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Website: http://clc.du.ac.in
Email: pic@clc.du.ac.in

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CONTENTS

From the Desk of Professor-In-Charge

The sixth volume of the Journal of The Campus Law Journal (JCLC) is before the esteemed readers. After the rigorous scrutiny and reviews, only four papers could be selected for the publication for this volume. We received a good number of papers, but many of them could not get through the process of double blind-review. The hard work of the Editorial Team-Dr. Raman Mittal, Dr. Ajay Sharma, Dr. Neelam Tyagi, and Mr Haris Jamil, is worth appreciable .

This volume features papers on Environmental Law, Judicial Overreach, Right to Information, International Humanitarian Law and Intellectual Property Rights. The views expressed in the papers are those of authors and in no way reflect the views of Campus Law Centre. In one of the articles, under the guise of dire economic consequences, sermons have been given against certain decisions of the Supreme Court of India. The paper urging the judiciary to exercise restraint in the matter of economic policy claims to be inter-disciplinary, but tilts heavily in favour of economics by providing an economic analysis of law. Another article argues for the inclusion of private institutions and NGOs under the ambit of Right to Information Act, and still another paper examines the accessibility barriers to copyrighted educational materials and argues that copyright debates that have always been shaped from the perspective of the right holders, have undergone drastic changes since the Marrakesh Treaty, 2013. The less-noticed principles of International Humanitarian Law , such as Equality of Belligerents, Maximum Applicability, Sovereignty of States and Automatic Application have been identified and explained, in another article, in the context of the applicability of IHL to the parties of an armed conflict. The 27 year journey of Australia's NSW Land and Environment Court is compared with 7 year journey of India's National Green Tribunal in another article to find that if NSW's LEC has achieved a high standard of environmental adjudication, India's NGT has been doing amazingly well in protecting the environmental, though it has to face many real challenges in terms of jurisdiction etc.

Three of our senior colleagues retired recently. Professor S.C. Raina who was on deputation to Himachal Pradesh National Law University as Vice-Chancellor and Professor J.L Kaul who was on deputation to HNB Garhwal University, Uttrakhand as Vice-Chancellor joined CLC a few months before their retirements and ultimately attained superannuation from University of Delhi. Mr. S.K. Gupta has also completed his academic journey at University of Delhi. This volume features write ups to honour our dear and revered senior colleagues. Two book reviews are also contained herein. Dr. Surat Singh, Advocate, Supreme Court of India reviews Arghya Sengupta and Ritwika Sharma (ed) book "Appointment of Judges to the Supreme Curt of India;

Transparency, Accountability, and Independence" and Dr. Kshitiz Kumar Singh, Assistant Professor, Campus Law Centres reviews Prashant Reddy T. & Sumathi Chandreshekanbook titled "Create, Copy, Disrupt: India's Intellectual Property Delimmas".

I am extremely delighted to inform the vast body of CLC *alumni* that Campus Law Centre Alumni Association (CLCAA) has been registered under the Societies Registration Act, 1860. The first Advisory Body meeting was held at Campus Law Centre, University of Delhi on 3rd September, 2018. The meeting was chaired by Hon'ble Mr. Justice Ranjan Gogoi (as he then was; now the Chief Justice of India), Patron-in-Chief. A lucid presentation & addresses were also made upon the agenda of CLCAA by Hon'ble Mr. Justice A.K. Sikri, the Patron; Hon'ble Ms. Justice Gita Mittal, the Chairperson; Hon'ble Mr. Justice Ajay Tripathi; Hon'ble Mr. Justice N.P. Singh and Additional Solicitor General of India Ms. Pinky Anand and other members of the Advisory Body. The Patron-in-Chief Hon'ble Mr. Chief Justice Gogoi also inaugurated the CLCAA's official website i.e. clcalumni.org . With Mr. Mohan Parasaran as the President, Mr. Rakesh Munjal, Mr. Sidharth Luthra, Mr. S.K. Gupta as Vice-Presidents and Mr. Jagdev the General Secretary of the Governing Body, CLCAA is currently engaged in the membership drive and planing various activities for the benefit of CLC students and teachers.

In the last year, Campus Law Centre organised many seminars, competitions, lectures etc.., I am pleased to mention some of them. The academic session, through Orientation Programme, was inaugurated by Hon'ble Mr. Justice Navin Sinha, Judge, Supreme Court of India as Chief Guest and Guests of Honour - Hon'ble Mr. Justice Sanjeev Sachdeva, Judge High Court of Delhi, Senior Advocates-Mr A.S. Chandhiok and Mr. Rakesh Munjal. The Campus Law Centre in collaboration with Mrs. Nirmal Luthra organized International Moot Court Competition, the 14th Edition of K.K. Luthra Memorial Moot Court Competition from 19th-21st January. Over 60 Universities participated in the event including International Universities such as Fitzwilliam College, Cambridge, Northumbria University Law School, University of Warwick, Bangor University Law School, University of Bristol Law School, United Kingdom, The George Washington University Law School, USA, Universitas Gadjah Mada, Indonesia, Pakistan College of Law, Lahore University of Management Sciences (LUMS), Pakistan, Sri Lanka Law College, Sri Lanka, Kathmandu School of Law, Nepal, London College of Legal Studies (South), Bangladesh and Hankuk University, south Korea. Hon'ble Mr. Justice Deepak Gupta, Judge Supreme Court of India Inaugurated the event while Hon'ble Mr. Justice L. Nageswara Rao, Judge Supreme Court of India delivered the Valedictory Address and Hon'ble

Mr Justices from the High Court- Hon'ble Mr Justice S. Ravindra Bhat, Hon'ble Mr Justice .Kameswar Rao and Hon'ble Mr Justice C. Hari Shanker were the Guests of Honour.

Campus Law Centre in association with Dr. Surat Singh, Advocate, Supreme Court of India organized "Lecture Series on Supreme Court Lawyering" in which Hon'ble Judges from the Supreme Court of India- Hon'ble Mr. Justice A.K. Sikri, Hon'ble Mr. Justice Deepak Gupta, Hon'ble Judges from High Court of Delhi- Hon'ble Ms. Justice Gita Mittal Acting Chief Justice, High Court of Delhi (as she was then); Hon'ble Mr. Justice S. Ravindra Bhat and top Senior Advocates of Supreme Court of India -Sh. Kapil Sibal, Mr. Mohan Parasaran; Mr. Rupinder Singh Suri, Mr. Sidharth Luthra and Mr. Parag P. Tripathi, delivered lectures on diverse topics such as"Qualities of a Top Lawyer and how to Cultivate them", "From Client Conference to Court Presentation", "How Do I Read Court File, Hear An Argument And Write A Judgment", "Challenges and Opportunities for a Female Lawyer/Judge", "How to Prepare a Criminal Case?"," To be an Effective Lawyer, what Matters Most – Connections or Competence?"; "How to Prepare the Case for Government and Argue it before the Court", "How to Make Contribution to Society Through Legal Profession", "How to Mobilize Cash Flow" and "Law and Politics".

A National Seminar on "Women with Disabilities: Law and Policy" was organized by the Campus Law Centre to mark the occasion of International Women's Day on March 10, 2018. Hon'ble Mr.Justice Ashok Bhushan, Judge Supreme Court of India was the Chief Guest for the Valedictory session and the Chief Guest of the Inaugural Session was Hon'ble Ms. Justice Mukta Gupta, Judge, High Court of Delhi. The seminar had three sessions with diverse themes including addresses by resource persons such as Prof. (Dr.) Nimesh G. Desai, Director, Institute of Human Behaviour &Allied Sciences (IHBAS), Ms. Seema Baquer, Director, Concerted Action (CAN), Prof. Nilika Mehrotra, Professor, School of Social Sciences, JNU, Prof. Anita Ghai, Professor, School of Human Studies, Ambedkar University, Delhi, Ms. Roma Bhagat, Advocate, Supreme Court of India, Dr. Nachiketa Mittal, Assistant Registrar (Research), Supreme Court of India, Mr. Pankaj Sinha, Advocate, Supreme Court of India and Mr. Jai Dehadrai, Standing Counsel, Government of Goa.

Hope the readers will find this Volume worth reading. Any suggestion for the improvement of JCLC is most welcome.

Usha Tandon
20 Nov., 2018

EDITOR'S NOTE

Welcome to the sixth issue of the Journal of Campus Law Centre (JCLC) which is the result of academic collaboration between academicians, researchers, professionals and other scholars. Our journal aims to provide a platform for projecting the results of legal scholarship by espousing research and reflection on the legal issues of the day. This issue contains a medley of various themes converging on the discipline of law.

Professor Usha Tandon in her paper on environmental courts and tribunals provides a comprehensive comparative analysis of environmental courts in India and Australia in terms of their respective historical background, statutory provisions and functioning. Dr. Seema Singh and Dr.MythiliBhusnurmath explore the inter-play of law and economics while adopting an inter-disciplinary approach and examine how courts have, over the years, moved away from a 'hands-off' approach to economic issues to playing a more activist role in economic policy formulation. A paper by Dr. Kavitha Chalakkal on right to information seeks to portray the role and responsibility of non-governmental and private organisations that perform public functions. Dr. Kailash Jeenger elucidates the principles and applicability of international humanitarian law by interpreting the provisions of the treaty law by identifying and focusing on certain less-noticed principles. Ms. Priya Anuragini and Dr. Abdullah Nasir investigate into the accessibility to copyrighted materials for educational purposes while evaluating whether the copyright regime is capable to meet the present day educational challenges. The issue contains tributes to three of our illustrious retiring professors—Prof. SC Raina, Prof. JL Kaul and Prof. SK Gupta.

Our goal is to provide scholars worldwide with comparative papers on recent legal developments not only in India, but also in the whole world. We hope that this issue of JCLC will be of value to all those who read it.

Dr. Raman Mittal

ENVIRONMENTAL COURTS AND TRIBUNALS: A COMPARATIVE ANALYSIS OF AUSTRALIA'S LEC AND INDIA'S NGT*

*Usha Tandon***

Abstract

Environmental Courts and Tribunals (ECT) are being rapidly growing throughout the world and are becoming an important phenomena of 21st century Environmental Law. As of January, 2016, the number of ECT have grown to 1,200 in 44 countries. The amazing growth of ECT worldwide is quite interesting, as there are no international treaties or conventions specifically requiring the States to create Special Environmental Courts. Principle 10 of Rio Declaration, 1992, is often quoted to suggest the creation of ECT, which in fact talks about "effective access to justice and administrative proceedings...". Australia had taken a lead in creating Environmental Court, way back in 1980 when New South Wales established the Land and Environment Court (LEC). India has established National Green Tribunal (NGT) way back in 2010. Since there is no true international framework as yet in this regard, ECT developments have been in various forms at the national levels. The present paper provides a comparative analysis of Australia's LEC and India's NGT to enhance the successful functioning of both courts in the light of the objectives with which these forums have been created. It also critically analyzes the scope and limitations of the aims and objectives behind the establishment of specialized adjudicatory bodies.

I
Introduction

Australia had taken a lead in creating Environmental Court, way back in 1980, when, the Land and Environment Court (hereinafter referred to as LEC) was established in its State of New South Wales (hereinafter referred to as

** Professor-In-Charge, Campus Law Centre, University of Delhi, Delhi.

I acknowledge the research assistance rendered by Advocate Aditya N. Prasad and Mr. Varun Bansal.

NSW). India has established it's National Green Tribunal (hereinafter referred to as NGT) in 2010 at the national level. Since late 1960s, widespread public awareness of environmental issues has resulted in a growing number of movements that aim to confront environmental degradation.[2] Environmental Courts and Tribunals (hereinafter referred to as ECT) are being rapidly growing throughout the world and are becoming an important phenomenon of 21st century Environmental Law.[3] The amazing growth of ECT worldwide is quite interesting, as there are no international treaties or conventions specifically requiring the States to create Special Environmental Courts. The Principle 10 of Rio Declaration, 1992, is often quoted to suggest the creation of ECT, which in fact talks about "effective access to justice and administrative proceedings...".[4] Since there is no true international framework as yet in this regard, ECT developments have taken various different forms at national levels. This chapter provides a comparative critical analysis of Australia's LEC and India's NGT in terms of historical background, important statutory provisions and their functioning. It is based on the argument that ECT is a better forum than regular courts to effectively respond to environmental challenges of this century, as this specialized forum is comprised of judicial and technical experts to deal with the growing complexity of environmental laws and science. It argues, further, that the comparative analysis of Australia's LEC and India's NGT will result in better understanding of the nature, scope, issues and challenges in the successful functioning of these forums setting the case for further improvement. To have

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1 In Australia Environmental Courts are also established in three other States viz. Queensland: Planning and Environmental Court established under Local Government (Planning and Environmental) Act, 1990 (Repealed), then under Integrated Planning Act, 1997 (Repealed) and now working under Sustainable Planning Act, 2009, See http://www.courts.qld.gov.au/courts/planning-and-environment-court ;Victorian Civil and Administrative Tribunal established under Victorian Civil and Administrative Tribunal Act, 1998 has jurisdiction to hear disputes relating to Planning and Environment Act, 1987 see https://www.vcat.vic.gov.au/adv/disputes/planning-and-environment South Australian Environment, Resource and Development Court established under South Australian Environment, Resource and Development Court Act, 1993. See http://www.courts.sa.gov.au/OurCourts/ERDCourt/Pages/default.aspx.

2 Lal Kurukulasriya and Kristen A Powel, *History of Environmental Courts and UNEP's Role*, *available at:* https://law.pace.edu/sites/default/files/IJIEA/jciPowell&Kurukulasuriya_3-16_History%20of.pdf.

3 As of January, 2016, the number of ECT has grown to 1,200 in 44 countries. See George Pring & Catherine Pring, *Greening Justice*: *Creating and improving Environmental Courts and* Tribunals (The Access Initiative 2009), *available at:* http://www.accessinitiative.org/resource/greening-justice.

4 UNCED, *Rio Declaration on Environment and Development*, 1992, Principle 10, para 2 *available at:* http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163.

a focused analysis of these two countries, in the given space and time, the chapter excludes the discussion on the environmental disputes settlements at the international level and setting up of an International Court for Environment within United Nations.

II
Historical Background

In New South Wales, prior to the establishment of the Land and Environment Court, in 1980, planning and land matters were dealt with by a range of different tribunals and courts.[5] Valuation, compulsory acquisition and land matters were dealt with by a Land and Valuation Court, Valuation Boards of Review and the Supreme Court (for title issues). Building, subdivision and development matters were dealt with by the Local Government Appeals Tribunal. Civil (equitable) enforcement and judicial review of both government and tribunal decisions were undertaken by the Supreme Court of New South Wales. Criminal enforcement was undertaken in the Local Court and the District Court of New South Wales. With the enactment of the New South Wales Planning and Environment Commission Act 1974, it was perceived that there was a need to integrate land use planning and environmental assessment and appraisal techniques.[6]

Two main objectives are cited for the creation of NSW's LEC- one, rationalization and the two, specialization.[7] When environmental matters, were broadly, dealt with by a range of different courts, tribunals or boards, the whole of an environmental dispute was not resolved in one place. There was a desire to have a "one-stop shop" for environmental, planning, and land matters. The establishment of the Land and Environment Court allowed all of these diverse jurisdictions to be rationalized into one court.[8] The other objective of setting up the court was specialization. The court personnel, the judges, and assessors who were to be appointed to the Court, needed to have knowledge and expertise in the jurisdiction. The belief was that a specialist court would better understand the science and the environmentally relevant knowledge, and ensure that

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[5] See History of Land and Environment Court, at the official website *available at:* http://www.lec.justice.nsw.gov.au/Pages/about/history.aspx.

[6] Young Lawyers, *A Practitioner's Guide to Land and Environment Court of NSW* 1, (2009).

[7] Brian J Preston,"Environmental Courts and Tribunals: Improving Access to Justice and Protection of the Environment Around the World" , *Pace Environmental Law Review* Volume, 29 Issue 2Winter (2012), 602 at 604, *available at:* http://digitalcommons.pace.edu/pelr/vol29/iss2/10.

[8] *Id.* at 605. Subsequently, the legislature has added jurisdiction to the Land and Environment Court.

decisions are scientifically and environmentally literate. It was thought that the Court would be more able to deliver consistency in decision making; that there would be a decrease in the delays because of a better understanding of the characteristics of environmental disputes, and the urgency in which they need to be treated; and also, and very importantly, it would facilitate the development of environmental law policies and principles.[9]

The concerns for establishing Environmental Courts in India originated from the pro-active judiciary, around thirty years back,[10] when in 1986,[11] the Supreme Court of India expressed difficulty in solving techno-science disputes handling environmental litigation. The Apex Court observed that, in as much as environment cases involve assessment of scientific data, it was desirable to set up environment courts on a regional basis with a professional Judge and two experts, keeping in view the expertise required for such adjudication.[12] In 2000, the Supreme Court of India speaking through Justice Jagannath Rao[13] in *A.P. Pollution Control Board* v *Prof M.V Nayadu,*[14] directed the Law Commission of India to seriously study the need of having Environmental Courts in India. When, in 2003, Justice Jagannath Rao became the Chairman of the Law Commission of India[15] the very first report that came out during his regime was on "Proposal to Constitute Environmental Courts",[16] wherein the Law Commission recommended for the constitution of State level Environmental Courts.[17]

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[9] *Ibid.*

[10] Some of the authors claim that a report of 1980 of the Government of India to set up to review the existing environmental legislations recommended for the constitution of environment courts in all District Head Quarters, and the appointment of experts to assist the Court. (For instance see, U. Sankar, "Laws and Institutions Relating to Environmental Protection in India", p 16 *available at:* http://www.mse.ac.in/pub/op_sankar.pdf (accessed on June, 16, 2016). However the present author after having carefully read this 49 page report did not find any recommendation of this sort. See Department of Science and Technology, Government of India, *The Report of Committee for Recommending Legislative Measures and Administrative Machinery For Ensuring Environmental Protection*, (September 1980) This report is popularly known as Tiwari Committee Report as it was set up under the Chairmanship of N.D. Tiwari, then Deputy Chairman of Planning Commission of India.

