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FOREWORD

I congratulate the editorial board of The Indian Journal of Law and Public Policy (IJLPP) for successfully bringing out its Winter 2018 Issue. Such academic exercises give everyone hope, particularly in a climate of intellectual poverty brought on by self-imposed censorship. The last few years have been dominated by a climate of fear which had a chilling effect on intellectuals, academics, researchers. In such an environment, a journal such as this from students, tomorrows leaders, is most welcome. Keeping in mind the vitriolic and targeted attacks on students and universities, this solemn effort of publication must be celebrated and read.

The authors in the present Issue have addressed some unconventional matters thrown up by the Supreme Court in the recent judgment in *Puttaswamy* (2017 SCC OnLine SC 996) which firmly established the right to privacy as a fundamental right. The first article takes the lead in expanding the frontiers of the right and explores the right to privacy to extend it to deceased persons. The rights of the dead are and their survivors is a little-known subject in law and hence this contribution will go a long way in helping their heirs maintain their dignity.

The second article explores the dimensions of the Legitimate Expectation within the realm of Article 14 and advances it to concept of good governance. Article 14 itself has been given a new lease of life in the *Shayara Bano case* popularily known as the Triple Talaq case (2017 SCC OnLine SC 963) which held that legislation could be struck down on the ground of being arbitrary within the meaning of Article 14.

The Intellectual Property Law has been a much-contested terrain in Indian courts and particularly with regards to the pharmaceutical industry. The continuing battle between Multi-National Corporations (MNCs) at one hand who claim patents and jack up prices of essential medicines on the one hand and the public interest on other hand surfaced sharply and clearly in the *Novartis case* ((2013) 6 SCC 1). The judgment in denying a patent to Novartis on the ground that there was no significant invention advanced in the public interest on the issue of right of health. In the same light, the third article discusses the balance between IPRs and public interest to ensure monopoly is thwarted.

The last article deals with the current political and developmental issues namely the much-talked about "Make in India" which was meant to encourage start-ups in India. The author

points out limitations of the policy proposed at conceptual level and lack of its implementation. This has direct policy and economic implications for the country and points to an alternative paradigm which could be adopted.

Finally, I congratulate the authors and publishers collectively for keeping up this knowledge production effort in the field of law and public policy, and for giving students the opportunity to develop the frontiers of the law

- **Ms. Indira Jaising**

Senior Advocate, Supreme Court of India

CONCEPT NOTE

The Indian Journal of Law and Public Policy is a peer reviewed, biannual, law and public policy publication. Successive governments come out with their objectives and intentions in the form of various policies. These policies are a reflection of the Executive's ideologies. Laws, concomitantly, become the means through which such policy implementation takes place. However, there might be cases of conflicts between the policy and the law so in force. These contradictions have given way for a continuing debate between the relationship of law and public policy, deliberating the role of law in governing and regulating policy statement of various governments.

This journal is our solemn effort to promote erudite discernment and academic scholarship over this relationship, in a way which is not mutually dependent on each of these fields but which is mutually exclusively and independent. The journal believes in ideology of quality over quantity and furnishes its platform for only quality articles. In this edition, we received more than hundred articles from students, researchers, professors and practitioners all over India. Out of these few best articles have been published after rigorous review process. The focus has been to give a multi-disciplinary approach while recognizing the various effect of law and public policies on the society.

(EDITOR IN CHIEF)

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THE 'GRAVE' ISSUE OF PRIVACY OF THE DECEASED

- *Antony Moses and Palada Dharma Teja**

Abstract:

The law of privacy is recognition of the individual's right to be let alone and to have his personal space inviolate. The need for privacy and its recognition as a right is a modern phenomenon. With the modern world rapidly becoming a surveillance society, the need for a robust privacy law has never been felt stronger.

The right to privacy, as enunciated by our courts, extends to all living persons. However, whether the said right extends to deceased persons is unexplored and needs to be seriously considered. The prevailing laws, especially those relating to information technology, protect the informational privacy of persons but whether deceased persons would come within its ambit needs to be elucidated. This paper shall expound the law relating to privacy, especially in light of the Puttaswamy[1] judgment, and shall, inter alia, attempt to make a jurisprudential analysis of the rights of deceased persons.

This research paper further discusses the road ahead for the law of privacy in India. Furthermore, it discusses the possible actions that could be taken to strengthen the legal framework governing the right to privacy.

Keywords: *Privacy, Deceased, Physical Privacy, Informational Privacy, Personal Autonomy*

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[1] Justice K S Puttaswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161.

I. Introduction

In the much-celebrated judgment of *Justice K.S. Puttaswamy (Retd.) v. Union of India*,[1] a nine-judge Constitution Bench of the Supreme Court of India held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution of India. It is a well-timed judgement, as in this epoch, concerns of privacy have become justifiable to both the living and dead alike, especially with the rise of social media. The reputation of both these categories of persons has never been in a more delicate position before. But, the question as to whether a breach of a dead person's reputation or privacy bears legal significance or as to whether decedents can be claimed to be 'persons' in this regard, still begs an answer. It is to this question that the authors seek to kindle discussion.

The plausibility of assigning legal rights to the dead is seemingly large in the scholarly community[2] particularly among interest theorists. Honouring the dead is not so unusual in this world and the authors argue that the interests that the deceased may have which are sought to be protected by rights are substantially grounded on dignity and reputation. As Salmond pointed out, these are definitely interesting that concern the anxieties of men beyond their lifetime.[3] The nature of these rights is inter-changeably similar, owing their origin to Article 21 of the Constitution. Generally, privacy is the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life.[4] Thus, the right to dignity and reputation is subsumed in certain cases like the one concerning this paper.

This paper, apart from examining the legal, jurisprudential and philosophical perspectives, will also delve into the practical aspects and cultural norms and morals that drive the creation of legal rules in the protection of these rights and it shall, attempt to provide a rudimentary analysis as to the extent of the right to privacy of the dead. In reaching such a conclusion, firstly, this paper shall subscribe to the Interests theory of rights which recognises persons

[1] *Id.*

[2] *See* Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 CAN. J.L. & JURIS. 29, 30 (2001); *See also* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 763–64 (2009).

[3] *See* JOHN SALMOND, SALMOND ON JURISPRUDENCE 301 (P. J. Fitzgerald eds., 12th ed, 2007).

[4] N.A. Moreham, *Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort*, *in* LAW, LIBERTY, LEGISLATION 231–248 (Jeremy Finn & Stephen Todd, eds.,2008), *available at* http://www.victoria.ac.nz/law/about/staff/publications-nicole-moreham/nm-law-liberty- legislation.pdf.

incapable of exercising choice also asII. potential right owners.[5] The Interest theory confers rights upon the dead because it subscribes to the theory that the dead also have interests that survive death, and as such, rights are ascribed to these interests to protect their well-being. Secondly, this paper shall keep mentally competent and living human beings as a reference point for discussion as their enjoyment of rights is uncontroversial. The drawing of similarities and differences between the dead and the living shall, to a large extent, explain the bases of the norms and morals that assign such rights to the dead.[6]

In his separate opinion, R.F. Nariman, J. observed that in the Indian context, a fundamental right to privacy would cover at least three aspects: physical privacy, informational privacy and personal autonomy.[7] For the purposes of this paper, the authors shall refer to the said classification for the analysis of the concept of privacy.

Why Recognise the Right to Privacy of The Dead?

Any breach or harm done to the privacy right of a living or dead person must be seen in an objective manner. To put it clearly, if X's privacy right is said to be violated, it may be construed that his interest in his privacy has been affected or 'harmed'.[8] But, when such an analogy is drawn in favour of a deceased person, the first question that begs an answer is whether a deceased person be considered as a potential right holder? If so, when one does not know or experience the consequences of such an injury, how could it be considered that such a person's right to privacy or his interest in it therein has been violated?

The first question can be answered in the affirmative. The dead are indeed identifiable. They can be recognized by their name, their physical appearance and shape and by the memories that surround them (especially the recently departed). They continue to have symbolic existence through the said characteristics[9] and they continue to be personified even after their

[5] Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 CAN. J.L. & JURIS. 29, 30 (2001).
[6] *See* Privacy and Medicine, Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/privacy-medicine/#PhyPri last accessed on 15/05/2018.
[7] Justice K S Puttaswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161at ¶ 81 (R.F. Nariman, J.).
[8] *See* DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 15 (1ST ED. 2008).
[9] *Id*. at 25-34.

death. They are still subjecting of human emotions such as love and hate.

Moreover, they are part of the human moral community.[10]Brecher states that even in death, individuals continue to be identified as part of the community.[11] Its best manifestation is in the fact that people leave behind a legacy, either material or psychological or both.[12] Raymond Bellioti argues that people desire to be remembered after death and he calls such a desire as one to which 'a principle of justice be applied properly when evaluating the lives led by them'. By such reasoning, it may be said that any posthumous event which harms the dead is bad because it violates the demands of justice.[13]

The latter question is effectively answered whilst taking an objective perspective over the concept of interests. To put it clearly, if X's interests are harmed, must X experience and be aware of the harm and its consequences and or is it sufficient enough for an action to be objectively bad, regardless of X's awareness of it? The authors subscribe to the latter because the former requires X to hold a mental state of well-being. In any event, X would be in a position to be aware and exercise discretion over his sources of well-being. There may be cases where X may possess an interest in Y without even being aware of it. For example, X may want to buy a house and may not be aware of requiring money to buy the same. But the ignorance of the interest in which he should have been aware of, shall not necessarily deprive him of it. Further, in cases where a person lacks such a discretion, for example, if he is mentally ill or a child, the latter view provides them with protection and it is no question that these individuals do possess interests.

Besides, mental states of knowledge or want or desire for an interest are vague and obscure. They can be erroneous or illusionary and they are also difficult to be observed or identified from the outside.[14] By reason of the aforementioned arguments, it follows that the subject of a harm need not necessarily experience the harmful event. It is on this reasoning that the authors subscribe to the interest theory of rights as well. Therefore, it follows from this objective approach that if an act be considered as a breach, in regard to the privacy right of a living person, the same must be considered when dealing with a deceased person as well. But the extent of

[10]*Id*. at 82.
[11]*See,* Bob Brecher, *Our Obligation to the Dead*,19(2) J. APPL. PHILOS. 109–19, 113 (2002).
[12]DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 83 (1ST ED. 2008).
[13] Raymond A. Belliotti, *Do Dead Human Beings Have Rights?*THE PERSONALIST 206 (1979).
[14]*See* DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 9-12 (1st ed. 2008).

this right may vary between the living and the dead and it shall be discussed further.

III. Physical Privacy of The Dead

There have been several instances wherein the bodies of the deceased have been desecrated. In Kalahandi, Odisha, a man, after being denied ambulance service by the local hospital and other government assistance, had to wrap his deceased wife in bed sheets and carry her for about 12 kilometres towards the hospital.[15] Elsewhere in Allahabad, at its High Court, the dead body of an advocate was used by some members of the Bar Association for ransom and for their own selfish interests. The body had been brought from the mortuary to be kept in the portico of the Bar Association in the building of the High Court and the alleged members had threatened to carry the body through the corridors of the Court unless action against the jailer, in whose custody the person was entrusted in a contempt case, was taken.[16] These are some examples of gross violations of the right to dignity of decedents.

Article 21 of the Constitution of the India, in its extended meaning, provides for the disposition of a dead body in a decent and dignified manner. The right to dignity and fair treatment under Article 21 is not only available to a living person but also to his body after his death.[17]

The validity of conferring rights of physical privacy upon decedents, though limited, is warranted by the existing legal provisions. For example, Section 377 of the Indian Penal Code preserves the bodily integrity of a deceased person by prohibiting the act of necrophilia.[18] Further, the use of "rights" language by the courts and legislatures when creating provisions that benefit the decedent's interests substantiates this claim.[19]

Physical privacy, as a concept, is not new to the Indian judiciary. Justice Chelameswar, in the *Puttaswamy* judgement,[20] equalized

[15]Prabhash K Dutta, *Dead bodies hauled over shoulders, corpses desecrated: India is no country to die in*, India Today, (Aug. 26, 2016), http://indiatoday.intoday.in/story/man-carries-wife-body-on-shoulder-kalahandi-balasore-odisha/1/749367.html.

[16]*See* Ramji Singh v. State of U.P., Civil Misc. Writ Petition No.38985 of 2004.

[17]*See* Pt. Parmanand Katara, Advocate v. Union of India, (1995) 3 S.C.C. 248. *See also*Ramjit Singh v. State of U.P., Civil Misc. Writ Petition No.38985 of 2004; Ashray Adhikar Abhiyan v. Union of India, (2002) 2 S.C.C. 27; In Jamuna Das Paras Ram v. State of M.P.,the court has interpreted the word 'person' to include a dead body of a human being.

[18] Or any other 'unnatural' acts, which shall not be the sources of discussion of this paper.

[19] Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763-4 (2009) ("Consistent use of rights language, therefore, suggests that a series of social and cultural norms guide judges and legislatures to honor and respect the dead, particularly where the concomitant harms to the living are minimal").

[20]*See* Justice K S Puttaswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161 at ¶ 36 (Chelameswar, J.).

the concept of physical privacy with 'Repose' which is referred to as freedom from 'unwarranted stimuli', as described by Gary Bostwick.[21] He further attempted to describe the scope and nature of physical privacy and observed that "corporeal punishment", "forcible feeding of certain persons by the State" as intrusions to this right.[22] In *Selvi v. State of Karnataka*,[23]the Court has made considerable analysis on the right to bodily and mental privacy with respect to the administration of narco-analysis and brain mapping. The living persons enjoy physical privacy in three different ways: solitude, bodily modesty and bodily integrity.[24]

Solitude is an inherent part of physical privacy. Communities have understood its importance in specific points of time in an individual's life. For example, following the death of a loved one, orthodox Jews are expected to stay at home, apart from a daily visit to the synagogue, whilst others feed and care for them. Coming to terms with the loss of a loved one is a difficult, painful and largely solitary process which may be delayed rather than aided by distractions.[25] Changes of attitude are facilitated by solitude and often by change of environment as well. This is because habitual attitudes and behaviour often receive reinforcement from external circumstances.

However, the concept becomes obsolescent in death. The dead are distinguishable from the living in the loss of life in their bodies. The interests that are assigned to the dead are grounded on interests of dignity and autonomy. But they are also limited by factors of impossibility, importance of the right, time and conflict of interests between the dead and the living.[26] Among them, the factors that govern the obsolescence of the right are the former two.

Coming to impossibility, the capacity to be alone is a valuable resource when changes

[21] Gary Bostwick, '*A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision'* 64 California Law Review 1447 (1976).

[22]*See* Justice K S Puttaswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161 at ¶ 38 (Chelameswar, J.); *See also* Gautam Bhatia, *The Supreme Court's Right to Privacy Judgement III: Privacy, Surveillance, and the Body*, Indian Constitutional Law and Philosophy (Aug. 29 2017, 4:23 PM), https://indconlawphil.wordpress.com/2017/08/29/the-supreme-courts-right-to-privacy-judgment-privacy-surveillance-and-the-body/.

[23]Selvi v. State of Karnataka, A.I.R. 2010 S.C. 1974; *Seealso* Justice K S Puttaswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161 at ¶ 38 (Chelameswar, J.).

[24]*See* Privacy and Medicine, Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/privacy-medicine/#PhyPri last accessed on 06/01/2017; *See also A Buddhist Theory of Privacy, Chapter II, Philosophical foundations of privacy, available at http://www.springer.com/cda/content/document/cda.../9789811003165c2.pdf?SGWID...%20Cached%20Similar*last accessed on 06/01/2018.

[25]*See*ANTHONY STORR, SOLITUDE A RETURN TO THE SELF 31, 32 (1st ed. 1988).

[26]*See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763-4 (2009).

of mental attitude are required.[27] For that, a minimum level of cognitive ability is necessary. Hence, conferring such a right is impossible upon the dead. Further, the importance of a right decreases on the death of an individual, on the basis of it being personal in nature or the emotional cost attached with losing that interest while living.[28] Solitude, seen as a means to attain the renewal of one's habitual existence,[29] is no longer necessary for the dead, because they no longer exist in flesh and bone to renew their existence and personality. But, the concept of existence and personality is difficult to explain. Wherein belief in the revival of holy men from their state of 'Samadhi'[30] survives in the modern society and the concepts of spiritual personality are yet to be shaped in jurisprudence, it is best to keep the discussion of these concepts only to the living. For the aforementioned reasons, this paper will no further investigate into the concept of solitude.

Bodily modesty is widely identified as a moral virtue.[31] The desire to cover one's body, or to conceal one's bodily functions, varies from culture to culture, and from one period of history to another. For example, the adult women belonging to the Islamic religion cover their faces while the adult women of numerous tribes in Africa go almost completely unclothed without embarrassment.[32]In regards to the dead, the same seems to be applicable. While disposing of their dead brethren, men usually dress the men and the women usually dress the women.[33] Burial practices in most religions involve covering the dead in some way or the other.[34] But it is a fact that the bodily modesty of the dead vary from religion to religion. In *Ramji Singh v State of U.P.*,[35] the Court held that the State is obliged in law to provide necessary facilities for its preservation and disposal in accordance with dignity and respect which the person deserves. Interpreting it in

[27]*See* ANTHONY STORR, SOLITUDE A RETURN TO THE SELF 31, 32 (1st ed. 1988).
[28]*See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763-4 (2009).
[29]*See A Buddhist Theory of Privacy, Chapter II, Philosophical foundations of privacy, available at http://www.springer.com/cda/content/document/cda.../9789811003165c2.pdf?SGWID...%20Cached%20Similar*p. 34-35 last accessed on 15/05/2018.
[30]Dalip Kumar Jha v. State of Punjab, L.P.A. No.2043 of 2014.
[31]*See* G. F. Scheuler, *Why Modesty is a virtue*, 107 ETHICS467 (1997).
[32] Lois Shawver, *Bodily Modesty* (1992) available at http://users.rcn.com/rathbone/mil00002.htm#0002_0015 last accessed on 15/05/2018; *See also* R.J. Lewis & L. H. Janda, *The relationship between adult sexual adjustment and childhood experiences regarding exposure to nudity, sleeping in the parental bed, and parental attitudes toward sexuality*,17 (4) ARCHIVES OF SOCIAL BEHAVIOR (1988).
[33]*See* Cort McMurray, *Dressing the Dead: The sweet, sad ritual of clothing*, Houston Chronicle, (June 7, 2015), http://www.houstonchronicle.com/local/gray-matters/article/Dressing-the-dead-The-sweet-sad-ritual-of 6311141.php.
[34] Helen T Gray, *How Different Religions Bury their dead*, The Wichita Eagle, (May 13, 2011), http://www.kansas.com/living/religion/article1063828.html.
[35]*See* Ramji Singh v, State of U.P.,Civil Misc. Writ Petition No.38985 of 2004.

accordance with the prevailing cultural and moral norms, it can be inferred that the 'necessary facilities' for the burial of the decedent includes the right to bodily modesty as well.

The right to bodily integrity is the concept of an individual's right of autonomy and self-determination over his own body. This right obviously extends to the living and is recognised by the Constitution of India under Article 21 and under several international legal instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The *Puttaswamy* judgement quoted a plethora of cases in which the right to bodily integrity has been upheld and Justice Chandrachud conveyed the same.[36]

Several cultures across the world recognise the right to bodily integrity of the decedent. For example, in Judaism and Islam, tampering with the body or embalming it is prohibited while disposing of their dead. It does not mean that the right does not extend to such circumstances in which there is 'no body' in its corporeal form for the right to bodily integrity to be conferred upon i.e. in Hindu and certain other Western cultures like Protestantism, cremation of the dead is the practice. In Protestantism culture, where it is agreeable to cremate the dead, the body is seen as the temple in which the holy spirit resides, and thus it is prohibited to scatter ashes anywhere and they are to be contained in an urn at all times. On the other hand, Hindu culture considers it highly irrelevant whether the ashes are scattered or collected in an urn, because in the end, the soul, which sanctified the body has left the body.[37]

But ultimately, it seems that the extent of respecting the bodily integrity of the decedent seems largely to be dependent upon the decedent's wishes during his lifetime on how his body is to be disposed or handled after death. In the absence of any express command, the law seems to follow the course which the decedent would have preferred had he been living, on the basis of his religious faith. The same has been given statutory recognition in the Transplantation of Human Organs Act 1994.[38] Under the said Act, harvesting organs from the human body is only possible if the deceased had given his consent to it prior to his death or by the consent of his kith or kin or by the

[36] *See* Suchita Srivastava v. Chandigarh Administration,(2009) 9 S.C.C. 1; Selvi v. State of Karnataka, (2010) 7 S.C.C. 263; Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225, 1461 at ¶ 783; *See also* State of Maharashtra v. Madhukar Narayan Mardikar, A.I.R. 1991 S.C. 207.

[37] Helen T Gray, *How Different Religions Bury their dead*, The Wichita Eagle, (May 13, 2011), http://www.kansas.com/living/religion/article1063828.html.

[38] *See* Ramji Singh v. State of U.P.,Civil Misc. Writ Petition No.38985 of 2004.

State, if the body is unclaimed.[39] There may be several sociological reasons as well for the recognition of a legal right to individuals to make decisions about treatment to their corpses. One is that contravening people's prior wishes is considered to harm the dead and dishonour them. Another reason is that such a right may be granted because living people care about what happens to their bodies after death and the law confers this right upon them to give them confidence that their wishes would be respected. On this basis, the dead need not have the right because the law creates it to comfort the living. Also, we may protect an interest in posthumous bodily integrity because, as a society, we wish to see ourselves as people who respect the wishes of the dead. It could be because we promise people that we will respect their wishes, and we want to be a society that keeps our promises.[40]

However, there are certain obstacles that present themselves while explaining these concepts of privacy rights. A person, after death, still exists as a continuing influence on other people and on the development of various events. He exists as memories of him, residing in the minds of people who knew him or knew of him and exerts his influence through the array of possessions which he accumulated and then bequeathed or failed to bequeath. For a certain period after his death, a person can be morally assimilated. Mahatma Gandhi or Nelson Mandela are examples of great personalities whose influence still endures in people's lives.[41]

All of the aforementioned reasons for assigning legal rights to the dead are grounded on reasons of morality and respect for the decedent's wishes and in cases, it normally lead us to the conclusion that these individuals do not hold these rights that we have elaborately discussed.[42] It is right to assume that the furtherance of interests of these individuals may be impaired after their death but however they are afforded certain legal safeguards by virtue of them being morally assimilable in the society. What may be affected is the extent of the safeguard on their interests and not their rights. The rights of physical privacy are natural rights, given the status of fundamental rights in various constitutions and international covenants[43]

[39] Section 3 of the Transplantation of Human Organs and Tissues Act 1994.

