

NCU LAW REVIEW

VOL. 1, ISSUE 1 (MARCH 2018)

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NCU Law Review is a peer-reviewed biannual academic publication of the Centre of Post-Graduate Legal Studies (CPGLS) at School of Law (SoL), The NorthCap University (NCU), Gurugram (formerly ITM University, Gurgaon). This publication is an endeavour to serve as a forum for the promotion and circulation of views on contemporary legal issues among members of the legal profession, academicians, and students. The Law Review aims at legal research centres, policy makers and government organisations. The views expressed in this publication are those of the authors and not necessarily those of the Editorial Board of the Law Review.

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EDITORIAL NOTE

We are very proud to present to the legal academia the first volume of The NCU Law Review with valuable contributions from scholars across the country. From quality of submissions to wide readership – our previous endeavour, ITM Law Review had been very successful and that has helped creating a niche for ourselves in taking this initiative ahead in a rechristened form. We don't have any preferences in the fields of law as all branches of law are interesting to us. The Board also welcomes inter-disciplinary articles. We aspire to make the NCU Law Review a scholarly platform for facilitating dialogues on any problem connected to the world of law.

This issue of the Law Review deals with myriad subject areas across jurisdictions from ground water regulation in India to transfer pricing in the United Kingdom to protection of YouTube audio-samples in US. The issue also consists of legislative and case comments. The Editorial Board has been very vigilant in selecting articles for this volume and hence, put in lot of time and effort towards categorizing, checking for plagiarism, and facilitating peer review. The Board is delighted to place on record the enormous contribution of the student editors, namely, Ms. Sunethra Sathyanarayanan, Ms. Rashi Sharawat, Ms. Arohi Kashyap, Mr. Ramik Singh Ahlawat and Mr. Mohit Vats for their sincere all-round efforts in this regard.

We are extremely grateful to Dr. Subhash C. Kashyap for penning a special note, Stray Thoughts on the Republic Day, explaining the essence of the Day reminding us to be vigilant about our obligations as citizens in making our country a true republic.

Dr. Amar Pal Singh, through his article, Freedom of Media and the Concept of Regulatory Mechanism in India, has assessed the counters of media freedom in the backdrop of regulatory mechanism in India.

In his article, Evaluation of Geographical Indications Act in India With Reference To TRIPS, Dr. A. S. Dalal strives to compare the Indian model of establishing TKDL as a competent model to protect TK within national and international jurisdiction.

Akash Kashyap has examined the unauthorized use of copyrighted audio files on YouTube from the US legal perspective in his article, Audio-Sampling on YouTube: A Critical Analysis under the US Legal System.

Next, Shashikant Yadav, in his article, Technology Transfer under TRIPS & UNFCCC Regime: A Policy Analysis, has discussed as to how climate change negotiations and international IPR regimes have failed to aid developing nations with sufficient technology transfer for climate change mitigation, as patent laws often act as barrier to facilitate such transfer.

Dr. Gargi Chakrabarti, in *An Evaluation of the Law on Database Protection in India*, argues that in the new era of information technology, database protection is a global agenda. She explores the points of vulnerability in the existing legal measures and attempts to strike a balance between the interest of providers and users.

Dr. Kushum Dixit and Jaydip Sanyal, in *Sustainable Development and Judicial Activism in India*, have recounted the judicial precedents to establish as to how they have developed the environmental jurisprudence regarding sustainable development.

Taniya Malik, through her article, *Rethinking Regulation of Groundwater in India: A Legal Perspective*, has highlighted the inevitable impact of unsustainable activities on water resources and assessed the ability of present legal framework to deal with this threat.

Shaswat Bajpai, in his article, *Transfer Pricing in the United Kingdom: A Legal Analysis*, has detailed transfer pricing regulations and explained dispute settlement strategies employed in the UK.

In the legislative comment section, Dr. Debasis Poddar, has made a critical analysis of *Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015*, asserting that although the law has seemingly addressed a crucial matter attached to public sentiment but practically the ‘high profile’ tax evaders could well remain out of bounds.

In the case comment section, Dr. Aneesh Pillai has been critical about the judgment of *Cellular Operators Association of India v. Telecom Regulatory Authority of India* and holds that the judgment has not been able to untangle the contradiction among various telecom regulations.

We are grateful to Hon’ble Members of the Governing Body, NCU; Prof. (Dr.) Prem Vrat, Hon’ble Pro-Chancellor, NCU; Prof. (Dr.) H B Raghavendra, Hon’ble Vice-Chancellor, NCU; Col. (Retd.) Bikram Mohanty, Hon’ble Registrar, NCU for their invaluable guidance and encouragement at every step of this journey. We are also thankful to many other important actors who made this issue possible including the reviewers, the dedicated staff of the University and Decorpac (I) Pvt. Ltd.. Last but not the least; the Editorial Board is indebted to the authors and other members of our fraternity and look forward to further academic endeavours

Editorial Board

NCU LAW REVIEW

MESSAGE FROM THE VICE CHANCELLOR, NCU

Quality legal research and publications are the hallmarks of a new age law school like ours. Hence, with immense pleasure, I present you with the first volume of NCU Law Review published under the aegis of the Centre for Post-Graduate Legal Studies (CPGLS) at School of Law, The NorthCap University. Of course, it's not a complete new beginning for us. In fact, due to rebranding of ITM University to The NorthCap University (NCU), we have rechristened ITMU Law Review to NCU Law Review, keeping our pursuance of excellence unharmed. Like our earlier endeavour, this time also we have been quite conscious about our quality and which has helped us in bringing out this volume with quality academic contributions from scholars across the country.

With well-researched and insightful articles covering wide range of legal issues, I sincerely believe that this law review would provide legal scholars, be it students, academicians, researchers or advocates, a dynamic platform to share their views about numerous contemporary and critical legal problems and suggest innovative solutions. Therefore, I encourage all legal scholars, who are in pursuit of excellence, to contribute our law review.

The arduous task of publishing this law review could not have been possible without the tireless and meticulous work at every stage of the publication from screening the articles to reviewing them till the final printing of the same. I congratulate everyone involved, especially the Editorial Team, the reviewers and the printer for their impressive work. I would also like to acknowledge the scholars whose articles have been published in this issue and hope the relationship will continue further.

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Prof. (Dr.) H B Raghavendra,
Vice Chancellor,
NCU, Gurugram

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STRAY THOUGHTS ON THE REPUBLIC DAY

*Dr. Subhash C. Kashyap**

For last few years, presence of “very high profile guests” has created renewed interest in the grandeur of the Republic Day celebration. As usual, the media has spiced it up with speculations, applause and criticism. Nevertheless, the cardinal questions remain. Is the Republic Day only meant for pomp and show? Is it only to demonstrate our might before the world? Or is it way more than the parade in the capital?

The importance of 26 January in our history goes back to the days of the national struggle for freedom. On the midnight of 31 December, 1929, in an atmosphere of great excitement and enthusiasm, the Lahore Congress adopted the historic resolution on complete independence moved by Mahatma Gandhi. It was decided that the Independence Pledge, also drafted by Gandhiji, be taken all over the country on January 26, 1930 and that it be repeated each year on that day till complete independence was achieved. The pledge was taken by millions of people in all parts of the country, year after year till 1947. In his famous midnight speech in the Constituent Assembly on August 14-15, 1947, Pt. Nehru referred to this pledge of January 26 as the “Tryst with Destiny”.

To immortalise this day and to pay homage to all those who fought, suffered and sacrificed for fulfilling the pledge of complete independence, 26 January 1950 was declared as the date of the commencement of the Constitution of independent India and the birth of the Sovereign Democratic Republic. Accordingly, since 1950, 26 January is celebrated every year as our Republic Day.

On its very first day, our Constituent Assembly, before it proceeded to frame a Constitution for this ancient land, was reminded of the words of warning uttered by one of the greatest jurists, Joseph Storey, who had said that howsoever

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immaculately built by the founding fathers to last for eternity, a Republic may “perish in an hour by the folly, or corruption, or negligence of its only keepers, The People”. Storey added:

Republics are created by the virtue, public spirit and intelligence of the citizens. They fail when the wise are banished from the public councils because they dare to be honest, and the profligate are rewarded because they flatter the people, in order to betray them.

The concept of republic is that of a State in which the people are supreme, there is no privileged class and all public offices are equally open to every citizen without any discrimination. There is no hereditary ruler and the head of the State is elected by the people for a fixed term. At all times, in a republic, the government derives its powers from the people and it is for a limited period. At the root of all variants of republican polity is the principle of sovereignty vesting in the people, of the citizens being both the rulers and the ruled at the same time, of the people ruling over themselves through their freely elected representatives and having an elected Head of the State, most often called the President. Republics generally go well with a Presidential system. In a classic parliamentary model, on the other hand, Parliament is supposed to be sovereign in theory and the head of the State usually is some hereditary or non-elected dignitary.

For India, democratic republic was never an alien plant. There is ample historical evidence to show that republican forms of government and democratic self-governing institutions existed in many parts of India from as early as the Vedic Age (Circa 3000-1000 B.C.). In fact, India can be well considered to have been the birthplace and the first cradle of democracy. The Rigveda, believed to be the earliest known literary work of mankind mentions the word *gana* at 46 places. *Gana* literally means numbers but is also used for assembly or for rule by numbers - *ganarajya*, *sangha* or republic. There was a time when India was studded with a large number of republics even though the size of such republics was small like the later city states of Greece or the native tribal republics. Also, where there were monarchies, they were either elected or limited and had to function in accordance with Dharma or what we now call the Rule of Law. Pali

texts provide interesting details of how the assemblies of the republics in the post-Vedic period functioned like parliaments and followed highly sophisticated procedures.

When our founding fathers sat down to frame a constitution for independent India, they decided to put it in the unique position of being both a parliamentary democracy and a republic. It is in the widest sense that the Preamble speaks of India being a republic. All citizens are equal in the eyes of law. The Constitution guarantees as fundamental rights equality before law and equal protection of laws and non-discrimination on grounds of race, caste, religion, sex or place of birth. There is no privileged class and all public offices are open for every citizen without any discrimination. The head of the Union is the President who is elected for a fixed term by an electoral college consisting of the elected representatives of the people. All executive powers of the Union vest in the President and have to be exercised in his name. He is also the Supreme Commander of the armed forces. However, It has been held, that unlike the US President, our President is only a constitutional head and real political power is with the ministers who are drawn from among members of Parliament and the Council of Ministers remains collectively responsible to the popular house of Parliament i.e. the House of the People.

The journey of 67 years traversed by our republic was most eventful and full of many challenges. There were scores of substantial achievements coupled with some dismal failures. The phenomenon of increasing globalisation and newer and newer advances in technology led to developments at the speed of a hurricane. Centuries got compressed into years and pressures of various sorts made basic changes in Indian polity a categorical imperative.

In the context of the present state of the Republic of India, the reality is that we are far from fulfilling the basic principles of a republic. Our republic is under tremendous strains. Without getting into details, an attempt may be made to analyse to what extent the position on the ground matches the essential requirements of a republican system and whether the precepts have been translated into practice. A few points may need to be flagged.

While in a republic, people are supposed to be sovereign and supreme masters with all State functionaries at their service and accountable to them. Unfortunately, following independence and even after the commencement of our Constitution, we continued the colonial model of legislative, judicial and administrative institutions and practices developed on the Indian soil by the British colonial masters to rule over India. Masters changed but the gulf between the rulers and the ruled continued. The people did not graduate from the status of subjects to that of citizens of a free country or masters in a democratic polity. The Ministers, MPs, MLAs, bureaucrats and babus, from constables and messengers to Principal and Cabinet Secretaries constitute the ruling class and consider the ordinary citizens as nothing more than their riyaya or subjects. The 'public' component in our 'Republic' is the least remembered except at election time.

In a republic, there is no privileged class and all the citizens are equal and cannot be discriminated. Our daily experience as ordinary citizens is, however, enough to conclusively prove that that the present state of our polity is an antithesis of an ideal republic inasmuch as there is a very wide gulf that separates the common men and women from the privileged VIPs of various sorts. India has a VIP or VVIP culture which is unparalleled in the world. While ordinary citizens - men, women and children - do not feel secure, millions are spent on providing many variants of security cover to those who prize it more as a status symbol and to flaunt their privileged position. The public perception is that the privileged, moneyed and the powerful are rarely punished by law for wrong doing. Justice, healthcare and education are all too expensive to be within the reach of the poor who still constitute the majority. Equality and non-discrimination between citizens in our republic thus remain pious aspirations.

It is said that in a republic, all public offices are open to all citizens equally, on merits, without any discrimination on grounds of caste, gender, religion etc. While it would be highly improper to make any sweeping generalisation, the fact is that we all feel that there is no equality before law, no equality of opportunity or status and hardly any equal protection of laws. These remain only constitutional guarantees. There is both positive and negative discrimination

between citizens. Besides, there is rampant corruption. Jobs, posts and positions in various fields are freely bought and sold. There are some serious scrambles even on the highest levels on who should control the power of appointment.

On principle, there are no hereditary rulers in a Republic. As it is, in our democracy, politics is run by parties and majority of major national and State parties are dominated by a few families and often leadership gets transferred from father to son/daughter. Thus, both at the Union and State levels, barring a few honourable exceptions, for a large part of the last 67 years Prime Ministerial, Chief Ministerial and Ministerial positions have very largely revolved round a few privileged families.

Ideally, in a democratic republic, people are presumed to rule over themselves through their freely elected representatives. In a highly divisive electoral system that we have developed, overwhelming majority of those elected have more votes cast against each one of them than for them. In many cases, the winners represent even less than five to ten percent of their electorate. How can they be called the representatives of the people? Their representational legitimacy is in doubt. And, this is systemic and apart from the much talked about role of the money power and muscle power in elections. Power for its own sake or for personal ends has become the supreme value. It is well-known those huge amounts of black money are spent on elections and that many persons with criminal background get elected. Besides the natural attraction of power and position, politics has come to be seen as a lucrative whole-time profession. The number of those who come with a spirit of self-sacrifice and to serve the nation has been declining.

Politics has become very largely synonymous with struggle for power with political parties becoming transmission belts to power. Communal and caste factors, slogans of secularism, mafia leaders, money, winnability etc. all become essential parts of vote-bank politics. Public interest comes to occupy a back seat. The party or parties losing the electoral battle come to regard it as their bounden job to oppose the government and do their best through all possible means to make all institutions including the houses of Parliament dysfunctional. This is evident from the way sessions after sessions of Parliament are washed away

without transacting much meaningful business. While fervent appeals are made to the people to be good citizens and pay their taxes, there is hardly any accountability for crores per day of poor tax payer's money being squandered on Members doing nothing except disruption.

Irrespective of which party or parties constitute the opposition, it seems to have become a part of opposition culture not to allow the houses of Parliament to function. It is, of course, for the presiding officers not to yield to unruly and obstructionist tactics of any elements. The Presiding Officer has enough powers under the Rules to ensure orderly functioning of the House. But, as at present and for last several years, what the Presiding Officers often do is to adjourn the House again and again.

On the positive side, it may be said that so far we had always had distinguished persons elected as Presidents and as such as Heads of the Republic for a fixed term. The high office has been almost entirely free from controversies. Also, we had as many as sixteen general elections to the Lok Sabha and a few hundred for various State Assemblies and all these have been acknowledged to be free and fair.

As for the shortcomings in the state of our republic, public memory is proverbially short. It is necessary to point out that those who attribute all this only to the immediate present and to the current leadership forget that the ten years before the 16th general elections to Lok Sabha in 2014 were marked by tremendous governance deficit and a long succession of corruption scandals of horrendous magnitude. The people at large were fed up and anxious for a change. They pined for a new leadership that would come as a gush of fresh breeze. An Alliance, a party and a popular leader came to power with a clear majority and a massive popular mandate in May 2014. During the election campaign, they could have clearly explained to the people the dismal state of affairs and the need for hard and sustained effort for some years to put the train back on the rails and bring about national regeneration. Perhaps, the people of India would have understood and appreciated just as the British had done when Winston Churchill said that he could promise nothing except "blood, sweat and tears". Also, like Prime Minister Lal Bahadur Shastri, the people could be taken

into confidence and asked to make sacrifices for fellow citizens. The people would have responded positively provided the sacrifices began from the top and the political class and the senior bureaucrats also agreed to cut their perks and emoluments. Unfortunately, we were instead promised too much including things which could not be considered achievable. As a result, the public perception was that the promised good days had not come, black money stashed in tax heavens abroad had not come back, those guilty of looting the public exchequer had not been punished, poverty and hunger had not vanished and corruption in public dealings continued unabated. On the other hand, it cannot be denied that substantial progress has been made on the development front, in external affairs, in transport, defence, communications, railways and several other areas. The direction seems to be right but the speed of change is not what the people had come to expect. Unfortunately, all the three organs of the State are not performing their assigned roles and discharging their responsibilities. At least partly, the reason for not being able to move faster in national interest is that Parliament is not functioning or is not being allowed to function as it should. More than three crore cases are said to be pending in courts, many for more than several tens of years but instead of attending to clearing the backlog, the Judiciary is busy abrogating to itself executive, law-making and even constituent powers. Often, we shy away from taking difficult decisions and fail to deliver.

The Government presumably had the best of reasons behind the recent demonetization. The decision was indeed difficult and called for the people agreeing to face some difficulties and inconveniences. The most acceptable justification for the sudden announcement could be the need of national defence, fighting terrorist and anti-national forces, thwarting activities of arms and drug smugglers, use of Rs 500 and 1000 currency notes for paying to young and not so young boys for pelting stones at security forces, etc. Although all the sensitive details in these matters could neither be put in the public domain or documented, it could be argued that if massive influx of counterfeit currency to destabilise Indian economy and polity was feared to be imminent, a sudden decision without prior notice or adequate preparations was a categorical imperative. Some of these things were mentioned in the passing but pride of

place was given to the crusade against corruption. It is extremely doubtful if demonetization would prove to be a panacea for eradication of corruption. In fact, if the menace of black money and corruption has to be seriously fought, highest priority has got to be accorded to political party and electoral reforms.

The future of our republic is full of challenges and our hopes consist in turning every challenge into an opportunity by ensuring the well-conceived “Less Government, More Governance” and “Sabka Sath, Sabka Vikas” in all sincerity and at every level and in every sector. What we need most is people-friendly, citizen-centric, corruption-free, clean, good governance. That requires that the idiom and image of politics and politicians must change. Democracy may need to be so reinvented that howsoever idealistic it may seem, public life should once again be based on the spirit of self-sacrifice and service to the people. Irrespective of the political parties involved, it is most important for the future of India and for the survival of our republic, freedom, democracy and rule of law that the present regime succeeds. If we, the people, the keepers of the republic, are vigilant and conscious of our obligations as citizens, there is every hope.

May our Republic live long.

FREEDOM OF MEDIA AND THE CONCEPT OF REGULATORY MECHANISM IN INDIA

*Dr. Amar Pal Singh **

ABSTRACT

Media has for a long time played a crucial role in upholding the principles that democratic systems are based on, which is why media is considered as the fourth pillar of democracy. With India being the third largest broadcasting market in the world, the persisting need for an independent regulator to comprehensively control all aspects of the media can seldom be ignored. Despite the Indian legislative making several efforts in that regard, it hardly measures up to the speed and magnitude at which the 21st century media is progressing. On the other hand, it is also pertinent to understand the evolution of media and the right to freedom of press under the Indian Constitution with relevance to current circumstances where certain media trends deviate largely from the conventional media. This paper aims at comprehensively and comparatively analyzing the Indian media with the existing regulatory architecture in the country. The paper has also laid emphasis on the pattern of regulatory mechanisms that are in place and has also formulated certain suggestions and tweaks that could be adopted for its betterment.

I. INTRODUCTION

Media freedom has been the hallmark of democratic systems across the globe and the Indian media is not an exception. The major components of Media today are print, radio, television and internet. What we need to understand is that media is not just another factor in the life of the nation. It is fourth pillar of the state and it constitutes and shapes the socio-cultural life of the community, apart from serving as a strong tool for public perceptions. As such media plays a

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special role in democracies as it provides the arena for public debates, virtual public space where different issues of public interest can be discussed and represented. Indeed the media influences ideas and can swing opinions and therefore mass communication media carries and transmits a variety of political social messages and opinions from leaders to voters; it, in the right sense of the term, is our modern political infrastructure¹. Indian Constitution provides for right to free speech and expression and by implication right to free media as well, but since no right is absolute, there has always been a need to regulate the freedom of media.²

We may take note of the fact that India is the third largest broadcasting market amounting to roughly 1500 billion rupees in 2016, and through broadcasting the media plays a fundamental role in providing knowledge and information to the people. As such it is a powerful means of exerting influence as well. With the emergence of marketplace of ideas³ primarily becoming a marketplace of commercial profits as well, and the emergence of next generation media in the form of internet, mobile devices, terrestrial TV and convergence, the earlier model of broadcasting being almost exclusively controlled by the State under old Telegraph Act 1885 has become redundant and outdated. There is apparently a need for an independent regulator. In most of the democratic countries an independent, autonomous broadcasting authority or some kind of a commission is created to control all aspects of the operation of the mass media, electronic or print, entertainment or gaming. Such authority is representative of all sections of the society and is free from control of the political and administrative executive of the state. Though there have been attempts to meet the challenges of regulation of emerging problems of variety of media in India, by way of Cable TV Network (Regulation) Act 1995, and Information Technology Act 2000 and several other regulatory measures, these have all been half-hearted and

¹ See Seane Michael McGuire, *Media influence and modern American Democracy*, 4 CARDOZO PUB. L. POL. & ETHICS J. 689, 691 – 92 (2006)

² Art. 19 (1) (a) and Art. 19 (2), which provide for right to free speech and expression and also the grounds for restricting that right, thus providing right to the government that it has power to regulate media freedom.

³ See generally JOHN MILTON, *THE AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* (1643)

stop gap measures only, failing to provide a comprehensive mechanism to govern Indian media of 21st century. This paper makes an attempt to bring out the bottlenecks and contradictions that exist in the regulatory architecture of Indian media and by way of comparative study seeks to come up with a suggestion for provisioning of comprehensive media regulation mechanism.

II. BASIC IDEA OF FREEDOM OF MEDIA

When India became independent and started planning its own architecture of law and governance, free speech and media freedom were some of the important values that were incorporated in the basic document of our politico-legal existence, i.e. the Constitution. Pandit Nehru would very often make a remark that he would prefer to have an inefficient system along-with Media with all its attendant irritants and nuisances rather than an efficient system of governance without media. Therefore one of six fundamental freedoms that were talked of under Article 19 was the freedom of speech and expression. Noticeably the Indian Constitution does not provide freedom for media separately. But there is an indirect provision for media freedom that is derived from Article 19(1) (a). This Article guarantees freedom of speech and expression. Unlike this, the constitution of United States of America provides for right of free speech and media freedom separately⁴. Article 19 of our Constitution deals with the right to freedom and it enumerates certain rights regarding individual freedoms apart from freedom of speech and expression etc. All citizens shall have the right to freedom of speech and expression, to assemble peaceably, and without arms, to form associations or unions, to move freely throughout the territory of India, to reside in any part of the territory of India, to acquire hold and dispose of property and to practice any profession or to carry on any occupation, trade or business.

At no point of history in any political or constitutional system, the rights and

⁴ First amendment of US Constitution provides, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

freedoms have been taken to be absolute. Rights always entail responsibilities, obligations, limitations etc. In the US system, the permissible limitation that may be imposed upon the exercise of these freedoms by way of state regulation has been left to be determined by the courts. However, under the Indian Constitution the limitations have been specifically specified within the constitution⁵. As such the right to freedom of speech and expression shall not affect the operation of any existing law or prevent the state from making any law insofar as such law imposes reasonable restrictions on the exercise of that right in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public decency or morality or in relation to contempt of court, defamation or incitement to an offence. The scheme of freedoms that have been provided for individual and media clearly envisages a system of regulation, which obviously needs to be within the parameters of constitutional goals and values.

III. US REGULATORY PARADIGM

In US system where ‘market-place of ideas’ is the principal metaphor for indicating the ambit of media freedom, the regulation is something that has been justified in most eloquent terms. For example in the famous *Red Lion* judgment⁶ of US Supreme Court, the court emphasized that the first amendment though apparently restricts congress in making laws, the duty of the state actually emanates from this provision alone. The court observed, “the first amendment is not without a sense of irony; the power to regulate speech emanates from the first amendment’s declaration of freedom from government regulation of speech”. Further the court emphasized that the right to regulate press emanates from public’s right to receive information and not out of media’s right to disburse it. It is for the purpose of prioritizing the rights of the consumer over the rights of media that it becomes the duty of the governments to enforce those

⁵ Article 19 (2) provides for 9 grounds on the basis of which restrictions can be imposed on the free speech and expression provided under 19 (1) (a)

⁶ *Redlion Broadcasting Corporation v. Federal Communications Commissions*, 395 US 367 (1975)

priorities. Supreme Court of US has clearly been emphasizing the role of the government in regulating media for the purpose of protecting democratic rights. The recurring theme of US Supreme Court has always been that governments use their counterweight to wealthy and powerful private interests. Government in a democratic system offers a unique source of countervailing power to push public interest against the tide of market forces.

The imperatives of regulation of media have been highlighted in the US system by referring to the “tragedy of commons” of Garret Harden.⁷ A tragedy of commons is a situation where collective resource is squandered because individuals, acting in their narrow self-interest, have no incentive to limit consumption of resources. This concept has been explained with reference to a hypothetical instance involving publicly owned grazing lands. If several shepherds have access to use the grazing lands but have no ownership, no individual shepherd has any incentive to limit the size of his or her herd, because each additional sheep will bring more personal profit. Eventually, all of the grass will be consumed and public resources would get spoiled. It is for the purpose of protecting this public commons that state needs to necessarily involve itself in regulatory processes. This is precisely the argument that Indian Supreme Court is making in BCCI judgment⁸, wherein the airwaves have been held to be a public property or the public commons and therefore need to be regulated for the benefit of the public at large. Relying on the doctrine of Public Trust, declared by Supreme Court of India in *M C Mehta v. Kamalnath*⁹, it is clear that the governmental systems are not the owners of natural resources that exist within the territories under their jurisdiction, rather they are the trustees of public properties and therefore need to administer those properties for the benefit of the public at large. This is precisely the reason that regulation of media for the benefit of the public as the basic consumer of public information is a primary imperative in a democratic system.

For the purpose of understanding the regulatory justifications in the historical

⁷ See Garrett Hardin, *The Tragedy of the Commons*, 162(3859) Sci. 1243, 1243 (1968).

⁸ *Secretary ministry of Information and Broadcasting v. Cricket Association of Bengal*, AIR 1995 SC 1236

⁹ (1997) 1 SCC 388

process, one may look at the US system and see the way they sought to protect the public domain of information systems, the media and tried to administer it as a trust for the benefit of the public. The initial attempt at media regulation was the Radio Act of 1912, which relied on a property-rights based regulatory model. By specifying the power and location of each broadcaster's signal, the government created a property right in that signal and the whole business of bandwidth allocation was viewed only as a question of how to preserve the collective resource and the subset of property rights contained therein. Congress responded by passing the Radio Act of 1927 which granted a new federal agency, the Federal Radio Commission, the power to oversee licensing and enforcement of radio frequencies. In 1934 Federal Communications Commission Act brought in the institution of Federal Communication Commission, (FCC), one of the most enduring systems that US generated and it ruled the roost for more than half a century. FCC's approach towards regulation was exactly in line with the Supreme Court of United States wherein the rights of the listeners as speech consumers were given preference over the rights of the broadcasters as speech producers¹⁰. It contented that the marketplace competition alone would not sufficiently maintain the public interest and therefore there is need for intervention of the State system to ensure a fair regulation of marketplace of ideas to the benefit of the consumer, the people and the common man.

For fifty years FCC shaped the broadcast media through numerous regulations, it created two categories of controls, one set of policies regulated media ownership and the other directly regulated media contents. It may be noted that the inherent conflict of interest which arises from uncontrolled ownership in the media sector gives rise to manifestations such as paid news, corporate and political lobbying by popular television channels, propagation of biased analysis and forecasts both in the political arena as well as in the corporate sector, irresponsible reporting to create sensationalism. These are even more lethal where the ownership/control rests with entities which have both business and political interests and unfortunately such ownership/control is not uncommon in

¹⁰ *Abrams v. United States*, 250 US 616 (1919)

India. Unregulated media markets, in the pursuit of efficiency through economies of scale and network effects, generally have a tendency to move away from the competitive form of organization towards oligopoly or monopoly.

Such a situation raises concern as the efficiency that results from large economies of scale also leads towards a smaller number of competitors and can degenerate into inefficient abuse of monopoly power. Monopoly in media markets is however quite different in its impact from monopoly in products and services markets. Concentration in media markets, apart from the usual economic effects, can profoundly influence opinions and ideas. Empirical evidence suggests that concentration in media markets – fewer independent owners of media outlets— has a negative effect on diversity. The economic interests of media owners influence their advertising, programming choices, and how they provide access to information. Regulating ownership of media outlets is thus essential in the public interest, as a guarantee of plurality and diversity of opinion. It must be remembered that media is not like any other business; it has to be regulated in a different way, which is how the US media was regulated during 1930 to 1980. However with the onset of Reagan era, this era of media regulation virtually came to an end and a sort of deregulatory process began whereby the US media today is marked by huge corporations which exercise their monopoly rights in allowing and manipulating public opinion brazenly¹¹.

The fairness doctrine that has helped Federal Communications Commission of US in upholding the time tested values in terms of diversity of opinions, dictates that holders of broadcast licenses are supposed to present both controversial issues of public importance and do so in a manner that is honest, equitable and balanced. Fairness doctrine was probably the first casualty of de-regulation era of Reagan years¹². The prevailing wisdom of de-regulation era, has been that broadcasters as community trustees be replaced by broadcasters as participants

¹¹ See Editors of Broadcasting Magazine, *The First 50 Years of Broadcasting* 187 (1982).

¹² For an excellent documentary history of the origins and evolution of the fairness doctrine, see Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation* 6 MINN. INTELL. PROP. REV. 3, 18-26 (2004).

in marketplace and scarcity be allowed to be managed by market forces, without realizing the stark fact that without controversial and minority viewpoints, the metaphor of marketplace breaks down, that the overweening economic power of the owners, the big corporations does affect the editorial autonomy. The burgeoning obsession with making money and pleasing advertisers has crowded out the sense of obligation towards the society at large and under the circumstances (economic pressures) the walls that separate the culture of newsroom from the business culture of surrounding corporations have been swept away¹³. No wonder, that five enormous corporations now control a majority of Media in the US creating an unprecedented degree of ownership concentration, which has been working towards reduction of diversity of viewpoints. In fact the incestuous relationship of media with the industry and the political system has been working to the detriment of common man.

In the current broadcast climate, alternative viewpoints are not just rare, but are becoming extinct. The economics of media ownership create structural barriers that endanger speech on the periphery of public debate. In 1950s and 1960s, there were as many as 25000 media houses in US, and by early 1990s this entire gamut of varied ownership patterns got concentrated in mere 50 multinational corporations. During last decade or so, the major pie of the market cake, has been cornered by half a dozen major corporations of the US. We may note the fact that the result of this entire process is that today only 4 per cent America's radio stations and less than 2 per cent of America's television stations are under minority ownership, despite the fact that minorities make up about one-third of the U.S. population.¹⁴ It seems that the rise of phenomenon like xenophobia created is the product of elimination of diversity of ideas and options in the media system.

While a debate has been raging during last one decade or so as to the end of the fairness doctrine, as sharing ideas is no longer a laborious exercise in regulatory compliance in contemporary America, the fact is that this particular marketplace

¹³ See generally Daniel Pearl, *Media Consolidation Has Left and Right Worried About Big Firms Gaining a Lock on Information*, WALL ST. J., Aug. 31, 1995, at A10.

¹⁴ U.S. Dep't of Commerce, *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States*, at 7, 8 (Dec. 2000).

of ideas is only sharing some of the ideas. Virtually every single one of these personality-driven political shows is highly conservative. A major reason for the partisan discourse that is witnessed today in the US during one of the most crucial days of the US history is because lot of viewpoints are often denied access to the airwaves and those who do express a more liberal perspective are discouraged from expressing their views through fiscal intimidation. By now enough research in the US has been done wherein such instances have been well documented. However, the point that I am trying to make is that, given that a very partisan and one side of the philosophical spectrum getting debated these days, the dominant opinions are going unchallenged and political growth is stunted.

The lopsided marketplace of ideas is completely antithetical to the paradigm of media system in a democratic form of governance. Large media interests control profitability through their unique political and social influence. An interesting parallel one can draw to the contemporary US system is that of armament companies that have been able to control profitability through their ties to the military. Similarly, the phenomenon as to media impact might be called a media-political complex. In a free society, gatekeepers and agenda setters have tremendous influence. Due to powerful gatekeeping ability and dazzling agenda-setting power, media conglomerates have an enormous potential to shape political decision in their favor,¹⁵ often without public awareness.

IV. MEDIA REGULATORY PATTERN IN INDIA

Looking at India's regulatory environment, as has been seen above, the pre-independence phase was marked by the colonial experience, wherein the government controlled the press and other forms of media strictly, for fear of disaffection and revolutionary tendencies. In the post-independence phase right to free speech and expression and media freedom having been guaranteed by the Constitution, government control over media in the name of reasonable

¹⁵ JON D. MICHAELS, BEYOND ACCOUNTABILITY: THE CONSTITUTIONAL, DEMOCRATIC AND STRATEGIC PROBLEMS WITH PRIVATIZING WAR, 1001, 1014-1015 (2004)

restrictions on the exercise of freedom of speech and expression and media freedom continued, particularly the broadcast media along existing lines. Statutory basis of government control of the broadcast sector, which was widespread until the emergence of satellite television in the 1990s, can be traced to the 123 year-old Indian Telegraph Act of 1885. The Act states that the Central Government has the exclusive privilege of establishing, maintaining, and working telegraphs within India. The Act and its subsequent amendments define telegraph broadly to include most modern communication devices irrespective of their underlying technology. Judicial decisions have also held that the term 'telegraph' includes the term telephone, television, radio, wireless, mobile and video equipment. This enabled the governments of the day to control the media, particularly electronic media.

