and problems existing in our environmental legislations.

- Suo Motu: Justice Swatanter Kumar, NGT chairperson, maintains, "Suo motu jurisdiction has to be an integral feature of NGT for better and effective functioning of the institution. In the Constitution of India, the high courts also have not been exclusively conferred suomotu jurisdiction. However, the high courts have been exercising the same. There are some inherent powers which are vital for effective functioning and suomotu jurisdiction is one such power."[27]. Hence, the ambit of the NGT's jurisdiction should be expanded to include suo motu jurisdiction.

- Conflict with high court over jurisdiction: There is a constant conflict between NGT and the High Courts as to where an appeal from an NGT order should lie. As per the NGT Act, appeals from the NGT can only go to the apex court however, the High Courts claim that power of judicial review still lies with the High Courts. Hence, the verdict of the Supreme Court on this matter is of grave importance, to end the tussle between the High Courts and the NGT.

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[26] Kalpavriksh v. Union of Inida, 2013 SCC OnLine NGT 1163.

[27] Downtoearth.org.in. (2017). 'NGT must have suo motu powers'. [online] Available at: http://www.downtoearth.org.in/interviews/ngt-must-have-suo-motu-powers-47542 [Accessed 11 Jul. 2017].

- Checks and balances between NGT and governments: The central and state governments are often interfering in the workings of the NGT. Hence, a better checks and balances system needs to be evolved to ensure harmonious relations between them.

- Change public perception about the NGT "hogging" power**:** Recently, the NGT has been targeted for "hogging" power.. Thus, steps need to be taken to change this perception about the NGT as it is merely fulfilling its duties. In our opinion not every might seem directly related to environmental concerns but it might have a drastic effect in the future, which is why an expert opinion is required to solve the issues.

- Frivolous cases: There has been rise in the number of frivolous cases being filed before the NGT. Once a similar problem was faced in the case of PILs. Similar steps should be adopted i,e., higher costs should be imposed to discourage frivolous petitions to save time and resources.

- Establish principles to determine damages: The NGT is merely governed by the principles of natural justice. However, as it an expert body a methodology needs to be developed to ascertain damages and compensation. This will also help in maintaining transparency.

CONCLUSION

National Green Tribunals, better referred to as 'Green Courts' are the best initiative towards the sustainable development of the country. These Tribunals are needed to ensure that the justice to the environment is done. The NGT imposes strict penalty for non-observation of the law.

The judiciary has been the backbone for development of environmental law in India, be it through Fundamental Rights or Duties. It has developed environmental jurisprudence, even though policy enforcement has been weak. However, there are still certain drawbacks which have to be addressed so that the NGT can not only do justice in environmental law cases but also do justice to the objective of its establishment.

"Environmental democracy needs legislature to lay down what is right and wrong and it needs judiciary to right the wrong."

WIDER INTERPRETATION OF THE DEFINITION OF SERVICE UNDER CONSUMER PROTECTION ACT: CONTEMPORARY ANALYSIS

Avinash Kumar*

Abstract

Before the enactment of the Consumer Protection Act, 1986 "hereinafter CPA", consumer was responsible for protecting himself from any kind of unfair trade practice but now the consumers need protection by law when goods and services fail to live up to their promises or indeed cause direct or indirect loss to the customers. The exclusionary part of Section 2 (1) (o) does not seems proper because in welfare state era, the state takes part in more and more social welfare activities and also renders services free of charge. Therefore, even the services provided by the State cannot be called free of cost as those services is provided out of the tax and revenue collected from public at large, so State cannot be afforded the chance to be negligent and provide deficient services. Thus, the services provided by the State may be brought within the purview of the definition of service and this exclusionary party should only be made limited to the extent of free of cost services provided by private sectors.

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INTRODUCTION

The prevalent consumer law jurisprudence in India has aged barely 31 years, and may not be as thorough as the US jurisprudence of competition law policy and consumer law jurisprudence, which has been evolving since the beginning of 19th Century. In spite of that, it is a progressive bit of legislation which, unlike the MRTP Act, protects the consumers from different types of deficient services and injustices. It is right that the Consumer Protection Act, 1986 *"hereinafter CPA"* underwent great changes in the last few years and the courts and forums helped in improving it by keeping in mind the larger interest of Consumers.

In the present scenario, the consumer is a victim of many unfair and unethical trade practices adopted in the market and he is very often cheated in quality, quantity and price of goods or services. Before the enactment of the CPA, the consumer was responsible for protecting himself from every kind of restrictive trade practice but now the consumers need protection by law when goods and services fail to live up to their promises or indeed cause direct or indirect loss to the customers. In the recent years there has been a greater public concern with regard to consumer protection issues all over the world.

On 9th April, 1985, the General Assembly of the United Nations, adopted the guidelines to provide a framework for Governments of the member states, particularly to those of developing countries, to use in elaborating and

strengthening consumer protection policies and legislation[1]. The objectives of the said guidelines include assisting countries in achieving or maintaining adequate protection for their consumers and encouraging high levels of ethical conduct for those engaged in the production and distribution of goods and services, and for this purpose they make provision for the establishment of consumer council and other authorities for the settlement of consumers' disputes and for matters connected therewith. Apart from the consumer protection laws in developed countries, we find that developed countries as well as like Thailand[2], Sri Lanka[3], Mauritius[4], Nepal[5], Indonesia[6]are also taking keen interest in making consumer laws.

Therefore, the law relating to Consumer Protection was enacted in India as CPA. To implement the CPA properly, primarily we need to understand the concept of service and the recent developments in the field concerned. Earlier, the concept of service was not so broadly interpreted in India and it only included some of the traditional services like medical services, legal services, hotel services, accountancy etc., but in recent times, the concept of service is gaining more importance in our day to day lives. It has begun to include services like housing construction, banking services, insurance

[1] U.N. General Assembly, *Consumer Protection* Res. 39/248, U.N. Document A/RES/39/248, (16/04/1985) available at http://www.un.org/documents/ga/res/39/a39r248.htm, last seen on 26/06/2017.
[2] Consumer Protection Act, 1979 of Thailand, amended in 1998.
[3] Consumer Protection Act, 1979 of Sri Lanka.
[4] Consumer Protection Law, 1991 of Mauritius.
[5] Law on Consumer Protection, 1998 of Nepal.
[6] Law on Consumer Protection, 1999 of Indonesia.

policy, transportation, educational institution and many others, which have been brought within the purview of definition of service.

Definition of Service

This has led to chaos as the term is being interpreted differently by various courts and thus there was no consistency. The definition clause under Sec.2 (1)(o) of CPA provides the definition of a service as *"service means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, [housing construction], entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"*[7]

It is noteworthy that the first part of the definition of 'services' provided in the definition clause is inclusive in nature and may include services of any description, while the second part of the definition pertains to simply the illustration of specific services.

In Lucknow Development Authority v. M K Gupta[8] the apex court while dealing with the meaning of the word 'service' observed that "It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. Further the Hon'ble Court found that "the words 'any' and 'potential' are significant. Both are of wide amplitude. It appears to any service made available to potential users. The word 'any' according to the dictionary

[7] S. 2 (1) (o), The Consumer Protection Act, 1986
[8] 1994 AIR 787, (1994) 1 SCC 243.

means ‘one’ or ‘some’ or ‘all’. In Black’s Law Dictionary, it is explained, thus word ‘any’ has a diversity of meaning and may be employed to indicate ‘all’ or ‘every’ as well as ‘some’ or ‘one’ and is meaning a given statute depends upon the context and the subject matter of the statute. The use of the word ‘any’ in the context has been used in Sec. ‘2 (1) o’ indicates that it has been used in the wider sense extending from one to all. The other word ‘potential’ is again very wide. In Oxford Dictionary it is defined as 'capable of coming into being, possibility'. In Black's Law Dictionary it is defined as "existing in possibility but not in act.’ In other words services which are not only extended to actual users but those who are capable of using it are also covered in the definition. The clause is thus very wide and extends to any or all actual or potential users.”

The Supreme Court of India had already in 1993 in the *M K Gupta Case*[9] and *Indian Medical Association v. V P Santha*[10] interpreted the definition of service by keeping in view the wider perspective and thus it led to a dilemma in the mind of the lower courts who did not apply it properly. This dilemma led to injustice to the innocent consumers but the judiciary were not silent spectators and in coming times they made it particular in spite of a general wider definition.

The definition provides a list of eleven sectors to which services may pertain in order to come under the purview of the Act. The list of the sectors is not

[9] *Ibid.*
[10] 1996 AIR 550, (1995) 6 SCC 651.

an exhaustive one. Services may be of any description and pertain to any sector if it satisfies the following criteria:

a. A service is made available to potential users, i.e. services not only to the actual users but also to those who are capable of using it;

   The consumer of services includes not only the hirer of services for consideration but also the beneficiary of such services provided that he is availing the services with the approval of hirer. This is necessary to protect the interest of user of services, because under the general principles of law of contract such user cannot sue the provider of service on the grounds of Privity of Contract. This rule proves that only parties to the contract can sue and not the stranger. But now such a user or beneficiary may seek relief against the deficient services under the Act[11]. For example when a person buys a car and uses it as a taxi, he does not cease to be a consumer. This provision is helpful in widening the scope of service under CPA.

b. It should not be without consideration, e.g. the medical service rendered free of charge in Government hospital is not a service under the Act;

c. It should not be under a contract of personal service; and

   The expression 'contract of personal service' is not defined under CPA. There is a difference between 'contract of service'[12]and 'contract for service.[13]' In the case of 'contract of service', the service seeker can

[11] Asia Pacific Journal of Marketing & Management Review *Vol.1 (4), December (2012) [Online available at indianresearchjournals.com]* (accessed on 10/02/2017).
[12] Supra Note 7
[13] Ibid.

order or require what is to be done and how it should be done; for instance a master can tell his servant to bring goods from a particular place. In a 'contract for service', the service seeker can express only what is to be done. How the work will be done is at the wish of the performer; such as when a person gives suit to the tailor for stitching, he does not tell him which method he should use to stitch it. Contract of Personal Service is excluded from the definition of service under sec 2(1)(o)and 'Contract for service' is recognized as service under the Act.

d. It should not be for commercial purposes.

It is to keep in mind while applying this Act that services purchased or hired for commercial purposes is not included in Sec 2(1) (o) of the Act. Before 15.3.2002 a person availing services on payment of consideration even if it was for commercial purpose was a consumer. It was excluded from definition of consumer by Amending Act, 2002.[14]

It is pertinent to mention here that, it would not make any difference that whether the service provider is a Government body or a Private body. In *M. K. Gupta case* Apex Court held that "*even if a statutory corporation provides a deficient service, it can be made liable under the Act. Though there are several other services which are not particularly included within the definition clause, but it does not mean that they can't be held liable."* The Consumer Forum and particularly the Judiciary have liberally interpreted the term 'Service' and included several other services within the definition clause from time to time may be listed as 'Advocates, Airlines, Chartered

[14] 2012(3) CPC 587 N.C.

Accountants, Courier, Chit Fund, Education, Gas Cylinder/ LPG, Medical Services, Postal services, Railways, Investment related services and Telecommunication service.'

Since then, many services were falling under the act with the passage of time due to developing needs of the society. Due to pronouncements of the apex court in the *M.K. Gupta* case the situation regarding statutory authority was made very much clear but regarding medical services and Government hospitals, the matter was still uncertain. Finally, in *Indian Medical Association v. V P Santha*[15] the issue related to medical services came before the Supreme Court of India and the apex court appears to have settled the issue relating to the medical profession or deficiency in medical services. It was observed by the Apex Court that *"It is no doubt true that the relationship between a professional man and a consumer carries with it a certain degree of mutual confidence and trust, and therefore, the services rendered by a professional can be regarded as service of personal nature but since there is no relationship of 'Master' and 'Servant' between the professional man and consumer, the contract between them cannot be treated as 'contract of personal service' but it is 'contract for service' and the service rendered by a professional man to his customer or client under such a contract, is not covered by the exclusionary part of the definition of service."*

After the apex court made this landmark judgment, P. D. Dalmia in his writing very interestingly stated that all professionals Advocates, Architects, Chartered Accountants, Doctors, Engineers, Interior Decorators and others

[15] 1996 AIR 550, (1995) 6 SCC 651.

are covered under the CPA, 1986. All the professionals are licensed and covered under respective laws of the land. So it does not mean that professionals are not liable for due compensation under the CPA for their 'negligence' and 'deficiency' in service.[16]Hence all professionals are answerable and covered under the CPA which is unique piece of legislation.[17]

The above analysis and interpretation of the concept of service provides us with a general understanding of the term, but for the purpose of bringing it into the proper implementation we need to understand it in details by categorizing the different services, which is as follows:

Medical Services

Medical services were not a popular topic of discussion in this context before the decision of the apex court in *Indian Medical Association*[18]. This case appeared to settle the issues relating to deficiency in services provided by medical professionals, hospitals etc. and the case settled many a problems, thereby establishing the principle applicable in case of services provided by medical professionals. However, this case left some room for interpretation which created confusion among the lower courts.

The first difficulty that appeared was whether this term is included in the definition clause. The apex court interpreted it as though it is not expressly included within the definition clause but it comes with the inclusionary part

[16] P D Dalmia, "Consumers v. Professional".1 (4) CPJ 15 at 16 (April 1996).
[17] Ibid.
[18] 1996 AIR 550, (1995) 6 SCC 651.

and it was further held by the Hon'ble court that this will not make any difference whether it is provided by public or private sector.

The court further clarified the matter and held that *"medical practitioners, though belonging to the medical profession, are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected. Keeping in view the wide amplitude of the definition of `service' the main part of the definition clause as construed by this Court in Lucknow Development Authority, we find no plausible reason to cut down the width of that part so as to exclude the services rendered by a medical practitioner from the ambit of the main part of Sec. The other part of exclusionary clause relates to services rendered "free of charge". The medical practitioners, Government hospitals/nursing homes and private hospitals/nursing homes (hereinafter called "doctors and hospitals") broadly fall in three categories:-*

i) Where services are rendered free of charge to everybody availing the said services.

i) Where charges are required to be paid by everybody availing the services and

iii) Where charges are required to be paid by persons availing services but certain categories of persons who cannot afford to pay are rendered service free of charges.

There is no difficulty in respect of first two categories. Doctors and hospitals who render service without any charge whatsoever to every person availing the service would not fall within the ambit of "service" under Sec 2(1) (o) of the Act. The payment of a token amount for registration purposes only would not alter the position in respect of such doctors and hospitals. As far as the second category is concerned, since the service is rendered on payment basis to all the persons they would clearly fall within the ambit of Sec 2(1) (o) of the Act. The third category of doctors and hospitals do provide free service to some of the patients belonging to the poor class but the bulk of the service is rendered to the patients on payment basis. The expenses incurred for providing free service are met out of the income from the service rendered to the paying patients. The service rendered by such doctors and hospitals to paying patients undoubtedly fall within the ambit of Sec 2(1) of the Act."

After this case to a great extent it was felt that no further conflicts will take place regarding medical services but as earlier submitted that the lower courts did not apply the landmark judgment of *M K Gupta case and Indian Medical Association case* properly. In 2004, again a questionable judgment was passed by the lower consumer forums, which was later on rightly decided by National Consumer Forum in *Shailesh Munjal v. AIIMS.*[19]The forum observed that it would be difficult to hold that "services rendered by AIIMS would not be covered by the provision of sec 2 (1) (o) of the Act as the service is not free of charge. It may be subsidized to a large extent but that may not be said to be free of charge. The reason being it is not covered

[19] Sailesh Munjal v. AIIMS.

by exclusionary clause. The above mentioned case was relied in the case of *AIIMS v. Ayesha Begum*[20]in which amount of Rs.750/- as registration charges was taken as consideration and negligence on the part of AIIMS was considered as deficiency in service.