[11] *M.C. Mehta* v *Union of India,* 1986 (2) SCC 176.

[12] *Id.* at 202. See also *Indian Council for Enviro- Legal Action* v *Union of India*, 1996 (3) SCC 212.

[13] Justice Jagannath Rao retired on Dec 1, 2000. This was his last judgment before his retirement from Supreme Court.

[14] Decided on Dec 1, 2000 reported in (2001) 2 SCC 62. See also *A.P. Pollution Control Board* v *Prof M.V Nayadu,* AIR1999 SC 812.

[15] Justice Jagannath Rao was the Chairman of Seventeenth Law Commission of India, 2003-2006.

[16] Law Commission of India, Government of India, 186th Report on Proposal to Constitute Environmental Courts (September, 2003).

[17] *Id.* at 142.

Before the National Green Tribunal Act was passed by the Indian Government, the Parliament in 1995 enacted the National Environment Tribunal Act (NETA),[18] the main objective of which was to provide for the establishment of a National Environment Tribunal for effective and expeditious disposal of cases arising from accidents occurring while handling any hazardous substance, with a view to give relief and compensation for damages to persons, property and the environment. However this Tribunal never saw the light of the day and was ultimately repealed with the passing of National Green Tribunal Act in June 2010. In 1997, National Environment Appellate Authority (NEAA) was created under the National Environment Appellate Authority Act, 1997, that mainly dealt with environmental clearances and turned out to be grossly ineffective, primarily due to the heavy control of the Authority by the MoEF.

India's NGT was established on 18th October, 2010 and became functional from 5th May 2011,[19] with New Delhi selected as the site for the Principal Bench, later followed by four zonal benches in Chennai, Pune, Bhopal and Kolkata.[20]

III
Land & Environment Court Act, 1979 and National Green Tribunal Act, 2010

(i) Overview of Statutory Provisions:

Title and Objectives

New South Wales' legislation is entitled "Land and Environment Court Act",[21] whereas Indian legislation is named as "National Green Tribunal Act",[22] accordingly Land and Environment Court operates in NSW and National Green Tribunal operates in India.

The objective of NSW'LEC is to constitute the Land and Environment Court and to make provision with respect to its jurisdiction.[23] The Land and Environment Court of New South Wales was established in 1980 as a superior

[18] Act No 27 of 1995.

[19] Ministry of Environment and Forests (MoEF), Government of India, Notification, 5 May 2011,SO 1003 E. (The Ministry has now been renamed as Ministry of Environment Forests and Climate Change-MEF&CC).

[20] Ministry of Environment and Forests, (MoEF), Government of India, Notification, 17 Aug. 2011, SO 1908 E. (It also holds Circuit Benches at various places like Shimla, Jodhpur, Shillong etc.).

[21] Land and Environment Court Act (LEC Act) 1979 No 204 (NSW).

[22] National Green Tribunal Act, (NGT Act) 2010 (Act no. 19 of 2010) (India).

[23] LEC Act, *supra* note 21, Preamble.

court of record, replacing the Local Government Appeals Tribunal, the Land and Valuation Court, the Clean Waters Appeal Board and the Valuation Boards of Review. In addition, certain jurisdictions formerly exercised by the District Court were also transferred to the new Court.[24]

The National Green Tribunal ('NGT') was established, as stated above, on 18th October, 2010 and started functioning from 5th May, 2011. The objective of India's NGT is to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters comnnected therewith.[25]

Composition

NSW'LEC is composed of Judges, Commissioners and other Officers of the Court. LEC is constituted as a Superior Court of Revord having a seal of its own.[26] The Court consists of the Chief Judge appointed by the Governor and such other Judges as may be appointed by the Governor from time to time.[27] The Governor may also appoint Commissioner[28] of the Court[29] who may be a full-time Commissioner or a part-time Commissioner.[30] A Registrar, an Assistant Registrar and such other officers of the Court as may be necessary for the proper administration of the Act may also be employed.[31] All proceedings in the Court are heard and disposed of before a single Judge, who constitutes the Court.[32] It also prescribes for thehearing and disposal of proceedings before one or more Commissionersor other officers of the Court[33] with respect to specified matters.

A person is qualified for appointment as a Judge of LEC if the s/he is not more than 70 years of age and holds judicial office of this State or of the Commonwealth or is an Australian lawyer of at least 7 years' standing.[34]

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[24] Young Lawyers, *supra* note 6 at 1.
[25] NGT Act, *supra* note 22, Preamble.
[26] LEC Act, *supra* note 21, s.5.
[27] *Ibid.* s.7.
[28] Though the word is used in singular, but reading of the whole Act implies for plurality of Commissioners.
[29] *Ibid.* s.12.
[30] *Ibid.* s.12 (2A).
[31] Under the Public Sector Employment and management Act, 2002, *Ibid.* s.15.
[32] *Ibid.* s.6 (1).
[33] *Ibid.* s.6 (2).
[34] *Ibid.* s.8 (2).

Amended version of the Act also provides for Supreme Court Judges to act as Land and Environment Court Judges with few exceptions.[35] No qualification of Chief Judge has been precribed. A person is qualified to be appointed as a Commissioner, if the person has suitable qualifications and experience in town or country planning or environmental planning or inarchitecture, engineering, surveying or building construction;[36] the special knowledge and experience in the administration of localgovernment or town planning,in environmental science or mattersrelating to the protection of the environment and environmental assessment, in the law and practice of land valuation,in the management of natural resourcesor the administration and management of Crown lands, lands acquired underthe Closer Settlement Acts and other lands of the Crown, in urban design or heritage or; or has suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines also make a person qualified to be appointed as a Commissioner.[37] An Australian lawyer is also qualified to be appointed as a Commissioner.[38] Commissioner holds office for a term of 7 years, and is eligible for re-appointment.[39] The Act also provides for the disqualification of Commissioner[40] provision for the Acting Chief Judge[41] and Acting Judges.[42] No disqualification for judges have been prescribed.

India's NGT consists of a full time Chairperson,[43] ten to twenty full time Judicial Members, and ten to twenty full time Expert Members.[44] The

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[35] *Ibid.* s.11A.

[36] *Ibid.* s.12 (2).

[37] *Ibid.*

[38] *Ibid.* s.12 AA.

[39] *Ibid.* Schedule I.

[40] *Ibid.* Section 14 Disqualification of Commissioners.
(1) Where a Commissioner:
(a) has a pecuniary interest, direct or indirect, in a matter which is the subject of proceedings before the Court, or
(b) is a member, officer, employee or servant of a public or local authority that is a party to any proceedings before the Court, being proceedings in respect of which the Commissioner is exercising any functions conferred or imposed on the Commissioner by or under this Act or the rules, then:
(c) the Commissioner shall inform the Chief Judge that the Commissioner has such an interest or is such a member, officer, employee or servant, and
(d) the Commissioner shall thereupon cease to exercise those functions in relation to the proceedings.

[41] *Ibid.* s.10.

[42] *Ibid.* s.11.

[43] Justice Lokeshwar Singh Panta was its founding Chairperson. Currently Justice Swatanter Kumar holds this position since Dec. 2012.

[44] NGT Act, *supra* note 22, s.4.

Chairperson of the Tribunal has been vested with the power to invite any one or more persons having specialised knowledge and experience in a particular case before the Tribunal to assist the Tribunal in that case.[45] The Chairperson, Judicial Members and Expert Members of the Tribunal are appointed by the Central Government.[46] The Chairperson is appointed by the Central Government in consultation with the Chief Justice of India.[47] The Judicial Members and Expert Members of the Tribunal are appointed on the recommendations of such Selection Committee and in such manner as may be prescribed.[48] Only Judge of the Supreme Court of India or Chief Justice of a High Court is eligible to be appointed as the Chairperson or a Judicial Member.[49] A person who is or has been a Judge of the High Court is also qualified to be appointed as a Judicial Member of the Tribunal.[50] A person is qualified for appointment as an Expert Member, if he has a degree in Master of Science (in physical sciences or life sciences) with a Doctorate degree or Master of Engineering or Master of Technology and has an experience of fifteen years in the relevant field including five years practical experience in the field of environment and forests including pollution control, hazardous substance management, environment impact assessment, climate change management and biological diversity management in a reputed National level institution.[51] A person having administrative experience of fifteen years including experience of five years in dealing with environmental matters in the Central or a State Government or in a reputed National or State level institution is also eligible for being appointed as Expert Member of the Tribunal.[52]

The Chairperson or the Judicial Member, if he was a Judge of Supeme Court, holds office for a term of five years[53] or upto seventy years of age whichever is earlier.[54] The Chairperson or the Judicial Member, if he was Chief Justice of High Court, holds office for a term of five years or upto sixty-seven yearsof age whichever is earlier.[55] Similarly the Judicial Member, if he was Judge of High Court, holds office for a term of five years or upto sixty-seven years of age whichever is earlier. The Expert Member hold office for a term of

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[45] *Ibid.* s.4 (2). This power has not been invoked so far.
[46] *Ibid.* s.6 (1).
[47] *Ibid.* s.6 (2).
[48] *Ibid.* s.6 (3).
[49] *Ibid.* s.5 (i).
[50] *Ibid.* s.5 (I) Proviso.
[51] *Ibid.* s.5 (2 a).
[52] *Ibid.* s.5 (2 b).
[53] *Ibid.* s.7 first para.
[54] *Ibid.* s.7 first Proviso.
[55] *Ibid.* s.7 second Proviso.

five years or upto sixty five years of age whichever is earlier.[56] The Chairperson, Judicial Member and Expert Member are not eligible for re-appointment.[57] To avoid conflict of interest, it is included explicitly in the Act that the Chairperson, Judicial Members and Expert Members of the tribunal shall not hold any other office during their tenure.[58] In addition, for a period of two years from the date on which they cease to hold office, they cannot accept any employment in or connected with the management or administration of, any person who has been a party to a proceeding before the tribunal.[59] Their appointmeny by Central Government or State Government, however has been saved by the statute.[60]

The Central Government may, in consultation with the Chief Justice of India, remove the Chairperson or Judicial Member from office on certain specified grounds which include inter alia abuse of his position as to render his continuance in office prejudicial to the public interest.[61] The Chairperson or Judicial Member can be removed from his office by an order made by the Central Government after an inquiry made by a Judge of the Supreme Court in which such Chairperson or Judicial Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.[62] The Expert Member may also be removed from his office by an order of the Central Government on the same grounds on which Chairperson or Judicial member may be removed.[63] The Act provides that the number of Expert Members shall, in hearing an application or appeal, be equal to the number of Judicial Members hearing such application or appeal.[64]

Jurisdiction

NSW's LEC has been given a wide jurisdiction in relation to environmental planning and land matters. The jurisdiction is made exclusive; hence, no other court or tribunal could exercise the jurisdiction given to the Land and Environment Court. Under Part 3 of the Act, the jurisdiction of the Court is divided into eight Classes of Proceedings.[65] Classes 4, 5 and 8 of Part 3 give Original Jurisdiction to LEC with respect to Environmental Planning Protection and Civil

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[56] *Ibid.* s.7 third Proviso.
[57] *Ibid.* s.7 first para.
[58] *Ibid.* s.5 (3).
[59] *Ibid.* s.5 (4).
[60] *Ibid.* s.5 (4) Proviso.
[61] *Ibid.* s.11 (1).
[62] *Ibid.* s.10 (2).
[63] *Ibid.* s.10 (5).
[64] *Ibid.* s.4 (4C).
[65] LCT Act, *supra* note 21, ss.16 to 21C.

Enforcement; Environmental Planning and Protection Summary Criminal Enforcement and Mining Matters. Classes 1, 2, 3, 6 and 7 confer Appellate Jurisdiction on LEC with respect to Environmental Planning and Protection Appeals; Local Government and Miscellaneous Appeals and Applications; Land Tenure, Valuation, Rating and Compensation Matters; Appeals by Defendants from Convictions Relating to Environmental Offences Imposed by Magistrates in the Local Court; and Appeals from Magistrates in Respect of Environmental Prosecutions which previously would have been heard by the Supreme Court of New South Wales.

Each one of these Classes refers to host of legislations with specific sections of the legislation. These Classes provide jurisdiction to LEC with respect to more than fifty legislations.[66] The court also has jurisdiction to hear and dispose of the matter relating to the claim for compensation in compulsory acquisition of land.[67]

India's NGT deals with environmental matters and not with planning and land matters. Planning and land matters are dealt with by civil courts.

Chapter III of NGT Act deals with jurisdiction and powers of the Tribunal. Section 14 of the Act prescribes Original Jurisdiction to the Tribunal; Section

[66] The main legislative instruments which grant the Court jurisdiction to hear and dispose of proceedings and or appeals are:
- *Environmental Planning & Assessment Act 1979 (NSW)*
- *Local Government Act 1993 (NSW)*
- *Protection of the Environment Operations Act 1997 (NSW)*
- *Heritage Act 1977 (NSW)*
- *Threatened Species Conservation Act 1995 (NSW)*
- *Native Vegetation Act 2003 (NSW)*
- *Contaminated Land Management Act 1997 (NSW)*
- *Roads Act 1993 (NSW)*
- *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)*
- *Trees (Disputes Between Neighbours) Act 2006 (NSW)*
- *Noxious Weeds Act 1993 (NSW)*
- *Water Management Act 2000 (NSW)*
- *Environmentally Hazardous Chemicals Act 1985 (NSW)*
- *Fisheries Management Act 1994 (NSW)*
- *Pesticides Act 1999 (NSW)*
- *Forestry and National Park Estate Act 1998 (NSW)*
- *Pipelines Act 1967 (NSW)*
- *National Parks and Wildlife Act 1974 (NSW)*
- *Aboriginal Land Rights Act 1983 (NSW)*

In addition, there are a plethora of environmental planning instruments under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) that regulate various planning and environmental matters.

[67] Under Land Acquisition (Just Terms Compensation) Act, 1991 or any other Act. *Ibid.* s.24.

16 provides Appellate Jurisdiction to the Tribunal and Sections 15 and 17 deals with the powers of the Tribunal to order for the relief and compensation to the victims of pollution and restitution of environment. The Act provides only civil jurisdiction to the Tribunal. An interesting thing with respect to the original jurisdiction of NGT is the language in which it is drafted which states that "The Tribunal shall have jurisdiction over all civil cases where a substantial question relating to environment is involved and such question arises out of the implementation of the enactments specified in Schedule I of the Act. Schedule I of the Act contains only seven enactments.[68] The Schedule does not even include all modern Environmental Law statutes. For instance Wild Life Act[69] has been excluded. In India, there are more than two hundred legislations having direct or indirect bearing on environment, which have been totally excluded from the purview of the Act. Thus, to this extent, the present legislation has a myopic operation by providing a limited jurisdiction.[70]

The NGT Act gives jurisdiction to the Tribunal to hear the disputes relating to the enforcement of any legal right relating to environment.[71] Under its Appellate Jurisdiction,[72] the Tribunal can hear appeal from any direction, order or decision made by Appellate Authority under the Water Act, Water Cess Act, Air Act. It can also hear appeal from any order passed by the State Government under the Water Act, Forest Act as well as from any direction issued by the State Pollution Control Board under the Water Act, order by the NBA or SBB under the Biological Diversity Act.[73]

India's NGT has been vested with jurisdiction and power to provide relief and compensation to the victims of pollution and other environmental damage arising under those seven enactments; for restitution of damaged property and for restitution of the degraded environment.[74] The Tribunal while passing any

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[68] NGT Act, *supra* note 21, Schedule I (See: s.14(1), 15(1), 17(1)(a), 17(2), 19(4) (j) and 34(1)]
1. The Water (Prevention and Control of Pollution) Act, 1974 (hereinafter Water Act)
2. The Water (Prevention and Control of Pollution) Cess Act, 1977
3. The Forest (Conservation) Act, 1980 (hereinafter Forest Act)
4. The Air (Prevention and Control of Pollution) Act, 1981 (hereinafter Air Act)
5. The Environment (Protection) Act, 1986 (hereinafter EPA)
6. The Public Liability Insurance Act, 1991
7. The Biological Diversity Act, 2002.

[69] Wildlife (Protection) Act, 1972.

[70] C.M. Jariwala, "National Green Tribunal: Whether (In) Justice?", *Delhi Law Review*, 1 (2010).

[71] NGT Act, *supra* note 22, s.14 (1).

[72] *Ibid.* s.16.