[40] *See* Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right it is,* 14 MARQ. ELDER'S ADVISOR 197 (2013).

[41] *See* Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 CAN. J.L. & JURIS. 13, 14 (2001).

[42] *Id.*

[43] *See* Justice K S Puttaswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161 at ¶ 40-46, 134 (Chandrachud, J.).

and therefore they would be available to these individuals too, but the extent to which society affords them these rights in questionable.

Another circumstance in which the concepts of bodily modesty and bodily integrity seem to become obsolete is during times of natural calamities or war. The dead are usually so much that they overwhelm the State's resources to carefully dispose of them with dignity and respect. But the governments of the world usually make attempts to trace the identity of the decedents to dispose of them with dignity and in accordance with their faiths.[44] The right still remains but the protection that it affords to provide to those interests may become scanty. Organizations such as the International Committee of the Red Cross and the World Health Organization hope to facilitate in supporting the governments of the world to provide their citizens these rights of physical privacy.[45]

IV. Informational Privacy of the Dead

In his separate opinion, R.F. Nariman, J. observed that informational privacy deals with a person's mind and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Any unauthorized use of such information may therefore lead to infringement of the said right. Furthermore, Sanjay Kaul, J. recognised the said right to informational privacy and observed that certain other rights emanate from the right to privacy such as the right of individuals to exclusively commercially exploit their identity and personal information, to control the information that is available about them on the 'world wide web' and to disseminate certain personal information for limited purposes alone.[46]

The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet. However, the said right to privacy is not absolute and is therefore

[44] *See* Sebastien Berger, *Burial for hundreds of unknown tsunami dead*, The Telegraph, (Dec. 07, 2006), http://www.telegraph.co.uk/news/worldnews/1536277/Burial-for-hundreds-of-unknown-tsunami-dead.html.

[45] *See* Pan American Health Organisation, Management of Dead Bodies After Disasters: A Field Manual for First Responders, 2nd edn (2016) available at http://www.who.int/hac/techguidance/management-of-dead-bodies/en/ last accessed on 15/05/2018; World Health Organization, Management of dead bodies: Frequently asked questions, available at http://www.who.int/hac/techguidance/management-of-dead-bodies-qanda/en/ last accessed on 15/05/2018.

[46] Justice K S Puttaswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161 at ¶ 54 (Sanjay Kaul, J.).

subject to reasonable restrictions based on compelling state interest.

The decision of the Supreme Court in *Canara Bank*[47]can be said to lay the foundation for the import of the concept of informational privacy into India. In this case, the Court held that the information provided by an individual to a third party carries with it a reasonable expectation that it will be utilized only for the purpose for which it is provided.

In *Her Majesty, The Queen v. Brandon Roy Dyment*,[48] the Court observed that the informational privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit. In *R v. Spencer*,[49] the Court set out three key elements of informational privacy: privacy as secrecy, privacy as control, and privacy as autonomy.

In the age of information technology, businesses and governments often aggregate a variety of information fragments, including pieces of information which may not be viewed as private in isolation to create a detailed portrait of personalities and behaviour of individuals.[50] The balance between data regulation and individual privacy raises complex issues requiring delicate balances to be drawn between the legitimate concerns of the State on one hand and individual interest in the protection of privacy on the other.

In this context, it is pertinent to allude to the privacy rights of a deceased person. In the *Puttaswamy*[51]judgment, Abhay Manohar Sapre, J. observed that the right to privacy of an individual is a natural, cherished, inseparable and inalienable right which is born with a human being and extinguishes with it. In *Ramji Singh v. State of U.P.*,[52] the Allahabad High Court made an important reference to the rights of a deceased person. It observed thus:

We thus find that the word and expression 'person' in Art.21, would include a dead person in a limited sense and that his rights to his life which includes his right to live with human dignity, to have an extended meaning to treat his dead body with respect, which he would have deserved, had he been alive subject to his tradition, culture and the religion, which he professed…

Protection of informational privacy of a deceased person ensures that living

[47] District Registrar and Collector, Hyderabad v. Canara Bank, (2005) 1 S.C.C. 496.
[48] Her Majesty, The Queen v. Brandon Roy Dyment, [1988] 2 SCR 417.
[49] R v. Spencer, (2014) SCC 43.
[50]*See* Christina P. Moniodis, *Moving from Nixon to NASA: Privacy 's Second Strand- A Right to Informational Privacy*, 15 (1) YALE JOURNAL OF LAW AND TECHNOLOGY159 (2012); DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 70 (2008).
[51] Justice K S Puttaswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161.
[52] Ramji Singh v. State of U.P. and Ors., Civil Misc. Writ Petition No.38985 of 2004.

individuals re confident to provide sensitive personal information, in the knowledge that the said information will not be disclosed in inappropriate circumstances after they die. However, there exist many difficulties in protecting the informational privacy of a deceased person, especially online privacy, which is now a major concern in the increasingly globalized world. There are two primary theories offered as a means for protecting a deceased person's online privacy. The first is rooted in contract law, while the second is rooted in property law. The contract theory relies on analysing terms of service agreements that users accept to determine the scope of their posthumous privacy rights, while the property theory evaluates whether a deceased user's digital assets may be treated similarly to "real property" after death. These measures, however, do not sufficiently protect a deceased person's right to privacy. It is argued that the courts should extend tort law to a deceased person's right of privacy to protect his digital assets.[53] Currently, only a living person can bring a tort claim for invasion of privacy.[54] Extending the right to the tort posthumously is justified because the common law already recognize that people can retain their rights posthumously. Common law acknowledges deceased persons' rights after death. Under common law, an individual has the right to decide how to dispose of his or her own body after death.[55]

Regarding digital assets such as social media accounts, since common law already recognizes the right of an individual to make decisions about the disposal of his or her own dead body, it should also recognize a deceased person's interest in the privacy of his/her digital assets. Furthermore, relying on tort law to address the privacy concerns of the deceased can be justified and strengthened by the potential damage awards.[56] Damages are often brought for the purpose of restitution, punishment or vindication.[57] They are also frequently used as a means of deterring future misdeeds.[58] Judicial action that imposes punitive tort damages for violating a deceased user's privacy could deter other actors who may try to gain access to a deceased's digital accounts. Thus, since dignity and privacy are closely intertwined and digital assets tend to elicit much more personal

[53] Natasha Chu, *Protecting Privacy after Death*, 13 NW. J. TECH &INTELL. PROP. 255 (2015).
[54]RESTATEMENT (SECOND) OF TORTS § 652I(b) (1977); *See also* Hendrickson v. Cal. Newspapers Inc., 48 Cal. App. 3d 59, 62 (Cal. Ct. App. 1975).
[55]DAVID A. ELDER, PRIVACY TORTS § 1:3 (2013).
[56]*See* M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 STAN. L. REV. ONLINE 29, 29 (2011).
[57] Stein, 1 STEIN ON PERSONAL INJURY DAMAGES § 1:1 (3rd ed. 2013).
[58]*See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 357, 359, 363–64 (2003).

information than a dead body, extending the tort posthumously is necessary to protect these rights.

It is further important to deal with the privacy interest with regard to decedent's personal health information. Health information privacy is an individual's claim to control the circumstances in which personal health information is collected, used, stored and transmitted.[59] Confidentiality is a branch or subset of informational privacy. Several international legal instruments affirm the legal right to confidentiality in the medical context, such as the Convention on Human Rights and Biomedicine,[60] OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data[61] and the Charter of Fundamental Rights of the European Union.[62] Article 4.1 of the Declaration on the Promotion of Patients' Rights in Europe[63] specifically addresses the issue of post-mortem confidentiality. The General Data Protection Regulations, for instance, envisages a duty of confidence with regard to personal data, which extends beyond death. One justification for the right to confidentiality in the medical context is rooted in decedent's elementary right of privacy,[64] as acknowledged by case law.[65] However, it is pertinent to note that several inconsistencies exist across various jurisdictions, thus making it difficult to construct a coherent and convincing approach to post-mortem confidentiality. For example, in USA, the right to medical privacy is substantially eroded at death, giving personal representatives the ability to obtain sensitive information about a decedent's medical condition.[66] Daniel Sperling, in his seminal work on posthumous interests, proposed certain principles which serve as guidelines for striking a balance between various competing interests in protecting and disclosing health information after death.[67] Thus, it is important to delineate the nature of protection that is to be granted to information privacy of the deceased.

[59] LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY AND RESTRAINT 128 (2000); *See also* Barbara Von Tigerstrom, *Protection of Health Information Privacy: The Challenges and Possibilities of Technology*,4 APPEAL 44, 46 (1998).
[60] Convention on Human Rights and Biomedicine, Apr. 4, 1997, E.T.S. No. 164.
[61] OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (2013).
[62] Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012/ C 326/02.
[63] Declaration on the Promotion of Patients' Rights in Europe art. 4.1, June 28, 1994, ICP/HLE 121.
[64] DANIEL SPERLING, POSTHUMOUS INTERESTS 196 (2008).
[65] Hammonds v. Aetna Casualty & Surety Company, 243 F Supp. 793, 801-2 (ND Ohio 1965).
[66] In re Application of D'Agostino, MD 181 Misc. 2d 710, 695 N.Y.S.2d 473 (1999).
[67] DANIEL SPERLING, POSTHUMOUS INTERESTS 234 (2008).

V. The Right to Personal Autonomy or Decisional Privacy of The Dead

The third aspect of privacy that Justice Nariman makes mention in his opinion in the *Puttaswamy* judgement is "the privacy of choice, which protects an individual's autonomy over fundamental personal choices".[68] The right to personal autonomy or decisional privacy is a complicated concept that needs to be explained briefly if an analysis to be made of its relevance to the dead. Decisional privacy is the right to do something, as contrasted to the right to do it in seclusion, or the right to do it without the world knowing. Although it is distinguishable from the other two parts of privacy, conduct that is protected by decisional privacy is also protected by physical and informational privacy.[69] For example, the use of a condom in one's bedroom is protected by physical privacy. But it is a further question whether these physical privacy rights indicate the existence of a decisional privacy right to use a condom: from the fact that one enjoys a physical privacy right to use a condom in one's bedroom, it does not necessarily follow that one has a decisional right to use a condom.[70]

In *Stanley v. Georgia*,[71] the US Supreme Court held that ''mere private possession'' of obscene matter may not be criminalized. But the Court noted that the ''mere private possession'' of narcotics or firearms may be criminalized, as may private possession of obscene materials with intent to distribute them. These cases illustrate that physical and informational privacy rights are sometimes coupled with a decisional right (to view obscene materials or to use a condom, for example) but sometimes not (as in the case of private possession of hand grenades or narcotics).[72]

This right also sometimes overlaps with the right to liberty. An example to distinguish them is as follows: A right to consume any food is a "*liberty right*" just in case the right rests upon the fact that one is not morally forbidden to consumer any food. A right to consume any food is a "*decisional privacy right*" just in case the right rests upon the fact that interference with consuming any food is normally impermissible regardless of the moral permissibility of consuming itself.[73] Religion is also a very apt example of describing a decisional right to privacy. What one believes and professes as his religion is none of another person's

[68]*See* Justice K S Puttaswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161 at ¶ 81 (Nariman, J.).
[69]MARTIN P. GOLDING & WILLIAM. A. EDMUNDSON, THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 272-273 (1st ed. 2005).
[70]*Id.*
[71] Stanley v. Georgia, 394 U.S. 557.
[72]*Id.*
[73]*Id.*

business. This example is what decisional privacy could be described in its simplest form.[74] Several other examples are also mentioned in the *Puttaswamy* judgement.[75] Justice Chalemeswar's definition of privacy in the judgement consists of 'repose', 'sanctuary' and 'intimate decision'. Of this, he defines 'intimate decision' to consist of autonomy with respect to the most personal life choices.[76]

One shall examine whether the right to personal autonomy of the living continues to their death. 'Choice' is an important concept when the right to personal autonomy is being considered. Making decisions on one's life's choices is the subject of personal autonomy. However, to exercise this right of choice, a minimum level of cognitive functioning is required. The dead lack these requirements. It is for this reason, a Will theorist stated that a *right to personal autonomy* cannot be conferred upon the dead. But the Interest theory approach is superior in this respect because it acknowledges that the dead can have interests that survive death and classifies them as potential right owners and it is this interpretation that would validate the recognition of posthumous legal rights, if the lawmakers are driven by a desire to treat the dead with dignity.[77]

The law extends its protection to the deceased because the society wants to respect the wishes of the dead and because the society believes in the principle of autonomy.[78] Possibly, one of the reasons for conferring these rights is probably because the legal system wants to give confidence to men that their wishes and interests would be respected and protected after death.[79] There are however legal limits to autonomy, even for the living, and the

[74]*See* BEATEROSSLER, THE VALUE OF PRIVACY (1st ed. 2005).

[75]*See* Justice K S Puttaswamy (Retd.) v. Union of India, A.I.R. 2017 S.C. 4161 at ¶37-39 (India) (Chandrachud, J.). ["… the choice of people regarding the kind of literature, music or art which an individual would prefer to enjoy" (¶ 37), "an individual's rights to refuse life prolonging medical treatment or terminate his life" (¶ 38), "a woman's freedom of choice whether to bear a child or abort her pregnancy" (¶38), "the freedom to choose either to work or not and the freedom to choose the nature of the work" (¶ 38), and the freedom not "to be told by the State as to what [one] should eat or how [one] should dress or whom [one] should be associated with either in their personal, social or political life." (¶ 39)]

[76]*See* Justice K S Puttaswamy(Retd.) v. Union of India, A.I.R. 2017 S.C. 4161 at ¶36 (Chandrachud, J.); *See also* Gautam Bhatia, *The Supreme Court's Right to Privacy Judgement V: Privacy and Decisional Autonomy*, Indian Constitutional Law and Philosophy (Aug. 31 2017, 2:15 PM), https://indconlawphil.wordpress.com/2017/08/31/the-supreme-courts-right-to-privacy-judgment-v-privacy-and-decisional-autonomy/; Gary Bostwick, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976); Griswold v. Connecticut,381 U.S. 479, 487 (1965).

[77]*See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 763–64 (2009).

[78] *Id.*

[79]*See* Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right it is*, 14 MARQ. ELDER'S ADVISOR 197, 200-201 (2013).

law is constantly struggling with the exact boundaries of these limits.

With the dead, autonomy is more limited than with the living, because there is no individual who can speak out contemporaneously about the decedent's desires and also because the ability to make choices and change preferences dies with the decedent.[80] But the extent to which the autonomy of the dead can extend differs from a case to case basis.

For example, let us consider the right to reproductive autonomy. Advancements in science and technology have made it possible for the dead to exercise the right to reproductive autonomy. It may be possible in three different ways: (1) the use of frozen sperm after the death of the donor; (2) the use of frozen embryos after the death of one or both parents; and (3) the maintenance of a brain-dead pregnant woman to enable her foetus to develop more fully before delivery.[81] No landmark judgements have been made in India regarding whether the deceased have interests in their reproductive autonomy on how their gametes are to be used after death. In cases involving the former two scenarios, the Courts in the US have held that the deceased do have such interests and have stressed upon the need to protect them.[82] But they have also stated that posthumous reproduction shall be allowed only in cases where the intent is clearly reflected and in its absence, the destruction of the gametes is usually ordered.[83] Thus, this is a clear case wherein the personal autonomy of the dead is respected by the courts.

However, in the third case, when a brain-dead pregnant woman is kept alive by life support, the courts have interpreted the principle of autonomy in a different manner. In cases where the woman has expressed her intent to bear the baby, the law upholds her desire. But in cases where the woman has advanced her desire to be taken off life support, without knowing the development of a foetus, the law, by using the principle of autonomy, decides the case in favour of what she would have wanted had she foreseen these particular circumstances; in other words, it seeks to protect the foetus.[84] In the aforementioned cases, the law recognises the autonomy of the dead. However, it interprets in a different way so as to set aside the direct

[80] *See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 763–64 (2009).
[81] *See* Fred. H. Cate, *Posthumous Autonomy Revisited*, 69 IND. L. J. 1067 (1994).
[82] *See* Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 259, 270 (Mass. 2002).
[83] Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 282-83(Cal. Ct. App. 1993); *See also* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 763–64 (2009).
[84] *See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 763–64 (2009).

choice of the decedent because it dislikes the result.[85]

Another example would be the testamentary powers of the dead. Usually, the courts are not concerned about the fairness of the distribution of assets. The law is only concerned with its distribution in regards to the decedents' will. Even when inheritance is based on the fulfilment of a condition precedent, courts have seemed to uphold these partial restraints on marriage. In *re Estate of Keffalas*, the court held that a bequest to the decedents' three eldest unmarried sons was valid even though it was conditioned on each of them marrying someone of ''true Greek blood and descent and of Orthodox religion'. This bequest necessarily sets up a conflict between the decedent's right to freely bequeath his property and the right of his sons to marry partners of their choosing.[86] Nevertheless, the Court ruled in favour of the decedents wishes.

But Courts choose to rule in the contrary when the decedent's wishes impose some kind of restraint or burden on the living. For example, the law limits a testator's ability to destroy valuable pieces of art, manuscripts, and property upon his death.[87] Sometimes, a provision in a testator's will destroying property is held to be invalid as against public policy.[88] A permanent trust for the maintenance of his tomb is also considered to be illegal and void by the English Courts[89]. This is based on the reasoning that property is for the uses of the living, not of the dead.[90] These examples, though not exhaustive, best explain the reasons that the court may use to trace the extent to which the dead may exercise their right to personal autonomy. They further substantiate the claim that the courts do respect the autonomy of the dead.

VI. The Road Ahead for the Law of Privacy in India

It is thus understood that with no specific laws in place, the right to privacy remains a grey area. The notion of privacy is unable to challenge the new regime since it lacks a concrete theoretical justification. The AP Shah Committee Report (2012) is the most noteworthy contribution towards the journey to developing adequate mechanisms to protect the right to privacy in India.

[85] *Id.*
[86] Re Estate of Keffalas, 233 A.2d. (1967).
[87] *See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 763–64 (2009); *See also* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 796 (2005).
[88] Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 214 (Mo. Ct. App. 1975).
[89] Re Vaughan, (1886) 33 Ch.D. 187 (UK); Hoare v Osborne, (1866) 1 Eq. 585 (UK); *See* JOHN SALMOND, SALMOND ON JURISPRUDENCE 302 (P J Fitzgerald ed., Sweet & Maxwell 12 ed. 2007).
[90] *See* JOHN SALMOND, SALMOND ON JURISPRUDENCE 302 (P J Fitzgerald ed., Sweet & Maxwell 12th ed. 2007).

The Privacy Bill, 2014 is drawn heavily from the AP Shah Committee Report. It recognizes the right to privacy in India under Article 21 of the Constitution and restricts the scope of interference with it by formulating requirements including 'legitimate purpose' for data collection. The principles such as choice and consent, disclosure of information, openness, accountability among others are incorporated in the said bill. However, the bill suffers from certain lacunae. The right to privacy remains susceptible to be overridden by liberally worded exceptions such as 'security of India'. Moreover, the bill accords wide powers to governmental agencies. The recommendation of triple test i.e. principles of proportionality, necessity and legality to establish a meaningful balance between privacy and security is not considered adequate in ascertaining the scope of the exemptions. The broad exceptions carved out for the purpose of national security clearly act as barriers to the realization of a meaningful right to privacy.[91] The bill has not seen much progress since 2014 and is currently still at the consultative stage.

The demand for the law on right to privacy gained greater support after the Nira Radia tapes controversy (2010). In the said controversy, the telephonic conversations between the corporate lobbyist on one side and politicians, business leaders and journalists on the other were taped by the income tax department in the year 2008-09. The DoPT (Department of Personnel and Training) had prepared the draft on the right to privacy in 2010 after the tapes were leaked. The government is considering to amend the IT Act, 2000 rather than formulating a comprehensive law on privacy encompassing the provisions for data protection, bodily privacy and safeguards against surveillance (the "go slow" approach). The intelligence agencies have been sceptical about the comprehensive law holding that it will put restrictions on their activities leading to an impact on national security. In addition, it is not sure how the privacy law will be interpreted, dragging the police and intelligence agencies to the courts.[92] A robust privacy law looks like a distant dream.

In India, the privacy law is archaic and is not in consonance with the various

[91] Prakhar Bhardwaj and Abhinav Kumar, *Comparing two Inchoate Conceptions: Balancing Privacy and Security by E-Surveillance Laws in India*, 3 NATIONAL LAW SCHOOL JOURNAL 1 (2014).

[92] Pratap Vikram Singh, *Big Brothers will keep watching you*, Internet Democracy Project, available at https://internetdemocracy.in/media/big-brothers-will-keep-watching-you/, last seen on 15/05/2018.

complexities of this age.[93] There is an impending need for an omnibus privacy law to harmonize policies that affect our right to privacy. In the absence of an express privacy statute, privacy remains a *de facto* right, enforced through reasoning and interpretation of either constitutional or tort law. A mere amendment to Section 43A (compensation for failure to protect data) of the IT Act would only add to the complexity of the current situation. Right to privacy includes protection of sensitive personal and biometric information. Now, the question arises whether the UID Card (or Aadhaar card) scheme initiated by the Unique Identification Authority of India (UIDAI) infringes an individual's right to keep his/her personal information private. An Aadhaar card is issued by the UIDAI (government agency) to provide a unique identity to a person by obtaining his finger prints and vision pattern. It can be used as an identity proof and is a gateway to various government services. Every UID card holder has to furnish certain personal and biometric information. In *Mr. CJ Karira* v. *Planning Commission* (Delhi), an RTI application was filed to seek information regarding the sharing of information concerning Aadhaar card held by public authorities.