Regarding the difference between a contract of personal service and a contract for personal service within the medical profession the Apex Court in the *Indian Medical Association case,* further observed that "Firstly, a 'contract of personal service' has to be distinguished from a 'contract for personal services'. In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service rendered under a 'contract of personal service'. Such service is service rendered under a `contract for personal services' and is not covered by exclusionary clause of the definition of 'service' contained in Sec 2(1) (o) of the Act. The expression 'contract of personal service' cannot be confined to contracts for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of service' as defined in the Act.

Housing Construction Services

It has been an issue for the Courts in India to decide whether deficiency in Housing Construction Services comes within the purview of the definition

[20] AIIMS v. Ayesha Begum (Citation needed)

clause or not. This difficulty may arise because this sector is run by private as well as public sector. The position on this was made clear through 2nd amendment in the year 1993, which brought number of services under the CPA apart from the earlier scope of dealing with the matters concerning market goods. In the same year, the Apex Court on the issue of a Housing board engaged in construction of houses for the registered consumers decided the landmark judgment of *M.K. Gupta case*. The issue was as to how housing board can fall under the preview of CPA, it being dealing with immovable property whereas so far goods defined under the sale of goods act (movable goods) were the subject matter of CPA.

During the *M.K. Gupta case,* the Supreme Court dealt with the question of whether housing construction could be regarded as a service under sec 2 (1) (o) of the Act. The term, "housing construction" was inserted into the inclusive part of the definition in 1993. The Hon'ble Court held that housing activity is a service and was covered by the main part of the definition. Government or semi-governmental body or a local authority is as much amenable to the Act as any other private body rendering similar service. Construction of a house or flat is for the benefit of person for whom it is constructed and therefore, he may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by

a builder or a contractor. If the service is defective or it is not what was represented then it would be unfair trade practice."[21]

In relation as to what amounts to deficiency in cases of service of housing construction court found that "any defects in construction activity would be denial of comfort and service to a consumer, e.g. when possession of property is not delivered within stipulated time, rendering service not of that particular standard, quality or grade. A flat with a leaking roof, or cracking wall or substandard floor is denial of service."[22]

In one other landmark judgment the Supreme Court of India held that where the appellant assured he would to provide infrastructure facilities to the allottee of the plot, such activities are covered under the term service and company is a service provider. Thus, such complaint is maintainable under C. P. Act.[23]

Legal Services

Unlike other services, the possibility of liability being attracted by legal services created chaos among the forums and courts. Whether the services provided by an Advocate falls within the jurisdiction of the Consumer Forums or not, was a matter of confusion. A large number of cases came up against the medical profession, but only a limited number of cases involving

[21] 1994 AIR 787, (1994) 1 SCC 243.
[22] Ibid.
[23] 2012(3) CPC 178 S.C.

issues relating to the legal profession have been filed before consumer forums.[24]

For the first time this issue came before the National Commission in *K. Rangaswamy v. Jaya Vittal*[25], in which the client hired an advocate for filing a writ petition. The advocate did not appear and it was passed over to the next date and the said writ was dismissed on behalf the absence of the respondent's counsel. The respondent filed a complaint in Consumer Forum on account of deficiency in legal services. The main question which came before the Forum was whether the services rendered by an advocate was a 'service' within the definition clause? It was held that service under a contract of "personal service" is excluded from the definition of the word service and since the advocate-client relationship falls within this category, it is automatically excluded from the definition of service.

However, in the later decision of *C. K. Johnny v. Jaisundaram*[26], the National Commission itself held that a client is a consumer as he has availed the service of the advocate for appropriate consideration. Of the two decisions, the former seems to depend on the exclusionary part of the definition of service.

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[24] K. Rangaswamy v. Jaya Vittal, Supra Note 21, Kankati A. Snnapurnamina v. A. P. State Legal Aid & Advice Board. (1991) (1) CPR 418 (NC); S. P. Thirumala Rao v. Bar Council of India, II (1991) cp. 1 201: Niranjan Pandhi v. Registrar, Supreme Court of India, I (1993) CPJ 279.
[25] (1991) CPJ 688
[26] (1995) CPJ 311.

Soon after the *C. K. Johnny* decision, the above issue, once again, came before Madras High Court in *Srimathi v. Union of India*[27]. The Hon'ble Court held that the consumer forums have got the necessary jurisdiction to deal with the claims against the advocates. The court was dealing with a collection of writ petitions and the common question raised in all these writ petitions was regarding the validity of Sec. 3 of the Act. The Court after referring to the statement of the objects and reasons of CPA held that "*what Sec 3 of the Act says is that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law. The Sec only provides that it will be open to any person to claim the benefits of this Act and also avail himself of the provisions of other enactments if there is no inconsistency or conflict and if he is not barred otherwise, by any other principle of law, like estoppels."*[28]

The other contention of the petitioners was that advocates are governed by the Advocates Act and thus, does not fall within the purview of CPA. The reliance was placed on an earlier decision of Rajasthan State Consumer Forum in *Nathamal Ashok Kumar case*, but in this regard the Hon'ble Court held that *"this cannot help the petitioners herein as it is a question of interpretation of the relevant provisions of the Act. It is seen that there is a specific Sec in the Railway Claims Tribunal Act barring the jurisdiction of other Courts and authorities. But, there is no such provision in the Advocates Act to bar the jurisdiction of other Courts and authorities or Tribunals in*

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[27] (1997) 5 CTJ 99.

[28] Srimathi and Ors v. Union of India and Others on 6 March, 1996 (1997) 5 CTJ 99, Available at: Indian Kanoon - http://indiankanoon.org/doc/1400607/. Last accessed on 26th June 2017.

relation to matters connected with the advocates or disputes arising between the clients and their advocates."

It is pertinent to mention here that similar contentions were raised in Indian Medical Association, while rejecting their plea, the Apex Court had categorically held that *"the applicability of the CPA cannot be questioned on the ground that the medical practitioners are subject of disciplinary control under Medical Council Act, 1956."*

Now the current position regarding deficiency in legal services is that if there is deficiency in legal services it would fall within the definition clause and thus it will not make any difference whether the Legal Services is regulated by the Bar Council of India or through a separate statute.

Electrical Services

The existence of two separate acts or statutes on the same subject always creates a problem for the courts and forums to decide a matter conveniently. On one hand there is the Electricity Act in almost all the states and the CPA deals with the deficiency and consumer protection in the same area. The fault is not on the part of bringing the statute but the difficulty aroused due to non-understanding of the application and purpose of the above two acts. While the Electricity Act was brought to govern electricity distribution, while the CPA was brought for the purpose of protecting consumers' interest.

Sec 2 (1) (o) reveals that supply of electrical energy, has in express terms been included in the definition. In *Manoramaben case*[29] the Hon'ble Gujarat

High Court held that *"the only question involved in these cases is whether the Consumer forum has jurisdiction to entertain the complaint filed by the consumer against the bill raised under Sec 126 of the Electricity Act, 2003 or against the action taken under Sec 135 of the said Act. The court explained the purpose of CPA, which sought to provide better protection of the interests of consumers and for the purpose, to make provision for the establishment of Consumer councils and other authorities for the settlement of consumer disputes and for matters connected therewith. The Hon'ble Court also clarified the definition of service and held that from the aforesaid provisions, that it will be evident that having availed the service for supply of electrical energy on payment of consideration it will thereby fall within the definition of "consumer" as defined under Sec 2(1) (d)(ii) for the purpose of "service" as defined under Sec 2(1)(o) of the CPA.*

In another landmark judgment, namely *Jharkhand State Electricity Board v. Anwar Ali Sarkar*[30], the National Consumer Forum held that *the consumer forum has jurisdiction to deal with the grievances of the consumers in case of deficiency in service by electricity supplier as consumer forum is not barred by the provisions of the Electricity Act and therefore, it is logical to conclude that there is no ouster of jurisdiction of the Forum constituted under the CPA in matters concerning the supply of electricity. The Forum further observed that Consumer Forum constituted under the CPA would have jurisdiction to entertain only the complaints filed by a consumer of electricity alleging any defect or deficiency in the supply of electricity or alleging adoption of any unfair trade practice by the supplier of electricity.*

[30] II (2008) CPJ 284 (NC).

The Forum have no jurisdiction over the matter relating to the assessment of charges for unauthorized use of electricity, tampering of meters etc. as also over the matters which fall under the domain of special Courts constituted under the Electricity Act, 2003."[31]

In a recent judgment the Supreme Court of India held that if complainant has not pleaded unfair trade practice or unauthorized use of electricity, the matter will be decided under the Electricity Act instead of the CPA as the complainant is neither a consumer one nor is the industry a service provider for the purpose of the CPA.[32]

Insurance Services

The status of Insurance services his clear as it is expressly included under sec 2(1)(o) and the interpretation of the court and forums include all types of insurance services including insurance services for marines, fire, life, property etc.

Bringing it into the application, in the case where the Life Insurance Corporation failed to make a payment to a nominee appointed under Sec 39 of the Insurance Act, it committed a default in the performance of an undertaking in pursuance of the contract of insurance. A nominee being a person is a beneficiary entitled to avail the service with the approval of the person who hired such services for consideration, and is, therefore, a consumer.

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[31] 2008 CTJ 853(CP).
[32] 2013(2) CPC 365 S.C.

Telecom Services

In the present scenario the most important and necessary services is telecom services. The existence of two acts, one specifically dealing with the telecom regulations and on the other hand, the CPA, creates a similar situation to that of Electricity services.

It is noteworthy that when a telecom service provider provides telephone connection on the condition of payment and recovers from him rental as well as call charges for the use of the facility, it clearly constitutes hiring of a 'service' for consideration.

It has repeatedly been held by the National Commission that the Consumer of Telecommunication services are entitled to seek relief from the Consumer forum in spite of provision for appointment of arbitrator in case of dispute contained in sec 7B of Indian Telegraph Act.[33]

Recently, Hon'ble Supreme Court, in *General Manager, Telecom v. M. Krishnan and another*[34] held that Telegraph Act was a special law and its provisions would prevail over a general law like the CPA and when there is a special remedy provided in Telegraph Act regarding disputes in respect of telephone bills, then the remedy under the Consumer Protection Act is by implication barred.

This judgment made this issue complicated. The above judgment suffers from defects as during the *lis pendens* TRAI had issued license to several private players and passed Telecom Consumers Protection and Redressal of

[33] Union of India v. Dr. B. S. Sidhu, 1 (1992) CPJ 208 (211) (NC): 1991 (I) CPR 537.
[34] AIR 2010 SC 90.

Grievances Regulations, 2007 and the above regulation was not brought to the notice of the apex court and thus this judgment cannot be held as precedent.

Educational Services

In the past, only the governmental institution was there to provide educational services. The situation changed due to lack of capacity and poor conditions, bringing several private players to the field. However, even the private players started providing educational services with much defects or deficiency. Regarding the jurisdiction of consumer forums to hear the cases of defects in educational services there have been a large number of decisions – both in favour[35] as well as against.[36] Their inclusion within the ambit of CPA, has given rise to a lot of controversy and speculation.

But in the latest judgment the Supreme Court held that the services provided by Educational Institutions is a service and the forum below rightly held the petitioner liable for deficiency in service who had wrongly denied refund of admission fees despite denying admission to the respondent's daughter in a medical course.[37]

[35] Tilak Raj of Chandigarh v. Haryana School of Education Board, Bhiwani, I (1992) CPJ 76; Abel Pacheco Gracias v. Principal, Bharati Vidyapith College of Engineering, I (1992) CPJ 105; Controller of Examination, Board of Intermediate Examination, Hyderabad v. Kandukuri Uma Devi, I (1993) CPJ 572; Mumbai Crahak Panchayat, Bombay v. Registrar, University of Bombay, I (1993) CPJ 37).

[36] Nirmal Taneja v. Calcutta District Forum, II (1992) CPJ 591;Seemu Bhatia v. Registrar, Rajsthan University, II (1992) CPJ 899; Registrar, and University of Madras v. Union of India. (1995) 3 CTJ 100 HC.

[37] 2013(1) CPC 495 S.C.

In another recent landmark judgement the Hon'ble Supreme Court directed the Bihar Educational Board to pay an amount of Rs.12, 000/- because they delayed the result of the complainant's son. In an earlier decision, it was held that board is not a service provider, and the impugned order was set aside.[38] After this judgment of the Supreme Court, the confusion about statutory authorities providing educational services has been cleared. Even if it is a statutory authority providing educational services, where their actions constitute a deficiency in service, it would fall within the definition clause.

Banking Sector

There is no case about the normal banking transactions and it is noteworthy that every court and forums accepts the jurisdictions of the Consumer Forum to hear the cases of deficiency in banking services. The dispute here is regarding whether all the banking operations come within the purview of service or if only some of them may be considered as service? In a large number of cases, banks have been pulled up for deficiency in service and compensation has been awarded to complainants by the Consumer Courts.

The courts and forums have accepted that money lending is one of the important services rendered by the banks and that too for consideration in the form of interest. It was also observed that even if the bank does not charge for providing cheque facility, it cannot be said that the same is given without consideration. Actually, the cheque book is obtained in consideration of his putting funds at the disposal of the bank.

[38] 2009(3) CPC 217 S.C.

WIDER INTERPRETATION OF THE DEFINITION OF SERVICE

In *Vimal Chandra Grover v. Bank of India*[39], the Supreme Court found that the bank is rendering a service by providing overdraft facilities to a consumer, which is not without consideration. The bank is charging interest and other charges as well for providing the service. In another landmark judgment delay of five years in delivery of possession of a truck purchased in open auction was held to be deficiency in service.[40] Dishonouring of a cheque by a bank despite sufficient funds resulted in lapse of policy. Thus, the bank was held liable for deficiency in service.[41]

Where, bank had discharged its legal duty by sanctioning requisite loan. It was not bound to make supply of provision and the bank was not held liable for deficiency in service.[42]

A bank refused to sanction a loan as the property proposed to be purchased from DLF was not covered under the scheme of National Housing Bank. The bank is not liable for any deficiency in service as complainant did not comply with the requisite condition.[43]

Thus, it can be said on the basis of above propositions held by courts and forums in India that almost all the services provided by banking institutions is considered service under Sec 2 (1) (o) of the act. The bank may be exempted only when they are not negligent and not in a case where deficiency of service is in question.

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[39] 2000 (2) CPJ 11 (SC): AIR 2000 SC 2181.
[40] 2009(3) CPC 94 S.C.
[41] 2010(2) CPC 552 N.C.
[42]2010(1) CPC 502 U.P.
[43]2011(2) CPC 637 N.C.

Service rendered by the Courts

The services provided by courts, both by paying fee and without, is not a service and the reasoning behind this given by the court is that it is not a professional service and it is just considered as a part of sovereign function of the State.

In *State of Gujarat v. Akhil Bhartiya Grahak Panchayat*[44] the complainant contended that the court fees paid by the civil litigants is the consideration paid for hiring of service, and dispensation of justice by a judge is rendering of services to the civil litigants. The Gujarat State Commission observed that the state is exercising its sovereign function of providing justice to the citizens and others which is not contractual, and that the court fee levied by the state is not a consideration as contemplated under the Act. A court fee is imposed under the taxing power of state. The complainant cannot have any contract or negotiations. If he wants to avail the privilege offered by the state, he has to pay the court fees prescribed, and it will not amount to deficiency in service within the meaning of the Act. The Commission, thus, held that the decision of the District Forum that the litigants are consumers and the service rendered by court is a service as contemplated under the Act is erroneous and deserves to be set aside.