[73] A critical analysis of Section 16 bringing out its legislative flaws was provided by the author in "India-Australia Workshop on "Role of Specialist Environmental Law Courts for the

order or decision or award, apply the principles of Sustainable Development, the Precautionary Principle and the Polluter Pays Principle.[75] The decisions of the Tribunal are taken by majority.[76] If there is a difference of opinion among the Members hearing a matter and the opinion is equally divided, then the Chairperson hears such matter and decides, provided if he has not heard such matter earlier.[77] However, where the Chairperson himself has heard such matter along with other Members of the Tribunal, and if there is a difference of opinion among the Members and the opinion is equally divided, then in such cases, he shall refer the matter to other Members of the Tribunal who shall hear such application or appeal and decide.[78]

An appeal from the award, decision or order of the Tribunal lies to the Supreme Court of India.[79] The aggrieved person may file the appeal within a period of thirty days from the date on which the order or decision or direction or determination is communicated to him. The period can be extended by the Tribunal to sixty days in case of sufficient cause.[80]

Penalty

Under India's NGT Act, if a person fails to comply with any order or award or decision of the Tribunal, he is punishable with imprisonment for a term which may extend to three years, or with fine which may extend to ten crore rupees, or with both.[81] If the failure or contravention continues, the Tribunal may impose additional fine which may extend to twenty-five thousand rupees for every day during which such failure or contravention continues after conviction for the first such failure or contravention.[82] In case, a Company fails to comply with any order or award or a decision of the Tribunal then such company is punishable with fine which may extend to twenty-five *crore* rupees, and in case the failure or contravention continues, with additional fine which

Resolution of Environmental Disputes, organized by Faculty of Law, University of Delhi in association with Australia India Institute, Melbourne, February, 1-2, 2011.

74 NGT Act, *supra* note 22, s. 15 (1).

75 *Ibid.* s.20.

76 *Ibid.* s.21.

77 *Ibid.* s.21 first Proviso.

78 *Ibid.* s.21 second proviso.

79 *Ibid.* s.22 (Madras High Court, however, in its order dated Feb. 4, 2014 held that high courts did have jurisdiction to entertain appeals against the orders of the NGT. See A Subramani, "High court can hear appeal against National Green Tribunal orders" *available at:* http://timesofindia.indiatimes.com/city/chennai/High-court-can-hear-appeal-against-National-Green-Tribunal-orders/articleshow/29876486.cms

80 *Ibid*, s.16 Proviso.

81 *Ibid.* s.26.

82 *Ibid.*

may extend to one *lakh* rupees for every day during which such failure or contravention continues after conviction for the first such failure or contravention.[83] Special provision[84] for penalty is made for the Government Department, if it fails to comply with any order, award or decision of the tribunal. The Head of department is deemed to be guilty of such failures and is liable to be proceeded against for having committed an offence under the Act and punished accordingly. NSW's LEC Act does not contain any provision on penalty for failure to comply with its orders.

(ii) Critical Comparative Analysis of Statutory Provisions

To settle environmental disputes, the State of NSW has established a 'Specialized Court', whereas India has established a 'Tribunal' which is a quasi-judicial body. All proceedings before NGT are deemed to be judicial proceedings and the Tribunal is deemed to be a civil court.[85] Being a Tribunal, NGT has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908,[86] but is not bound by procedure laid down under the Code of Civil Procedure, 1908,[87] and is guided by principles of natural justice.[88] It has power to regulate its own procedure.[89] It is also not bound by the rules of evidence.[90]

NSW's LEC is a specialist court, established as a superior court of record.[91]Australia's State of NSW has established specialized courts for a population of 7.5 million,[92] whereas, India has created one Tribunal for a population of 1336 million.[93] This centralized forum at the national level is criticized as a misfit for a vast country like India, due to its inaccessibility to the majority of people. The decision to set up specialised environmental courts in India was motivated by none else than green courts like the Land and Environmental Court in New South Wales. However in the process of setting up the specialised

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[83] *Ibid.* s.26 Proviso.
[84] *Ibid.* s.28.
[85] *Ibid.* s.19 (5).
[86] *Ibid.* s.19 (4).
[87] *Ibid.* s.19 (1).
[88] *Ibid.*
[89] *Ibid.* s.19 (2).
[90] *Ibid.* s.19 (3).
[91] For knowing the judicial hierarchy in Australia, See Brian J. Preston, "Judicial Specialization through Environment Courts: A Case Study of the Land and Environment Court of New South Wales", 29 *Pace Environmental Law* Review (2012), 602-625, *available at:* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1700&context=pelr.
[92] Available at : http://stat.abs.gov.au/itt/r.jsp?databyregion#/.
[93] Available at : http://www.indiaonlinepages.com/population/india-current-population.html.

Tribunal, the virtues of that legislation could not be preserved.[94] It may further be noted that Hon'ble Supreme Court of India speaking through Chief Justice Bhagwati (as he then was) in *oleum gas leak* case[95] had ruled for the Regional level Environmental Courts in the country, the Law Commission of India in its 186th Report recommended for the constitution of State level Environmental Courts, but the Government of India has established Green Tribunal at National level with different places of sitting for the large and populous developing country.

The Green Tribunal takes away the jurisdiction of Civil Courts to entertain appeal or settle environmental disputes.[96] It needs to be emphasized that there are around 600 District Courts in India[97] whose jurisdiction to settle disputes, entertain appeals in environmental matters as well as to entertain claim for relief and compensation has been barred by the Act. The NGT has it's headquarter in Delhi and four regional benches at Bhopal, Calcutta, Pune and Chennai. It is structurally inadequate to satisfy people's needs in a vast country[98] like India. Due to lack of access, thousands of grievances related to environmental issues do not reach the adjudicatory mechanism at all. This is also antithetical to the concept of "just, quick and cheap" judicial remedy offered by the Land and Environmental Court in New South Wales, Australia.[99]

NGT Act gives only civil jurisdiction to the Tribunal. The Tribunal does not have criminal jurisdiction to prosecute for environmental crimes. With respect to civil cases, the jurisdiction of the Tribunal is where a substantial question relating to environment is involved (which specifically includes enforcement of any legal right relating to environment) and such question arises out of the implementation of the enactments specified in Schedule I. The 'substantial question relating to environment' as defined in the Act[100] includes two types of questions. Firstly, it includes an instance where there is a direct violation of a specific statutory environmental obligation by a person by which the community at large is affected or the gravity of the damage to the environment is substantial or the damage to the public health is broadly measurable. Secondly it includes an instance where the environmental consequences relate to a specific activity or a point source of pollution. Schedule- I of the Act lists only seven statutes[101]

[94] Kaleeswaram Raj, Decentralizing Environmental Justice, Economic & Political Weekly, ISSN (online)-2349-8846, *available at:* http://www.epw.in/journal/2014/48/web-exclusives/decentralising-environmental-justice.html.

[95] *M.C. Mehta* v *UOI*, 1986 (2) SCC 176.

[96] NGT Act, *supra* note 22, Section 29.

[97] Available at : http://ecourts.gov.in/index.php.

[98] Kaleeswaram Raj, *supra* note 94.

[99] *Ibid.*

[100] NGT Act, *supra* note 22, s.2 (m).

[101] See *supra* note 68.

viz. Water Act, Water Cess Act, Air Act, Forest Act, Environment Protection Act, Public Insurance Act, and Biological Diversity Act. One wonders as to why The Wild Life (Protection) Act, 1972, is not included in Schedule- I of the Act. The Tiwari Committee Report[102] had listed around 20 central enactments, besides many State enactments related to environment, which did not find any place in Schedule –I to give jurisdiction to the Tribunal.

The major flaw of the legislation is demonstrated in making the 'substantial question relating to environment arising out of the implementation of those specified seven statues. Schedule-I to the Act referring to only seven legislations is absolutely unwarranted and should be deleted. Section 14 needs to be amended to entertain cases involving enforcement of any legal or constitutional right relating to environment. The right may arise from the Constitution of India, from any environmental statute directly or indirectly protecting the environment or it may arise from any tort action. It may be noted that in India, the modern Environmental Law, including those seven statutes operate on criminal justice administration which stipulate deterrent theory of punishment. They do not legislate the legal rights relating to environment; rather create environmental offences against those who violate the legal right relating to environment. Therefore, the NGT Act with respect to original civil jurisdiction is not in consonance with the legislative scheme of specified seven legislations.

The original jurisdiction of the Tribunal under the NGT Act could have been with respect to offences committed under those listed legislations. But, it does not have criminal jurisdiction to prosecute offenders under the specified Acts. Reference in this regard may be made to *Bichhri* case[103] wherein the Apex Court through Justice B.P. Jeevan Reddy has suggested for the establishment of Environmental Courts having criminal jurisdiction.

NSW's LEC's jurisdiction, on the other hand, is quite wide. It has a civil jurisdiction to deal with a range of different civil disputes concerning trees and mining; has the equitable jurisdiction of a court of chancery and can issue equitable injunctions and declarations in civil enforcement actions.[104] It has the prerogative powers of a superior court, able to judicially review government action and subordinate legislation.[105] It also has criminal enforcement jurisdiction, and can impose criminal penalties including fine and imprisonment.[106] It has an appellate jurisdiction. Appeals from the Local Court in relation to environmental

[102] See *supra* note 10, Annexure 12.
[103] *Indian Council for Enviro-Legal* v *UOI,* AIR 1996 SC 1446.
[104] Brian J Preston, *supra* note 91 at 5.
[105] *Ibid.*
[106] *Ibid.*

crime go to the LEC.[107] It also has a tribunal type function to review on the merits the decisions of government in relation to environmental matters and make a fresh decision.[108]

IV
A Critical Analysis of the Functioning of LEC and NGT

This part critically examines the functioning of NSW's Environmental Court and India's Green Tribunal[109] in terms of independence & impartiality; speedy & efficacious justice, technical expertise; credibility and powers to enforce the orders passed by LEC and NGT.

(i) *Independence and Impartiality*

One of the essential components of a system of good environmental justice and governance is the existence of an independent and impartial adjudicator.[110] Independence not only requires independence from the legislative and executive branches of government but also independence from all influences external to the ECT which might lead it to decide cases otherwise than on the legal and factual merits. Independence is particularly apposite to specialized ECTs, as these types of fora deal with environmental and planning disputes where there is high potential for significant external pressures.[111] In case of NSW's LEC, establishing an environment court, as a court, rather than as an organ of the

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[107] *Ibid.*

[108] *Ibid.*

[109] Drawing upon examples from multiple jurisdictions, Brian J Preston identifies twelve characteristics required for an environmental court or tribunal to operate successfully in practice See Brian J Preston, "Characteristics of Successful Environmental Courts and Tribunals", *26 Journal of Environmental Law* 365 (2014), wherein he identifies and elaborates 12 key characteristics, in this regard, that include, Status & Authority; Independent from Government and Impartial; Comprehensive & Centralized Jurisdiction; Judges & Members are Knowledgeable and Competent; Operates as a Multi-Door Court House; Provides Access to Scientific and Technical Expertise; Facilitates Access to Justice; Achieves Just, Quick & Cheap Resolution of Disputes; Responsive to Environmental Problems and Relevant; Develops Environmental Jurisprudence; Underlying Ethos & Mission and Flexible, Innovative & Provides Value Adding Function, *available at:* https://papers.sssn.com/sol3/papers.cfm?abstract_id=2770879

[110] See Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge 2012) 48–49, cited by Brian J Preston *Id.* at 369.

[111] The independence and impartiality of ECT judges or decision-makers can be enabled by institutional arrangements and rules concerning selection of judges or decision-makers on the basis of appropriate qualifications; long-term tenure and security of tenure; procedural and substantive protection against the removal of judges; the means of fixing and reviewing reasonable remuneration and other conditions of service; the publishing of reasons for decisions

executive arm of government, and as a superior court of record, rather than an inferior court or tribunal, evidences and enhances its independence.[112]

Closely related to the principle of independence is the requirement that a decision-maker be impartial. Impartiality also requires decision-makers to alert themselves to, and to neutralize as far as possible, personal predilections or prejudices or any extraneous considerations that might pervert their judgment.[113]India's NGT has exemplified its independence and impartiality by coming down heavily not only against microstructures but also challenging the big corporate sectors and the Central and State Governments for not following environmental regulations.[114] It has even issued warrants against high profile government authorities like the Commissioner of Delhi Police and Environment Minister of Odisha.[115] It has the courage and conviction to reject the environmental clearances from its master[116] and at the same time get the funding increased from it manifold from Rs 8 *crore* to Rs 34 *crore*.

(ii) *Speedy and Efficacious Justice*

The overriding purpose of an ECT is to facilitate the just, quick and cheap resolution of proceedings. The purpose of much environmental litigation is to prevent or mitigate harm to the environment. Delay in the final determination of the proceedings defers making of an order preventing or mitigating that environmental harm.[117] The NSW's LEC provides an instructive example of case management in this regard. The Court Rules and Practice of the NSW's LEC deal differentially with various types of cases that come before the Court. Processes used include directions hearings before judges, commissioners or registrars to set timelines in the particular proceedings for filing of applications, documents and evidence, document and information exchange between the

made; and sufficient resources to maintain a functioning ECT. Such institutional arrangements and rules are intended to guarantee that judges will be free from extraneous pressures and be independent all authority except that of the law. George Pring and Catherine Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (The Access Initiative 2009), 75 in Brian J Preston. *Id* at 370.

[112] Brian J Preston, *supra* note 91 at 613.

[113] Brian J Preston, *supra* note 109 at 370.

[114] Armin Rosencranz & Geetanjoy Sahu, "Assessing the National Green Tribunal After Four Years", *5 Journal of Indian Law and Society* 191 (2014), at 194; *Jeet Singh Kanwar v. Union of India* Appeal No. 10 of 2011 (T) dated 16-4-2013; *Adivasi Majdoor Kisan Ekta Sangthan* v. *Ministry of Environment and Forests* Appeal Number 3 of 2011 (T) (NEAA No. 26 of 2009) dated 20-4-2012, *available at:* http://www.manupatra.co.in/newsline/articles/Upload/0F0228AB-83C3-4B64-9F8E-2E3FABEB20A6.pdf.

[115] *Id.* at 192.

[116] The Ministry of Environment Forests & Climate Change (MEF&CC).

[117] Brian J Preston, *supra* note 109 at 384.

parties, interlocutory applications and the final hearing; case management conferences; ADR processes such as conciliation conferences or mediations; and case review by the Court to assure appropriate handling and timing of the case and ensure that deadlines are met and filed documents are complete. NSW's EEC case management include a clear, comprehensive and current court website providing all necessary information for parties; electronic filing and processing capability; teleconferencing and videoconferencing capability for hearings and taking evidence; and computer data management systems that track the status, progress and deadlines for each case and provide regular reports on individual cases and overall caseload.

Since its functioning in May 2011, India's NGT has, more or less, been successfully upholding its mandate as a 'fast-track Court' for effective and expeditious disposal of cases relating to environmental protection and conservation.[118] Majority of the matters before NGT relate to environmental clearance and pollution.[119] The number of cases received since the establishment of NGT till January 31 2015 is 7,768. The number of cases disposed till January 31 is 5,167 and the number of cases pending is 2,601.[120] NGT has been successful in speedy and effective settlement of environmental matters, as it is much more regular in scheduling hearings, typically with time gaps of two to three weeks between two consecutive hearings. Perhaps, this promptness in deliberating over cases is reflected in the increasing number of cases being settled by NGT. This has also created optimism in the community regarding decisions of environmental dispute.[121] The Act prescribes[122] 30 days for challenging an order under the Tribunal's appellate jurisdiction, six months on disputes of substantial questions related to environment[123] and five years for seeking compensation and relief.[124]

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[118] The number of judgments pronounced by NGT May-Dec, 2011, 36; Jan-Dec, 2012, 91; Jan-Dec, 2013, 164; Jan-Dec, 2014 362 and for the one and a half month Jan-Feb, 15, 169. CEL on National Green Tribunal, *available at:* http://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/.

[119] Category wise judgments adjudicated by NGT (from May 2011until February 2015: Environmental Clearance-119 (26%); Forest Clearance 09 (2%); Pollution 148 (32%); Mining 24 (5%); Forest conservation 12 (3%); Limitation 23 (5%); CRZ 20 (4%); Cutting of Trees 20 (4%); Illegal Construction 09 (2%); Miscellaneous 76(17%). *Ibid.*

[120] As per the written response, to a question in the Lok Sabha, by the Union Environment Minister Mr. Prakash Javadekar, see PTI March 3, 2015, *available at:* http://articles.economictimes.indiatimes.com/2015-03-03/news/59725502_1_national-green-tribunal-wildlife-crime-control-bureau-lok-sabha (Last visited on July 3, 1016).

[121] *Available at :* http://www.downtoearth.org.in/coverage/tribunal-on-trial-47400.

[122] NGT Act, *supra* note 22, s.16.

[123] *Ibid.* s.14(3).

[124] *Ibid.* s.15(3).

Coming to case management, NGT website is still improving with time. The website does provide for e-filing but it has not taken off as yet. Largely the filing remains cumbersome with six sets of documents to be filed. The website does try to provide all the orders of the case but it seems to get lost while doing so. The website needs substantial improvements. NGT Court rooms do not have the facility of teleconferencing and videoconferencing as of today.[125]

(iii) Technical Expertise

Environmental issues and legal and policy responses demand special knowledge and expertise. NSW's LEC's lay commissioners have knowledge and experience in environmental matters. They don't need a master's degree, but in fact many do possess. They are drawn from local government, town, country and environmental planning, environmental science, arboriculture, horticulture, land valuation, architecture, engineering, surveying, management of natural resources, aboriginal land rights and disputes involving aborigines, which is one of our jurisdictions, urban design and heritage and law.[126] The NGT Act considers higher degrees in Science, Engineering, Technology and experience in Administration only as technical qualifications. It further requires that degree should be from a reputed national level institution.[127] There is no provision for environmental academicians who have been proactive in the field of environment protection. In its current form, NGT Actmainly facilitates back-door entry for retired bureaucrats.