Recently, the Committee of Experts on a Data Protection Framework for India, chaired by Justice B. N. Srikrishna, released a white paper on November 27, 2017. The Committee was constituted in August 2017 to examine issues related to data protection, recommend methods to address them, and draft a data protection law. The objective was to ensure growth of the digital economy while keeping personal data of citizens secure and protected. The Committee suggested that a framework to protect data in the country should be based on seven principles: (i) law should be flexible to take into account changing technologies, (ii) law must apply to both government and private sector entities, (iii) consent should be genuine, informed, and meaningful, (iv) processing of data should be minimal and only for the purpose for which it is sought, (v) entities controlling the data should be accountable for any data processing, (vi) enforcement of the data protection framework should be by a high powered statutory authority, and (vii) penalties should be adequate to discourage any wrongful acts.[94] This is an important step in developing a comprehensive data protection law for the country. It is imperative the privacy rights of the deceased persons are also adequately

[93]Rishika Taneja and Sidhant Kumar, *Towards a Robust Right to Privacy in India*, (2012) 8 SCC J-13.

[94] PRS Report Summary, White Paper on Data Protection Framework for India.

addressed in the proposed data protection legal framework.

Thus, in the information age, the right to privacy remains highly vulnerable to the overpowering state's propensity to curtail individual liberties through a number of government policies. There is a pressing need for a comprehensive privacy law which satisfactorily addresses our privacy concerns, both against the State and private individuals. As has been pointed above, the Privacy Bill, 2014 suffers from several infirmities and needs to be strengthened in consonance with the international legal framework. The conflict between right to privacy and the Aadhaar project is incomprehensible.

VII. Conclusion

Thus, this paper traced the extent to which the law affords the right to privacy to the dead and further traces its origins in cultural norms and morals. The various facets of the right to privacy, as articulated by Justice Nariman in the *Puttaswamy* judgment i.e. physical privacy, informational privacy and personal autonomy have been analysed in regard to the deceased. The legal lacuna surrounding the privacy rights of the deceased must be comprehensively addressed by the legislature and the judiciary. The rights of the deceased must therefore be taken into consideration while interpreting the right to privacy. The content and duration of such a right has been effectively kept away from discussion in this paper as the authors believe that it is best handled by the judiciary. Though valuable guidelines could have been provided in this paper, in a country with different moral communities, any basic principle is subject to varying interpretations. The authors do not seek to exhaustively analyse these concepts but rather hope that this research paper provides impetus to the growing need for earnest deliberation on the privacy rights of the deceased. With regard to the Aadhaar project and the proposed data protection law, it is necessary that the Supreme Court adopts a proactive approach and perform its role of sentinel of fundamental rights of its citizens to provide a lasting solution to the architecture of enforced surveillance that is sought to be established in our country.

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DOCTRINE OF LEGITIMATE EXPECTATION - A COMPARATIVE STUDY OF UK, USA & INDIA

- *Jayanta Chakraborty*[*]

ABSTRACT

The "doctrine of legitimate expectation" is one of the newest weapons found in the armoury of judiciary to fight the menaces of unreasonableness and uncertainty on the part of the administration or the government. The basic idea behind this doctrine is that whenever there is any hindrance is caused to any individual due to certain policy change or deviation by the government then as a matter of legal right the individual can approach the judiciary to get a remedy. The accountability of the government is not merely confined within the boundaries of acting reasonably, but now has extended to the premises of certainty and predictability. This concept of "legitimate expectation" had its beginning through the common law judgments of the United Kingdom which was subsequently incorporated by the Indian court as well. In fact, the Indian judiciary has regarded this concept as an integral part of Article 14 of the constitution. Talking of constitutionality, even the United States of America is not behind and even though the American courts prefer the term "consistency principle" over the traditional "legitimate expectation" but still the treatment of the American judiciary is quite similar to that of UK and India. This study aims to study the position of the "legitimate expectation" doctrine in UK, USA and India and then draw parallels through comparison. The lacunas of the Indian approach will also be analysed and the areas where there is scope of improvement shall be discussed in details.

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I. INTRODUCTION

The "doctrine of legitimate expectation" is a significant effort by the judiciary to make the state answerable or accountable for its various actions or policies. If the state authorities announce a sudden change in their policy or deviates from the past practices which have been adhered to since a long time or goes back on its announced polices, which drastically affects the interests of common people then the judiciary may hold the state authorities liable for violating the "legitimate expectation" of the people.

This doctrine has been developed to provide a relief to the people when their interests are harmed but they are unable to ask for a relief on the basis of violation of their legal rights. The doctrine has been given due recognition within the domain of administrative law so as to bring about a certainty in government actions and to avoid arbitrary changes in government policies. The Indian Supreme Court has considered this doctrine to be an integral part of Article 14 of the Indian constitution and held that this doctrine ensures that the citizens are dealt in a non-arbitrary manner[1]. Again, in the case of *Ashoka Smokeless Coal India Ltd v. Union of India,*[2] the Supreme Court while defining the scope of "legitimate expectation" has noted that:

"*Principle of natural justice will apply in cases where there is some right which is likely to be affected by an act of administration. Good administration however demands observance of doctrine of reasonableness in other situations also where the citizens may legitimately expect to be treated fairly. Doctrine of legitimate expectation has been developed in the context of the principles of natural justice."*

In Halsbury's Laws of England, the "doctrine of legitimate expectation" has been explained as[3]- "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The existence of a legitimate expectation may have a number of different consequences; it may give *locus standi* to seek leave to apply for judicial review; it may mean that the authority ought not to act so as to defeat the expectations without

[1] State of West Bengal v. Niranjan Singha (2001) 2 SCC 326

[2] Ashoka Smokeless Coal India Ltd v. Union of India (2007) 2 SCC 640

[3] Halsbury's Laws of England 4th Ed. Vol. 1(1) 151

some overriding reason of public policy to justify its doing so; or it may mean that, if the authority proposes to defeat a person's legitimate expectation, it must afford him an opportunity to make representations on the matter. The courts also distinguish, for example in licensing cases, between original applications, applications to renew and revocations; a party who has been granted a license may have a legitimate expectation that it will be renewed unless there is some good reason not to do so, and may therefore be entitled to greater procedural protection than a mere applicant for a grant."

In the United States of America this doctrine is also known as the "consistency principle". Lewison L. Harold writes that "This principle fits well in the contractual setting. The party who complains about breach of contract is asserting, in effect, that the other party induced legitimate expectation when entering into the contract, and later frustrated these expectations by threatening or committing a breach of the contract. The consistency principle is closely related to the rule of law, which recognizes that each citizen has a legitimate expectation that the actions of public officials will be consistent with controlling law. The consistency principle makes its strongest claim when it coincides with established legal norms, such as the rule of law, the guarantees of equal protection and due process, and the law of contracts. Its weakest claim involves situations where inconsistency is built into our system of government. Between these two extremes the consistency principle may offer useful guidance. The consistency principle, on its own, cannot confer rights nor grant remedies. It merely provides a theoretical point of departure for discussion, and a possible source of inspiration for judges and other public officials in the development and implementation of policy." [4]

II. POSITION IN UNITED KINGDOM

United Kingdom is considered to be the birthplace of this doctrine. It was the common law courts that invoked this doctrine first as a matter of right when the affected persons have no other remedy left. Frankly speaking the "doctrine of legitimate expectation" was actually a private law concept which was given a bigger radius by incorporating its philosophy into the realms of public law. It can also be considered as branch of

[4] Levinson, L. Harold. "The Legitimate Expectation that Public Officials Will Act Consistently." "Am. J. Comp. L. Supp. 46 (1998): 549".

procedural fairness and doctrine of reasonableness.

This doctrine is much newer in area of administrative law and as the "legitimate expectation" doctrine gained popularity, it began to be applied in a variety of cases which have been categorized as follows:

i. "The first was cases in which a person had relied upon a policy or norm of general application but was then subjected to a different policy or norm.
ii. The second category, which was a slight variation on the first, included cases in which a policy or norm of general application existed and continued but was not applied to the case at hand.
iii. A third category arose when an individual received a promise or representation which was not honoured due to a subsequent change to a policy or norm of general application. [5]
iv. A fourth category, which was a variation on the third, arose when an individual received a promise or representation which was subsequently dishonoured, not because there had been a general change in policy, but rather because the decision-maker had changed its mind in that instance"[6].

Prof. Clive Lewis in his book *Judicial Remedies in Public Law*[7]talks about the origin and scope of the "doctrine of legitimate expectation". He writes that "the legitimate expectation doctrine commonly arises in two scenarios. The first is when a person who enjoys a benefit or advantage argues that they expect that the benefit or advantage will continue. In this instance, the substantive legitimate expectation can effectively preclude a decision-maker from exercising a discretionary power to revoke the benefit or advantage because revocation is only permitted in very limited circumstances. The other scenario is when a person does not yet enjoy a benefit or advantage but argues that they rightfully expect that it will be granted. In this instance, the substantive legitimate expectation can effectively force decision-makers to grant the benefit or advantage because the court can require decision-makers to take account of both the substantive legitimate expectation and the circumstances upon which it is based. The important quality in each form of substantive legitimate expectations that it leads a court very close to determining the outcome of administrative decision-making, rather than only its procedure. This move from procedure to substance is a

[5]Kioa v West (1985) 159 CLR 550, 583
[6]Salemi v MacKellar [No 2] (1977) 137 CLR 396, 404

[7] Lewis, Clive. Judicial remedies in public law. Sweet & Maxwell, 2004.

radical one that takes judicial review of administrative action well beyond its traditional boundaries."

This doctrine was introduced in the branch of administrative law in England by Lord Denning in the leading case of *Schmitd v. Secretary of State for Home Affairs*[8]. It was noted that an administrative body is bound to provide a person the opportunity of being heard if his right, interest or legitimate expectation were severely affected by an administrative action. In this instant case a petition was filed by some foreign students who had come to pursue Scientology at the Hubbard College of Scientology. They filed the case against the Home Secretary for not extending their stay permits to complete their period of study. It was alleged that the refusal to grant extension was not valid and that it was done for an unauthorised purpose which failed to comply with the practices of fair procedure.

The policy followed by the Home Affairs was to allow foreigners to enter the country to pursue full time study at any educational establishment and on this basis, permission was granted to the plaintiffs as well. Subsequently there was an amendment to the policy and the Minister of Health issued to the House of Commons declaring that Scientology is an objectionable practice and the government would take necessary steps to curb its growth which included the denial of extensions to foreign students who were studying this subject in UK. It was on the basis of this policy that the visa application of the plaintiff was rejected.

Dealing with the issue whether the action of the Minister was according to the authorized norms, the court held that under the common law "*no alien has any right to enter this country except by the leave of the Crow; and the Crown can refuse leave without giving any reason".* The court also interpreted the provisions of the Alien Order, 1953 and stated that "*Secretary of State has ample power either to refuse admission to an alien or to grant him leave to enter for a limited period, or to refuse to extend his stay… the Minister can exercise his power for any purpose which he considers to be for the public good or to be in the interests of the people of this country. There is not the slightest ground for thinking that the Minister has exercised the power here for any unauthorized purpose or with any ulterior motive."*

On the issue whether the Home Secretary was under a duty to act fairly, the Court emphasised the need to not act in unfair

[8]Schmitd v. Secretary of State for Home Affairs (1969) 1 ALL ER 904

manner or in an arbitrary manner. In this case it was held that the purpose of the Minister's action was disclosed in the statement submitted before the House of Commons.

This doctrine was further enhanced in the case of *Attorney-General of Hong Kong v. Ng Yuen Shiu.*[9]In this case the applicant was an illegal migrant who was originally a resident of China had entered into Hong Kong in 1967. After an amendment in immigration policy, the Director of Immigration was given the power to pass removal orders against such people and exterminate them. On petitioning the Governor a senior immigration officer had made the announcement that every illegal immigrant would be interrogated and "treated on its merits". After being questioned by an immigration office, the applicant was detained, and the Director of Immigration passed an extermination order against him without giving him an opportunity to defend his case. The main issue in the appeal was whether the applicant can claim for a right of fair hearing before a decision severely affecting his interests are made by a public official based on the concept of legitimate expectation of being accorded such a hearing. The court held that "the expectations may be based upon some statement of undertaking by, or on behalf of, the public authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry."

Applying the principles of legitimate expectation in favour of the applicant it was held that-

"*The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct. In opinion of their Lordships the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the Government of Hong Kong to the applicant, along with other illegal*

[9] A-G of Hong Kong v. Ng Yuen Shiu. (1983) 2 All ER 346

immigrants from Macau, in the announcement outside the Government House on October 28, that each case would be considered on its merits."

Perhaps the most leading case of this doctrine is the *Council of Civil Service Union v. Minister for Civil Service*[10]. In this case the House of Lords had overwhelmingly recognized the "doctrine of legitimate expectation" as a potential ground for judicial review of administrative action and had commented that "even when a person claiming some benefit or privilege has no justifiable legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so, the courts will protect his expectation by judicial review as a matter of public law. Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a long periodical which the claimant can reasonably expect to continue. It generally relates to a benefit or privilege to which the claimant has no right whatsoever in private law, and it may even be to one which clashes with his private rights".

Lord Diplock speaking about the application of this doctrine noted that-

"To qualify as a subject for judicial review the decision must have consequences which affect some person other than the decision maker although it may affect him too. It must affect such other persons either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some other benefit or advantage which either (i) he has in the past been permitted to enjoy which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

Lord Diplock categorically justified the usage of the term "legitimate expectation" over the term "reasonable expectation" so as to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' man would not necessarily have such consequences. Lord Roskill in the same judgment had

[10] Civil Service Union v. Ministry of Civil Service (1985) A.C. 374

simultaneously stated that although in recent times the terms reasonable expectation and legitimate expectation are being treated in a similar fashion, yet it would be preferable to use the adjective of 'legitimate'

In case of breach of legitimate expectation, the ground of judicial review is confined to determining whether procedural norms were adhered to by the administrative authorities at the time of taking the decisions. The applicable procedural norms are to be determined based on the substance of the issue of the decision, the powers of the authority making the decision and the particular circumstances in the light of which the decision was made. The prima facie rule of procedural propriety in public law applicable to such cases is that a benefit shall not be withdrawn until the reason for its proposed withdrawn has been communicated to the person who has until then enjoyed that benefit and that person has been offered an opportunity to comment on the reason.[11]

In recent years the doctrine has been expanded to include the claim for substantive rights as well. Lord Wolf in *R. v. North and East Devon Health authority, ex p Coughlan*[12]had stated that "where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon the change of policy."

Subsequently in R v Secretary of State for the Home Department ex parte Hindley[13] the English courts have merged the substantive and procedural part of legitimate expectations and emphasised that in all cases of legitimate expectation the court should fundamentally look into three practical questions:

i. What has the public authority whether by practice or promise committed itself?
ii. Whether the authority has acted or proposes to act unlawfully in relation to its commitment?
iii. What should be action of the court in this regard?

[11] See Supra Note 13
[12] R. v. North and East Devon Health authority, ex p Coughlan (2000) 2 SCC 326
[13] R v Secretary of State for the Home Department ex parte Hindley [2001] 1 AC 410, 421,

Thereafter the court shall determine fundamentally whether the reneging by an authority on its promise was 'so unfair as to amount to an abuse of power.'

So basically, in United Kingdom there has been a decisive shift in the last 3 decades where the dimensions of legitimate expectations have widened from the narrow walls of procedural irregularities to the substantive unreasonableness.

III. POSITION IN THE UNITED STATES OF AMERICA

The consistency principle

The American Courts have preferred the term Consistency Principle rather than the Common Law notion of Legitimate Expectation. The adherence to prior laid down legal and executive practices is the main areas of concern rather than looking much into the debate of procedural and substantive law. The party which brings a suit for the enforcement of contract actually pleads the doctrine of "legitimate expectation" for private contracts because rationally speaking he was having an expectation that the contract which he entered with expectations would be fulfilled.

The consistency principle can also be invoked in non-contractual settings. In cases when the government or state agencies suddenly shift their positions or change the customs which people were used to for a good number of years then the doctrine of "legitimate expectation" can be invoked even though American courts have not used this term in much cases.

In the case of Shaball[14] the American Supreme Court held that "the consistency principle is closely related to the rule of law, which recognizes that each citizen has a legitimate expectation and that the actions of public officials will be consistent with the existing law and legal practices. The consistency principle makes its strongest case when it clashes with established legal norms, such as the rule of law, the guarantees of equal protection and due process, and the law of contracts while in cases where inconsistency is built into our system of government the doctrine displays its weakest claim. Between these two extremes the consistency principle generally tends to present a balanced position.

This principle on its own generally does not give birth to any rights as such. But this principle is a useful aid in assisting the

[14]Shaball v. State Compensation Ins. Auth., 799 P.2d 399

judges to enforce any right which has been violated as a result of deviation from the general prevalent practices."

1. **Types of Consistency:**

a. **Horizontal consistency**

This type of consistency is generally observed at the federal level. The legislature, executive and judiciary are horizontal to each other that is to say that none is at a higher level than the other. The consistency followed by these 3 organs in performing their individual functions and also the relationship between these 3 organs can be termed as horizontal consistency.

b. **Vertical Consistency**

On the other hand, the relationship between the federal and state agencies in respect of all the 3 organs can be considered as vertical consistency. The vertical consistency denotes that some authority has the power to command a lower authority and the lower authority is bound by the decision of the higher authority.

2. **Difference between multiple layers of consistency**

Any public law in the USA is generally having various layers of provisions and implementing modes. In case a person's right in respect to such a right is violated then the courts can determine the amount of consistency only by looking into each such layer of the public law.

"If any law enforcement officer conducts a search which violates these expectations, the products of the search may be excluded from evidence".[15]In another case it was held that, "if a public official commits a serious violation of constitutionally protected rights, the victim may bring a constitutional tort suit."[16]

3. **Consistency protected by the Constitution**

The American Constitution itself has guaranteed certain provisions of consistency that is to be observed by the federal and state governments. The provisions regarding "ex post facto laws", "double jeopardy", "due process of law" and "equal protection" are such provisions which are incorporated both in the federal and state constitution. Thus, the consistency principle has deeper roots right from the inception of the constitution[17]

4. **A confluence of private interests as well as public interest**

[15] Taylor Bus Service v. Dept. of Motor Vehicles, 202 Cal. Rptr. 433

[16] Alfred C. Aman, Jr. & William T. Mayton, Administrative Law, Sec. 14.2 (1993)

[17] Lavin v. Emigrant Indus. Sav. Bank, 1 Fed. 641, 660-62 (Cir. Ct., S.D.N.Y., 1880)

In certain cases, an individual may have a "legitimate expectation" of consistency but yet the court may overlook such expectation if any larger public interest is proved to be present in denial of the consistency right.

Mathews v. Eldridge[18]incorporated the "flexible due process" prescribes a test having three different parts. The court held that:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail."

Taking into regards the applications of this three-part test, the Court adjudicated that "the protection of the private party's procedural expectations in this case would not provide a reasonable co-existence between the public and private interests at issue."

5. Statutory Provisions regarding Consistency

Apart from the Constitution, the consistency principle also finds its existence in various federal and state statutes. The acts enacted by the different states have almost the similar provisions and even the legal language. Generally, the courts depend on the "arbitrary, capricious standard to annul an agency's unexplained departure from its own adjudicated precedents."[19]

The Apex Court applied the consistency principle in "*Ashbacker Radio Corp. v. Federal Communications Commission".*[20]Two applicants applied for a radio license on the same frequency from the Radio Commission. The Commission accepted the proposal from both the applicants but silently granted the license to one and rejected the application of another although the second applicant was scheduled a hearing. The Court held that "the Commission had provided inconsistent procedural opportunities to the two applicants, thereby frustrating the second applicant's legitimate expectations. The Court ordered the Commission to conduct a

[18] Mathews v. Eldridge 424 U.S. 319 (1976).

[19] General Service Employees Union v. Illinois Educational Labor Relations Board, 673 N.E.2d 1084

[20]Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945).

comparative hearing in which each applicant could participate."

The court further cited the amendment of the statute and said that "a 1996 amendment to the Florida APA provides an interesting innovation".[21] This amendment requires agencies "to consider and, if appropriate, grant applications for waivers and exceptions from their own rules. The grant of such relief provides inconsistent treatment to those parties who obtained the relief, in contrast to other parties who did not. The inconsistency may be temporary, however, because the agency must publish its actions on all applications. Private parties may therefore seek their own waivers and take the plea of exceptions to match those already granted to others. It remains to be seen whether a private party who has not applied for a waiver or exception may receive the benefit of a waiver or exception granted to someone else similarly situated, by keeping arguments based on refusal of equal protection, or even violation of legitimate expectations".

6. Present utility of the principle

The principle is used in several kind of legal matters. Although the most important of them are government contracts yet there are other areas as well where this principle is applied. They are

a. Criminal judgements,
b. Privacy rights,
c. Regulation over private ownership
d. Government allowances and benefits
e. Laws regarding immigrants
f. Insolvency laws,
g. Civil proceedings,
h. Tortious liability
i. Imposing tax.

The "doctrine of legitimate expectation" also has application for people who have been dealt in a particular way for a long time by any agency and suddenly the agency acts in a detrimental way. Actually, the American courts have borrowed the principle of consistency from common law principles of "res judicata" and "promissory estoppels".

So, what we observe in the American scenario is that the "doctrine of legitimate expectations" are seen more as an instrument of consistency in government functions rather than a tool to enforce procedural or substantive regularities based on past practices.

[21] Fla. Stat. Ann. Sec. 120.542 (Supp. 1998) (added by Laws 1996, ch. 96-159,Sec. 12, amended by Laws 1997, ch. 97-176, Sec. 5).