In *Govt. of Madras v. Zenith Lamps*[45] *Hon'ble* Supreme Court held that there must be a broad co-relationship with the fees collected and the cost of administration of justice.

[44] (1993) 1 CPR 327 (Guj. CDRC).
[45] AIR 1973 SC 724.

CONCLUSION

From the perusal of the paper it is clear that legislature has cast its net in a very wide way to protect consumer of the services under CPA. To a large extent it fulfills the requirements because the definition under Sec 2(1)(o) in itself is very wide and the judiciary in recent times has interpreted it in a very wide manner with all availed possibilities and constructive way so as to cover almost all the services, except the services hired without consideration. The exclusionary part of Sec 2 (1) (o) does not seem proper because in an era of welfare states, the state takes part in a plethora of social welfare activities and also renders services free of charge. Therefore, even the services provided by the State cannot be said to be free of cost as those services are provided out of the tax and revenue collected from public at large so the State cannot defend their negligence. Thus, the services provided by the State may be brought within the purview of the definition of service and this exclusionary party should only be made limited to the extent of free of cost services provided by private sectors.

The Courts in India to a large extent included almost all the services provided either by private players or by public authorities and the three types of services categorized by Supreme Court of India in *Indian Medical Association case* were rightfully distinguished. The exclusion being the free of cost services provided the State, i.e. free of cost services provided by the private players and the services provided during sovereign function of the State may be justified on account of fair running of the Administration.

'REGULATORIZATION' OF INDIAN ADMINISTRATION: UNDERSTANDING THE CHALLENGES AND CONUNDRUMS OF THE INDIAN REGULATORY MECHANISM

Rupesh Aggarwal*

ABSTRACT

Recently there have been a myriad of new regulatory bodies, which have been established in India by the Parliament through its various legislations. These legislations envisage the creation of an appellate tribunal, which acts as a court of first instance and hears appeals from the decisions and orders of the respective regulatory bodies. While the tribunalisation of the Indian Courts have received much attention from scholars and academia, the same is not true for the phenomenon of 'Regulatorization' of the Indian Administration. This paper tries to ascertain some of the legal concerns attached with the regulatorization of the Indian Administration. In the process, efforts will be made towards understanding the need for such an intensive reformation of the decision making structure and procedure at the administrative levels. Further this paper proposes some solutions to the problems attached with the regulatory form of administration in India.

INTRODUCTION

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The Executive forms one of the pivotal branches of the governmental structure, which is vested with the duty to implement and enforce the laws enacted by the Parliament. Ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.[1] For the executive to perform all these functions optimally, it is divided into different ministries. The different ministries handle different portfolios and are vested with the power to ensure smooth and effective rule implementation in these respective fields. In the process, these ministries come out with various policies for effective governance. Within the past decade or so, there is an emerging trend of creating regulatory bodies so as to aid the concerned department or ministry in their working. The basic rationale of establishing these bodies is to insulate technical matters attached with a particular field or arena from political interference, thereby introducing some sort of legal certainty by ensuring that the approach to these technical matters is not subject to the vagaries of politics.[2] In doing this, the legislature and the executive try to ensure that a few select experienced individuals, appointed as members of these bodies, are able to bring in the adequate technical expertise required to deal with the specific problems attached to the functioning of a particular sector. Experience with this recent trend of 'regulatorization' has been mixed. The problems are many, and solution implementation has been shoddy. The administrative phenomenon is comparable to its judicial counterpart of

[1] Ram Jawaya Kapur v. State of Punjab AIR 1955 SC 549.

[2] Ministry of Finance, Government of India, *Report of the Financial Sector Legislative Reforms Commission— Volume I: Analysis and Recommendations*, March, New Delhi (2013), access at http://finmin.nic.in/fslrc/fslrc_report_vol1.pdf, last seen on 02/02/2017.

‘tribunalization’, except that in the former scenario, cogent understanding and analysis of the matter at hand remains at a nascent stage.

This paper discusses the attenuating problems associated with the regulatory bodies established under a plethora of legislative Acts, coupled with proposals towards remedying these issues. This paper fully recognizes the importance of delegating executive and administrative authority and functions to these bodies in the current era of scientific and technical advancement, and hence has nowhere asserted the need for the abolishment of regulatory mechanisms. Further, it is cleared at the outset that this paper specifically focuses on independent sectoral regulatory bodies brought into effect in the post-liberalization era. In order to fully appreciate the quagmire faced by the regulators, it is important that the history and background of the inception of these regulatory mechanisms are discussed in brief.

HISTORY, BACKGROUND AND OVERALL FRAMEWORK

The module of regulatory framework is fairly new in the Indian scenario. In the pre-1991 era, the need for having separate regulatory bodies was not felt since most of the sectors in our economy and industries were governed and regulated by the government itself. The aspects of managing finances, giving licenses, decisions on the productivity threshold and maintenance of just distribution to the public were all state controlled. The government not only controlled the economy but in many industries, was the sole provider of services too. This state controlled and mandated economy ran into difficulties in the 1990s when the P.V. Narasimha Rao government decided to liberalize the economy and in the process, deregulated most of the sectors of the economy barring a few industries. Many private players entered the

market to fill the void created by this scenario of the State retracting its monopolistic hand from many of the sectors. These private players started to govern the rules of the market. With market forces governing many of the indices of economics in these sectors rather than the government, the introduction of some amount of regulation became expedient so as to protect the interests of the consumers, to ensure that the forces of market economy didn't ride roughshod over the principles of equity, and that the procedure adopted by these private players to maximize their interest remained fair and just.

These regulatory bodies are established by a piece of legislation, which governs different facets of these authorities. Much of the jurisprudence attached to these regulatory authorities and the overall framework of regulation is mainly derived from two Acts, namely the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as TRAI Act) and the Competition Act, 2002. The regulatory frameworks in the other Acts establishing authorities such as the Electricity Commission, the Real Estate Regulatory Authority (RERA), the Airport Economic Regulatory Authority, the Petroleum Regulatory Board, etc., adopt the module of regulation as provided in these two Acts (TRAI Act and Competition Act). These statutes establish a two-tier mechanism, with the first tier consisting of a regulatory authority performing strictly administrative tasks and the second tier consisting of a tribunal dealing with adjudicatory functions.[3] While the first tier works in tandem with the executive, the adjudicatory body, performing

[3] T.V. Somanathan, *Administrative and Regulatory State* in Oxford handbook of Indian Constitution, (S. Choudary, M. Khosla, P.B. Mehta, 394 (OUP, 1st ed. 2016).

quasi-judicial and judicial functions, is sought to be independent of any governmental influence. The rationale for this set-up was to bring in scientific expertise, technical know-how, quick policy making processes and operational independence to deal with complex sectoral work without jeopardizing separation of power. In the past few years, the regulatory mechanisms have not been able to stand up fully to this rationale and have in turn faced many theoretical and practical challenges alike in their working.

REGULATORIZATION NOT A PANACEA: CONCERNS AND ISSUES INVOLVED

The issues involved with the regulatory bodies can be classified into three broad categories, namely, conceptual challenges, structural challenges and functional challenges. It is stated at the very outset that these three classifications are extremely permeable and the elements included cannot be separated into watertight compartments. Hence a criticism included in one category can be included as a part of another category if viewed from a broader perspective. The attempt here is to particularize the issue at hand.

Conceptual Challenges

Navroz K. Dubash has in his seminal article on regulatory authorities[4] discussed some of the difficult questions that are linked to the working of regulatory bodies in India. In this paper he tries to bring in the conundrums attached with the establishment and the working of these bodies. The task of

[4]N.K. Dubash, *Independent Regulatory Agencies: A Theoretical Review With Reference To Electricity and Water in India*, (SA) 43(40), Economic and Political Weekly, 43 (2008), access at http://environmentportal.in/files/Independent%20Regulatory%20Agencies.pdf, last seen on 13/02/2017.

balancing economic efficiency with public interest is a difficult one. This difficulty is directly linked to the very concept of regulation outside the traditional realm of governance and administration. Regulation, as a concept, involves vesting decision and subsidiary policy framing roles to an independent organization, which is not elected via popular elections. In addition to facing perception challenges, these regulatory bodies are criticized for exercising important functions, which it should not in an ideal scenario. This deficit in conceptual acceptance gets pronounced when the regulators have to choose economic efficiencies over public interest and greater good. As a result of this deficit, there have been multiple legal challenges to the Acts[5] establishing regulatory bodies.[6] These challenges to the bodies have at a conceptual level been targeted towards the aspect of excessive delegation, usurpation of judicial and quasi-judicial functions, appointment of the members of the regulatory authorities and tribunalization.

Important functions vested in unelected officials

A strong opposition against these regulatory bodies is that they consist of unelected officials[7] who are vested with some important powers to make rules and regulations.[8] While the very un-elected nature of these regulatory

[5] Brahm Dutt v. Union of India 2005 SC 730.
[6] Delhi science forum v. Union of India, AIR 1996 SC 1356.
[7] M.P.Tangirala, *The Costs of Inappropriate Delegation: TRAI Act and its Amendment*, 16(1) Competition and Regulation in Network Industries 47, 48(2015), access at https://www.researchgate.net/publication/274883974_The_Costs_of_Inappropriate_Delegation_TRAI_Act_and_its_Amendment. Last seen on 23/02/2017.
[8] S. 36, TRAI Act, 1997; S. 64, Competition Act, 2002; S. 177, Electricity Authority Act, 2003; S. 61, Petroleum and Natural Gas Regulatory Board Act, 2006.

mechanisms allow them to frame unpopular regulations[9], many believe that this overarching presence of a regulatory state leads to a decrease in the legitimacy of the government.[10] The rationale presented for this delegation is to help the sector be governed by people having scientific expertise and know-how.[11] This rationale is debatable. In this regard, the idea behind the creation of tribunals can be brought to the fore. As per the Hon'ble Supreme Court in a plethora of cases, these tribunals perform important quasi-judicial and judicial functions[12] and hence, they need to have one member strictly from the judiciary[13]. This is to ensure that cases before the tribunal are decided according to the principles of fair trial. Similarly, it is important that bodies and officials who are democratically elected by the people take the important administrative decisions.[14] Currently, these regulators are perceived basically as independent agents[15] creating democratic deficit[16].

A case of excessive delegation

[9]M.S Sahoo, C.K.G Nair: "Regulating the Regulators," *Hindu Business Line*, (05/06/2015) access at http://www.thehindubusinessline.com/opinion/reg-ulating-the-regulators/article 7389314.ece, last seen on 13/02/2017.

[10] Giandomenico Majone, *The Regulatory State and its Legitimacy Problems*, Reihe Politikwissenschaft/ Political Science Series No. 56 (1998), access at http://aei.pitt.edu/32416/1/1208943461_pw_56.pdf, last seen 02/02/2017.

[11] Supra 3 at, 397.

[12] R. Gandhi v. Union of India [2010] 6 S.C.R. 857.

[13] L. Chandra Kumar v. Union of India AIR 1997 SC 1125.

[14] R. Baldwin, C. McCudden, Regulation and Public Law, 286-294 (London: Weidenfeld and Nicholson, 1st Ed., 1987).

[15] Select Committee on the Constitution, House of Lords, *The Regulatory State: Ensuring its Accountability*, Vol. I, 6th Report (2003-04), access at http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/68.pdf, last seen on 13/02/2017.

[16]Kaushiki Sanyal, *Regulating the Regulators*, 51(13) Economic and Political Weekly 16, 17 (2016), access at https://www.researchgate.net/publication/301513898 _Regulating_the_ Regulators_The_Role_of_Parliament, last seen on 20/02/2017.

It is a settled position of law that the subordinate legislation cannot contain substantive rights and obligations, which are not provided in the principal Act.[17] The court had earlier declared some of the regulations passed by the Central Electricity Regulatory commission to be ultra vires of the constitution.[18] The TRAI Act[19] and The Competition Act[20] have also been challenged for excessive delegation. Though the Courts have consequently repelled these challenges, the fact of legal uncertainty[21] surrounding these Acts is however still conspicuous.[22]

Inability to separate functions

Separation of power amongst the three branches of government forms part of the basic structure of our constitution.[23] Though the said theory of separation of power, as propounded by Montesquieu, is not applied in the Indian scenario in its strict sense, the working of the Indian constitution has preserved the basic essence of the theory.[24] These three branches of government perform legislative, administrative and judicial functions. The distinction between legislative and judicial functions is clearer than the distinction between executive and legislative functions on one hand[25] and

[17] Kunj Behari Lal Butail & Ors. v. State of H.P. & Ors., (2000) 3 SCC 40.
[18] Global Energy Ltd. & Anr v. Central Electricity Regulatory, Civil appeal nos. 3457-3458 of 2009, SC.
[19] Star India P. Ltd. v. The Telecom Regulatory Authority W.P. (C) 24105/2005 (DHC).
[20] Super Cassette Industries Pvt ltd. v. Union of India & Ors. W.P. (C) 7186/2014 (DHC).
[21] Supra 3, at 401.
[22] Supra 5 and 6.
[23] Keshvanand Bharti v. State of Kerala (1973) 4 SCC 225
[24] Granville Austin, *Working in a Democratic Constitution: A History of the Indian Experience* (1st Ed. 2000).
[25] Union of India v. Cynamide India ltd (1987) 2 SCC 720.

executive and judicial functions on the other.[26] Executive functions can at some instances involve deciding the rights and liabilities along with performing administrative duties. In the case of *A.K. Kraipak vs. Union of India*[27] the Court had held that 'the dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated.' Quasi-judicial functions have been held to be a mix of both administrative decisions and judicial procedures.[28] The Court has not been able to provide a cogent definition of the term judicial, which according to it depends on the facts of the case, nature of the functions to be performed[29] and the consequences ensuing from the exercise of the authority as prescribed in the legislation[30]. Not able to strictly define the contours of authority exercised by different organs and bodies have the propensity of threatening the very concept of separation of power. For instance, the Supreme Court has in relation to the Electricity Commission, expanded the meaning of power to mean regulatory power as well, and has held the commission's role to be an aggregate of legislative, judicial and administrative functions.[31]

Absence of judicial member in performing adjudicatory functions

Not being able to fully effectuate a demarcation between the judicial, quasi-judcial and administrative functions has a far reaching impact. The Court, in

[26] See S. 36, TRAI Act, 1997; Cellular Operators Association of India and Others v. Telecom Regulatory Authority of India and Others, Civil Appeal No. 5017 of 2016, SC.
[27] A.I.R. 1970 S.C. 150.
[28] Shri Sitaram Sugar Co. Ltd. v. Union of India and Ors. (1990) 3 SCC 223.
[29] Dr. Binapana Devi v. State of Orissa, [1967] 2 S.C.R. 625.
[30] A.K. Kraipak v. Union of India, A.I.R. 1970 S.C. 150.
[31] PTC India Ltd v. CERC (2010) 4 SCC 603.

the case of *Sampath Kumar v. Union of India*[32], ruled on the need to have a judicial member in the tribunals since the functions performed by the tribunal are quasi judicial and judicial in nature. The Court in *L. Chandra Kumar v. Union of India*[33], though partially, overruled the judgment in the Sampath Kumar case, yet reiterated the need to have a judicial member in the tribunals selected through consultation between the executive and the judiciary. This rule regarding the need to have a judicial member overlooking judicial and quasi-judicial functions should technically prevail in every case, i.e., outside the framework of the tribunals, if the concerned body is carrying out functions which are capable of determining the rights and liabilities of people.