The Prasar Bharati Act, 1990 was an attempt to provide some autonomy to this sector. The legislation provided for the formation of an autonomous Broadcasting Corporation that would manage Doordarshan and AIR, discharging all powers previously held by the Information and Broadcasting Ministry. The Corporation inherited the capital assets of Doordarshan and AIR and is managed by a Prasar Bharati Board, including the Directors-General of the two organisations and two representatives from amongst the employees. The Chair and other members of the Board would be appointed on the recommendations of the selection committee headed by the Vice President. A few more regulatory attempts have been made in India in so far as the Broadcast sector is concerned. The Broadcasting Bill, 1997, 2008 & 2012 and the Communication Convergence Bill, 2000, both failed for this reason or that. Cable TV Network Act was brought in to regulate the suddenly new emerging paradigm of cable TV, related business and their operations. Other regulations in the sector are being accomplished by issuing guidelines such as those for up-linking and down-linking TV channels, DTH, FM Radio and community radio etc. With the onset of internet and related devices, the scene of media regulation has become still more complicated. Indeed it could be called a tectonic shift in the regulatory pattern and ushers in a system which has come to be known as a case of technological over-run, creating a huge gap in the real time technological operations and ambit for impact of regulations. It might be of interest for the

reader to know that in the current debate on multilateral governance model of internet governance versus the multi-stakeholder model, the real issues of international governance mechanism appears to have drowned in the jostling for more space by competing interests. While countries like Russia, China and Saudi Arabia bat for multi-governmental body under the International Telecommunication Union of United Nations, the US insists on multi-stakeholder oversight body. India apparently has been trying to hide its lack of preparedness under the grand-standings like greater say to governments and accountability on the nature of civil society. It is worth noting in this context that while a multi-lateral government takeover is apparently a bogey, the multi-stakeholder concept and the way it works, may end up serving the needs of powerful corporations with the imprimatur of civil society. In such a scenario securing a healthy democratic space with due respect to the values of freedom of speech, human rights and privacy rights in the internet governance is going to be a major challenge before the new government in New Delhi which swears by the name of e-governance.

Though unfortunate, it might be instructive to note that despite the fact that the powerful and proliferating media constitutes a vital part of life today, the public sphere has been shrinking rather than expanding over the past couple of decades. Certain trends in media are believed to have contributed to this erosion of public sphere; one such trend is a movement towards greater concentration of media ownership. Interestingly this aspect of public sphere getting reduced has not been part of vigorous public discussion during recent years. Though, the fact is that restrictions on media ownership have been important features of media regulation in most mature democracies, in Indian media markets the monopolistic trends have been prevented due to linguistic and socio-cultural heterogeneity of Indian society and the trends of media houses being family owned businesses. However recent researchers show that this peculiar paradigm which has ensured diversity of news and views in India is already in the process of getting changed.

It is in this background that I try to work out a plan of regulatory pattern for media regulation in India, which I tentatively call a hybrid model of

“Independent regulation with statutory verification through soft law approaches”. This I shall try to explain. It has been noted earlier that State interventions in regulatory processes cannot be ruled out. The frontiers of public commons do not fare well without government protection. The Red lion judgment, which talked about the irony involved in the indispensability of governmental intervention process is that the duty of the government to regulate stems from the prohibition of regulation itself. The Public Trust Doctrine propounded in *M. C. Mehta v. Kaml Nath*,¹⁶ by the Supreme Court of India is an emphatic statement that protection of public commons is the responsibility and duty of the Sovereign State. The limitless space provided to the influential corporations in the name of market place of ideas to be market driven might result in another tragedy of commons. The problem is of regulatory strategies.

Generally speaking the regulatory strategies have historically been classified into two viz. soft law approaches and hard law approaches, those who think that people will comply with the laws when only confronted with tough sanctions and those who believe that gentle persuasion works in securing compliance with the law. Further, the emphasis of the sanction approach is *post-monitory*, i.e. reacting to violations of the law with penalties once they are committed. On the other hand, the persuasion approach is *pre-monitory*, and tends to ensure compliance with law before violations occur. The latter approach is typically known as soft law approach.¹⁷ It is interesting to note that even Constitution of India takes recourse to a mix of soft and hard law approaches, for the purpose of ushering into a democratic process which takes care of the individual interests and protects the public commons as well.¹⁸ At a time when we are talking of pre-litigation mediation processes, soft law approach is something which also accords with current trends of law. The argument made by those in the soft law

¹⁶ (1997) 1 SCC 388

¹⁷ See generally John S. Kirkton & Michel J. Trebilcock, *Introduction: Hard Choices and Soft Law in Sustainable Governance*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 3- 29 (John S. Kirkton & Michel J. Trebilcock, eds. 2004)

¹⁸ A combination of hard law approaches in terms of Fundamental Rights which are to be implemented by the best of resources including directives from the Apex Court, and Directive Principles of State policy, which depend on the sweet will of the state.

camp is that persuasion is cheap, and punishment expensive. Furthermore, the argument is that it is better to spend your money up front to proactively prevent violations, than to invest your energies in violations that have already occurred. The administrative justice system, in particular, has come to understand clearly that enforcement and adjudication in hard law paradigm are expensive in terms of time and cost. As a result, a variety of alternative dispute resolution (ADR) models have proliferated that build on the successes of negotiated solutions in labour arbitration. Although ADR is not without its critics, the attempt is made to provide less costly and less confrontational adjudication experiences.

For the purpose of understanding the soft law approaches one can look into some of the defining features of 'soft laws'. First, in a soft law regime the formal, legal regulatory authority of government is not relied on unduly; second, there is voluntary participation in the construction, operation, and continuation in the regime of a particular party; third, there is a strong reliance on consensus-based decision making for action and institutional legitimacy; and, fourth, there is absence of authoritative material in terms of sanctions by state.¹⁹ It is different from hard law approaches, which in its most basic form insists on adherence to the letter of law, rather than its spirit. Depending upon the complexity of the law, and the adjudicative system, it is possible for individuals and corporate firms to spend time and valuable resources on building a legal defense for a violation, rather than adhering to the spirit of the law itself. As such an individual might be encouraged to develop a rather legalistic defense, when the facts of the case do not appear to support his or her claim. Finally, for the government agency, hard law approaches are costly in terms of legal counsel and administrative support.

Hard law approaches have a particular meaning for the justice administration system as well. First, it refers to the degree of formality in the physical layout and atmosphere of enforcement proceedings, and second, to the way in which tribunals interpret and apply legislation. Under soft law approaches, on the other hand, the current ADR endeavours and institutions like administrative tribunals

¹⁹ See Kirkton & Trebilcock, *supra* note 17, at 9.

have been envisaged as providing ready access and natural justice for the workplace parties. Hard law would generally tend towards uniformity of treatment and fixed conditions based on prior knowledge while many current issues in cyber governance would demand significant diversity and constant experimentation and adjustment. Further hard law is very difficult to change and many times actors do not internalize the norms of hard law and therefore, to achieve optimal results and to ensure compliance it may be necessary that frequent changes in a typical paradigm of technological over-run are affected with lot of negotiating space for parties in question. Excessive formalism in statutory interpretation tends to work contrary to the spirit of law. Say for example, in cases of unjust dismissals it becomes difficult to proceed without a lawyer and sophisticated legal argument. As a result, easy accessibility, speedy decisions, and low cost adjudication had been increasingly getting jeopardized. Indian system with its experiences in PIL cases has lots of experiences of this sort.

V. CONCLUSION

The argument is not exactly to do away with the hard law approach altogether. In the matters where hard law approaches have been given up, such as Press Council of India or Advertisement Standards regulations or for that purpose the DTH, IPTV etc., things have not been rosy enough. Therefore the need is to come up with a comprehensive Regulatory system with a single body to regulate all aspects of media on the pattern of US system of FCC of 1930-80, independent regulator with representation from all stakeholders and under a statutory verification process to work together to ensure a genuine media freedom within an overall framework of protection of commons and common interests of the public at large. An example can be given from ASCI, which, by way of an amendment to the Cable TV Network Act, was given some legal powers regarding ad contents in the broadcasting space. In the consumer complaints council, 14 members, both from Civil Society and Industry, can tell a channel to modify or withdraw an advertisement and in case a channel doesn't obey, IB Ministry could take stringent action.

New media legislations will have to encourage media companies to be sustainably independent and maximally diverse. The only way to achieve such a model is to abandon the view of media as a mere industry and recognize media as a uniquely important foundation upon which democracy is to be built up and consolidated. Market could be an ideal thing for determining the values of variety of products, such as peanuts and potatoes, toasters and bread. The market is not a good way to allocate the right to be heard. While handing over the whole thing to market mechanism shall amount to rejection of trusteeship model of governance of commons, reliance over black letter law might also end up in distorting the system and compromising the media freedom. Therefore the imperative is to ensure precedence of political consumers' right to access a variety of ideas over the media industry's desire for profit. What we see in Indian media today, is the existence of two opposite viewpoints- while the media's concern is the removal of governmental interference of all types, the governmental concern is to control the things by way of legal control mechanism. What is required is a balancing process between these two extremes of thinking and ensure that while governmental role in protecting the commons' space is recognized, governments realize the importance of the multi-stakeholder shape of media, as a bulwark of democratic processes.

ROLE OF WIPO IN PROTECTING TRADITIONAL KNOWLEDGE WITH REFERENCE TO TRADITIONAL KNOWLEDGE DIGITAL LIBRARY MODEL IN INDIA

Dr. A. S. Dalal*

“Innovation is central to economic growth and to the creation of new and better jobs. It is the key to competitiveness for countries, for industries and for individual firms. It is the process by which solutions are developed to social and economic challenges. And it is the source of improvements in the quality of all aspects of our material life.”
- Francis Gurry¹

ABSTRACT

Traditional Knowledge (TK) as one of the important aspect of intellectual property rights regime which is loosely protected across the globe. The author intends to analyze the efficiency of World Intellectual Property Organization (WIPO) to protect TK originated at various communities and countries. He also strives to compare the Indian model of establishing Traditional Knowledge Digital Library (TKDL) as a competent model to protect TK within national and international jurisdiction.

I. INTRODUCTION

Traditional Knowledge (TK) is a knowledge which is the result of prolonged development of any object, practice or concept adopted from generation to generation forming its cultural or spiritual identity. Antiquity or uniqueness is also one of the features of TK but this is not the sole element of it. The nature of this intellectual property (IP) is so diverse and is developed by multiple generations belonging to a specific area. Hence, it is too difficult to distinguish

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from other communities residing in other regions. Most of the times, it's almost impossible to identify the original community or sole owner of TK. As a result, protection of TK as IP seems to be almost impossible at global level. Sometimes it is confused with geographical indications also. Therefore, classification amongst major aspects of IP is almost developed, yet it remains debatable.²

This is the principle reason behind absence of clear cut difference between many facets of IP rights and therefore protection of these specific intellectual property rights (IPR) also become difficult. We can enact legislations but first of all we must identify and classify these aspects of IPR in clear cut dimensions.³

Development of IP regime across the globe can be regarded as a historic shift in the international law that states have recognized traditional forms of creativity and innovation to enable indigenous and local communities to protect their TK which can be used by others. For instance, IP legal regime is capable to protect traditional remedies and indigenous art and music against misappropriation and enable communities to control and benefit collectively from their commercial exploitation. But in absence of international treaties amongst many countries on TK the practical implications of enforcement of IP laws is still a challenge.

II. TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY

Overwhelming approach towards protecting IP was initiated in the western countries during the era of industrialization and developed subsequently in other parts of the globe with the pace of industrialization. But protection of IP across the globe is still a utopia for the indigenous people, regional communities and many governments. Whereas developed countries have appreciated various methods and policies to recognize and protect their TK. This is the paradigm shift that developing and underdeveloped countries are still fighting for

² See G. Bharathi Kamath, *Trade Related Intellectual Property Rights (TRIPs): A Primer*, INDIANMBA.COM, http://www.indianmba.com/Faculty_Column/FC535/fc535.html (last visited Feb. 15, 2018)

³ See generally Ramesh Menon, *Traditional Knowledge receives a boost from the government*, INDIA TOGETHER.ORG, <http://www.indiatogether.org/> (last visited Feb. 13, 2018)

protection of their ancient IP rights. South Asia is generally susceptible to this shift.⁴

Although the exchange of information with respect to guidelines, rules and regulations to protect IP have been initiated and propelled by WIPO, still local communities and indigenous population is unable to protect their IP rights except few developed countries. Developed countries are very vigilant to protect their IP rights by the international instruments and international trade sanctions. But other indigenous groups are still fighting for their rights.

III. METHODOLOGY TO PROTECT IP

Basically two types of methodology are adopted by many countries to protect IP rights. Firstly, defensive protection aims to restrict people of other regions to acquire rights over TK of the community concerned. For instance, TKDL is one of the models of defensive protection adopted by India. TKDL comprises of a huge online database of every TK originated or developed in India. India has compiled a complete database of traditional medicine. An access to this database is available to the public and this can be used as evidence of prior art by patent examiners. This makes assessment of patent applications very transparent and effective. The case relating to the use of Turmeric was responsible for establishment of TKDL, where the US Patent and Trademark Office granted a patent in favor of University of Mississippi Medical Centre for the use of turmeric to treat wounds. This Patent was challenged by traditional communities of India where this well-known property of turmeric was documented in ancient Sanskrit texts. Where two American researchers of Indian origin, Suman K. Das and Hari Har P. Cohly of the University of Mississippi Medical Center, put a claim to the US Patent and Trademark Office, maintaining that they had discovered turmeric's healing properties. And, surprisingly, they were granted a patent in March 1995 for something our Indian ayurveda has documented and used for centuries. It meant they had exclusive rights over any such turmeric

⁴ See Arvind Kumar, *Intellectual Property Rights protection in South Asian countries*, LIVELAW.IN, Sep. 5, 2014, <https://www.livelaw.in/intellectual-property-rights-protection-south-asian-countries/> (last visited Feb. 13, 2018)

drug and were in a position to make millions of dollars. The Council of Scientific and Industrial Research (CSIR) applied to the US Patent Office for a re-examination in 1996. This was after Indian scientists raised our concern about how we are losing our TK to marauding foreign companies who have started poaching on our ancient healing techniques. Hence, the US Patent on turmeric was revoked. Thereafter these defensive strategies were used to protect sacred cultural manifestations, sacred symbols and word from being registered as trademarks. This was one of the instances of dominating behavior of west over east with respect to international policies on protection of IPR.⁵

Secondly, positive and active protection is required to empower communities to utilise their TK, regulate its propagation and to get advantage from its commercial use. Although the use of TK in certain manner has been protected by existing IPR regime established by many developed countries,⁶ yet its use in other parts of the world is outside the umbrella of domestic laws hence many communities and governments are demanding international legal instrument or treaties to protect their IPRs. This is impossible to protect TK in absence of an international instrument and moreover in absence of strong enforcement of international obligations. Otherwise after a prolonged continuous debate, the issue to protect TK will become an obsolete concept.⁷

The WIPO has reacted in a very effective and phased manner to recognise IPR. WIPO has worked in this area to recognise three types of TK i.e.

- a) TK in strict sense; technical know-how, skills, practices, innovations, agriculture, biodiversity etc.
- b) Traditional cultural expressions of folklore; cultural manifestations, such as, music, arts, designs, performance and symbols etc.

⁵ Peter Drahos, *Developing Countries and International Intellectual Property Standard*, 5(5) J. WORLD INTELL. PROP. 765 – 89 (2002)

⁶ B. Kirshenblatt-Gimblett, *Theorizing heritage*, 39 (3) ETHNOMUSICOLOGY, 367, 370 (1995).

⁷ Graber, C. B. and Girsberger, M. A., (2006), *Traditional Knowledge at the International Level: Current Approaches and Proposals for a Bigger Picture That Includes Cultural Diversity*, in RURAL LAW: THE 60TH BIRTHDAY OF PAUL RICHLI 243, 247 (Jörg Schmid and Hansjörg Seiler eds., 2006)

- c) Genetic resources; genetic material of actual or potential value found in plants, animals and micro-organisms, etc.

While comparing with other innovations, people opt for patents to protect their IP whereas TK has ancient roots and is often informal and oral. This also creates a hurdle in protecting TK.⁸ This has prompted some countries to develop their *sui generis* systems for protecting TK. Still many under developed countries lack proper domestic legislations to counter IPR violations. The process to document TK is one of the effective initiatives to protect it and to preserve or disseminate it, or to use it. As Francis Gurry remarked:

“In environmental management, rather than for the purpose of legal protection, there are nevertheless concerns that if documentation makes TK more widely available to the general public, especially if it can be accessed on the Internet, this could lead to misappropriation and use in ways that were not anticipated or intended by TK holders.”

Documentation is the foremost effective tool to protect TK. The document itself will serve the purpose to be presented in any court of law as a credible evidence to justify the claim of TK by the respective community. Most of the times many contributors in WIPO propose with an aim to add exceptions in use of TK on the basis of informed consent, especially for sacred and secret materials. Other experts argue that this may likely to diminish the willingness to innovate and discover their IP. There is a need to create evidence in the form of document by the authority of in any form so as to contest in any international forum to prove the claim of IPR.⁹

⁸ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter ‘TRIPS Agreement’]

⁹ See generally Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUSTON L. REV. 1115-1185 (2009)

IV. GENETIC RESOURCES AS INTELLECTUAL PROPERTY

Genetic resources are creation of nature and these creations cannot be claimed by human mind as its IP. But any invention to develop genetic resources by humans using genetic technology associated with TK may be patentable as IP. For instance, development of new plant variety by plant breeder is recognised as plant breeders' rights. Development of genetic resources is recognized by WIPO in international legal framework and explained in Convention on Biological Diversity (CBD)¹⁰ in detail.

A. Defensive Protection of Genetic Resources

In case, if the element of novelty and inventiveness is absent in genetic resources associated with TK, preventing patents being granted over genetic resources. TK databases are very helpful for patent examiners to find relevant prior art, to avoid erroneous patents.¹¹ WIPO has also developed its own tools and system to classify patents. The CBD has also provided for process of prior informed consent, mutually agreed terms and equitable profit sharing and disclosure of origin and non-observance of the process may lead to disqualification of patent applications. Intergovernmental Committee on IP and Genetic Resources, TK and Folklore (IGC) has cautioned:

“Bio-piracy is a term sometimes used loosely to describe biodiversity-related patents that do not meet patentability criteria or that do not comply with the CBD's obligations – but this term has no precise or agreed meaning.”

Bio-piracy is the biggest challenge in front of IPR regime and it must be prioritised by WIPO and WTO to enact effective international instrument without delay.

B. Requirement to Disclose Origin

With an aim to implement the aims and objectives of CBD, many of countries have enacted domestic legislations to recognize genetic resources as IP with

¹⁰ 1760 U.N.T.S. 79 (1992)

¹¹ See TRIPS Agreement, preamble.

their own methodologies based on principles such as prior informed consent and agreeing to fair and equitable benefit sharing principles. WIPO members are also analysing various methods to implement the CBD obligations in the global IP regime. WIPO also deals with the complete IP aspects of every kind of Trade Related Aspects of Intellectual Property (TRIPS) with respect to TK and preparing databases of the same. It has contributed significantly to provide a platform to deliberate upon laws to protect TK across the globe.¹²

C. Traditional Cultural Expressions

Many countries have established the same legal principles to protect traditional cultural expressions by their existing legal systems to protect copyright and related rights, geographical indications, appellations of origin, trademarks and certification marks. For instance, contemporary adaptations of folklore are copyrightable, while performances of traditional songs and music may come under the WIPO Performances and Phonograms Treaty. Trademarks can be used to identify authentic indigenous arts, as the Maori Arts Board in New Zealand, Te Waka Toi, has done. Some countries also have special legislation for the protection of folklore. Panama has established a registration system for traditional cultural expressions, while the Pacific Regional Framework for the Protection of TK and Expressions of Culture gives traditional owners the right to authorize or prevent use of protected folklore and receive a share of the benefits from any commercial exploitation.¹³ Traditional cultural expressions are explained and applied by WIPO by legislating and enforcing multiple international treaties.

V. DEVELOPMENT OF WORLD INTELLECTUAL PROPERTY ORGANIZATION

The WIPO was established in 1967 with its headquarters in Geneva, Switzerland. As of now, a total 184 nations are member to this organization.

¹² Marisella Ouma, keynote address at Seminar on Intellectual Property and TK, Geneva, Switzerland, Nov. 25, 2016.

¹³ *Background Brief Traditional knowledge and intellectual property*, WIPO.INT, http://www.wipo.int/export/sites/www/pressroom/en/documents/background_brief_tk.pdf (last visited Feb. 15, 2018)

Basically, WIPO administers 24 international treaties, including: PCT, Madrid, Hague, etc. WIPO is one of the largest institutions of UN which is working on self-fund raising principle to meet its own internal expenses requirements.¹⁴

The WIPO has contributed a lot in development of IP laws across the globe.

- a) It has assisted governments and organizations to legislate to recognize and protect all aspects of IP.
- b) It has worked with Member States to develop international IP law. Moreover WIPO has assisted in drafting and administering treaties.
- c) It has initiated the registration systems for trademarks, industrial designs and appellations of origin.
- d) It has established a system of filing of patents. In case of any international dispute with respect of use of any instrument of IP, WIPO has delivered dispute resolution services.

To develop uniform principles to protect IP, WIPO provides a forum for informed debate and for the exchange of expertise. In other words:

“WIPO is United Nations specialised agency that coordinates international treaties regarding IP rights. Its 184 member states comprise over 90% of the countries of the world, who participate in WIPO to negotiate treaties and set policy on IP matters such as patents, copyrights and trademarks.”¹⁵

The WIPO Convention concluded about categorization that “IP shall include rights relating to:

- a) literary, artistic and scientific works,
- b) performances of performing artists, phonograms and broadcasts,
- c) inventions in all fields of human endeavour,

¹⁴ See R. G. Tarasofsky, *The Relationship between the TRIPs Agreement and the Convention on Biological Diversity: Towards a Pragmatic Approach*, 6(2) Rev. Euro. Com'nity & Int'l Env. L. 148, 149.

¹⁵ Director General, WIPO Magazine about Future of IP, Sept. 26, 2016.

- d) scientific discoveries,
- e) industrial designs,
- f) trademarks, service marks and commercial names and designations,
- g) protection against unfair competition, and
- h) all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Other IP areas such as literary, artistic and scientific works are included under copyright regime. The area mentioned as protection against unfair competition may also be considered as belonging to that branch, the more so as Article 1(2) of the Paris Convention for the Protection of Industrial Property (Stockholm Act of 1967) (The Paris Convention) includes:

“The repression of unfair competition among the areas of the protection of industrial property; the said Convention states that any act of competition contrary to honest practices in industrial and commercial matters constitutes an act of unfair competition”.¹⁶

This shows the effectiveness and importance of treaties in protecting IPR in a highly competitive global market.

A. Important Strategic Goals Achieved by WIPO

This is one of the unique UN organisations amongst all that itself work on self-fund raising principle. WIPO earns approximately 90 per cent of annual budget from the fees charged for international trademark registrations and patent applications. WIPO earns remaining 10% of its budget from arbitration services. Whereas other UN institutions still depend on funding from member countries to work upon aims and objectives established by UN.

¹⁶ See Paris Convention for the Protection of Industrial Property Stockholm Act (1967), art. 10(B)(2), available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=287756 (last visited Feb. 20, 2018)

B. Decision-Making Model of WIPO and WTO

The UN General Assembly governs WIPO, which convenes all activities of the organisation, including its budget. WIPO operates on a “one country, one vote” basis. Decision making model of WIPO is also benchmarking to give representation to every country and abridging the gap between developed and developing countries. Furthermore, contribution of WIPO was enhanced in making treaties with respect to cyber space such as the “internet treaties” in response to the demands of IP holders worried about infringement in cyberspace. Moreover WIPO has effectively developed treaties on “WIPO Copyright Treaty”¹⁷ and the “WIPO Performances and Phonograms Treaty”¹⁸ marked an important change for WIPO’s involvement in setting ICT regulation and for copyright law regime.

VI. PROTECTION OF TK IN INDIA

The term “traditional knowledge” is also used interchangeably with indigenous knowledge, which is used to describe any indigenous knowledge, innovation, or custom, tradition of local communities that is important in protection, conservation and sustainable use of biodiversity and various traditions.¹⁹ TK is vital to the food security and health of millions of people and is developed and passed on from generation to generation in the form of accounts, songs, cultural values, local languages, customs and customary practices, healing arts, and agricultural practices, for the collective good of the communities. It closely interlinks cultural and biological diversity, forming an essential basis for the conservation and

¹⁷ See generally International Bureau of WIPO, World Intellectual Property Organization Copyright Treaty, Mar. 6, 1992, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157 (last visited Feb. 20, 2018)

¹⁸ See generally International Bureau of WIPO, WIPO Performances and Phonograms Treaty, Dec. 20, 2002, available at <http://www.wipo.int/wipolex/en/details.jsp?id=12743> (last visited Feb. 20, 2018)

¹⁹ See S. Ghosh, *Traditional knowledge, Patents, and the New Mercantilism (Part II)*, 85 (11) J. PAT. & TRADEMARK OFF. SOC’Y 885, 898 (2003)

sustainable use of global biodiversity TK systems in India for biodiversity conservation. Or in other words, TK involves the quest in the ancient IP developed by ancestors of a particular region.

It is now recognized that western criteria are not the sole benchmark by which other cultural knowledge should be evaluated. While the term ‘traditional’ sometimes carries the connotation of ‘pre-modern’ in the sense of ‘primitive’ or ‘outdated’, many of the traditional sciences and technologies were in fact quite advanced even by western standards as well as better adapted to unique local conditions and needs than their later ‘modern’ substitutes. In countries with ancient cultural traditions, the folk and elite sciences were taken as part of the same unified legacy, without any hegemonic categorizations.

Biodiversity and associated TK are two capital resources of India. In 2000 the Council for Scientific and Industrial Research in India found out that almost 80% of the 4896 references to individual plant based medicinal patents in the United States Patents Office that year related to just seven medicinal plants of Indian origin.²⁰ Three years later, there were almost 15,000 patents on such medicines spread over the United States (US), United Kingdom (UK), and other registers of patent offices.” In 2005 this number had grown to 35,000, which clearly demonstrates the interest of developed world in the knowledge of the developing countries.²¹ This pace of efficiently recognizing ancient medicinal methods of Indian origin to protect Indian IPR is commendable.

India is an active member of WIPO and conducted one of the benchmark International Conference in 2011 on the Utilization of the TKDL as a Model for Protection of TK for the first time across the globe. This model of TKDL was appreciated worldwide. This was the beginning to recognise TK and making it public on web so as to resolve many future probable disputes over claim of TK. India fought successfully with United States Patent and Trademark Office

²⁰ See S. Sahai, P. Pavithran & I. Barpujari, *BIOPIRACY: IMITATIONS NOT INNOVATIONS* 35 (2007)

²¹ See generally Jayant Menon, *Bilateral Trade Agreements*, 21(2) *ASIAN-PACIFIC ECO. LIT.* 29 – 47 (Nov. 2007)

(USPTO) against granting patents of turmeric and basmati. India also fought with European Patent Office (EPO), for granting neem patent.

As a result of development of TKDL, in just under two years, India succeeded in bringing about the cancellation or withdrawal of 36 applications to patent traditionally known medicinal formulations against Europe. The TKDL is a growing database which contains 34 million pages of formatted information on some 2,260,000 medicinal formulations in multiple languages. The TKDL is designed as a tool to assist patent examiners of major IP offices in carrying out prior art searches and other investigations. The TKDL also serves a credible evidence to prove in any domestic or international court with respect to claim of any IPR. The TKDL is a unique repository of India's traditional medical wisdom and other ancient methodology to save lives developed in India. Moreover TKDL is providing information in many languages such as Sanskrit, Arabic, Persian, Urdu and Tamil, and those used by patent examiners of major IP offices to bridge the linguistic gap between TK expressed in different languages.²² India's TKDL is a powerful weapon to counter "biopiracy". Dr. V. K. Gupta²³ explains the critical role that this unique tool plays in protecting India's TK:²⁴

"TK is integral to the identity of most local communities. It is a key constituent of a community's social and physical environment and, as such, its preservation is of paramount importance. Attempts to exploit TK for industrial or commercial benefit can lead to its misappropriation and can prejudice the interests of its rightful custodians. In the face of such risks, there is a need to develop ways and means to protect and nurture TK for sustainable development in line with the interests of TK holders. The preservation, protection and promotion of the TK-based

²² See generally V.K. Gupta, *Protecting India's Traditional Knowledge*, WIPO MAG. 5 – 8 (Jun. 2011)

²³ Director TKDL & Sr. Advisor, CSIR, India & Senior Advisor and Director TKDL in Council of Scientific and Industrial Research (CSIR) & Chairman, TKDL Task Force, India.

²⁴ *Supra* note 22 at 5

innovations and practices of local communities are particularly important for developing countries. Their rich endowment of TK and biodiversity plays a critical role in their health care, food security, culture, religion, identity, environment, trade and development. Yet, this valuable asset is under threat in many parts of the world”.

A. Major Challenges in India to Protect TK

The TKDL is one of the effective means to preserve TK by documenting and digitizing TK-related information. India is pioneer in this field. But still with respect to check domestic and international “bio-piracy” an effective enforcement system is the need of the hour. Some of the major challenges towards protection of TK in India are as follows:

1. Costly and time consuming litigations

India developed its TKDL as a collaborative project between the CSIR and the Department of AYUSH, to ensure patent offices around the world do not grant patents for applications based on profound knowledge of Indian origin. TKDL was established in India after the efforts to revoke the patent granted by the USPTO on the wound healing properties of turmeric, and the patent granted by the European Patent Office (EPO) on the antifungal properties of neem. These litigations were successful but proved as extremely costly and time-consuming. So aftermath TKDL, still protection of TK through litigation is costly and time consuming.

2. Parallel grant of Patents

The TKDL was established in 2001 and during the establishment of database, the TKDL expert group estimated that every year more than 2,000 patents relating to Indian medicinal systems were being erroneously and deliberately granted by patent offices around the world. So as of now, the only remedy to protect IP lies in litigation which itself is very costly.

3. Challenges pertaining to multiple languages and scripts

India's traditional medicinal knowledge is existed in multiple languages such as Sanskrit, Hindi, Arabic, Urdu and Tamil. Some how many patents were granted before the establishment of TKDL. Under the IP law to grant a patent; an applicant must satisfy that a claimed invention is novel and not previously known. However, at that time the concern related to prior art search and inspection related to novelty and innovation was not strictly observed by the global patent offices. As a result to this effectiveness of TKDL was undermined before its inception.²⁵

4. Importance of Patents in International Markets

The United States and Europe has granted patents of Indian origin erroneously which caused a great deal of national distress of India. The people of India felt that knowledge belonging to India was wrongfully being taken away from them. Moreover, these "wrong" patents conferred exclusive rights to exploit the technology in the country in which patent protection was granted. This issue created a major challenge for Indian manufacturers to face a competitive challenge in foreign markets.

B. Impact of TKDL in India

India is capable of protecting some 0.226 million medicinal formulations and at zero direct cost. Access to the database helps patent examiners root out those applications that clearly do not satisfy the novelty requirement at an early stage. Without a TKDL database, the process of revoking a patent can be a costly and time-consuming affair. It takes, on average, five to seven years and costs between 0.2-0.6 million US dollars to oppose a patent granted by a patent office. Multiply this by India's 0.226 million medicinal formulations and it is clear that the cost of protection, without a TKDL, would be prohibitive.²⁶

²⁵ V. Vadi, *Intangible Heritage: Traditional Medicine and Knowledge Governance*, 2 (10) J. INTELL. PROP. L. & PRAC. 682, 685 (2007)

²⁶ *Supra* note 22 at 8

C. An Innovative Model of Classification System

India's innovative TKDL is modelled on WIPO's International Patent Classification (IPC). It consists of some 27,000 subgroups for Ayurveda, Unani, Siddha and Yoga and, like the IPC, is indispensable for the retrieval of relevant information. Comparison of time and costs associated with post-grant opposition and pre-grant opposition based on the submission of prior art evidence supported by TK documentation is as follows:

Table: An innovative classification system

| No. | Methodology & Process | Post-grant Opposition | Pre-grant Oppositions supported by a database such as TKDL |
|-----|-----------------------|---|--|
| 1. | Nature | Opposing party is part of re-examination process, can submit counter documents and participate in re-examination and hearing process. | Objecting party can only file evidence as a third party and cannot participate in the examination process. |
| 2. | Cost | Highly expensive and requires legal assistance. | Inexpensive and does not require legal support because prior art evidence is available from the TKDL. |
| 3. | Time period | 4 – 13 years | 3 – 20 weeks |
| 4. | Documentation | Does not require extensive documentation | Requires extensive digital documentation. |
| 5. | Appeal | Patent Applicant can | Patent applicant cannot |

| | | | |
|--|--|------------------------------------|---|
| | | appeal invalidation of the patent. | appeal as the application is rejected at the pre-grant stage. |
|--|--|------------------------------------|---|

To date the TKDL has enabled the cancellation or withdrawal of a large number of patent applications attempting to claim rights over the use of various medicinal plants. India's TKDL is a unique tool that plays a critical role in protecting the country's TK. The TKDL has since spent a not-insubstantial sum of money translating, digitising and cataloguing Indian TK into an online database. Even if this seems like an otherwise worthy exercise, it has been in the pursuit of a pointless outcome. It also did not create new knowledge as much as scan databases of existing publications and books written by others and in many cases likely infringed on the copyrights of the original publishers.²⁷

VII. CONCLUSION

The last thirty years has seen lively interpretations and active negotiations about the extent that IP law could (or even should) be utilized to protect knowledge of indigenous people. The administration of the proposed model and the establishment of the 'TK Fund', that collects the revenues from the contracts, are proposed to be overseen by the National Biodiversity Authority of India (NBA). Developing a database for TK is listed as one of the general functions of the NBA under the Biological Diversity Act, 2002 ('BD Act'). Therefore allowing NBA to manage the commercialisation of TKDL is the only viable solution.