IV. POSITION IN INDIA

The Indian judiciary adopted the "doctrine of legitimate expectation" much later. It was the British judicial system which inspired the Indian judges to apply this doctrine in Indian scenario. The Indian view is pretty much consistent with the constitutional approach of the Indian courts regarding the other doctrines of administrative law.

The first case in which this doctrine was invoked was the case of *Union of India v. Hindustan Development Corporation*[22]. Justice Jayachandra Reddy took the effort to explain the meaning and scope of the "doctrine of legitimate expectation" and highlighted some important questions in the nature of

a. "Who is the expectant and what is the nature of the expectation?
b. When does such an expectation become a legitimate expectation?
c. What is the foundation of such an expectation?
d. What are the duties of the administrative authorities while taking a decision in cases attracting the doctrine?"

It was observed:

"*Time is a three-fold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purposes the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertible expectation and a mere disappointment does attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on a sanction of law or custom or an established procedure followed in regular and natural sequence. Again, it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in conventional sense.*"

The "doctrine of legitimate expectation" in administrative law is a well-known and applied doctrine. "Legitimate expectation" is the newest entrant in an existing line up

[22] Union of India v. Hindustan Development Corporation (1993) 3 SCC 499

of theories propounded by the courts to enforce judicial review of executive action. This doctrine is now well settled among the earlier established doctrines of "promissory estoppels".

On critical evaluation of this principle it understood that it gives an opportunity to an individual to invoke the judicial review in matters affecting his right. The "doctrine of legitimate expectation" is more or less revolving around the spectrum of fair hearing chance given to the person whose rights would be hampered by the decision. This doctrine generally does not offer an opportunity to the affected person to claim direct rights as no straightaway right is involved in such circumstances. Moreover, the court has also agreed that mere recognising and acknowledging the presence of "legitimate expectation" does not mean the fulfilment of such expectation if the decision taken by the authority is in greater "public interest".

Approach of Indian Judiciary

Now we take a look at the various judgements and approach of the Indian Supreme Court as far as the "doctrine of legitimate expectation" is concerned.

In the case of *Hindustan Development Corporation*[23]while drawing parallels with the Indian Constitution, the apex Court observed that "if a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of the principles of natural justice , the same can be questioned on well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit in these league must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits, particularly when the element of speculation and uncertainty is inherent in that very concept."

[23] Union of India v. Hindustan Development Corporation (1993) 3 SCC 499

In another case of *F.C.I v. Kamadhenu Cattle Feed Industries*[24], this doctrine was freshly applied. In this case the appellant had invited tenders for the sale of stocks of damaged food grains. After the tenders were submitted, the appellant was dissatisfied with the adequacy of the bid amount and hence rejected all the applications and thereby invited the applicants for individual negotiations. The respondent who was the highest bidder as per the tender process refused to participate in the subsequent negotiations. After the negotiations the price soared up and the appellants formulated the contract. The respondent challenged the action on the ground of arbitrariness and stated that the appellant could not grant a contract by rejecting the tender process and were to give the contract to the highest tender. The Supreme Court upheld the action of the appellant and held that "in contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the constitution of which non arbitrariness is a significant facet. There is no unfettered discretion in public law; a public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is fair play in action. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction whit the State and its instrumentalities, with the element forming a necessary component of the decision-making process in all State actions. It is therefore necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge in the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review. The mere reasonable or legitimate expectation of a citizen, in such a situation may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor

[24] Food Corporation of India v. Kamdhenu Cattle Feed Industries (1993) 1 SCC 71

requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of facts in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other important considerations may outweigh what would otherwise have been legitimate expectation of the claimant. A bona fide decision of the pubic authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

In another case called *Madras City Wine Merchants Association v. State of Tamil Nadu*[25]the members of the appellant association were granted licenses to carry on business of Indian made of foreign spirits (IMFS). Subsequently they were granted license to set up bar in the adjoining areas to the liquor shops for which higher license fee were collected. The license holders made major investments in getting the adjacent properties and for setting up the bar. The setting up of the bar had caused major public outcry which ultimately gave rise to major law and order problem in the state. The Government subsequently repealed the Bar Rules framed under the Tamil Nadu Prohibition Act. 1937 and thereby the bar licenses of the appellants were not renewed. One of the major legal arguments made on behalf of the appellants was based on the "doctrine of legitimate expectation". In this case the Supreme Court revisited the various judicial opinions relating to the doctrine and reiterated the principles of legitimate expectation as was held earlier. The court opined that the doctrine would become applicable when:

"(a) if there is an express promise given by the public authority, (b) because of the existence of a regular practice which the claimant can reasonably expect to continue, and (c) Such an exception must be reasonable. However, if there is a change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise. But in cases of delegated legislation the doctrine has no applications and can only arise in the field of administrative decisions. If the plea of legitimate expectation relates to procedural fairness there is no possibility whatsoever of invoking the doctrine as against the legislation. In the absence of any specific

[25] Madras City Wine Merchants Association v. State of Tamil Nadu (1994) 5 SCC 509.

promise or right renewal the government is within their prerogative to change their policy and the principles of non-arbitrariness does not apply to change in legislative policy."

One of the leading cases of Indian Jurisprudence is the case of *Navjyoti Co-Group Housing Society v. Union of India*[26]. The Supreme Court applied this doctrine while dealing with the sudden change of policy in ascertaining seniority of registered Cooperative Group Housing Societies by the Delhi Development Authority (DDA). The DDA had earlier followed the practice of making land allotment according to registration date and serial number held by societies with the Registrar of Cooperative Societies but suddenly changed the policy and held that seniority would be on the basis of when the papers of the Society were found to be proper and authorised by the Registrar Office. This change of policy was challenged not only on the ground of unreasonableness and arbitrariness but also on the ground of violation of the legitimate expectation of the people. The Court observed that "*the doctrine of 'legitimate expectation' imposes in essence a duty on the public authority to act fairly by taking into consideration all the relevant factors relating to such 'legitimate expectation'. Within the conspectus of fair dealing in case of legitimate expectation the reasonable opportunities to make representation by the parties likely to be affected by any change of consistent past policy, come in. We have not been shown any compelling reasons taken into consideration by the Central Government to make a departure from the existing policy of allotment with reference to seniority in Registration by introducing a new guideline."* The court also emphasised that before introducing or making any change in the guidelines or procedures to be followed for allotment, the people whose rights would be affected should be given a chance to make a representation.

But in the case of *Bajaj Hindustan Limited v. Sir Shadi Lal Enterprise Private Limited*[27]the court has categorically remarked that the doctrine has limited application in restricting the power of policy formulation by the state. When the Government is satisfied that change in the policy was necessary in the public interest it would be entitled to revise the policy and lay down a new policy.

[26]Navjyoti Co-Group Housing Society v. Union of India AIR 1993 SC 155.

[27] Bajaj Hindustan Limited v. Sir Shadi Lal Enterprise Private Limited (2011) 1 SCC 640

In *Southern Petrochemical Industries Co. Ltd. V. Electricity Inspector & ETIO*[28]the Supreme Court expanded the scope of the doctrine and recognized the legitimate expectation of a substantive benefit. Ordinarily the principle would not be applicable in the face of legislative provisions but if the legislature has itself allowed the parties to enjoy the benefit of their existing rights with reference to the repeal and saving clauses contained in the statute then the same shall also apply. It was observed:

"Legitimate expectation is now considered to be a part of the principles of natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where the law itself recognises existing right and did not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit may be held to be applicable."

In *Mahabir Auto Stores v. Indian Oil Corporation*[29], the issue was whether continuous past practice can be a valid ground which can give rise to legitimate expectation and thus can create a legal obligation. The appellant company received all kinds of lubricants from the respondent for the past 18 years acting as a Lube Distributor of the respondent in Northern India. But there was no formal distributorship contract between these two parties. Subsequently the policy was revised in the corporation by which supply of lubricants were discontinued to those companies which were merely re-sellers, traders and those parties who were not having any sort of formal agreement with the corporation. Based on this new policy supply of lubricants to the appellants were also stopped. The appellant company challenged the action of the respondents and one of the arguments was based on the "doctrine of legitimate expectation". The Supreme Court while dealing with various aspects of the case recognized the fact that "IOC was an instrumentality of the state under Article 12 of the constitution and therefore the respondents were bound to act in a non-arbitrary and reasonable manner. Every action of the state must conform to the Rule of Law and must be backed by reasons. So, whatever be the activity of the public authority, in such monopoly or semi

[28] Southern Petrochemical Industries Co. Ltd. V. Electricity Inspector & ETIO (2007) 5 SCC 447

[29]Mahabir Auto Stores v. Indian Oil Corporation AIR 1990 SC 1031

monopoly dealings, it should meet the test of Article 14. If a Governmental action even in the matters of entering contracts, fails to satisfy the above-mentioned tests like the test of reasonableness, rule of reason, rule against reason and against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in such cases. Even though the rights of the citizens are merely contractual, the manner, the method and the motive of a decision of entering a contract are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case".

So, after considering the particular acts of the case as well as the long period of dealings and association between the parties the Court held that-

"Decision of the state/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of Corporation like IOC when without informing the parties concerned, as in the case of the appellant firm herein on alleged change of policy and on that basis action to seek to bring to an end the course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any straight jacket basis. It depends on the nature of the rights involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a state has the right to function in public field or private field is a matter which in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence. Such transactions should continue as an administrative decision with the organ of the State. It may be contractual or statutory but in a situation of transaction between the

parties for nearly two decades, such procedure should be followed which will be reasonable, fair and just, that is, the process which normally be accepted to be followed by an organ of the State and that process must be conscious and all those affected should be taken into confidence."

The Court thereby directed the respondent company to consider afresh the submissions of the appellant regarding the nature of the contractual relations and distributorship under the new policy after taking the appellant firm into confidence.

In *State of Haryana v. Jagdish*[30]the Supreme Court reiterated the principle that consistent past practice by the state will furnish the ground of legitimate expectation. In this case the respondent was a convict who had already served 15 years of imprisonment and hence was eligible for consideration under the remission policy of the state which he was not granted. The Court emphasised that "the state authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of his conviction that his case for premature release would be considered after serving the sentence, prescribed in the short-sentencing policy existing on that date. The State has to exercise power of remission also keeping in view any such benefit to be construed liberally in favour of a convict which may depend upon case to case and for that purpose it should relate to a policy which, in the instant case, was in favour of the respondent. In case a liberal policy prevails on the date of consideration of the case of a 'lifer' for premature release, he should be given benefit thereof."

In *Chandrakala Trivedi, v. State of Rajasthan*[31] the appellant was provisionally selected for appointment to the post of teacher but his appointment was subsequently cancelled the Rajasthan Civil Service Commission informed him the same by a letter. The reason cited was that the appellant "didn't pass the Higher Secondary Examination after passing the Secondary Examination". The appellant contended that when he passed the Secondary Examination, it was legally viable for an individual to get admission into upper standards after undertaking a certain course. Based on it the appellant completed her graduation from Indira Gandhi Open University and then got her B. Ed degree as well as M.A. qualification as a normal candidate Dayanad Sarasvati University, Ajmer, Rajasthan. Hence it was contended that the appellant possessed the

[30]State of Haryana v. Jagdish (2010) 4 SCC 216

[31] Chandrakala Trivedi, v. State of Rajasthan (2012) 3 SCC 129.

required qualification for appointment to the post in question. Applying the "doctrine of legitimate expectation" relating to substantive benefits the Supreme Court held that "after a person is provisionally selected, a certain degree of reasonable expectation of the selection being continued also comes into existence". The Court therefore instructed to consider the appellant for provisional appointment and the same should not be cancelled based on special facts and circumstances.

Again, in *Ashoka Smokeless Coal India Limited v. Union of India*[32] the Supreme Court was asked to determine whether the "doctrine of legitimate expectation" will be applicable in case of unlawful representation i.e. the representation in ultra vires the power of local authority. The Supreme Court advocated the "doctrine of balancing" so as to ensure that the principles of legitimate expectation would be extended to all cases where the unlawful actions were not much averse to public interest.

Finally, in the case of *Monnet Ispat & Energy Limited,*[33] the apex court summarized the essential principles of the "doctrine of legitimate expectation" which serve as guide till date:

- "The doctrine is founded on the principle of reasonableness and fairness. The doctrine arises out of the principles of natural justice and there are parallels between this doctrine and the doctrine of promissory estoppel.
- Where the decision of the authority is founded in public interest as per executive policy or law, the court would be reluctant to interfere with such decision. The doctrine cannot be invoked to fetter changes in administrative policy if it is in the public interest to do so.
- The doctrine is different from anticipation and anticipation cannot amount to an assertible expectation. Such expectation should be justifiable, legitimate and protectable.
- The protection of this doctrine does not require the fulfilment of the expectation even if it is legitimate if the decision of the executive is in response to "larger public interest". In other words, the doctrine would not be invoked to block public interest for public benefit."

Thus, if we analyse all the decisions of the Supreme Court of India then we see that what basically began as a matter of private law has been widely accepted as an integral

[32] Ashoka Smokeless Coal India Limited v. Union of India (2007) 2 SCC 640

[33] Monnet Ispat& Energy Limited v. Union of India (2012) 11 SCC 1

part of Article 14 and is now widely applied in the cases of administrative law.

V. COMPARATIVE ANALYSIS

So, after having a deep look into the judicial understanding of the "doctrine of legitimate expectation" in these 3 nations, it is imperative on our part to analyse the same and reach a conclusion as to what are the lacunas or shortcomings of our Indian system.

If we have a look into the UK system then we see that initially the concept of legitimate expectation was more or less interwoven with the concept of procedural irregularity. Only if procedural right of a person was violated, he could invoke this doctrine and seek a remedy from the courts. The main reason for the courts to formulate this doctrine was basically to keep the lamp of justice illuminated when there is darkness of injustice everywhere. Although the "doctrine of legitimate expectation" in UK has now gained a bigger dimension after substantive rights have also been taken into account by the courts yet the UK system falls short mainly because it does not divulge much deep into the arbitrariness, unreasonableness of the administrative actions as it does in the cases of procedural or substantive rights.

Whereas USA system is concerned, we should take into consideration that the "doctrine of legitimate expectation" is not present here in the shape that we generally conceive it to be. In America it is called the "doctrine of consistency". Perhaps the best thing about this doctrine of consistency is that it not only covers executive decisions but also covers legislative and judicial decision. The concept of horizontal and vertical consistency which means that consistency should not only be on the same level of executive or other organs but also among the higher and lower hierarchical bodies. This concept of consistency in America was earlier confined only within Private Law sphere i.e. mainly operated in the vicinity of contracts. But it was the wisdom of the judges and their foresight power that expanded the ambit of the doctrine of consistency and applied in all the organs of the government be it at the state level or at the Federal Level. This ensures smoothness in the entire transactions of the government with the public and guarantees fairness.

Now coming to India, it cannot be denied that like many other common law principles, this "doctrine of legitimate expectation" was also borrowed by the Indian courts from England. It was only in the mid 80's that the Indian courts started to adopt this principle and enhanced the scope

of judicial review of administrative actions. In India this doctrine is present in more or less a balanced way compared to UK and USA. Unlike the judiciary of these 2 countries, the Indian judiciary has interpreted the doctrine of legitimate action in such a way that it gives both the administration and a normal person a strong chance to defend their case. While on one hand the administration looks to evade the doctrine and accountability by taking resort to the "public purpose" excuse, on the other hand the individuals whose rights are violated can now also invoke a violation of Right to Equality under Article 14 of the Constitution. This basically goes to show that the Indian judiciary is very serious in protecting the rights of the citizens and hence time and again considered this doctrine to be an integral part of Article 14 of our constitution. While in UK it is mainly about procedural and substantive rights and in USA it is about institutional consistency, the Indian judges have gone a step further and incorporated the concepts of reasonableness, arbitrariness, natural justice and fairness in it. Moreover, as a result of being held as a part and parcel of Article 14, this right can also be invoked by the means of Writ Jurisdiction of the High Courts and Supreme Courts.

But one place where the Indian system falls short is that the Indian courts have in many cases given an upper hand to the administrative bodies by giving them an opportunity to protect themselves behind the shield of "public purpose". This sometimes led to a gross violation of individual rights as the State easily justifies such action in the name of public purpose. So, this aspect needs a relook and should be considered by the courts in near future because India being a social democracy, needs to achieve the goals of social and economic justice as well, which cannot be reached unless individual rights are trampled in the name of public purposes. The "doctrine of legitimate expectation" which can be considered still in a developing state needs many such modifications to ensure a better protection o citizen's right.

VI. CONCLUSION

It is well understood that this "doctrine of legitimate expectation" is still in a nascent stage and is being developed daily by judiciaries throughout the world. It is not only in UK, USA or India but many other countries like Australia, Canada etc are applying this doctrine to make sure that their administrative organs are functioning in a better way. However, it cannot be denied that "doctrine of legitimate expectation" is itself not a right and hence can be revoked only as a tool for scrutiny of administrative actions. Thus, this doctrine

more or less is a shield against certain decisions of the government rather than being a machinery to enforce a remedy by itself.

Legitimate expectations may come in various forms and owe their existence to different kind of circumstances and it is not possible to give an exhaustive list in the present vast and fast expansions of governmental activities. Therefore, keeping in mind such growing changes in the administrative law sphere of our nations, the courts have to adopt a more flexible outlook towards this doctrine and need to review the traits of this doctrine time and again. Expectations change with time and hence a rigid formulation of this doctrine cannot be a reasonable thing to do. So, the administrative actions have to be scrutinised keeping all these aspects into mind so that the rights and expectations of the citizens can be protected in a much better way.

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INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW: A SATISFACTORY COMPROMISE IN INDIA

- *Aravind Prasanna*[*]

ABSTRACT

While Intellectual Property Rights appear to incentivise the innovators by allowing the IPR holders to exclude others from commercially exploiting the IPR-protected innovations, the competition policies and legislations operates to promote competition in the market. The interplay between these two regulatory systems gained prominence with the increasing misuse of IPRs in hampering the competition in the market. The paper intends to study the relationship between IPR and Competition Law by analysing, separately, the perspectives and objectives of both the regulatory systems. Both the systems have their own boundaries, and an attempt is made in this paper to understand the boundaries of the systems.

Developed economies such as European Union and United States are considered as the most advanced jurisdictions in terms of the interface between the two systems. The paper aims to make a brief study on the policies and the regulations established by the developed economies for resolving the IPR related competition concerns. The regulatory frameworks established by these developed economies have laid down substantial precedents to the developing economies like India for controlling the abuses of IPR that causes adverse effects on the competition in the market. The main objective of this paper is to study and analyse the regulatory framework of India in solving IPR linked competition issues, with the help of legislations and judicial decisions. Finally, the paper tries to answer the question as to whether the regulatory framework of India is adequate to address the IPR related competition issues. The author feels that a stricter approach is not necessary, considering the growth of IPR in India and the Competition Act has enough in it, to bring a satisfactory compromise between both the regulatory systems.

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I. INTRODUCTION

Discussions and deliberations on inter-relationship between Intellectual Property Rights and Competition Law have gained profound significance as the tension between these two branches has been steeply rising in this era of advanced science and technology. This can be well evident from the increasing IPR related competition cases in different jurisdictions, predominantly in the European Union and USA[1]. India is found to have only a small share in addressing different issues in IPR related competition cases since the jurisprudence is believed to be in the infant stage.[2] Hence, on a positive note, this stage can be considered as a good platform in understanding the precise boundaries of these two areas, and consequently, bring the much-desired success in making the 'satisfactory compromise'. But, before drawing such a kind of positive inference it is very essential to analyse the existing policies, legislations and the judicial precedents that has assisted India in facing the challenges pertaining to the IPR related competition cases.

The Competition Act, which was enacted in 2002, aims 'to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India'.[3] But, the efficiency of this piece of legislation in dealing with the tension between IPR and competition law is worth analysing. The role of judiciary in tackling the IPR related competition issues is noteworthy as it has led the way to a logical apprehension about the field. In the case of India, it can be said that any development in understanding the interplay between these two, if seen, emanate from the valuable contributions made by the judicial decisions.

The major concerns relating to the competition law are often featured by the abuse of dominance in the market situation. The market dominance that is potentially created through IPR can be misused to the effect that such dominance distorts the fair competition in the market, thus creating a monopoly. This anti-competitive practice can be categorised into various forms such as high pricing, refusal to license, tying agreements etc. But it would be a complete misconception of the idea if it is understood that the rights over IP would always bestow market domination upon the IP holders. It

[1] K.D. Raju, *The Inevitable Connection between Intellectual Property and Competition Laws*, Vol. 18, JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, p. 111 (2013).

[2] *Id.*

[3] The Competition Act, 2002 [No.12 of 2003]

is observed that such a dominant position in the market - commonly known as monopoly - arises only when there is a lack of availability of alternative technologies to the rival establishments.[4] And, abusing that position would amount to anti-competitive practices. To that extent, it is very important to carefully understand the boundaries of the two regulatory systems to resolve issues arising out of this area.

The first section of this work will deal with a brief analysis of the inter-relationship between IPR and competition law. For a clear understanding, an attempt is made to study this area in the light of the regulatory frameworks of both European Union and United States of America. The second section aims to study the boundaries of both the regulatory systems relying upon various forms of anti-competitive practices. The third section aims at studying the issues from India's standpoint. It also focuses on the contribution of Indian judiciary in throwing light on the relevant issues. Finally, an attempt is made to ascertain that India's regulatory framework is capable enough to bring a satisfactory compromise between the two regulatory systems.