Most of the regulatory bodies perform important quasi-judicial duties. On the contrary, the requirement of the inclusion of a judicial member into the adjudicatory mechanism of the executive is merely discretionary and has not been made mandatory.[34] It is quite true that the distinction between quasi-judicial and administrative functions has been obliterated, but that nowhere decreases the concerned regulator's duty to adhere to principles of natural justice and rule of law. Section 19 of the Electricity Act, 2003 gives the Central Electricity Regulatory Commission the power to revoke a license given under Section 16 of the Act. Section 19(3) states that such revocation cannot take place without prior notice. This function is quasi-judicial in nature, but performed by people merely selected by the executive. Other Acts too, provide the regulatory authorities with the power to impose penalties

[32] (1987) 1 SCC 124.
[33] AIR 1997 SC 1125.
[34] See S. 8 of the Competition Act, 2002; S. 4(3) of the SEBI Act, 1992.

without specifically mandating the need to have a judicial member.[35] This is in contra-distinction from the approach adopted under Section 3 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (hereinafter referred to as PNGRB Act) where there is a specific mandate for the regulatory board to have at least one legal member in its fold.[36]

An added layer of regulation

There are multifarious interpretations of the term regulation.[37] All these interpretations do not clearly draw a line between the act of regulation and the authority to adjudicate.[38] In case of the Telecom Regulatory Authority of India Act, the TDSAT has the original jurisdiction to entertain and adjudicate disputes between various interested parties.[39] The Adjudicatory Tribunal, instead of being an appellate body, is deciding on the disputes related to the functioning of the sector, thereby leading to the tribunal regulating important matters from its incipient stage, and creating a second stage of regulation.[40] The legislators do not seem to be learning their lessons since even in the pending Major Ports Authority Bill, 2016, the adjudicating body consisting of a presiding officer and two other members selected solely by the

[35] See Ss. 43, 43A, 45 of the Competition Act, 2002; S. 15 of the SEBI Act, 1992.
[36] S. 3 of the PNGRB Act states that: "*The Board shall consist of a Chairperson, a Member (Legal) and three other members to be appointed by the Central Government.*"
[37] K. Ramanathan v. State of Tamil Nadu, (1985) 2 SCC 116; State of Tamil Nadu v. Hind Stone (1981) 2 SCC 205; Jiyajeerao Cotton Mills Ltd. v. M.P. Electricity Board 1989 Supp (2) SCC 52; 34. Reference in this connection can also be made to the judgment in U.P. Coop. Cane Unions; Federation v. West U.P. Sugar Mills Association (2004) 5 SCC 430.
[38] PTC India Ltd v. CERC (2010) 4 SCC 603.
[39] S.14A, TRAI Act, 1997.
[40] V.V Singh, S. Mitra, *Regulatory Management and Reform in India*, Background Paper for OECD, CUTS International, access at http://www.oecd.org/gov/regulatory-policy/44925979.pdf, last seen on 23/02/2017.

executive, have been vested with some tariff related functions,[41] thereby raising doubts about the true nature of the adjudicatory establishment. Regulators have a function different from the tribunals. While the latter deals with adjudicating past behaviours of the concerned parties, the other deals with future practices by means of fixing and framing rules and policies. There will be a reduction in the fairness to the parties and flexibility in regulation if the tribunals start controlling future behaviours and practices.[42]

Tribunalisation: A direct outcome of Regulatorization

In modern debates on constitutionalism, regulatory frameworks have been overshadowed by the tribunal system.[43] These debates fail to recognize the origin of the system of tribunals in the first place. With the formation of a regulatory form of governance, there was a need felt to introduce a parallel appellate adjudicatory system to entertain appeals from the decisions of the regulatory mechanisms. Much of the criticism meted to the tribunals does not present a complete picture of the scenario, since the role of establishing regulatory bodies in this phenomenon of tribunalisation is not taken into account. Due to Supreme Court decisions, the regulatory framework has been overshadowed by the tribunal system, leading to the aforesaid skewed attention to the drawbacks of tribunals. In true effect, regulatory authorities consist of experts concerned with the particular sector, thereby mandating a

[41] S. 51(3)(a), Major Ports Authorities Bill, 2016

[42] S.G Breyer , R.B Stewart, *Administrative Law and Regulatory Policy*, 402, 405 Little, Brown and Company, Boston and Toronto, 6th ed. 2006

[43]See Arvind P. Datar, *Tribunals: a tragic obsession*, Seminar (Feb, 2013), access at http://india-seminar.com/2013/642/642_arvind_p_datar.htm, last seen on 15/02/2017.

need for an adjudicatory establishment consisting of technical experts themselves.[44]

Structural Challenges

The framework in relation to the composition, arrangement and edifice of these regulatory bodies faces some acute challenges vis-à-vis the aspect of independence, uniformity and accountability. The structures of these regulatory authorities have not been able to address crucial questions related to: a) the edifice of working, for e.g., how to maintain independence from the ministry and work in collaboration with them at the same time; b) processes that should be adopted to ensure the development of some minimum working objective standards across different regulators; c) the manner in which different stakeholders in the regulatory decision making process should be involved; and d) ways to make these authorities effectively accountable to the Parliament.

A thin veneer of independence

One of the foremost rationales for establishing independent regulators for the governance of a specific industrial and economic sector is to insulate the technical and policy making process from unnecessary political interference[45] so as to increase transparency.[46] In reality, this rationale and reasoning seems to be lost in the case of many regulatory bodies due to their

[44] P.N. Bhandari, *Avenues for Appeal-Proposed tribunal promises effective disposal of case*, Luthra and Luthra Law Office (Dec, 2004), http://www.luthra.com/publications-articles-details.asp?id=38&st=0&links=, last seen on 15/02/2017.
[45] Delhi Science Forum v. Union of India, AIR 1996 SC 1356.
[46] Supra 40.

organizational setup and cross functioning with the concerned ministry. The example of the TRAI can be cited in this regard. The regulator has merely advisory powers under Section 11 of the TRAI Act. The recommendations made by the regulator are not binding on the government. The concerned department i.e. Department of Telecommunication within the Ministry of Communication and Information Technology takes the final decisions with regard to telecommunication policy. Due to its close functioning with the ministry, the regulatory bodies in different sectors remain trapped within the traditional and formal political-administrative setup. Section 25 of the TRAI Act for instance, makes the directives passed by the government binding on the regulator.[47] While on paper, these provisions are necessary to ensure that the regulators function within the traditional system of governance, in practicality, the experience has not been so ideal.

Financial dependence: A thorn in the flesh

While the presence of separate statutes establishing these regulatory bodies and the fact that these authorities are composed of independent members selected by the executive, ensure[48] a certain level[49] of functional autonomy[50], the same is not true for financial independence.[51] Most of these regulatory bodies are cash tied to their respective ministries, which has the capacity of

[47] S. 25, TRAI Act, 1997.
[48] CUTS International, *Regulatory Framework for Infrastructure Sector in India*, Report, January 14, 2005, access at http://www.cuts-international.org/RptRegFrmwork140105.htm, last seen on 20-02-2017.
[49] S.L. Rao, *Regulatory Confusion*, The Telegraph, Calcutta, (26/10/2016), access at https://www.telegraphindia.com/1161026/jsp/opinion/story_115533.jsp#.WKJMThJ96gQ, last seen on 19/02/2017.
[50] Skewed executive influence interferes even in the appointment of members to these regulatory bodies at certain instances.
[51] Supra 40

lowering their autonomy. They don't have separate financial sources. The Ministry of Finance doesn't directly communicate with these authorities over financial matters and the money drawn from the consolidated funds of India is not directly routed towards them.[52] A combination of these factors has led to interference from the political class, which sees these regulatory bodies as tools to carry out their electoral agendas .

Regulators as means to legitimizing governmental decisions

Overindulgence of the government in the functioning of these regulators has led to a competitive imbalance and a decrease in competitive neutrality.[53] An illustration of this is quite visible in the telecom sector where the government makes the final decision of giving licenses while it also owns BSNL, a public telecom service provider.[54] Political interference in these regulatory mechanisms is seen as a major hurdle in improving the present scenario of regulation.[55] In sectors such as electricity, the government, in order to implement its populist policies, fails to increase the electricity tariff, which is acutely needed.[56] Due to unnecessary interference by politicians, the regulators many a times formulate policies moulded to benefit the elected class. From the working of the regulators it can be observed that these

[52] Supra 40.
[53] Supra 40.
[54] CUTS C-CIER, *Comparative study of regulatory framework in Infrastructure sector: Lessons for India*, Briefing Paper No. 12/2008, access at http://www.cuts-international.org/pdf/CCIER-9-2008.pdf, last seen on 15/02/2017.
[55] Pradeep S. Mehta, *Competition and Regulation in India*, CUTS International, 2013, access at http://www.cuts-ccier.org/icrr2013/pdf/Competition_and_Regulation_in_India-2013_Leveraging_Economic_Growth_Through_Better_Regulation.pdf, last seen on 17/02/2017.
[56] Sunil Jain, *Is India's Regulary System bust?*, access at http://thesuniljain.com/files /Is%20India%E2%80%99s%20regulatory%20system%20bust. pdf, last seen on 13/02/2017.

authorities act as proxies to legitimize the decisions of their ministry (line ministry). Most ministries in the government face a legitimacy quagmire. The recommendatory, rule making and policy-developing role of the regulators are very deftly being used by the government of the day to legitimize their political actions.

No precise and definite structure

There is a lack of definite structure among the regulatory bodies. These regulatory bodies have been developed in a haphazard manner without any cogent systematic approach being followed.[57]Arguments are often made that none of the regulatory authorities provide for a model for the other body.[58] There is a general opinion among scholarly groups that the regulatory mechanism in India has been developed in a manner wherein much thought about the need to maintain a uniform structure has not been given.[59] While a two-tier system of regulation and adjudication has become a common feature, there is still a lack of structural definiteness among these regulators. The reason of sector specific working and needs cited for this non-uniformity is not tenable, as these incongruities relate to the non-sectoral area of functioning.

Differential capacity and authority

[57] Planning Commission, Government of India, *Approach to regulation-Issues and Options*, Consultation Paper (2006), access at http://planningcommission.nic.in/reports/genrep/infra_reglawl.pdf, last seen on 23/02/2017.
[58] S.L. Rao, *Regulatory process in India fails to perform its biggest function; here's why*, The Financial Express, (27/10/2016), access at http://www.financialexpress.com/opinion/regulatory-process-in-india-fails-to-perform-its-biggest-function-heres-why/431424/, last seen on 19/02/2017.
[59] Supra 57.

The authorities vested in different regulatory frameworks are differential, with some bodies like the Securities & Exchange Board of India (SEBI) and Competition Commission of India (CCI) exercising vast penal authority while other bodies such as the Telecom Authority lack any teeth in this regard. This anomalous position allows increased political interference in some of the regulatory bodies while in other cases the dependence of the bodies on the respective ministries is somewhat less. The electricity regulatory authority has vast powers in respect of distribution of licenses and rule making. This is somewhat restricted in the sector of telecom. For example, Section 15 of the Electricity Act gives the appropriate regulatory commission the authority to grant licenses to any person for the purpose of transmitting, distributing and undertaking trading in electricity. In contra-distinction with the TRAI, this aforesaid commission is allowed to issue licenses, prescribe[60] and amend its conditions[61] without much interference by the concerned ministry. TRAI, on the other hand, is mandated to promote competition while this is not the case with the electricity and port regulatory authorities.[62]

Incongruity in the provision for judicial review

[60] S. 16, Electricity Act, 2003.
[61] S.18, Electricity Act, 2003.
[62] Shishir Sinha, *New Regulatory Reform Bill seeks to bring parity across infra sectors*, Business line (05/07/2015), access at http://www.thehindubusinessline.com /economy/ policy/new-regulatory-reform-bill-seeks-to-bring-parity-across-infra-sectors/article7389340.ece.

While some Acts provides for appeals directly to the Supreme Court of India from the decision of the tribunal[63], other Acts explicitly route the appeal first to the High Courts[64]. The jurisdiction of the appellate tribunals is varied too. For instance, while at one end of the scale, TDSAT has the jurisdiction to entertain appeals from licensors, service providers and consumer groups[65] too, at the other end, the Securities Appellate Tribunal (SAT) can only entertain appeals against the decisions of the capital market regulator - SEBI[66]. Mechanism established in the Insurance Regulatory and Development Authority Act, 1999 and the Lands Port Authority of India Act, 2010 do not include provisions for a specific appellate tribunal. Insurance related matters are appealed to the SAT,[67] which is an appellate body established under the SEBI Act. This framework for the insurance sector has not proved to be fruitful.[68] Further, in some instances, exclusion of the tribunal's authority to review the regulations framed by the regulators[69] has led the whole field of regulatory jurisprudence to a state of confusion and vagueness.

Lack of parliamentary oversight

[63] S. 18, TRAI Act, 1997; S. 53T, Competition Act, 2002; S. 125, Electricity Act, 2003; S. 37, PNGRB Act, 2006.
[64] S. 58, RERA, 2016.
[65] S. 14, TRAI Act, 1997.
[66] S. 15T, SEBI Act, 1992.
[67] *See* S. 37 of the Insurance Laws (Amendment) Act 2015. The concerned section substitutes Section 33 of the IRDA Act, 1999. Amended Section 33(8) of the Act states that: '*Any insurer or intermediary or insurance intermediary aggrieved by any order made under this section may prefer an appeal to the Securities Appellate Tribunal.'*
[68] N.S Subramanian, *2 years on, Securities Tribunal still lukewarm to insurance*, Business Standard, (24/01/2017) https://www.pressreader.com/, last seen on 19/02/2017.
[69] BSNL v. Telecom Regulatory Authority of India (2014) 3 SCC 222.

The respective ministries earlier performed many of the functions that are now delegated to these regulatory bodies. Despite this delegation, the ministry continues to be answerable to the legislature for many of these functions exercisable by regulatory authorities. These regulators are never summoned for answering questions related to their working in the parliament[70]. For instance, during question hour, SEBI, as an independent regulator despite holding vast penal authority, is not answerable to the parliament for many aspects of its working since it is the Ministry of Finance which is held directly accountable to the parliament in this particular sector.[71] This creates accountability deficit whereby regulatory bodies become immune to direct legislative influence and in turn face excessive interference from the ministries. The system of proxy oversight developed, whereby the executive, on account of the legislature, oversees the working of these regulatory authorities, which jeopardizes the administrative influence of the regulators. Though provisions regarding tabling reports of different regulatory bodies do exist,[72] their effectiveness is questionable, since the discussions about these reports in the parliament are negligible and meagre.[73] These reports are not in many cases discussed since structurally regulatory

[70] Harsimran Kalra and Sakshi Balani, *Parliamentary Oversight of Regulators*, PRS Legislative Research, access at http://www.prsindia.org/administrator/uploads/general/ 1370 586800_Parliamentary%20Oversight%20of%20Regulators.pdf, last seen on 21/02/2017.
[71] Supra 16.
[72] S. 101(2) of the Electricity Act, 2003; S. 78 of the Real Estate (Regulation and Development) Act, 2016 which places the responsibility on the regulatory authority to prepare an annual report and place it in front of one house of the parliament.
[73] In the 16th Lok Sabha, till date, out of 3,889 discussions, only two are related to independent regulators.

authorities are perceived to be accountable to ministries first, and then the legislature.[74]

Functional Challenges

The regulatory bodies have been criticized for the way they have functioned and operated. Further, frequent appeals from the orders passed by the regulatory bodies have lead to the deterioration in the efficacy of speedy decision-making processes. The regulatory bodies, in their functioning, have always been grappled with the question of balancing procedural robustness, efficiency, institutional capacity and social safeguard.[75] In this section the author has talked about the practical difficulties that Indian regulatory bodies have faced due to the aforementioned structural and conceptual challenges.