Though the existing international IP system does not fully protect TK and traditional cultural expressions, many communities and governments have called for an international legal instrument providing *sui generis* protection. An

²⁷ See Prashant Reddy Thikkavarapu and Sumathi Chandrashekar, *Why the Traditional Knowledge Digital Library's Existence Deserves a Thorough Relook*, THE WIRE, Apr. 4, 2017, <https://thewire.in/science/tkdl-csir-neem-patents> (last visited Feb. 21, 2018)

international legal instrument would define what is meant by TK and traditional cultural expressions, which the rights holders would be, how competing claims by communities would be resolved, and what rights and exceptions ought to apply. Working out the details is complex and there are divergent views on the best ways forward, including whether IP rights are appropriate for protecting traditional forms of innovation and creativity.”

WIPO Voluntary Fund provides assistance to representatives of indigenous and local communities to attend the WIPO talks because their active participation is crucial for a successful outcome. WIPO members are willing to expedite a diplomatic conference for final adoption of one or more international instruments.²⁸ The impact of TKDL is already witnessed when two such cases the EPO has already reversed on the strength of evidence by Library. Moreover, in 33 other cases, the applicants themselves withdrew their old applications on the ground of evidence by library.

The TKDL is no doubt an effective counter mechanism to curb the menace of bio-piracy. A recent study reported 44 percent decline in the number of patent applications filed concerning Indian medicinal systems or medicinal plants. It is effectively deterring bio-piracy of genetic resources of many indigenous and local communities and countries. Even the TKDL is bridging the gap between various international mechanisms created by the CBD. Hopefully in the near future a consensus across the world will emerge in the form of international instrument to effectively protect TK across the globe.

With respect to establishment of TKDL in India, this is the first institutional mechanism in the world to protect its TK. The Library helps the patent examiners and registration authority to cancel or withdraw patent applications relating to India's TK without any cost and promptly. TKDL also serves the purpose of evidence with respect to any claim of TK in India or abroad. TKDL is no doubt one of the best models to protect TK of communities across the

²⁸ See generally S. Twarog, Preserving, Protecting and Promoting Traditional Knowledge: National Actions and International Dimensions, in PROTECTING AND PROMOTING TRADITIONAL KNOWLEDGE: SYSTEMS, NATIONAL EXPERIENCES AND INTERNATIONAL DIMENSIONS 420, 461 (S. Twarog, S. & P. Kapoor eds., 2004)

globe. Nevertheless, effective international treaties at global level must be facilitated by WIPO or WTO to enforce protection of TK, as it is, is the need of the hour.

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AUDIO-SAMPLING ON YOUTUBE: A CRITICAL ANALYSIS UNDER THE US LEGAL SYSTEM

*Akash Kashyap**

ABSTRACT

In this paper the author examines the unauthorized use of copyrighted audio files on YouTube from the US legal perspective. First, there is a brief discussion of the applicable law, which in this case is Title 17 of the United States Code (also known as the Copyright Act of 1976). The universal use of this law is explained briefly, after which the article goes on to discuss the application of this law to different types of usage. Such uses fall briefly into three categories - passive audio synchronization, active audio synchronization, and cover music - and each with a distinct legal situation. Finally, the paper discusses the enforcement of Title 17, and how it is shaped by the Digital Millennium Copyright Act.

I. INTRODUCTION

YouTube is a website that combines the interactivity and free-form communication of a social network with the entertainment and production of a television network. The site consists of user-created videos, uploaded into each user's own channel. But while this invaluable innovation has helped bring content creators and hungry audiences together, the age-old problem of copyright violations – particularly in the case of protected music poses a challenge. Many contributors to YouTube use clips and tracks that are protected by copyright. There are three situations in which contributors use copyrighted music. First, there is passive synchronization, in which a content creator uses a clip or series of clips from an audiovisual work that had music previously synchronized to the visuals. Secondly, there is active synchronization, in which

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the content creator himself synchronizes a piece of music onto a series of visuals. Finally, there are cover videos, in which the content creator performs the musical composition of another and subsequently uploads a music video of the resultant creation. Contributors argue that all three of these uses are either protected under the fair use defense or do not constitute a violation under the *de minimis* use principle.¹ Despite these objections, the use of copyrighted music is a far more black and white issue. Without a license, these are indefensible violations of copyright. To understand this, one must consider the three parties involved. The owner of the copyright of the sound recording used - usually the studio label. Then there is the owner of the copyright of the musical composition used - effectively the ASCAP, BMI or SESAC.² Finally is the contributor using the copyrighted work. When analyzing the nexus of rights and defenses available to these parties it becomes clear that law provides little protection to the contributor.

II. JURISDICTION

When discussing these matters, it is important to note that the applicable law is U.S. Federal law alone, despite the internet's international scope. This largely comes down to the most common form of enforcement, when ASCAP, BMI or SESAC, go after the company providing public access to the infringing material – rather than chasing after a username. In this case the access is provided by YouTube, which makes them the primary target for litigation. Now YouTube is a subsidiary of Google, Inc., a company incorporated and situated within the

¹ The *de minimis* use principle is one applied in varied areas of American jurisprudence, and serves to protect defendants from overly rigid enforcement of certain technical laws. It stems from the legal aphorism *de minimis non curat lex*, which roughly translates to “The Law does not concern itself with trifles.” One such area is copyright, where the *de minimis* use principle has served as a valid defense to alleged copyright infringement (See *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997). In colloquial terms, a *de minimis* use defense alleges that the alleged infringement constituted too small a use of the protected material to constitute true infringement.

² Music producers, also known as labels, do not usually police their own copyrights. Instead they outsource that function to organizations like ASCAP, BMI or SESAC. These three are the collective enforcement organizations that represent the vast majority of publishing labels for the purpose of copyright enforcement and collection of royalties.

United States³. This means that any controversy arising between the two would have jurisdiction solely within the United States – no matter where the end user resides. As for why only federal law, this is a simple matter of original jurisdiction. Under the U.S. Constitution,⁴ the grant and enforcement of copyrights is a power reserved for the federal government, through Congress.

III. ACTIVE SYNCHRONIZATION

Active synchronization is when a contributor directly attaches copyrighted music to a piece of video to which it had not previously been attached. This is the most aggressive form of violation by a content creator possible - in which the actions are more clearly in the wrong.

A. Scope of Copyright Protection

Under Title 17 of the United States Code (USC) §102 (a)(2) and (7) the copyrights for a sound recording and the underlying musical composition are separate and reflect separate bundles of rights. §102 (a)(2) provides for the protection of rights to a musical composition, while §102 (a)(7) provides an independent protection for a sound recording that affixes that composition to a phonograph. However, the rights of the sound recording copyright are narrowed significantly by 17 USC §114. §114(b) in particular narrows the rights of the copyright.

In the case of synchronization, it is actually both parties that possess a right to exploitation by virtue of their copyrights. The difference is in breadth - the sound recording copyright extends as far as synchronization of any part of the recording to an audiovisual work, while the composition copyright covers any recording of that composition or a “substantially similar” composition.⁵ If a

³ Both Google’s principal place of business and state of incorporation are within the US. See generally <https://www.google.com/about/company/>

⁴ Article I §8: “The Congress shall have power... To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; . . .”

⁵ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005): A case in which the rap group N.W.A. looped a two second clip from Funkadelic’s “Get Off Your

cover or secondary recording is used then the owner of the original recording copyright has no claim, but the owner of the composition copyright still does.⁶ However, if the original clip is used both parties may bring a copyright infringement claim.

B. Fair Use Defense

The ‘fair use’ defense is still largely defined by the relevant statute 17 U.S.C. §107:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Ass and Jam” five time through their song “100 Miles and Running” without a license or permission. The 6th Circuit held that sampling, even to this extent, constituted a prima facie violation of copyright, and requires a license.

⁶ Of course in this case the owner of the secondary or cover recording would also have a claim, but that consideration would complicate the point being illustrated above.

These factors have been held up and interpreted time and time again - from *Sony v. Universal*⁷ where it was determined that the judgement of fair use was an “equitable rule of reason” utilized by balancing factors, of which §107 are a non-exhaustive list, *Campbell v. Acff-Rose*⁸ where it was determined that the commercial nature of a work was neither dispositive nor overwhelmingly persuasive, instead it was “only one element of the first factor of purpose and character.”, to *Harper & Row Publishers v. National Enterprises*⁹ in which it was determined that the determination of “amount and substantiality of the portion used” was both a quantitative determination as well as a qualitative one. Taking “the heart” of a piece of work weighed as much as taking the bulk of it and *Suntrust Bank v. Houghton Mifflin Co.*,¹⁰ where it determined that the highly creative nature of the source cannot weigh against a parody for fair use purposes.

Unfortunately, these factors are weighed only in relation to the work used, not the entirety of the resultant work. So while a use of part Hoobastank’s song “Give it up” for the purposes of parodying itself would weigh in favor of the use. However, if the clip were used to parody a news reel that purpose wouldn’t factor in at all. This applies to all four factors - transformative uses must transform the song itself, “amount and substantiality” refers to the amount of the song used and not how much of the video uses it, and so on. This makes it very difficult to make a case for a synchronized bit of music being protected by ‘fair use’.

C. *De Minimis* Use

The *de minimis* use defense is generally unavailable to active synchronizers of music; however in some limited cases it may be applied. There are two parties at play here, and the defense against each varies. For the owner of the sound recording’s copyright the *de minimis* use is no bar to recovery. *Bridgeport*

⁷ 464 U.S. 417

⁸ 510 U.S. 569

⁹ 471 U.S. 539

¹⁰ 268 F.3d 1257

Music, Inc. v. Dimension Films,¹¹ one of the seminal cases in sampling music, the court concluded that the only determination to be made for a *de minimis* defense over use of a sound recording was whether or not that recording was used. Since, by definition the music being used originates from the sound recording, *Bridgeport* bars this defense.

However, when it comes to the composition copyright issues become muddier. The original standard for the *de minimis* defense was elucidated in *Fisher v. Dees*¹². It held that, if the “average audience would not recognize the appropriation” the *de minimis* defense was applicable. In *Bridgeport* it was then held that the composition used, if “substantially similar” to the original composition would bar this defense. This apparently meant that a direct use of a sound recording would itself be sufficient - as the clip would obviously be similar to itself. Two factors cut against this. First was the distinction drawn in *Bridgeport* between composition rights and those of sound recordings - in which usage of the actual recordings was dispositive - implies that composition rights should be construed as something different. Second is the holding of *Newton v. Diamond*¹³ - in which it was held that usage of a small, one second clip did not constitute a violation of the composition's copyright due to its “meager and fragmentary nature”.

The body of law above boils down to a context based analysis of the music clip used, skewed heavily against the use of this defense. However, if the clip used is either small or generic enough to avoid identification by the *Newton* standard then the content creator would be able to use this defense against a composition copyright claim.

¹¹ 410 F.3d 792

¹² 794 F.2d 432: *Fisher v. Dees* involved Ricky Dees, a parody artist who recorded a parody of “When Sunny Gets Blue” entitled “When the Sonny Sniffs Glue”. The case was ultimately decided on a fair-use parody basis, but the legal test for *de minimus* sampling was elucidated as a possible defense.

¹³ 388 F.3d 1189: Here the Beastie Boys used a 1 second clip of James W. Newton’s song “Choir”, which consisted of “three notes separated by a half-step over a background C note”. This was found to be sufficiently small enough a use to constitute a *de minimus* defense.

IV. PASSIVE SYNCHRONIZATION

Passive synchronization refers to the use of a clip from an audiovisual work that already has a piece of music synchronized to it. Passive synchronization creates the most interesting of grey areas for such use of music. However, there is yet to be a truly clear decision on this point, so discussion here is by and large speculative.

A. Scope of Copyright Protection

As discussed above the use of the music clip is generally a violation of the copyrights of both the composition copyright owner as well as the sound recording copyright owner. However, given the passive nature of the violation, it hardly seems just that a content creator could face copyright violation for a third-party song he had simply failed to strip out of the audiovisual clip he was using. Unfortunately, the courts have not yet faced a case of first impression for this issue. However, given the bare law, it seems that a claim could be made that this sort of synchronization does not fall within the scope of a copyright's protection.

Synchronization is generally considered the creation of a derivative work, and thus protected by virtue of 17 U.S.C. §106(2):

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

...

(2) to prepare derivative works based upon the copyrighted work;

However, in this case, the derivative work was actually created by another - the person who synchronized the music to the visuals in the first place. In this context it could be argued that the music and visuals - once affixed - form a single new piece of work, with a copyright held by the licensee. In which case - while the licensee may be able to claim infringement of their video - the composition and recording owners would not have any claim - as their work was never copied by the content creator.

B. Fair Use Defense

The applicability of the ‘fair use’ doctrine here hinges entirely on whether or not courts consider passive synchronization a violation of 17 U.S.C. §106(2). If they decide that it does not constitute a violation of the music’s copyright as argued above, then a ‘fair use’ argument can be made strongly as it applies only to the clip used. Here the four factors would be evaluated with a focus on the clip, not the song used. This could lead to a slightly stronger case for the content creator. Otherwise, the content creator would have a much harder time gaining protection under ‘fair use’, as his video would have to justify use of the clip four factor test when, in fact, the attachment of the music was done by another - giving him much less say in its use.

C. *De Minimis* Use

The only true difference between passive and active synchronization for this defense would be factual. As discussed above, actual synchronization is usually with a purpose. Thus factually these situations are much more likely to fall outside the possible *Newton* exception. However legally there is no difference in the applicability of the *de minimis* defense. If, for some reason the content creator uses a snippet of a song too short or indistinct to be unrecognizable for the average audience, then this defense would apply against the composition copyright holder. However, just as before, *Bridgeport* precludes the defense against the sound recording copyright - since the clip used did, in fact, come from the recording.

V. COVER MUSIC VIDEOS

Cover music refers to the recreation of a musical composition that has previously been released by a different artist. Generally, these covers follow the composition and lyrics of the original faithfully - only adding trills or minor stylistic changes in order to suit the strengths, sensibilities and skill level of the new artist. Cover artists must obtain a mechanical license for the work they are covering from the owner of the composition’s copyright. However, this right only gives them the ability to make and sell phonographs of the composition.

When the cover artist decides to upload a music video for their cover a variety of legal issues come into play.

A. Scope of Copyright Protection

Putting up a music video for a cover is an interesting situation. As a cover is a recreation of a composition, it does not use the sound recording itself.¹⁴ So the copyright of the sound recording is not violated by a cover. However, as the cover will, by its nature, recreate many - if not all - of the compositional elements of the song, the work would infringe upon the copyright of the musical composition - under 17 USC §106(1).

One solution commonly taken here is the statutory compulsory license granted by 17 USC §115 - known in the industry as a mechanical license.

“When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.”

This statute permits a cover artist to acquire a license to recreate the composition on paying a statutory royalty. It also permits the cover artist to modify the track as per their own style, within certain broad limits.¹⁵

However, the issue here is more complicated due to the addition of the video. As the composition is being synchronized with visuals, it constitutes synchronization. Indeed, 17 USC §115 explicitly limits the mechanical license to “a compulsory license to make and distribute phonorecords of the work”. The

¹⁴ 17 USC §114(b) narrows the rights granted by a copyright on a sound recording to works actually incorporating that recording. The question of similarity is rendered moot by this statute - the cover, by virtue of being a new recording - is now outside the bounds of that copyright.

¹⁵ 17 USC §106(a)(2) provides: the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

synchronization of the composition is neither licensed nor forfeited by the terms of §115. Thus the synchronization of the resultant cover to a video would still be a violation of the copyright holder's right to derivative works as per 17 USC §106 (2).

B. Fair Use Defense

The 'fair use' defense is usually a little shield to a cover. Of the four factors in 17 USC §107, a cover video would fail most of them. Most covers are used to drive sales of the phono records authorized by the mechanical royalty, making them primarily commercial in nature. As a musical composition is a highly creative work, the second factor weighs against the cover as well - especially since, unlike *Campbell* or *Suntrust* the cover is not a protected parody. The third factor works especially against the cover artist. As discussed above the covered performance generally encompasses the entire composition, and by definition is changed only at the periphery. The "heart of the work" as defined by *Harper & Row* would thus be copied, and so the work would fail the third prong both quantitatively and qualitatively. As for the fourth factor, a cover is the clearest example of a substitutive good discussed here. The video is used to drive traffic for a different version of the same song - making it a direct competitor to the original. Thus, by failing all four of the 17 USC §107 factors, a cover would likely be unable to garner 'fair use' protection. However, as the defense is nebulous in its application, there may be some future court decision that decides to extend 'fair use' to protect such covers.

C. De Minimis Use

When it comes to the sound recording rights, the *Bridgepoint* standard is dispositive here - as the original work was not used, there is no violation.

However, for the compositional copyright a *de minimis* use is unavailable here. The standard in *Fisher* requires the used portion be such that an average audience would not recognize the appropriation. The very purpose of a cover video is to render a complete song in and of itself - absent those stylistic changes described in 17 U.S.C. §106(a)(2). However, the very point of a cover is to evoke the original composition in the minds of the audience; a cover that failed

to do so could not legitimately be called a cover, it would be an original composition. Thus the *de minimis* usage defense would fail to meet the standards of *Fisher* for any cover. This defense would be unavailable for the cover artist.

VI. ENFORCEMENT: DIGITAL MILLENNIUM COPYRIGHT ACT

In the early days of YouTube, there was an endemic of such copyright violations. And despite what content creators claimed, this was not mere *de minimis* or ‘fair use’ as above. Moreover, the content creators would monetize their videos on YouTube, deriving profit from videos that used unlicensed audio.¹⁶ This violated the very spirit behind licensing contracts, and permitted users to profit off of others’ work. Moreover, the wide reach of the internet made each violation far reaching, and made it easy for infringing works to be mirrored, copied, and otherwise replicated. And for each new copy a fresh suit would have to be instituted, wherein the laborious process of proving a copyright violation occurred would be repeated, albeit with slightly changed circumstances each time. For each and every violation the copyright holder was forced to play a sick game of whack-a-mole – one they would lose every time.

In response, congress passed the Digital Millennium Copyright Act (DCMA)¹⁷ which harshened the penalties for online violation, while making it easier to prove a violation occurred, by equating the violation of a security protocol with a fully argued copyright violation.¹⁸ Yet this solution created a new problem. With the path for joined lawsuits cleared and the financial penalties raised substantially, companies like YouTube were facing down the barrel of a gun. While ultimately not able to monitor each and every action by their end users,

¹⁶ For a detailed explanation of how users receive revenue, see <https://support.google.com/youtube/answer/72902?hl=en>

¹⁷ H.R. 2281, Amending Title 17 of the USC.

¹⁸ 17 U.S.C. §1201

they would be liable under the new laws for masses of damages.¹⁹ This financially untenable situation spelled the end for video-based social media.

The solution came in the form of the Online Copyright Infringement Liability Limitation Act (OCILLA) – or DCMA 512. This provided a safety net for online service providers (OSPs) like YouTube, by providing a set of guidelines for OSP's to follow under 17 U.S.C. §512(c):

“...(c) Information Residing on Systems or Networks At Direction of Users. —

(1) In general. —A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A)

(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access

¹⁹ While liability attached to them under the previous regime, the difficulty in proving each case, as well as the limited damages made it a manageable cost-of-business. Under the DCMA, the equation changed, making them less able to whether the increased number of claims.

to, the material that is claimed to be infringing or to be the subject of infringing activity.”

As long as these criteria are met, the OSP is shielded from liability. Moreover, the act of removing offending material under §512(c) constituted a remedy for the copyright violation – negating the need for a lawsuit. Thus, the OCILLA didn’t just help keep OSPs viable as a business, but changed the way copyright disputes were resolved on the internet: a notice instead of a summons, and a takedown instead of damages.

VII. CONCLUSION

While there are some interesting arguments to be made here, the vast majority of defenses will fail the content creator. The copyright system is able to cover most of these scenarios to grant rights to the holder. It is possible to claim ‘fair use’ - although the factors of 17 U.S.C. §107 can only be applied to the song, and not any other subject matter being transformed, parodied, or argued as low-value speech. It is possible to argue *de minimis* use as a defense - but that defense will rarely work against composition copyright, and will never hold against the sound recording copyright. Consequences will, however, largely be limited to the removal or monetization of one’s videos by the copyright holder – as per the Digital Millennium Copyright Act’s safe harbor provision. Overall the best course of action for a content creator would be to back his videos with his own music, public domain tunes, or silence.

back. Now, almost all the organizations starting from companies to universities, local authority and charity follow governance to run their organizations with particular emphasis on its accountability, integrity and risk management. Broadly speaking, corporate governance is not about enhancing shareholder or stakeholder value. It is about enhancing economic growth, entrepreneurship, innovation and value creation. Corporate governance basically involves a set of relationships between a company’s management, its board, its shareholders and its stakeholders. Two reasons are responsible for highlighting the importance of corporate governance. First, the wave of financial crisis in 1998 in Russia, Asia,

and Brazil, seriously affected the economies and destabilized the global financial system. Secondly, the growing corporate scandals in United States and European countries due to bad corporate governance adopted by corporates.²⁰ Corporate governance has gained a lot of focus in India after the Satyam corporate fraud. Further, rapid pace of globalization and liberalization have forced companies in having effective corporate governance strategy and adopt improved standards of corporate governance to run their business. To cut down the cases of fraud, malpractice in companies and financial instability, both policy makers and business managers emphasized the importance of improved standards of corporate governance. At international level, OECD and World Bank continuously worked upon better corporate governance and adopted a set of principles to strengthen corporations.²¹ Similarly, in India several reforms have been initiated to improve the corporate governance standard by the Securities and Exchange Board of India and the Ministry of Corporate Affairs, Government of India. The introduction of Companies Act 2013 has brought out a new phase to the corporate sector: to make corporate law more effective, much reliance is placed on the disclosure.

²⁰ Organization for Economic Co-operation and Development (OECD), *Corporate Governance, Value Creation and Growth - The Bridge between Finance and Enterprise* (2012) available at

<http://www.oecd.org/corporate/ca/corporategovernanceprinciples/50242938.pdf> (last visited Jan. 12, 2016)

²¹ E.g. in 1998 OECD included: Fairness-protecting shareholder rights and ensuring contracts with resource providers are enforceable, Transparency-requiring timely disclosure of adequate information on corporate financial performance, Accountability-ensuring that management and shareholder interests are kept in alignment, Responsibility-ensuring corporate compliance with laws and regulations and society norms.

AN EVALUATION OF THE LAW ON DATABASE PROTECTION IN INDIA

*Dr. Gargi Chakrabarti**

ABSTRACT

In the new era of information technology, database is a powerful weapon to be utilized as a searchable unit in the internet to get various kind of useful information. Database is created digitally by different stakeholders and it usually contains sensitive personal, professional, and financial information which needs to be protected from misuse. Database protection is a global agenda of today, especially in digital form as it requires special attention in legal context. Copyright protection is available for databases, even similar provision is talked about in TRIPS; but seems not to be absolute for digital databases due to its very nature. The European Union has special provision for databases by virtue of EU Database Directive of 1996 (EC/96/9/EC). It provides two layers of protection for databases; copyright for original one and sui generis protection for the non-original. In India, the Copyright Act, 1957 and Information Technology Act, 2000 have provisions for database protection. This article tends to review first the reasons of database protection in India, which is created either by public sector or by private sector. Then this article will analyse the international provision regarding the same, lastly the analysis will be done for Indian provision towards database protection, keeping in mind that stricter provision must not undermine the usage of various databases. Author's suggestion will be to explore the points of vulnerability in the existing legal measures and to rectify them by amendments (instead of creating a new Act); which will maintain the privacy and will balance the interest of providers by effective protection and the interest of users by providing easy and user friendly environment in digital databases.

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I. INTRODUCTION

In the era of growth and development, data usage has reached a new dimension. With increasing foreign investment, data has been used more effectively than earlier days. Data collection involves substantial amount of investment; systematic collection and compilation of data called databases. Databases are important for financial business institutions, scientific research, educational and research purposes. Databases also include telephone directory, entertainment details like television programme schedule, sensitive personal data like biometric and demographic data,¹ DNA profile of criminals by police and intelligence department², gene sequences³ and so on. Thus varieties of information are included under the head of collection of data or 'database' and make it complex array of potential intellectual property. With the advancement of computer and information technology the dissemination, transformation and use of data become easier; at the same time access to data becomes easier, which makes it more vulnerable for misappropriation. The growing role of data and database in the internet age has brought the question of legal protection of database. It is also to be remembered that protection must not be provided at the cost of easy access to the information included in the database and privacy concern need to be taken care of in case of sensitive personal data.

¹ Under the Unique Identification Number (UID) Scheme [Aadhaar Scheme] of Indian Government, three types of biometric data are collected: facial photographs, finger prints and iris scans.

² The Government of India had informed the Supreme Court of India about its intention to create a database of DNA profiles; this information is provided in response to a Public Interest Litigation filed by a NGO Lokniti Foundation. DNA Profiling Bill is also pending before Parliament since 2007. *See Indian Government plans a DNA profiles database to find missing persons, privacy?* Jul. 18, 2014, <http://dnapolicyinitiative.org/indian-govt-plans-a-dna-profiles-database-to-find-missing-persons-privacy/> (last visited Feb. 13, 2018). In USA Federal DNA Database Unit (FDDU) is responsible for development of DNA Profile in USA, which is uploaded to the National DNA Index System, *See generally Federal DNA Database*, FBI.GOV, <https://www.fbi.gov/services/laboratory/biometric-analysis/federal-dna-database> (last visited Feb. 13, 2018).

³ Human Genome Project is developed for mapping all gene sequence of human being.

II. DIFFERENT ASPECTS OF DATABASE PROTECTION

Science, business, education, law, culture, financial activities and all areas of human development can progress with the continuous support of data. Databases play the crucial role in continuous supply of data for all developmental activities.

A. Definition of “Data” and “Database”

Under the Information Technology Act, 2000 (hereinafter ‘IT Act’), data is defined as “a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer”.⁴ This definition includes the data processed in a computer system or by the computer network along with traditional form of data, which will help meeting the modern day need of protection of computerized data.

The Black’s Law Dictionary defines a database as a “compilation of information arranged in a systematic way and offering a means of finding specific elements it contains, often today by electronic means.”⁵ A database is defined as “a collection of independent works, data or other materials which are arranged in a systematic or methodical way and are individually accessible by electronic or other means”.⁶

According to these definitions information arranged in a systematic way can be termed as a database but for the legal protection it has to be the collection of independent works. Here comes the ‘originality’ criterion for copyright protection of database. Thus, non-original databases are not protected under the

⁴ Sec. 2(o), IT Act, 2000, Act No. 21 of 2000

⁵ *Database definition*, BLACK’S LAW DICTIONARY (10th ed. 2014)

⁶ European Union (EU), Council Directive of May 14, 1991 on the legal protection of computer programs (91/250/EEC), art. 1(2), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=126879 [hereinafter ‘Council Directive 1991’] (last visited Feb. 20, 2018)

purview of copyright protection. This issue has been discussed in details subsequently.

B. Right to Data Protection: Right to Privacy

Making of database by public authorities containing personal information must be done taking the constitutional and international obligation of human rights into consideration. The Constitution of India does not explicitly provide for any Fundamental Right to privacy; nevertheless, through judicial activism, the right to privacy has come to the realm of Fundamental Rights. The right to data protection is directly related with the right to privacy. The Supreme Court deducted the right to privacy from the right to life and personal liberty depicted in Article 21 of Constitution⁷ by the process of interpretation of the phrase “*personal liberty*”. The Court held that “*personal liberty*” means life free from intrusions unjustifiable by law. Therefore, invasion into privacy can only happen through administrative, executive or judicial orders. The duty of the Court is to judge the reasonableness and proportionality of invasion and its purpose. In a judgement given by Supreme Court of India enumerated three themes, which are as follows:

- “(1) that the individual’s right to privacy exists and any unlawful invasion of privacy would make the ‘offender’ liable for the consequences in accordance with law;
- (2) that there is constitutional recognition given to the right of privacy which protects personal privacy against unlawful governmental invasion;
- (3) that the person’s “right to be let alone” is not an absolute right and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.”⁸

⁷ INDIA CONST., art. 21. Protection of Life and Personal Liberty. – No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁸ *District Registrar and Collector v Canara Bank*, (2005) 1 SCC 496

This clearly indicates that the Supreme Court has recognized the right to privacy. At the same time the Court has also mentioned that right to privacy is not an absolute right, and that it can be taken away for the prevention of crime, protection of health or moral, or protection of lawful rights and freedom of others. Legal regime for data protection or database protection has to be formulated taking into consideration the fundamental right to privacy, as sometimes database contains sensitive and vulnerable personal information.

The issue of ‘right to privacy’ as a fundamental right is being relooked recently in the context of complaints against the collection of biometric information of citizens of India by Unique Identification Authority of India (UIDAI) under Aadhaar scheme. The first complaint was filed in 2012 by retired Justice K. S. Puttaswamy and subsequently 12 more complaints were lodged between 2013 and 2015.

Senior counsel of the Supreme Court, Mr. Shyam Divan put forward many contention,⁹ such as, (i) whether Indian Constitution sanction the surveillance by State as is done through Aadhaar project; (ii) whether personal autonomy of any individual extends to the biometrics of them; (iii) in Aadhaar card scheme there was no ‘opt-out’ option for citizens and all basic facilities like bank accounts, mobile numbers, PAN card, income tax return, LPG subsidy, mid-day meal and so on, are linked with Aadhaar number by order of Government of India, so without Aadhaar number no one can live in the society; (iv) enrolment under the Aadhaar card scheme was done between Jan 28, 2009 – July 7, 2016, but Aadhaar Act came into force on 7th July 2016 which has ratified the project, so the issue was how the fundamental rights can be protected retrospectively; (v) no audit check was undertaken by UIDAI for the private collection agents who was given the responsibility of personal data collection; (vi) citizens of India have no idea about how the personal information is going to be used by the government; (vii) whether Aadhaar database is secured enough as the paper which was published by Reserve bank of India’s Institute for Development and Research in Banking Technology, in which it is mentioned that the Aadhaar

⁹ *S. G. Vombatkere & Anr. V Union of India*, W.P. (Civil) No. 829 of 2013, (S.C.)

Central Database or Central ID Repository (CIDR) can be target for internal or foreign attack.¹⁰

The concerns are genuine and it can be argued that for having the passport everyone need to provide the personal information as well as biometrics to the authority, that is also deposited in the central database. Even during immigration for entry into any foreign country everyone needs to give the biometrics to the authority of the foreign country. In both the cases it is mandatory and provided with the personal information as well as biometrics in good faith. However, the fact is that no one knows how those personal information and biometrics data can be used later on by the respective authority. So, this is a general practice and it is believed that the authorities are aware about their legal responsibilities and limitations. Another notion is, it is the duty of the respective authorities to secure the database from any internal or external threat, and same is applicable for the CIDR. While discussing the other issues, it was mentioned by Chief Justice Deepak Mishra that, informational privacy issue has become very complex in the age of information and digitalisation as the data output from any source can be used as the data input for other purposes and more data output can happen and even that data output can be used again as data input elsewhere and so on. It is also difficult to detect such invasion as these are almost invisible in nature. The implications of such evolving technologies are posing huge threat not only to human existence but also to the Court's responsibilities. Judges can

¹⁰ See Apoorva Mandhani, *Aadhaar is a Switch which can Cause Civil Death of An Individual: Senior Advocate Shyam Divan Submits Before 5-Judge Constitution Bench*, LIVE LAW.IN, Jan. 17, 2018, <http://www.livelaw.in/aadhaar-switch-can-cause-civil-death-individual-senior-advocate-shyam-divan-submits-5-judge-constitution-bench-read-opening-statement/> (last visited Feb. 18, 2018); see also Mehal Jain, *Aadhaar Hearing: Day-1 (Summary) 'Eminent Domain Does Not Extend To Human Body', Argues Shyam Divan*, LIVE LAW.IN, Jan. 17, 2018, <http://www.livelaw.in/aadhaar-hearing-day-1-summary-eminant-domain-not-extend-human-body-argues-shyam-divan/> (last visited Feb. 18, 2018); see also Sruthi Radhakrishnan & K. Rajagopal, *Constitutional validity of Aadhaar: The Arguments in Supreme Court So Far*, THE HINDU, Feb. 14, 2018, <https://www.thehindu.com/news/national/constitutional-validity-of-aadhaar-the-arguments-in-supreme-court-so-far/article22752084.ece> (last visited Feb. 18, 2018)

perceive the seriousness of the situation yet cannot able to think of all possible uses of the data and the consequences of such uses.¹¹

The issue of “right to privacy” as a fundamental right is discussed at length in the case of *Justice K. S. Puttaswamy (Retd) & Others v. Union of India*,¹² in which the 9 Judge bench of Supreme Court affirmed the constitutional right to privacy. In the judgement it is declared that “right to privacy” is an integral part of Part III of Constitution of India to be read with “right to equality”,¹³ “right to freedom of speech and expression”,¹⁴ “right to freedom of movement”,¹⁵ and “right to protection of life and personal liberty”.¹⁶ Though the “right to privacy” is accepted as a natural right and an element of human dignity; but at the same time the Supreme Court’s 9 judge bench clarified that like other rights, the right to privacy is not an absolute right, it is subject to certain tests and criteria; and also personal “right to privacy” can be limited by security and other interests of the State.¹⁷ This judgement call for the following tests, (i) the test of ‘reasonableness’, (ii) test for invasion into privacy under Art 19 which will fall under the specified restrictions like public order, morale, obscenity etc.; (iii) test for invasion into personal liberty under Art 21 which needs to be fair and reasonable; (iv) test of arbitrariness in cases where violation of Article 21 and Article 14 both is assumed; and (v) “highest standard of scrutiny” needed to be ensured in cases of compelling State interest.¹⁸

¹¹ See Mehal Jain, *Violation of Fundamental Rights cannot be validated retrospectively: Shyam Divan*, LIVELAW.IN, Jan. 18, 2018, <http://www.livelaw.in/aadhaar-day-2-session-2-violation-fundamental-rights-cannot-validated-retrospectively-shyam-divan/> (last visited Feb. 18, 2018)

¹² *K. S. Puttaswamy & Otrs. v. Union of India*, W.P. (Civil) No. 494 of 2012 (S.C.)