(iv) *Credibility*

NSW's LEC has upheld the rule of law, and that, in turn, promoted public trust and confidence in the rule of law and in the court system.[128] The number of cases being instituted at India's NGT, each year is phenomenally increasing. The number of cases filed has increased from just 548 in 2012 to 3,116 in 2013 to 2,348 in the first three months of 2014.[129] This reflects a growing trust people, have in NGT for resolving increasing environmental crisis. NGT targets to dispose of cases within six months. It has been broadly successful in achieving this aim, though there have been some high profile cases where NGT has not been able to deliver on time.[130] It is gaining greater credibility and is being accepted by both industry groups and NGOs focusing on environmental protection. The judicial members coupled with

[125] Information sought from advocates appearing before NGT.
[126] See LEC Act *supra* note 22, s.12.
[127] See NGT Act *supra* note 21, s.5.
[128] Brian J Preston, *supra* note 91at 614.
[129] Yukti Choudhary, "NGT on Trial", *available at:* http://www.downtoearth.org.in/coverage/tribunal-on-trial-47400#1.
[130] The Sterlite case and Meghalaya rat hole mining cases are two such examples.

technical expertise have exponentially strengthened the environmental protection regime in the country. It been progressive in its approach towards environmental protection in general and the rights of marginalized people in particular.[131] It needs to evolve, however, some internal system for checks and balances for efficient and transparent delivery of justice.[132]

(v) *Enforcement Powers*

NSW's LEC enforces law through statutory notices including penalty notices (on-the-spot fines) and stop work notices; civil proceedings including court orders granting an injunctions or a court declaration of a breach of the law; and criminal prosecutions imposing sentences for fines and imprisonment. If a person fails to comply with a notice, the Environment Protection Authority EPA may take the action required to mitigate or prevent harm to the environment and recover the costs by issuing a compliance cost notice to the person responsible.[133]

India's NGT has, largely, been successful in implementing its orders, which usually relate to staying environmental clearances. The Regional Green Tribunals seem even more active and aggressive than the NCT in Delhi, as the regional judges are fearless and have no ambition for national positions.[134] The NGT Act stipulates the powers vested in the Tribunal to enforce its orders including jail terms and fines amounting to crores. But it is clearly evident that there is hardly any use of such powers to enforce the directions. Given the present composition of the NGT, it is very difficult on its part to monitor its directions in each and every case. In order to implement NGT's directions effectively, it is necessary to make the implementation process more efficient through the marshalling of agencies responsible for the control of pollution, such as local Government bodies and Pollution Control Boards. The petitioner can be involved in the monitoring of its directions.[135]

V
Conclusion

NSW's LEC has been functioning for the last thirty five years, whereas

[131] Armin Rosencranz, *supra* note 114 *at* 192.

[132] See Chandra Bhushan, "NGT Must be Strengthened", *available at:* http://www.downtoearth.org.in/coverage/tribunal-on-trial-47400. For an excellent insight into the internal decision-making processes of the five benches of the NGT, See: Gitanjali Nain Gill, "Environmental Justice in India: The National Green Tribunal and Expert Members", *Transnational Environmental Law,* (2015 at 29 Available on CJO 2015 doi:10.1017/S2047102515000278).

[133] Protection of the Environment Operations Act 1997 (NSW), s.101.

[134] Armin Rosencranz, *supra* note 114 at 200.

[135] *Id.* at 195.

India's NGT is hardly five years old, hence the comparative analysis of this ECT has necessarily to been seen in the context of this time gap period. In the words of Brian J Preston," The Land and Environment Court is now long established over thirty years and is undoubtedly a model of a successful environment court."[136] However, the functioning of NSW's LEC's in the initial years is more relevant to draw meaningful comparisons with India's NGT.

In the initial years, NSW's LEC has discordant image and operated in a climate of quite trenchant, often misconceived, criticisms about its role, leading its first Chief Judge to declare the Court was a 'fragile bastion'.[137] Majority of the cases before LEC related to Class 1 of its jurisdiction, categorised as the Court's merit review jurisdiction, to hear appeals from decisions of a Council in relation to development applications, where the Court had the power to review the material in issue and substitute its decision for that of the original decision maker. These appeals were complete hearings or "de novo" hearings where the Court assessed the merits of the development application.[138] The tension between the Court and Councils[139] arose where the Court reviewed and overturned administrative decisions of Councils. Those opposing merit review criticized that it is a waste of public and private funds for the Court to conduct a review of an administrative decision and, in effect, replace it with another administrative decision.[140]

This tension between LEC and Councils forced the NSW Government to appoint a Working Party to review the jurisdiction of the LEC.[141] Its main task was to review the role of the Court in determining development applications and to look at the potential for an increased use of alternative dispute resolution. The report of the Working Party, chaired by the Jerrold Cripps QC,[142] a former

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[136] Brian J Preston, *supra* note 91 at 617.

[137] Patricia Ryan, "Court of Hope and False Expectations: Land and Environment Court 21 years on", *Journal of Environmental Law*, Vol 14, No 3, (2002) 301

[138] LEC Act, *supra* note 21, s.39(2).

[139] Councils are bodies established under the Local Government Act 1993 (NSW) ("LGA"). Each Council constitutes a statutory corporation.

[140] The Court's Class 1 jurisdiction is usually exercised by a Commissioner. Commissioners are technical experts processing specialist knowledge and expertise.

[141] Paul Lalich and Scott Neilson, "Review of the Land and Environment Courts Jurisdiction: Review of Issues Relating to the Working Party Review and Reform of the Court", *Local Government Law Journal,* Vol 7, (August 2001) 49 at 51, *available at:* https://www.allens.com.au/pubs/pdf/env/lecjaug01.pdf.

[142] Jerrold Cripps was appointed as one of the foundation judges of the Court on 18 August 1980. He was appointed Chief Judge on 3 June 1985 and served until 1 April 1992, when he was appointed to the NSW Court of Appeal, *available at:* http://www.lec.justice.nsw.gov.au/Documents/Announcements/31122015The%20Hon%20Jerrold%20 Sydney%20Cripps%20QC.pdf.

Chief Judge of the Court, recommended that the merit review of Council determination of development applications by the Court should continue.[143] In its opinion, the Court in its Class 1 jurisdiction is the most appropriate forum for such review because the Court is not affected by the political considerations which often weigh heavily upon Council when determining a development application and it comprises experts with experience in determination of development applications and related issues. It also called for the reform within the current framework of the Court on increasing the role of alternative dispute resolution.[144]

India's NGT, in its short period of five years of functioning, has emerged as a powerful and effective quasi-judicial body, adjudicating environmental disputes in the country. The current Chairperson of India's NGT, Justice Swatanter Kumar,[145] has ushered a new era in the history of India's 'greening justice' playing a very pro- active role in protecting and enhancing the environment. The period after his appointment has seen a noticeable change in the strict implementation of environmental laws. The NGT under his robust leadership has fearlessly applied the green law for Union Government, State Governments, Pollution Control Boards, big corporate bodies, big spiritual leaders etc. India's NGT is flying high expanding its wings to reach the prestigious and highest jurisdiction relating to Public Interest Litigation (PIL)[146] and *suomoto* powers.[147]

Like NSW's LEC, India's NGT, however, is also experiencing some teething problems in these initial years.The very success of the NGT has been a cause of anxiety for powerful interests, specifically the MEF&CC, State Governments -such as the Chief Minister of Meghalaya- and also the concerns of some of the High Courts.[148] With a view to clip its wings, MEF&CC, on 29th August, 2014, constituted a High Level Committee (HLC) to review Environmental Laws under the chairmanship of former Cabinet Secretary T.S.R Subramanian. The Committee submitted its report to the Central Government in less than

[143] Paul Lalich, *supra* note 141 at 52.

[144] *Id.* at 58.

[145] A former judge of Supreme Court of India, he is the second Chairperson of NGT, after Justice Lokeshwar Singh Panta, appointed on 20th December, 2012 following a turbulent phase fraught with resignations by expert members, judges and acting Chairperson due to the lack of infrastructure and facilities.

[146] See for instance" NGT to Hear PIL Challenging Environmental Clearance to Amravati" The Quint March 11, 2016, *available at:* https://www.thequint.com/hot-wire/2016/03/11/ngt-to-hear-pil-challenging-environmental-clearance-to-amravati.

[147] See for instance *Tribunal on its own Motion* v. *Secretary, Ministry of Environment and Forests*, NGT Judgment, 4 Apr. 2014; Tribunal on its own Motion v. Government of NCT, Delhi, NGT Order, 19 June 2015. Also see Madras High Court order dated 4th Feb., 2014, *supra* note.

[148] Gitanjali Nain Gill, *supra* note 132.

three months[149] suggesting Parliament to enact an umbrella legislation known as The Environmental Laws (Management) Act,(ELMA) that would constitute 'National Environment Management Authority' (NEMA) at the Centre and 'State Environment Management Authority' (SEMA)[150] in States to deal with applications for clearances and permissions under environment related laws.[151]To hear appeals against the decision of NEMA, or SEMA, it proposed the creation of an Appellate Tribunal, to be constituted by the Government of India presided over by a retired judge of High Court with two senior officers of the rankof Additional Secretary to the Government of India. [152] The role of NGT was proposed to be limited only to the judicial review of the decisions of the Appellate Boards.[153] The MEF&CC would have the powers to issue directions to NEMA and SEMA in all matters.[154] It proposed to ban the jurisdiction of NGT stating" The decisions of the Government, NEMA or SEMA shall not be questioned before nor enquired in to by any court or tribunal either *suomoto* or at any ones behest on any ground what so ever.[155]

The HLC Report aiming to defang the National Green Tribunal has been heavily criticized [156] by various stake holders. The Parliamentary Standing Committee (PSC) on Science & Technology,[157] fortunately, after reviewing the HLC report, has rejected it. The PSC has instead recommended that the Government should constitute a new committee to review the laws, noting that the "three-month period given to the HLC for reviewing six environmental Acts was too short and that "there was no cogent reason for hurrying through with the report without comprehensive, meaningful and wider consultations with all the stakeholders".[158]

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[149] Ministry of Environment, Forest and Climate Change(MEF&CC), Government of India, *Report of High Level Committee to review various Act Administered by MEF&CC,* Nov, 2014.

[150] *Ibid*, para 8.2, p 62.

[151] The NEMA and SEMA, when established under ELMA, shall replace Central Pollution Board and State Pollution Boards. *Ibid.* Para 8.2 (v) p 63.

[152] *Ibid.* para 8.7, p 64.

[153] *Ibid.* para 8.8, p 65.

[154] *Ibid.* s.6.2 of Proposed ELMA, P 71.

[155] *Ibid.* s.15 of proposed ELMA, P 75.

[156] Ritwick Dutta, Manoj Misra, Himanshu Thakkar "The High Level Committee Report on Environmental Law A Recipe for Climate Disaster and Silencing People's Voice" P7, *available at:* www.ercindia.org/files/erc_desk/HLC%20Report.pdf.

[157] Report was tabled before the Rajya Sabha in the current monsoon session of the Parliament. It went to the Rajya Sabha on July 21 and to the Lok Sabha on July 22, *available at:* http://www.downtoearth.org.in/news/parliamentary-standing-committee-rejects-tsr-subramanian-report-on-environmental-laws-50577.

[158] Srestha Banerjee, "Parliamentary Standing Committee Rejects TSR Subramanian Report on Environmental Laws, 24 July 2015," *available at:* http://www.downtoearth.org.in/news/parliamentary-standing-committee-rejects-tsr-subramanian-report-on-environmental-laws-50577.

To sum up, it may be said that NSW's LEC, which has now been long established, has achieved a high standard for environmental adjudication especially under the dynamic leadership of its current Chief Judge Brian J Preston[159] who seems to be extremely efficient- administratively, judicially as well as academically.Not resting, however, on LEC's laurels, he believes in adaptive management to continuously monitor its performance to meet the environmental challenges of the future.[160] India's NGT has been doing extraordinary well in protecting the environment and public health and may be a leading example for the nations planning to constitute ECT. Though amazingly successful, it is also facing some real challenges. The jurisdiction of India's NGT should be statutorily widened to expressly include public interest litigation and *suomoto* powers. It needs to have more Regional Benches as well as to hold more Circuit Benches for better accessibility to justice for the masses. The Tribunal deserves the support of various stakeholders especially the MEF&CC and needs to be improved and strengthened with better infrastructure, appointment of office staff, case management facilities-etc. for efficient delivery of green justice.

[159] Brian J Preston has, since Nov. 2005, been the Chief Judge of NSW's LEC for the last eleven years.

[160] Brian J Preston, *supra* note 91 at 618.

INTER-PLAY OF LAW AND ECONOMICS: THE INDIAN EXPERIENCE

Seema Singh and Mythili Bhusnurmath ***

Abstract

The inter-play of law and economics and, following from that, an inter-disciplinary approach to law, is still a relatively nascent area of study in India. This paper details-(a) how failure to think through the economic consequences has often resulted in bad law, using the example of two recent legislations – The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – better known as the Land Acquisition Act and the National Food Security Act, 2013 and (b) examines how courts have, over the years, moved away from a 'hands-off' approach to economic issues to playing a more activist role in economic policy formulation, once again often with adverse economic consequences.

I
Introduction

There are two stages at which economics impacts law. One is when laws are framed by the legislature; the second is when courts are called upon to interpret the law. This paper looks at how lack of understanding of basic economic principles plays out at both stages and can have (unintended?) and often adverse consequences for economic policy outcomes. It then goes on to suggest possible ways to limit such adverse consequences.

In a world where the line between different disciplines is getting increasingly blurred, the resolution of most real world issues calls for an inter-disciplinary, rather than narrow, approach. Hence, the need to look at law and economics, not as separate disciplines in narrowly-defined silos, but more holistically since the spillover effects go well beyond the immediate subject domain of either law or economics taken separately.

'The first lesson of economics is scarcity: There is never enough of anything to satisfy all those who want it. The first lesson of politics is to disregard the first lesson of economics,' said American economist and political philosopher,

* Assistant Professor, Campus Law Centre, Faculty of Law, Delhi University.
** Consulting Editor, Campus Law Centre, Economic Times and ET Now.

Thomas Sowell.[1] Read in conjunction with the words of the father of the Nation, Mahatma Gandhi, 'the world has enough for everyone's need but not for everyone's greed',[2] and the Directive Principles of State Policy in Part IV of the Constitution (governing the principles guiding the State in its endeavor to provide economic, social and political justice to its citizens), the intersection between economics, law and policy becomes blindingly obvious.

In any country, especially in poor democracies, policies are ultimately the outcome of political choices made by governments and these are often shaped, *inter alia*, by economics. However, formulation of policies alone will not succeed in achieving desired objectives, unless these are first codified in the form of law and incorporated in statute books. It is this legal under-pinning, enshrined in the form of a clearly enunciated legal framework that defines the scope of all other activity, both economic and political, in any country.

India is no exception. As a noisy, if somewhat chaotic, democracy, where the rule of law, as understood in Western societies, is still a relatively new concept, the importance of a clearly enunciated legal framework cannot be over-emphasised. Unfortunately, the study of law and economics has largely been done through a narrow prism, of water-tight compartments, with little or no overlap. Yet many of the promises laid down in the Constitution, especially in Part IV relating to the Directive Principles of State Policies - can only be realized if the inter-play between law and economics receives the attention it deserves.

Fortunately, our Founding Fathers recognized the need to have a Constitution that is far-sighted but allows flexibilities needed to reflect changing aspirations of the people as the country transitions from a poor, under-developed economy to a developed one. Consequently, unlike the American Constitution, that has been amended only 17 times since it was adopted in 1787,[3] the Indian constitution has been amended 101 times since it was first adopted in 1950,[4] in keeping with the philosophy that the law must keep pace with the times. The Goods and Services Tax (GST), which was introduced via the 122 Amendment Act Bill,[5]

[1] See The Brilliance of Thomas Sowell: A Tribute, *available at:* https://fee.org/articles/the-brilliance-of-thomas-Sowell-on-his-retirement-from-journalism/ (Last visited on Aug.16, 2018).

[2] See The relevance of Gandhi in the capitalism debate, *available at:* https://www.theguardian.com/sustainable-business/blog/relevance-gandhi-capitalism-debate-rajni-bakshi/ (Last visited on Aug. 21, 2018).

[3] See United States Constitution, *available at:* http://web.newworldencyclopedia.org/entry/United_States_Constitution (Last visited on Aug. 21, 2018)

[4] See Amendments, *available at:* https://www.india.gov.in/my-government/constitution-india/amendments?page=9 (Last visited on Aug. 17, 2018).

[5] See The Constitution (122nd Amendment) (GST) Bill, 2014, *available at:* http://www.prsindia.org/billtrack/the-constitution-122nd-amendment-gst-bill-2014-3505/ (Last visited on Aug. 17, 2018).

is, perhaps, the most recent example of the dynamic nature of the Indian Constitution as it re-defines the taxation powers of the Union and State governments in keeping with present-day realities.

Despite the large number and scope of these amendments, grey areas remain. Thus Article 50 of the Constitution is unambiguous about the role of the judiciary and the executive.[6] It says 'The State shall take steps to separate the judiciary from the executive in the public services of the State'. The use of the word 'shall' makes it abundantly clear that the separation of powers envisaged in the Constitution is not a matter of choice, but a compulsion.

The problem is the Constitution (Article 32)[7] also confers the power of 'judicial review' on the Supreme Court (Article 226 does likewise in the case of the High Courts but limited than Supreme Court)[8] to declare any law unconstitutional and invalid. This gives rise to some amount of ambiguity, especially since over the years courts have expanded the interpretation of fundamental rights like the 'right to life and liberty' to encompass a whole host of other considerations such as the right to clean air, for instance.