Excessive Ministerial interferences: Creating breeding grounds for corruption

Keeping in mind that no regulatory body can ever be completely insulated from political intervention so as to maintain political accountability[76], the focus herein is on the term 'excessive'. The close-knit system of the concerned regulatory authority working with the respective department, coupled with the lack of parliamentary accountability has led to excessive interferences from the political class. This has led to large scale corruption under the garb of the working of these regulatory bodies (for e.g. 2G scam,

[74] Supra 16.
[75] Supra 4, at 46.
[76] Supra 4, at 44.

corruption in the electricity department).[77] Siphoning of funds on the pretext of scientific and technical application has become a commonplace circumstance in the Indian regulatory landscape.

Low functional inter-regulator interactions

The excessive streamlining of these respective regulatory bodies with the concerned Ministries, lowers the coordination between the different regulatory bodies. There is functional interaction and coordination between the various ministries instead of regulators directly governing their own communication. In many instances, there is an overlap between the functions of these regulatory bodies, thereby creating confusion with regard to the administrative jurisdiction. For instance, Section 60 of the Electricity Act allows the competent regulatory authority to issue directions to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in the electricity industry.[78] This particular provision clashes with the function vested in the Competition Commission of India by virtue of Section 4 of the Competition Act, 2002. Inspite of overlapping provisions and functions, there lacks coordination amongst these two authorities, thereby leading to unnecessary procedural compliances as well as lack of coordinated approach.

Another instance where there is a void in relation to the interaction between various regulatory bodies is the field of environment protection regulation.

[77] Sunil Jain, *Regulatory Roulette*, access at http://thesuniljain.com/files/Regulatory%20Roulette(1).pdf, last seen on 02/03/2017.
[78] S. 60 of the Electricity Act, 2003.

Section 67(2)(k) of the Electricity Act, for instance, calls the appropriate government to frame appropriate rules which leads to avoidance of environmental damage. Nowhere in the Act, is there a provision where the regulatory body can coordinate with the respective body or ministry dealing with the aspect of environment. The same holds true for the interface between these regulatory bodies and the aspect of governing competition between different private entities. The communicational dynamics between the CCI and the other regulatory bodies seem to be absent, thereby leading to a functional disconnect between the regulators promoting improvement of the sector and determining the level of competition and the CCI prohibiting anti competitive practices.[79] The House of Lords Report of 2003 had clearly opined the need to adopt a more integrative approach in the working of the various regulators.[80] There is an immediate need for the different regulatory authorities to pay heed to the policies and objectives adopted by the other regulatory establishments and attune their regulatory policies according to an overarching regulatory structure.

Frequent appeals: Loosing the scientific expertise

Although not strictly related to functional fallacies within the regulatory mechanism, a liberal approach towards admitting the appeals against the decisions of these regulatory bodies has a debilitating effect on their efficiency. Appellate structures established in the various statutes allow the decisions of the regulatory bodies to be appealed to the tribunals. This structure is not uniform amongst the gamut of statutes establishing regulatory

[79] TCA Anant & S Sunder, *"Interface between regulation and competition law", Towards a functional Competition Policy for India*, CUTS, 77 (edr. Pradeep S. Mehta, 1st ed., 2005).
[80] Supra 15.

bodies. The number of appeals from the decisions given by the regulatory bodies to the tribunals and subsequently to the High Courts and the Supreme Court is high.[81] This high number of appeals is ensuring that the current regulatory form of governance loses its advantage of scientific expertise in the field of policy making. The composition of the regulatory bodies is slightly different from that of the tribunals and vastly different from the High Courts and the Supreme Court. When an appeal reaches the High Court, the bench deciding the matter constitutes solely of judicial members. The absence of technical experts results in decisions losing the scientific and technical edge. The basic reason for tribunals to constitute both judicial members and technical members is to ensure that both layman’s knowledge and technical knowledge gets combined in the judgment rendering process. There have been instances wherein the apex court has excluded the authority of tribunals from deciding upon the regulations passed by the regulators.[82] Experts are of the opinion that these examples of exclusion of tribunals’ authority and consequently vesting the already overburdened High Courts with the duty to review the regulations framed by the regulators can be detrimental to the technical and scientific effectiveness offered by the regulatory mechanisms.[83]

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[81] Supra 49.
[82] BSNL v. Telecom Regulatory Authority of India (2014) 3 SCC 222.
[83]Mona lisa, *TDSAT can’t admit petitions challenging Trai rules: SC*, Live Mint (10/12/2013), access at http://www.livemint.com/Industry/lzj5Ba25L36GmNyqt2DgWI/TDSAT-cant-admit-petitions-challenging-Trai-rules-SC.html, last seen on 22/02/2017.

The law commission has in its 215th report asked the Supreme Court to review its decision in *L. Chandra Kumar* v. *Union of India*[84], which restored the High Court's power to judicially review the decisions rendered by the tribunals. Post the decision in L. Chandra Kumar, the number of appeals to High Courts from tribunals has increased manifold.[85] This in turn has led to administrative decisions passed by the regulatory bodies going through multiple stages of appeal. Most of the policies framed by these regulatory bodies deal with a pivotal part of a particular sector. The delay in deciding the appeal by virtue of added appellate stages can stall the very policy making functioning of the regulatory mechanisms. The Courts have seldom applied Wednesbury's principle of reasonableness in deciding matters emanating from the administrative decisions of the regulatory bodies.[86] As a result, further delays are caused and most of the administrative decisions taken by the regulators are reviewed on merit and principle. In the case of *Indian Medical Association* v. *V.P. Shantha*,[87] the Court had delved into the importance of a lay-man in contributing to the decision in a matter specific to a particular technical field or economic sector.[88] On the reverse side, equal is the importance of technical experts in deciding upon issues, which remain complex in nature. The higher judiciary has, by liberally admitting appeals against the decisions of the tribunals and regulatory bodies, caused somewhat of a depreciation in the effectiveness of a regulator's role. The decisions

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[84] AIR 1997 SC 1125.
[85] 215th Law Commission of India Report, *L. Chandra Kumar be revisited by Larger Bench of Supreme Court*, 21, 39, 65 (2008), access at http://lawcommissionofindia.nic.in/reports /report215.pdf, last seen on 21/02/2017.
[86] Supra 11.
[87] AIR 1996 SC 550.
[88] Indian Medical Association v. V.P. Shantha, AIR 1996 SC 550.

taken by the regulators that are appealed against so frequently are further, in most of cases, overruled by High Courts.[89]

CORRECTING THE PROBLEMS: THE WAY FORWARD

With the increasing clamour to bring regulatory bodies in the sector of nuclear energy, coal, ports, posts etc. and with the establishment of nascent regulatory bodies such as RERA, it is clear that the importance of these regulatory bodies and the phenomenon of 'regulatorization' will increase in the coming years. If these regulatory mechanisms have to establish their footholds, then public perceptions towards them, which are currently not at adequate levels,[90] have to be strengthened. With the current executive branch of the government, consisting of different ministries, not able to innovate and serve the public interest adequately, the regulatory form of state governance remains the only effective solution to resort to. Weeding out the existing problems faced by these bodies, hence, becomes pivotal.

- Parliamentary oversight: Instilling genuine accountability

Increasing the accountability of these regulatory bodies should be the main focus of our Parliament. Although some form of legislative check is present[91], these have not been sufficient to establish a system of transparent

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[89] A.V. Desai, *India's Telecommunication Industry: History, Analysis, Diagnosis*, 74-109 (1st ed, 2006).

[90] N.K.Dubash ,N.D Rao, *Regulatory Practice and Politics: Lessons from Independent Regulation in Indian Electricity*, 16(4), Utilities Policy, 321, 326 (2008), access at https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2050291, last seen on 21/02/2017

[91] See S. 37, TRAI Act, 1997; See S. 64 (3), Competition Act, 2002 which mandates the regulations passed by the respective regulatory authorities to be placed before the parliament; See S. 78, Real Estate (Regulation and Development) Act, 2016 which places

checks and accountability and have merely acted as eyewash.[92] In countries such as USA[93], U.K[94], Sri Lanka[95] and Australia, parliamentary oversight of the regulatory mechanisms is established through various committees.[96] The formation of sector specific committees in the parliament can be a positive step forward in bringing these bodies under the purview of democratically elected parliament. Matters related to finances, appointments and fulfilling the policy mandate require urgent legislative oversight.

The House of Lords Report in 2004 titled "The Regulatory State: Ensuring its Accountability' has stated that a 360 degree accountability should be provided for these regulatory mechanisms (which includes parliament, citizens). Public participation in these regulatory authorities can only be effective if an adequate parliamentary oversight via these committees remains, otherwise it can further create a divide in the social groups that the present form of governance caters to in reality. Groups with vested interests will be able to take hold of the negotiating processes if the regulators are not made answerable to the sector specific standing committees of the parliament.[97] For extensive accountability, these committees should be permanent in nature, instead of being merely ad hoc.[98] A system of

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the responsibility on the regulatory authority to prepare an annual report and place it in front of one house of the parliament.

[92] Supra 48.

[93] The regulators are directly made accountable to the congress.

[94] U.K. has implemented the Regulatory Reforms Act, 2001.

[95] The regulatory authorities place the reports of their workings in front of the parliament.

[96] Supra 70.

[97] Michael Moran, *Understanding the Regulatory State*, 32 British Journal Of Political Science, 391, 413, access at http://www.jstor.org/stable/4092224?seq=3#page_scan_tab_contents, last seen on 15/02/2017.

[98] Supra 70.

independent expert witnesses akin to the one established in Australia can help these committees in their genuine scrutiny of the working of these bodies.[99]

On similar lines, the 'Damodran Committee Report for Reforming the Regulatory Environment for Doing Business in India' has recommended that the heads of the regulatory bodies should be made accountable to the parliament by ensuring that the members of the regulatory authorities consisting of the head and his board level colleagues appear before an appropriate parliamentary committee once in six months to report on the developments of the previous six months and the broad plan for the next six months.[100]

- Financial independence

Accountability and independence are intricately connected to each other and are two sides of the same coin. Without independence, accountability has no role to play in making the regulatory mechanisms more effective. Financial independence although difficult to accomplish, is the foremost element needed to be achieved for the regulatory framework to function in the most appropriate manner vis-à-vis public interest. Currently, the regulatory bodies are tied up for funds from the respective ministries. Allowing these bodies to

[99] Supra 70.
[100] Ministry of Corporate Affairs Government of India, *Report of the Committee for Reforming the Regulatory Environment for Doing Business in India*, 13, (2013), access at http://dipp.nic.in/English/Investor/Ease_DoingBusiness/Annexure_VII_DamodaranCommitteeReport_26February2016.pdf, last seen on 14/02/2017.

take funds at regular intervals from the consolidated fund of India can go a long way in truly instilling financial soundness and insulation.

In addition to the financial oversight by parliamentary sub-committees or the CAG into the accounts of these regulators,[101] allowing the regulators to have their own sources of finance[102] will achieve the twin purpose of inculcating an approach of parliamentary oversight and creating administrative independence in the working of these bodies. These bodies should also be armed with the power to borrow whenever required.[103] The draft Major Ports Authorities Bill, 2016 that has been recently introduced in the Lok Sabha, provides a financially sound model for the regulators to emulate. Section 30 of the Bill gives the 'major ports authority' power to raise its working expenditure by raising loans from a: (a) scheduled bank or financial institution located within India; or (b) financial institution in any country outside India in compliance with the laws for the time being in force.[104] However, the central government's prior sanction is needed for loans above 50 percent of its capital reserves.[105] Other regulatory bodies should also be given this mandate to raise capital from sources independent of their line ministry.

- Utilising full potential of the Regulators

[101] S. 52(2) of the Competition Act, 2002 provides the CAG with the authority to audit the account of the commission at regular intervals. A similar provision exists under Section 23 (2) of the TRAI Act, 1997.
[102] See S. 18 (2) (c) of the Draft Regulatory Reform Bill, 2013.
[103] See S. 22 of the Draft Regulatory Reform Bill, 2013.
[104] S. 30 of the Major Ports Authorities Bill, 2016.
[105] Ibid.

The practise of developing overall consensus for the orders and recommendations of the regulatory bodies on topics strictly needing scientific expertise will determine the effect these regulatory decisions will have on the public and people in governance. The respective ministries should, in framing policies, take suggestions of these bodies and shouldn't try to impose their will on them. For example, regulators in the petroleum sector have not been allowed to regulate on various sensitive petroleum products without much explanation.[106] A comprehensive policy should involve multiple stakeholders and self evaluation by the regulatory bodies.[107] It has to be ensured that the policy objectives, recommendations and technical rules framed by the regulators are not cherry picked by the ministries and are not continuously adjudicated upon by the judiciary.

Establishing uniform standards

A piece of legislation akin to the Administrative Procedure Act[108] in the United States can be implemented in India whereby certain laws regarding rule-making by these regulatory bodies can be established so as to ascertain objective standards in relation to appointments and rule prescribing models. An attempt to bring a legislation governing the regulatory bodies in the field of infrastructure was made by the previous UPA government in 2013 when it introduced a draft Regulatory Reform Bill.[109] Section 3 of this draft bill

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[106] Sunil Jain, *Is India's Regulatory System bust?*, access at http://thesuniljain.com/files/Is%20India%E2%80%99s%20regulatory%20system%20bust.pdf, last seen on 23/02/2017; Supra 77.
[107] Supra 100.
[108] Administrative Procedure Act (APA), 1946.
[109] Supra 62.

states that the establishment of any regulatory commission and appellate tribunal will have to be in consonance with the provisions mentioned in the Bill.[110] These provisions cover the aspect of appointments, duties, functions, etc. A singular legislative document like this can instil uniformity in the development of regulatory bodies.

An objective policy research on the creation of an independent ministry of regulators governing all the technical matters regarding governance in regulatory authorities can present a solution for implementing a uniform Act similar to the one mentioned above. The Regulatory Task force established in the U.K. to oversee the implementation of the Regulatory Reforms Act, 2001 can be taken as a model for ensuring uniformity among regulators about effective procedures and enforcement.[111] Taking cues from the provisions currently in force, such as Section 25 of the Insurance Regulatory Development Authority Act, 1999, establishment of advisory committees to assist the regulatory bodies on matters concerning rules and regulations should be a permanent characteristic of the regulatory mechanisms.

Minimising Judiciary's role in adjudicating regulatory process

The judiciary has a role to play in ensuring that the scientific expertise possessed and utilised by the non-judicial members of these regulatory authorities are recognized to the fullest extent possible by not liberally entertaining the appeals from the decisions of these regulatory bodies and tribunals. A concept akin to the Wednesbury principle[112] or Chevron

[110] S. 3 of the Draft Regulatory Reform Bill, 2013.
[111] Supra 106.
[112] Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, [1948] 1 KB 223.

deference[113] has to be applied in this regard. Based on the 215th Law commission Report, since Article 32(4) of the Constitution of India does not hold the review authority exercised by the High Courts as sacrosanct or inviolable[114], the jurisdiction of the High Courts under Article 226/ 227 of the Constitution can be excluded so as to minimise the delay in execution of the authority's decisions. Multiple provisions provide for an appeal from the decision of the appellate tribunals to the Supreme Court.[115] A confusing situation arises in this scenario since the High Courts reserve their power to judicially review the decisions of the tribunals and in turn, the regulations passed by these regulatory authorities. This anomaly needs to be removed. One solution to this can be the adoption of an administrative justice system akin to that of France where there is a single administrative judicial body – "The Conseil d' État" to adjudicate claims against all the administrative bodies. Although this proposal was explicitly rejected in the 14th Law Commission Report, a fresh look in this matter can provide a basis to create complete uniformity in the way regulatory decisions are adjudicated upon.