II. COMPETITION LAW - IPR RELATIONSHIP

Competition law can be defined as a set of legislations, judicial precedents and regulations which protects and prevents anti-competitive practices and fulfils the government's 'liberalized economic policy'[5] of promoting competition in the market. Whereas, Intellectual Property Rights incentivise innovators by empowering them with the right to exclude others, for a limited period of time, from commercially benefiting from or exploiting the inventions that are protected by the IPR, and subsequently earn reasonable profits[6] out of the invention.[7] Both the systems work towards maximization of wealth in the country.[8]

It is an undisputable fact that IPR and competition law has evolved as two separate regulatory systems.[9] But somewhere in the history, the observers had to witness dynamic and frictional interplay between these two systems. The element of

[4] Alice Pham *'Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?*', CUTS INTERNATIONAL, Jaipur, India p.1, pp. 4-5 (2008)
[5] *Supra* note 1, at p. 112
[6] The motive behind promoting this profit-making is to make the IPR holders use the *ex ante* incentives in investing for further innovations. *See* Thorsten Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US*, Oxford: Hart Publishing (2012), p.47- 48
[7] *Supra* note 4, at pp. 2-3
[8] K.D. Raju, *Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India*, Vol. 2, Issue 3, INTEL PROP RIGHTS 2: 115. doi:10.4172/ipr.1000115, p. 1 (2014)
[9] *Supra* note 1, at p. 111

'economics of innovation' keeps these two systems bound together.[10] The convergence between the two systems is treated to be very essential for maintaining a competitive and dynamic economic climate as it is expected to foster technical progress, and thereby, create competition in the field of innovation.[11] But the interactions will face some issues when the correct balance is not struck between the two regulatory systems. As there is no uniform approach to the interplay between competition law and Intellectual Property Rights, the law makers have found it difficult to lay down procedures for the establishments to follow.[12] One of the earliest statutory recognitions in relation to the tension between the systems can be traced back to 1624, the year in which Statute of Monopolies was enacted in England. And this is considered to be the first enactment in England to restrict monopolies as it forbade monopolies except the patent monopolies.[13]

It is pertinent to understand that these two regulatory systems share a common objective. 'The two bodies of law are complementary, as both are aimed at encouraging innovation, industry and competition.'[14] Though they have a complementary character, the interface between these two branches of law has brought in new analytical challenges to the policy-makers.[15] These kinds of challenges have posed serious questions to the developing countries than the developed countries as the former is observed to have only a minimal tradition in application of the competition law and policies.[16] Hence, the approach of the developed economies such as United States of America and European Union, towards the interplay of IPR and Competition law and policy is worth understanding.

III. REGULATORY FRAMEWORK IN DEVELOPED ECONOMIES

United States of America

[10] *Supra* note 4, at p. 1

[11] *Convergence between Competition Law and Intellectual Property*, United Nations Conference on Trade and Development, Available at: http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Intellectual-Property-and-Competition-Law.aspx (Last accessed on: 14.12.2016)

[12] *Id.*

[13] Chris Dent, *'Generally Inconvenient: The 1624 Statute of Monopolies as Political Compromise'*, Vol. 33, No. 2 MELBOURNE UNIVERSITY LAW REVIEW p. 415 (2009)

[14] *Atari Games Corp. v. Nintendo of America, Inc.* 897 F.2d 1572, 1576, (Fed. Cir. 1990)

[15] Carlos M. Correa, *Intellectual Property and Competition Law: Exploration of Some Issues of Relevance to Developing Countries*, ICTSD IPRs and Sustainable Development Programme Issue Paper No. 21, International Centre for Trade and Sustainable Development, Geneva, Switzerland, (2007) p. 1

[16] *Id.*

The 'Antitrust'[17] issues in United States attained a statutory recognition with the enactment of the Sherman Act[18], in the year 1890. It is held by the U.S. Supreme Court that the acquisition and the use of IPR which can potentially create a monopoly fall under the ambit of Section 2 of the Sherman Act.[19] It is important to note that the interface between the two systems in the United States of America had a long history. Earlier, the antitrust laws and IP laws were thought to have conflicting character based on the presumption that IPR not only bestowed upon the holder the exclusive rights to the invention but also gave them a monopoly.[20] The Courts followed a hostile approach towards IP licensing agreements without weighing its impact in the market power.[21] In 1970, the U.S. Department of Justice Antitrust Division announced a new government policy called "Nine No-No's", which was a milestone in the historical overview of the relationship between the two systems.[22] The nine illegal patent licensing practices were:

(1) Requiring the licensee to grant back the licensor the right to use the licensee's improvements to the licensed technology; (2) Requiring the licensee to pay royalties unrelated to the licensee's sale of the patented product; (3) Tying the purchase of patented and unpatented products; (4) Restricting the resale rights of the purchasers of the patented materials; (5) Making tie-outs; (6) Providing veto power to the licensee over the licensor's grant of further licenses; (7) Requiring mandatory package licensing; (8) Restricting the sales of the unpatented products made out of patented process; (9) Specifying the price that a licensee could charge on resale of the licensed products.[23]

However, it was found out by the courts that application of these rules often gave

[17] The term used for competition law in U.S. is antitrust law. For detailed understanding, *See* William E. Kovacic and Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, Volume 14, Number 1, JOURNAL OF ECONOMIC PERSPECTIVES (2000) pp. 43-60

[18] This was the first legislation enacted to maintain a fair competition in the U.S. market. The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade", and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize" that harms the competition in the market. *See 'The Antitrust Laws',* Federal Trade Commission Protecting America's Consumers, Available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (Last accessed on: 15.12.2016)

[19]*See* Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965)

[20] Sheila F. Anthony, Antitrust and Intellectual Property Law: From Adversaries to Partners, 28 AIPLA Q.J.1 (2000) Available at https://www.ftc.gov/public-statements/1999/05/antitrust-and-intellectual-property-law-adversaries-partners#N_10_ (Last accessed on: 15.12.2016)

[21]*Id.,*

[22] Bruce B. Wilson, *Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions, in Antitrust Primer: Patents, Franchising, Treble Damage Suits* (1970) 11, 12-14

[23]*See id.,* at 13; *See also* Michael A. Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law*, Oxford University Press(2009), p. 77

economically irrational results that refused to acknowledge the benefits of the licensing agreements in promoting the competition in the market.[24] As a result of this concern, there was a shift in the anti-trust policy. The U.S. antitrust law started recognising the 'rule of reason' standards in order to solve these disputes.[25] In 1995, U.S. Department of Justice and Federal Trade Commission issued the '*Antitrust Guidelines for the Licensing of Intellectual Property'* (hereinafter '1995 Guidelines').[26] It embodies three basic principles viz., (a) for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property; (b) the Agencies do not presume that intellectual property creates market power in the antitrust context; and (c) the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally precompetitive.[27] The first principle states that, though there will be some differences in features between the intellectual property and other forms of property, the agencies will apply the same antitrust principles in the evaluation.[28] The second principle expresses that market power with IPRs *prima facie* would not amount to a violation of the antitrust practices. And, it would not be a violation, if the IPR enables its holder to attain supra competitive profits, market power or even monopoly that is solely "a consequence of a superior product, business acumen, or historic accident".[29] The third principle states that the licensing agreements bring incentives to both the consumers and the creators of the technology through efficient exploitation of the invention. This facilitates investments in further innovations.[30] Another significant rule in the 1995 Guidelines is the application of the 'rule of reason' in the interpretation of the 'Nine No-No's'.[31] Using this rule, U.S. Supreme Court in *Illinois Tool Works Inc. v. Independent Ink, Inc.* held that merely because there was a tying agreement, a patent cannot be presumed to have conferred a market power upon the patentee; instead, it should be proved by the plaintiff.[32]

Having understood the importance of the 'rule of reason', a brief analysis regarding

[24] Kenneth M. Frankel and Mark S. Zhai, *A Return to the DOJ's "Nine No-Nos"?,*The AIPLA Antitrust News, (January 2013) Available at: http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=9324c489-94fe-4bb0-a499-8a8817794e44 (Last accessed on: 15.12.2016)
[25]*Supra* note 4, at p. 11
[26] U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property,* (1995). Available at http://www.justice.gov/atr/public/guidelines/0558.pdf (Last accessed on: 15.12.2016)
[27]*Id.,* at § 2.0
[28]*Supra* note 20
[29]*Supra* note 26, at § 2.2
[30]*Id.,* at § 2.2
[31]*Id.,* at §§ 5.3, 5.5
[32] 547 U.S. 28 (2006), pp. 3-17

the usage of this doctrine seems necessary. The agencies are expected to use this doctrine in the following ways. Firstly, the agencies (Department of Justice and Federal Trade Commission) would find out if there is any market substitute for the product or if the particular market substitute product is imported by the consumers from another country because the domestic product has become difficult to afford. This step will crystallise the relevant market competition, in the case of former, product wise and, in the case of latter, geography wise. Then, the market power of the company will be determined. This is one of the most difficult factors to determine. The agencies will ascertain whether there is a market power exercised by the company. If present, then the next step would be to study the means used by the company in acquiring the market power. For this step, the agencies shall use the 1995 Guidelines and decide on the matter.[33] With a joint report, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*[34], issued from Department of Justice and Federal Trade Commission in 2007, the 1995 Guidelines got a reaffirmation, and its reliance continues assisting the agencies in resolving the disputes.

European Union

It is an acknowledged fact that the U.S. antitrust law had a strong influence in the formation of competition law in the European Union (hereinafter 'EU').[35] The roots of the EU competition law can be traced back to 1951, the year in which the Treaty of Paris which established the European Coal and Steel Community (ECSC) was signed among the 'parties'[36]. This agreement is observed to have paved the way for the creation of the EU.[37] The chief purpose of this treaty was to ensure that the six member states would create a free and common market for steel and coal.[38] This meant that the member states ensured that Germany could no longer maintain an abusive dominant position in the market.[39] Thereafter, in 1957, the

[33] *See supra* note 20

[34] U.S. Department of Justice & Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007). Available at http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf (Last accessed on: 15.12.2016)

[35] Steven D. Anderman, EC COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: THE REGULATION OF INNOVATION, Oxford: Clarenden Press, (1998), p. 62

[36] Belgium, West Germany, France, Italy, Luxembourg, and Netherlands (Known as "The Six")

[37] European Coal and Steel Community, Lehman Business Collection - Contemporary Business Archives, Harvard Business School. Available at http://www.library.hbs.edu/hc/lehman/company.html?company=european_coal_and_steel_community (Last accessed on: 16.12.2016)

[38] *Id.*

[39] Karen J. Alter and David Steinberg, *The Theory and Reality of the European Coal and Steel*

landmark Rome Treaty, establishing the European Economic Community[40] (hereinafter 'EC Treaty') among the High Contracting Parties[41] which included some important competition provisions, was signed. The purpose of this agreement is to "establish a common market and promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, and an accelerated raising of the standard of living".[42] The objectives of EC Treaty, *inter alia*, focus on resolving the disputes pertaining to competition through "the institution of a system ensuring that competition in the common market is not distorted".[43] Article 81 and 82 of EC Treaty address the IPR related competition issues. Clause 1 of Article 81 prohibits all the agreements which may "affect the trade between the Member States" and Clause 3 of Article 81 provides exemptions for the agreements if it contributes "to improving the production or distribution of goods or to promoting technical or economic progress".[44] Article 82 prohibits abuse of dominant position which may affect the trade between the Member States.[45] As a result of Council Regulation No. 1/2003[46], Articles 81 and 82 was replaced by Articles 101[47] and 102[48] respectively. Derived from the earlier rules, Article 101 of the EU Treaty bars anti-competitive agreements, and Article 102 prohibits abuse of dominant position. Both these provisions of the EU Treaty aim at promoting the welfare of the consumers. These provisions focus on maintaining a common market with an effective competition that would satisfy the wants of the consumers. Now, the objectives of the EU competition rules may seem to conflict with the aims of the Intellectual property law which revolves around rewarding the IP holders with incentives and encouraging innovation. For instance, cases involving licensing of the IPRs may raise issues under Article 101(1) as the licensing is done through agreements (Technology Transfer Agreements). The restrictions which are

Community, Buffet Centre for International and Comparative Studies, Working Paper No. 07-001, (2007) p.1, at p. 13

[40] The Treaty of Maastricht, 1992 removed the word 'Economic' and so the treaty is now known as EC Treaty.

[41] *Supra* note, at 36

[42] Article 2, The Treaty of Rome, 1957. Available at http://www.gleichstellung.uni-freiburg.de/dokumente/treaty-of-rome (Last accessed on: 16.12.2016)

[43] *Id.*, at Article 3

[44] Article 81, The EC Treaty, 1957. Available at http://ec.europa.eu/competition/legislation/treaties/ec/art81_en.html (Last accessed on: 16.12.2016)

[45] Article 82, The EC Treaty, 1957. Available at http://ec.europa.eu/competition/legislation/treaties/ec/art82_en.html (Last accessed on: 16.12.2016)

[46] Official Journal L 1, 4.1.2003

[47] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal 115, 09/05/2008 P. 0088 - 0089

[48] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal 115, 09/05/2008 P. 0089 - 0089

imposed as conditions in such licensing agreements may bring competition concerns when the boundaries of EU Treaty are transcended. It is important to understand that Article 101(3) of the EU Treaty lays down the criteria to decide whether the licensing agreements possess anti-competitive character. In other words, the provision provides exceptions to paragraph 1 of the Article 101.

The Technology Transfer Block Exemption Regulation[49] (hereinafter 'TTBER') along with the Guidelines[50], which was came into force on 2014, provides competition rules for assessment of the technology transfer agreements with respect to licensing of patents, know-how or software for the production of goods and services.[51] These competition rules offer a 'safe harbour', in so far as the said agreements are concerned, from the prohibition provided in Article 101(1).[52] TTBER provides immunity to all the technology transfer agreements which satisfies 'safe harbour' criteria. Three steps are followed in assessing whether the agreements fall under the ambit of safe harbour viz., (1) find out whether the parties to the agreement are competitors. Competition should be examined both on the market where the technology is licensed (technology market) and the market where the products are sold (product market).[53] They can be actual competitors and potential competitors. The parties will become actual competitors in the technology market only if both the parties are licensing out substitutable technology or the licensee licenses out its own technology, and then the licensor grants license for a competing technology to the licensee.[54] The potential competitors are those who own substitutable technology, and the licensee has not licensed it but the licensee is likely to do so when there is a small and a permanent increase in technology prices.[55] Geographic market determines the competition in the product market, and the same steps as mentioned above will be used to find out whether they are competitors. (2) Once the distinction is made, the next step will be to assess

[49] Commission Regulation (EU) No, 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, Official Journal L93, 28.03.2014, p.17-23

[50] Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, Official Journal C89, 28.03.2014, p.3-50

[51] Licensing agreements for the transfer of technology, Antitrust, European Commission, Available at http://ec.europa.eu/competition/antitrust/legislation/transfer.html (Last accessed on: 16.12.2016)

[52] Slaughter and May, *The EU Competition Rules on Intellectual Property Licensing* (June 2016) at p. 2. Available at https://www.slaughterandmay.com/media/64581/the-eu-competition-rules-on-intellectual-property-licensing.pdf (Last accessed on: 16.12.2016)

[53] *Id.* at p. 6

[54] *Supra* note 50, at para. 35

[55] *Id.* at para. 36

whether the parties to the agreement meet the market share threshold stipulated.[56] Combined market share of both technology and product market of the parties should be considered for the assessment. If the parties are competitors, then the neither parties' combined market share should exceed 20%. For non-competitors, the market share threshold is 30%.[57] It is important to note that if the parties meet the market share threshold, then they would fall within the safe harbour of TTBER. Merely exceeding the threshold will not attract a presumption that the agreement falls within the ambit of Article 101(1). The other effects of the agreement should be assessed individually. Hardcore restrictions in the agreement will draw the attraction of Article 101(1).[58] (3) Then, an assessment is made as to whether the agreement contains the restriction clauses which may be hardcore or excluded. The hardcore restrictions for competitors are enlisted in Article 4(1) of TTBER and if the parties are non-competitors then the hardcore restrictions listed in Article 4(2) will apply. If the agreements are found to have any of the enlisted hardcore restrictions, then those agreements will fall outside the safe harbour provided by TTBER. The hardcore restrictions in the agreements would attract a presumption that the agreements fall within Article 101(1). The final step would be to assess whether the agreements had any excluded restrictions which are enlisted in Article 5. The excluded restrictions are considered not harmful to the competition but TTBER requires an individual assessment to be made on the agreements.[59] The presence of excluded restrictions in the agreement does not prevent the application of TTBER to the remainder of the agreement only if the excluded restrictions are severable as a matter of law.[60] If the Commission finds that the agreements are not within the scope of TTBER safe harbour, then the assessment is made as to whether the agreements are caught by Article 101(1). For this purpose, criteria under Art 101(3) are relied upon. There are some important factors which would be considered viz., market position of parties and competitors, nature of agreements, entry barriers, market position of buyers on relevant markets, and maturity of the market.[61]

The regulatory framework established by these developed economies in order to deal with the IPR related competition issues has made a huge contribution in understanding

[56] Article 8, TTBER, Official Journal L93, 28.03.2014
[57] Article 8(e), TTBER, Official Journal L93, 28.03.2014
[58] *Supra* note 50, at para. 43
[59] *Supra* note 52, at p. 10
[60] *Id.*
[61] *Supra* note 50, at p. 159

the relationship between the two regulatory systems.

III. UNDERSTANDING THE BOUNDARIES OF IPR AND COMPETITION LAW

Having understood the significance of the objectives of both the regulatory systems in contributing to a country's economy, it is very important to establish a harmony between these systems. With the increasing misuse of IPR which is capable of bringing adverse effects to the competition, harmony can be established by understanding the boundaries of both IPR and Competition law. Therefore, the formula is to see whether a particular practice has an anti-competitive character. The jurisprudence evolved in the developed economies has helped us in understanding various forms of anti-competitive practices that can be carried out by misusing IPRs.

Abuse of dominance has been one of the most commonly found anti-competitive practices. The competition regulations across the world prohibit abuse of dominant position in the market. Dominant position can be defined as the economic strength that is conferred upon an establishment in the market.[62] This position is related to the term 'monopoly'. IPRs create a natural economic exclusivity in the market. The IPRs, by its legitimate exclusivity, potentially help the firms in conferring the market power or a dominant position.[63] But this by itself does not amount to anti-competitive practice. Only if there is an abusive conduct involved such as setting high prices, refusal to license without legitimate defences, when there is lack of substitutes in the market etc., the position is said to constitute an abuse of dominance. Monopoly pricing is one important kind of abuse of dominance in the developing countries, where there are lacks of substitutable technologies available. The practice followed by Microsoft by imposing end user restrictions on the users is considered as an abuse of dominant position.[64]

At some instance, refusal by the IPR holders to license can amount to abuse of dominant position, thus making it an anti-competitive practice. Without considering the objectives of competition law, it may be argued that IPR holders can exclude the competitors from the use of the IPR as a matter of right conferred upon them by the statute.[65] But it is important to bear in mind that both IP laws and competition laws have complementary goals, and thus the rights,

[62] *Supra* note 1 at p.114
[63] *Supra* note 4 at p. 18
[64] *Id.*,
[65] Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. (1908) p.405 at p.429

with respect to excluding others from exploiting the intellectual property, conferred upon IPR holders would not be absolute. Refusal to license can be an anticompetitive practice when it is unjustified, if it is preventing the emergence of a new product, and when it excludes competition in the secondary market.[66]

In mergers and acquisitions, misuse of IPRs is an important concern. Such misuse can happen in mergers, when the transfer instrument contains certain clauses regarding the usage or licensing of IPRs, which can cause adverse effects to the competition in the market. The test followed for finding such misuse is assessing whether such restrictions are reasonable and necessary to the transaction.[67]

Other IPR related anti-competitive practises occur when IPRs are licensed by the holders. The contractual agreement between the parties can bear an anti-competitive nature. The various forms of such agreements which can potentially hinder the competition are grant-banks, tie-in agreements, exclusive dealing agreements territorial restraints, resale price maintenance etc. Grant-backs clauses in the agreement would state that the licensee should extend the right to use the improvised version of the licensed technology to the licensor of the IP protected licensed technology. These clauses are not *per se* unlawful. A number of factors such as the nature, duration, market power etc. are considered to test the anti-competitive character of the grant-backs in the agreement. Tying agreements has been held as anti-competitive in certain circumstances. These agreements impose conditions on the licensee to purchase another good or service, most probably less marketable, from the IP holder along with the licensed IP protected item. Microsoft's practice of tying of media player middleware to Windows operating system has been held as an anti-competitive practice.[68] The parties may also come up with exclusive dealing agreements which coerce the licensees to deal only with the licensor, and the licensees cannot use any technology from players other than the licensor in manufacturing, selling or distributing products. The factors such as duration, market share of the parties, the reason behind such agreements etc. would decide the anti-competitive character of the agreements. The licensor can agree to provide the licensee with an exclusive

[66] Case C – 418/01, IMS Health [2004] ECR I-5039
[67] *Supra* note 4 at p. 21
[68] US v. Microsoft Corporation, 253 F.3d 34 (DC Cir 2001)

market by assigning a territory to the licensee. These are called territorial restraints, and they become anti-competitive when the parties under the guise of the territorial restraints collude to form a cartel for the purpose of price fixing or allocating the market. When a particular practice is held to be anti-competitive based on the dimensions used by the IPR holders, it can be understood that the boundary line of regulations that protect intellectual property has been transcended.

IV. REGULATORY FRAMEWORK IN INDIA

India acknowledged the importance of regulating competition long back in 1950 as the recognition was made in the Directive Principles of State Policy of the Constitution of India. Article 38 of the Constitution of India, *inter alia*, lays down that the "state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life". Clauses b and c of Article 39 provide that the state shall direct its policy towards securing that "the ownership and control of the material resources of the community are so distributed as best to sub serve the common good", and ensuring that "the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment." It can be inferred that these provisions might have influenced the policy makers to adopt the 'command-and-control' approach, and as a consequence of this policy, Monopolies and Restrictive Trade Practices Act (hereinafter 'MRTP Act') was enacted in 1969.[69] The thrust areas of this Act until 1991, were prevention of concentration of power to the common detriment, control of monopolies, and prohibition of monopolistic and restrictive trade practices.[70] The MRTP Act also focused on consumer protection.[71] But the 1991 economic policy reform lead the way to a major transformation in the competition law as new issues arose with gateways opened for Liberalisation, Privatisation, and Globalisation. With the rising role of IPRs in its market, India also felt the necessity of establishing a regulatory framework to counter the misuse of IPRs, which hampered the competition in the market. Having closely observed the path taken by the developed economies in

[69] S. Chakravarthy, *MRTP Act metamorphoses into Competition Act*, CUTS Institute for Regulation and Competition Position Paper (2014) at p. 1 Available online at www.cuts-international.org/doc01.doc (Last accessed on: 16.12.2016)

[70] Monopolies and Restrictive Trade Practices Act, 1969 [Act No. 54 of 1969]

[71] *Supra* note 69, at p. 2-3

dealing with the relationship between IPR and Competition law, India had substantial precedents at their disposal for meeting the challenges in harmonising the two regulatory systems.