In the initial years after independence, many Constitutional amendments, whether relating to the abolition of The Privy Purses Act,[9] or abolition of the Right to Property[10] as a fundamental right, were driven by the prevailing political economy of the times rather than pure economics.

All this changed post the 1991 reforms, when reforms and increasing integration of the Indian economy with the rest of the world, resulted in a sea change in the *inter-se* relation between law, economics and policy. In many instances, existing laws were found to be out of step with the demands of the new economy. The early 90s also coincided with the period when the scope and ambit of public interest litigations (PILs) expanded hugely to cover issues such as ecological damage and sustainable development. The resultant judicial activism saw the judiciary impinge more and more on the turf of the executive and legislature, often with serious and adverse consequences for the economy and economic well-being of the public at large.

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[6] Art.50- Separation of judiciary from executive - The State shall take steps to separate the judiciary from the executive in the public services of the State.

[7] Art.32-Remedies for enforcement of rights conferred by Part III.

[8] The Power of High Courts to issue certain writs.

[9] The 26th Constitutional Amendment Act, 1971.

[10] The 44th Constitutional Amendment Act, 1978.

II
Western Perspective about this Interplay between Law and Economics

The overlap between law and economics has long been recognised in western countries. Ronald Coase[11] (1910-2013), the well-known British economist and emeritus Professor of economics, University of Chicago Law School, is widely regarded as among the first mainstream economists to adopt an inter-disciplinary approach.[12] In truth, however, that honour should go to John Neville Keynes,[13] (1852-1949) better known as the father of the much more famous John Maynard Keynes.[14]

Neville Keynes recognised the importance of applied economics or economic policy as distinct from positive and normative economics. His Scope and Method of Political Economy, published in 1884,[15] was a response to a controversy then raging in the field of economics (a controversy that finds ready resonance today when post the Global Financial Crisis, behavioral economics has got a fresh lease of life). The controversy essentially related to whether economics should be seen as a science that comes up with hypotheses based on deductive logic starting with certain assumptions (the English school) or as the study of the working of institutions in a certain historical context, (the German school).[16]

Neville Keynes tried to find a middle ground between these two schools and distinguished between what he called positive economics (the study of how the economy works), normative economics (how the economy ought to work) and the art of economics (how lessons learnt in the first can be related to the second and carried over into policy formulation). He illustrated his three fold economic taxonomy in the context of interest rates and taxation. (Art of law and macroeconomics: selected works of Bruno Meyer Salama). In the context of interest rates, for instance, positive economics would look at why interest

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[11] British-born American economist who was awarded the Nobel Prize for Economics in 1991.

[12] See Ronald H Coase, Founding Scholar in Law and Economics 1910-2013, *available at:* https://www.law.uchicago.edu/news/ronald-h-coase-founding-scholar-law-and-economics-1910-2013 (Last visited on Aug. 21, 2018).

[13] A British economist who He divided Economy into "positive economy" (the study of what is, and the way the economy works), "normative economy" (the study of what should be), and the "art of economics" (applied economics).

[14] English economist, journalist, and financier, best known for his economic theories (Keynesian economics) on the causes of prolonged unemployment.

[15] Keynes published his first book in 1884, under the title '*Studies and Exercises in Formal Logic*'.

[16] See John Neville Keynes, *Scope and Method of Political Economy* (Macmillan and Co, 1891).

has to be paid and how much, normative economics would consider what is a fair rate and would lie in the realm of ethics and political economy while the third aspect would consider the more practical, policy-oriented part of whether the state should interfere in private arrangements regarding payment of interest between lenders and borrowers. And if yes, what is the mechanism to be used to ensure that the standard that is normatively desired is reached at least partially.

Bruno Meyerhof Salama, Professor of Law at the Fundação Getúlio Vargas School of Law in São Paulo, Brazil,[17] where he heads the Center of Law, Economics & Governance, puts it well. 'Both the fields of law and economics deal with problems of co-ordination, stability and efficiency in society'.[18] But the formation of complementary lines of analysis and research is not simple because their methodologies differ sharply. While law is exclusively verbal, economics is also mathematical; while law is markedly interpretative, economics is markedly empirical; while law ultimately aspires to be fair, economics ultimately aspires to be scientific; and while the yardstick of economic analysis is cost and benefit, the yardstick of legal analysis is legality. These methodological differences have historically rendered the intellectual dialogue between legal and economic scholars quite turbulent and often destructive'.

III
Indian Perspective

In India the study of the inter-play of law and economics is relatively new. While TR Andhyarujina noted SC advocate and former Solicitor General of India, from among legal luminaries has been in the forefront of the debate, most Indian economists are in thrall to the view of economics as a science rather than an art. Writing in the Indian Express[19] Andhyarujina points out how over the years, the unexceptional social action dimension of the public interest litigation (PIL) has been diluted, converted, and eclipsed by another type of 'public cause litigation' where the court's intervention is not sought for enforcing the rights of the disadvantaged, but to simply correct the actions or omissions of public officials, government departments or other public bodies.

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[17] See Bruno Salama, *available at:* http://www.law.columbia.edu/faculty/bruno-salama (Last visited on Aug. 16, 2018).

[18] See Bruno Meyerhof Salama, "The Art of Law and Macroeconomics", 74(2) *University of Pittsburgh Law Review* 131 (2013).

[19] See T.R. Andhyarujina, "Disturbing Trends in Judicial Activism" *The Hindu*, Aug. 6, 2012, *available at* : http://www.thehindu.com/opinion/lead/disturbing-trends-in-judicial-activism (Last visited on Aug.21, 2018).

This is not to say that the issue has been entirely ignored. Anant and Jaivir Singh,[20] point to the judgments and orders surrounding the PIL that aimed to reduce vehicular pollution in Delhi, calling these starkest examples of judicial activism.

The net result, as Finance Minister, Arun Jaitley, himself a well-known lawyer, noted, is judicial over-reach, with all its attendant perils. Responding to a debate in the Rajya Sabha in early 2016, the FM cautioned, 'Step-by-step, brick-by-brick, the edifice of India's legislature is being destroyed'.[21] His warning came in response to an opposition demand for a court-monitored dispute redress mechanism in the context of the implementation of the Goods and Services Tax (GST).

In order to try and understand the inter-play between law and economics at the two stages mentioned above, we look at some recent legislations in India that have been singularly ill-informed by a lack of understanding of the economic costs and benefits. We detail how failure to think through the economic consequences resulted in bad law, using the example of two recent legislations – The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – better known as the Land Acquisition Act and the National Food Security Act, 2013.

We also look at some of the recent judgments of the Supreme Court that, despite the separation of powers between the legislature, judiciary and the executive enshrined in the Constitution (and regarded as an integral part of its unalterable Basic Structure (Kesavananda Bharati),[22] could arguably, be seen as failing to respect this separation of powers with (unintended?) adverse economic consequences!

We trace how courts have, over the years, moved away from a 'hands-off' approach to economic issues to playing an activist role in economic policy formulation. We give examples of how recent judicial rulings resulted not only in judicial over-reach, with the judiciary straying into the turf of the executive and at times, of the legislature, but also adversely affected economic outcomes.

Court rulings in the auction of coal/spectrum and more recently, the ruling

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[20] Jaivir Singh, TCA Anant, "An Economic Analysis of Judicial Activism" 37(43) *EPW* 4433 (2002).

[21] See Sagnik Chowdhury, "Judiciary is destroying legislature brick by brick: Arun Jaitley" *The Indian Express*, May 12, 2016, *available at:* https://indianexpress.com/article/india/india-news-india/gst-bill-judiciary-is-destroying-legislature-brick-by-brick-says-arun-jaitley-harish-rawat-rajya-sabha-2796065/ (Last visited on Aug. 21, 2018).

[22] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

of the national green tribunal on deregistering old diesel vehicles in the capital and the Supreme Court in banning large diesel cars, are all instances of how a narrow legal perspective, unsupported by a proper understanding of economic principles, has had unfortunate economic consequences.

Disconnect in drafting of law: Two examples

(i) Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

(ii) National Food Security Act, 2013

(i) *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013*

The above Act, which was passed during the regime of the previous UPA government and came into effect from January 2014, imposes a number of onerous conditions that make land acquisition virtually impossible for a non-government entity. For instance, prior consent of 80% of land owners is a pre-requisite for private projects while in the case of public-private partnership projects, 70% of landowners have to agree; if the land acquired under the Act remains un-utilised for five years after taking possession, it has to be returned to the original owners; a social impact assessment has to be done before any acquisition can be made; the quantum of compensation for affected families has also been raised to four times the market rate in rural areas and twice the market rate in urban areas.[23]

The net effect of such obligations has been to make land acquisition both costlier and more time –consuming, apart from adding to uncertainty about successful acquisition. Not surprisingly, corporates are reluctant to invest time and money in any project that entails large-scale land acquisition (inevitable in any large project) with serious implications for economic growth. Estimates place the value of projects stuck due to problems in land acquisition at close to Rs 60,000 crores.[24]

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[23] See G. Raghuram, Simi Sunny, *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance, 2014: A Process Perspective* (W.P. No. 2015-07-03, IIM Ahmedabad, 2015), *available at:* http://www.indiaenvironmentportal.org.in/files/fileRight%20to%20Fair%20Compensation%20and%20Transparency%20in%20Land%20 Acquisition.pdf. (Last visited on Aug.20,2018).

[24] See "Nitin Gadkari hint at amending Land Acquisition Act Progress on many highway projects is laggard due to delay in land acquisition" *The Indian Express,* June 18, 2014, *available at.* http://indianexpress.com/article/india/politics/nitin-gadkari-hint-at-amending-land-acquisition-act/ (Last visited on Aug. 18, 2018).

The present NDA government (2014 – to date) tried to water down some of the more onerous provisions of the Act through an amendment proposing that certain types of projects such as defence, rural infrastructure, affordable housing, industrial corridors, and social infrastructure be exempted.[25] However, determined opposition to the amendment in the Rajya Sabha, the Upper House of Parliament, where the government lacked the numbers to ensure passage of the amendment, saw its efforts come a cropper.

In a bid to overcome the legislative impasse, the government resorted to the ordinance route. However, that tactic too proved in vain. After re-promulgating the ordinance thrice, citing the need for a less time-consuming alternative for private or PPP projects in areas such as rural roads, affordable housing, infrastructure and city-building failed to build enough consensus on the amendment, the government finally gave up the attempt leaving it to the states to make the necessary changes in their laws.[26] (Under the Constitution, land acquisition is mentioned on the Concurrent List, although Article 254 (2) allows a state to amend a Central government act on the list provided the President approves it.)

Following this, Tamil Nadu amended the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 by inserting a new section — Section 105 — that exempts land acquisition for industrial purposes and highways from the provisions of the Centre's land Act. Other states are following suit while still others like Andhra Pradesh are adopting innovative ways such as land pooling to acquire large tracts of land to build the new State capital, Amravati. For instance, the State government is acquiring 33,000 acres from about 18,000 farmers, with the proviso that 25% of the acquired land post-development of the capital city will be given to the farmers, besides providing for annuity payments for 10 years.[27]

(ii) *National Food Security Act, 2013*

The National Food Security Act, 2013 is another instance of a law that, though well-intentioned, was driven primarily by political-economy, rather than

[25] See Prashant K Nanda and Preetika Khanna, "Govt passes ordinance to ease land acquisition Rules eased for five key sectors, including defence and power; compensation levels remain unchanged", *Live Mint,* Dec 30, 2014, *available at:* http://www.livemint.com/Politics/lfHSaie6iTHvTKvvWdMG5O/Govt-considers-emergency-orders-to-ease-land-deals-auction.html. (Last visited on Aug. 21, 2018).

[26] *Ibid.*

[27] See "Farmers offer 33,000 acre land for Andhra capital at Amravati", *The Indian Express,* June 18, 2017, *available at*: http://indianexpress.com/article/india/farmers-offer-33000-acre-land-for-andhra-capital-at-amravati-4710. (Last visited on Aug. 18, 2018).

economic, considerations. Indeed it seems singularly uninformed from the perspective of an economic cost-benefit analysis. The Act, which marks a paradigm shift in addressing the problem of food security – from the earlier welfare approach to a rights-based approach -- converted the existing food security programmes of the Government of India into a legal entitlement.

Under the Act, 75% of the rural population and 50% of the urban population are now entitled to cereals at subsidised rates,[28] despite the fact that the percentage of the population below poverty line is less and hence, arguably, in need of subsidised grain, is much less. No less importantly, despite the fact that the calculations of more than one expert/expert committee show the scheme could prove very costly (inadvisable?) to the exchequer and could be at the cost of far more important uses of taxpayer money.

The December 2012, Commission for Agricultural Costs and Prices (CACP) Discussion Paper 2 on the Food Security Bill authored by Ashok Gulati, Jyoti Gujral and T Nandakumar, points out that large scale distribution of grain on a subsidized basis to close to two- thirds of the population of 1.2 billion calls for massive procurement of food grains and a large distribution network resulting in a huge financial burden on an already-burdened fiscal system.[29] To support the system and attendant welfare schemes, additional expenditure would be needed for the envisaged administrative set up, scaling up of operations, enhancement of production, investments for storage, movement, processing and market infrastructure etc. The paper warned that the Bill perpetuates the existing inefficient system of food security covering procurement, stocking and distribution and would increase the operational expenditure of the scheme given its creaking infrastructure, leakages & inefficient governance.

Hence the stated annual expenditure of Rs 1,20,000 crore mentioned in the Bill is merely the tip of the iceberg.[30] The yearly food subsidy bill would increase rapidly. While the exact estimate of food subsidy would depend upon economic cost, central issue price of food grains, number of beneficiaries covered and quantity of food grains allocated and lifted, the food subsidy would balloon as the number of beneficiaries rose and the minimum support price raised to cover the rising costs of production and to incentivize farmers to

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[28] See National Food Security Act, 2013, India, *available at:* http://dfpd.nic.in/nfsa-act.htm. (Last visited on Aug.21, 2018).

[29] *Available at:* http://www.prsindia.org/uploads/media/Food%20Security/CACP%20Report%20on% 20Food%20Secur. (Last visited on Aug. 21, 2018).

[30] See Shaleen Jain, "Food Security in India: Problems and Prospects" 9(1) OIDA International Journal of Sustainable Development 11, (2016), *available at* : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733930 (Last visited on Aug.18, 2018).

increase production. These issues, said the authors, raise doubts regarding the sustainability of the financial obligations entailed in Bill. Despite this and similar apprehensions voiced by many others, including the Chairman of the then Prime Minister Manmohan Singh's Economic Advisory Council, Dr C Rangarajan, the UPA government went ahead as it saw it as part of its strategy for the 2014 elections.

Fears about the economic viability of the scheme have already come true. As per the latest available data, food subsidy in the FY17 budget is Rs 1.34 lakh crore; in addition there are pending bills to the tune of Rs 61,000 crore.[31]

IV
Economic Cost of Judicial over-reach

In the years immediately after independence, the judiciary consciously kept away from interfering in issues in the economic arena. The Supreme Court, in *Bajaj Hindustan Ltd. v. Sir Shadi Lal Enterprises Ltd*[32] observed, "It is settled law that in the areas of economics and commerce, there is far greater latitude available to the executive than in other matters. The Court cannot sit in judgment over the wisdom of the policy of the legislature or the executive".

The Apex Court in *Balco Employees Union (Regd.) v. Union of India and Ors,*[33] observed: In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court. (vide paragraph 92)

Further, "Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved." (para 93)

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[31] See "The government has earmarked Rs 1,45,338.60 crore for food subsidy in the next fiscal as against Rs 1,35,172.96 crore in the revised estimate of this fiscal", *The Indian Express,* February 1, 2017, *available at*: http://indianexpress.com/article/business/budget/union-budget-2017-subsidy-bill-up-over-3-per-cent-at-rs-2-4-lakh-crore-in-2017-18-4502370/. (Last visited on Aug. 21, 2018).

[32] Civil Appeal No. 5856 of 2005, *available at:* https://indiankanoon.org/doc/1338345/ (Last visited on Aug. 18, 2018).

[33] (2002) 2 SCC 333.

Again *Prag Ice & Oil Mills v. Union of India*[34] the Supreme Court observed: "We do not think that it is the function of the Court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ."

The Supreme Court in *Shri Sitaram Sugar Co. Ltd. v. Union of India*[35] observed: "Judicial review is not concerned with matters of economic policy. The Court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The Court does not supplant the view of experts by its own views."

In the words of the then Chief Justice, Neely: 'I have very few illusions about my own limitations as a Judge. I am not an accountant, electrical engineer, financer, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review 5000 page record addressing the intricacies of a public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administrator.'

Even till as late as 2001, the Apex Court (in suits filed by Balco employees against privatization of the company) held that disinvestment is essentially an economic policy decision and hence beyond the domain of judicial scrutiny. The Court held that Balco was a company formed by the government and the government, like any other shareholder, is free to transfer its shares for a consideration, quoting its earlier judgment in *RC Cooper v. Union of India*[36] (better known as the Bank Nationalisation case, "It is again not for this Court to consider the relative merits of the different political theories or economic policies...".

Ironically, in this case the Court was upholding the need for a hands-off approach to an executive decision (selling government stake) that was essentially undoing an earlier executive decision (nationalisation) that the Court had then upheld on the very same grounds, namely the right of the executive to take decisions without the Court sitting in judgment of the 'merits of different political theories or economic policies' driving these decisions!