Introducing impact assessment vis-à-vis the need for regulators

Sectoral experiences have shown that each arena of governance doesn't necessarily require an independent regulator. The author proposes that akin to environmental impact assessment, wherein the anticipated effect of a particular project on the environment is calculated and measured prior to its

[113] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[114] Supra 85.
[115] S. 18, TRAI Act, 1997; S. 53T, Competition Act, 2002; S. 125, Electricity Act, 2003.

initiation[116], a form of sectoral impact assessment should be done before proposing a need to establish a regulatory authority in that sector. This assessment should be undertaken by the parliamentary committees or the proposed Ministry. This can ensure that regulators are not established in a particular sector for extraneous reasons, thereby leading to a decrease in the financial burden on the public exchequer. Requirement of scientific expertise, presence of complex sectoral specific dynamics, material roadblocks in implementing reforms, etc. should be some of the guiding factors that can be taken into account while undertaking the aforementioned sectoral impact assessment. A haphazard introduction of regulatory authorities in a particular sector without understanding its dynamics can be detrimental to its governance. For a more integrated approach, this assessment should look into the possibilities of conflating or merging the mechanism of separate yet complimentary regulatory authorities in different sectors[117] into a multi-sectoral regulatory model akin to the recent trend emerging in the United kingdom,[118] Australia and Sri Lanka[119]. In this way a single regulatory body can govern similar sectors, for instance a single transportation regulatory body can govern road, air, ports and rail sectors.[120]

CONCLUSION

[116] Indian Council for Enviro-Legal v. Union of India (2011) 8 SCC 161; Vellore Citizens Welfare Forum v. Union of India AIR 1996 SC 2715.
[117] See S. 6 of the Draft Regulatory Reform Bill, 2013.
[118] Utilities Act, 2000. Under this Act, a multi-sector regulator have been established under which the working of both gas and electricity sector has been combined.
[119] Public Utilities Commission of Sri Lanka Act, 2002
[120] Supra 48.

‘REGULATORIZATION’ OF INDIAN ADMINISTRATION

Regulatory bodies have established their roots within the functioning of the Indian administration despite the many conceptual, structural and functional problems associated with them. In the present scenario, there doesn’t seem to be any better way to govern specific sectors. On one hand, while the Indian regulatory bodies are grappled with complex issues qua maintenance of independence, increasing inter-connectivity between regulators, establishing a uniform structure, putting a check on excessive delegation, instilling accountability, etc., on the other hand regulators have led to an increased productivity and efficiency *albeit* in few sectors. In a country where political currency and the faith among people for the elected officials is at its nadir, bolstering economic growth and productivity requires novel techniques, outside the traditional framework of three separate branches of government. For regulators to be this effective option, it is necessary for them to remain accountable to the legislature in their working and not to be perceived solely as extensions of their respective ministries. Irrespective of how inextricably the regulators are connected in their working with the executive, financial independence cannot be forsaken. The judiciary has to further ensure that frequent appeals and delays in executing the decision of the regulators do not become reasons for the decrease in regulatory efficiency. Although regulatorization has come to acquire its own space, regulatory bodies should be introduced in cases of actual need. Keeping in mind the importance of these authorities in sectoral and administrative matters, it is time that a uniform structure is brought forth with regard to these, so as to achieve a more compatible form of governance attuned towards achieving both economic and non-economic interests.

FIGHT OF DELHI FOR A FULL STATEHOOD

Divya Ann Samuel*

Abstract

The biggest dilemma of the judiciary, in terms of interpretation of the Constitution, has come into existence with the recent heated debates gathering around the relationship between Delhi Government and the Centre. The issue lies in the fact that Delhi, being the capital and the headquarters of almost all the major governmental bodies, is in fact not a 'State' yet. The dispute between the Central Government and the State Government of Delhi persists by far because of non- recognition of Delhi as a State.

The paper aims to analyze the recent debates of the Centre and State. It also talks about the role of judiciary in handling such disputes. In this paper, the author tries to present an analytical approach to deduce whether the grant of the title of 'State' would act as a lubricant in the relationship between the Union and the Delhi Government.

INTRODUCTION

Delhi has been a witness to political turmoil for over five centuries. If we go by ancient history, Delhi was founded by the Tomaras and the Tunwar Rajputs. It was ruled by the Mughals in succession to the Khiljis and the

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Tughlaqs[1]. The Delhi Sultanate was established in 1206. In 1803, Delhi was constituted as a territory, after General Lake defeated the Marathas in a battle at Patparganj and brought the Mughal emperor Shah Alam under his control[2].

In 1911, Delhi was selected as the national capital of British India and Governor-General in Council was held responsible for the governance of Delhi. Further, a committee was established (during 1947-50) led by Dr. B. Pattabhi Sitaramayya, which recommended that the Province of Delhi should be provided with a responsible government with reasonable restrictions. It further recommended that the province should function under Lt. Governor (which would be appointed by the president of India) and that there should be a council of ministers headed by Lt. Governor. A committee was set-up in 1989 under S. Balakrishna because of which the 69th Constitutional Amendment was passed and Article 239AA and 239AB were added to the Indian Constitution. As an effect of this amendment, Delhi was given a special status and designated as National Capital Territory of Delhi. It provides for a legislative assembly and was empowered to make laws on all matters of the state list and concurrent list except on three matters of State List i.e. Public Order, Police and Land.

Distribution of Power[3]

[1] http://www.delhitourism.gov.in/delhitourism/aboutus/history_of_delhi.jsp (last visited on December 24, 2015)

[2] http://thewire.in/2015/05/22/whats-the-legal-status-of-the-nct-of-delhi-under-the-constitution -of-india-2216/ (last visited on December 24, 2015)

[3] D.D Basu, Introduction to the Constitution of India, 20th edition

FIGHT OF DELHI FOR A FULL STATEHOOD

Article 1 (1) of India Constitution states that, "India that is Bharat, shall be a Union of states" and while submitting the draft, Dr. Ambedkar, chairman of the drafting committee, stated that "although its constitution may be federal in structure", the committee had used the term 'Union' because of certain advantages[4] which are:

1. The Indian Federation is not the result of an agreement by the units
2. The component units have no freedom to secede from it.

There are three lists namely, Union, State and Concurrent list, as specified under Seventh Schedule of the Constitution of India under which different items have been mentioned on which the state, union or both governments respectively can make rules. In case of overlapping of a matter between the three lists (same subject), predominance[5] has been given to Union government. While the above mentioned lists are normal distribution of general legislative powers, there are instances in which the above system of distribution is either suspended or the power of the Union government is extended over State subjects. They are as follows:

a) In *National Interest* Parliament shall have the power to make laws with respect to any such matter included in the State list, for a temporary period, if the council of states declares by a resolution of 2/3 of its members present and voting, that it is necessary in the national interest that Parliament should make laws over such matters.(Article 249)

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[4] Draft Constitution, 21-0-1948, p. iv.
[5] Zaverbhai vs. State of Bombay, AIR 1954 SC 752

b) Under a *Proclamation of Emergency* (Article 250)

c) By *Agreement between States* (Article 252[6])

d) To *implement treaties* (Article 253)

e) *Under a Proclamation of Failure of Constitutional Machinery in States* [Article 356 (1) (b)].

Executive and Financial Powers are also distributed between Union and States. It extends only to its own territory and with respect to those subjects over which it has legislative competence.

Administration of Union Territories

According to the original Constitution of 1949, states were divided in three different kinds of categories stated in Parts A, B and C the first Schedule of Constitution. Delhi was included in Part C. The unique feature of Part C was that it was governed and administered by the President through a Chief Commissioner or a Lieutenant Governor, acting as his agent. Legislative powers were in the hands of Parliament but the Constitution empowered Parliament to create a legislature as well as a Council of Ministers for a Part C State to advise the Chief Commissioner, under the overall control of the President. Seventh amendment of Constitution, 1956 replaced Part C with 'Union territories' which are also similarly administered by the Union.

Article 239 (1) provides that, save as otherwise provided by Parliament by law, every union territory shall be administered by the President acting, to

[6] D.D. Basu, Constitutional Law of India, Prentice Hall of India, p.280

such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify. Article 239 (2) further states that instead of appointing an administrator from outside, the President may appoint the Governor of a state as the administrator of adjoining territory and where a Governor is so appointed, he shall exercise his function as such administrator independently of his Council of Ministers.

Later in the year, 1962 Article 239A was introduced in the Constitution which gives power to create a legislature or Council of Ministers or both for some of the Union Territories. On 1st Feb 1992, by virtue of 69th Amendment, Articles 239AA and 239AB were inserted and to supplement these provisions the Government of National Capital Territory of Delhi Act, 1991 was enacted.

Since 1993, Delhi has its own Legislative Assembly and Council of Ministers and also has all the legislative powers in the state list excluding three entries and they are:

1. Public Order
2. Police
3. Land

As per Article 264(4) of Indian Constitution Parliament has exclusive legislative power over a union territory, including matters which are enumerated in the State List. Parliament may by law constitute High Court for a Union Territory or declare any court in any such Territory to be a High Court for all or any of the state for the purpose of this Constitution (Art. 241). Delhi has its own High Court. However Punjab and Haryana High

Court acts as the High Court of Chandigarh; Lakshadweep comes under Kerala High Court.

Despite there being clear demarcations at the face of it, Delhi has seen a lot of battles between the Lieutenant Governor and the State Government. The following section deals with this aspect of the story highlighting the consequences of granting 'statehood'.

TUSSLE BETWEEN LIEUTENANT GOVERNOR AND CM:

Soon after oath as the Chief Minister of Delhi, Mr. Arvind Kejriwal and AAP government escalated their discord with Lt. Governor Najeeb Jung over multiple issues. A full-fledged war was witnessed between the two over appointment of acting chief-secretary for 10 days[7]. Further, he also accused the Central Government to disrupt and create an unhealthy situation through LG. However, Home Ministry took a tough stand and said that the government and the ministry has nothing to do with it.

Kejriwal in another post alleged that there is a huge nexus between officers, politicians and companies, and AAP government is trying to break it and because of that he has to face such difficult situations. The tussle did not stop and fight continued when LG Najeeb Jung wrote back a letter to the CM of Delhi and said only he has the constitutional power to do such transfer and postings. He stated, "the power to appoint and to transfer, from steno to IAS

[7] Open war between LG Najeeb Jung and Arvind Kejriwal as Shankuntala Gamini takes charge, See http://articles.economictimes.indiatimes.com/2015-05-17/news/62276834_1_lg-najeeb-jung-chief-secretary-lt-governor (last visited on December 30, 2015)

officers is with LG"[8]. Later the AAP government used a letter written by P. Chidambaram (former home minister) in 2011. In this letter(he quoted the attorney's general Vahanvati's view) it was mentioned that the government of NCT of Delhi meant the government elected by the people, and lieutenant governor is bound to act on the advice of council of ministers. He kept on accusing LG by saying he works at the behest of Prime minister.[9]

In the meantime few comments came from the side of Union Government, for instance, once Mr. Arun Jaitley said, "Those who are ruling Delhi don't want to govern".[10]

The battle is still going on between the LG and AAP government on issues like Lokpal, Odd-even rule scheme, and many more such critical issues. One can easily find headlines in newspapers depicting the two quarrelling on some or the other issue. An attempt should be made to decode the battle between them. It is clear that the fracas is not likely to stop, but what is also unlikely to end soon is the ambiguity of powers of Delhi government. It is a known fact that Delhi, though has a state government, is not a complete state. As per Schedule I of Constitution of India, Delhi continues to be a Union territory. But Delhi and Puducherry enjoys a special status among UTs.

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[8]http://zeenews.india.com/news/delhi/no-end-to-jung-kejriwal-tussle-delhi-lg-orders-rein statement-of-officers-removed-by-aap-govt_1598323.html (last visited on December 3, 2015)

[9]http://www.hindustantimes.com/delhi/delhi-in-kejriwal-vs-jung-tussle-letter-from-chidambaram-crops-up/story-WIOc1VErBIvjFFEwsGRn0L.html (last visited on December 30, 2015)

[10] http://timesofindia.indiatimes.com/city/delhi/Kejriwal-vs-Najeeb-Jung-AAP-govt-a-costly-experiment-for-Delhi-Jaitley-says/articleshow/47340878.cms (last visited on December 30, 2015)

Government of National Capital Territory of Delhi Act, 1992 and the Transaction of the Business of the Government of NCT of Delhi Rules, 1993 leaves scope to fight for power. In other words there is vagueness, ambiguity and clash in the powers of CM and LG.[11]

Rule 45 deals with the executive functions of the LG and allows it to exercise his powers in matters connected to public order, police and land in consultation with the Chief Minister, if so provided under any order passed by the President under article 239 of the constitution. [12]

Rule 46 states that with "respect to persons serving in connection with the administration of NCTD", LG shall "exercise such powers and perform such functions as may be entrusted to him under the provisions of the rules and orders regulating the conditions of service of such persons or by any order of the President in Consultation with the chief minister, if so provided under any order passed by the president under article 239 of the constitution.

In another clause of the Government of NCT of Delhi Rules, 1993, it is stated that when an issue can be referred to the Central Government and in case of a difference of opinion between LG and a minister, the LG must first try to settle the issue through discussion and if the difference of opinion still persists, the LG can direct that the matter be referred to the Council of Ministers. If, however, the difference of opinion persists, then it must be referred to the Central Government for the decision of the President and they

[11]http://indianexpress.com/article/explained/explained-delhi-cm-v-lg-much-lies-between-the-lines-of-statute-act-and-rules/ (last visited on January 1st, 2016)
[12] Transaction of the Business of the Government of NCT of Delhi Rules, 1993

are then bound to abide by it. Soli Sorabjee is of the opinion that rule 55 suffers from "serious legal infirmities".

Recently Arvind Kejriwal accused a senior bureaucrat Shankutala Gamini and said she is in cahoots with the power companies. In light of this issue, the speech made by the first Union Home Minister Sardar Patel would be important to analyze. He said "As a man of experience I tell you don't quarrel with the instruments (i.e is the officials) with which you have to work, it is a bar workmen who quarrels with his instruments. Today my secretary can write a note opposed to my views. I have given that freedom to all my secretaries. I have told them that if they don't give me their honest opinion for fear that this will displease me they better go. I will find another secretary. I will never be displeased by frank opinion of expression of opinion". The openness and frankness of a person is vital but going in public and making such statements to some extent shows the attitude of a work shirker. It is imperative to resolve this dispute because in the end it is hampering the growth of the capital city and in turn the nation. Ego from both sides should be kept aside and law should be used as a lubricant and not as a mode to create friction in the working of two bodies.

As statehood is what Delhi Government has been looking forward to, it becomes significant to analyze the consequences of such a grant.

Statehood

The discussion above brings to light only the facts per se. It is important to analyze that granting Delhi complete statehood would at the face of it be the solution of various problems faced by Delhi. Deeper analysis of the issue

reveals that there are many disadvantages which are more of a political nature.