¹³ INDIA CONST., arts. 14 – 18

¹⁴ INDIA CONST., art. 19. Protection of certain rights regarding freedom of speech etc. – (1) All citizens shall have the right (a) to freedom of speech and expression; . . .

¹⁵ INDIA CONST., art. 19. Protection of certain rights regarding freedom of speech etc. – (1) All citizens shall have the right . . . (d) to move freely throughout the territory of India; . . .

¹⁶ INDIA CONST., art. 21

¹⁷ *V. Bhandari et al., An Analysis of Puttaswamy: The Supreme Court's Privacy Verdict.*

¹¹ INDRASTRA GLOBAL 1-5 (2017), available at <http://nbn-resolving.de/urn:nbn:de:0168-ssaoar-54766-2> (last visited Feb. 20, 2018)

¹⁸ *Id.*

Breach of “right to privacy” and “right to data protection” issues have been discussed in Cambridge Analytica data breach case in which Facebook India had confessed that the data of approximately 5,62,000 Indian Facebook users were misused for over two years by Cambridge Analytica and Global Science Research (GSR), which are technological giants doing data analysis by using special software to predict the behaviour of the mass of a certain geographical area; these predictions are useful for political parties specially during election and may be in some other occasions.¹⁹ The data breach by the company Cambridge Analytica was done by using about 50 million Facebook profile across the world. According to the version of some whistleblower from the company, the firm was linked with the-then advisor of US President Trump, Mr. Steve Bannon to exploit Facebook profile and personal data of about 50 million Facebook users in early 2014 to build a model for profiling the US voters and to comprehend the personalised political views. Based on such data analysis, the advertisements and campaign policies were made by the Donald Trump’s election team during the Presidential election.²⁰ This is an example of serious breach of “right to privacy”, which is now accepted as a fundamental right by Supreme Court of India, and also the breach of “right to data protection”. Currently, the UK based company Cambridge Analytica is under investigation in USA.²¹ Facebook is facing huge financial damages of about £ 500,000 due to

¹⁹ Rahul Srivastava, *Cambridge Analytica data breach hit 5.62 lakh Indians: Facebook tells govt.*, BUSINESS TODAY, Apr. 8, 2018, available at <https://www.businesstoday.in/current/economy-politics/cambridge-analytica-data-breach-562-lakh-indian-users-facebook/story/274258.html> (last visited Feb. 20, 2018)

²⁰ C. Cadwalladr & E. Graham-Harrison, *Revealed: 50 million facebook profiles harvested for Cambridge Analytica in major data breach*, THE GUARDIAN, Mar. 17, 2018, available online at <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> (last visited Mar. 20, 2018)

²¹ M. Rosenber M. & N. Confessore, *Justice Department and F.B.I. are Investigating Cambridge Analytica*, N.Y. TIMES, May 15, 2018, available at <https://www.nytimes.com/2018/05/15/us/cambridge-analytica-federal-investigation.html> (last visited May 20, 2018). See also J. Kirby, *The feds are reportedly investigating Cambridge Analytica*, VOX.COM, May 15, 2018, <https://www.vox.com/2018/5/15/17358820/cambridge-analytica-facebook-fbi-investigation-facebook> (last visited May 20, 2018)

its failure to protect the personal data of its users by UK Information Commissioner's Office and the need to strengthen its privacy policy.²²

The European Convention on Human Rights (ECHR),²³ 1950, has considered right to protection of personal data from the human rights perspective. Article 8 of ECHR states:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence; (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

It is interesting to note that a similar approach is found here when compared to the interpretation of Article 21 of Indian Constitution by Supreme Court of India, as ECHR also clarifies about the exception of the right to privacy in certain specified cases mentioned hereinabove.

In 1981 Council of Europe adopted the Convention for the protection of individuals with regard to the automatic processing of personal data (Convention 108).²⁴ This Convention is adopted to regulate all data processing carried out by both private and public sectors. It is a legally binding mechanism made to protect the rights of individual in relation to data collection and processing;²⁵ to

²² London AP, *Facebook Faces U.K. Fine Over Data Privacy Scandal*, New York CBS, Jul. 11, 2018, available at <https://newyork.cbslocal.com/2018/07/11/facebook-faces-uk-fine-over-data-privacy-scandal/> (last visited Feb. 20, 2018)

²³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, Nov. 4, 1980, ETS No. 5, available at <http://www.refworld.org/docid/3ae6b3b04.html> (last visited Feb. 20, 2018)

²⁴ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, available at <http://conventions.coe.int/Treaty/en/Treaties/html/108.htm> [hereinafter ‘Convention 108’] (last visited Feb. 20, 2018)

²⁵ See *id.*, arts. 4, 5 & 6.

secure personal data stored in automated files against unauthorised access, modification and dissemination;²⁶ and to control trans-border flow.²⁷ Convention 108 thus enshrines the right to privacy (like ECHR) by regulating data processing throughout the European Community.

C. Copyright Protection of Database

Traditionally databases are protected under copyright protection. Berne Convention for the Protection of Literary and Artistic Works, 1886²⁸ is the earliest international instrument for copyright protection. It has provision of copyright protection for collections and compilation of data subject to condition that selection and arrangement of information constitute intellectual creation.²⁹ Later on, World Intellectual Property Organization Copyright Treaty³⁰ clarifies the copyright provisions further. The WCT is a special agreement under the Berne Convention which deals with the protection of works and the rights of their authors in the digital environment. In addition to the rights recognized by the Berne Convention, they are granted certain economic rights. The Treaty also deals with two subject matters to be protected by copyright: (i) computer programs, whatever the mode or form of their expression; and (ii) compilations of data or other material ('databases').³¹ Subsequently, Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter 'TRIPS

²⁶ See *id.*, art. 7.

²⁷ See *id.*, art. 12.

²⁸ Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693 (last visited Feb. 20, 2018) [hereinafter 'Berne Convention']

²⁹ Berne Convention, art. 2. Protected Works: . . . (5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without Prejudice to the copyright in each of the works forming part of such collections.

³⁰ International Bureau of WIPO, World Intellectual Property Organization Copyright Treaty, Mar. 6, 1992, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157 (last visited Feb. 20, 2018) [hereinafter 'WIPO Copyright Treaty (WCT)']

³¹ *Id.*

Agreement')³² standardized the provisions of all sorts of intellectual property rights. Article 5 of WCT³³ and Article 10 (2) of TRIPS Agreement³⁴ provides similar provisions for protection of compilation of data that too subject to same condition, i.e. selection and arrangement of information must constitute intellectual creation. Both these provisions specifically mention that copyright does not subsist to the information itself and it would not prejudice the copyright subsisting in the data or material contained in the compilation.³⁵

Thus, regarding copyright protection of databases, certain aspects may be noted, such as (i) copyright law protects databases as collection of data or compilation of literary or artistic works only when the compilation is the result of intellectual effort of the author and it meets the required originality criteria; (ii) intellectual efforts are required for organization of the data in such a way that it would facilitate access and analysis of data; (iii) law regarding copyright protection varies from country to country and in some countries many databases do not satisfy the originality criteria of copyright law.

With time different approaches came for consideration of “originality” in a database; such as “sweat of the brow” consideration, which is applied for the factual compilations such as library catalogue or directories; or ‘modicum of creativity’ consideration in which minimum level of creativity is required to get

³² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter ‘TRIPS Agreement’]

³³ WCT, art. 5. Compilations of Data (Databases): Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

³⁴ TRIPS Agreement, art. 10. Computer Programs and Compilations of Data: . . . (2) Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

³⁵ Brown Mary *et al*, *Database protection in a digital world*, 6(1) RICH. J. L. & TECH. 2-10 (1999)

the copyright protection.³⁶ According to the “sweat of the brow” theory, any database can be regarded as original if its creation involves investment of time, money, skill or labour.³⁷ The Supreme Court of the United States clarified the “originality” requirement in *Feist Publications Inc. v Rural Telephone Services Co.*³⁸ case, in which the Court refused copyright protection for white pages of a directory as it does not satisfy the minimum creativity criteria. Such databases are termed as non-original or non-creative database. There is diversity in approach to judge the “originality” in European countries before 1996. The United Kingdom (UK) had given importance on sweat of the brow doctrine;³⁹ but in Germany, database required creativity for copyright protection.⁴⁰ In 1996, European Database Directive⁴¹ was adopted and the minimum creativity rule is considered uniformly for copyright protection of databases in all European countries. In India “sweat of the brow” criteria is considered as per the decision of the Delhi High Court in *Burlington Home Shopping v Rajnish Chibber*⁴² case. In this case, the Court permitted copyright protection on database based on the fact that author invested time, money, labour and skill though there was no creativity in the arrangement of data. In some cases like *Eastern Book Company v Navin J Desai*,⁴³ even the “minimum creativity” criteria also had been given importance in India to judge the originality of the database. However, the sweat of the brow doctrine has some inherent problems with regard to its applicability towards the “originality” test for databases.⁴⁴ It fails to distinguish between

³⁶ Tabrez Ahmed & Sourav Dan, *Comparative analysis of copyright protection of databases: The path to follow*, 17 J. INTELL. PROP. RTS. 111-21 (2012)

³⁷ See generally Jane Ginsburg, *No ‘sweat’? Copyright and other protection of works of information after Feist v Rural Telephone*, 92(2) COLUM. L. REV. 343 – 88 (1992)

³⁸ 499 US 340 (1991).

³⁹ *BBC v Wireless League Gazette Publishing Co.* [1926] Ch. 433, *Independent Television Publications v Time Out* [1984] FSR 64.

⁴⁰ FROMM NORDEMANN ET AL, *Urheberrecht (Copyright Law)*, Commentary to Section 2 & 4 of Copyright Act, 8th ed. 1994.

⁴¹ EU, Directive 96/9/EC of the European Parliament and of the Council of Mar. 11 1996 on the legal protection of databases, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=126789 [hereinafter ‘EU Database Directive 1996’] (last visited Feb. 20, 2018)

⁴² (1995) PTC 278 (Del).

⁴³ AIR 2001 Del 185.

⁴⁴ See generally, Ginsburg, *supra* note 37

creative and non-creative databases. Thus it may extend the protection to the facts and hence may violate the basic principle of copyright protection for databases that no copyright protection is available for the data or information in a database (as depicted in all international guidance). Moreover, if hard work or labour and minimum creativity is compared as the criteria for copyright protection, the minimum creativity test comes more closer towards the criteria for an intellectual property right because intellectual input is absent in case of hard work. There has to be some intellectual input to get intellectual property protection and intellectual input is examined in minimum creativity test. This is justified when intellectual property protection context is considered for databases, but non-original or non-creative databases also need some kind of protection.

III. LEGAL PROTECTION IN DIFFERENT COUNTRIES

As stated earlier there is diversity in approach regarding protection of databases in different countries. To elucidate further, examples from few countries/regions are mentioned hereinafter.

A. European Union (EU)

EU Database Directive 1996 protects the “*collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.*”⁴⁵ The Directive tried to harmonise the creativity/originality threshold required for copyright protection of database. It makes special mention of data “accessible by electronic or other means” in securing all digital databases under copyright protection subject to the originality criteria. It also has the provision for a *sui generis* protection of non-original or non-creative databases. It protects the database from unauthorised extraction of whole or part of the database, but can’t prevent unauthorised copying.⁴⁶ This provision is a clear departure from the copyright model. EU

⁴⁵ EU Database Directive 1996, arts. 1 & 2

⁴⁶ Article 10(2) of EU Database Directive; see Corbett. S., *Harnessing data: the intellectual property in a racing database*, 3(9) N.Z. INTELL. PROP. J., 194 – 202 (2003).

Directive also mandates the protection to be provided in all Member States, and it is mentioned that the protection has to be provided to all the databases whose creation involves “substantial investment”. The intention may be to extend the protection for important non-original databases but this creates a confusion regarding which can be construed as “substantial investment” and whether it would protect databases where investment is directly attributable to the production of database.⁴⁷ From the case laws of European Courts, it can be concluded that the protection of database is made open-ended to extend the protection for a wide variety of databases related with different products and services.⁴⁸

It may further be mentioned that the UK law kept very low threshold of originality for copyright protection of databases, they used to consider whether some degree of “labour, skill and judgement” is applied for the collection and compilation of data.⁴⁹

B. United States (US)

In the US “sweat of the brow” doctrine was applicable as a test for copyrightability of any database, but in *Feist Publications, Inc.* case, the Supreme Court rejected that doctrine and demonstrated the importance of minimum creativity test for database protection. This test mandates the requirement of addition of substantial value to the data and its arrangement which makes the access and use of information easier. The US Court also considered the extension of protection to the format imposed upon the collected data.⁵⁰

⁴⁷ See Bernt Hugenholtz, *Abuse of Database Right. Sole-source information banks under the EU Database Directive* 5 (2004), available at <https://www.ivir.nl/publicaties/download/abuseofdatabaseright.pdf> (last visited Feb. 20, 2018), See also Wei Wei Jeang & Robin Brooks, *Exploring emerging issues: New intellectual property, information technology and security in borderless commerce*, 8 TEX. L. REV. 615-34 (2002).

⁴⁸ See generally *id* at 6 – 8.

⁴⁹ *University of London Press v University Tutorial Press* (1916) 2 Chancery Div. 601.

⁵⁰ Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1905-1907 (1990).

C. Australia

Australia considered database for copyright protection only if it is “original”, *i.e.* if it is created by some individual independently and if skill and effort is used for collection and arrangement. This was the situation until 2002, but after *Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd*.⁵¹ Case, the Australian legal approach has turned similar to that of the European countries (*sui generis* type of protection provided by EU). In this case, the Federal Court of Australia acknowledged investment as a criterion to test the originality, and also considered the “labour and expenses” incurred for production of a database.⁵² This set of criteria can be termed as more appropriate threshold when commercial databases are seeking protection. Later in 2009, the Australian High Court expressed doubt for considering the “labour and expense” criterion in examining the copyrightability of a database in its decision in *Ice TV v Nine Network*⁵³ case.

D. India

In India, the IT Act has certain protection provisions. It is interesting to examine whether those provisions are enough for proper protection of data. The scope of IT Act pertains to ‘e-commerce’ and ‘e-governance’; hence the data protection provisions also pertinent for ecommerce and e-governance sectors. Yet the definition of “data” is more relevant from cyber-regulation and cybercrime point of view. Chapter IX and Chapter XI of the Act have the required provisions which prevent unauthorized access and modification of computer-stored data or computer-database. Modifications which are prevented include alteration, deletion, addition, destruction, duplication or transmission of data. Section 43 provides penalty for several such activities namely, unauthorized access, or trespassing secure access, or downloading, copying or extracting of data from computer database, or introduction of viruses or other contaminant into computer system or network which may harm the database, or any potential or

⁵¹ (2002) 192 ALR 433

⁵² See S. Corbett, *Harnessing Data: the intellectual property in a racing database*, 9(3) N. Z. INTELL. J. 194 – 202 (2003)

⁵³ (2009) HCA 14 (188).

actual damages to the computer system or computer network which may cause subsequent damage to the database, etc.; this list of offences has been prepared keeping the ever-changing nature of cybercrime and hence tried to include the newer types of threats which may evolve with the change in technology.⁵⁴ It has also attempted to cover different relevant functional components which is or may be associated with the handling of data, such as database theft, database damage by cookies, viruses, spyware; and forbidden activities like downloading, digital copying, digital extraction, digital transmission etc. Penalty provided in this section amounts to imprisonment up to three years and/or fine up to two lakh rupees. Section 66 has some special provisions regarding hacking. Hacking is usually done with the intent of unauthorized access and use of sensitive personal or economically important or otherwise important data, hence it is relevant for data protection as well. It is to be noted that by virtue Section 66 of IT Act, hacking is considered as a criminal activity and person committing hacking is liable for punishment with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both. Section 72 of the IT Act is dedicated to the breach of privacy and confidentiality and provided the penalty thereof. According to this section, any unauthorized access or disclosure of any data stored securely in any electronic medium without consent of the of the person concerned is an offence and punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both. This section hence tries to secure the public storage of personal and sensitive data in electronic form such as bio-information documented in UID in India or the DNA sampling database kept by police or other intelligence authorities.

It was debated that all these provisions of IT Act put together is not sufficient for protection of data or database (with special reference to digital databases as those are more prevalent nowadays with the modernization of information technology), hence on Expert Committee on Information Technology Act was set up on January, 2005 by the Department of Information Technology, the

⁵⁴ Harsh Maggon, *Legal protection of databases: An Indian perspective*, 11 J. INTELL. PROP. RTS. 140 – 44 (2006)

Ministry of Communications and Information Technology, Government of India.⁵⁵ The Expert Committee in their Report suggested for considering a suitable legislation for data protection (data privacy) under the IT Act, 2000. Consequently, the following amendments are made by IT (Amendment Act), 2008:⁵⁶

- A new section 43A was incorporated for handling of sensitive personal data or information to provide reasonable security practices and procedures. It imposes duty on the relevant authority or body corporate owning or handling the sensitive data and pushes them to maintain highest level of security provisions to avert the breach of security and unauthorized access. In case of any unauthorized access and use, the owner will be held liable to pay damages as compensation to the aggrieved party for not maintaining proper security measures.⁵⁷ This is in conformity with international and statutory provisions of the right to personal data.
- Substitution of Section 66 & 67 is done to provide gradation of severity of criminal activity which will further help in deciding the degree of punishment.⁵⁸
- Amendment of section 72 is done by inclusion of a new section 72A, which covers the intentional unlawful disclosure of the data by the personnel having secured access which will be held for criminal liability and will be punishable. According to the new sub-section, the intermediaries (like internet service providers) will be held liable for the violation of data privacy and security breach; for which they also have to pay monetary compensation to the victimized subscriber.⁵⁹

D. Comparative Analysis

Before initiating a comparative analysis of different approaches, few basic issues related to data protection need to be considered. That

⁵⁵ Gov't of India, Notification No. 9(16)/2004 –EC dated Jan. 7, 2005.

⁵⁶ Act No. 10 of 2009 [hereinafter 'IT Act, 2008']

⁵⁷ IT Act, 2008, sec. 22

⁵⁸ IT Act, 2008, sec. 32

⁵⁹ IT Act, 2008, sec. 37

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- Databases are mostly digitalised in present day;
 - Digitalised databases are access and used in different innovative ways;
 - Database protection needs protection of data or information (especially sensitive personal data) as well as protection of the intellectual input in the way it has been compiled or arranged;
 - Database protection is associated with the right to data (constitutional right of privacy);
 - Whether database protection is proper according to the existing legislation or there is a need of new legislation.

Originality criteria for copyright protection of database is still debatable (as is discussed earlier), but more important question is to decide whether copyright protection of database can provide overall protection to all the components of database. Copyright protection of database can protect only the intellectual input in the arrangement, not the data, so the EU Copyright Directive and other legislation which provides copyright protection to database do not provide protection to the content of database or the information contained into it. From intellectual property point of view it is justified, but when the unauthorised access and use is concerned, the copyright protection does not seem to provide justified protection to the database. As already mentioned that nowadays most of the databases are digitalised and newer innovative ways are discovered to gain unauthorised access to those databases. In this given scenario the protection of database also has to aim to protect its content from the unauthorized access. Indian legal position of inclusion of the database protection in the IT Act is giving some protection to the important databases. But the innovative ways of unlawful handling of databases mandate the regular renovation and amendment of the legislation related to these provisions. The amendment of the legislation is done to handle the different processes of unauthorised access and use of database in more comprehensive way, now proper implementation of the amendments is required to prevent the misuse. It has to be understood that legal protection of data or information needs to be provided keeping the constitutional right of any person to their sensitive personal data in mind. There has to be some

balance of interest during the compilation and use of sensitive personal data so that interest of the person whose personal data has been compiled and interest of the authority that is compiling or using the data in the form of database for various reason can be maintained. It is also important to remember that protection also has to be formulated in such a way that it is not provided at the cost of easy access. Digital databases can be provided with digital security provisions by the practice of digital signatures, encryption or other relevant processes. Pertinent authorities have to take proper security measures and intermediaries need to be aware about their responsibilities. Even in case of any mishandling or irresponsibility on their part, they should be liable for damages and penalties.

IV. CONCLUSION AND SUGGESTION

Database is an important component of our day to day life in today's world. Computer system and the internet facility has transformed the picture of today, database compilation and use is revolutionised by the help of computer and internet. The growth of internet has increased the capacity to access huge amount of data. Property rights provided over the database will not create a monopoly over the information contained in the database. Legislature can use property rights to balance private and public rights. Original databases can be provided with copyright protection, but non-original databases require other kind of protection. It is not required that new legislation has to be enacted for protection of non-original databases; instead existing legislation can be used effectively to provide such protection. Provisions of information technology act or cybercrime prevention can be used for protection of database from unauthorised and unlawful access and use of information. In some cases contract law can also be used for protection of information as well as interests of different stakeholders. Logical and effective use of legal measures will provide an environment in which data can be used for commercial, economic, educational and research purpose, even data can be effectively used for national safety and security purpose. Hence in coming years, database protection

measures need proper formulation, so that effective use data can be done for betterment of future of mankind.

TECHNOLOGY TRANSFER UNDER TRIPS & UNFCCC REGIME: A POLICY ANALYSIS

Shashikant Yadav^{*}

ABSTRACT

Owing to the principle of common but differentiated responsibility, the developed economies are under constant pressure to not only lower down their carbon emission but also to aid developing nations to cut down their emission which makes climate technology transfer through ESTs a viable option to achieve the specific carbon emission targets. Climate change negotiations and international IPR regimes have failed to aid developing nations with sufficient technology transfer for climate change mitigation, as patent laws often act as barrier to facilitate such transfer. The Paris agreement fosters technology transfer with an immense budget of \$23 million. However, it is imperative to analyze that how international IPR regime interacts with technology transfer policies under UNFCCC. The reverberations of WTO agreement on TRIPS through relevant provisions on transfer of technologies will be addressed in this paper. Reasonable pricing along with the utmost need of such technology transfer is discussed. The paper also evaluates feasibility of improving technology transfer through adopting a comprehensive policy under climate change and IPR regimes. Lastly the paper attempts to recommend policy changes to bridge the gap between objectives of UNFCCC and patent laws.

I. INTRODUCTION

Human activities are continuing to affect the Earth's limited energy budget via changing the emissions and resulting atmospheric concentrations of radioactively important gases and aerosols and by changing land surface

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properties.¹ Previous assessments have already shown through multiple lines of evidence that the climate is changing across our planet, largely as a result of human activities.² The most compelling evidence of climate change derives from observations of the atmosphere, land, oceans, rivers, ponds, wildlife, fisheries and so on.³ It is not that the protection and management of natural resources is something which is new, it is subject of international law for many hundreds years.⁴ All that it has lacked is an effective compelling legal, social and political regime. Close interactions among national laws and policies do have, to some extent benefitted this environmental legal regime.

One of the most complex challenges faced by the mankind in last few decades is to frame out a model to mitigate climate change which also caters to the development goals of the emerging economies. Often we have seen that environmental concerns do become marginal in the broader scheme of international legal and institutional arrangements. Recent developments among the scholars do insist, integration of environmental concerns into economic and development activities, without overtaken by powerful and well established rules of international economic co-operation. Addressing this issue, the concept of ‘Common but Differentiated Responsibilities and Respective

¹ Emissions of carbon dioxide, methane, nitrous oxide and of reactive gases such as Sulphur Dioxide, Nitrogen Oxides, Carbon Monoxide and hydrocarbons, which lead to the formation of secondary pollutants including aerosol particles and tropospheric ozone, have increased substantially in response to human activities. As a result, biogeochemical cycles have been perturbed significantly. Non-linear interactions between the climate and biogeochemical systems could amplify (positive feedbacks) or attenuate (negative feedbacks) the disturbances produced by human activities *available at* <https://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-chapter7.pdf>.

² I. BROWNIE, *State Responsibility and International Pollution: A Practical Perspective*, in *INTERNATIONAL LAW AND POLLUTION* 122 (D.B. Margo ed. 1991).

³ IPCC, *Climate Change 2013: The Physical Science Basis Final Draft Underlying Scientific-Technical Assessment (Contribution of Working Group I, 2013)* *available at* https://www.ipcc.ch/pdf/special-reports/srex/SREX_Full_Report.pdf.

⁴ Peter H. Sand, *The evolution of International Environmental Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 30 (Daniel Bodansky, Jutta Brunnée, and Ellen Hey eds., 2008).

Capabilities (CBDRRC)⁵ is framed by the international community to address climate change. The special needs of developing countries coupled with the capacities of all countries under the principle of ‘common but differentiated’ are framed by the international community to address climate change⁶. Responsibilities were formed, keeping in mind a need for effective institutional mechanisms to provide financial, technological and other technical assistance, in order to help them in fulfilling obligations of various environmental treaties.⁷ However, the underlying agenda of CBDRRC⁸ is neglected in recent international negotiations due to the infamous ‘blame shift’ politics between developed and developing nations. CBDRRC facilitate developed nations to help developing nations in reducing carbon emission and the same reduction is credited to the account of developed nation, which helps them to comply with their emission standards and fulfil international obligations.

Recent United Nations Framework Convention on Climate Change (UNFCCC) Conference of Parties, namely Marrakech (2016) and Paris (2015), had wide discussion on climate change technology transfer from developed to developing nations, as technology transfer is considered as the most viable option to combat climate change through mutual co-operation. Developed economies spend their considerable amount of Gross Domestic Product (GDP) in to Research and

⁵ A worth noting here is that the phrase ‘and respective capabilities’ is included in the UNFCCC art 3, reading Rio Principle 7, albeit a soft law, articulation of the principle of common but differentiated responsibility, negotiated in parallel with the UNFCCC do not convey similar meaning. However, irrespective of the inconsistencies in the articulation of this term in submissions from Parties, the text of UNFCCC Article 3 along with Berlin Mandate, the Delhi Ministerial declaration on Climate Change and Sustainable Development and Copenhagen Accord (which is non-binding), use the phrase ‘principle of common but differentiated responsibilities and respective capabilities’. See United Nations Framework Convention on Climate Change *available at* <http://unfccc.int/resource/docs/convkp/conveng.pdf>

⁶ See S. BINIAZ, S. Biniaz, *Common But Differentiated Responsibilities*, 96 AM. SOC. INT’L L. PROCEED. 358-368 (2002). See Lavanya Rajamani, *The Nature, Promise and Limits of Differential Treatment in the Climate Change Regime* 16 Y.B. INT’L ENV’T L. 605 (2007)

⁷ See PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 289 (2003).

⁸ See Christopher D. Stone, *Common but differentiated responsibilities in international law*, 98 AM. J. INT’L L. 276-301 (2004)

Development (R&D), therefore majority of emerging technologies is owned by either government of developed nations or Private companies having only capitalistic goals. Developing economies neglect the long term benefit of spending in R&D and hence are depended on industrialized nations for their technological needs. With the emerging strong regime of Intellectual Property Rights (IPR), the innovations are becoming more expensive and hence it is more difficult for developing economies to access and understand the latest technologies. From Bali Action Plan to Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, the concept of ‘technology transfer’ is discussed and negotiated widely at various international platforms. Due to substantive barriers the ‘transfer of technology’ under TRIPS is not effectively disseminated to developing nations, among the barriers that are normally listed are poor infrastructure, inadequate laws and regulations, lack of absorptive capacity, shortage of skilled workers, lack of finance, ignorance of technological issues and intellectual property barriers.

II. UNDERSTANDING COMMON BUT DIFFERENTIATED RESPONSIBILITY AND RELATED CAPACITIES: DEVELOPED VS DEVELOPING ECONOMIES

There are host of contentions lie among various developing nations regarding seemingly authoritative yet confusing and intuitively attractive CBDRRC principle. The obligations so imposed appear to be subject of differing interpretations.⁹ The concept of CBDRRC when read with the Article 3, gives nothing but inconclusive abstract concept.¹⁰ The principle does talk about common responsibility of all the nations signifying the global interest. All States

⁹ Lavanya Rajamani, *The reach and limits of the principle of common but differentiated responsibilities and respective capabilities in the climate change regime*, in HANDBOOK OF CLIMATE CHANGE AND INDIA: DEVELOPMENT, POLITICS AND GOVERNANCE (Navroz K. Dubash ed., 2013).

¹⁰ The debate surrounding the negotiation of UNFCCC Article 3 and the US efforts to circumscribe its legal effect is illustrative of how restrictive is this principle. The US sponsored alterations to the text of UNFCCC Article 3 during its negotiation and the notion of CBDRRC within UNFCCC cannot be termed as open ended or elaborate principle. It is couched in discretionary and guiding rather than prescriptive language, applying only to the parties in relation to the UNFCCC.

do have a legal interest in the protection of not just obligations owned to a particular State but to the International community as a whole, an obligation *erga omnes*.¹¹ With 'common responsibility' comes 'common concern', meaning whereby the other States on finding that a particular State has not carefully fulfilled certain obligations that it entered upon freely without any force; shall make the defaulting State answerable to the world at large.¹² Principle 7 of Rio Declaration notes the different contributions of countries, to the global environmental degradation. The words used are "In view of different contributions to global environmental degradation, States have common but differentiated responsibilities..." clearly stating the application of equity in general international law with specific recognition to the needs of developing countries.¹³ Here it is worth to mention that a country adopting practices which do have its impact on the environment does so not on the regional but at the global level because the impact of such activities will be felt globally.

It may be noted that differential treatment as justified and permitted under CBDTRC makes the entire process a bit impractical to implement. The UNFCCC and its Kyoto Protocol require developed and developing nations to reduce greenhouse gas (GHG) emissions.¹⁴ These GHG's do have their

¹¹ Article 48 of UNHRC on state responsibility recognizes that states, by virtue of their participation in a multilateral regime or as a consequence of their membership in the international community, have a legal interest in the performance of certain multilateral obligations. It recognizes the right of states to protect and enforce obligations entered upon.

¹² Where a state does not reach a particular standard of behaviour, 'common concern' treaties recognise the right of other states to at least remind the state of its obligations. This is in effect a 'Diplomatic form of a solidarity measure'.

¹³ B. Larschan & B.C. Brennan, *Common Heritage of mankind principle in International law*, 21 COLUM. J. TRANSNAT'L L. 305 (1983). D. French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, 49 INT'L & COMP. L. Q. 35 (2000). D. Magraw, *Legal Treatment of developing Countries: Differentiated Contextual and Absolute Norms*, 1 COLO. J. INT'L ENV'T'L L. & POL'Y 69 (1990).

¹⁴ The Kyoto Protocol puts in place an elaborate institutional architecture to oversee this division of responsibilities including a compliance system which references the CBDTRC principle, and applies differently to developing as well as developed countries. It is an effective/sound argument to hold responsible the current generation of industrialized nations benefitting from the fruits of Industrialization to bear the consequences. See UNFCCC, Procedures and mechanisms relating to

importance but due to the increase in human activities, the requisite amount of GHGs has grown causing global warming.¹⁵ The CBDRRRC principle on the basis of respective capabilities of the parties allows the differentiation between States in undertaking various measures, actions, commitments, compliances, obligations etc.¹⁶ The respective capability of those to whom (obviously to the world); if it based on the contribution to environmental harm then why not compensate the countries or the continents who are having adverse effect on their territories.¹⁷ In the climate change regime particularly in the interest of developing and third world countries aspiring for the future development, CBDRRRC does have an overreaching effect.¹⁸ It is found in the operational paragraphs of UNFCCC and further reiterated in the preamble of Kyoto Protocol.

III. CLIMATE CHANGE AND ENVIRONMENTALLY SUSTAINABLE TECHNOLOGY (EST) - POLICY NEXUS

Sustainable use in line with Johannesburg declaration calls for integration of social, technological, environmental, economic, and political with global

compliance under the Kyoto Protocol available at http://www.ciesin.columbia.edu/repository/entri/docs/cop/Kyoto_COP001_027.pdf.

¹⁵ GHGs are gases which control energy flows in the Earth's atmosphere by absorbing infrared radiation and which reduce the loss of heat into space. They are essential to maintaining the temperature of the Earth. GHGs have both natural and anthropogenic sources.....Global GHG emissions due to human activities have grown since pre-industrial times. See PAUL Q. WATCHMAN, CLIMATE CHANGE: A GUIDE TO CARBON LAW AND PRACTICE (2008). Also see Savante Arrhenius, *On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground*, 41 PHIL. MAG. & J. SCI. 237-276 (1896).

¹⁶ Differentiation was further clarified by various parties, amid various interpretations to CBDRRRC principle, to the Ad-Hoc working group on the long term cooperative action, available at http://unfccc.int/meetings/ad_hoc_working_groups/lca/items4578.php

¹⁷ Excessive use due to industrialization has worsened environmental conditions, reducing ecological space for others. Small Island states and African dry regions who are likely to lose their territories to climate change without even doing any harm to the same. See M. Grubb, *Seeking fair weather: Ethics and the international debate on the climate*, 71 INT'L AFF. 463-496 (1995)

¹⁸ However, US rejection of the Kyoto Protocol in 2001, as to the interpretation and application of CBDRRRC principle has added to the confusion as to its actual implementation, especially as to the liabilities of developed nations. See Sean D. Murphy, *Contemporary Practice of United States*, 95(3) AM. J. INT'L L. 647-650 (2001).

objectives. Global economic development can be achieved only through removal of poverty; provided such economic development uses sustainable means to achieve the same.¹⁹ Climate change has a wider and more severe impact on vulnerable and poverty ridden people. People who utilize marginal resources are affected the most due to climate change. Majority of vulnerable and poor population reside in emerging economies, having low pool of intellectual property. These emerging economies rely on transfer of Environmentally Sound Technology (ESTs) from developed nations.