India witnessed a major transformation from the 'command-and-control' economy to the free market economy. Consequently, the High-Level Committee on Competition Policy and Competition Law, appointed by the Government in 1999, drafted a new competition law, and as a result, the Competition Act, 2002 was enacted. The Competition Act, 2002 is now the regulatory framework in India that *inter alia* governs the relationship between the two systems. Specifically, Section 3(5) of the Act creates a harmony between the statutory rights conferred on the IPRs holders[72], and a main objective of the Act is incorporated in Section 3 that prohibits anti-competitive agreements. But, if the IPRs are used to the effect of abusing the dominant position in the market, then the Competition Act will make its interference by virtue of Section 4 of the Act. And, it is very important to note that Section 3(5) does not provide an absolute immunity to IPRs, and the limits provided are not to be transcended.[73]

Competition Commission of India, the regulatory quasi-judicial authority established under this Act, has jurisdictions in enquiring into the anti-competitive agreements[74], enquiring into the abuse of dominant positions[75], enquiring into combinations[76], and should contribute in promoting Competition Advocacy, creating awareness and imparting training about the competition issues.[77] It has an additional jurisdiction in dealing with anti-competitive acts taking place outside India but has adverse effects on the competition in India.[78] The Bombay High Court has held that Competition Commission of India has jurisdiction to handle IPR related competition issues.[79]

[72] The Copyright Act, 1957 (14 of 1957); the Patents Act, 1970 (39 of 1970); the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); the Designs Act, 2000 (16 of 2000); the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000)

[73] Shashank Jain and Sunitha Tripathy, *Intellectual Property and Competition Laws: Jural Correlatives*, JOURNAL OF INTELLECTUAL PROPERTY RIGHTS (2007) p. 224 at p. 229

[74] Section 19, Competition Act, 2002, (12 OF 2003)

[75] *Id.*

[76] Section 20, Competition Act, 2002, (12 OF 2003)

[77] Section 49(3), Competition Act, 2002, (12 OF 2003)

[78] Section 32, Competition Act, 2002, (12 OF 2003)

[79] Aamir Khan Productions Pvt. Ltd. v. Union of India 2010 (112) Bom L R 3778. *See also* Kingfisher Airlines Limited v. Competition Commission of India, Writ Petition No. 1785 of 2009, decided on 31 March 2010 [Bombay High Court]

As the jurisprudence regarding the interface is in a growing phase in developing economies, Indian judiciary, relatively, have a small bite in so far as dealing with IPR related competition issues are concerned. The role of judiciary in establishing the interface in India became prominent after the *Aamir Khan Productions*[80]case which opened the gates of the Judiciary in addressing the concerns relating to IPR-Competition law convergence.[81]

The notable cases regarding the IPR related competition issues that came up before the judiciary at the primary stage, was concerning the formation of cartels within the film industry. The first case in the limelight regarding the issue was *FICCI-Multiplex Association of India v. United Producers/Distributors Forum*[82] wherein the informant alleged that the members of certain organisations, who were jointly controlling almost 100% market share of production and distribution of Hindi motion pictures exhibited in the Multiplexes, were forming a cartel like activity and decided not to release any new movie to the members of the informant for exhibiting at their multiplexes. It was also alleged that UPDF had taken this decision in pursuant to their conflict with the members of the informant over the revenue sharing ratio. The Commission took cognizance of the matter by virtue of Section 19 of the Competition Act, 2002 and directed the Director General (DG) to investigate into the matter. In the findings of the DG, there was a clean violation of Section 3(3) of the Act as it was found that the members of UPDF formed a cartel for extracting higher revenues and in order to achieve this purpose, UPDF have limited the supply of films by refusing to release the films to the members of the informant for exhibiting them in their multiplexes. Consequently, Commission issued a show cause notice to UPDF and others. Pending the case before the Commission, the notice was challenged in the *Aamir Khan Productions* case, wherein it was contented that Commission did not have jurisdiction in this case as the issue concerning compulsory licensing will be governed by the provisions of the Copyright Act, 1957, and it falls under the blanket immunity of Section 3(5) of the Competition Act, 2000. The Bombay High Court held that the contentions regarding the copyright issues can be raised before the Commission as it has the authority to deal with the IPR linked competition cases and therefore dismissed the petition. Thereafter, the Commission heard the arguments of

[80] *Id.*
[81] *Supra* note 1, at p. 1
[82] Case No. 01 Of 2009, Competition Commission of India, (2009)

UPDF. Relying upon *Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce*[83], UPDF argued that the Commission had already accepted the fact that the copyright owner has exclusive and unhindered right to exploit the copyright without any limitations, and so the respondent, being the producers of the films, had an exclusive right to screen the films wherever they desire to do it. The next main contention was that the multiplex owners' claim that the producers should exhibit the films through the members of the informant would amount to compulsory licensing for which, under the Copyright Act, only the Copyright Board had the jurisdiction. UPDF also relied upon the blanket immunity provided under Section 3(5) of the Competition Act. The Commission rejected the contentions of UPDF and opined that the issue was neither relating to the exclusive rights of the producer conferred by the Copyright Act nor the protection of such rights. Relying upon the evidence, it held that the respondent had violated Section 3(3) of the Competition Act by limiting the supply of films to the informant. Clarifying that Section 3(5) do not confer absolute immunity, the Commission imposed a penalty of one lakh rupees each to the 27 parties and directed the parties to refrain from such anti-competitive practices in future.

The Delhi High Court in *Hawkins Cookers Limited v. Murugan Enterprises*[84] has, *inter alia*, observed that creating a monopoly in the market of the spare parts of pressure cookers, under the guise of the trademark rights, by restricting the third party from selling the ancillary parts of pressure cookers would tantamount to a violation of the competition law of the country. In this case, the plaintiff, *inter alia*, engages in manufacture of pressure cookers under the trademark 'Hawkins'. The same trademark is used by the plaintiff in manufacturing the gaskets for the pressure cooker. The defendant engages in manufacturing all the spare parts for the pressure cookers including gaskets. The plaintiff alleges that the defendant has been using the trademark 'Hawkins' for selling their gaskets. The High Court, upon finding that the defendant has used their own registered trademark 'Mayur' in the gasket packages and had used the plaintiff's trademark only for the purpose of indicating that the gaskets produced by the defendant would fit the pressure cookers produced by the plaintiff, dismissed the suit. Though, on appeal,

[83] Case No.25 of 2010, Competition Commission of India, (2010)

[84]Hawkins Cookers Limited v. Murugan Enterprises 2008 (36) PTC 290 Del

Division Bench of the Delhi High Court[85] set aside this judgement on the ground that the defendant-respondent's highlighted use of the trademark 'Hawkins' in their gasket packages was not reasonable as all the pressure cookers have equal size and therefore any gasket would fit into it, the *obiter* made in the former judgement remains significant in showing the judiciary's recognition of the interface between competition law and IPR.

In *Singhania & Partners LLP v. Microsoft Corporation (I) Pvt Ltd. & Others*, Competition Commission of India found that the informants failed to make a *prima facie* case under Section 26(1) of the Competition Act. Software was the intellectual property involved in the case. As per the information brought before the Commission, the informant alleged that the 1st respondent, who had a 90% market share, had violated Section 4(2) (a) of the Competition Act by coercing the informant to buy the volume licenses instead of the Original Equipment Manufacturer (OEM) Licenses which was double the price of the latter. It was further alleged that the 1st respondent had violated Section 3 by having agreements with the original equipment manufacturers (OEMs) to have pre-installed Windows Operating Systems in most of the computers shipped by the OEMs, thus causing an adverse effect on the competition. But the Commission found that there was no evidence placed to substantiate the contentions of the informants and thus ruled that they found no *prima facie* competition concern for referring it to the Director General for investigation under Section 26(1) of the Act. The view of the Commission has been criticised for the strange reason that Microsoft has escaped the liability in India while it had been penalised in EU and US for similar allegations.[86] The matter is now pending before the Supreme Court after Competition Appellate Tribunal dismissed the appeal[87].

Another recent case with respect to the interface between the two regulatory systems, is the *Intex Technologies (India) Limited v Telefonaktiebolaget LM Ericsson (Publ)*[88], wherein the informants alleged that the opposite party had committed abuse of dominance by demanding exorbitant and discriminatory royalty rates from them, and the terms of the SEP licensing agreement were unfair and discriminatory. It was also

[85]Hawkins Cookers Ltd. v. Murugan Enterprises, RFA (OS) No. 09/2008, decided on 13 April 2012 [Delhi High Court]
[86]*Supra* note 1, at p. 117-118
[87]Singhania & Partners LLP v. Microsoft Corporation (I) Pvt Ltd. & Others, decided on 9 October 2012 [Competition Appellate Tribunal]
[88] Case No. 76/2013, Competition Commission of India, 2013

complained that the opposite party had refused to share with the informant the commercial terms and the royalty rates that it had with other licensees under the guise of Non-Disclosure Agreements. Micromax also had similar complaints and so both the cases were clubbed together. The Commission found prima facie and directed the Director General to carry out the investigation under Section 26(1) of the Competition Act. In addition to this, Commission made substantial observations including Ericsson's obligations to FRAND terms. The order, along with the other order passed by CCI in favour of Micromax, was challenged in the Delhi High Court[89] contending that the Commission did not have a jurisdiction under this case as they argued that the Patents Act provided adequate mechanism and reliance was placed upon Section 3(5) and 62 of the Competition Act. The High Court observed that, relying upon the facts, Ericsson was not *prima facie* found to have disclosed abuse of dominance against Intex and Micromax, stating that the views expressed 'are in the context of the jurisdiction of CCI to pass the impugned orders', the High Court ruled that the CCI had jurisdiction in this matter. However, the Court was unhappy with the CCI for starting an 'adjudicatory' process, having made detailed determination, in the preliminary stage itself before directing investigation under Section 26(1). The matter is still pending before the Commission.

The most recent case, which deals with the IPR related competition issues, is *Kaveri Seed Company Limited v. Mahyco Monsanto Biotech (India) Limited*[90]. In this case, the informant alleged that the opposite parties were involved in abusing the dominant position by imposing unfair and discriminatory conditions in BT technology sub-licensing agreements to the seed manufacturing companies, charging unfair trade value, restricting technological development with respect to BT technology and BT cotton seeds and denying the market access. Furthermore, it was alleged that the opposite parties, having entered into exclusive supply agreements, refused to deal with the Indian seed manufacturers and reserved the right of fixing the prices in certain circumstances. Other cases with similar allegation were clubbed along with this case. The CCI directed the Director General to investigate the matter along with the clubbed cases under Section 26(1) of

[89]Telefonaktiebolagetlm Ericsson v. Competition Commission of India2016 (66) PTC 58

[90] Case No: 37/2016, Competition Commission of India, 2016

the Competition Act. The Commission is yet to decide on the matter.

Through these case laws, it can be said that the Indian courts are ready to deal with the issues that may arise when the IPRs are misused to the effect that it hampers the competition in the market. Establishing the harmony between the two regulatory systems will help the economy grow in all the possible ways. It should be said that India's shift from the MRTP's competition paradigm to the new liberalized economy-driven competition policy has helped the judiciary to establish a clear harmonised interface between IPRs and Competition law.

OBSERVATIONS AND CONCLUSIONS

The development of IPR has always been a concern for India. Thus, the IPR related competition concerns are at an infant stage. But, being a part of the globalised economy, it may be felt that India would need a strong regulatory framework to control the potential abuses of IPRs bringing adverse effects to the competition. The best example that is often pointed out is the *Microsoft* case in India[91] wherein the CCI could not find violations of any provision under the Competition Act while similar practices of Microsoft were held to be anti-competitive under the jurisdictions of EU and US. The way that the think tank and law makers of the developed countries had dealt with the IPR related competition issues would give some important lessons to India, which they could adopt in order to establish an effective regulatory framework to govern the interface between the two systems, considering the complexities they would potentially face in this global era. But, at the same time, we do not want our judiciary to rely upon the interpretations and regulations of various jurisdictions in deciding the IPR related competition concerns. Instead, a comprehensive regulatory framework that suits the socio-economic conditions of India would help the country in resolving the complex disputes pertaining to the IPR-Competition convergence. However, it would be too early to make such a framework as it may hinder the development process of IPR in the country. A stricter regulatory approach from the authorities, now, would not be sensible because India's goal of making a 'Creative and Innovative India'[92] will be in a spot of bother. But, as it is one of the

[91] Conclusive opinion has not been reached since the matter is still pending before the Supreme Court. Thus, it would not be fair to judge the efficiency of the framework with this instance.

[92] It is the motto of the Government of India recognised in the new National IPR Policy. *See* Cabinet approves National Intellectual Property Rights Policy, Press Information Bureau, Government of India (2016) Available at: http://pib.nic.in/newsite/PrintRelease.aspx?relid=145338 (Last accessed on: 17.12.2016)

fastest growing economies and with the increasing economic ties between nations, the issues triggered by the convergence of IPR and Competition would be inevitable to India. For the purpose of handling such IPR linked competition issues, it is strongly felt that Competition Act, 2002 would be adequate. The reason for this view is that the legislation gives CCI, the reasonable discretion in assessing whether a particular practice has an anti-competitive character rather than providing strict formulae. The Commission can, while bearing the objectives of both the systems in mind, strike a 'careful balance' between the regulatory systems. Therefore, India's regulatory framework is capable enough to make a satisfactory compromise between incentivising innovation and ensuring fair market competition.

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ALLOWING IDEAS TO CHANGE OUR WORLD: AN ANALYSIS OF THE CORPORATE REGULATORY FRAMEWORK FOR START-UPS IN INDIA

- *Nitansha Nema and Shivam Burghate*[*]

ABSTRACT

On the 16th of January, 2016, the Government of India unveiled the Start-up India Scheme in consonance with its objective or rather promise of transforming the nation into an economic superpower. Since then, several programmes and policies have been initiated by the Government to boost the growth of Start-ups and do away with the restrictive Government licensing and regulatory policies that account for the long gestation period for Start-ups. On the 13th of June, 2017, a Notification was issued by the Central Government amending the Indian Companies Act, 2013 to align its provisions with Start-up India by doing away with a number of procedural compliances. This paper aims at analysing the impact of this amendment on the growth of Start-ups in the country and addressing the problems that remain post this amendment. It will address three major questions; firstly, the problems surrounding the recognition and certification of start-ups post the amendment; secondly, the problem of funding that creates a dilemma between getting adequate investment and compromising on the promoter's original idea for the start-up. This segment will also discuss the ironically devious taxation system that imposes challenges to the initial growth of these start-ups. The third problem poses an interesting question as it addresses the entry barriers created by existing corporate giants in the same market and the role of the judiciary in addressing these anti-trust issues that has potential for creating an ecosystem, conducive for Indian start-ups. Lastly, a comparative study of the start-up environment of various regulatory systems around the globe will be undertaken to provide a forward-looking and growth-oriented solution to these problems.

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I. INTRODUCTION

A. Creating an Ecosystem Favourable to Change

The Indian *mise en scène* for new generation start-ups is an important affair, not only from the perspective of economic growth and job creation, but also for the potential it possesses in amplifying the regional development[1] needed by India in its quest to battle income inequalities, poverty, and illiteracy. Law as a mechanism has a huge potential for shaping society as the State can use the law to impose positive and negative reinforcement processes to regulate, deter and incentivise various facets of human behaviour.[2] The ecosystem that a country provides to its start-ups, therefore, plays a compelling role in their advancement. Start-ups are vulnerable entities, limited by scarce resources, apprehensive regulators and customers and susceptible to barriers posed by large and experienced competitors.[3] However, their potential for success has placed them in the spotlight for Indian policy makers who have made several recommendations for their promotion by doing away with the restrictive Government licensing[4] and regulatory policies that account for the long gestation period for Start-ups.[5]

In October, 2011, the Mitra Committee's report on Angel Investment and Early Stage Venture Capital observed that a catalytic government and regulatory environment, debt and equity capital flows, mentoring of talent and support from existing businesses and society could accelerate India's entrepreneurial growth.[6] On the 13th of June, 2017, a notification[7] was issued by the Central Government amending the Indian Companies Act, 2013 to align its provisions with 'Start-up India' by doing away with a number of procedural compliances. Not only does the Act recognise the Department of Industrial Policy and Promotion's definition for Start-ups,[8] but it also simplifies their

[1] ZOLTAN J. ACS & CATHERINE ARMINGTON, ENTREPRENEURSHIP, GEOGRAPHY AND AMERICAN ECONOMIC GROWTH(2006).

[2] CHRISTOPHER HODGES, LAW AND CORPORATE BEHAVIOUR: INTEGRATING THEORIES OF REGULATION, ENFORCEMENT, COMPLIANCE AND ETHICS(2015).

[3] M.H. BALASUBRAHMANYA, M. MATHIRAJAN, P. BALACHANDRA AND M. N. SRINIVASAN, R&D IN SMALL SCALE INDUSTRIES IN KARNATAKA, RESEARCH PROJECT REP., DEPARTMENT OF SCIENCE AND TECHNOLOGY (2001).

[4] GOVT. OF INDIA, RECOMMENDATIONS OF THE INTER-MINISTERIAL COMMITTEE FOR ACCELERATING MANUFACTURING IN MICRO, SMALL & MEDIUM ENTERPRISES SECTOR, at 17 (2013).

[5] MINISTRY OF MSMES, REP. OF THE WORKING GROUP ON MICRO, SMALL & MEDIUM ENTERPRISES (MSMES) GROWTH FOR 12TH FIVE YEAR PLAN, at 52 (2012).

[6] REP. OF THE COMMITTEE ON ANGEL INVESTMENT & EARLY STAGE VENTURE CAPITAL, PLANNING COMMISSION, GOVT. OF INDIA, CREATING A VIBRANT ENTREPRENEURIAL ECOSYSTEM IN INDIA, at 3-4 (2011).

[7] Notification, Ministry of Corporate Affairs, G.S.R. 583(E), Gazette of India, pt. lll sec.3 subs. (i) (Jun. 13, 2017).

[8] § 2 (40) *Explanation*, The Companies Act (2013).

incorporation process by integrating various pre-incorporation forms into three online forms, namely, INC-32, INC-33 (e-Memorandum of Association), and INC-34 (e-Articles of Association).[9] Further, prospective first Directors of the Company can obtain their Director Identification Number (hereinafter DIN) through the incorporation form itself. This has simplified the earlier system of acquiring a DIN prior to filling the incorporation form. Pre-filled forms 49A and 49B for obtaining a Permanent Account Number (hereinafter PAN) and Tax Deduction and Collection Account Number (hereinafter TAN) are now automatically generated after submission of the Incorporation Form.[10] Prior to this amendment, a newly incorporated company had to file separate applications with the Income Tax Department for obtaining their PAN and TAN.

In addition to this, private start-up companies are no longer required to prepare cash flow statements while submitting their financial statements under Section 2(40) of the Act[11] and are allowed to raise deposits from shareholders with exemptions from procedural compliances for the first five years.[12] An exemption allowing a company secretary or director to sign the annual return has been extended to start-ups.[13] Section 173(5), which earlier mandated the Board of Directors to meet at least once in 120 days has also been substituted and an exception has been carved for Private Start-up Companies. They are now required to hold a meeting at least once in each half of the calendar year with a minimum gap of ninety days between the two meetings.[14]Section 174 has been amended to count an interested director towards the quorum of a board meeting, provided he discloses his interest as per Section 184.[15] In addition to this, taxation benefits have been extended to Start-ups on obtaining the Inter-Ministerial Board's certification.[16]

This amendment undoubtedly creates a more favourable environment for start-ups. In its nascent years, a start-up cannot be expected to meet procedural compliances as it neither has the resources, nor the time to do so. Rather, the policies should be framed in a manner that allows

[9] Notification, Ministry of Corporate Affairs, *supra* note 7.
[10]Manoj K. Singh, *Changes in Companies Act which give a fillip to start-up*, BUSINESS TODAY (October 17, 2017, 10:10 PM), https://www.businesstoday.in/opinion/columns/changes-in-companies-act-which-give-a-fillip-to-start-ups/story/262250.html.
[11] § 2 subsec. 40, The Companies Act (2013).
[12] § 73 subsec. 2, The Companies Act (2013).
[13] § 92 (1) *Proviso*, The Companies Act (2013).
[14] § 173 subsec. 5, The Companies Act (2013).
[15] Notification, Ministry of Corporate Affairs, *supra* note 7.
[16] Notification, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Gazette of India, G.S.R. 501 (E), pt. ll sec. 3 subs. (i) (May 23, 2017).

start-ups to focus completely on the idea. Further, even minor procedural violations lead to imposition of penalties. Start-ups do not have the resources to fight long drawn legal battles. In this process, there is a huge risk of all prospects of innovation, development, wealth creation and employment generation getting drowned in this ocean of red tape and superfluous policies which have close to no role to play in the successful realization of an ingenious idea.

B. Storm-less Skies, Sinister Seas

Despite the manifestly accelerating policy amendments, start-ups are still found battling the challenges that exist in the ecosystem. There are problems on three major fronts: (i) a number of obstacles continue to exist in the recognition of a start-up and even if an enterprise manages to cross that hurdle, the process of certification that enables the start-ups to avail tax and IPR related benefits is not time bound and paves way for miscued judgments. (ii) Inadequacy of funds and scepticism of the traditional sources of debt towards start-ups compel entrepreneurs to take help from angel investors and venture capitalists, thus, depriving the entrepreneurs of control over their idea and business. This paucity of funds is further augmented by the double- edged taxation policy. (iii) The third major problem is in the form of entry barriers created by existing corporate giants in the same market. This issue is a cause for concern primarily because the judiciary is unaccustomed to handle these relatively new legal situations. The subsequent chapters present a detailed analysis of these quandaries and also suggest methods to deal with them for creating a more conducive regulatory framework for start-ups.