Delhi is the hub of almost all Central agencies and host to foreign dignitaries[13]. It guides foreign investments besides being a harbinger[14] of various activities in other states. This role makes Delhi to be a desperate want of Central Government's control.

Delhi shares its borders with many other States, making it strongly dependent on them for various basic amenities like water. This gives rise to an imperative need of coordination between various agencies and the need for unity of command. The agencies should then be made to be accountable to public.

The grant of complete statehood would make the State Government abuse their power and gain benefits from the Centre. This is not a pessimistic opinion, rather an indicator of mere possibility. It is important to realize the very purpose of 'Statehood', viz. betterment of administration in Delhi.

If this problem is addressed by division[15] of the Union Territory into two parts, one which is the 'State' and the other house of all cantonments and central offices, there would still be a persistent need to address further issues. The independence of Delhi as a State would lead to a bilateral distribution of

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[13] Delhi houses over 100 foreign missions. See http://www.financialexpress.com/article/fe-columnist/why-delhi-must-remain-a-ut/76589, (last visited on December 31, 2015)

[14] https://www.quora.com/What-chnges-will-come-to-Delhi-afer-it-gets-full-statehood, (last visited on December 31, 2015)

[15] Union Cabinet decided to carve out "National Capital Territory". See *NCT means Delhi will be a State though not India's Capital*, By Sayantam Chakravarty, July 13, 1998. Economic Times.

agencies like the Police and DDA. This would further lead to many new agreements for sharing of various resources, water being the utmost important resource.

Delhi Government's demand would be giving them a "moth-eaten"[16] Delhi. "Better to reign in hell, than serve in heaven"[17]. Delhi Government may reckon to it as, amongst other things, it is not a hidden fact that Delhi gets more taxpayers' resources than any other State. The independent status of Delhi will make the value-added taxes increase. Also, there will be a significant rise in primary revenue earners for a city-state are taxation of services, entry, exit and parking charges on vehicles, and property. Independent status would make Delhi pay for its law and order costs leading to a rise in land rents, annual property taxes, vehicle taxes and increase in rise of Metro fares.[18] The major force that would draw such decisions would be the need for Delhi to give up its special privileges in the form of 'subsidies'. In turn, this would all be at the expense of the promise of lower electricity and cheap water.

The Delhi government's model of governance as given by them in their manifesto would transform into a corporatized and top-down governance paradigm like Singapore and Shanghai. The only city-states that work are

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[16]http://www.firstpost.com/india/careful-what-you-ask-for-kejriwals-full-statehood-demand-could-backfire-2094609.html, (last visited on December 31, 2015)

[17] Milton, "Paradise Lost". See also http://www.firstpost.com/india/careful-what-you-ask-for-kejriwals-full-statehood-demand-could-backfire-2094609.html

[18] https://www.quora.com/What-chnges-will-come-to-Delhi-afer-it-gets-full-statehood, (last visited on December 31, 2015)

those than can centralize and optimize decision-making powers and deliver world quality public services, especially in a diverse city like Delhi.[19]

It is ironical that all Governments contesting State elections promise grant of full statehood in their manifestos but they soon forget their agendas when they come to Centre. This double standard attitude is demonstrated by all the parties, ranging from the BJP to Congress. In 1950s, since the inception of its Jan Sangh, BJP has been demanding full-statehood. Also veterans like Madan Lal Khuranna, Kedar Nath Sahani and V.K Malhotra, have themselves lead a battle of demonstrations for the grant of statehood.[20] The above mentioned facts are certain disadvantages of granting complete statehood to Delhi, However I am of the opinion that little more freedom should be given in financial and other matters. Like in Brazil, Delhi should have its own police to deal with civil and criminal matters in the crime. There is a need of better act and legislation regarding Delhi. If Delhi government will only become administrative body then it can be done by several other departments like Municipal Corporation, electricity board, etc. The fact cannot be denied that capital cities possess or come to possess some degree of social and political predominance and become centers of national culture. However, a State Government must also have some kind of autonomy in operation. Though security of Delhi is important, a police force can be created for state or Delhi police can come under it. There are several

[19]http://www.firstpost.com/india/careful-what-you-ask-for-kejriwals-full-statehood-demand-could-backfire-2094609.html, (last visited on December 31, 2015)
[20]http://www.dnaindia.com/india/report-centre-goes-to-drawing-board-to-give-full-statehood-to-delhi-2008337, (last visited on December 31, 2015)

other forces like CRPF, RPS, Special Forces to protect national and international institution situated in Delhi.

SOLUTIONS TO THE ISSUE

Position of Capital Cities in different countries:

a) The United States of America- In 1791, Washington D.C. became the national capital of U.S.A. and on November 21, 1800 the U.S. Congress convened for the first time in Washington D.C. [21]. In case D.C. the residents demanded statehood because they did not have voting powers in the Presidential election in United States. However, they have waived of this right and agreed to give up some benefits when they become residents of federal capital as they were getting other benefits. Thus, like India, Washington D.C. is also federally administered district under its constitution.

b) Australia- The capital of Australia is Canberra. Australian Self Government Territory Act, 1988 was passed which provides for creation of legislative assembly[22], and shall be headed by the Presiding Officer appointed under section 11 of the above mentioned act[23]. The situation in this country in this country is different from India because, though

[21] Green Constance MaLaughlin, Washington: A history of the Capital, 1800-1950 (1962), p.23

[22] Section 8 of SGTA, 1988.

[23] Presiding Officer of Assembly: (1) At the first meeting of the Assembly after the general election, the members present shall, before any other business, elect one of their number to be the Presiding Officer of the Assembly.

absolute statehood has not been granted, it still has power to make laws on public order, use a development of land[24], etc.

c) Canada- Ottawa is the capital of Canada and is still the part of the Province of Ontario for the purposes of governance. Federal Government passed the National Capital Act, 1960 and now doesn't interfere with Ottawa Municipal government. It created National Capital Commission (NCC) whose primary purpose was to prepare plans for and assist in the development, conservation and improvement of NCR[25]. Thus Canada has no legislative or executive control over Ottawa and has created separate and distinct body to administer it. But here also the executive and legislative competence on matters concerning land is subject of provincial control[26].

d) Malaysia-Kuala Lumpur, the capital city of Malaysia has complete federalisation and legislative and executive function lies with the federal government and there is no involvement of any local government. The citizens are only allowed to vote in federal elections and the administration is carried out by Lord Mayor which is appointed by federal government after every 3 years.

e) Germany- Berlin is the capital with a population of 3,562,166[27] and has reserved four seat in the upper house (also known as Bundesrat). According to the constitution, Berlin has an autonomous government and

[24] Section 37 read with schedule IV of the SGT Act, 1988.
[25] Section 10 of National Capital Act, 1960.
[26] Scetion 92, The Constitution Act, 1870.
[27] http://www.mapsofworld.com/where-is/berlin.html (last visited on January 2nd, 2016)

there is no special control of the federal government. The legislative power is divided as per the basic law of the Federal Republic of Germany. Nevertheless, the power to legislate on certain matters like foreign affairs, defence, law on weapons, etc lies with the federal government. In other words Berlin is seat of federal government.

f) Brazil- Brasilia is the capital city of Brazil with the current population of 2,852,372[28] (approx.). Before 1960, initially Salvador and then Rio De Janeiro was the capital of Brazil. Currently, Brasilia is the capital because it was felt that capital city should be at more central situation. After 1960 and till 1980's, federal government appointed the governor of the federal district and laws were made by Brazilian Federal Senate. Later in 1988 (Constitution of 1988), Brasilia gained the right to elect its governor and district assembly to exercise legislative powers. Though, the federal district has its own legislative structure, the Brazilian Constitution gives certain executive and legislative power to the union over said region like to organize and maintain plainclothes of police, fire-brigade, etc. It also gives power to organize and maintain judicial power, the public prosecution and public legal defense of federal district. But according to article 144, Brasilia has the power to have its Military Police, Civil Police and to exercise the function of criminal police[29]. This model has similar features ad can be related to Delhi because both of them were

[28] http://www.aboutbrasil.com/modules/brazil-brasil/top_10_brazil.php?hoofd=11&sub=53&art=1445 (last visited on January 2, 2015)

[29] Criminal Police have power to investigate criminal offences.

transformed from centrally controlled district to a partially autonomous region[30].

Different eminent personalities have different opinion on this issue. According to Shanti Bhushan, the former Union Minister of Law and Justice and a senior advocate of the Supreme Court, is of the view that Delhi should not become a full-fledged state because it has institutions like Parliament, embassies, etc. and it belongs to the entire country and thus should be administered by the government who has been elected by the entire country and not only by Delhi[31]. He is also of the opinion that the post of chief minister is ceremonial in nature and is effectively a subordinate of the Lt. Governor. I disagree with it because though absolutely true that such institutions should not be controlled by state legislature but calling the constitutional post of Delhi Chief Minister ceremonial in nature is not right. A lot of money is used to conduct an assembly election, also people vote for it and lots of money and time is given not to elect a ceremonial body and this view is espoused by Markandey Katju J. (Retired Supreme Court Judge). According to Gopal Subramanium, former Solicitor General of India, autonomy contemplated by articles 239AA and article 239AB to the local government is of much higher degree and must be respected[32]. He also of

[30] Legal opinion given by Gopal Subramanium, Senior Advocate at Supreme Court of India about the legal status of the NCT of Delhi under the Constitution of India and NCT of Delhi Act, 1991.

[31] http://scroll.in/article/778470/state-matters-shanti-bhushan-and-markandey-katju-debate-delhi-governments-right-to-order-ddca-probe (last visited on January 2nd, 2016)

[32] Legal opinion given by Gopal Subramanium, Senior Advocate at Supreme Court of India about the legal status of the NCT of Delhi under the Constitution of India and NCT of Delhi Act, 1991.

the opinion that section 22(special provisions as to financial bills) of NCT Act falls foul of the scheme of legislative assemblies under the constitution. If we go by the section 44 of NCT od Delhi Act, 1991the Transaction of the Business of the Government of National Capital Territory of Delhi Rules,1993, Rule 55(1)(c) requires LG to refer every legislative proposal before the Central Government which is linked with any matter which may ultimately necessitate additional financial assistance from Central Government. I believe that more autonomy should be given to Delhi Legislature as it also defeats the constitutional scheme (by section 2 of the act and rule 55 and 56). A legislature has to do a lot of work and thus need financial autonomy. Instead of relying on the literal rule of interpretation we should rely on the principle of purposive construction. I also believe that in the present context, there are two centre of powers in Delhi, one is Delhi government and the other is Union Government exercising its through Lt. Governor. There is two reporting authorities namely CM of Delhi and Lt. Governor of Delhi. It is doing nothing but delaying the growth speed and derailing Delhi. It agree to the fact that it is difficult and need great analysis to make Delhi a complete state but it does not mean that the CM of Delhi should only be treated as ceremonial body and it should not merely become an administrative body. When the NJAC judgement was given by the Supreme Court Arun Jaitley *said "Indian democracy can't be tyranny of the unelected"*, but in Delhi, it is the unelected body who has major control over the said area. It is good to have governor in state and Lt. General in Union Territories but when they become all in all of that state or UT, then the sole purpose of democracy will be defeated and it must not happen.

Role of Judiciary

In the case of Goberdhan Lal v. State of U.P[33] the Supreme Court of India opined that "In our opinion the citizens have a fundamental right to good governance, and this right to good governance is part of article 21 of the constitution. Article 21 of the constitution".

The people of Delhi have the fundamental right of good governance and the SC is bound to protect this right. The statutory provisions mentioned in the NCT Act of Delhi, 1991, Constitution and Transaction of the Business of the Government of National Capital Territory of Delhi Rules,1993 should be interpreted by the rule of purposive construction.

In Notham V/s Bamet Council[34], Lord Denning pointed out that the literal interpretation is now completely out of date and has been replaced by the purposive approach. U.S Supreme Court in Miranda v/s Arizona, Roe v/s Wade, etc has oftern relied on principle of purposive construction. In Hindustan Lever Ltd. v/s Ashok Vishnu Kate[35], the hon'ble SC of India said, "Francis Nenetton in Statutory Interpretation Second Edition has dealt with the Functional Construction Rule in Part XV of his book. The nature of purposive construction is dealt with in XX at page 659, thus:

A purposive construction of an enactment is one which gives effect to the legislative purpose by:

[33] 2000 SC Online All 308, para 12.
[34] 1978)1 WLR 220
[35] 1995 (6) SCC 326

a) Following the literal meaning of the enactment where the meaning is in accordance with the legislative purpose ,or,

b) Applying a stained meaning where the literal meaning is not in accordance with the legislative purpose".

CONCLUSION

This fight will not benefit anyone. The sole purpose of any person having authority is to use their powers to build a nation and not to destroy it. A committee was set up on 31st July, 1947 which was chaired by Dr. B. Pattabhi Sita Ramayya[36] .This committee was set up to study and report on constitutional changes in the administrative structure of the Chief Commissioner's provinces which included Delhi also. This committee was in favor of keeping Delhi Province intact and to confer upon the central government certain special powers. It was also decided that a High Court should be established having both original and appellate jurisdiction over the province. It was further decided that the Provinces of Delhi, Ajmer-Mewar and Coorg would have an elected legislature and would function under a Lt. Governor which is to be appointed by the President of India.

The committee also noted that "… we are, however of the opinion that the people of the province which contains the metropolis of India *should not be deprived of the right of self-government enjoyed by the rest of their countrymen* living in the smallest of villages…". Mr. Desbandhu Gupta a representative in the constituent assembly from Delhi accept the

[36] http://delhi.gov.in/DoIT/DoIT_Planning/ES2012-13/EN/Introduction.pdf (last visited on January 1, 2016)

recommendations made unanimously by the committee. However Pt. Jawaharlal Nehru said that Delhi is not a static situation; and if we put down any clauses in the situation we petrify the situation. It is far better to deal with in a way which is capable of being future change, i.e, by act of a parliament rather than by fixed provisions in the constitution.

Delhi got a cabinet and legislature but since it was the capital city of India, the powers delegated had to be curtailed. Delhi got a form of diarchical government seeking to reconcile central government over the federal capital with autonomy at state level[37].The framers of the Indian Constitution were also aware of the fact that under the Canadian Constitution which was studied as a model by them- the inter-governmental arrangements were evolving into a *de facto* system of co-operative endeavor of shared responsibilities, transcending the formally demarcated frontiers[38].

[37] G.C. Malhotra, "Cabinet Responsibility to Legislature: Motions of Confidence and No-Confidence in Lokh Sabha and State Legislature" p.942

[38] Sarkaria Commission Report, Legislative Relations, Chapter II

THE NATIONAL ANTHEM DEBATE

Chaitali Wadhwa*

ABSTRACT

The Supreme Court recently passed an Order making it compulsory for cinema halls to play the National Anthem before the start of a movie. All persons present in the hall must stand while the anthem is playing. This move by the apex court sparked a debate across the country, in all sects, groups and societies. Morally, the approach to such an issue would vary according to one's own beliefs, ideals and patriotic values. The author of this essay seeks to provide an insight into the legality of the Order the Supreme Court passed last year. The existing laws have been stated, followed by precedents that deal with the singing of the National Anthem. Both Indian and International judgements have been cited. The article critically analyses the issues surrounding this case and arrives at the conclusion that there are no illegalities in the Order issued by the Honourable Supreme Court of India.