Intellectual Property legal regime substantially acts both as an incentive and barrier to the transfer of technology, specifically ESTs.²⁰ The IPRs have emerged as a private right with the basic intent to promote innovation and disseminate knowledge.²¹ However a balance is required between accessibility

¹⁹ For the difference between economic development and economic growth, see E.J. MALECKI, *TECHNOLOGY AND ECONOMIC DEVELOPMENT* 23 (1991). For barrier on technology transfer, see generally Matthew Littleton, *The TRIPS Agreement and Transfer of Climate Change-Related Technologies to Developing Countries* (DESA Working Paper No. 71, 2008), available at www.un.org/esa/desa/papers/2008/wp71_2008.pdf.

²⁰ Sustainable development requires closer ties between social, economic, technological and environmental objectives. The Johannesburg Declaration 2002 reaffirmed: “a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development, economic development, social development and environmental protection- at the local, national, regional and global levels”. See M. Munashinghe et al., *Growth and Sustainability: An Overview*, in *THE SUSTAINABILITY OF LONG-TERM GROWTH: SOCIOECONOMIC AND ECOLOGICAL PERSPECTIVES* 2 (M. Munasinghe, O. Sunkel and C. de Miguel eds., 2001). As to the understandable definition of ESTs, it can be said that it is such use of technology which protects the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their wastes and products, and handle residual wastes in a more acceptable manner than the technologies for which they are or acts as a substitutes. See UN Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, Agenda 21 Programme of Action for Sustainable Development, ch. 34.1, U.N. Doc. A/CONF.151/26 (1992) [hereinafter ‘Agenda 21’]

²¹ Technology transfer to developing countries is crucial to their economic growth and competitiveness in world markets. There are also environmental benefits to technology transfer. Climate-change-related technologies assist countries, firms, and individuals in mitigating greenhouse gas emissions and coping with the adverse consequences of climate change. Their transfer to developing countries is a crucial element of efforts to meet the challenges posed by climate change. However, despite numerous commitments by the international community over the past generation,

of technology and level of protection to make sure that the underlying objective of IP rights are kept intact. However, from the discussion of Bali Action Plan, it would seem that UNFCCC parties disagree on whether such a balance exist under IP rights legal regime and technological aspects of climate change mitigation. International trade and laws related with it generally promote free trade and accordingly does enough to eliminate protectionism.²² The TRIPS agreement is only comprehensive international agreement which deals with the issue and addresses the concerns related to transfer of ESTs with respect to developing and developed nations' relationship. Climate change is a global phenomenon and its impacts are felt irrespective of the nation's boundaries. One of the most practical solutions to mitigate the climate change effect is to have EST's and its access to developing nation.²³ While acknowledging the Rio's 'Common but differentiated responsibility', TRIPS agreement layout a flexible regime for dissemination and transfer of technology. However, the flexible mechanism of 'Technology Transfer' is yet not fully exploited enough to give it, an effective implementation. Furthermore, UNFCCC promoted technology transfer through Clean Development Mechanism (CDM).²⁴ Failure of recent CoP Summits (Paris, Doha and Warsaw) under UNFCCC raised several questions on role of 'Transfer Technology' in mitigating the climate change effects. International negotiators had a keen eye on Paris Summit, where one of the key issues was facilitation of climate friendly technology transfer from industrialized nations to other part of the world. Poor capacity building of developing nations makes them dependent on developed

technology transfer is not happening quickly enough. *See generally* Littleton, *supra* note 19

²² GATT/WTO are generally criticized for their emphasis on trade and lack of expertise in and understanding of environmental problems. *See* ALEXANDRE KISS AND DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 776-789 (2004).

²³ In order to appreciate the impact of International Transfer of Technology to Developing Countries, *see generally* Keith E. Maskus, *Encouraging International Technology Transfer (UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 1, May 2004)*, available at http://www.iprsonline.org/unctadictsd/docs/CS_Maskus.pdf. Also *see generally* J. MAKOWER, *THE CLEAN REVOLUTION: TECHNOLOGIES FROM THE LEADING EDGE* (2001).

²⁴ *See* R.L. Ottinger & R. Williams, *Renewable Energy Sources*, 32 ENV'T L. 331- 368 (2002).

nations for ESTs, but patentability of ESTs results in to higher prices and accessibility problem. UNFCCC, Kyoto Protocol, Bali Action Plan and TRIPS have provisions which substantially establishes an international legal regime for 'Transfer of Technology' with reference to ESTs, however the difficulty of their implementations highlights the importance of moving beyond general language to the consideration of concrete problems and their solutions.

IPRs grant exclusivity and stop others to imitate one's innovation. The objective of IPRs is achieved through conferring exclusive right for the exploitation for protected patentable subject to its originator or to the person whom those rights are legally transferred. Exclusive right prevents the third party to commercially use the patentable project without authorization hence making the patentable product inaccessible, this led to a situation where the patent holder can dominate the market and erect barriers to the diffusion and use of the knowledge. This protection of exclusive rights impacts heavily on 'technology transfer' regime; ultimately causing enough confusion coupled with inability of developing countries to be in consonance with ESTs.²⁵ The only option available, especially to developing countries, is adopting measures which open up their market, causing exploitation of resources by multinationals on the pretext of 'technology transfer. Strategies are so formed as to create a win-win situation for the both (developing nation and multinationals with technology), combined with the removal of negative subsidies and barriers to foreign investment, targeted fiscal incentives and the facilitation of 'technology transfer will stimulate the adoption for EST's by private enterprise.²⁶ One thing needs to be emphasized here that, there should be no doubt as to the technological dependency of developing and third world nations to the few developed nations; besides having global pressure to reduce the environmental stress caused by industrialization/developmental

²⁵ See J. Abdel Khalik, *Prescriptive Treaties in Global Warning: Applying the Factors leading to the Montreal Protocol*, 22 MICH. J. INT'L L. 508 (2001). See S.Vaughan, *Trade and Environment: Some North-South Considerations*, 27 CORNELL INT'L L. J. 591-604 (1994)

²⁶ See E. BRAUN, *TECHNOLOGY IN CONTEXT: TECHNOLOGY ASSESSMENT FOR MANAGERS* 105-107 (1998). A.S. Miller, *The Global Environment Facility and the Search for Financial Strategies to Foster Sustainable Development*, 22 VT. L. REV. 1229 (2000).

process.²⁷ Generally, having IPR-protected technology means that the IP holder can control the use of his technology, and decide when, where and how to use it and whether to transfer it and the ways in which the technology can be utilized, if at all, in those countries where protection has been obtained.²⁸ Many firms in developing countries may not be able to afford this higher cost. Due to lack of resources developing nation rarely invest in local R&D which makes them dependent on the firms of developed nations. However, the costs of such technologies are usually high and the additional cost of transfer would increase the cost of production, making their product unviable, particularly in an open globalized market. Additionally, the IPRs grant exclusivity to the patent holder hence this may result in to additional pricing and restrictive access. Even if a local corporate house is willing to pay the commercial rate for the use of the technology, the patent holder can withhold permission to the corporate house or impose onerous conditions, thus making it impossible or extremely difficult for the technology to be used by the firm. For harnessing the bulk of international investment, The IPR regimes are an important consideration. Overall the literature is diverse concerning the relationship between IPRs and technology transfer. Strong IPR regimes, generally lead to increased innovation and “vertical” ‘technology transfer and increased foreign investment, although it should be kept in mind that it is not the only factor affecting investment decisions. Strong IPR regimes could, however, depending on the holder of the patents, slow down the dissemination of certain

²⁷ Needless to point here, in the London Conference, developing countries led inter alia by then Indian Minister, Maneka Gandhi, took the position, ‘We did not destroy the ozone layer, you have done that already. Don’t ask us to pay the price.’ *See generally* S.O. ANDERSON AND K.M. SHARMA, PROTECTING THE OZONE LAYER: THE UNITED NATIONS HISTORY 303-07(2002). Also *See generally* F. MENGHISTU, INTERNATIONAL TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES: A STUDY ON THE SIGNIFICANCE OF FISCAL POLICY FOR TECHNOLOGY TRANSFER FOR DEVELOPMENT 1, 8-46 (1988).

²⁸ *See* E. Maskus Keith & D. H. Reichman Jerome, *Can the TRIPS Agreement foster technology transfer to developing countries?*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY: UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 95 (E. Maskus Keith & D. H. Reichman Jerome eds., 2005).

technologies, the so called horizontal ‘technology transfer’.²⁹ Where this is the case, countries may address this concern by taking appropriate measures. For example, the risk of unlicensed patents may be reduced by charging increasing annual maintenance fees. If the fee becomes high enough by 5 to 10 years after patent issuance, the owner might let a commercialized patent lapse. Another option is so called compulsory licensing as specified under the TRIPS agreement and in decisions contained in Agenda 21³⁰, provided that correct procedures are followed.³¹ IPR regimes could be extended more widely to support innovation and dissemination of ESTs. Technology transfer for sustainable development often depends on the intention expressed in the agreed technological transfer and there upon the resulting actions of the States.³² Industry standards, including management standards developed through the International Standards Organization (ISO) and sector standards for some industries, could also play an important role in fostering global dissemination of ESTs. In general, developing countries and their companies tend to have fewer resources to purchase licenses and fear that strong IPR regimes would impede

²⁹ Developing countries aim to attain high levels of economic growth and to fill the development gap with developed countries. However, countries lack the capacity to undertake research and development activities and to generate technological innovations; therefore, they rely on the imitation of foreign innovations in their growth process. *See generally* Liza Jabbour & Jean Louis Mucchielli, *Technology Transfer through Vertical Linkages: The Case of the Spanish Manufacturing Industry* 10(1) J. APPLIED ECO. 115-136 (2007)

³⁰ Agenda 21 is a non-binding voluntarily implemented action plant of United Nations with regard to Sustainable Development during United Nation Conference on Environment and Development 2002. It is termed as ‘Soft Law’- not legally binding, status of persuasive and interpretative value in international law. *See generally* D. SITARZ, *AGENDA 21: THE EARTH SUMMIT STRATEGY TO SAVE OUR PLANET* (1993).

³¹ Generally, these processes require the user first to seek a license through regular venues, to pay reasonable compensation for the license and to practice the invention on a limited non-exclusive basis.

³² Many technology-related provisions rely on national measures for their implementation. E.g. Article 16 of the 1992 UN Convention on Biological Diversity (UNCBD) requires the adoption of ‘legislative, administrative or policy measures, as appropriate’ to provide access to, the transfer of and the joint development of technology. Clauses that provide that ‘all parties’ shall ‘cooperate’, ‘encourage’, ‘facilitate’, or ‘promote’ EST transfer, allow for to many discretions and loopholes. The problem of implementation magnifies when there is an insufficient, or non- existent, definition of what constitutes an EST (let alone addressing the issues of measuring compliance and the fulfilment of obligations).

their access to patented technologies. One thing is clear that there is greater need for ESTs, serving dual purpose of poverty alleviation and environment sustainability.³³ In the backdrop of no effective global regime for EST transfer, a need for coherent, effective EST transfer regime, in consonance of international acceptable norms, correcting certain inherent lacunas, has to be emerged.³⁴

IV. INTERNATIONAL LEGAL FRAMEWORK OF IPR & TECHNOLOGY TRANSFER

Contemporary IPR jurisprudence emerged with the basic understanding of promoting innovation and restricting flow of information without the consent of its creator. IPRs in general do not promote dissemination of knowledge, however understanding the special need of developing economies, international treaties usually address the issue of ‘dissemination of knowledge’ for fair use. The TRIPS agreement is one of the major legal instruments which has an underlying objective to remove barriers and promote effective and adequate protection of Intellectual Property Rights. In sum, migration of global energy system to low carbon pathways depends upon the successful transfer and absorption of ESTs to and within developing economy.³⁵ The TRIPS agreement facilitates trade among countries in this globalized economy. However, the implementation of TRIPS advocates the protectionist agenda of developed countries. TRIPS explicitly mentions about the ‘social considerations’ and use of IP as a matter of public policy but yet its recognition towards IP as a private/commercial right is much more. The preambular objectives of TRIPS

³³ A.S. Miller, *supra* note 26 and G. WILKINS, TECHNOLOGY TRANSFER FOR RENEWABLE ENERGY: OVERCOMING BARRIERS IN DEVELOPING COUNTRIES 102 (2002). See R.L. Ottinger & R. Williams, *supra* note 24 at 339-340. Also see GHENT, BELGIUM AND UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, UN Doc. FCCC/SBSTA/2003/INF 7 (2003), available at <http://unfccc.int/resource/docs/2003/sbsta/inf07.pdf>.

³⁴ Inherent flaws of non-binding nature, vagueness of obligations coupled with ineffective compliance mechanism; unnecessary protection of IPR's are few along with many others, which needs to be cured.

³⁵ Ockwell et al., *Final Report: UK-India collaboration to identify the barriers to the transfer of low carbon energy technology.*, (The Energy and Resources Institute and Institute of Development Studies, University of Sussex, 2007).

with respect to dissemination of technology and welfare of developing nations are:³⁶

Recognizing also the special need of the least developed country member in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technology base.

The preambular paragraph of TRIPS gives recognition to special need of LDCs countries by providing maximum flexibility within TRIPS regime; however this provision is restrictive to domestic implementation only. Hence, the preambular objective fails to put any liability on developed countries. Another provision in TRIPS which attempts to facilitate ‘technology transfer is Article 7³⁷, however this provision is suggestive in nature, hence reduced to a decorative Article only, which is rarely implemented. This Article was widely discussed during Uruguay around, in which developed nations lobbied to strictly adhere to the protection of technologies for extracting maximum benefits for innovators, however developing nations feared the concentration of technological innovation within the hands of developed economies and hence debated in favor of ‘dissemination’ of technological innovations on mutual basis.³⁸ Article 7 further on talks about balance of ‘rights and obligations’, this Article explicitly states that IPR is neither an end in itself nor an absolute right in a true sense. The preamble provides maximum flexibilities restricted to domestic laws only, however TRIPS specifies that exclusivity in IPR rights is not absolute, there is always a scope of public policy intervention for achieving substantive public welfare goals.³⁹ Further, it ensures innovation and transfer through

³⁶ TRIPS Agreement, Preamble para.5

³⁷ The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

³⁸ See Keith & Jerome, *supra* note 28 at 91.

³⁹ SHASHIKANT SANGEETHA & KHOR MARTIN, INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER ISSUES IN THE CONTEXT OF CLIMATE CHANGE 6 (2010)

domestic laws and related interpretation, in furtherance to it, Article 8.2⁴⁰ of TRIPS recognizes the need to prevent ‘abuse’ of intellectual property by restricting the transfer and hyping the relative pricing. However, implementation of both Article 7 and Article 8.2 is in questions due to lobbying of developed nations against flexible ‘technology transfer regime. Article 40.1 and 40.2 of TRIPS attempts to control anti-competitive practices through some regulatory provisions. It allows members to adopt measures and control anti-competitive practices by implementing unit competitive provisions in their legislations, *e.g.*, restriction of ‘exclusive grant back conditions’, ‘coercive practice licensing’, etc. WTO’s TRIPS manages to inculcate provisions such as Article 66.2,⁴¹ whose implementation is questioned time to time, but nothing substantive is achieved as this provision is reduced to a mere soft law at several instances. Article 66.2 establishes a specific obligation on developed nations to take measures to promote and encourage ‘technology transfer to Least Developed Countries (LDCs). Indian Government from 2002-2014, during several occasions raised the point of improper implementation of this provision to WTO governing council.

Primarily there are two major steps taken to implement provisions under Article 66.2: *First*, the Council for TRIPS took a decision on implementation of Article 66.2 of the TRIPS agreement which lays down a mechanism for ensuring the monitoring. The decision mandates:⁴²

⁴⁰ TRIPS agreement Article 8.2 (Principles), states: Appropriate measure, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practice which unreasonably restrain trade or adversely the international transfer of technology.

⁴¹ TRIPS have raised the question of technology transfer and reiterated the commitment to implement Article 66.2, such as the 2003 and 2005 decisions on TRIPS and Public Health.

⁴² Council for TRIPS, *Implementation of Article 66.2 of the Trips Agreement*, para. 1, IP/C/28 (Feb. 20, 2003), available at https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/ipc28_e.pdf. Also see G. Verhoosel, *Beyond the Unsustainable Rhetoric of Sustainable Development: Transferring Environmentally Sound Technologies*, 11(1) GEO. INT’L ENV’T L. REV. 49-75 (1998).

Developed country Members shall submit annually reports on actions taken or planned in pursuance of their commitments under Article 66.2. To this end, they shall provide new detailed reports every third year and, in the intervening years, provide updates to their most recent reports. These reports shall be submitted prior to the last Council meeting scheduled for the year in question.

Secondly Para 7 of Doha Declaration on TRIPS Agreement and Public Health, 14th November 2001, which states:

We reaffirm the commitment of developed-country members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country members pursuant to Article 66.2.

Para 7 of Doha Declaration on TRIPS certainly gave a much required spine to Article 66.2 as the declaration refers to ‘commitment of developed countries members’ thereby confirming that Article 66.2 is not mere containing ‘Best Effort Obligations.’ However, TRIPS council with the help of other international organizations has taken several steps in order to implement Article 66.2 and achieve its underlying objective. One such step in regards with ESTs is CDM under Kyoto Protocol, where ESTs are transferred in exchange of carbon credits. But due to non-conclusive negotiation such initiative is short lived.

Global economic growth specifically in developing nations resulted into increase in consumption of raw materials, loss of habitats, and increase in GHG emissions at an alarming rate. However, in order to give effect to any of the climate change negotiation instrument it is imperative to catalyze dissemination of technology and its transfer per se. Climate Change legal regime has developed furiously in past decade, however little has been done to monitor the impact and implementations of related legal instruments.

During 1992, when the movements in concern with climate change mitigation were taking up shape, UN members at United Nations Conference on Environment and Development in Rio agreed to adopt an agenda termed as 'Agenda 21'. Chapter 34 of the agenda specifically mentions about 'technology transfer' and 'ESTs' but it failed to ascertain implications of these agendas on IP rights. The chapter 34 of Agenda 21 begins with describing the nature and meaning of ESTs⁴³ and further elucidates the role of developed nations in 'technology transfer, however the agenda fails to provide any substantive solution on IP related barriers of 'technology transfer. Since there was no implementation of Chapter 34 (Agenda 21), in 1993, the 'United Nations Commission on Sustainable Development', a working group on 'technology transfer was set up, but after a few years of its working the group was closed down, illustrating the erosion and loss of importance of subject. Instead of connection asked for developing nations, the reverse i.e. much stricter IP regime was followed during TRIPS.⁴⁴

UNFCCC and Protocol to the Convention is one of the preliminary steps to describe the implementation methodologies related to 'technology transfer and ESTs. Where the Convention lays down the objectives and principles the Protocol to the Convention passed in 1997 known as Kyoto Protocol successfully adopted mechanism like Carbon Trading and Clean Development Mechanism which creates a strong obligatory mechanism and address the 'technology transfer barrier issues as well.

⁴³ 34.1 Environmentally sound technologies protect the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their wastes and products, and handle residual wastes in a more acceptable manner than the technologies for which they were substitutes.

34.2. Environmentally sound technologies in the context of pollution are "process and product technologies" that generate low or no waste, for the prevention of pollution. They also cover "end of the pipe" technologies for treatment of pollution after it has been generated.

⁴⁴ See SANGEETHA & MARTIN, *supra* note 39 at 10.

Article 4.1 (h) describe one of the most important principle under environmental law jurisprudence i.e. ‘Common but Differentiated Responsibilities⁴⁵’, the article states:

“Promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies”

Further Article 4.3⁴⁶ of the UNFCCC requires developed countries to provide financial resources needed by the developing country parties to meet agreed full increment cost of implementing necessary measures under UNFCCC, including ‘technology transfer. This provision ensures that provisions related to UNFCCC and Kyoto Protocol is properly implemented. Article 4.5 specifically states the need of ESTs this Article is an implementation archive of Agenda 21 chapter 34, where the former is a hard law, latter is a soft law and hence it is essential to give effect to the provision in order to achieve underlying objectives. This Article not only talks about to ‘transfer’ of the required technology but also makes it mandatory for the party to disseminate and even facilitates the ‘technology

⁴⁵The principle of ‘common but differentiated responsibility’ evolved from the notion of the ‘common heritage of mankind’ and is a manifestation of general principles of equity in international law. The principle recognizes historical differences in the contributions of developed and developing States to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems. Despite their common responsibilities, important differences exist between the stated responsibilities of developed and developing countries.

⁴⁶ The developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by 14 developing country Parties in complying with their obligations under Article 12, paragraph 1. They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11, in accordance with that Article. The implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties.

transfer process. With regards to the above mentioned provision much has been discussed in different CoP Summits of UNFCCC.

During Marrakesh Accord in 2002, the Conference of the Parties to UNFCCC realized and documented the importance of ‘technology transfer’ and impact of Intellectual Property Rights on dissemination of technology Article 4.7 further states:

“The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology ...”

The above stated provisions are certainly a step towards free dissemination of green technology, however the commitments of developing nations more and less depends on how well the Convention is implemented by the developed nations domestically.

The CDM under Article 12 of the Kyoto Protocol was designed from the beginning to meet multiple objectives. Under it, projects are registered that reduce emissions and enhance removals of greenhouse gases, leading to Certified Emission Reductions (CERs) that are tradable on carbon markets and countable against emissions targets instituted at both company level under national legislation and country level under the Kyoto Protocol. A key complementary objective is that the CDM is to assist developing countries in achieving their sustainable development. There are many co-benefits of the investment in climate change mitigation projects channeled through the CDM towards developing countries, not least of which is the transfer of technology and know-how not already available in the host countries.⁴⁷ One of the most important output of the protocol was Clean Development Mechanism where technology is transferred from developed to developing nations with carbon credits incentives. During the first commitment period of Kyoto Protocol, Clean Development Mechanism served a successful methodology of incentive based

⁴⁷See generally G. Verhoosel, *supra* note 42.

‘technology transfer. However, during negotiation of second commitment phase most of the developed nations refused to give any commitment, citing IPR issues as one of the main barrier to implement the CDM policies further on the basis that low-carbon development is impossible without low cost access to the required technology. However, the issue failed to make it into the final decision text, a reflection of the fact it remains one of the principal redline issues for developed countries. As the importance of IPR grows in the major emerging economies, it seems hard not to imagine a convergence of position at some point among G20 countries at least. In the meantime, however, tactical negotiating considerations will probably ensure, it remains on India’s list of priorities for a while yet.

After a failure on discussion related to IPR and technology issues in Doha CoP, the developing nations explicitly attacked developed economy for dodging the issue, where US said that the issue of IPR and ‘technology transfer’ is hyped up and “falsely stated”. The developing nations demanded for diluted IPR in developed nations for ESTs. However, COP 19 was successful in comparison to previous negotiation. The procedure and working of Climate Technology Centre (established as a body under UNFCCC framework) was modified to ascertain the IPR based issues. COP 20 fails to decide any substantive action on mitigations and technology transfer, however Lima promised for much anticipated COP 21 in Paris held in 2015. The Paris summit levelled the ‘technology transfer’ initiative with ‘Green Environment Facility’ (GEF)⁴⁸ funds but again failed to shape up a roadmap for technology transfer.

V. TECHNOLOGY TRANSFER AND ESTS: POLICY RECOMMENDATIONS

Technology Transfer for Climate Change mitigation is negotiated at various platforms in UNFCCC and TRIPS negotiations, but only as a subsidiary point of discussion. None of the international platform took the matter as a policy

⁴⁸ Green Environment Facility was established in 1990 as a three-year experiment to provide grants for investment projects through technical assistance. *See generally* J. Helland-Hansen, *The Global Environment Facility*, 3(2) INT’L. ENV’T’L. AFF. 137-44 (1991)

negotiation to be implemented within the framework of UNFCCC and TRIPS. During pre-TRIPS regimes, countries were free to exempt patent on certain kinds of technologies, however due to Article 27.1 of TRIPS, the flexibility to exclude certain technologies from patent is diluted. The probable solution to the climate change and innovation is to lay down a comprehensive policy highlighting the need of subsidized technological innovations funded through 'Green Environment Fund.' Channelizing funds in green technological innovation will help developed economies to increase their innovative pool and simultaneously facilitate not only transfer but dissemination of technology as well.

Clean Development Mechanism in 2012, failed due to lack of commitment from developed and developing nations. Industrialized nations demanded capping of carbon emission from developing economies and developing economies were against such demand, as it against the basic concept of common but differentiated responsibilities. Post 2012, UNFCCC has failed to device any substantive mechanism through which it can facilitate technology transfer, however there are success stories about REDD+ (Reducing Emission through Degradation and Deforestation), where developed economies engage local communities of developing countries to preserve forest through providing them initiatives. A programme similar to REDD+ can be adopted in further COP summits, where developed nations disseminate technologies to local communities which may help them to preserve forest or rather upgrade environment around them. Such dissemination of technologies will not only cater to environmental problems of developing nations but will also strengthen the livelihood of local communities. The need is to introduce the concept of 'technology transfer' within the implementation barriers of REDD+ programmes. TRIPS, addressing the gravity of problem faced by developing and least developed countries on 'Public Health', in 2001 passed 'Declaration on TRIPS agreement and Public Health.' The declaration serves as an explanation and a toll for developed nations for disseminating life -saving drugs to needy countries. A similar framework can be adopted for climate change mitigations. The jurisprudence of climate change regime works retrospectively, where developed nations are held liable for their past and continuing emissions, with

this understanding the similar declaration within TRIPS framework will facilitate towards a comprehensive UNFCCC and TRIPS framework on facilitation of ESTs.

VI. CONCLUSION

Intellectual Property Rights, more or less are considered as a barrier for climate change technology transfer. The existing regime for disseminating climate change technology is sufficient to suffice the cause only if, the commitment phobic developed economies and opportunistic developing countries exploit TRIPS flexibilities in a comprehensive manner. There are several flexibilities available within TRIPS Agreement such as compulsory licenses, exceptions to patent rights, regulatory voluntary licenses, etc. Recent trends in climate change negotiations focused on mutual agreements rather than 'Blame -Game politics' arising out of concepts like 'Common but Differentiated Responsibilities'. The initiative like REDD+ and 'Loss & Damage' is gaining momentum due to futuristic approach. There is a need to devise a policy where developing and developed economies, both constructively work towards reducing carbon emission.

Climate change affects poor and vulnerable in a serious way, for example, due to irregular patterns of rainfall, it's mainly farmers and subsidized food dependents, who are left in miserable plight. A recent statistical study by United Nations Environment Programme shows as to how women and children are affected the most by climate change. Therefore, usually the decision makers and capitalists take the consequences of climate change on a lighter note. There is an immediate need of capacity building of marginalized and vulnerable groups through participatory environmental governance and bottom up sustainability approach. The technology transferred should reach to the people in general with the 'dissemination' of 'know-how' as well. A recent example of dissemination of technology to local community is implementation of REDD+ projects in Manipur, India, where people were skilled to measure carbon stocks in the forest and were paid for conserving the same through carbon credits systems.

Another important aspect to combat IPR barriers is to facilitate bilateral agreements between developing and developed nations. A recent example is U.S- China agreement, where the developed nations channelize ESTs to the agreement party and ensure proper implementations. It is more practical to have such bilateral agreements, as it is nearly impossible to set a standard criterion for all the member countries through a protocol and treaty. The flexibility is more in such bilateral agreements and each party can amend the same according to their special needs. Human induced climate change is a threat to mankind, however diluting intellectual property laws to a dormant stage is also not a solution as it will ultimately affect the innovations. The need of the hour is to channelize technology transfer through a substantive and comprehensive legal instrument which also fosters bilateral agreements between developed and developing countries. These bilateral agreements should focus on bottom approach of sustainability through dissemination of the 'know-how' of the technology till local communities.

SUSTAINABLE DEVELOPMENT AND JUDICIAL ACTIVISM IN INDIA

Dr. Kushum Dixit & Jaydip Sanyal***

ABSTRACT

There has always been a debate revolving around development and protection of environment, both being crucial to human survival. In the history of environmental jurisprudence in India, the Judiciary has played a vital role in establishing some of the crucial principles of law such as sustainable development in protecting the environment through its landmark verdicts. Such efforts have been able to bridge the gap between statutory laws and the contemporary challenges relating to environmental disputes. The authors in this article have put forward their views on attaining sustainable development thorough judicial activism in India.

I. INTRODUCTION

Man is both the creator and the moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. The various activities of human beings (though necessary and unavoidable), such as the unscientific use of natural resources are likely to cause adverse effects. Man has caused severe air and water pollution, putting several living beings in danger. These actions have also caused a major harm to the physical, social and mental health of other human beings. The natural resources are being drained, ozone layer is depleted and ecological balance is disturbed. Both aspects of the environment, the natural and the man-made are essential to the man's well-being and for the enjoyment of basic human rights and the right to life.

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Man cannot afford to cause harm to the earth or to its bio-diversity as he has to live on earth. He cannot afford to dig his own grave. With an understanding between the developed and developing countries, with advanced scientific and technical knowledge, man can achieve for himself and a better environment for the posterity. To defend and improve the human environment for present and future generations has become an imperative goal for mankind. A goal is to be pursued together in harmony with the established fundamental goals of peace and worldwide economic and social development.

It was with the initiative of the Economic and Social Council (ECOSOC) of the United Nations that conducted the Conference on Human Environment. Continuous degradation of the environment needed immediate attention from all the countries. The historical Conference on Human Environment was held in 1972 at Stockholm. It was the first global recognition of the environment being in great danger and the efforts needed by the governments to protect the same. It was for the first time the developed countries realized that they had completely ignored the impact on the environment during rapid development. Then United Nations Environment Programme (UNEP) came into existence. Almost all the countries of the world have undertaken to monitor the quality of air, water, and other natural resources of the World. The UN General Assembly laid down as many as 26 principles at the Stockholm Conference.

The concept of “Sustainable Development” was used at the time of Cocoyoc Declaration on Environment and Declaration in the early 1970s. It further received impetus with the Stockholm Declaration resulting from the Stockholm Conference.¹ It was further strengthened in World Conservation Strategy in 1980. It was brought in to common use by World Commission on Environment and Development (the Brundtland Commission) in 1987. The Brundtland Report defines Sustainable Development as, “it is the development that meets the needs of the present without compromising the ability of the future generations to meet

¹ UN Conference on the Human Environment, Stockholm, Sweden, Jun. 5 – 16, 1972, *Stockholm Declaration on the Human Environment*, UN Doc. A/CONF.48/14/Rev.1 (Jun. 16, 1972) [hereinafter ‘Stockholm Declaration’]

their own ends².” Later, the concept of Sustainable Development was further developed by the United Nations conference on Environment and Development held in June, 1992 at Rio De Janeiro which is known as Rio-Declaration and also at Kyoto-Conference on Global Warming held in December 1997 including another declaration held at Johannesburg on Sustainable Development.

The important principles of Sustainable Development as culled out from Brundtland Report and other International documents like Rio-Declaration are:

1. Inter-Generational Equity,
2. Use and Conservation of Natural Resources,
3. Environmental Protection,
4. The Precautionary Principle,
5. The Polluter Pays Principle,
6. Obligation to Assist and Co-operate,
7. Financial Assistance to Developing Countries,

II. SUSTAINABLE DEVELOPMENT – THE INDIAN LEGAL SCENARIO

In India, attention has been paid right from the ancient times to the present age in the field of environmental protection and improvement. The present day legislations in India are the outcome of the growing industrialization and population pressure. There are nearly 500 central and state statutes, out of which at least 300 statutes are concerned with the environmental protection either directly or indirectly. Besides this, the common law, constitutional law, civil law and criminal law remedies relating to environmental protection are also there. In the economic development of any country, industries play a vital and a pivotal role. It is also a known fact that the industries have a major contribution in polluting the environment. The core question is whether for the sake of environmental protection, the industries/technological development can be neglected or withheld. In the era of economic liberalization at global, national, state, and local levels, the development activities are to be accelerated. In fact it

²WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (1987) (also known as ‘Brundtland Report’)

is a need of the hour, that there should be an environmental balancing approach which is necessary while pursuing the development projects. It is to be remembered that natural wealth and resources should not be exploited thoughtlessly. They are permanent assets of human beings and are not intended to be exhausted in one generation. The state has to protect the environment as well as promote development. The harmonization of the two needs leads to the concept of “sustainable development”. The environmental protection and development must go hand-in-hand to ensure sustainability of the future generations. Economic development at the cost of degradation of environment would not be long lasting.

In India, the Central Pollution Control Board (CPCB) monitors the industrial pollution prevention and control at the central level, and at the state level, the State Pollution Control Board is the designated agency. In the Pre-Independence period, the Indian government had passed an important legislation to protect the forest and wild life in the name of Indian Forest Act of 1927. After 1970, comprehensive environmental laws were enacted by the central government in India. Firstly, they enacted the Wild Life Protection Act 1972, aimed at rational and modern wild life management which was amended in 1993, 2002 and 2006. The Water (Prevention and Control of Pollution) Act 1974 provides for establishment of Pollution Control Boards at central and state level to act as watch dogs for prevention and control of pollution. The Forest (Conservation) Act 1980, aimed deforestation, diversion of forest land for non-forestry purpose and to promote social forestry. Later, the Air (Prevention and Control of Pollution) Act 1981 aimed at checking air pollution through Pollution Control Boards. The Environmental (Protection) Act 1986 is a land mark legislation which provides for a single focus in country for protection of environment and aims at plugging the loopholes in the existing legislation.