Starting from this position – with the Apex Court clearly laying out a 'hands-off' approach when it comes to matters of policy, especially economic policy,

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[34] AIR 1978 SC 1296.
[35] (1990) 3 SCC 223.
[36] AIR 1970 SC 564.

we have come a long way to the present situation where the Court has no compunction in entering into areas that are blatantly outside its domain.

In the PIL on spectrum auction, for instance, the SC set aside the earlier allocation resulting in the cancellation of several licences and disrupting the plans of several major foreign telecom companies, which saw India as an attractive market for expansion. Potential foreign investors will now be extremely wary of entering a country where supposedly legitimate agreements and contracts are suddenly declared illegal.[37] The Court also ruled against the first-come-first-served policy adopted by the then UPA government and held that all natural resources should be allocated only through the spectrum route, a clear case of judicial overreach. This despite the well-known criticism of auctions, extending to auction design, winners' curse etc, apart, of course, from the fallout that a higher spectrum price could lead to a higher price for the end-product – telecom services – and thereby interfere with the government desire to increase telecom penetration, albeit at the cost of realising a lower price for spectrum.

The resulting controversy led to a Presidential reference to the Court for its advice as to whether, under Article 143 of the Constitution, such a direction was correct and had to be followed. Subsequently, a larger bench of the court ruled that the policy of auctioning need not be followed for every public resource.[38] Nonetheless, the ruling has needlessly created a gray area, laying the floor open for future disputes.

Likewise, banning of iron ore mining in Karnataka and Goa by the Supreme Court following allegations of illegal mining causing environmental damage in 2011significantly reduced production and export of ore.[39] Ore exports declined by over $4 billion over the two-year period during which the ban was in force even as the resultant shortage caused a spike in the price of iron ore domestically, impacting the operations and profit margin of sponge iron plants. It is estimated that over a million people lost their jobs either directly or indirectly on account of the ban according to an Assocham-Yes Bank study.[40]

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[37] See Vikas Bajaj, "Indian Court Cancels Contentious Wireless Licenses", *The New York Times*, Feb. 2, 2012, *available at* : http://www.nytimes.com/2012/02/03/business/global/india-supreme-court-cancels-2g-licenses.html (Last visited on Aug. 21, 2018).

[38] See "Sans 2G, Presidential Reference maintainable: court", *The Hindu, available at*: http://www.thehindu.com/news/national/sans-2g-presidential-reference-maintainable-court/article394287/ (Last visited on Aug.20, 2018).

[39] See "Supreme Court bans iron ore movement in Goa", *available at*: https://in.reuters.com/article/india-ironore-mining-goa-supreme-court-idINDEE89405120121005/ Supreme Court bans iron ore movement in Goa. (Last visited on Aug.15, 2018).

[40] See *available at:* http://www.assocham.org/newsdetail.php/(Last visited on Aug. 20, 2018).

Irregularities in coal block allocation highlighted in the Comptroller and Auditor General's (CAG) report led to the Supreme Court cancelling all the licences issued to private entities. The net result was that despite having the third highest coal reserves in the world[41], India was forced to import large quantities of coal to run its power plants, many of which had been set up strategically close to domestic coal beds.

As Andhyarujina, points out, 'The apex court has original jurisdiction only to entertain petitions for breach of fundamental rights under Article 32 of the Constitution, and therefore these micro-managing exercises are hung on the tenuous jurisdictional peg of Article 32 taken with Article 21 or Article 14. In reality, no legal issues are involved in such petitions; the court is only moved for better governance and administration in such cases, which does not involve the exercise of any judicial function'.[42]

Under the guise of environmental protection, Indian courts have encroached on the turf of both the legislature and the executive, heedless of the economic repercussions. TCA Anant and Jaivir Singh[43] say the starkest examples of judicial activism can be found in the judgments and orders surrounding the PIL that aimed to reduce vehicular pollution in Delhi. In response to the PILs, the Supreme Court issued a number of directions, including restrictions on plying of all commercial vehicles (including taxis) that are over 15 years old; ban on supply of loose 2T oils at petrol stations and service garages;[44] augmentation of public transport (stage carriage) to 10,000 buses;[45] elimination of leaded petrol from NCT of Delhi; replacement of all pre- 1990 auto-rickshaws and taxis with new vehicles on clean fuels; steady conversion of the entire city bus fleet (DTC and private) to single fuel mode on CNG;[46] some specific restrictions on school buses etc. Not only did these directions have implications relating to the choice of technology, an issue on which even technical experts are not united, location of bus stations, etc, which are normally in the domain of the executive, they also entailed substantial economic cost of which the court seems to have taken no cognizance.

In the case of the recent ban on 10 year or older diesel vehicles in Delhi by the National Green Tribunal, the Tribunal's decision is evidently uninformed by

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[41] See "What's the coal scam about?" *The Hindu*, Mar 12, 2015, *available at:* http://www.thehindu.com/news/national/whats-the-coal-scam-about/article6983434.ece (Last visited on Aug. 20, 2018).
[42] See *supra* note 19.
[43] See *supra* note 20.
[44] *M.C. Mehta v. Union of India and others,* AIR 1998 SC 2693.
[45] *Ibid.*
[46] *M.C. Mehta v. Union of India and others,* 1997(4)SCALE6(SP).

the economic consequences of its judgment.[47] Given the preponderance of diesel vehicles in commercial transport, thanks to years of differential pricing on diesel, the ban, if implemented, is likely cause huge dis-location in the supply and availability of essential items in the capital. It will deprive lakhs of people who had borrowed money run taxis/trucks of their livelihood and also impact lenders (both banks and non-banking finance companies) adversely since borrowers would no longer be able to service their loans.[48]

That is not all! Automobile companies that had invested in setting up facilities for manufacture of diesel vehicles would suddenly find their investments being made unviable. Overseas auto majors like Toyota that had come into the country riding on the promise of a large domestic market are now re-evaluating their investments plans. At a time when the country desperately needs foreign direct investment, both on account of foreign exchange it brings in as also on account of the jobs it creates, such rulings have the potential to cause enormous damage to the economy.

In yet another case of judicial over-reach into the area of the executive, and unmindful of the larger economic consequences, in December 2015, the Supreme Court temporarily banned the sale of large diesel cars with an engine capacity of 2000 cc or more to combat pollution in Delhi.[49] Manufacturers argued that the decision would severely impact their sales and future investments and also leave dealers stranded with thousands of unsold cars; but the court would have none of it. Toyota described the verdict as a 'corporate death sentence.' In August 2016, however, the apex court lifted the ban in response to an appeal by Mercedes-Benz, for whom the Delhi region represents almost a quarter of sales in the country, and an association of auto-makers. But in a further instance of straying into an area clearly outside its remit, i.e., taxation, it

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[47] See Ajay Modi, "NGT blocks 10 year old diesel vehicles in Delhi", *Business Standard,* Last Updated at July 19, 2016, *available at*: https://www.business-standard.com/article/current-affairs/ngt-blocks-10-year-old-diesel-vehicles-in-delhi-116071800412_1.html (Last visited on Aug. 20, 2018).

[48] See Apurva Vishwanath, Amrit Raj, "Ban on sale of high-end diesel vehicles in NCR to continue: Supreme Court", *Live Mint*, Apr 1, 2016, ("According to a report by Indian Institute of Technology, Kanpur, cars and jeeps emit less than 10% of particulate matter while trucks are the bigger culprits. A big contributor to Delhi's air pollution is road dust that accounts for about 35% of tiny particles known as PM 2.5 in the air, followed by vehicles at 25%. Other contributors are domestic cooking, power plants and industries."), *available at:* http://www.livemint.com/Politics/NrR0AlLTJZTpCQOYRRf5IL/Ban-on-sale-of-highend-diesel-vehicles-in-NCR-to-continue.html (Last visited on Aug. 20, 2018).

[49] See "To clear air, Supreme Court bans sales of big diesel cars in Delhi", *available at:* http://in.reuters.com/article/india-autos-pollution/to-clear-air-supreme-court-bans-sales-of-big-diesel-cars-in-delhi-/ December 16, 2015 (Last visited on Aug. 20, 2018).

ruled that large diesel cars can be sold in Delhi, but only after manufacturers/ dealers pay a green fine to compensate for polluting the city's air. The tax 1% of the ex-showroom or retail price - must be deposited in a designated state-run bank, the top court said.[50]

The question is, if indeed the Supreme Court was aware of and had factored in the economic consequences of its rulings, would it have taken such a narrow legalistic view or would its rulings have been different. In the case of its ruling on the iron ore mines, for instance, might it have been better, from the economic perspective, if violaters had been penalised and mining allowed to be continued, albeit with due consideration of environment concerns? Again, in the coal block and telecom licence allocation process, would a partial rather than blanket cancellation of all licences have served the ends of economic welfare better? This is not to argue in favour of giving a go-by to the rule of law but rather to try and strike a balance between law and its economic consequences.

Unfortunately, the list of instances of judicial activism is constantly growing. Latest instances include the ban on sale of firecrackers in the national capital during the festive season in October 2017.[51] The ruling, ostensibly done with a view to keeping pollution under control, can be questioned not only on the grounds of infringement on a legitimate activity protected under the Constitution's 'Right to Work', but also on grounds of arbitrary distinction between Delhi traders and traders in the rest of the country.

The loss is estimated to be in the range of Rs 1,000 crore. Sivakasi, the nerve-centre of the firecracker industry, alone has an annual estimated turnover of about Rs 7000 crore and employs more than 300,000 workers directly. Another 500,000 are engaged in related industries related to packaging, printing, paper rolling transportation and others.[52]

The ban on sale of liquor by hotels and restaurants within 500 metres of national and state highways from 1 April 2017, is another instance of judicial

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[50] See Shreeja Sen and Amrit Raj, "SC lifts ban on sale of diesel cars in Delhi, imposes 1% green cess", *Live Mint*, Aug 13, 2016, *available at*: http://www.livemint.com/Industry/yHP6xg0RFW8hT4OxP5tywN/SC-lifts-diesel-car-registration-ban-in-Delhi-NCR-with-rider.html (Last visited on Aug. 15, 2018).

[51] See Hari Kumar and Kai Schultz, "Indian Court Chooses Clean Air Over Fireworks for a Festival", *The New York Times*, Oct. 12, 2017, *available at:* https://www.nytimes.com/2017/10/12/world/asia/india-pollution-new-delhi-diwali.html (Last visited on Aug. 16, 2018).

[52] See KV Lakshmana, "SC ban on firecrackers: Industry stares at Rs 1,000-crore loss, layoffs", *Hindustan Times*, Oct. 9, 2017, *available at:* http://www.hindustantimes.com/india-news/sc-ban-on-firecrackers-industry-stares-at-rs-1-000-crore-loss-layoffs/story-zctMTeZ16DaPf4O5DWggJI.html (Last visited on Aug. 17, 2018).

over-reach with scant regard for its economic consequences.[53] Though the ruling was later modified by the Court, the interim period took a huge toll on the hospitality industry, employing about 1 million people.

V
Findings and Conclusions

1. In a democracy, it is inevitable that laws are tempered by the zeitgeist of the times. Consequently, political economy, rather than pure economic, considerations will play a major role in the drafting of legislation. But this is further compounded by the poor quality of debate in Parliament, especially on technical issues. While this is likely to improve as the composition of our Parliament changes in line with higher education levels of its members, (only 23% of the members of the present Lok Sabha are matriculates or less as against 40% in the first Lok Sabha), given the growing complexity of many issues that our law-makers are called to legislate upon, all laws must be accompanied by a detailed report on their economic impact, and this must be considered by a standing committee of parliament.

2. Schemes such as LAMPS (legislative assistants to members of Parliament) presently sponsored by the NGO, PRS India should be extended and funded with taxpayer money so that members of Parliament can take a more informed view and thereby raise the quality of debate on bills.

3. Absolute separation of power is neither permissible nor possible in the Indian scenario. The line of separation of power is thin and this ambiguity gives scope for the judiciary to interfere in the area of executive. While the executive is responsible to the people, the judiciary is answerable to the constitution. Unfortunately, judicial overreach in economic policies can impact the economy adversely. While Judicial Review, the process by which the Apex Court keeps a Constitutional watch over the actions of the Executive and Legislature, has been acknowledged as a part of the basic structure of the Constitution, the time has, perhaps, come to refine what is meant by the term 'judicial review' and limit it to a strict review of questions of law alone.

4. Under a system of pure separation of powers, judges would mechanically (or "formalistically") apply the law, the assumption being the political

[53] See Faizan Mustafa, "The Supreme Court liquor ban may be a case of judicial overreach", *Hindustan Times*, Apr. 5, 2017, *available at:* http://www.hindustantimes.com/opinion/the-sc-liquor-ban-may-be-a-case-of-judicial-overreach/story-GeXXLnWCGUhZjLeiH2HiJL.html (Last visited on Aug. 22, 2018).

discussion has been resolved in the parliament. But, in today's constitutional democracies it is common to find increasingly active courts that sway regulation and public policy. To avoid this conflict institutional checks and balances, especially in key economic issues are required.

5. Judiciary should exercise self-restraint and refrain from interfering in the area of the executive to implement the spirit of separation of power. Here the example set by the Supreme Court in its more recent ruling in the context of international commercial arbitration, effectively removing the power of the Indian judiciary to interfere with arbitrations seated outside India, could be a good precedent for the way forward.[54]

6. Law makers and the executive should ensure that policies are so transparent that they leave no/little scope for litigation. The government's efforts to remove human interface and make more extensive use of technology in line with its philosophy of minimum government, maximum governance will help in this direction.

7. If a matter that is brought before the court has economic implications, it should be heard by special bench which should take the help of an expert committee. The recommendation of the expert committee should not be ignored without detailed reasons being provided in writing and the matter should be disposed of within a specified time limit.

8. Wherever the matter pertains to technical subjects, specialised tribunals should replace the normal court system. Unfortunately, as things stand courts have not been willing to dis-allow appeals to High Courts against tribunal rulings. The latest ruling of the Supreme Court in the *Madras Bar Association v Union of India* (May 2015) is a further setback to tribunalisation.

9. The court system should be more transparent, open and accessible. Courts should intervene only in exceptional conditions like when decision-making authority- exceeded its powers, committed an error of law, violated the rule of natural justice or abused its power.

10. The onus of proof for exhibiting arbitrariness must lie on the petitioner. Otherwise, an executive action taken after adherence to a procedure and on the recommendation of experts shall be upheld.

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[54] *Imax Corporation v. E City Entertainment India Private Limited*, 2017 SCC On Line SC 239.

It is in the nature of policy decisions in democracies, more so poor democracies, that these will be coloured by political-economy considerations rather than be driven by economics alone. Also, that there will be occasions when the State seems to be abdicating its role so that execution fails or leaves much to be desired, creating a vacuum into which courts might be tempted to enter. However, it is imperative that courts learn respect the line of separation of power and steer clear of entering areas that are clearly within the domain of the State. Economic policy is one such domain.

Courts must confine their role to curbing illegality and ensuring procedures adopted by the executive in its economic policies are not arbitrary and do not in any way violate the rights of citizens; rights that have been enshrined in the Constitution.

TRANSPARENCY AND RIGHT TO INFORMATION IN THE NON-GOVERNMENTAL ORGANISATIONS AND PRIVATE INSTITUTIONS PERFORMING PUBLIC FUNCTIONS

*Kavitha Chalakkal**

Abstract

The notion of freedom to information helps in the basic functioning of the modern democracy which essentially include human rights protection, right to vote and elect a government, making the government agencies accountable for its activities; and checking inefficiencies and corruption. The norm is that information must be accessible to members of the public in the absence of an overriding public interest in secrecy is an accepted principle of good governance and modern democracies. Access to information relates to the concept of accountability and transparency and consists of the constitutional, statutory or judicial norms and obligations. Access to information which was initially considered as an administrative governance reform has also been increasingly recognized as a fundamental human right. This paper looks into the scope of transparency and right to information in the non-governmental organisations and private institutions performing public functions and the scope of application of the Right to Information Act on these organisations. The paper also looks into the evolution of the right, its international perspective and the judicial decisions on the right.

I
Introduction

The modern democratic system of governments had made it imperative that exercise of authority be commensurate with responsibility, transparency and accountability. The concept of accountability and transparency consists of the constitutional, statutory and judicial norms and obligations. The basic argument in this context is that the information held by public authorities is not for themselves, but as custodians of the public. An accepted principle of good governance and modern democratic norms is that this information must be accessible to members of the public in the absence of an overriding public interest in secrecy. In this context, the right to information laws reflect the

* Assistant Director (Research) & Assistant Professor, Lloyd Law College, Greater Noida.

fundamental premise that the government is supposed to serve the people.[1] This requisite flow of information lies at the heart of the very notion of democracy and is crucial towards the respect for human rights. In this context, respect for the right to freedom of expression includes the right to seek, receive and impart information and ideas. The notion of freedom to information helps in the basic functioning of the modern democracy, which would essentially include human rights protection, right to vote and elect a government, making the government agencies accountable for its activities; and checking inefficiencies and corruption.