INTRODUCTION

In the year 2003, Shyam Narayan Chouksey had gone to watch the Bollywood movie *Kabhi Khushi Kabhi Gham* and was the only one in the hall to have stood up when the national anthem was played as part of the film. With a view to do something with regard to this, Mr. Chouskey filed a petition in the Madhya Pradesh High Court which ruled in favour in his favour, directing the movie to be shown after deletion of the alleged scene.

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The contention was that the dramatization of the National anthem is against the philosophy of the constitution. Justice Dipak Misra was the judge in the matter and stated that the national anthem is a symbol of our history, sovereignty, unity, pride and honour[1] and that it is the glory of the country.[2] This judgement was challenged by the producer. The apex court had overruled the judgement of the High Court, and held that the audience was not required to stand up during the national anthem which played during the exhibition of the film, newsreel or documentary as it caused interruption, disorder and confusion.[3]

Thirteen years later the same petitioner moved the court through a Public Interest Litigation on an issue concerning the National Anthem, yet again. The Supreme Court passed an interim order directing all cinema halls to play the national anthem before the feature film starts and all present in the hall are obliged to stand up to show respect to the National Anthem.[4] The bench comprised of Justice Dipak Misra yet again, along with Justice Amitava Roy.

The law of the land

Part III of the Indian Constitution provides the Fundamental Rights that are available to citizens and non-citizens except enemies[5] and in some cases only to citizens of India.[6] Article 32[7] confers the right to move to the Supreme

[1] Shyam Narayan Chouksey v. Union of India, AIR 2003 MP 233.
[2] Karan Johar v. Union of India, (2004) 5 SCC 127.
[3] Ibid.
[4] Shyam Narayan Chouksey v. Union of India, Writ Petition(s)(Civil) No(s). 855/2016.
[5] Arts. 14, 20, 21, 21A, 22, 23, 24, 25, 26, 27 and 28, the Constitution of India.
[6] Arts. 15, 16, 19, 29 and 30, the Constitution of India.
[7] Art. 32, the Constitution of India, 1950.

Court for enforcement of Fundamental Rights but it does not say who shall have this right.[8] Fundamental Duties were added as Part IV-A to the Constitution after the 42nd Amendment in the year 1976 upon the recommendations of the Swaran Singh Committee.[9] The 86th Amendment in 2002 increased the number of duties from ten to eleven.[10]

These duties are a reminder that citizens must act responsibly towards building a free, and healthy society. They must uphold the unity, integrity and sovereignty of the country[11] while promoting cultural harmony. Indians are promoted to spread the feeling of brotherhood,[12]protect the environment[13] and the heritage[14] of India. Fundamental duties are judicially unenforceable[15] and non-justifiable. This means that violation of a Fundamental Duty is not punishable by a court of law.

The Constitution lays down the Fundamental Duty of every citizen to respect the National symbols of India, namely the National Flag, National Anthem and the Constitution.[16] These have been recognised as national symbols by resolutions of the Constituent Assembly because they possess certain characteristics.[17] They are the secular symbols of nationhood.[18] The national

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[8]Bandhua Mukti Morcha v. Union of India & Others, AIR 1984 SC 802.
[9]Durga Das Basu, *Shorter Constitution of India*, 1972 (13th ed., 2003).
[10] The Constitution (Eighty-Sixth Amendment) Act, 2002.
[11] Art. 51A (c), the Constitution of India.
[12] Art. 51A (e), the Constitution of India.
[13] Art. 51A (g), the Constitution of India.
[14] Art. 51A (f), the Constitution of India.
[15] Udai Raj Rai, *Fundamental Rights and their Enforcement*, 786 (1st ed., 2011).
[16] Art. 51A, the Constitution of India.
[17]Karan Singh v. Jamuna Singh, AIR 1959 All 427.
[18] Union of India v. Naveen Jindal and Another, Civil Appeal No. 453 Of 2004 (Arising Out Of S.L.P. (C) No.15849 Of 1994).

anthem is rated as an ideal and a (sacred?) institution for Indian citizens.[19] It is an offence to intentionally prevent the singing of the Indian national anthem and causing any form of disturbance to any assembly engaged in singing the anthem. It is punishable with an imprisonment of three years.[20] The commission of this offence also attracts disqualification under Section 8 of the Representation of People Act, 1951. [21]

The Prevention of Insults to National Honour Act, 1971 does not define what a National Anthem is. Therefore, reliance is placed on the orders made on the National Anthem.. These Orders provide the definition, the duration and the occasions of playing the anthem. Order – V says that when the anthem is sung, the audience shall stand in attention, but this will not be the case when the anthem is played during the course of a movie. The Armed Forces Special Powers Act (**"AFSPA"),** 1990 which extends to Jammu and Kashmir allows for the use of armed forces necessary to prevent activities that cause insult to the National Flag, National Anthem and Constitution of India.[22]

In 2012, a proposal was made in the Lok Sabha to make singing of the National Anthem obligatory in all primary, secondary and higher educational institutions.[23] Education that covers all aspects is necessary for proper

[19] Sanjeev Bhatnagar v. Union of India, Writ Petition (Civil) No.16 of 2005.
[20] S. 3, The Prevention of Insults to National Honour Act, 1971.
[21] S. 8(1)(i), The Representation of People Act, 1951.
[22] S. 3(b), Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.
[23] Shri Haribhau Jawale, *Need To Make Singing Of National Anthem Daily Obligatory In All Primary, Secondary And Higher Educational Institutions In The Country,* Lok Sabha (6/9/2012).

development of students as they are the future citizens of the country.[24] The Central Board of Secondary Education (CBSE) has taken cue from Article 51-A and has issued an order mandating the singing of the National Anthem with decorum.[25]

Precedents

The issue around *Kabhi Khushi Kabhi Gham* was not the first time a movie was in the limelight for having insulted the anthem or the flag. When the Kannada movie "Jackie Chan" was released in 1997, the petitioner filed a case alleging that the scenes in the movie insulted the Flag and the Anthem. The actor who portrayed the character of the ex-Chief Minister did not stand when the Anthem was being played, and this amounted to an act of disrespect and dishonour.[26] The message of the movie was that every person should respect the National Flag and the National Anthem regardless of what position they hold in society. It is the duty of every citizen to be patriotic; their powerful positions in the government being no bar to the same. The National Anthem has been held to be the sovereignty and integrity of the Nation in numerous cases, one of them involving the founder and chairman of Infosys, Mr. Narayan Murthy.[27] This case held that playing the musical version of the Indian National Anthem instead of mouthing the words did not constitute an offence. It is the fundamental duty of every citizen of this

[24] Kamal Dey v. Union of India & Ors., Writ Petition No. 34289 of 2014.
[25] N. Selvathirumal v. Union Of India, Writ Petition .No.11116 of 2015.
[26] N.P. Amruthesh v. State of Karnataka and Ors., ILR 1998 Kar 2885.
[27] N.R. Narayan Murthy v. Kannada Rakshana Vakeelara, AIR 2007 Kant 174.

country to give respect to National Anthem whenever it is played, or sung, standing in attention.[28]

The case of Bijoe Emmanuel[29] is perhaps a landmark case on the debate concerning singing of the National anthem. In 1985 when two children refused to sing the national anthem, but stood up in respect, the dispute on the Fundamental rights to freedom of speech and expression[30], and right to practice religion[31] were attracted. The father of the children filed a writ petition in the High Court of Kerala. When the case was dismissed by the court, the father approached the Supreme Court through a Special Leave Petition under Article 136 of the Constitution. Article 136 gives residual power in the hands of the Supreme Court when gross injustice has been done, or a question of law is involved. The Supreme Court declared that there was no provision of law which obliged anyone to sing the national anthem and this did not amount to disrespect. It also further held that the provisions of The Prevention of Insults to National Honour Act, 1971 were not attracted. Freedom of speech includes the right to remain silent.[32]

The stark difference between this precedent and the case at hand is that the former dealt primarily with the right to religion as guaranteed by the Constitution of India under Article 25. The court found that the expulsion of

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[28] R. Pandi Maharaja v. The Secretary, Writ Petition (MD) No. 16680 of 2015 & M.P. (MD) No. 1 of 2015.
[29] Bijoe Emmanuel & Ors v. State of Kerala & Ors, AIR 1987 SC 748.
[30] Art. 19(1)(a), the Constitution of India.
[31] Art. 25, the Constitution of India.
[32] Moulana Mufti Syed Md. Noorur v. State of West Bengal & Ors., AIR 1999 Cal 15; Maruti Shripati Dubal v. State of Maharashtra, 1987 (1) Bom CR 499.

students for refusal to sing the national anthem was a violation of their fundamental right to freedom of conscience.

A similar situation arose much earlier in the state of West Virginia, in the United States of America in the year 1943. Before this judgement,[33] the refusal to salute the American flag was treated as insubordination. Students who refused to honour the Flag were expelled and charged of delinquency. This was challenged in the Court as being violative of the First Amendment, which prohibited any law being made that would abridge the freedom of practicing religion, speech, press, or peaceful assembly. The reason that the case arose was because students who were Jehovah's witnesses refused to say the pledge. This isn't unlike the Bijoe Emmanuel case where students who were Jehovah's Witnesses refused to sing the national anthem. Jehovah's Witnesses are an association of persons who believe that their God, Jehovah, is the supreme leader of the Universe.[34] The Witnesses have been taught and continue to teach that the obligations imposed by the law of God are superior to the laws imposed by any temporary Government.

The decision[35] pronounced by the judge on June 3, 1940 compelled the students to salute the Flag and recite the Pledge. Following this judgement, the West Virginia Legislature amended its statutes. The case was overruled in a landmark turn of events. In 1943, in the case famously known as West

[33] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943, Supreme Court of the United States).
[34]Adelaide Company of Jehovah's Witness v. Commonwealth, (1943) 67 C.L.R 116 (High Court of Australia).
[35] Minersville School District v. Gobitis, 310 U.S. 586 (1940, Supreme Court of United States).

Virginia v. Barnette,[36] the apex court held that such compulsion of students was unconstitutional. The belief of Jehovah's Witnesses can also be highlighted in the Canadian case of *Donald v. The Board of Education for the City of Hamilton*.[37] This therefore, is not an isolated incident.

Critical analysis of the judgement

To analyse the Chouksey judgement, one must have a look at the other precedents laid down by the courts of the country.

In the Bijoe Emmanuel case discussed earlier, the issue of importance is that though the court allowed for maintenance of silence during the national anthem, it emphasised on the children's action of standing up when the anthem played, thus indicating that such an act itself amounted to respect. If the 2016 interim order of the Supreme Court were to be read again, we would see that the guidelines, specifically guideline (d), provide for the compulsion of those present in the hall only to stand in the hall, and not sing the anthem. The act of standing itself amounts to showing respect.

The debate that has risen over the order passed by Justice Dipak Misra is two-fold: *firstly*, whether the Anthem should play before the movie starts, and *secondly*, whether it should be compulsory to stand and sing the anthem. The relevance and importance of the National Anthem has been brought forward in several cases. The Fundamental Duties also highlight the significance of the anthem in our country. The real issue is whether each

[36] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943, Supreme Court of the United States).
[37] Donald v. The Board of Education for the City of Hamilton, 1945 [OR] 518 (High Court of Ontorio).

person present in the hall must sing the anthem. Knowledge of the law, precedents and the order together would clarify that standing out of respect is compulsory, but mouthing the lyrics is not.

Those who remember the release of the film *Border* in the year 1997 also know of the Uphaar Tragedy. The audience in the Uphaar Cinema Hall located in Green Park, New Delhi saw smoke coming out of the screen. A fire had broken out in the cinema and around 60 people died, while over 100 sustained injuries. It was after this tragedy that the court passed a judgement saying no cinema hall was to be bolted from the outside.[38]

The relevance of the Uphaar Tragedy case can be drawn to guideline (e) in the Interim order[39] given by the apex court, which is the subject matter of this article. This guideline instructs the entry and exit doors of the cinema hall to remain closed prior to playing or singing the national anthem. This is done with the objective of prevention of disturbances so that no one can disrespect the national anthem. The question then arises as to whether the Supreme Court has overruled its own judgement? A closer inspection would lead us to the inference that the Uphaar Cinema Hall case prevents bolting of doors, and the recent Interim Order only allows for closing the door for 52 seconds while the national anthem plays, after which the doors can be opened.

The order of the court further goes on to declare that the abridged version of the Anthem will not be played or displayed. The analysis of this guideline

[38] MCD v. Uphaar Tragedy Victims Association, (2011) 14 SCC 481.
[39] Supra 4.

can be done by referring to the Order[40] by the Home Ministry relating to the National Anthem of India. The National Anthem is 52 seconds long and shall be played in its entirety. A special circumstance where the anthem shall be played in its abridged version of 20 seconds has been provided as well. The short version shall be played when drinking toasts in Messes. The dispute that arises has three layers: *firstly*, whether the Ministry has made a law; *secondly*, whether the Judiciary has the power to make a law, and *finally*, (subject to affirmation of the previous mentioned contentions), whether the Supreme Court's ruling overturned the law of the land.

As per the provisions of the Constitution, law includes Ordinances, orders, bye-laws, notifications, customs and usages.[41] This leads to a logical implication that the Order of the Ministry falls within the ambit of law. The judiciary too, has laid down the law in several occasions through their judgements. One such example would be the case of *Vishaka v. State of Rajasthan*[42], where the law relating to sexual harassment in the workplace was laid down by the apex court in the year 1997. Justice Ramaswamy has held that the role of the judge is not merely to interpret the law, but to lay new norms of law as well.[43]

Both the questions have thus been answered in the positive. The next step is now to determine whether the guidelines issued by the Supreme Court on the matter of playing the abridged version of national anthem contradict the

[40] (insert proper citation)
[41] Art. 13(3), the Constitution of India.
[42] Vishaka v. State of Rajasthan , AIR 1997 SC 3011.
[43] C Ravichandran Iyer v. Justice A.M. Bhattacharjee, 1995 SCC (5) 457.

Ministry's order. The Home Ministry has allowed for the shorter version of the anthem of 20 seconds to be played when there is a toast in Messes. This Order in fact, is consistent with the provision[44] of Border Security Force Rules, 1989, which allows for playing the short version on ceremonial occasions.[45] In the case at hand, the situation arises not in a Mess, but in a cinema hall where a movie is about to be screened. We can establish that there is no point of contention because the backdrop of both situations is absolutely different. There can be no comparison. The order of the Supreme Court therefore does not violate or invalidate the order of the Ministry.

CONCLUSION

There has been critical backlash against the Order of the Supreme Court that compels individuals in a cinema hall to stand for the national anthem before the movie is screened. The aforementioned analyses are an attempt at bridging the gaps apparent in these critiques. The Fundamental Duties enshrined in the Constitution are moral obligations that are not binding, but are only of persuasive value. The object is to uphold the dignity and integrity of the nation by respecting and honouring the national symbols, namely the Flag, Anthem and the Constitution. The Supreme Court's guidelines do not impose any regulations on the individual that violate their Fundamental Rights, nor are they contradictory to the precedents, or the law of the land. These guidelines merely act as reflection of an individual's love for his nation, and the motherland. It is not an act of forced patriotism.

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[44] S.3, The Border Security Force (Ceremonials and Marks of Respect) Rules, 1989.
[45] Ibid, at S.3 (b).

The moral debate on whether the Anthem should be played before the movie screens can and will continue, but on the legal front, there is no illegality in the order passed by the Supreme Court in the case *of Shyam Narayan Chouksey v. Union of India*.[46]

[46] Shyam Narayan Chouksey v. Union of India, Writ Petition(s)(Civil) No(s). 855/2016.