I. II. RECOGNITION AND THE RED TAPE: BATTLING BUREAUCRACY FOR BENEFITS

In the Indian context, the term Start-up was first defined by the Department of Industrial Policy and Promotion (hereinafter DIPP) in the year 2016 as "an entity working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property".[17] The past decade has witnessed the phenomenal growth of start-ups all over the world because of the significant positive effects they have on employment, and their potential to rejuvenate industries with disruptive

[17] Notification, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Gazette of India, G.S.R. 180(E), pt. ll sec. 3 subs. (i) (Feb. 17, 2016).

technologies[18].[19] However, on analysing the DIPP's definition in the context of the object and purpose of a start-up, a problematic situation can be found. A new venture can be substantially creative and have a positive effect on employment, creation of wealth as well as utility of a service or product. However, it may not necessarily work towards innovation, development or deployment of a "new product or service" or a product or service that is necessarily "driven by technology". In such a scenario, for instance, a micro enterprise which aims to deliver farm produce directly to customers in cities from the farmers will not be recognized as a start-up. This definition fails to consider the positive effect brought by this enterprise, by cutting down middle-men and ensuring that the fresh product reaches the customers, solely because its product is not new and its processes are not driven by advanced use of technology. This restrictive definition excludes various enterprises which although help in wealth creation, cost-cutting, employment generation and delivering maximum consumer satisfaction yet fail to comply with the definition that strictly demands a 'new product' driven by the use of 'technology'. Sectors like agriculture, manufacturing and handicraft, etc. are capable of providing employment opportunities to unskilled labour thereby positively impacting the majorly informal Indian economy. This definition ignores the possibility of recognizing such non-tech start-ups; thus, de-incentivizing talented entrepreneurs from exploring innovative possibilities in these sectors. The innovative ideas need to penetrate into these sectors for start-ups to help and find solutions to socio-economic problems in the country.

Considering the prevalent flaws in this definition, it has been recently amended by DIPP in May, 2017.[20] The recognition of a 'start-up' has been made easy through the Start-up India portal or mobile app.[21] An entity is now considered a start-up if "it is working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation."[22] This

[18] Disruptive technology is a technology that significantly alters the way that businesses or entire industries operate. Often times, these technologies force companies to alter the way they approach their business or risk losing market share or risk becoming irrelevant. Recent examples of disruptive technologies include smartphones and e-commerce. CLAYTON CHRISTENSEN, THE INNOVATORS DILEMMA (1997).

[19] M. H. Bala Subrahmanya, *New Generation Start-ups in India*, ECONOMIC AND POLITICAL WEEKLY, Vol. 50 Issue no. 12 (2015).

[20]Notification, Department of Industrial Policy and Promotion, *Supra* note 16.

[21]Notification, Department of Industrial Policy and Promotion, *Supra* note 17.

[22]Notification, Department of Industrial Policy and Promotion, *Supra* note 16.

inclusive definition solves various problems created by the earlier definition. It opens floodgates for deserving enterprises with a high potential of employment generation and wealth creation, regardless of them creating a 'new product', for being recognized as a start-up. This definition also paves a way for the recognition of non-tech micro and small enterprises as start-ups. These non-tech start-ups provide enormous employment opportunities in the areas where formal industries fail to reach, thereby helping to bridge the gap between the formal and informal workforce in India.

Even though these major issues have been solved by the latest definition, it still creates obstacles in the ease of doing business as it lays out bizarre criteria for an enterprise to be recognized as a start-up. The definition states that an enterprise must not be more than seven years old (ten years in case of a bio-technology enterprise) and must have an annual turnover below INR 25 Crore.[23] Some start-ups might not be able to achieve stability and liquidity in seven years of their incorporation due to market forces which are not under their control. However, they may still have the potential to do significantly well if they are given a few more years.

The latter part of this definition creates a problem because the funding and progress of a start-up relies upon various horizontal and/or verticals that it deals with. Putting a cap of turnover or time period is preposterous in this volatile stage of uncertainty. B2B start-ups, for instance, have a higher turnover (which may exceed INR 25 crore) in comparison to the normal B2C start-ups as they demand bigger investments at higher risks.[24] In this scenario, a B2B start-up with a higher turnover than a B2C start-up may earn lesser profits and yet be deprived of the recognition because of the conditions set in the definition. Thus, setting an objective cap does not serve the purpose of incentivisation in both these cases.

Even after being recognised, a start-up cannot claim tax and IPR related benefits without a certification by the Inter-Ministerial Board (hereinafter IMB). These benefits are essential for a start-up's sustainable growth in its nascent stage when there is no assurance of profit. The IMB comprises several bureaucrats, namely the Joint Secretary of the DIPP and

[23]Notification, Department of Industrial Policy and Promotion, *Supra* note 16.

[24]Suprita Anupam, *Angel Tax And Startups: Why Are Reforms Still Ineffective?*,INC42 (Dec. 21, 2017), https://inc42.com/buzz/angel-tax-startups-mohandas-pai/.

representatives of the Department of Science and Technology, Department of Biotechnology and Ministry of Electronics and Information Technology.[25] This creates a two-fold problem for the start-up ecosystem. Firstly, this fails to address the problem of government's involvement which leads to nepotism and red-tapism in the system. As of January, 2018, 6096 ventures have been recognised as start-ups by the DIPP out of which only 74 start-ups have received certification from the IMB for availing tax benefits.[26] In a market where these start-ups compete with corporate giants, it has to be ensured that administrative delays do not deprive small players of the support that the government intends to provide. As per the *status quo*, the members on the certification board are not required to know the dynamics of the market eco-system, most often leading to miscued judgments. Secondly, adjudicating innovation, creative products and services with a single parameter in a single box is precarious. A sizeable number of budding enterprises with innovative marketable ideas might not fit into these vexatious criteria, thus bereaving them of the benefits.

Measures should be taken to ensure that the members on the board are technologically aware and acquainted with the start-up eco-systems to safeguard the interests of genuine start-ups. The board should publicly list the reasons for not certifying a particular enterprise. A completely online and time-bound process for seeking certification would go on a long way in ensuring transparency and removing red-tapism out of the system.

III. FINANCIAL FOLLIES: THE PROBLEMS WITH FUNDING AND TAXATION OF START-UPS

Like any new venture, a Start-up does not start minting money since its inception. Especially because the idea on which a start-up is based is novel, it takes some time in finding acceptance in the market. Thus, during its nascent years, there is a very high degree of uncertainty with regard to the profits. Unavailability of a regular and steady source of income makes the day-to-day functioning of the business an arduous task. Bankers hesitate in financing start-ups as more often than not they have no collateral security to offer.[27] To add to the

[25] Notification, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Gazette of India, G.S.R. 401 (E), pt. ll sec.3 subs. (i) (Apr. 21, 2017).

[26] *The Status Report*, START-UP INDIA (Jan. 4, 2018), https://www.startupindia.gov.in/uploads/other/status_report_on_startup_india.pdf.

[27] REP. OF THE COMMITTEE ON ANGEL INVESTMENT & EARLY STAGE VENTURE CAPITAL, PLANNING COMMISSION, GOVT. OF INDIA, CREATING A VIBRANT ENTREPRENEURIAL ECOSYSTEM IN INDIA, at 5 (2011).

woes of the entrepreneur, they are also subjected to multiple filings of tax returns and are harassed by the IT authorities if they fail to comply. In these difficult times of poor liquidity, an entrepreneur has to look for other sources like angel investors and venture capitalists to fund her idea. Angel Investors play a crucial role not only in funding the start-up, but also in providing the much-needed mentorship and training to these budding entrepreneurs. However, the lack of clarity around issues like angel tax[28] and capital gains exemptions[29] defeats the whole idea of respite that is offered in the form of these Alternative Investment Funds (hereinafter AIF).

Start-ups require more capital for meeting further market demands which are customarily provided by venture capital funds. Indian Companies saw an investment of more than $103 billion between 2001 to 2015 in venture capital and private equity.[30] Although this figure testifies the enormous contribution of these AIFs to the growth of Indian economy, it qualitatively fails in making a huge difference to the start-up market as entrepreneurs are often impelled to use equity capital as working capital for meeting the enterprises' daily functioning costs and the payment of unreasonable taxes. This often creates conflicts as it reduces the ability of the entrepreneur to scale the business.[31] The discussion that follows shall attempt to undertake a more profound analysis of these issues.

A. The Innovator's Dilemma: Money at the Cost of Creativity

Lessons in parenting differentiate between 'parental tyranny' and 'loving parental authority'.[32] The tyrant parent is impatient and has unreasonable demands, whereas the loving parent places reasonable and age appropriate expectations on children. In the loving parent paradigm, the child still has to perform chores and meet behavioural expectations; however, these are age appropriate. Parental tyranny creates an oppressive environment characterized by harsh competition, fear and resentment, whereas loving parental authority facilitates the child's self-growth, innovative spirit and an ability to stand on one's own feet.

[28] Anupam, *supra* note 24.
[29] Rajeev Chandrasekhar, *Start-up India' Action Plan: a good start, but Govt apathy, big corporates a hurdle*, THE HINDU (Sep. 23, 2016, 02:50 AM), http://www.thehindu.com/business/Industry/%E2%80%98Start-up-India%E2%80%99-Action-Plan-a-good-start-but-Govt-apathy-big-corporates-a-hurdle/article14017710.ece.

[30] 1st Rep., ALTERNATIVE INVESTMENT POLICY ADVISORY COMMITTEE, S.E.B.I., at 6 (2016).
[31] REP. OF THE COMMITTEE ON ANGEL INVESTMENT & EARLY STAGE VENTURE CAPITAL, *supra* note 27, at 3.
[32] WILLIAM C. KASHATUS, ABRAHAM LINCOLN, THE QUAKERS, AND THE CIVIL WAR: A TRIAL OF PRINCIPLE AND FAITH, at 41 (2014).

Just as children are financially and emotionally dependent on their parents for the first quarter of their life, start-ups, in the absence of an alternate source of capital, are dependent upon venture capitalists for money and structural support. Venture capitalists then have two options: to adopt either the tyrant parent model or the loving parental model. Unfortunately, most venture capitalists in India do not have the patience to wait for their investee company to grow to a meaningful capacity and make a public exit with a substantially sized IPO.[33] Founders of Indian start-ups, describing their venture capitalists as "tyrant teachers", often lament the fact that they have to take permission for nearly every business decision,[34] leaving them with little to no control over their own brainchild. There is no malice in minds of the venture capitalists; rather they inadvertently indulge in such patently damaging behaviours[35] as they too are answerable to their investors, the Limited Partners (hereinafter LP).

Structurally, the life of a Venture Capital Fund is such that the returns need to be harvested over the last two to three years of their investment which typically spans seven to eight years.[36] In order to cope with this structural deficit, venture capitalists often resort to precarious tactics such as premature scaling,[37] coerced morphing into banal saleable entities,[38] selling off the start-up due to growing impatience, and indulging in circular investments and re-investments that potentially amplify the gravity of business failure.[39]

Premature scaling is like a nefarious short-cut to success that more often than not creates an environment of toxicity leading to the death of the start-up.[40] Driven by a desire for hasty returns, the venture capitalist compels the founder to start expanding the venture at a critical time when strengthening the core business idea should be the cynosure of the monetary and intellectual resource pool of the start-up. This policy of 'bad growth' is quick in revealing the inefficiency of a start-up's model. It leads to a situation of diminishing

[33] Mahesh Murthy, *Is Venture Capital Killing India's Startup?,* QUARTZ INDIA (Nov. 16, 2014), https://qz.com/297245/is-venture-capital-killing-indias-startups/.
[34] Rajiv Singh, *Funding taps run dry; start-ups look at Nasdaq for listing,* ECONOMIC TIMES (Feb. 05, 2017, 07:42 PM), https://economictimes.indiatimes.com/small-biz/startups/funding-taps-run-dry-startups-look-at-nasdaq-for-listing/articleshow/56975316.cms.
[35] Murthy, *Supra* note 33.
[36] Bob Zider, *How Venture Capital Works,* HARVARD BUSINESS REVIEW, Nov-Dec 1998 Issue (Mar. 24, 2018, 8:25 PM), https://hbr.org/1998/11/how-venture-capital-works.
[37] Eric Parley, *Toxic VC and the marginal dollar problem,* TECH CRUNCH (Oct. 27, 2017), https://techcrunch.com/2017/10/26/toxic-vc-and-the-marginal-dollar-problem/.
[38] Murthy, *Supra* note 33.
[39] Murthy, *Supra* note 33.
[40] Parley, *Supra* note 37.

returns per unit of capital invested, often described as the 'Marginal-Dollar Problem'.[41] At this point, instead of fixing the loopholes in the existing business idea, the venture capitalists' resort to expanding the business in their hurry to harvest the investment and return the principal amount to their Limited Partners. The desperation to chase the marginal dollar drives the venture capitalists to sink deeper into the quick-sand of injecting more capital for scaling, which rapidly augments the losses.

The second notorious tactic employed by venture capitalists involves increasing investment in sectors like advertising and marketing, switching to standard areas of production or mergers with other dominant market players in the same sector.[42] The unique innovation which is particular to a specific start-up gets destroyed when it switches to a standard area of production or merges with a traditional company with an established line of business. Excessive expenditure on advertising and marketing further redirects the resource pool from the central idea. This leads to an amplification of the product's inefficiencies, creates bad publicity and reduces the possibility of an enhanced clientele even after encountering the problems with the core idea. Both these situations culminate into feelings of despondency for the entrepreneur which eventually proves fatal for the start-up.

Start-ups such as Naukri.com and MakeMyTrip took more than a decade in getting ready for listing on a stock exchange.[43] It is this long gestation period, accompanied by the vicissitudes of the early stages of a business that make most LPs eager for returns, thereby compelling the Venture Capitalists to put pressure on start-ups. If the start-up fails to meet the investors' expectation in terms of return on investment, it is prematurely put up for sale. The problem lies in the system of fund structuring accompanied by the lack of patience on part of the investors, who, if not for such ill-timed decisions, could have capitalized on the high returns of a sizeable IPO exit that a start-up would reach given a few more years of nurturing.[44]

Given the above real-life scenarios, the issue of capital can be seen as a major cause for trepidation for entrepreneurs and venture capitalists alike. For start-ups, it poses the obvious dilemma; is it worth sacrificing one's vision, talent and unique idea for the sake of capital? Capital undoubtedly is important, but does it necessarily have to be at the cost of creativity and control over one's own idea?

[41]Parley,*supra* note 37.
[42]Murthy,*supra* note 33.
[43]Singh,*supra* note 34.
[44]Murthy,*supra* note 33.

There is veracity in the saying, "value is not made of money, but a tender balance of expectation and longing."[45] A study conducted by Founder Collective[46] indicated that lightly capitalized companies mostly outperform their well-capitalized counterparts up to the IPO.[47]This testifies that capital isn't the only factor which makes an enterprise successful. A start-up needs guidance in operational aspects and insights from the veterans about the market structures to sustain its idea and make it profitable.

This emphasises the need for establishing sector specific incubators that are in the nature of organisational setups, mostly formed with the help of government and private funds by academia and industries for nurturing start-ups in their initial phase. Incubators provide work space, shared office services and access to specialised equipment in case of technology driven start-ups which would have otherwise been costly along with value added services like technical assistance, business planning, legal services, fund raising and networking.[48] A substantive element of the incubation process is interaction with academicians and public research institutes that facilitates a rigorous exchange of ideas. These brainstorming sessions between various stakeholders enable efficient and quick solutions to the problems faced by young entrepreneurs in establishing their ideas in the initial phase.

However, incubators, as mentioned, can only play a significant role in the initial stage of the start-up; they cannot nourish a start-up till the time it is capable of making an IPO exit. Thus, they are not a substitute for the resources provided by a VC or Angel Investor. Furthermore, in India, a plethora of problems including corruption, red tape and a lack of quality mentorship plague the incubator framework;[49] hence, the innovators' dilemma persists.

B. The Irony of Tax Incentives

The struggle to sustain in the competitive market with limited resources and minimal assurance of profitability emphasizes the need to provide tax exemptions to the entrepreneurs. Various factors like prevalence of risk, delay in returns, etc. discourage investors from

[45]BARBARA KINGSOLVER, ANIMAL, VEGETABLE, MIRACLE: A YEAR OF FOOD LIFE (2007).
[46] An American Seed Stage fund.
[47] Eric Paley & Joseph Flaherty, *Overdosing on VC: Lessons from 71 IPOs*, TECH CRUNCH (Oct. 15, 2016), https://techcrunch.com/2016/10/15/overdosing-on-vc-lessons-from-71-ipos/?_ga=2.49357286.1967983203.1522082756-1800269797.1522082756.
[48]*Technology Business Incubators: An Indian Perspective & Implementation Guidance Report*, CENTRE FOR INTERNET & SOCIETY, at 4, https://cis-india.org/internet-governance/blog/technology-business-incubators.pdf.
[49]*Id.* at 30.

investing in start-ups. Tax incentives have to be provided to allure more investment in start-ups. The Government has tried to introduce various such measures under the 'Start-up India' Action Plan.[50] Provisions in the Income Tax Act, 1961 have been amended to include Limited Liability Partnership (hereinafter LLP) under the definition of 'eligible start-ups'.[51] LLP has been gaining momentum as the preferred form of business entity as it protects individual partners from joint liability in a partnership firm.[52] Thus, including this form of business entity under the definition broadens the scope of an enterprise being certified as a start-up for it to be able to avail tax and IPR related benefits. Under this plan, eligible start-ups have been allowed to deduct up to 100% profits while computing their total income for any three consecutive years out of the five since their incorporation.[53] However, this exemption still fails to address the core concern as it poses the unreasonable expectation on a start-up to start generating income in the first five years. There is a two-fold problem in this exemption. Firstly, expecting budding entrepreneurs to choose three consecutive years for claiming exemptions out of the first five at a critical time when they scuffle to even evaluate the feasibility of their business idea augments their burden. Secondly, even in the hypothetical scenario where a start-up begins to earn profit and claims the exemption, it will still be liable to pay Minimum Alternative Tax, which amounts to 18.5% of the total revenue of the company, in the years that it claims the exemption.[54] While the companies engaged in infrastructure and power sector are exempted from paying this tax,[55] there is no rationale in excluding start-ups from this exemption. This goes on to show the hurdles that need to be crossed by a start-up even after being recognized as one to ensure tax related benefits.

Persons earning long term capital gains arising from sale of capital assets during a year are exempted from paying tax on the same if they choose to invest the gains in the Fund of Funds (hereinafter FFS)

[50] *Startup India Action Plan*, STARTUP INDIA (Jan. 16, 2016), https://www.startupindia.gov.in/pdffile.php?title=Startup%20India%20Action%20Plan&type=Action&q=Action%20Plan.pdf&content_type=Action&submenupoint=action.

[51] § 80 IAC, I.T. Act (1961).

[52] *Diljeet Titus & Baljit Singh Kalha, Why your Startup should be an LLP*, THE ECONOMIC TIMES (May 27, 2015, 12:37 PM), https://economictimes.indiatimes.com/small-biz/legal/why-your-startup-should-be-an-llp/articleshow/47440287.cms.

[53] § 80 IAC, I.T. Act (1961).

[54] § 115 JA, I.T. Act (1961).

[55] *What is minimum alternative tax?*, INDIA INFOLINE NEWS SERVICE (Mar. 25, 2018, 8:15 PM), https://www.indiainfoline.com/article/research-articles-personal-finance/what-is-minimum-alternative-tax-113111501003_1.html.

recognized by the Government.[56] An initial investment of INR 2,500 crore and a total investment of INR 10,000 crore over a period 4 years (i.e. INR 2,500 crore per year) had been promised by the Government while setting up this fund.[57] FFS indirectly invests in start-up ventures through SEBI registered venture funds.[58] According to the latest figures, total commitments under FFS stand at merely at Rs. 1,050.7 crore.[59] This shows the lacklustre attitude of the government towards its commitment of funding start-ups which further discourages the investors from investing in FFS regardless of the tax exemptions provided. The only way to make this provision help promote investment is to ensure that the FFS is managed properly by able fund managers and venture capitalists that are aware of the market dynamics. Additionally, an individual or HUF (Hindu Undivided Family) is provided an exemption if it invests capital gain from the transfer of a residential property in subscribing more than 50% equity shares of an eligible start-up. However, in order to avail this exemption, the recipient start-up is mandated to utilize this capital gain in acquiring 'new assets.[60] Computers or computer software are also considered as new assets under this provision considering the technology driven start-ups.[61]

The obvious problem with this 'supposedly incentive-driven' provision is that it needlessly coerces a start-up to purchase new assets, when this capital can very conveniently fill the working-capital void that has been addressed earlier. Moreover, a start-up should be entitled to use the received capital for several other purposes, depending upon its subjective needs rather than in buying 'new assets'. Enough liberty needs to be given to these budding enterprises. It should not be forgotten that start-ups are primarily driven by innovation and a quest for achieving societal ends by ways and functions that are off the beaten track. Given this paradigm, the desired approach from a policy perspective should ideally be that of less governmental interference in the internal functioning of new ventures. In fact, it is suggested that the government indulge in some kind of introspection as by imposing such impractical conditions, it contradicts its own stand of "Minimum Government,

[56] Fund of Funds for Startups, Department of Industrial Policy and Promotion & S.I.D.B.I. (Mar. 24, 2018, 11.56 PM), https://venturefund.sidbi.in/files/Fund_of_Funds_Brochure_070417.pdf.
[57] STARTUP INDIA, *supra* note 50.
[58] Chandrasekhar, *supra note 29.*
[59] Harsh Upadhyay, *Govt backs over 100 startups under Fund of Funds, SIDBI's aid plunges to 20% in FY17*, ENTRACKER (Mar. 13, 2018), https://entrackr.com/2018/03/govt-fund-100-startups-ffs-sidbi/.
[60] § 54 GB, I.T. Act (1961).
[61] STARTUP INDIA, *supra* note 50.