The importance of the right to access information held by public bodies, sometimes referred to as the right to know, is considered as the fundamental "freedom to gain knowledge of all public matters and to mould all decisions which affect public interest".[2] The right was first recognised in Sweden over 200 years ago through the Freedom of the Press Act, 1766, the first freedom of information legislation in the modern sense. It granted public access to official documents and was included in the Constitution of Sweden to encourage the free exchange of opinion and availability of comprehensive information and free access of official documents to every Swedish citizen.[3] The modern right to information statutes warrant the freedom of information, which prescribes the "public's fundamental right to information about the government and its functions".[4] This is recognition of the principle that the government is obligated to balance the competing interest of the public's right to know on one hand and, the plausible peril of divulging classified governmental data on the other.[5]

Access to information which was initially considered as an administrative governance reform has also been increasingly recognized as a fundamental human right. The growth of right to information as a legal right in the domestic legal systems has seen an exponential increase in the beginning of the twenty-first century. In 1990, only thirteen countries had domestic legislation on right to information laws, which has currently increased to more than eighty countries. Along with the States, various inter-governmental organisations, multilateral development banks and other international institutions have recognized the

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[1] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (UNESCO: Paris 2nd edn., 2008).

[2] V.R. Krishna Iyer, *Freedom of Information* 22 (Eastern Book Company, Lucknow, 1990).

[3] Government Offices of Sweden, "The principle of public access to official documents", *available at*: https://www.government.se/how-sweden-is-governed/the-principle-of-public-access-to-official-documents/ (Last visited on July 16, 2018).

[4] Peyton S. Kampas, "Should Everyone Know Everything?: The Freedom of Information vs. Governmental and National Security", 5(1) *JBBL* 129-152 (2014).

[5] *Ibid.*

concept of right to information.

II
Right to information: International perspectives

Right to Information (RTI) is most commonly interpreted as the right to request and receive information from public authorities or agencies.[6] The United Nations (UN) recognised the notion of 'freedom of information' as early as in 1946. In 1946, the UN General Assembly adopted resolution 59(1), which stated, "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated". Article 19 of the Universal Declaration of Human Rights, 1948 states that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, regardless of frontiers.[7] The United Nations Educational, Scientific and Cultural Organization (UNESCO) has stated that freedom of information legislation reflects the fundamental premise that all information held by governments and governmental institutions is in principle public, and may only be withheld if there are legitimate reasons, typically privacy and security, for not disclosing it.[8] UNESCO was instrumental in creating the World Summit of the Information Society, which has reaffirmed freedom of expression and universal access to information as cornerstones of inclusive knowledge societies. International instruments like the Brisbane Declaration on Freedom of Information: The Right to Know (2010), the Maputo Declaration on Fostering Freedom of Expression, Access to Information ad Empowerment of People (2008) and the Dakar Declaration on Media and Good Governance (2005) are the results of UNESCO efforts to reaffirm the importance of freedom of information.

The Economic and Social Council of the United Nations (ECOSOC) also forwarded a Draft Declaration of Freedom of Information in 1960, with an aim to identify the right to information as a fundamental human right and foster friendly relation among the states.[9] The International Covenant on Civil and

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[6] Roy Peled and Yoram Rabin, "The Constitutional Right to Information", 42(2) *Colum. Hum. Rts. L. Rev* 357 (2011).

[7] United Nations, The Universal Declaration of Human Rights, 1948, UNGA *Res.* 217 (III) *available at*: http://www.un.org/en/universal-declaration-human-rights/ (Last visited on July 16, 2018).

[8] UNESCO, *available* at: http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/ (Last visited on June 30, 2018).

[9] ECOSOC *Res.*756 (XXIX), *available at*: http://repository.un.org/handle/11176/207721 (Last visited on June 30, 2018).

Political Rights (ICCPR), 1966, a legally binding treaty, adopted by the UNGA also guarantees the right to freedom of opinion and expression, under article 19 in similar language to that of the UDHR. In 1998, the UN General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders). Article 6 specifically provides for access to information about human rights:[10]

Everyone has the right, individually and in association with others:

(a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how these rights and freedoms are given effect in domestic legislative, judicial or administrative systems;

(b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms...

More recently, the right to information has been recognised as an integral aspect of sustainable development. Goal 16 of the United Nations Sustainable Development Goals (SDGs) expressly considers freedom of information as a tool for the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building accountable institutions at all levels.[11]

These international principles are binding on all States as a matter of customary international law.[12] However, it has to be considered that these international human rights instruments did not specifically elaborate on a right to information, and their general guarantees of freedom of expression were not, at the time of adoption, understood as including a right to access information held by public bodies. However, the last three decades on this mandate has received a spectacular legislative response and the right has been increasingly

[10] Resolution 53/144, 8 March 1999.

[11] UN, "Transforming our World: the 2030 Agenda for Sustainable Development", Goal No 16. *available at*: http://in.one.un.org/page/sustainable-development-goals/sdg-16/ (Last visited on June 30, 2018).

[12] For judicial opinions on human rights guarantees in customary international law, see, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium* v. *Spain) (Second Phase)*, ICJ *Rep*. 1970, 3; *Namibia Opinion*, ICJ *Rep*. 1971, 16, Separate Opinion, Judge Ammoun (International Court of Justice); and *Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). See generally, M. S. McDougal, H. D. Lasswell and L.C.Chen, *Human Rights and World Public Order* 273-74, 325-27 (Yale University Press, New Haven, 1980).

interpreted as access to information held by public bodies.

Information is an essential aspect of democracy, whereby it gives the ability to individuals to participate effectively in making decisions that affect them. It also serves as a participatory mechanism which central to fair and efficient decision-making in development programmes.[13]Participation is central to sound and fair development decision-making. A right to information can also help ensure a more balanced participatory playing field. It has been noted that unequal access to information allows officials "to pursue policies that are more in their interests than in the interests of the citizens. Improvements in information and the rule governing its dissemination can reduce the scope for these abuses".[14] Amidst all the governmental reforms, access to information has been described as the "oxygen of democracy".[15]

The modern information access laws, places the obligation on public bodies to publish information on a proactive or routine basis, even in the absence of a request. The scope of this varies, but it usually extends to key information about how their operation, policies, opportunities for public participation in their work, and how to make a request for information. 'Pushing' information out in this way is increasingly being recognised as one of the effective ways to enhance access to information held by public bodies.

Similarly, all major regional agreements dealing with human rights invariably recognise the right to information as a core principle or tool in the realisation of human right goals. The American Convention on Human Rights, under article 13, provides for the right to freedom of expression and states that it provides the right "to seek, receive and impart information". Although, it is not an absolute privilege yet and is susceptible to the stipulations such as, "protection of national security, public order, or public health or morals, amongst others". The European Convention on Human Rights recognises the freedom of information in article 10, which states that everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority, regardless of frontiers. However, this is conditional and limited by the terminology of the provision, where the right to 'seek' information is not recognised and paragraph 2 of

[13] UNDP, *Human Development Report 2002: Deepening Democracy in a Fragmented World* 3 (Oxford University Press, Oxford, 2002).

[14] Joseph Stiglitz, "Transparency in Government", in Roumeen Islam, Simeon Djankov, *et al* (eds.). *The Right to Tell: The Role of the Mass Media in Economic Development* 28 (World Bank Institute, Washington, D.C., 2002).

[15] Article 19, *The Public's Right to Know: Principles on Freedom of Information Legislation*, 1999, *available at*: https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf (Last visited on June 30, 2018).

article 10 lists out the grounds on which the information flow can be limited.[16]

III
Right to Information in India

Right to Information as a Constitutional Right

It was initially, the Indian judiciary, rather than the parliament that recognised the pivotal aspect the right to information in India. The legal position in this context has developed through several Supreme Court judgments in the context of the right to freedom of speech and expression, which has gradually widened the scope of the right. In *State of Uttar Pradesh* v. *Raj Narain*,[17] the Supreme Court of India recognised that the right to know, derived from the concept of freedom of speech, mandates that the information should be available to the public and secret transactions by the public authority shall be discouraged unless it could have a repercussion on public security. However, it also stated that the freedom of information is qualified or limited by varying in accordance with the constitutional restraints. Later in *Dinesh Trivedi* v. *Union of India,*[18] the Supreme Court of India reiterated the significance of the right to know about the affairs of the Government, which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. In this instance, also the court was specific about the limitations. In *People's Union for Civil Liberties* v. *Union of India*,[19] the Court has contended that the effect of Article 19(1)(a) can only be felt when it is complete with the right of every citizen to obtain information.

In *Secretary, Ministry of Information and Broadcasting, Government of India and others* v. *Cricket Association of Bengal and others*,[20] the Court observed that the right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create

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[16] Art. 10 para 2: The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

[17] (1975) 4 SCC 428.

[18] (1997) 4 SCC 306.

[19] AIR 2004 SC 1442.

[20] (1995) 2 SCC 161.

an uninformed citizenry when the medium of information is monopolized either by a partisan central authority or by private individuals or oligarchic organizations. Similarly, in *S.P. Gupta* v. *Union of India,*[21] P.N. Bhagwati J., observed that the concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under article 19(1) (a). Therefore, the disclosure of information about the functioning of the Government must be the rule and secrecy an exception. In *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express*,[22] the court emphasised upon the 'right to know' is an integral part of the 'right to life', and unless one has the 'right to information', the 'right to life' cannot be enjoyed meaningfully.

Although, the development of RTI as a part of the fundamental right of the country started with Supreme Court decisions for the enforcement of certain logistical implications of the right to freedom of speech and expression, the Indian Parliament, in the late 1990's took into consideration the need for legislation on the issue initiated the process for the same. The Manepalli Narayana Rao Venkatachaliah J. *Report of the National Commission of Review of Working of the Constitution*, 2002, paved the way for the enactment of a central legislation on right to information.[23] The report stated that much of the common person's distress and helplessness could be traced to their lack of access to information and lack of knowledge of decision-making processes.[24]After many years of public debate and after the right to information laws had been passed in a number of Indian states, the Freedom of Information Act 2002 was passed. However, the instrument was considered weak and subjected to widespread criticism, mainly because its scope was limited with no judicial remedy or appeal provisions. The 2002 Act never came into force due to the failure of the government to notify it in the Official Gazette. Renewed, concerted campaigns by the civil society lead to the creation of the Right to Information Act in 2005(RTI) by the Indian parliament. The Right to Information Act, 2005, which has been appreciated internationally, as a comprehensive legislation, includes provisions for independent appeals, proactive disclosure and penalties for non-compliance.

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[21] AIR 1982 SC 149.

[22] AIR 1989 SC 190.

[23] Report of the National Commission to Review the Working of the Constitution, 2002, *available at*: http://legalaffairs.gov.in/ncrwc-report (Last visited on June 18, 2018).

[24] *Id.*, Chapter 6, para 10.

IV
The Right to Information Act, 2005

The Act covers the whole of India except Jammu and Kashmir,[25] and covers all constitutional authorities, including the executive, legislature and judiciary; any institution or body established or constituted by an act of Parliament or a state legislature. The Act states that bodies or authorities established or constituted by order or notification of appropriate government including bodies "owned, controlled or substantially financed" by government, or non-Government organizations "substantially financed, directly or indirectly by funds" provided by the government are covered in the Act.

(i) *Public Authority*

Section 2 (h) of the Act provides the definition of public authority as an authority or body or institution of self- government established or constituted, by or under the Constitution; any other law made by Parliament or State legislature; notification or order by the appropriate government. This also includes any—

(i) Body owned, controlled or substantially financed;
(ii) Non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government;

It has to be noted that the definition of public authority is broader than what is envisaged under article 12 of the Constitution of India as it goes beyond the constitutional and statutory bodies. In *M.P. Varghese* v. *Mahatma Gandhi University*,[26] the Court concluded that only that set of information which would relate to public function is privy to the Act and that the definition of 'public authority' has a much wider meaning than 'State' under article 12, which primarily relates to the enforcement of fundamental rights, whereas the RTI Act creates a framework for effective implementation of access to information.

Substantial Financing Criteria

One of the main criteria to be considered for bringing a private entity under the scope of the RTI Act is that it should be substantially funded by the government. This particular aspect is identified as a point of debate as to what should be the exact percentage of funding required. In various cases the adjudicating bodies have relied on the different interpretations of this condition

[25] In Jammu and Kashmir, the J&K Right to Information Act 2009 is in force.
[26] AIR 2007 Ker 230.

like initial investment,[27] controlled and financed by the government,[28]along with other factors like government recognition. It has also been observed there is no requirement for a major stake holding by the government to bring the entity under the scope of the Act.[29]

(ii) *Scope of the RTI Act*

The major feature of the RTI Act is the right of information to citizen. This is stated in Section 2 (j) which states that 'right to information' means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

(i) inspection of work, documents, records;

(ii) taking notes, extracts or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

The list of information to be proactively published by public bodies is wide. The RTI Act defines information under section 2(f) in a very broad manner so that the citizens can have access to a large number of items, which includes information or material in any form. These include records, documents, memos, e-mails, opinions, advice, g) press releases, h) circular, i) orders, j) logbooks, k) contracts, l) reports, m) papers, n) samples, o) models, p) data material, q) information relating to any private body which can be accessed by a public authority under any other law for the time being in force etc. However, it does not include file noting. The categories of information, which can be exempted from disclosure are:[30]

- Security, strategic, scientific or economic interest of the State, foreign relations or may lead to incitement of an offence;
- Any information, the disclosure of which may constitute contempt of Court;
- Any information, the disclosure of which would cause a breach of privilege Parliament or State legislature;
- Any information including commercial confidence, trade secrets or

[27] *Dhara Singh Girls High School* v. *State of Uttar Pradesh*, AIR 2008 All 92.
[28] *Ravneet Kaur* v. *Christian Medical College*, AIR 1998 P&H 1.
[29] *Satya Prakash Rathi* v. *Ministry of Civil Aviation*, Appeal No CIC/OP/A/2009/000129 (2011).
[30] RTI Act 2005, s.8.

intellectual property, the disclosure of which would harm the competitive position of the third party;

- Cabinet papers and deliberations of the Council of ministers and their Secretaries.

However, it also states that notwithstanding anything in the Official Secrets Act 1923, a public authority may allow access to information if public interest in disclosure outweighs 'the harm' to the protected interests.

The Act specifies time limits for replying to the request:[31] and however, since the information is to be paid for, the reply of the PIO is necessarily limited to either denying the request (in whole or part) and/or providing a computation of "further fees". The time between the reply of the PIO and the time taken to deposit the further fees for information is excluded from the time allowed. If the information is not provided within this period, it is treated as a deemed refusal. Refusal with or without reasons may be ground for appeal or complaint. Further, information not provided in the times prescribed is to be provided free of charge. Appeal processes are also defined in the Act.

Another important aspect of the Act is PIOs/Assistant PIOs who are to be appointed in all administrative units/offices are required as maybe necessary to provide information to persons requesting it.[32] The application fee is to be reasonable and no fee is to be charged to persons who are below the 'poverty line' as determined by the government. Where a public authority fails to comply with time limits under the Act, the information shall be provided free of charge. The Act provides for the establishment of a Central Information Commission (CIC) at the Centre and State Information Commissions (SICs) in all states comprising of a Chief Information Commissioner and other Information Commissioners. The Act also provides for penalties for non-compliance of the provisions of the Act or giving incomplete, misleading, or false information; to require information on any other matter relating to access to records.

(iii) *Limitations to the Access to Information under the RTI Act*

From the time of its implementation, the Act has faced many issues; some of the issues relate to the scope and procedural aspects of the legislation and others pertain to capacity building of the executive. However, one of the main contentious aspects is the status of private bodies under the law. Most freedom-of-information laws tend to exclude the private sector from their jurisdictional purview and apply only to information and records held by the State, subject to

[31] RTI Act 2005, s.7.
[32] RTI Act 2005, s.5.

exemptions. The Indian Act provides for the information from private bodies to be collected through public authority, thus keeping the onus on the government.

V
Increasing role of Non-Governmental Organisations in the modern states

Non-governmental organizations (NGOs) are non-profit, voluntary citizens' groups that are organized on a local, national or international level, functioning to serve particular societal interests by focusing advocacy and/or operational efforts on social, political and economic goals, including equity, education, health, environmental protection and human rights. The UN describes a NGOs as "not-for-profit, voluntary citizen's group, which is organised on a local, national, or international level to address issues in support of the public good. Usually, task-oriented and people with common interests, NGOs perform a variety of services and humanitarian functions, bring citizens' concerns to governments, monitor policy and programme implementation, and encourage participation of civil society stakeholders at the community level."[33] Many authors simplify NGOs as organizations working against or outside government in an advocacy role (through direct confrontation by exerting outside pressure or lobbying to influence decision-making and increase the capacity of the poor to demand and influence services, or through watchdog activities), or in a service role on behalf of the government, by providing education and compensating for the lack of government capacity.[34] Some others classify NGOs into three: (1) advocacy NGOs (promoting concepts or interests of groups, which or who do not have either means to meet or voice for their needs); (2) operational NGOs, which provide goods and services to needy clients; and (3) hybrid NGOs, which perform both the functions. Generally, they are organized around specific issues (e.g. human rights, health and environmental protection, arguably, the most successful NGO arenas).[35] NGOs often function along with and/or work to improve or correct government and private businesses.

In the modern world, NGOs have emerged to play a vital role, at national,

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[33] Anon, "Role of NGOs, Development Studies", Trinity College, The University of Dublin: Dublin, *available at*: https://www.tcd.ie/Economics/Development_Studies/link.php?id=95 (Last visited on July 12, 2018).

[34] Inger Ulleberg, "The Role and Impact of NGOs in Capacity Development: From Replacing the State to Reinvigorating Education", International Institute for Education Planning and UNESCO, Paris; IIEP, (2009), *available at*: http://unesdoc.unesco.org/images/0018/001869/186980e.pdf (Last visited on July 12, 2018).