In 1991, the Public Liability Insurance Act was passed to provide for mandatory insurance, for the purpose of providing immediate relief to persons affected by accidents, while handling any hazardous substances. In 1995, National Environment Tribunal Act was passed to provide speedy disposal of environmental related cases through these tribunals. In 1997, the National

Environmental Appellate Authority Act came into force for the establishment of National Environmental Appellate Authority (NEAA) to hear appeals with respect to restrictions relating to the industries. The Biological Diversity Act was passed in 2002 to protect the bio-diversity and to facilitate access to genetic materials. There are a number of other laws which deal with the various aspects of environment protection, regulation, harmful activities and to provide for remedies in case of any breach. In constitutional law, Article 48-A and Article 51-A(g), provides for the protection and improvement of environment. The other acts are the Indian Penal Code, 1860, Code of Civil Procedure 1908, the Factories Act 1948, the Mines Act 1952, The Industries Development and Regulation Act 1951, The Insecticides Act 1968, The Atomic Energy Act 1962, the Motor Vehicles Act 1939, 1988, and Noise Pollution Regulation and Control Rules 2000, the Bio- Medical Waste (Hazardous Disposal Rules), 1998, the Coastal Regulation Zone Notification 1991, etc.

Thus, in the recent decades, India has employed a wide range of regulating instruments to preserve and protect its natural resources. These new legislations are impressive in their range, covering several unregulated fields such as noise, hazardous environment impact assessment etc, the legislations have specified new enforcement agencies and strengthened the old ones.

III. JUDICIAL ACTIVISM AND SUSTAINABLE DEVELOPMENT

The government and parliament, both have taken a number of steps to control environmental pollution and to promote the concept of “Sustainable Development”, but nothing concrete has been achieved so far. Therefore, the judiciary has taken the environmental challenge and contributed a lot through the strategy of judicial activism in the area of combating environmental pollution. However, the fact is that no law or authority can succeed in dealing with environmental pollution, unless there is cooperation from the citizens of the country. The role of judiciary in controlling environmental pollution and its conservation can be duly acknowledged.

In *Vellore Citizen Welfare Forum v. Union of India*,³ the Supreme Court observed the Precautionary Principle and Polluter Pays Principle which are essential features of “Sustainable Development”. In this case, the Supreme Court held that sustainable development is a balancing concept between ecology and development, which has been accepted as a part of customary international law.

In *M.C. Mehta v. Kamal Nath*,⁴ the Supreme Court took recourse in the Public Trust Doctrine, which implies that the State is a trustee and is under a legal duty to protect the natural resources and these resources should be meant for public use which cannot be converted into private ownership.

The enactments are plenty and the rules associated with the Acts are umpteen. There was a good initiative from the legislature and the executive, but it is the Indian judiciary which has taken a lead in terms of the protection of environment pollution. Failure of the governmental agencies to implement the laws prompted the non-governmental organizations (NGOs) and the public to approach the court as a last resort. Though the credit for the evolution of environmental jurisprudence in India goes to the Supreme Court, but it cannot be denied that the maximum contribution has been put forth by the renowned environmental activist, Mr. M.C. Mehta, who was the recipient of Magsaysay Award in 1997.

As far as Mr. M.C.Mehta is concerned, he has succeeded in getting new environmental policies initiated and has brought environmental protection into India’s constitutional framework. He has obtained almost more than 40 landmark judgments from the Supreme Court against environmental pollution. The most notable cases among them are *M.C. Mehta v. Union of India* (Ganga Pollution case),⁵ *M.C.Mehta v. Union of India* (Calcutta Tanneries case),⁶ *M.C Mehta v. Union of India* (C.N.G Fuel case).⁷ Apart from these, the Supreme Court has decided several other cases such as *Centre For Social Justice v. Union*

³A.I.R. 1996 S.C. 2715

⁴(1977) 1 S.C.C. 388

⁵ A.I.R. 1988 S.C. 1037

⁶(1997) 2 S.C.C. 411

⁷ (1991)2 S.C.C. 137

of India,⁸ *R.A. Goel v. Union of India*,⁹ *Narmada Bachavo Andolan v. Union Of India*,¹⁰ *Municipal Council Ratlam v. Vardichand* (Ratlam case),¹¹ *Union Carbide India Limited v. Union of India* (Bhopal Gas Disaster case),¹² *Shriram Food and Fertilizer Industries v. Union of India*,¹³ *M.C. Mehta v. Union of India* (Taj Trapezium case),¹⁴ *Jagannath v. Union of India*.¹⁵ In *Vijay Singh Puniya v. State of Rajasthan*,¹⁶ the High Court decided on the principle of Polluter Pays and directed that each of the polluting industries units shall pay to the state industrial corporation 15% of its turn over by way of damages.

IV. CONCLUSION

Judicial activism in the sphere of environment is the need of the hour, especially when the legislation lagging behind in bringing lacuna in the existing legal mechanism and administration, is still not equipped to meet the challenge. In future too, the courts will have to play an active role in the formulation and effective determination of environmental policy, so that elected persons of the government become accountable to land and the public. An overview of the decisions of the apex court reveals a picture of active judicial intervention to enforce the principles of sustainable development and to protect the environment. Courts have a social duty, since they are a part of the society and there should be a proper balance between the protection of environment and development process in their judgements. The society should prosper, but not at the cost of the environment and at the same time, the environment should be protected, but not at the cost of development of the society. Administrative actions should focus on maintaining a balance between development and protection of the environment.

⁸A.I.R. 2001 Guj. 71

⁹A.I.R. 2000 P&H 320

¹⁰ (2000) 10 S.C.C. 664

¹¹ A.I.R. 1980 S.C. 1622

¹² AIR 1986 SC 1097

¹³ (1986) 1Comp L.J 25 (S.C.)

¹⁴ (1997) 2 S.C.C. 353

¹⁵ A.I.R. 1997 S.C. 811

¹⁶A.I.R. 2004 Raj. 1

In this aspect, the social workers, NGOs and the public spirited lawyers in India are well aware of the fact that invoking the writ jurisdiction of the Supreme Court by the way of Public Interest Litigation (PIL), is not sufficient to abate the environmental pollution. Prevention is better than cure. This can be achieved by bringing awareness among the general public. Their awareness can help in combating the problem on a major scale. The Supreme Court of India has directed that all the cinema theatres shall exhibit the slides on environment, free of cost. Now, it has become a compulsory subject up to 12th standard from the academic session of 1992 and the University Grant Commission (UGC) also plans to introduce the same in higher classes in various universities. The credit of the evolution of environmental justice goes to the Supreme Court and the public spirited lawyers like Mr. M.C. Mehta.

RETHINKING REGULATION OF GROUNDWATER IN INDIA: A LEGAL PERSPECTIVE

*Taniya Malik**

ABSTRACT

Water is essential component for the mankind. Wherever we are we need water to survive and sustain mankind. The water on the planet has remained fairly constant but the population has exploded. This increases the competition for a clean and copious supply of 2.5 % of fresh water. Since the dawn of civilizations groundwater has been of vital importance, providing drinking water and augmenting irrigation. It acts as a buffer in times of draught when all other sources of water fail to meet human needs. In modern times, groundwater exploitation has come to occupy central place in India's agriculture and food security. Since Green Revolution under which high yielding and high water demanding crops were introduced in agriculture, groundwater has become a major source of irrigation and now provides 60% of total irrigation needs.¹ This article intends to highlight the inevitable impact of inhumane activities on water resources and ability of present legal framework to deal with this threat. The author also emphasize on reasonable solution to this conundrum.

I. INTRODUCTION

It is impertinent to note that the growth in groundwater irrigation has happened mainly through decentralized private activity and is not government monitored. A new anxiety that has emerged in recent years relates to ground water. While irrigation was earlier associated with dams, reservoirs and canals, there was an unforeseen and unplanned explosion of groundwater exploitation from 1980s onwards, and this has been a significant factor in the increase in agricultural

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¹ P. S. Vijay Shankar et al., *India's Groundwater Challenge and the Way Forward*, 46(2) ECO. & POL. WE'KLY 37-45 (2011)

production. Since the 1960s and 1970s it has been observed that the share of surface water irrigation to the net irrigated area in the country has decreased while the share of ground water irrigation has increased.² (See Fig. 1)

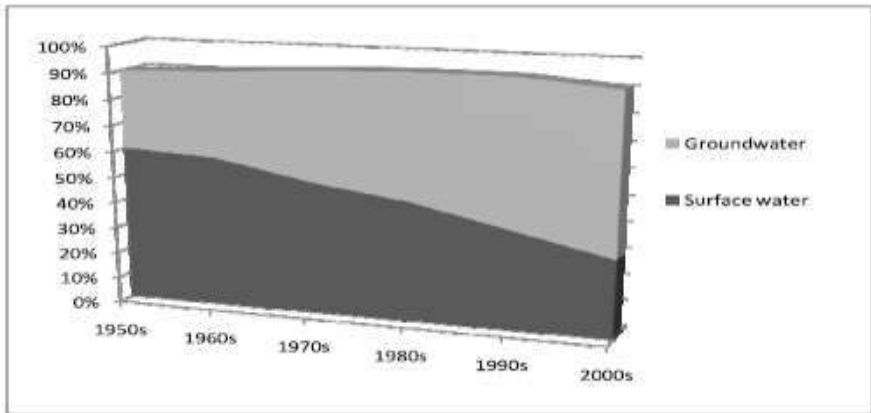


Fig. 1: Decade-wise trend of shares of groundwater and surface water to Net Irrigated Area - an aggregated National Picture (Source: Indian Agricultural Statistics, 2008)

A disturbing trend emerging in the agriculture sector is that although over the years the net irrigated area in the country has increase, the share of canal irrigation in the net irrigated area has been falling while the share of ground water irrigation has been constantly increasing. (See Fig. 2) This is despite the fact that India has spent more than Rs. 150,000 crores for the development of major and medium irrigation projects during the period 1990-2008.³

² MIN. OF AGRICULTURE, GOV'T OF INDIA, INDIAN AGRICULTURAL STATISTICS (2008)

³ Himanshu Kulkarni & Himanshu Thakkar, *Framework for India's Strategic Water Resource Management under a Changing Climate*, in HANDBOOK OF CLIMATE CHANGE AND INDIA: DEVELOPMENT, POLITICS AND GOVERNANCE 330 (Navroz K. Dubash ed. 2012).

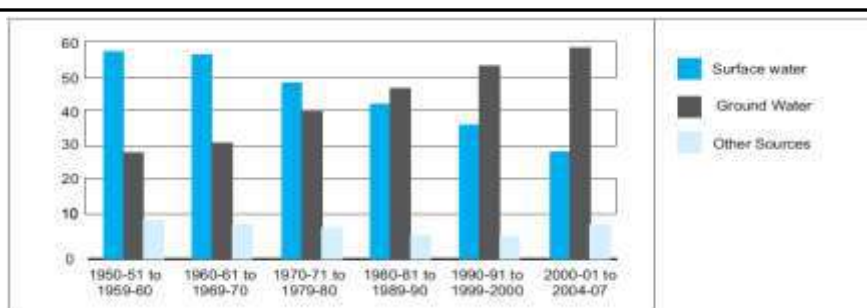


Fig. 2: Decade-wise Share of Surface Water and Groundwater in Net Irrigated Area⁴ (%)

In fact, this sporadic rise in ground water irrigation had made India the largest ground water user in the world by the 1980s and by the beginning of the 21st century; South Asia alone had more area under groundwater irrigation than rest of the world combined.⁵ In many ways this groundwater overuse has many disturbing consequences and it undermines the potential of the groundwater resources to act as ‘drought buffer’ in areas where there has been an overexploitation of this resource. So far, two national groundwater assessments have been carried out, in 1995 and 2004. For the purposes of assessment, administrative units, mostly ‘blocks’, are classified into safe, semi-critical, critical and over-exploited categories. Between 1995 and 2004, the proportion of districts in the semi-critical, critical and over-exploited categories has grown from 9% to 31%, area from 5% to 33% and population affected from 5% to 35%.⁶ Moreover, these studies do not take into account the groundwater quality status, clearly significant for rural drinking water requirements.

There are many factors that have facilitated the growth of groundwater exploitation viz. pumping technology fuelled by subsidized free power provided to farmers across country. Changes in cropping pattern are also responsible for

⁴ See Indian Agricultural Statistics, Min. of Agriculture, cited in Vijay Shankar et al., *supra* note 1.

⁵ See TUSHAAR SHAH, TAMING THE ANARCHY: GROUNDWATER GOVERNANCE IN SOUTH ASIA, RESOURCES FOR THE FUTURE 310 (2009).

⁶ See generally CENTRAL GROUNDWATER BOARD, DYNAMIC GROUNDWATER RESOURCES OF INDIA (2006).

the rapid expansion in overexploitation of ground water resources in India. Introduction of high yielding and high water demanding crops in Indian agriculture is another factor. Ground water has become the preferred source of irrigation in agriculture because of its advantages like the continuous availability, good quality and the control that the user can exercise on its use.

Overexploitation of groundwater has had adverse impact on water table in several parts of the country. The quality of groundwater is also suffering due to exposure to pesticides and other industrial pollutants which find their way into the aquifers. The fall in ground water level and deterioration in groundwater quality give rise to drinking water shortages. The declining water table is a matter of special concern to small and marginal farmers since it tends to reduce due to increase in costs of extractions. There is little doubt that groundwater exploitation is heading for a crisis and needs urgent attention and understanding in India. Thus the “business as usual” or “no-intervention” approach will not work in future and any water resource management policy of tomorrow needs to tackle with care this precious but finite water resource.

Central and state authorities have not been able to evolve appropriate measures to tackle the problem of groundwater overexploitation. Most authorities are focusing on supply side measures aimed at increasing the availability of ground water, for e.g. artificial recharge of groundwater through rain water harvesting and watershed development. Although such steps are appreciated, however they have been unable to produce the expected results. These measures may reduce the problem at specific locations but they cannot solve it altogether at the national level because of their limited potential. Hence, the need is to develop adequate non-structural or demand side measures for moderating demand so that equilibrium between demand and supply is reached.⁷ However, management of demand has been lacking in India due to factors like institutional inadequacy, public indifference and lack of political will.

⁷ See KAMTA PRASAD, MIN. OF WATER RESOURCES, INSTITUTIONAL FRAMEWORK FOR REGULATING USE OF GROUND WATER IN INDIA 11 (2008).

Since the existing economic, technical, social and regulatory methods have failed to tackle the problem, sincere attempts must be made to protect further degradation of water table. The situation is likely to be more critical in near future and would have serious implications for future generation since ground water has become the primary source of irrigation, domestic and industrial use in India.⁸ Thus there is an urgent need to change the focus from development to sustainable management of this resource.

The need for current study arises out of the need to review the existing legal and institutional framework for regulating and managing groundwater utilization under varying physical and socio-economic conditions so that it can lead to a more sustainable resource use.

II. CONSTITUTIONAL AND LEGAL PROVISIONS FOR GROUND WATER GOVERNANCE

Before we move on to a detailed discussion of the water law instruments in India dealing with groundwater law, we must have a brief introduction of the water laws operating in our country.

A. Introduction- A Brief Overview of Water Law in India

Regulation of water in our country is not of recent origin. Water being an essential condition for the survival of mankind, regulation of water has been an important concern for the ancient Indian rulers. However it was only in the colonial period that some emphasis was laid on formal water law in India. The colonial government started taking a direct interest in water law in the nineteenth century. This included laws for the protection and maintenance of embankments, regulation of ferries and fisheries. The colonial government also gave a lot of attention to the regulation of irrigation and this led to the adoption of various enactments, including the Northern India Canal and Drainage Act, 1873. On the whole the colonial laws tended to focus on the economically

⁸ *See id.*

productive uses of water and did not consider themselves either with environmental considerations or with the social aspects of water⁹.

However, many changes in the water law of the country have taken place since independence. Environmental and social aspects of water have now taken precedence over economic considerations. With rapid industrialization and urbanization, the issue of water pollution started gaining momentum in the 1970s. Further on the policy makers as well as the judiciary have taken measures for ensuring equitable access to drinking water for each individual and for recognition of the fundamental right to water of every individual¹⁰. To further augment India's water resource management, many water sector reforms and water law reforms have been envisaged.

The basic objective this article is to examine the legal and institutional framework related to ground water sector in India. This requires a clear understanding of the Indian legal system. Indian legal system like any other legal system works on the foundation of the Constitution. Hence, an analysis of the Indian constitutional provisions dealing ground water becomes necessary. But before that we must have a look at the general constitutional provisions dealing with 'Water'.

B. Constitutional Provisions dealing with 'Water'

So far as the Indian constitutional position is concerned, 'water' is primarily a State subject under the Indian Constitution. Even after independence, the Constitution of India retained the basic scheme of the Government of India Act, 1935 and gave States a leading role in Water regulation. The reason behind this devolution of powers to the States is obvious - primarily because water related issues vary under local circumstances.

The Constitution of India demarcates the legislative and financial jurisdictions of the Union, State and local governments on different subjects including

⁹ JOHN BRISCOE & R.P.S. MALIK, WORLD BANK, INDIA'S WATER ECONOMY: BRACING FOR A TURBULENT FUTURE (2005).

¹⁰ *Subhash Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420

‘Water’ by way of various lists. Under Constitutional provisions, the allocation of responsibilities between the states and the centre falls in three categories - first, the Union List (List I), second, the State List (List II) and the third, the Concurrent List (List III). In the Constitution of India, water as a whole is included in Schedule VII in Entry 17 of list II, i.e., State List which states “Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List I”. Thus, this entry is subject to the provision of Entry 56 of List I i.e., Union List.

The 1992 (73rd and 74th) amendments to the Constitution regarding Panchayats and Municipalities introduced the following entries in the schedules listing the subject-areas in which the State governments and legislatures may devolve functions to such bodies, so as to make them evolve as local self-governing institutions:

In the Eighth Schedule (Part IX) dealing with Panchayats, the subjects, “Minor irrigation, Water management and Watershed development”, “drinking water” and “maintenance of community assets” are listed.

In the Twelfth Schedule (Part IX) dealing with municipalities, the subjects “water supply of domestic, industrial and commercial purposes” is listed. Here it may be noted that ground water comes under minor irrigation, drinking water and water supply.

Functional responsibilities are, thus, visualized for local governments in respect of several aspects of ground water use.

However this does not mean that the Union has no role to play. Union or the Central government enjoys various provisions under the Indian Constitution wherein it can regulate affairs related to Water. Firstly with respect to the adjudication of inter-state river water dispute, Art. 262 and Entry 56 of List I (Union List) allow the Parliament to legislate on this issue. This has led to the adoption of the Inter-state River Water Disputes Act, 1956. Secondly, the Union has taken action under the Art. 252 of the Constitution of India which allows the

Parliament to adopt legislation in any field in which the states are competent to legislate, provided the states have given their consent. This was the basis for the adoption of the Water (Prevention and Control of Pollution) Act, 1974.

Thirdly, the Union has used less formal mechanisms to aid the states into adopting certain measures, such as the rural water supply programs. The National Water Policies of 2002 and 2012, the National Action Plan on Climate Change (NAPCC) and the National Water Mission under its aegis are such policy initiatives that deal with the efficient management of the India's water resource. Thus the regulation of water occurs both at the central and the state level.

C. Legal Position of Groundwater

Unlike several countries, India does not have any separate and exclusive water law dealing with all water resources and covering all aspects. Instead the water related legal provisions are dispersed across various irrigation acts, central and state laws, orders/decrees of the courts, customary laws and various penal and criminal procedure codes. As a result, understanding of the exact legal position with respect to ground water becomes rather cumbersome. Moreover, India does not have any explicit legal framework specifying water rights. The Supreme Court of India has, however, reinterpreted Article 21 of the Constitution of India to include the right to water as a fundamental right to life.¹¹

1. The Indian Easement Act, 1882

The Easement Act of 1882 made all rivers and lakes the absolute right of the state. But as per the provisions of the Easement Act 1882 as usually understood and the Transfer of the Property Act of 1882, a land owner is supposed to have a right to ground water beneath his land as it is considered as an easement of the land¹². So, the land owners own the ground water on their lands. Ground water was considered an easement connected to land: he/she who owns the land: owns

¹¹ *Id.*

¹² Kamta Prasad, *Groundwater Governance in India: Gaps and the way out*, 59(2) INDIAN J. PUB. ADMIN. 232 (2013)

the ground water beneath the land. Ownership of ground water, therefore, accrues to the owner of the land above. Ownership of ground water is transferred along with the transfer of ownership of land. Thus, ground water is viewed as an appendage to land¹³. This absolute ownership concept has been counter-productive and has allowed unlimited withdrawals of ground water beneath the land by the owners. There is no limitation on how much ground water may be drawn by a particular land owner. As a result, a person is free to draw water as per personal requirement and can even sell the same in the market. Moreover, the landless have no right on ground water.

The legal aspects governing ground water resources have remained the same over centuries despite substantial changes in ground water scenario that have taken place since then. Rapid expansion in the exploitation of ground water resources in India for irrigation and other uses has led to an over-exploitation of ground water in several parts of the country. As a result, the above approach of law is no longer in harmony with resource sustainability. It may, however be noted that the letter and spirit of the law, as actually specified in the Easement Act, 1882, is different from the law as usually understood and interpreted. Section 7(g) of the Indian Easement Act, 1882, states clearly that, “The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel”. This clause explicitly relates to ground water and is the basis for prevailing thinking that land owners have absolute rights over water underneath their land. Similar views, drawing attention to the independent nature of water flows, are found in Section 7(h) and 7(i) of the said Easement Act. Easement thus applies only if groundwater does not pass in a ‘defined channel’.

The crucial words of “defined channel” have been totally forgotten by our political executives, engineers and administrators. The Easement Act does not permit land owners ownership of ground water if it is passing in a defined channel. A proper implementation of this Act would require authorities to

¹³ See *id.* at 233

provide information whether ground water in an area is passing through a defined channel. This is not done presumably because most parts of ground water pass through defined channels with the result that the more one person withdraws ground water from his/her land, the less ground water becomes available to the person owning the neighboring land.¹⁴

2. The Model Bill and the Subsequent State Acts

The need for restricting excessive exploitation of ground water was realized by the Centre as early as about 40 years ago. But the Centre could not do much since regulation of ground water was supposed to be a state subject. What it did was to prepare a model bill for the purpose and circulated the same to the state governments for enactment and implementation.

The Draft Model Bill was circulated to all States/UTs by Government of India, Ministry of Agriculture (which was the concerned ministry at that time) as early as in 1970. The bill envisaged empowering the state governments to acquire powers to restrict installation of new ground water structures like bore wells, tube wells and even dug wells by private individuals or groups for purpose other than drinking water. The Bill was revised thrice, once in 1992, , 1996 and 2005 by the Ministry of Water Resources (MoWR) (which became the concerned ministry later on).

Thus, Government of India has been requesting States/UTs since 1970 to implement Model Bill by enacting ground water legislation. It was also printed out by the Central Government that before attempting any such enactment, common people as well as farmers should be fully educated about the need of judicious regulation of ground water. However, not many states have enacted and implemented the legislation.¹⁵ The reasons for non-implementation of the proposed legislation could be several. But the most important one seems to be lack of political will, Political parties have been reluctant to impose restrictions on use of ground water due to fear of losing support of the electorate.

¹⁴ See Prasad, *supra* note 7, at 26.

¹⁵ See Prasad, *supra* note 12, at 26.

It would, of course, be unrealistic to expect that the implementation of the Model Bill in its present form would take care of the problem of over exploitation of ground water. It cannot do so because it has no provision for restricting the extent of ground water extracted by the existing users. It would have some minor advantages only. The latest Draft Groundwater Model Bill, 2011, discussed later, has been able to introduce a much more effective legal framework for regulation of groundwater.

3. The Environment Protection Act, 1986 and the Central Groundwater Authority

Water as well as items related to 'Water' are covered under the Environment Protection Act (EPA), 1986 which has an all India jurisdiction. Notwithstanding this Act, the Central Government took no steps to prevent overexploitation of groundwater. It was the Supreme Court which invoked this Act in the case of *M.C. Mehta v. Union of India*¹⁶ (Ground water case) and passed an order on December 10, 1996 directing the Central government to constitute a Central Ground Water Authority (CGWA) under section 3(3) of the said Act. The CGWA has been functioning ever since January 1997 with its headquarters in the office of the Central Ground Water Board (CGWB). Ground Water investigation, exploration, development and management are being dealt with by the CGWB. The regulation and control of groundwater management is in the hands of the Central Ground water Authority. Some of the activities that the Authority has undertaken – such as declaring 'Notified Areas', scrutinizing and clearing applications from industries for sinking deep tube wells, registration of drilling agencies, conducting mass awareness programmes, conducting training on ground water management and rain water harvesting techniques, etc. – duplicate functions of the State and local-level bodies. Infact the CGWA has in practice been the replica of the CGWB which has been associated closely with the framing of the Model Bill.

¹⁶ (1997) 11 S.C.C. 312.

III. A CRITICAL REVIEW OF THE LEGAL FRAMEWORK FOR GROUND WATER PROTECTION – REASONS FOR INEFFECTIVENESS

A. Lack of Equity in Access to Groundwater Resources

There is a major equity imbalance in the system. The current common law property system gives absolute ownership rights over groundwater to landowners while leaving non-landowners with little protection. This is probably the greatest flaw in the groundwater system in terms of equity. This antiquated nexus of land ownership and groundwater rights fails to adequately protect the water needs of the millions of poor Indian citizens who are landless. Abolishing the rule of absolute groundwater ownership by landowners and implementing a less rigid ownership structure that allows non-landowners to hold rights to groundwater would greatly enhance equity interests.¹⁷ However, the deep-rooted nature of the absolute ownership rule makes overturning the rule a difficult task.

B. Overlapping Jurisdiction

Both the legal measures taken in form of the Model Bills since 1970s and the subsequent State Acts and the establishment of the CGWA since 1996, have similar *modus operandi*. A question thus arises as to how far is it desirable to have two legal bodies performing the same functions in the same manner. In this regard the Ministry of Water Resources has opined that, “though the states are competent to make their own laws and constitute state authorities regulating ground water, the provisions of The Environment (Protection) Act, 1986 would override the State Enactments under Article 253”.¹⁸ Although the above view point is acceptable in legal sense, the presence of two authorities at centre and State level creates administrative confusion. Hence it is advisable that since States are better equipped to perform the regulatory functions in view of the State’s administrative machinery at the grass root level, this duality needs to be done away with.

¹⁷ Daniel Aguilar, *Groundwater Reform in India: An Equity and Sustainability Dilemma*, 46 TEX INT’L L.J 638 (2008).

¹⁸ Kuldeep Singh Takshi, *Groundwater Governance: Issues & Perspectives Regarding Model Bill Application in Punjab State*, in GROUND WATER GOVERNANCE: OWNERSHIP OF GROUNDWATER AND PRICING 246 (Saleem Romani et al. eds., 2007)

C. Basic Deficiencies on the Legal Framework

The laws have been ineffective due to several reasons. These laws are toothless. The focus of both the legal measures is entirely on stopping installation of new ground water structures and not on restricting the extent of ground water extracted by existing structures, thereby allowing the existing owners of such structures to withdraw any amount of groundwater according to their wish. Thus, those responsible for over-exploitation of water are left completely off the hook. Another major problem is that while the legislations are easier to implement in urban areas, the rural areas pose a problem. The number of farmers owning tube wells in rural areas is too large to be regulated by a central agency. Besides the regulatory machinery of these legislations is highly bureaucratic without any involvement from members of public. The absence of an effective role for local population in the decision making process tends to arouse the apprehension that either there would be little control or the control may degenerate into corruption and harassment of public as often happens during discretionary exercise of bureaucratic powers in India. The Model Bills as well as the CGWA framework did not take any cognizance of the Constitutional 73rd and 74th Amendments regarding giving powers to panchayats and Municipalities in the management of ground water even though the new legal measures came into being much after the two Constitutional Amendments.

D. Difficulties in Administration

The central-level water regulatory bodies, the CGWB and the CGWA, and also the authorities existing at state level are considered to be administrative failures. The reason is obvious – in a country with more than 21 million groundwater extraction structures, the sheer number of groundwater extraction structures that the CGWA is supposedly monitoring makes full implementation all but impossible in the absence of vast central government institutional support.¹⁹ Despite the good intentions of the legislature, the authorities are grossly underequipped with databases, machinery, and technicians necessary to give the

¹⁹ See *id.* at 639.

law any sort of meaningful implementation. Further hindering successful implementation, research suggests that corruption is especially high in India's water management sector.

IV. CONCLUSION AND SUGGESTIONS

The need for reforms of groundwater law has been felt for decades, especially since the widespread use of pumping devices being used for withdrawing ground water. The Central Government has also acknowledged the need for statutory framework for regulating groundwater. Consequently, in 1970 it put forward a Model Bill to regulate and Control the Development and Management of Ground Water for adoption by the states. This Model Bill has been revised several times (1992, 1996 and 2005) but the basic scheme adopted in 1970 has been retained. The basic scheme seeks to establish a groundwater authority under the direct control of the government. The authority is also given the right to notify areas which have become over-exploited and need regulation. However there are certain drawbacks in these bills, as already pointed out in the previous section.

This new bill viz. The Draft Model Bill for the Conservation, Protection and Regulation of Groundwater, 2011 has to some extent addressed some of the problems outlined above. The Basic premise of the Draft Groundwater Model Bill, 2011 is that the small farmers and people living in the rural areas are directly affected by the existing framework, which is highly skewed and gives exclusive control over groundwater to land owners and no effective control to other ground water users or democratically elected local bodies of governance.²⁰ Some of the basic principles of the Draft Groundwater Model Bill 2011 are outlined below.

²⁰ See generally Philippe Cullet, *The Groundwater Model Bill: Rethinking Regulation for the Primary Source of Water*, 47(45) ECO. & POL. WE'KLY 40 -47 (2012)

A. Public Trust

The Draft Groundwater Model Bill, 2011 starts by recognizing groundwater as a Public Trust.²¹ This marks a significant change in approach. In the context of increasing recognition of the need for a new framework regulating groundwater, the Planning Commission took up the challenge of preparing a new Ground Water Model Bill. It bears the potential to give the communities the power to regulate groundwater use at aquifer level. The Bill vide Ss. 18 and 20(1) (b) provides that an aquifer situated entirely within a Panchayat is under the direct control of the Gram Panchayat Groundwater Committee. In case an aquifer is shared with another Panchayat, then the Block Panchayat Groundwater Committee facilitates the coordination of sharing the aquifer. It should be pointed out that The Draft National Water Framework Act, 2011 also calls for treating water as a common pool resource held by the state under the public trust doctrine. Thus there is definitely a shift in approach of the lawmakers and policymakers alike so far as treatment of water is concerned. Water resources are seen today as subjects of community rights for common enjoyment of all rather than objects of private enjoyment. Such a line of thought is progressive and definitely needs to be put into action.

B. Fundamental Right to Water

The Draft Groundwater Model Bill, 2011 ensures that the right to water is specifically integrated within its operational provisions. The Draft National Water Law Framework Act, 2011 also guarantees a right to water, not just to humans but to livestock or other domestic animal or bird as well so that they have sufficient and safe water to meet the requirement of water for life.²² So far as the priorities in water allocation are concerned, both The Draft National

²¹ The *Public Trust Doctrine* primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources as trustees for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.

²² See Draft National Water Law Framework Act, 2011, sec.10.

Water Law Framework Act, 2011²³ and the Draft Model Bill for the Conservation, Protection and Regulation of Groundwater, 2011 (hereinafter 'Draft Groundwater Model Bill, 2011')²⁴ have pointed out that the state must ensure that water for life needs are met first, followed by water required for all other uses.

C. Institutional Framework

The institutional framework of the Draft Groundwater Model Bill, 2011 reflects the decentralization mandate of the 73rd and 74th amendments to the Constitution. It is divided into rural and urban areas. In each case, the Draft Groundwater Model Bill, 2011 provides for the setting up of groundwater committees starting at the lowest level – these are the Gram Panchayat Groundwater Committees in rural areas and Ward Groundwater Committees in the urban areas.²⁵ The Bill also provides for Block and Municipal groundwater Committees to address issues that cannot be tackled at lower level. Further, it provides for the setting up of district groundwater councils tasked, for instance, with the coordination of measures taken at the block and municipal level and a state groundwater advisory council set up to provide advice and support to all groundwater bodies constituted under the legislation.²⁶ The Groundwater Model Bill, 2011 further recognizes that it is unrealistic to expect every local institution to have the scientific and technical expertise necessary to perform all the given functions. As a result, a series of information and monitoring cells and supporting institutions are constituted to assist and help in the effective implementation of the Draft Groundwater Model Bill, 2011.

D. Groundwater Protection Zones

The Groundwater Model Bill, 2011 introduces two innovative instruments to foster groundwater protection, groundwater protection zones, and groundwater security plans. These are conceived primarily for areas that suffer from

²³ See *id.*, sec.11.

²⁴ See Draft Groundwater Model Bill, 2011, sec.10.

²⁵ See *id.*, secs.17 & 21.

²⁶ See *id.*, secs. 26(1)(e) and 28(1).

groundwater depletion and are thus to be implemented according to the needs of specific areas.

The Draft Groundwater Model Bill, 2011 provides a basis for rethinking groundwater regulation. The existence of a new model that can be used by states for drafting legislation is a welcome step forward. However States in the past have shown little interest in turning model bills into legislation at the State level. Thus this lack of political will needs to be addressed. Groundwater is now the main source of water for all main water uses and needs to be given the policy attention it deserves. The fact that it is a politically sensitive topic because any reform may affect the vote bank cannot be an excuse anymore for lack of action. Inaction only increases existing inequalities in access to groundwater by progressively reinforcing the power of bigger landowners at the expense of other water users. Further inaction has a price that will be borne by future generations since the groundwater over-exploitation has already turned unsustainable.