Maximum Governance"[62] which was promised by the Hon'ble Prime Minister while introducing the 'Start-up India' plan.

Start-ups receive equity funds from angel investors and residents. These investments are made at a premium to the fair market price. This premium works favourably for the small firms as they accede less equity by giving away lesser shares for an extra price to investors. This amount is recognised as 'income from other sources' and is taxed at a hefty 30.9%.[63] Even though funds sourced from non-residents and venture capital funds are exempted from this tax, notices for paying taxes on investments received by Indian residents were still served to nearly 200 entities for raising funds over and above the assessed fair market value.[64] Several notable personalities in the Indian Start-up ecosystem including Mohandas Pai[65] had sought attention of the government towards this 'disastrous' step.[66] One of the major problems faced by the whole industry was in recognizing a 'fair-value' for start-ups while levying the tax, considering their discounted cash flow.[67] The notification by the Income Tax Department finally cleared the ambiguity around the issue and exempted eligible start-ups from paying this tax.[68] However, there is a need to redefine section 56 (ii) of the IT Act, 1961 as many of the start-ups have still not been able to avail the exemptions.[69] These administrative lacunas have to be worked upon for a better implementation of the intended policy to help start-ups grow.

The 'Alternative Investment Policy Advisory Committee' constituted by SEBI under the chairmanship of Narayan Murthy has suggested a tax deduction of up to 50% to the investors in SEBI regulated angel funds.[70] Legally recognizing 'angel funds' and 'angel group' and labelling their

[62] Yamini Aiyar, *Maximum government, minimum governance*, LIVE MINT (May 23, 2016, 01:54 AM), http://www.livemint.com/Opinion/zvfpsEcUj5ekp10SluXRXJ/Maximum-govt-minimum-governance.html.
[63] § 56 (ii), I.T. Act, 1961.
[64] Team INC42, *From The GST Conundrum To Easy Exit Policy, What Indian Startup Ecosystem Expects From Upcoming Union Budget 2018*, INC42 (Jan. 27, 2018), https://inc42.com/features/budget-2018-tax-startup.
[65] Former Director of Infosys; Currently, the Chairman of Aarin Capital.
[66] Suprita Anupam, *Angel Tax And Startups: Why Are Reforms Still Ineffective?*,INC42 (Dec. 21, 2017), https://inc42.com/buzz/angel-tax-startups-mohandas-pai/.
[67] M. Devan, *Angel investors in startups worried over 'angel tax', seek relief from Govt.*, THE NEWS MINUTE (December 27, 2017, 11:21 PM), https://www.thenewsminute.com/article/angel-investors-startups-worried-over-angel-tax-seek-relief-govt-73820.
[68] Times News Network, *CBDT gives startups small relief on 'angel tax',* TIMES OF INDIA (Feb. 7, 2018, 11:36 AM), https://timesofindia.indiatimes.com/trend-tracking/cbdt-gives-startups-small-relief-on-angel-tax/articleshow/62816427.cms.
[69] Suprita Anupam, *Angel Tax: Indian Startups May Get Policy Boost from Indian Govt.*, INC42 (Feb. 19, 2018), https://inc42.com/buzz/angel-tax-indian-startups-policy-indian-govt/.
[70] 1st Rep. of A.I.P.A.C., *supra note* 30, at 7.

investment as genuine investment in start-ups can further facilitate the exemption on the investments made by these investors.[71] Following the footsteps of successful start-up ecosystems like the USA, angel investors should be offered tax benefits when they fund small companies.[72]

IV. COURTING FAIRNESS AMIDST POWERFUL ENEMIES: ROLE OF THE JUDICIARY IN COMBATING ANTI-TRUST ISSUES

The law has always been in a race to keep pace with societal growth. The advent of technology is posing greater challenges to law makers who are struggling to ensure that laws keep up with the novel ideas and innovations brought about by mankind in the 21st century. There are situations where laws are caught up in a blind spot and lack the vision to regulate a new area of human conduct. It is in these predicaments, that society requires the judiciary to aid the law with its farsighted and profound vision.

Start-ups, too, are children of technology and the desperate post crises era faced by humankind. These start-ups mostly bring about innovations in existing technology that increase utility, efficiency, convenience and cost-effectiveness. Thus, it is natural for them to appear like a thorn in the eyes of traditional firms and service providers in the same market.

The issue of disruptive technologies vis-à-vis Competition Law came before the Competition Commission of India (hereinafter CCI) for the first time in 2015 in the case of *Fast Track Call Cab v. ANI Technology.*[73]Fast Track, a traditional cab operator, accused ANI Technology of predatory pricing and an abuse of dominant position as a violation of Section 4 of the Competition Act, 2002.[74] The informant alleged that ANI Technologies was responsible for the informant's business losses as a consequence of the unrealistic discounts and incentives offered to customers and drivers by them. Though the decision was eventually in favour of ANI, the dissenting opinion of Mr. Augustine Peter, ordering ANI to re-organize its pricing structure[75] was a cause for concern

[71]Taslima Khan, *Talks on with DIPP to secure legal status for angel groups*, ECONOMIC TIMES(Feb 19, 2018, 08:12 AM), https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/talks-on-with-dipp-to-secure-legal-status-for-angel groups/articleshow/62977212.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[72] Meera Siva, *All you wanted to know about Angel Tax*, BUSINESS LINE (Jul. 25, 2016) https://www.thehindubusinessline.com/opinion/columns/slate/all-you-wanted-to-know-about-angel-tax/article8897945.ece.

[73] In Re: M/s. Fast Track Call Cab Private Ltd. and M/s. A.N.I. Technologies Pvt. Ltd., Case No. 6 of 2015 (CCI).

[74] § 4, Competition Act (2002).

[75] In Re: M/s. Fast Track Call Cab Private Ltd. and M/s. A.N.I. Technologies Pvt. Ltd., Case No. 6 of 2015 (CCI).

as it projected the traditional view against novel pricing algorithms that have revolutionized the Indian cab market. Later in 2015, Meru, which is a traditional taxi service-provider had filed a complaint against Uber, a mobile application based taxi operator[76] with the CCI for abuse of its dominant position[77] and offering services at anti-competitive pricing.[78] The CCI out rightly rejected Meru's claim on the grounds of unreliable evidence and non-existence of Uber's alleged dominant position.[79] In response to this, Meru Cabs filed an appeal with the Competition Appellate Tribunal who gave a prima facie opinion against Uber and called for the Director-General to investigate.[80] Uber challenged this decision before the Supreme Court which passed a restraint order against the Commission.[81]

In August, 2016, the Association of Radio Taxis, which consists of big players like Meru, Mega and Tab Cabs in its fold, sought a ban on Uber and Ola.[82] The ban was sought on the grounds that tourist vehicles were being used for intra-city commutation which is in violation of the Motor Vehicles Act.[83] The result was not favourable for the app based start-ups, who faced numerous problems at the hand of regulators post this case.[84] In October, 2016, the Maharashtra Government released the draft of the Maharashtra City Taxi Rules, 2016 which imposed onerous regulations on app-based cab operators in the form of restrictions on engine capacity, pricing and permits.[85] In August 2016, a notice was issued by the Delhi High Court to both Ola and Uber to stop surge pricing and adhere strictly to government prescribed fares.[86] In November, 2016, the Karnataka High Court also ruled in favour of the draconian Karnataka on-demand Transportation Technology Aggregators Rule, 2016, dismissing Uber's request

[76] Meru Travel Solutions Private Limited v. Uber India Systems Private Limited and Ors., Case No. 96 of 2015 (CCI).
[77] *Id.* at 4.
[78] *Id.*
[79] *Id.*
[80] Press Trust of India, *Uber Claims Competition Appellate Tribunal's Order Suffers From Jurisdictional Flaw*, FINANCIAL EXPRESS (Mar. 1, 2017, 08:24 PM), http://www.financialexpress.com/industry/uber-says-supreme-court-compat-order-suffers-from-jurisdictional-flaw/571590/.
[81] *Id.*
[82] Swati Deshpande, *'Radio Taxi seeks ban on Uber, Ola; Bombay HC seeks reply from state'*, TIMES OF INDIA (Aug. 24, 2016, 10:52 AM), https://timesofindia.indiatimes.com/india/Radio-Taxi-seeks-ban-on-Uber-Ola-Bombay-HC-seeks-reply-from-state/articleshow/53849330.cms.
[83] *Id.*
[84] Meha Agarwal, *Uber India Drags Taxi Associations to Bombay High Court*, INC42 (Apr. 24, 2017), https://inc42.com/buzz/uber-india-sues-taxi-associations/.
[85] Aparna Mishra, *Uber Raises Concerns to Maharashtra CM over New City Taxi Rules*, INC42 (Oct. 24, 2016) https://inc42.com/flash-feed/uber-argues-maha-taxi-rules/.
[86] Aparna Mishra, *Ola, Uber Face Dress Down as High Court Puts Stop to Surge Pricing*, INC42 (Aug. 12, 2016), https://inc42.com/buzz/delhi-hc-no-surge-22aug/.

challenging the authority of the government to impose such rules.[87]

In April, 2017, eventually, the Bombay High Court passed a verdict favourable for the online taxi aggregator[88] by directing the Joint Commissioner of Police to ensure that Uber vehicles are not blocked or damaged. The Court even praised the convenience of the services offered by Ola and Uber over the traditional Black-and-Yellow Taxis prevalent in Bombay.[89] Though this marks a welcome change, it does not alter the bitter truth of harassment faced by start-ups at the hand of partisan regulatory bodies and adjudicatory bodies underexposed to such upcoming anti-trust issues.

What is significant here is that such suits by incumbent market players against technology based start-ups are not uncommon in other parts of the globe.[90] The United States' Supreme Court in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*[91] remonstrated about "market participants, for instance, dentists or taxi cab owners running the state boards overseeing their own industry."[92] Though the ruling did not explicitly deal with start-ups, it definitely had a ripple effect on the start-up industry especially in sectors like accommodation and urban transportation, where hotel and city taxi commissions have filed lawsuits on regulatory grounds, similar to the ones in India to drive out tech start-up competitors like Uber, Instacart, Lyft and Airbnb.[93] In the words of Ted Ullyot, advisor to start-ups at the venture capital firm Andreessen Horowitz and former general counsel at Facebook, the Supreme Court case "sent to government bodies of all sorts, a message that may dissuade them from trying to impose onerous regulations in the first place."[94]

Disruptive technologies and new ideas fairly out-compete traditional market players, who subsequently levy allegations of unfair competition against the start-up. It is important for competition regulators to

[87] Ambika Chopra, *Karnataka High Court Rejects Uber's Plea; Rules in Favour of State Government,* INC42 (Nov. 11, 2016), https://inc42.com/flash-feed/high-court-rejects-uber-plea/.
[88] *Bombay HC Praises Taxi Aggregators,* THE ASIAN AGE (Jul. 1, 2017, 3:10 AM) http://www.asianage.com/metros/mumbai/010717/bombay-hc-praises-taxi-aggregators.html?fromNewsdog=1&utm_source=NewsDog&utm_medium=referral.
[89] *Id.*
[90] Danny Chricton, *Do Startups Stand A Chance Against Valley Incumbents?*,TECH CRUNCH (Apr. 9, 2014) https://techcrunch.com/2014/04/08/do-startups-stand-a-chance-against-valley-incumbents/.
[91] North Carolina State Board Of Dental Examiners v. Federal Trade Commission, No. 13-534, Slip op., 574 U.S. 135 (2015).
[92] *Id.* at 9.
[93] Jeff John Roberts, *Supreme Court Ruling Gives Startups a New Weapon against Regulators,* FORTUNE (Aug.11, 2015), http://fortune.com/2015/08/11/supreme-court-startups/.
[94] *Id.*

understand that innovative business models cannot be evaluated in the same manner as traditional business models. Adjudicatory and enforcement actions have a direct impact on the impetus to undertake a new venture or invest in a market, thereby affecting the entire ecosystem of innovation and ease of doing business.

This trend where existing powerful market players bring lawsuits against new entrants is perilous on a micro as well as macro level. A micro level analysis reveals that most start-ups are not well equipped to fight these long drawn legal battles. They neither have the time, nor the money to hire lawyers that can match the experienced in-house counsels of big players. Further, on a macro level, the time and money wasted in battling these mostly frivolous and vindictive lawsuits can be utilized more effectively in developing superior and more economical technology that can benefit the society as a whole. There have been numerous instances of bright-eyed promoters ending up despondent and hopeless, and eventually abandoning their venture after a brigade of lawsuits and enforcement actions came their way.[95]

Leaving these issues unaddressed would frustrate the purpose of amending the Companies Act. Meeting general regulatory compliances is an augean task for start-ups owing to their limited manpower and resource pool; thus, burdening them even further with onerous lawsuits and unfair anti-trust requirements is like sending a soldier to the warfront without proper battle-gear and training. Indian regulators and adjudicatory bodies need to learn by the example of countries like the U.S. create a legal ecosystem that strikes a balance between effective monitoring of technical pricing algorithms and maintaining a regulatory environment that is conducive for innovation to flourish.

V. CONCLUSION

The World Bank Group's latest 'Doing Business 2018: Reforming to Create Jobs' report places India at the 100th position in the Ease of Doing Business (hereinafter EoDB) Ranking.[96] This ranking is of particular significance to developing nations as it helps attract entrepreneurs and investors worldwide to invest in a country which in turn augments the process of job and wealth creation in the

[95] Mark Suster, *Why Lawsuits Are On the Rise at Startups and What To Do About It*, BOTH SIDES (May 10, 2015), https://bothsidesofthetable.com/why-lawsuits-are-on-the-rise-at-startups-and-what-to-do-about-it-83f80676bfd4.

[96] Press Release, *India Jumps Doing Business Rankings with Sustained Reform Focus*, THE WORLD BANK (Oct. 31, 2017), http://www.worldbank.org/en/news/press-release/2017/10/31/india-jumps-doing-business-rankings-with-sustained-reform-focus.

host state. This marks India's maiden entry into the top 100 countries in EoDB and is also the highest jump that any country has made in this calendar year.[97] Though the concentrated reforms in the policy framework brought forward by the government to boost the economy have enabled India to make this leap, the government's vision of reaching 'top 50'[98]continues to remain blurred by shortcomings in the existing system.

Areas like starting a business, enforcing contracts and dealing with construction permits still need a drastic reform. According to the above-mentioned report, it takes 1445 days in enforcing a contract in India, making it the 164th country on the indicator of Enforcing Contracts.[99] On the other hand, Singapore, which has emerged as one of the most sought after ecosystem by entrepreneurs and investors around the world, ranks 2nd on this indicator since it takes only 164 days to get a contract enforced in Singapore.[100] The average time taken for 'trial and judgement' in Singapore is 118 days,[101] while it is 1095 days[102] in India because of various reasons like complex litigation procedures, confusion related to jurisdiction of courts and highly existing pendency of cases.[103]

Fast track courts that primarily deal with start-ups and business laws that affect the ecosystem could be formed to reduce the time taken in basic issues like enforcing a contract. The Department Related Standing Committee on Commerce has recommended an alternative dispute resolution mechanism and creation of certified practitioners to assist in conflict resolution.[104] It has also recommended that adjournment in cases dealing with 'enforcing a contract' should only be limited to exceptional circumstances.[105] Start-ups often have a limited nature of business and are confined by inadequate resources for fighting legal battles; these recommendations need to be strictly

[97] Ajay Dua, *India improves on ease of doing business, but much work left to be done,* LIVE MINT (Nov. 1, 2017, 07: 19 PM), https://www.livemint.com/Opinion/gDTnRkzbR9ao1fRdYMGEdM/India-improves-its-ease-of-doing-business-but-much-work-lef.html.
[98]*India makes it to Top 100 in 'ease of doing business'*, BUSINESS LINE (Mar. 30, 2018, 08:44 PM), https://www.thehindubusinessline.com/economy/policy/india-makes-it-to-top-100-in-ease-of-doing-business/article9935450.ece.
[99]THE WORLD BANK, *supra* note 96.
[100]*Doing Business 2018*, World Bank Group, at 4 (Oct. 31, 2017), http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Profiles/Country/SGP.pdf.
[101]*Id.* at 54.
[102]*Doing Business 2018*, World Bank Group, at 109 (Oct. 31, 2017), http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Profiles/Country/IND.pdf.
[103]*Ease of Doing Business*, 122nd Rep. by Department-Related Parliamentary Standing Committee On Commerce, Rajya Sabha, at 50 (Dec. 21, 2015).
[104] *Id.* at 33.
[105] *Id.*

implemented to ensure that they don't end up with huge losses owing to delay in trial and judgement.

The problems pertaining to effective recognition of start-ups can be addressed by forming a separate statutory board specially assigned to undertake the regulation, recognition and certification of start-ups, comprising venture capitalists, industrialists and other stakeholders along with government officials. In the same breath, recognition will also become more effective if the current definition of a start-up that prescribes objective criteria for recognition is changed to a purposive one so that start-ups with varying natures of business can also be accommodated in the definition.

The government is required to play an active role in fostering venture capital communities for meaningful injection of funds in the start-up sector that can make new ideas marketable and impactful. The National Research Foundation (NRF) of Singapore generously tops up investments by accredited incubators by adding S$5 for every S$1 put in by the incubator up to a maximum of S$500,000.[106] Investors have also been given the right to buy back the government stake in the start-up at the original price with a modest interest charge within three years from the time of investment.[107] Such initiatives that decrease investors' risk should be taken by the government to attract funding for the initial phase of the start-up. Start-up accelerators and incubators go a long way in providing technical assistance, mentorship and even funding a start-up. The number of incubators and accelerators in India grew a sharp 40% in 2016, with more than 40 of them seeing the light of the day.[108] But China and U.S.A. who are ranked first and second above India, which has the third highest number of incubators and accelerators, have over 2,400 and 1500 incubators respectively.[109]Thus, for making a qualitative impact on the ecosystem, the number of incubators needs to be increased aggressively. Along with funds, an entrepreneur also needs access to skilled labour, research and a market to sustain and

[106]Astrid Seegers, *Start-Up Ecosystem In Singapore*, HOLLAND INNOVATION (Sep. 8, 2017), http://hollandinnovation.sg/start-up-ecosystem-in-singapore/.

[107]*All together now*, THE ECONOMIST, (Jan. 18, 2014) https://www.economist.com/news/special-report/21593582-what-entrepreneurial-ecosystems-need-flourish-all-together-now.

[108]*Incubators/Accelerators (I/As) Driving the Growth of Indian Start-up Ecosystem–2017*, NATIONAL ASSOCIATION OF SOFTWARE AND SERVICES COMPANIES (NASSCOM) AND ZINNOV CONSULTING, http://www.nasscom.in/knowledge-center/publications/indian-start-ecosystem-%E2%80%93-traversing-maturity-cycle-edition-2017.

[109] Disha Sharma, *India now ranks third globally in number of incubators, accelerators*, VCC CIRCLE(May 6, 2017), https://www.vccircle.com/india-now-ranks-third-globally-in-number-of-incubators-accelerators-report/.

flourish. This is provided by educational institutions, research agencies and large businesses. A policy framework that encourages research and development in educational institutions will not only increase the scientific output of the country but will also lead in creation of skilled labour and prospective entrepreneurs.

Incentives and exemptions being currently provided to start-ups and investors in India do not really address the problems and need to be modified in order to have a meaningful impact. For instance, rather than putting an objective time cap for providing tax exemption on income, taxes should only be charged when the start-up breaks even and begins to earn profits. Tax incentives should be provided to angel investors to encourage more investments. U.S.A. has seen a steady increase in the angel funds and a booming start-up ecosystem because of investor friendly tax regulations which allow for up to 100% exclusion on capital gains for investing in early stage companies.[110]

Emerging issues in the field of competition law due to the entry of start-ups with their ability to disrupt existing markets with the use of innovations and technology could be addressed by taking a lead from countries which have an evolved business regulatory framework. India could follow the example of the Competition and Market Authority of the U.K. that issued guidelines for start-ups to make them aware of the existing framework of Competition Law.[111] Such a move would ensure that start-ups frame their internal business policies and contracts[112] in a manner that does not breach the law and save them from getting embroiled in anti-trust lawsuits later on. Similar to the Australian Competition and Consumer Commission,[113] CCI should undertake research studies to understand the functioning of pricing algorithms and their potential effect on the issues of anti-competitive pricing and fair markets. The outcome of such a research initiative can aid the courts and regulators in making well-informed decisions and policies that govern technology-based start-ups.

In developing countries, where resources are insufficient to cater to the basic needs of every citizen, businesses

[110] Internal Revenue Code § 1202, 26 U.S.C. (1986).

[111] *Quick Guide to Complying with Competition Law*, COMPETITION AND MARKETS AUTHORITY, at 3, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306899/CMA19.pdf.

[112] Arshad Khan & Gaurav Bansal, *Does competition law affect startups?*,DECCAN HERALD (Apr. 11, 2016, 12:04 AM), http://www.deccanherald.com/content/539665/does-competition-law-affect-startups.html.

[113] Gilbert & Tobin, *Digital Platforms the Focus of a "World First" Inquiry,* LEXOLOGY (Dec. 12, 2017), https://www.lexology.com/library/detail.aspx?g=288db970-de56-45ec-b765-47081a0d5047.

play an invaluable role in generating employment creating sustainable economies. However, a limited resource pool restricts the overall entrepreneurial ability of a nation. In such situations, a conducive regulatory environment constituted by laws and policies that promote and incentivize businesses are of essence in building the economy. Thus, the concerted efforts of legislators, administrators and the judiciary in overhauling the myriad laws pertaining to business incorporation, taxation, competition and financing can go on to play a catalytic role in fulfilling India's dream of enhancing the general quality of life of her citizens and securing to them, justice: social, economic and political.

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