TRANSFER PRICING IN THE UNITED KINGDOM: A LEGAL ANALYSIS

*Shaswat Bajpai**

ABSTRACT

This research paper involves the discussion of the transfer pricing regime in the United Kingdom and how it has evolved over time especially after the tax re-write. Few years back, in 2012 the House of Commons Public Accounts Committee (PAC) had actually gone ahead and launched tax investigations into tax avoidance by MNCs especially in relation to the transfer pricing aspects. This research paper has also discussed the transfer pricing regulations at length while analyzing the modus operandi used to arrive at the Arm's Length Principle based on the TP methods used in light of the comparable methods used. Special emphasis is laid on the most advanced structure of Advanced Pricing Agreements contained in Sections 218-230 of the Taxation (International and Other Provisions) Act, 2010. The UK APA program commenced in 1999 and is today one of the most well-established and efficacious programs across the globe. The new Statement of Practice SP2/10 has guided the same through interpretational hurdles. This Paper has detailed out the UK disputes settlement strategies employed especially in the now extant procedure of arbitration. One of the rare occasions where the matter entered into the adjudicatory arena was in the landmark judgement of DSG Retail v HMRC, which has been critically appraised along with Glaxo Group Ltd v IR Commrs and Waterloo plc and other v IR Commrs. The perception did undergo a brief change from collaborative to litigation, following the publication of the 'Litigation and Settlements Strategy' (LSS) by HMRC. Lastly the paper has also shed light on the requirements qua TP documentarian as well the penalties leviable for violation of the same.

I. INTRODUCTION

The transfer pricing regime and the Arm's length principle (ALP) took center

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Nations' draft Convention qua Allocation of profit and Property of International Enterprises. The not-so long history of Transfer Pricing regime can be traced back to the early treaties resolved by the United States, United Kingdom and also France, way back in the 1920s and 1930s, though at that time such jargon was not used. Some of these earlier provisions share resemblance with the Article 9 of the 1963 Organization for Economic Co-operation and Development (OECD) Draft Convention as also Article 9, paragraph 1 of the present OECD and the current & extant UN model Tax Treaties.¹

Article 9² being one of the corner stones, sets the tone for a Transfer Pricing adjustment by confirming in a treaty situation the (domestic) right of a contracting state to adjust the profits of an enterprise located on its territory, wherein such an enterprise is managed, held or controlled directly or indirectly by another enterprise³ of the other contracting state if the conditions in their relationship differ from the conditions⁴ which would have been stipulated between independent enterprises.⁵ This research paper involves the discussion of the transfer pricing regime in the United Kingdom and how it has evolved over time especially after the Tax re-write.

II. T.P. REGULATIONS & RULINGS

The extant Transfer Pricing Rules, which came into force on April 1, 2010, form part of Taxation (International and Other Provisions) Act (TIOPA) 2010. Parts 4 and 5 of the TIOPA, incorporates the principal UK transfer pricing legislation. TIOPA, 2010 was incorporated as a part of the UK government's tax law rewrite project and expounded a restatement of all the previous provisions provided,

¹ United Nations Model Double Taxation Convention between Developed and Developing Countries, art. 9, (2001), *available at* <http://www.un.org/esa/ffd/wp-content/uploads/2014/09/DoubleTaxation.pdf>

² *See id.*

³ Under Indian legal regime, it is referred to as the 'Associated Enterprise' under section 92A of the Income Tax Act, 1961, Act No. 43 of 1961 (hereinafter 'IT Act').

⁴ Controlled 'International' Transactions as contradistinguished with Comparable Uncontrolled Transactions (CUTs)

⁵ *See* Sections 92, 92A to 92F of IT Act, 1961 *available at* http://caclubindia.s3.amazonaws.com/cdn/forum/files/602188_1009063_sec_92_of_inco metax.pdf.

inter alia, under Income and Corporation Taxes Act (ICTA) 1988 & Schedule 28AA which were applicable from 1 July 1999 to 1 April 2010.⁶ The central government agency having the primary responsibility for enforcing the transfer pricing rules is the Her Majesty's Revenue & Customs (HMRC). The taxpayer and the revenue department are also guided by the transfer pricing rules provided under Schedule 28AA⁷ & section 770A of the Corporation Taxes Act, 1988. Several amendments have been carried out to the same thereafter.

Similar to the US regulations, UK follows the same approach of making the transfer pricing regulations applicable to 'all related party transactions' once the following threshold conditions are met:⁸

- (A) A 'provision' has been made or imposed between two persons by means of a transaction or series of transactions;
- (B) One of those persons was directly or indirectly participating in the management, control and capital of the other; or the same person or persons were directly or indirectly participating in the management, control and capital of both parties to the provision;
- (C) The actual provision differs from the arm's length provision which would have been made between different enterprises; and
- (D) That difference gives rise to a potential UK tax advantage.

In earlier years before the introduction of the self-assessment procedure, which is similar to US self-assessment procedure, it was not obligated upon the assessee to adopt the arms-length price, except where a specific direction from the HMRC was issued.⁹ Now of course every Assessee has to comply with the transfer pricing regulations by identifying such transactions and making appropriate adjustments to reach the ALP at the time of filing their returns.

The applicability of the regulations in cases of related party transactions extends to cases where one enterprise either controls the other enterprise or both the

⁶ PwC, INTERNATIONAL TRANSFER PRICING 2013/14 792 (2013), available at <https://www.pwc.com/gx/en/international-transfer-pricing/assets/itp-2013-final.pdf>

⁷ See *id.*

⁸ See generally Slaughter & May, *Transfer Pricing 2016 United Kingdom*, LAW BUSINESS RESEARCH LTD. 2 (Oct, 2015). Note that after 1 April 2004, the rules have applied to UK-to-UK transactions; similar to the Indian SDTs (Specified Domestic Transactions) from 2012.

⁹ See V.S. WAHI, TRANSFER PRICING LAW 768 (2011).

enterprises/entities are under a single common control. The threshold for transfer pricing rules to apply between parties ranges between 40 percent and 50 percent ownership;

As seen here, ‘control’ is not restricted to the usual one party being majority shareholder in the other instance but also enlarges the scope to ‘*effective control*’ wherein one party exercises the power to ensure that the affairs of another party are conducted in accordance with the terms as provided by the said first party. PwC¹⁰ rightly provides that the concept of control as set out under Section 1124 is subject to important extensions *qua* TP adjustments under Part 4 of the TIOPA 2010, Part 4¹¹ –

- i) “The rules apply to many joint venture companies where two parties each have an interest of at least 40%.
- ii) Attribution rules are used to trace control-relationships through a number of levels in determining whether parties are controlled for the purposes of the transfer pricing rules.”

Though as per sec. 4 of the TIOPA, 2010, schedule 28AA does not capture within its ambit transactions occurring between a UK company and its own branch and/or a permanent establishment; which is in stark contrast with the Indian TP regulations where a permanent establishment (PE) is defined as part of an ‘Enterprise’,¹² (which if and how proven to be an ‘Associated Enterprise’),¹³ would be subject to the Indian transfer pricing rules. TIOPA 2010, Part 4¹⁴ is not applicable to the transactions between the Assesse enterprise and its PE or branches as the law does not treat them as two separate legal entities. “Instead, other sections of the legislation as well as the ‘Business Profits’ article of the relevant Double Tax Agreements (DTA) operate to tax the appropriate amount of profit in the UK...In the case of a UK branch or permanent establishment of an overseas company, income arising directly or indirectly through or from the branch remains taxable in the UK under

¹⁰ See *id.* at 793

¹¹ See Income and Corporation Taxes Act 1988, c. 1 sch.28AA (hereinafter ‘ICT Act’)

¹² See sec. 92F, IT Act)

¹³ See *id.* Sec.92A

¹⁴ See ICT Act, c. 1 sch.28AA.

Corporation Tax Act (CTA), 2009.”¹⁵ An overseas branch/PE of a UK resident company may well fall within the mischief of these provisions and consequentially the UK corporation tax may well become applicable to the branch/PE.¹⁶

Both the Indian and UK transfer pricing regulations borrow the definition of Permanent Establishment (PE) from the OECD guidelines, since neither of the countries has defined the same under their respective statutory provisions. The definition includes any fixed place of business and/or agents/agency acting on behalf of the overseas company, Not just merely rubber-stamping their decisions, but acting on their independent volition in certain given circumstances or all; and excludes any entity merely rubber-stamping the decisions of the overseas company and/or carrying on only preparatory or auxiliary functions.

There is no gain in saying that obviously the law provides that any such transactions between the Assessee and such a permanent establishment has to be necessarily at arm's length. Examples would include disallowance of deduction in any payment/s of royalty or any such relatable fee/s made by the PE to be assessee for use of the intangible asset, ownership of which lies with the UK resident Assessee.

It is extremely germane to point out that the UK TP rules follow the ‘*one-way street approach*,¹⁷ i.e. where in the course of carrying out the TP analysis, the assessee makes a detrimental TP adjustment, it would be allowed. This is where the result increases taxable profits or reduces allowable losses in the UK. On the

¹⁵ See WAHL, *supra* note 9, at 794.

¹⁶ Provisions for the same introduced by the Finance Act, 2003; Few limited exemptions are provided to certain cases of small and medium-size enterprise/s (SMEs); In fact, SMEs are not required to apply transfer pricing unless (i) they elect to do so (which can be done only irrevocably), (ii) they transact with an affiliate in a ‘non-qualifying’ territory (broadly, a territory which does not have a ‘full’ double tax treaty with the UK), or (iii) they receive a notice from HMRC requiring them to apply transfer pricing; Slaughter & May, *supra* note 8, at 4.

Per Contra : “The exemption does not apply where the enterprise has transactions with or provisions which include a related enterprise in a territory with which the UK does not have a double tax treaty with an appropriate nondiscrimination article. Such transactions remain subject to the UK’s transfer pricing rules.”

¹⁷ See VAHL, *supra* note 9.

other hand, where it is beneficial for the Assessee, it is impermissible, and This is where the result is decreased taxable profits or greater allowable losses.

Apart from codified legislation on the subject, for further guidance periodically updated HMRC Manuals are prepared and are available for internal use by the Department. Notably, some of the TP provisions of the International Manual were substantially rewritten in 2012. Furthermore, The Practical guidance on transfer pricing covers the following main areas:

- i) Governance.
- ii) Risk assessment.
- iii) Working an enquiry.
- iv) Examining TP reports.
- v) Gathering evidence.
- vi) The interaction with direct taxes.

III. ARM'S LENGTH PRINCIPLE (ALP) & TP METHODS USED

The UK methods are entirely similar to those applied in India¹⁸ –

1. Comparable Uncontrolled Price Method
2. Resale Price Method
3. Cost Plus Method
4. Comparable Profits Method
5. Profit Split Method
6. Other Method/s

Though as such there are no preferred methods but the HMRC, in line with the OECD TP Guidelines 2010, provide that the general traditional transaction methods are to be applied followed by transactional profit methods; and the comparable uncontrolled price (CUP) is one of the preferred methods for determining the ALP, wherever comparable uncontrolled transactions can easily be documented and verified.

That having been said, subsequent to a tax case in 2010, HMRC more routinely challenges the robustness of external CUP data, particularly in relation to IP licenses. The challenge can be blunted only when analysis around the relevant

¹⁸ See ICT Act, c. 1 sch.28AA.

entities in question and their respective bargaining positions qua the third party is taken into account and properly documented.¹⁹

Adjustments are carried out under schedule 28AA in the same manner as under the Indian and US TP regulations, between related parties/associated enterprises, where of course the transactions are not within the arm's length range. It is pertinent to note that there are no specific provisions or rules which provide for the manner/modus operandi for carrying out these adjustments. Once an adjustment is made to profits under schedule 28AA, the tax authority cannot make any increases (sic) to the price to be offered to the UK taxpayer or issue of refund for reduced price.²⁰ Moreover, there is no scope for any secondary adjustments available to the HMRC.

Needless to add, that since the UK follows the self-assessment procedure, the primary obligation to make adjustments, if any, to the price or income lies solely on the Assessee. One of the important exceptions provided under the UK TP rules is that adjustments would not be allowed even though the transaction is a non-arm's-length transaction if it does not consequentially result in any tax advantage in UK.²¹ Though, Adjustments for any consequent double taxation (which may arise from under another country jurisdiction's TP Regulations) can be provided if requested for and proven therein, there is a time limit (at least six years) on pursuing the Mutual Agreement Procedure (MAP). The UK has an extensive double taxation treaty network, with over 100 treaties, including treaties with all of the world's 50 largest economies other than Brazil and Iran. Most of these treaties have effective MAPs.

IV. JURISPRUDENCE OF THE TRANSFER PRICING LAWS IN THE UK

The United Kingdom is not fraught with litigation which is quite opposite to the Indian scenario where almost all transfer pricing cases end up in litigation. The resolution mechanism for the transfer pricing disputes in the UK is mostly

¹⁹ ERNST & YOUNG, 2012 TRANSFER PRICING GLOBAL REFERENCE GUIDE (2012), available at <http://www.ey.com/gl/en/services/tax/international-tax/transfer-pricing-and-tax-effective-supply-chain-management/2012-transfer-pricing-global-reference-guide---united-kingdom?pe=2012>. (last visited Mar. 3. 2018)

²⁰ See WAHL, *supra* note 9, at 771

²¹ See *id.*

through negotiations between the Assesse and the HMRC, under a more collaborative umbrella.

The perception did undergo a brief change from collaborative to litigational following the publication of the Litigation and Settlements Strategy (LSS) by HMRC.²² But experience has shown the litigational approach to be restricted to the “tax avoidance” cases, and in fact prescribes that – “*where possible, issues should be resolved in non-confrontational and collaborative ways without entering into a dispute*”²³.” HMRC’s recent Report titled “Improving Dispute Resolution”, providing 35 recommendations²⁴ and its establishment of the Business International Division (BID) in January 2009 with the responsibility of especially addressing international transfer pricing issues, adds fuel to the collaborative approach adopted by the HMRC in TP disputes.

One of the rare occasions where the matter entered into the adjudicatory arena was in the landmark judgement of *DSG Retail v HMRC*²⁵ where the hearing lasted for 15 days. The pertinent highlights of the judgement have been discussed below:

A. *DSG Retail v HMRC*²⁶

The case is also referred to as the Dixons case since it is concerned with the sale of extended warranties to third-party customers of Dixons, a large retail chain in the UK selling white goods and home electrical products. It involved substantial application²⁷ of the transfer pricing regulations and provisions and the OECD Guidelines, to ascertain the appropriate TP method for making a transfer pricing

²² See Peter Nias, *Transfer Pricing and Dispute Resolution—The U.K. Experience*, 28 INT’L TAX J. (Sep- Oct, 2010).

²³ See HMRC’s Litigation and Settlement Strategy (LSS) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387743/Litigation_and_settlement_strategy.pdf

²⁴ See Peter Nias, *Tax: Alternative Dispute Resolution*, 3, (Aug. 8, 2013), available at https://www.pumptax.com/wp-content/uploads/old/documents/WLDoc%20%2013-9-12%204_30%20PM.pdf.

²⁵ [2009] STC (SCD) 397

²⁶ *Id.*

²⁷ The earlier cases involved adjudication only on procedural and interpretative issues – *Watson v. Hornby* (1942), *Sharkey v. Wernher* (1955) and *Petrotim Securities Ltd v. Ayres* (1963), established the principle of arm’s-length prices for transactions between related parties as now embodied in the legislation; See *supra* note 6, at 796.

adjustment. The facts of the case surrounded the issue of sales commission. DSG, one of the largest retailer of electrical goods in the UK had a subsidiary, CIS, which further acted as an agent for Cornhill Insurance plc (Cornhill) and offered DSG's customers extended warranties on electrical goods, in return for which Cornhill paid CIS a sales commission. What caught the eye of the HMRC was that Cornhill was retaining 5% of the risk and reinsuring 95% of the risk with DISL, a subsidiary of DSG, incorporated in the Isle of Man, even though there was no privity of contract between DSG and DISL directly. This, the HMRC contended, resulted in a large proportion of the profits accumulating in the Isle of Man subsidiary, DISL, on which tax in the UK was not being paid.²⁸ HMRC sought to bring a larger share of the profits into charge in the UK by invoking the transfer pricing rules and contending that the arrangements were not consistent with the arm's length principle. The major issues, which arose for determination, were:

1. In light of no direct contractual relationship, could the TP provisions be made applicable?
2. Applicability of Schedule 28AA ICTA to the arrangement between DSG & DISL. In this regard, Section 770 ICTA may also be mentioned, since the period under enquiry included years prior to the introduction of Schedule 28AA ICTA – Benefit conferred upon DISL represented the giving of a 'business facility' [under ICTA s 770 (which applied in respect of the period 1996/97 to 1998/99)] or a 'provision' from DSG Retail [under ICTA Sch. 28AA (which applied from 1999/00 to 2003/04)].
3. Did the arrangement result into conferment of a potential advantage in relation to UK tax?
4. Nature and extent adjustment is required.
5. TP methodology to be used.

²⁸ Chelsea Roche, *Landmark case on UK transfer pricing rules: DSG Retail v. HMRC*, 23 July 2009, BIRD & BIRD LLP, available at <https://www.twobirds.com/en/news/articles/2012/landmark-case-uk-transfer-pricing-rules> (last visited Mar. 15, 2018)

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6. Selection of the appropriate ‘tested party’ for benchmarking this transaction.

The Special Commissioners (first tier tax tribunal) ruled on the applicability of the TP provisions to the transactions in the affirmative and held that Section 770 of ICTA 1988 and Schedule 28AA were fully applicable to the particular series of transactions and “essentially the phrases ‘facility’ (Section 770) and ‘provision’ (Schedule 28AA) were interpreted broadly so that there was something to price between DSG and DISL, despite the insertion of a third party and the absence of a recognised transaction between DSG and the other parties involved”.²⁹ For this, a corresponding fee had to be levied and should have been paid by DISL, having regard to the risks undertaken and functions performed by DISL.³⁰

The tribunal rejected the Assessee’s choice of comparables in similar contracts based on DSG’s (Third-party re-insurer) position –

- i) Being a strong powerful brand
- ii) DSG’s point-of-sale advantage being the largest retailer of domestic electrical goods in the UK.³¹
- iii) DSG’s point-of-sale advantage as per DSG’s past claims data.
- iv) The powerful brand providing extended ‘off-the-shelf’ warranty cover through disparate distributors.
- v) Looking at the market return on capital of DISL.

The First Tier Tax Tribunal concluded that this advantageous bargaining power of DSG gave rise to ‘Super Profits’, which need to be necessarily distributed between the concerned enterprises proportionately as per their normal competitive forces and each party’s bargaining power.

Apart from the bargaining power, the Tribunal, while rejecting the CUP method and comparables chosen by the Assessee, also observed that the time, product,

²⁹ See PwC, *supra* note 6, at 798.

³⁰ See Batanayi Katongera, Hartley Foster, *Two key transfer pricing cases: DSG and Xilinx*, TAX J. (Sep. 28, 2010), available at: <https://www.taxjournal.com/articles/dsg-retail-ltd-and-others-v-hmrc-2009-stc-scd-397> (last visited Feb. 15, 2018)

³¹ The Tribunal also noted that DSG had a strong brand, powerful point of sales advantage through access to customers in their shops and could easily have sourced the basic insurance provided by DISL elsewhere; see PwC, *supra* note 6, at 798.

termination contract term and the ‘Extended Warranties’ clauses in the comparable contracts were very different. The Tribunal further validated the use of profit based methodologies, while employing the PSM method in the case therein, and affirmed its application in cases where reliable comparables cannot be found.

The contentions and judgment surrounding the term ‘provision’ under (Schedule 28AA) must also be seen in the light of the new legislation wherein section 147(1)(a) TIOPA, 2010 is made applicable in cases where a “provision ... has been made or imposed as between any two persons ... by means of a transaction or series of transactions,” which is different from the arm’s-length provision that would have been made between independent parties.”³² The term ‘provision’ is much wider under the new legislation as compared in the same sense of term or condition in a contract.³³

B. *Waterloo plc v. Inland Revenue Commissioners (IR Commrs.)*³⁴

This was another UK TP case in the new millennium where the Special Commissioners held that a tax should be leviable on Waterloo plc for providing share benefits to the employees of the subsidiaries, for them to participate in the option arrangements. This was termed as a ‘business facility and required an upward transfer pricing adjustment to Waterloo’s taxable profits.

The Court rejected the Assesse’s arguments on the inapplicability of Section 770³⁵ on the ground of no direct privity between Waterloo and the employees of the subsidiary, but instead being between the share scheme trustee and Waterloo plc. It held that as per the provisions of the UK transfer pricing regulations, section 770 of the ICTA 1988³⁶, requires ‘giving’ of facilities to a recipient, which in this case was done by providing remuneration to the employees of the subsidiaries for the clear and valuable benefit incurred by them under this

³² See Nias, *supra* note 24.

³³ See *id.* at 27; See S.147(5) TIOPA 2010; In such a given situation, “the profits or losses of the U.K. person who has benefited as a result should be computed as if the arm’s-length provision had been made.”

³⁴ SpC 301 [2002] STI 80

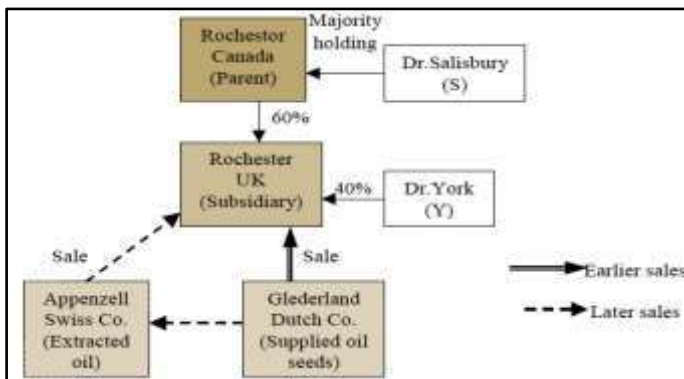
³⁵ ICTA, 1988.

³⁶ As amended by ICTA, 1988, S. 773(4)

‘business facility’.³⁷ Paragraph 57 of the judgement highlights the use of the phrase ‘business facility’ in the sense of a commercial and not as a legal term and held that – “*where a commercial term is used in legislation, the test of ordinary business might require an aggregation of transactions which transcended their juristic individuality*”.

C. Rochester (UK) Limited v. Pickin³⁸

Another case in the late 1990s was that involving the UK subsidiary of Rochester Canada. The transactions involved are depicted in the following Figure 1.

Fig. 1³⁹

The Court held in the Assesse's favour, and rejected the Revenue Department's contention of payments made by the Assesse to the Appenzell Swiss Co. for the medical research actually done for zero consideration. Since the department had failed to discharge the burden of showing any tax avoidance technique being put

³⁷ PwC, *supra* note 6, at 797; “On a wider level, the case provides a presumption that ICTA 1988, Section 773(4) allowed the Revenue to tax the total facility provided intra-group and did not require a transaction-by-transaction analysis. The Revenue issued guidance on its view of this case and, subsequently on the application of the arm’s-length principle to share plans in light of the accounting rules for share-based payments under IFRS, which apply to accounting periods beginning on or after 1 January 2005.”

³⁸ [1998] STC (SCD) 138.

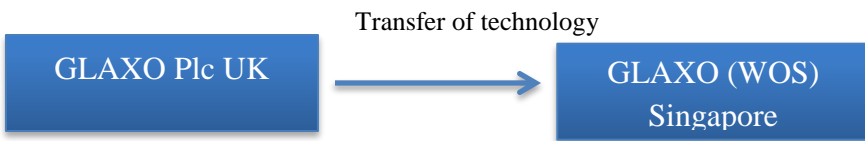
³⁹ NISHITH DESAI, RECENT INTERNATIONAL CASE LAW ON TRANSFER PRICING 26 (2002), available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Recent_International_Case_Law_on_Transfer_Pricing.pdf (last visited Feb. 15, 2018).

to use, the payments made by the UK Assesse were taken on its face as part of the commercial arrangement made wholly and exclusively for the purposes of and in facilitation of the assist, the state and the business within the meaning of S.74 (1)(a), CTA, 1988.

Some of the other earlier litigation and adjudication was undertaken upon the application of the legislation which preceded Schedule 28AA (ICTA 1988), in 2 1990's cases which have been discussed below.

D. *Glaxo Group Ltd v. IR Commrs.*⁴⁰

The facts of this case involved the transfer of technology from the UK Assesse (Glaxo Plc) to its wholly-owned Singapore subsidiary (Glaxo Singapore).



This instant case was on a distinctive footing and adjudicated a more preliminary issue deciding upon the power of the revenue department to make adjustments in the open assessments arising on account of application of its unsurprising provisions, without having to make any further assessment.

The court interpreted Section 485(3) & section 50(7) of the Income and Corporation Taxes Act, 1970 to hold that the Commissioner at complete powers to make any necessary arrangements even to increase the assessment at the hearing of the appeal, and make adjustments during the course of the assessment already open.

E. *Ametalco UK v IR Commrs.*⁴¹

In this case the Department initiated the levy of an implicit interest on an interest-free loan advanced by the UK Assesse to a related company on the requests of its parent company, by invoking Sections 770 to 773 of ICTA 1988. The court extended the application of transfer pricing provisions including the concept of 'business facility' (under Sec. 773, ICTA, 1988) to transactions involving loans and advances of money and held in favour of the department.

⁴⁰ [1996] S.T.C. 191.

⁴¹ [1996] STC (SCD) 399

V. DOCUMENTATION REQUIREMENTS

As mentioned earlier, the UK provisions and regulations pertaining to transfer pricing do not contain any rules for requiring any specific documentation. The general self-assessment rule has to be adhered by the Assessee by carrying out any related party transactions which requires taxpayers to keep and preserve the records needed to make and deliver the correct and complete return⁴². The International Manual on the record keeping requirements incorporates the HMRC guidance in relation to the Assessee maintaining accounting and tax records, for filing of the tax return for the relevant assessment year.⁴³ In case of unsurprising enquiries having been initiated, all the relevant documents pertaining to the said transaction in question would mandatorily have to be preserved for six years.

The relevant information and documentation requisite may include but be not limited to –

- i) The nature of the transaction ;
- ii) Method used & ALP determined after testing compatibility on the anvil of the FAR analysis comparative;
- iii) Commercial or financial arrangement in controlled and uncontrolled transaction be deleted and third parties respectively;
- iv) Any other material information especially relevant for the purpose of disclosure.

As stated above, the UK Transfer Pricing Legislation does not provide for the submission of any specific documentation except those which are to be necessarily filed along with the Tax Returns by the Assessee. The contemporaneous transfer pricing documentation maintained by the Assessee can help it avoid penalties leviable in cases of inaccurate tax return caused by careless (or deliberate) conduct (almost similar to the Indian Penalty levy under Section 271(1)(c) of The Income Tax Act, 1961, for providing ‘inaccurate

⁴² See WAHL, *supra* note 18, at 776.

⁴³ See *id.*

particulars’ and/or ‘deliberate concealment’), which gets offset by the reasonable belief with which the Assessee has carried out the TP analysis in the tax return.

In cases where there are specific requests or queries made by the HMRC seeking information in lieu of any enquiry qua the Assessee’s TP obligations, the Assessee must provide at least the FAR analysis, addressing the functions, assets and risks in the UK as compared to those belonging to other parts of the business.⁴⁴ The HMRC under its general information powers (introduced with effect from April 1, 2009) can ask for this information by issuing a written notice to the Assessee who is given a reasonable period of time to produce the said documents and relatable information.⁴⁵

HMRC’s Internal Guidance in its International Manual provides the record-keeping requirements. Basically HMRC specifies the following four classes of records/ evidence to be taken into account as follows: ⁴⁶

1. Primary accounting records (Documents in relation to the Transactions.) –
2. The tax adjustment records (Documents in relation to identifying Adjustments)
3. The records of transactions with associated businesses.
4. The evidence to demonstrate an arm’s-length result.

The Global Reference Guide by E&Y⁴⁷ further elaborates on these requirements, and states that in consonance with the OECD Guidelines, HMRC suggested inclusion of the following information:

- i) An identification of the associated enterprises with whom the transaction is made
- ii) A description of the nature of the business

⁴⁴ Slaughter & May, *supra* note 8 at 4, “There is no requirement to produce UK-specific evidence, so global, regional or non-UK transfer pricing reports may be accepted.”

⁴⁵ *Id.* at 802, “The person receiving the information notice may appeal against it, unless the notice is to produce the statutory records that the person is obliged to keep or if the tax tribunal approved the issue of the notice.”

⁴⁶ *Id.* at 804.

⁴⁷ Ernst & Young, *supra* note 19.

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- iii) The contractual or other understandings between the parties
 - iv) A description of the method used to establish or test the arm's length result, with an explanation of why the method is chosen
 - v) An explanation of commercial and management strategies, forecasts for the business or technological environment, competitive conditions and regulatory framework

VI. ANALYSIS OF TP PENALTIES

Yet again, as has been seen under the foregoing head of 'Documentation Requirements', there are no specific TP Rules or provisions on penalty and the general penalty provisions are automatically applied in case of any stated violation/s. Under the amended rules (with effect from April 1, 2009), penalty can be imposed for "failure to notify chargeability to tax, and/or failure to provide necessary & requisite information and/or filing of incorrect documents or returns".⁴⁸

Similar to the Indian provision of section 271(1)(c) of the Income Tax Act, 1961, the UK procedure also follows the twin test of applying the penalty provision in cases of Assesse providing inaccurate particulars or deliberate act of concealment. However, in UK, the quantum of penalty may vary depending on which of the two acts has been committed by the Assesse – ranging from 30-100%. In India, it ranges from 100 – 300%⁴⁹. The variation depends upon the 'degree of culpability',⁵⁰ whether there was a failure to take reasonable care, or it was deliberate or whether it was both deliberate and an act of concealment; the amount of penalty leviable would be 30%, 70% and 100% respectively for the three acts mentioned above. The threshold requirement for the Assesse to be penalised under these provisions is firstly the mandatory incurring of either a loss of tax or an increased claim to a loss or repayment and secondly the information provided is inaccurate which may be due to negligence or deliberate

⁴⁸ WAHI, *supra*, note 9, at 778.

⁴⁹ See generally IT Act, sec. 271

⁵⁰ See PwC, *supra* note 6.

or, deliberate and concealed.⁵¹

The provisions for careless or deliberate inaccuracies as contra-distinguished from sheer neglect are provided under schedule 24 of the Finance act 2007 (penalties for error) and the HMRC guidance on these revisions in the penalty provisions effective from 1 April 2008, is provided under HMRC International Manual⁵². The HMRC Guidance has set out examples of the negligence (maximum penalty of 30%) and/or deliberate inaccuracies (maximum penalty of 100%) –

Examples of negligence and carelessness include:⁵³

1. No attempt to price the transaction
2. Shared service centre overseas, cost base, allocation key applied — turnover, modest mark up, but no consideration of benefits test for UK entity
3. Policy, otherwise arm's length, not properly applied in practice

Examples of deliberate inaccuracies include:

1. A clear internal CUP has been omitted with no reasonable technical analysis to support why it has been disregarded;
2. A cost plus return to a company that has in reality controlled the development of valuable intangibles (as not demonstrable as a sub-contractor to group members);
3. Material factual inaccuracies in the functional analysis on which the pricing analysis has been based.

Thus, it is imperative for the Assessee to prepare and maintain proper transfer pricing documentation while submitting the tax return, fully evidencing the adoption of the chosen method for arriving at the arm's-length price. Such sufficient due diligence will offset any penalties arising as a result of negligence or carelessness.

⁵¹ Ken Almand, *Transfer Pricing & Penalties*, TAX J. (Sep 28, 2010).

⁵² See *HMRC International Manual*, para. 434040 (2016)

⁵³ ERNST & YOUNG, *supra* note 19.

VII. DISPUTE SETTLEMENT MECHANISMS IN CASES RELATING TO TP

The first line of courts in case of any dispute between the Assesse and the tax department is through an appeal to the to the First-tier Tribunal. This is usually in cases of an open enquiry or HMRC having issued a closure notice, amended the taxpayer's return or made a 'discovery' assessment. Unlike in India, the transfer pricing litigation is extremely scarce in UK and only two cases so far have reached the tribunal stage. Most of the reliefs are acquired, in the cross-jurisdictional cases, through the Double Taxation Advanced Agreements (DTAA) and MAP procedure established between the UK and the other country. The alternative available to the Assesse for dispute settlement through the Tribunal is the power to seek review from HMRC under the aegis of Section 49A of the Tax Management Act 1970 (hereinafter TMA). Under section 49E of the TMA, the review may result into HMRC (to be notified to the assessee within 45 days) choosing to uphold, vary or cancel its original view on the issue.⁵⁴ The Assesse may choose to take an adverse review order of the HMRC into appeal to the tax tribunal within 30 days; failure to exercise this choice will result into a deemed acceptance of the review order.

If a review takes place, HMRC may choose to uphold, vary or cancel its original view of the matter, and must notify the taxpayer of its conclusion within the following 45 days, or other agreed period (TMA 1970 section 49E).⁵⁵ If HMRC's review is unfavorable and the taxpayer does not wish to accept it, the taxpayer must file an appeal to the tax tribunal within 30 days; otherwise HMRC's review conclusions are treated as having been agreed.

A. Arbitration

A niche area not explored by any other jurisdiction (except UK & EU) is that of solving transfer pricing disputes through Arbitration. This of course was before **Brexit**⁵⁶, when UK being an EU member was a signatory to the Arbitration procedure of the EU Arbitration convention. Now the adoption of the same depends upon what agreement gets signed as a consequence of invoking of

⁵⁴ See PwC, *supra* note 6 at 802.

⁵⁵ See *id.* at 803

⁵⁶ For more information on the issue of BREXIT, see generally, <http://www.bbc.com/news/uk-politics-32810887>.

Article 50 of the Lisbon Treaty. Prior to Brexit, the EU convention insisted on a *mandatory arbitration procedure* in cases where there was no mutual agreement for 2 years or more.

Though there is no fixed *modus-operandi* for conducting the Arbitrations and are to be done on a case to case basis; the main procedure consisted of an Advisory Commission, which included independent experts who were bound to give their opinion within a specified timescale, wherein both the tax authorities of the two countries has to mandatorily act on this opinion or agree within six months on another course of dispute resolution.⁵⁷ The UK has also included arbitration provisions in its most recent double tax treaties, such as those signed with France, Germany and the Netherlands.⁵⁸

VIII. ADVANCED PRICING AGREEMENTS (APAS)

The APA legislation is contained in Section 85 to 87 of the Finance Act 1999, which was later rewritten (as part of the UK's Tax Law Rewrite Project) as Sections 218-230 of the Taxation (International and Other Provisions) Act 2010 (TIOPA) (Part V). Guidance for interpretation and practical application of the new APA legislation came in the form of the new Statement of Practice (SP) SP2/10. The UK APA program commenced in 1999. Prior to this date, the APAs were agreed using the MAP of the relevant DTAA. The UK APA program is today one of the most well-established and efficacious programs across the globe.⁵⁹

Like the US, India & other countries, the APAs are unilateral, bilateral or multilateral. Though the preference for the UK Assessee is bilateral APAs, one of the significant changes (in addition to relaxing the 'complexity' threshold for accepting APA applications) brought about in the HMRC's new statement is

⁵⁷ See WAHI, *supra* note 9, at 780.

⁵⁸ See PwC, *supra* note 6 at 808.

⁵⁹ KPMG, GLOBAL TRANSFER PRICING REVIEW: UNITED KINGDOM 4 (2013) available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/global-transfer-pricing-review/Documents/uk.pdf>. (last visited Feb. 15, 2018)

encouragement for a greater number of unilateral⁶⁰ APAs. Once the agreement is concluded, the Assessee loses the right to withdraw. The HMRC does have the authority to reject an Assessee's APA request but only after the Assessee has been granted the opportunity of being heard, and issued a former statement containing the reasons for rejection.

The time period for the APA is determined in the agreement itself, though HMRC expects most APAs to last for a maximum period of five years. The APA will apply prospectively for the assessment years subsequent to the application, although HMRC does allow 'roll-back' of APAs in certain given circumstances.⁶¹

Section 218(1) of the TIOPA 2010⁶², is the initiation section for filing the application under the statutory provisions. The procedure for APA with the typical steps is as follows –

1. The APA process is initiated by the Assessee
2. A Pre-Filing 'Expression of Interest'⁶³ and meeting with HMRC
3. Filing of a formal application to the HMRC
4. Evaluation of the application by HMRC (differs in procedure for a unilateral APA & for a Bilateral APA)
 - i) Check the TP methodology used.
 - ii) Several rounds of discussions between HMRC & the Assessee
 - iii) Exchange of information
 - iv) Negotiation With Taxpayer
5. Final mutual agreement between the Assessee & HMRC.

⁶⁰ See PwC, *supra* note 6, at 808.

⁶¹ See *id.* at 809.

⁶² See generally Finance Act, No. 27 of 1999, Sec. 85(1)(c)

⁶³ "The Expression of Interest presentation or meeting should generally cover: (1) The nature of the transfer pricing issues intended to be covered by an APA; (2) Details of the tax residence of the parties involved and the importance to the wider business of the transactions intended to be covered; (3) If already decided upon, a description of the proposed TPM by which prices are to be set or tested;" See Ernst & Young, *Guide to advance pricing agreements (APA): United Kingdom*, EY.COM available at <http://www.ey.com/gl/en/services/tax/international-tax/guide-to-advance-pricing-agreements--apa----united-kingdom> . (last visited Feb. 20, 2018)

6. Filing of Annual APA Report⁶⁴ demonstrating whether the Assessee has complied with the terms and conditions of the APA.

The formal application by the Assessee must include, *inter alia*, the following –

1. Enterprises involved
2. TP issues arising
3. Documents in support of methods proposed
4. ‘Critical assumptions’ assumed by the Assessee⁶⁵
5. Assessment period/years
6. Group structure (if and where applicable)
7. Nature and details of any ongoing or pending tax enquiries and/or Competent Authority claims.
8. And any other relevant ancillary issues arising that are within the reasonable knowledge domain of the Assessee during the course of the suggested APA.

It must be noted that the HMRC has the leverage to use the aforementioned information for any other purposes apart from evaluating the APA request.

A. Pre-filing conferences

Under the UK framework, (as pointed at no. 2 of the APA procedure above) the initial contact regarding APAs is referred to as the ‘Expression of Interest’ process. HMRC strongly recommends that an interested Assessee enterprise makes an informal first contact with it prior to submission of a formal application. For Large Business taxpayers, this may be done through their customer relationship manager at HMRC. The SP 2 Policy paper explicitly observes that this practice should be followed so as to “ensure that the resources of the business are not wasted on an unsuitable application and to ensure that the detailed work that will need to be undertaken by the business in finalizing (sic) its application is focused on relevant issues.” As per the HMRC it furthermore

⁶⁴ *Id.* The annual report is generally submitted with the business’ tax return. The particular requirements of each report are set forth in the finalized APA agreement and focus narrowly on the issue covered by the APA.

⁶⁵ “Taxpayers also need to take great care over the ‘critical assumptions’ in the APA. If these are breached, the certainty offered by the APA drops away entirely.” Slaughter & May, *supra* note 8.

provides it “an opportunity to outline a realistic anticipated timetable for agreeing an APA based on past experience, or to discuss other practical ‘process’ issues with the business.”

Though the HMRC aims at completing the APA process between 12-21 months from the date of formal submission, one of the differences between a unilateral or bilateral APA is that, a unilateral APA is quicker, wherein the HMRC takes around nine months for Application evaluation followed by negotiations over the terms and detail of the APA; whereas in a bilateral case the procedure may extend to beyond nine months.⁶⁶ (Figure 2 below). According to HMRC in the year 2013/2014, half of the APAs were formally agreed to within a time span of about 19.7 months, which was up by 4.7 months from the previous year.⁶⁷



Figure 5.2⁶⁸

An APA request can be made by any of the following:⁶⁹

Any UK business, including a partnership, with transactions to which the provisions of Part 4 of TIOPA 2010⁷⁰ apply (the UK transfer pricing rules)

Any non-resident trading in the UK through a permanent establishment

⁶⁶ PwC, CERTAINTY IN THE UNCERTAIN WORLD OF TRANSFER PRICING: WHITEPAPER ON APA IN INDIA 2011 (2011), available at https://www.pwc.in/assets/pdfs/publications-2011/pwc_india_-_white_paper_on_apa_in_india_2011-130112.pdf. (last visited Feb. 20, 2018)

⁶⁷ “Also as per the HMRC statistics in the year 2013/2014 43 APA applications were made, of which 29 were eventually agreed. In 2012/2013 45 applications were made but only 27 were agreed.” *Slaughter & May*, supra note 8

⁶⁸ PwC, ADVANCE PRICING AGREEMENTS: REMOVING UNCERTAINTY FROM TRANSFER PRICING (2014), available at <https://www.pwc.co.uk/tax/assets/Ing-shipping-transfer-pricing-considerationsng.pdf>. (last visited Feb. 20, 2018)

⁶⁹ See Ernst & Young, supra note 63.

⁷⁰ See ICT Act, c. 1 sch.28AA.

Any UK resident trading through a permanent establishment outside the UK.

Though the HMRC has not laid out any preference or categorization for the cases to be taken up under the APA program, usually the cases which are taken for consideration have complex transfer pricing issues⁷¹ or there exists a high likelihood of double taxation or there is ambiguity with regard to the implementation of the TP method and arm's-length price.⁷²

The United Kingdom along with US are one of the key territories for the APA programs. India and South Korea are the key growth jurisdictions having current focus, in the APAs.

IX. MUTUAL AGREEMENT PROCEDURE (MAP)

Apart from the APA another procedure of mutual agreement procedure (MAP) exists, which is dealt under Sections 124 and 125 of the TIOPA 2010⁷³; although it must be noted that there is no formal method prescribed for applying under the MAP in the UK and the HMRC does not take it as a formal alternative.

Therein the HMRC may choose to debate with the other tax authorities to eliminate instances of economic double taxation. However, regular meetings between HMRC and certain other tax authorities where the competent authority cases are likely to be most numerous, such as the Internal Revenue Service (US), the NTA (Japan) and the SLF/DGI (France), help considerably to resolve MAP cases. The designated competent authority for the MAP procedure is the CTIAA which handles the cases presented under the MAP in respect of any transfer pricing issues.⁷⁴

X. CONCLUDING COMMENTS

In the given scenario of BEPS Action Plans being implemented around the world, UK along with USA has been the frontrunner. This research paper has

⁷¹ See PwC, *supra* note 6, at 809.

⁷² *Id.*

⁷³ ICT Act, sec. 815AA

⁷⁴ See Ernst & Young, *supra* note 63.

highlighted the effectiveness of the rules and regulations relating to transfer pricing and their efficacy qua MNCs' profit shifting tax-avoidance measures, having base of operations both within and outside the UK. The execution of the Rules for resident Assessors as well non-resident taxpayers has been discussed in detail highlighting the same.

Needless to add, the United Kingdom having one of the most advanced transfer pricing regimes, also has the corresponding duty to ensure implementation of the globally discussed OECD Guidelines, vide its local laws. After its Tax Rewrite Project, it has done exactly that, which has made other countries like South Korea & Singapore follow suit. The few judgments mentioned above also point in the same direction. The UK regulations and their ubiquitous following has made United Kingdom one of the dominant BEPS spearhead.

TAXATION ON UNDISCLOSED FOREIGN INCOME AND ASSET: A GLANCE ON FLIP SIDE OF THE BLACK MONEY REGIME

*Dr. Debasis Poddar**

I. INTRODUCTION

Often than not a seasonal delicacy for the electorate, claim for possession of so called ‘black money’ out of political (read electoral) rivalry appears common to commoners and the same stands cherished before the same is put to shelf once again thereafter. Thus, occasional hue and cry apart, the same hardly attracted attention of Parliament due to want of political will, irrespective of wide variation in political orientation. Besides the lack of consensus, there is also a lack of contemplation in the given public administration about the concept of black money itself. While both, Department of Revenue and Income Tax Department accept the workable definition offered by National Institute of Public Finance and Policy (NIPFP),¹ the literature mentioned above, however, does little to distinguish between income generated from legitimate activities and activities which are illegitimate *per se*, like smuggling, illicit trade in banned substances, counterfeit currency, arms trafficking, terrorism and corruption.² However, whether these two qualitatively diverse domains may be construed alike and if so, what is the extent to which it can be done? It leaves a conundrum and is thus left apart for a deliberation elsewhere. In the given circumstances, let us move with the given flow of thought and thereby treat them alike.

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¹ ‘Black money’ can be defined as assets or resources that have neither been reported to the public authorities at the time of their generation nor disclosed at any point of time during their possession; *available at* <http://www.income-tax-india.com/read-answers/80-simple-meaning-of-black-money.html> (last visited Dec. 6, 2016). Also *see* Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, *Black Money, White Paper*, May 2012, *available at* http://finmin.nic.in/reports/whitepaper_blackmoney2012.pdf, (last visited Oct 6, 2016)

² *See id.* at 2

By its nomenclature, the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015³ (hereinafter *the Act*) conveys a clear message that the same is meant to recover the overdue tax on undisclosed income and assets generated and possessed out of India along with provisions for penalty and punishment on the count of *mala fide* suppression of material fact on the same from the concerned authority. In the crossroads of political polemics, the statute was enacted after a long-pending cry toward extraterritorial extension of the direct taxation network worldwide to book the cases of evasion. Also, given the instinct towards economic empowerment, the Act appears another bold one in a series of recent statutes to bulldoze major legal fetters on its way to recover tax otherwise due to India and imperative for fiscal strength of its people. So far as the technical craftsmanship of its legislative draftsmen is concerned, as one of the finest statutes since introduction of New Economic Policy (NEP) to embrace liberalization-privatization-globalization after the trend worldwide, indeed the Act deserves credit for its physical health, while mental health could have been better than what it is at present. Rather than a blunt appreciation, the effort is meant to engage a critical appreciation for betterment in times ahead.

II. LAW WENT OMNIPRESENT

Way back in the year 1600 AD, Shakespeare did bank upon divine justice thus: “If these men have defeated the law and outrun native punishment, though they can outstrip men, they have no wings to fly from God”.⁴ In terms of extra-territoriality, nowadays human law replaces divine law to book tax evasion and try these evaders in a manmade temple of justice even if the impugned income and assets are located elsewhere- far away from his native territory- and thereby governed by altogether different legal regime. In an increasingly globalized system of governance, the Act enables India to reach the evader and recover whatever stands overdue to the state along with his penalty and punishment, as

³ Act No. 22 of 2015

⁴ See generally WILLIAM SHAKESPEARE, THE LIFE OF KING HENRY THE FIFTH, or HENRY V (1600), Act 4, Scene 1.

the case may be. Thus, Indian income tax regime spreads across the world to unearth and drag all clandestine assesses with undisclosed foreign resource in its net. Likewise, the regime fortifies rule of law genre to one and all these assesses under the sun. The way foreign resources operate as a decisive divider between national players with local resource and those with foreign resources destabilize an otherwise level-playing field in the free market and thereby contribute to comparative advantage of the latter against the latter. Therefore, the regime holds great reasoning to this end.

The agenda behind the legislative output is manifold: (i) national resource generation for economic development to facilitate the transition economy; (ii) state surveillance on elite players and their operation in the market to attain better governance ahead; (iii) tiebreaker clause through tax treaty regime to initiate speed-breaker for the so called black money to get diverted to facilitate non-state actors in general and terrorist activists in particular to gross detriment of already threatened international peace and security worldwide. All these together constitute prudence behind the regime. Accordingly, as summary of all these concerns encapsulated in legislative debates, major agenda found expression in the precise language of the Preamble to the Act. Even the penology deserves mention since the same provides for empowerment of black money regime through teeth and nails, e.g. a penalty of three times the tax computed under section 10 of the Act in addition to tax,⁵ rigorous imprisonment for not less than six months but extendable to seven years and with fine,⁶ at times extendable to ten years as well,⁷ and the like. For the gentry abroad, target group of the regime, statutory intimidation seems pervasive enough in terms of deterrence to this end.

⁵ See sec. 41 of the Act.

⁶ See sec. 49-50 of the Act.

⁷ See sec. 51 of the Act.

III. LAW TURNED BLIND

On the flip side of the statute, a cynical mind may find lightning along with thunderbolt rather than shower to follow. Thus, compared to strong intimidation, implementation is unlikely to follow with evil consequence that the regime may end in smoke. For instance, while no state apparatus did stop Vijay Mallya, Member of Parliament, move out of India with a phenomenal amount of nine thousand crores (Rs. 90000000000/-) of Indian rupees which was somehow overdrawn out of nationalized banks, the likelihood that legislative optimism in favour of the same state apparatus for bringing in similar crowd back to India while they are abroad would get reduced to otiose. Except few, too few, occasions of political will out of extraneous reasoning, the implementation of the Act seems too low to blow-off the coverage over hitherto black money market. Like plenty of others, the Act has had strong potential to appear a legislative grandeur in the times ahead. While monster market players are well within the House of Parliament, despite popular wisdom, law-making stands exposed to get subverted from within and thereby perpetuate hitherto pervasive black money market in a way or another. Courtesy to juridical tongue-twister terminology, one accused of money laundering to the extent of nine thousand crores is labelled as “defaulter” (albeit wilful) and remains beyond reach of the state, while for petty amounts, another rots behind bars with the label of a “thief” with social solitude for family members left to their ‘tryst with destiny’; albeit not in the Nehruvian sense of the term.

An Achilles’ heel, however, lies elsewhere. A theory reigns in criminology to advance an argument that crime gets encouraged by the coexistence of high profit and low risk. Black money market across the world is run after the same praxis in administration of justice and India is no exception to this end. While drafting the Act, lawmakers fell severely short in reading human psychology out of everyday lifestyle in practice. No person with foreign income or/ and assets belongs to middle class of the society. Even middle class crowd which is otherwise perceived as a set to observe ethics and morality more often than not falls prey to erratic practices while receiving cash payment

elsewhere. For instance, payment for professional performance stands more often than not undisclosed to Income Tax Department since the same leads to 20 per cent reduction from the amount for those in the middle earning group. While this is the case for even four-digit sum (Rs. 1000/- or above), the state of mind of those earning in millions, thus liable to pay 30 per cent as tax, ought to get read in advance and enact the statute accordingly. While lesser percentage of taxation is bound to reduce the hitherto desperate trend of tax evasion, such impractical percentage of taxation accelerates the trend to this end. Also, want of implementation followed by *de minimis* conviction adds on to the trend. Together these variables contributed to draw an imagery of the Act as white elephant for the given black money regime. Indeed, there lies a valid defence to be advanced in support of the statutory regime and the same lies in criminalizing evasion followed by deterrence in penology to initiate punishment of long rigorous imprisonment and provision to get the same extended to ten years as well. The way-out, however, lies in untying the knot through corrupt practices here and there while India scores poorly in worldwide statistics prepared by a global caretaker.⁸ Thus, despite ocular opulence of the Act, issues and challenges remain as they were ever before. At its best, the Act requires market players to play smarter than earlier in hide-n-seek with policemen; nothing more and nothing else.

Last but not least, the Act being dedicated to grapple with residents other than not ordinary residents in India under the Income Tax regime, even if it is implemented, the Act is bound to set a heart-breaking trend for the affluent crowd hailed from India to take recourse to the endgame through surrender of citizenship and thereby sever their relationship with the Republic of India. Needless to mention, the same will serve the purpose for neither. Thus, blindfold implementation of the Act is likely to lead the diaspora of Indian elites toward exodus to disadvantage, if not damage, for India. In turn, economy, polity and diplomacy of India would suffer from kneejerk effect within its home and abroad alike. Back to introduction, in the black money

⁸ Transparency International, *Corruption Perceptions Index 2014: Results*, TRANSPARENCY.ORG, <https://www.transparency.org/cpi2014/results> (last visited Dec. 7, 2016)

regime, want of distinction between resource out of illegal activities and resource generated out of lawful activities but undisclosed to the concerned authority are considered alike to constitute black money. Unless and until India dissociates these two diverse areas of concern, the legislative fallacy would proliferate into more predicament than prize to resource governance. In a nutshell, no quixotic movement, economic foresight and forbearance foster the need of the hour. Earlier the state appreciated the same as better for its economy. In its otherwise valid anxiety for resource generation, the regime takes resort to overt intimidation of invasion while invitation with covert intimidation to its target group could serve the purpose better.

IV. CONCLUSION

To sum up, the Act seems prudent enough toward appeasement of popular perception against corruption in general and black money market in particular. Besides, the Act is bound to facilitate generation of political dividends by means of electoral mileage for crowd puller leadership, to silence the opposition leadership in floor of the House, clean imagery worldwide on the count of intolerance toward corruption, and the like. At bottom, however, the trajectory of economics is driven by different discourse; and at times appears poles apart from that of politics. Black money, with its widespread variety in terms of form and content, is a by-product of the market- economic space and the same needs economic prudence rather than jurisprudence to attain its object. For instance, newly introduced digital asset under the disguise of so called 'bitcoin' may and does contribute to the black money market. The Act, however, turns blind eye on bitcoin since the same is yet to earn value to the world of polemics (read politics). Had the Act been meant to deal with the problem of black money, bitcoin ought to get included for the sake of coverage of the regime. Regrettably, economic worry is run by political pressure to place the cart before the horse.

Thus after few years, if not decades, rising public pressure would be instrumental for another piece of legislation on bitcoinage to get enacted and

celebrated by the electorate thereafter. Also, the way black money is scheduled to affect the market hereafter, likewise bitcoin would prosper worldwide despite the legislative deterrence to this end. The marriage of economics with politics thereby procreates autistic instruments and thereby defeats the purpose of the law. Consequently, the legislative process culminates into a win-win ballgame for one and all, e.g. political party running the government is content with its credit to counter existing corruption, the civil society is content with its achievement to push the government to enact the statute, party in opposition is content with its contribution to bring in amendment and thereby turn the Act better, commoners are content with demonstration of their strength as electorate, players abroad are content with *status quo* for their hitherto existing foreign income and asset in the market, and non-state actors are content with their share flowed from the same. With such widespread contentment, the Act but appears another legislative grandeur in practice. With aggressive legislative jingoism, at bottom, *quiet flows the Don* and *all quiet in the Western front* – by courtesy contemporary literary rhetoric – to prove the eternal poetic prophecy in resource governance:

Making innumerable statutes, men

Merely confuse what God achieved in ten.

- *Humbert Wolfe.*

**COMPLETE LACK OF INTELLIGENT CARE AND DELIBERATION IN
FRAMING A REGULATION: A COMMENT ON CELLULAR
OPERATORS ASSOCIATION OF INDIA AND OTHERS V. TELECOM
REGULATORY AUTHORITY OF INDIA AND OTHERS**

Dr. Aneesh V. Pillai*

I. INTRODUCTION

Mobile Phones are one of the finest gifts given by the developments in science and technology. Today mobile phones are an indispensable part of our day to day lives. The most important attraction of mobile phones is its portability; anyone can carry anywhere and could stay in touch with others. Integration of camera and internet in mobile phones are another reason for its increased acceptance and dependence by the society. One of the most frustrating problems in mobile communication is the call dropping. Per Telecom Regulatory Authority of India, 'Call drop represents the service provider's inability to maintain a call once it has been correctly established i.e. calls dropped or interrupted prior to their normal completion by the user, the cause of the early termination being within the service provider's network'.¹ Mobile phone call drops are irritating and sometimes it can adversely affect the personal life to business relationships of the user.² Inadequate infrastructure, overloaded networks and fast paced expansion with poor investment by Telecom Service Providers to match the expansion are some of the reasons behind this occurrence.³

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¹TRAI, Press Release no. 48/2015, *Information note to the Press*, available at https://www.mygov.in/sites/default/files/mygov_1441799829190667.pdf (last visited Jan. 29, 2017)

² Pragyam Verma, Sattyam Kishore Mishra & Preeti Sharma, *Reasons of Mobile Calls Drop so Frequently*, 2 (5) INT'L J. SCI. AND RES. 1 (May, 2012)

³ Seema Jhingan & Manasi Chatpalliwar, *India: TRAI's Regulations for Compensation to Consumers for Call Drops Upheld*, MONDAQ.COM available at <http://www.mondaq.com/india/x/483436/Telecommunications+Mobile+Cable+Communi>

Over the years, the Telecom Regulatory Authority of India (TRAI) has taken many steps to solve the problem of call drops, however the problem is still existing. Recently, TRAI issued the Ninth Amendment to the Telecom Consumer Protection Regulations, 2015 and thereby imposed a duty on the part of service providers to compensate consumers in cases of call drops. This regulation has been challenged before the Hon'ble Delhi High Court and was upheld. However, on an appeal Hon'ble Supreme Court points out that, the Ninth Amendment to the Telecom Consumer Protection Regulations, 2015 is ultra vires to Section 36 read with Section 11 of the TRAI Act, 1997. The Apex Court also declared that, the impugned regulation violates the appellant's fundamental rights under Article 14 and Article 19(1) (g) of the Constitution. This paper briefly examines the judgment in *Cellular Operators Association of India and Others v. Telecom Regulatory Authority of India and Others*.⁴

II. BACKGROUND OF THE CASE

Telecom Regulatory Authority of India notified the Telecom Consumers Protection (Ninth Amendment) Regulations, 2015 on October 16, 2015, (to take effect from January 1, 2016). As per this Amendment, every originating service provider who provides cellular mobile telephone services is made liable to credit only the calling consumer (and not the receiving consumer) with one rupee for each call drop (as defined), which takes place within its network, up to a maximum of three call drops per day. Further, the service provider needs to provide details of the amount credited to the calling consumer within four hours of the occurrence of a call drop either through SMS/USSD message in the case of a post-paid consumer, such details of amount credited in the account of the calling consumer were to be provided in the next bill. Various writ petitions were filed in the Delhi High Court challenging the validity of this Regulation. However, the validity of the impugned regulation was upheld and the Writ Petitions were dismissed by the Delhi High Court. Against this impugned

cations/TRAI+Regulations+For+Compensation+To+Consumers+For+Call+Drops+Upheld (last visited Jan. 29, 2017).

⁴ (2016) 7 S.C.C. 703

judgment, a group of appeals were placed before the Hon'ble Supreme Court of India.

III. DISPUTED ARGUMENTS AND QUESTIONS

According to the Appellants, the Ninth Amendment of the Telecom Consumers Protection Regulations, 2015, is *ultra vires*, Section 36 r/w Section 11 of the Telecom Regulatory Authority of India Act, 1997.⁵ Elaborating their arguments, the appellants point out that present impugned regulation has nothing to do with ensuring compliance of the terms and conditions of licence, and none of such terms and conditions empowers the Authority to levy a penalty based on 'no fault liability'. There is already a Quality of Service Regulations, 2012 made under the same provision, *i.e.* Section 36 r/w Section 11 and the present impugned regulation is contrary to the Quality of Service Regulations.

These regulations, being subordinate legislations, is arbitrary and unreasonable, and affects the fundamental rights guaranteed under Article 14 and Article 19(1)(g) of the Constitution. Since, these regulations establish a strict no fault penal liability, it is manifestly arbitrary and unreasonable. Further it is argued that TRAI has no power to interfere with the licence agreement between Union of India and Service Providers. The learned Attorney General, appearing on behalf of the Telecom Regulatory Authority of India, has countered these submissions. Attorney General submits that, when read in light of the Statement of Objects and Reasons of the TRAI Act, 1997, it is clear that the Impugned regulation has been made bearing this object in mind and that the Impugned regulation conforms to Section 11(1)(b)(i) and (v) and is otherwise not *ultra vires* the Act.

Further, the Attorney General relied upon a statistic that shows an average of 36.9% of call drops takes place owing to the fault of the consumer – the rest take place because of the fault of the service provider. Therefore, the Impugned regulation should be read down so that service providers are made to pay only for faults attributable to them, which would come to a rough figure of 63% of

⁵ Act No. 24 of 1997

what is charged, for amounts payable to the consumers under the Impugned regulation. Further it is argued that both Quality of Service Regulations and the Impugned regulations are a parallel set of regulations which must be read separately (both having been framed by TRAI) to protect consumer interest. During the arguments of both parties, two important questions came up for consideration by the Hon'ble Supreme Court:

1. Whether the Ninth Amendment to the Telecom Consumer Protection Regulations, 2015 is *ultra vires* to Section 36 read with Section 11 of the TRAI Act, 1997?
2. Whether the impugned regulation violates the appellant's fundamental rights under Article 14 and Article 19(1) (g) of the Constitution?

IV. JUDGMENT

The Hon'ble Supreme Court took recourse to its earlier case *BSNL v. Telecom Regulatory Authority of India*,⁶ and observed the Regulation making power under the said TRAI Act is wide and pervasive, and is not trammelled by the provisions of Section 11, 12(4) and 13. However, this power should be exercised consistently with the Act and the Rules in order to carry out the purposes of the Act. The impugned regulation refers to Section 11(1)(b)(i) and (v) as the source of power under which the impugned regulation has been framed. The Section 11(1)(b)(i) empowers the TARI to ensure the compliance of the terms and conditions of the licence. After analysing Clause 28 of Quality of Performance Regulation, the Hon'ble Supreme Court concluded that, the Impugned regulation is not referable to Section 11(1)(b)(i) and (v) of the Act and hence it is *de hors* Section 11. Because, the Regulation has not been made to ensure compliance of the terms and conditions of the licence nor has it been made to lay down any standard of quality of service that needs compliance. Further under Section 36, not only does the Authority have to make regulations consistent with the Act and the Rules made thereunder, but it also has to carry

⁶ (2014) 3 S.C.C. 222

out the purposes of the Act. Since the Regulation does not carry out the purpose of the Act, it is *ultra vires* the Act.

The Impugned regulation is based on the fact that the service provider is 100% at fault, at the same technical paper dated November 13, 2015, which shows that an average of 36.9% can be call drops owing to the fault of the consumer. Hence, the Court observed: “this being the case, it is clear that the service provider is made to pay for call drops that may not be attributable to his fault, and the consumer receives compensation for a call drop that may be attributable to the fault of the consumer himself”. Therefore, the Court observed that, a strict penal liability laid down on the erroneous basis that the fault is entirely with the service provider is manifestly arbitrary and unreasonable.

V. ANALYSIS OF THE JUDGMENT

The Telecom Regulatory Authority of India (TRAI) was, established in 1997 by an Act of Parliament, *i.e.* the Telecom Regulatory Authority of India Act, 1997, to regulate telecom services, including fixation/revision of tariffs for telecom services which were earlier vested in the Central Government.⁷ The mission of TRAI is to ensure that the interests of consumers are protected and at the same time to nurture conditions for growth of telecommunications, broadcasting and cable services in a manner and at a pace which will enable India to play a leading role in the emerging global information society.⁸ However, the TRAI Act does not envisage redressal of individual consumer complaints/ grievances by the Authority. It provides that the Authority shall lay down standards of quality of service to be provided by the service providers and ensure that the quality of service is actually provided.⁹ Hence, it can be seen that the TRAI is

⁷ See generally *TRAI History*, TRAI.GOV.IN, <http://www.trai.gov.in/about-us/history> (last visited Feb. 2, 2017).

⁸ See generally TRAI, *A JOURNEY TOWARDS EXCELLENCE IN TELECOMMUNICATIONS* (2007)

⁹See TRAI, *Consultation Paper on Complaints/ Grievance Redressal in the Telecom Sector* 6 (2016), available at https://www.mygov.in/sites/default/files/mygov_1469705972190667.pdf (last visited Feb. 8, 2017)

authorised to issue various regulations to ensure the protection of consumer's interest.

Section 36 of the Act empowers TRAI to make regulations consistent with the provisions of the Act, to carry out the purposes of the Act. Since as per the Preamble of the Act, the protection of consumer's interest is one of the purposes of the Act, the TRAI is competent to issue the impugned regulation. Further Section 11(1)(b)(i) declares that the TRAI is charged with the function of ensuring compliance of terms and conditions of licence. Also Section 11(1)(b)(i) declares that, the TRAI is entitled to lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service. Hence, it can be seen that TRAI is competent enough to make a regulation which is a step towards for the protection of consumer's interest and can also direct the service providers to pay compensation as per the regulation.

Call drops can be considered as a deficiency in service by the service provided as per the provisions of Consumer Protection Act, 1986.¹⁰ Thus in cases where there is a call drop, a consumer can very well approach Consumer Dispute Redressal Forum. However, the consumers are ordinarily not inclined to file a suit or even approach the redressal agency, if the amount involved is trivial. At the same time, this trivial amount that is deducted from each call drop accumulates to a vast amount per month.

Further the consumers are usually reluctant to get involved in a lengthy and expensive litigation over such matters. This may encourage the service provider's to pay less attention on the issue of call drops. It is imperative that consumer complaints in the telecom space are resolved in a timely, efficient and cost-effective manner through a system that is easily available all across the country. Without such a system, benefits of the telecom revolution, which

¹⁰ CPA, Act No. 68 of 1986, sec. 2(1)(g) defines deficiency as: "any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner or performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service".

encompasses provision of a variety of services, such as banking, money transfer, govt. services, to the public will fail to meet the intended target.¹¹ In a welfare state, it is the duty of the Government to see that their consumers' interests are being protected. Hence the Government is duty bound to make regulations for protecting consumers against call drops. Therefore, the Ninth Amendment to the Telecom Consumers Protection Regulations, 2015 made by TRAI is well within the powers conferred under Section 36 read with Section 11.

The causes for call drops are either owing to the fault of the consumer, or owing to the fault of the service provider. According the technical paper, 2015, an average of 36.9% call drops are owing to the fault of the consumer. The impugned regulation, 2015 directs the service providers to pay compensation for all call drops irrespective of fault, is manifestly arbitrary and unreasonable, and thus violates Articles 14 and 19(1)(g). The impugned regulation, 2015 should have considered the observation made in the technical paper, 2015. A consumer may well suffer a call drop after 3 or 4 seconds in a voice call. Whereas the consumer is charged only 4 or 5 paisa for such dropped call, the service provider has to pay a sum of rupee one to the said consumer.¹² This would further suggest that the impugned regulation, 2015 is unreasonable and imposes restriction on the right guaranteed under Article 19(1)(g).

Further, the presence of Quality of Service Regulations, 2009 is in a way contradictory to the impugned regulations in 2015. The Quality of Service Regulations, 2009, grants an allowance of an average of 2% call drops per month and in case there is a failure to meet this parameter the service provider is liable to pay, by way of financial disincentive, an amount not exceeding Rs.1,00,000/-, and Rs.1,50,000/- for the second consecutive contravention, and Rs.2,00,000/- for each subsequent consecutive contravention. It is to be noted that both these regulations are issued with an ultimate aim of ensuring quality in service, hence, both these regulations should be read together. Such a reading would show that, the service providers are not responsible for 2% call drops for

¹¹ See TRAI, *supra* note 8, at 5

¹² *Cellular Operators Association of India v. Telecom Regulatory Authority of India and Others*, (2016) 7 S.C.C. 703, para. 49

a month and in any case the call drops goes more than 2%, the service providers are to pay the amount as per 2009 regulation and also to compensate as per impugned regulations in 2015. This would cause serious difficulty. It is seen that only 3 out of 12 licensees are not adhering to the said benchmark of 2% call drops.¹³ Therefore, in effect all call drops now persist would cover under 2% benchmark and as a result the service providers in reality require to compensate consumers for call drops.

VI. CONCLUSION

The object of impugned regulations in 2015 is to ensure quality service and to protect the interest of consumers. Thinking from the angle of a consumer this regulation is a superior effort taken by the TRAI to protect the consumer's interests. However, the language of the regulation invites trouble and ultimately becomes unconstitutional. Since the TRAI is empowered to make regulations, it could have considered the fact of 36.9% call drops are due to the fault of consumers. The impugned regulations of 2015 would not be arbitrary if the service provider was made liable only to compensate for call drops that can be attributed to the fault of the service provider. Further, instead of compelling compensation at the rate of one rupee, the Regulation could have imposed a duty to reverse the amount deducted from the consumers in cases of call drops. The contradiction with Regulations in 2009 would have also avoided by inserting a *non obstante clause* in the impugned regulations of 2015. Such a *non obstante clause* become relevant since the Regulations in 2009 does not provide any compensation to consumers for their loss. The decision in this case stands as a reminder of the fact of a complete lack of intelligent care and deliberation in framing a regulation.

¹³ See *id.* para 7

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