[35] Hildy Teegen, Jonathan P Doh, *et al*, "The Importance of NGO's in Global Governance and Value Creation: An International Business Agenda" 35, 463-483 *JIBS*, (2004).

regional and international levels. They function in a niche space, and even substitute government agencies in many important aspects of modern life and development, and have a unique role to play on a range of things, from environmental protection and human rights to governance and global politics.[36] As economies increasingly move towards free markets and private enterprise at the cost of social cohesion, with an increase in socio-economic inequity, NGOs function to provide a healthier balance between the market and the state. The rise and establishment of NGOs in the modern world stems from the inability of the welfare state and free market systems at times to create a just and sustainable system.[37] The inadequacies and often gross failures of these systems have forced citizens around the planet to seek answers through the formation and functioning of NGO's; this has been born out of necessity to meet important social needs ignored by or made impossible by the State or the Market.

NGO's have certain key roles to play in the modern societies. One, they provide opportunities for the citizens to voluntarily work towards self-organization of society, using acceptable social frameworks and goals regarding a range of aspects such as environment, health, poverty alleviation, culture, arts, education, etc., where the State or market might not be interested in ensuring sustainable systems. Thus, NGOs ensure inclusivity and addresses diversity and extend the concept of community and collective decision-making into increasingly market-based frameworks. Second, NGOs provide an essential balance between profit-oriented private businesses and the governance and custodianship-oriented government systems, by providing a middle ground that promotes essential checks and balances in the society, while fostering creative and productive partnerships among the other two sectors, for ensuring common goals are met. Thirdly, NGOs function as important catalysts for social experimentation and change by undertaking methods and ways both government and private sectors could not do. The basic functioning of an NGO allows it to take risks that are unacceptable to the market and the governments. NGOs often could be noticed as the representatives of marginalized sections in developing countries or

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[36] Barbara Gemmill and Abimbola Bamidele-Izu, "The Role of NGOs and Civil Society in Global Environmental Governance", in Daniel C. Esty and Maria H. Ivanova (eds.), *Global Environmental Governance* (Yale University: New Haven, 2002).

[37] Shaughn McArthur Global Governance and the Rise of NGO's, Asian Journal of Public Affairs, 2 (1) pp 54-67(2008) and Hildy Teegen, Jonathan P Doh, Sushil Vachani (2004), The importance of nongovernmental organizations (NGO's) in global governance and value creation: an international business agenda in the Journal of International Business Studies, 35, 463-483.

sometimes as defenders of the socio-economic needs of developing states.[38]

NGOs offer a number of distinct advantages over the other two sectors, such as (a) they often enjoy a great degree of legitimacy in the eyes of the public; (2) being well attuned to public concerns, they could highlight the needs of specific groups that might not be represented by the market or defended by the government; (3) their grass-roots reach could be more than government or industry; (4) they prove to be more cost-effective than the others; and (5) their specific work and focus provides them with higher technical expertise in fields neglected by the others.[39] However, they also hold disadvantages such as lack of transparency and accountability and their dependence on "donors" for scarce funds. Despite these drawbacks, the strengths of NGO systems have led governments, intergovernmental bodies and even private businesses to direct increased funding through them to meet social ends. After the Second World War, the role of non-governmental organisations (NGO's) and other private bodies in various governmental programmes and schemes has increased. NGO's, in particular, have been using their consultative status in influencing major policy changes and executive decisions, and has been participating in the implementation process, using funds set aside by the government and by generating financial support from other sources.

VI
NGOs, Private Institutions and Access to Information

In a world where non-state actors such as private institutions, non-governmental organisations, quasi non-government organisations and international institutions influence the policies and development agenda of many states, the information held with these institutions becomes very relevant to the general public in the decision-making process. As more and more public functions, like provision of health care, supply of water, power and transport, are privatised, the public need to get information from these organisations gain more relevance.

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[38] Tek Nath Dhakal, The Role of Non-Governmental Organisations in the Improvement of the Livelihood in Nepal, (University of Tempere, Finland, 2002), *available at*: https://tampub.uta.fi/bitstream/handle/10024/67199/951-44-5347-6.pdf?sequence=1 (Last visited on June 24, 2018).

[39] Gayle Allard & Candace Agrella Martinez (2008), "The Influence of Government Policy and NGOs on Capturing Private Investment" in OECD Global Forum on International Investment, March 2008, *available at*: http://www.oecd.org/investment/globalforum/40400836.pdf (Last visited on June 28, 2018)

A fundamental principle underpinning the right to information is the principle of maximum disclosure, which establishes a presumption that all information held by public bodies should be subject to disclosure unless there is an overriding public interest justification for non-disclosure. Most domestic freedom of information laws excludes these institutions from its purview. 'Private sector', which denotes statutory bodies not owned by the state, and which function primarily for profit (businesses, companies, corporations, firms, banks, etc.), has traditionally been pretty much excluded from having any legal mandate to show commitment towards public demand for information.

Of about 70 countries that had adopted comprehensive freedom of information laws only 50-55 are applicable only to government systems.[40] By dividing human society into two—state and citizens, the conventional frameworks rested the duty of protection of rights of its citizens solely on the former. Here, the accountability of the private sector in the context of promotion or violation of human rights is only through the state. Though during 1980s the need to disclose information on marketed products gained international acceptance, discussions were limited to "preventive disclosure", where information regarding threat to human lives, health and safety needed to be shared with the public. Slowly, with the involvement of private sector increasing in the public sphere, argument for availability and access to more information with regard to consumer rights gained further audience.

Rapid privatization, de-regulation, and economic globalization across the world in the recent decades meant that substantial amount of information about public functions, previously kept by the governments, came to the possession of the private sector; this included vital services such as banking, water supply, health, telecommunication, education, electricity, etc. It is necessary that individuals should be entitled to access information from the private sector as a legal 'right' in the same manner as from the government. However, the existing information laws, which allow individuals to access private-sector information through the government, does not recognise the need to include the sector under a right to information regime. However, a range of issues, including the restricted scope of disclosure laws and weak enforcement of the disclosure laws is highly inadequate, especially, with regard to the changing situations in the modern society, where the private sector started performing constantly increasing number of public functions, previously performed by the governments. These inadequacies of disclosure laws to provide individuals with needed

[40] Mazhar Siraj, "Exclusion of Private Sector from Freedom of Information Laws: Implications from a Human Rights Perspective", 2(1) *Journal of Alternative Perspectives in the Social Sciences* 211 (2010).

information for making informed choices, affects essentially the just and sustainable functioning of the modern society. Even when certain countries included the private sector under the right to information laws,[41] it was restricted to those performing public tasks or receiving public funds. However, the increasing role of the private sector in the modern society demands more: in an increasingly privatized world, with governments could be seen as shifting more and more services to the private sector, and with various cases of human rights being affected by the sector receiving limelight (e.g. non-discrimination, women's rights, employees' rights, child rights, slavery, labour rights, food, health, education, environmental rights, civic freedoms, etc.), private sector could be expected to be brought under stricter right to information regimes.

Realising the importance of the functions performed by these NGOs and private institutions, a smaller, but steadily growing number of countries extends coverage, in addition, to entities that receive public funds without reference to whether or not they perform public functions. It has been identified that applying RTI laws to such entities more rational and would be fair as the approach and helps to avoid the uncertainties that flow from a lack of agreement as to what constitutes public function or that receive substantial public funds etc.[42]

Other than India, Denmark, Ireland, Montenegro and Serbia also have access to information laws apply to private entities that receive substantial public funds regardless of the functions they perform. However, Denmark and Ireland stipulate that coverage shall be extended to private entities only pursuant to a specific order issued by the relevant minister and, at least in Ireland, few such private entities have yet been so designated.

VII
Private Authorities and Non-Governmental Organisations under Indian law

One of the concerns expressed by the accountability and transparency advocates is the exclusion of private entities from the scope of the RTI Act 2005. Section 2(h) of the Indian RTI Act gives the scope of application of the Act. The private entities that exercise administrative authority, perform public functions or receive substantial public funds are the only category that falls under this section. These three elements are closely related, and there are

[41] *Ibid.*

[42] Right2Info, "Private Bodies and Public Corporations", *available at:* https://www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Last visited on June 21, 2018).

considerable variations and lack of precision concerning what is understood to constitute 'administrative authority' and 'public functions, as well as concerning the amount of funding that constitutes 'substantial'. Administrative authority in many countries means the authority to regulate, for instance, by professional licensing and standard-setting bodies. Such bodies are the subject of administrative (or public) law. Regarding the definition of 'public function', not only are there variations among countries, but even within countries. Public functions may be limited to public safety and security (protection of life and property), or may encompass a broad range of services, e.g., including health care. The 'Public Function Doctrine', as entailing that a private person's actions constitute State action if the private person performs functions that are traditionally reserved for the State.[43] In *Ajay Hasia* v. *Khalid Mujib Sehravardi*,[44] the Supreme Court of India held that if a corporation is performing functions of public importance, closely related to governmental functions it may be categorised as an agency or instrumentality of the State. Similarly, in *Rahul Mehra* v. *Union of India*,[45] it was held that anybody, public or private, performing a public duty is subject to judicial review under article 226. The Court stated in *Binny Ltd.* v. *V. Sadasivan*,[46] that the private bodies may also be discharging public functions and that it is difficult to draw a line between 'public functions' and 'private functions' when they are being discharged by a purely private authority. A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies, therefore, exercise public functions when they intervene or participate in social or economic affairs in the public interest. In *G. Bassi Reddy* v. *International Crops Research Institute*,[47] it was observed that although it is not easy to define what a public function or public duty is, it can be reasonably said that such functions are akin to those performable by the State in its sovereign capacity.

However, what is to be noted that in spite of these institutions increased presence in the domestic scenario, these bodies are not comprehensively covered by the RTI Act 2005. Currently, only those private institutions and NGOs which are receiving substantial grants from the government are brought within the purview of the Act.[48] To the question as to what constitutes "substantial

[43] Bryan A Garner, *Black's Law Dictionary* (Thomson West, 10th edn, 2014).

[44] AIR 1981 SC 487.

[45] (2005) 4 Comp LJ 268 Del.

[46] (2005) 6 SCC 657.

[47] AIR 2003 SC 1764.

[48] The laws of Denmark, Ireland, Serbia, and India suggest that more than 50% public funding should suffice: Denmark's law requires that the entity be "mainly" funded by government funds; Ireland's law requires that the entity be financed "wholly or in part" from the public

financing", the Supreme Court of India stated that only those organisations or institutions receiving more than 95 per cent of government funds for infrastructure would have to provide all their information under the RTI Act. This definition allows a wide space for these institutions to be out of the legal regime. Private bodies are not within the Act's ambit directly. In *Sarbjit Roy v. Delhi Electricity Regulatory Commission*,[49] the Central Information Commission decided that privatised public utility companies are not applicable for RTI. In *Air India Statutory Corporation* v. *United Labour Union*,[50] the Supreme Court emphasised on the public nature of the functions performed by a private body is a necessary criterion for falling under Article 226.

In *Secretary, Ministry of Information and Broadcasting, Government of India* v. *Cricket Association of Bengal & Ors.*,[51] the Court reiterated the importance of the access to information in the context of the right freedom of speech and expression. Identifying it as the 'only vehicle of political discourse so essential to democracy', the Court stated that the right includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. It was also observed that the right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues. This is adversely affected by the one-sided information, disinformation, misinformation and non-information and results in an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations.

In *Thalappalam Service Cooperative Bank ltd and Others* v. *State of Kerala and Others*[52] it was held that even though the government may not have any statutory control over the NGOs, as such, still it can be established that a particular NGO has been substantially financed directly or indirectly by the funds provided by the appropriate government, in such an event, that organisation will fall within the scope of Section 2(h)(d)(ii) of the RTI Act. The bench, however, said that whether an NGO has been substantially financed by the government (or its authorities) or not, is a question of fact, to be examined

purse; Serbia requires that an entity be "wholly or predominantly" funded; and India offers the most thoughtful (and far-reaching) approach . The RTI law applies to bodies that receive "grants *or loans*" (emphasis added) from Central or State government (presumably not including local governments) totaling more than the equivalent of about US$60,000 or 75% of their total budgets.

[49] CIC Decision dated 30-11-2006 in application No. CIC/WB/A/2006/00011.

[50] (1997) 9 SCC 377.

[51] AIR 1995 SC 1236.

[52] Civil Appeal 9017 of 2013, decided on 7 October 2013. The decision excluded service cooperative banks from the ambit of RTI.

by the authorities concerned under the RTI Act. The Court also stated that substantially financed means "the degree of financing must be actual, existing, positive and real to a substantial extent, not moderate, ordinary, tolerable etc." "Merely providing subsidiaries, grants, exemptions, privileges etc., as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding was so substantial to the body which practically runs by such funding and but for such funding, it would struggle to exist," the bench said. "The State may also float many schemes generally for the betterment and welfare of the cooperative sector like deposit guarantee scheme, scheme of assistance from National Bank for Agricultural and Rural Development (NABARD) etc., but those facilities or assistance cannot be termed as substantially financed by the government to bring the body within the fold of public authority," the apex court said.[53] These decisions indicate the ambiguity in the interpretation of the question when a particular authority deems to undertake a public function or is substantially funded.

Recognising the need for a comprehensive implementation of the RTI Act and to remove the limited scope of the same, the Supreme Court of India, recently in the *Board of Control for Cricket* v. *Cricket Association of Bihar*,[54] asked the Law Commission of India to examine whether the BCCI would be covered under the ambit of the RTI. The Court made this request on the basis of its decision that BCCI discharges public functions monopolistic in nature with the approval of the central and state governments. The other mandate was to identify what constitutes substantial funding and whether it includes direct and indirect funding.[55] The Commission recommended bringing the BCCI and its constituent member cricket associations under the ambit of the RTI Act and also concluded that:[56]

The monopolistic nature of the power exercised by BCCI, the de facto recognition afforded by the Government, the impact of the Board's actions/

[53] Karnataka Information Commissioner Shekhar D. Sajjanar, in 2014 said Private institutions and NGOs receiving substantial grants from the government directly or indirectly have been brought within the purview of the Right to Information (RTI) Act and stated that the "Organisations or institutions" which get more than 95 percent of government funds for infrastructure will have to provide all their information under the RTI Act according to the SC rule, *available at:* http://www.thehindu.com/todays-paper/tp-national/tp-karnataka/private-institutions-ngos-now-come-under-rti-act-information-commissioner/article6688274.ece (Last visited on July 12, 2018).

[54] (2015) 3 SCC 251.

[55] The Commission submitted the Report No 275- Legal Framework: BCCI vis-à-vis Right to Information Act 2005, *available at*: http://lawcommissionofindia.nic.in/reports/Report275.pdf (Last visited on July 12, 2018).

[56] *Id.* at 99.

decisions on the fundamental rights of the players, umpires and the citizenry in general, entail that the nature and character of functions performed by BCCI are that of public functions.

Regarding the question of substantial funding, the Commission stated that it should be adjudged on a case-by case basis and seen contextually.[57]

VIII
Conclusion

The RTI Act has certainly been used extensively and has begun to permeate almost every sphere of governance. Different strata of citizenry (individually or collectively) have used it for seeking redress of personal grievances or seeking access to entitlements or enforcing rights, thereby enabling the average citizen to make informed choices. Taking into consideration the increased presence of NGO's and private institutions in the public sphere, this exclusion could have deleterious effects on the transparency and integrity essential to any democracy. While these institutions perform a multitude of functions usually performed by the state, keeping critical information out of the scope of legal regime could defeat the basic purpose of the RTI law. Also, considering the huge employment generated by the NGOs and private entities, the need and scope for availability and accessibility of information with regard to ensuring human rights and transparency is also required. The right to information was harnessed as a tool for promoting development; strengthening the democratic governance and effective delivery of socio-economic services. Acquisition of information and knowledge and its application have intense and pervasive impact on the process of taking informed decision, resulting in overall productivity gains. The Act has also helped to breach the walls Indian administrative power structures, its veils of secrecy and has given the citizen a new dignity and respect in the eyes of the bureaucracy. Civil liberties and human rights activists are using principles of the RTI to ensure transparency and accountability of the police and custodial institutions. People displaced by dams and Special Economic Zones, communities affected by polluting industries, forest dwellers evicted by new industries – have all used the RTI in their battle for lost land, homes or livelihoods. As movements and groups make their questions more focused and the public body or agency is forced to part with information, it can be expected that public bureaucracies and governments in India at all levels become more sensitized to people's issues. In this context the parliament has to consider the need to include the private institutions and NGOs under the ambit of RTI with reasonable limitations and exceptions.

[57] *Id.* at 101.

INTRODUCING THE PRINCIPLES OF APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW

*Kailash Jeenger**

Abstract

Applicability of international humanitarian law (IHL) generally touches four dimensions: material, geographical, personal and temporal. The treaty law of IHL lays down certain conditions of applicability to be fulfilled in respect of each of these dimensions. The provisions containing the conditions are founded on some principles. The identification of the principles is an outcome of interpretation of the provisions, as they are not expressly mentioned in the respective provisions. The principles have not received much attention, except for subtle references on few of them in the ICRC commentaries on the Geneva Conventions of 1949 and two Protocols of 1977 additional to them, and in the judgments of international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR). By interpreting the provisions of the treaty law, the article identifies those less-noticed principles, brings out their significance and stresses on their relevance as well as due recognition. These principles are certainly different from widely recognised principles of humanitarian law.

I
Introduction

Every branch of law is divided in two segments, namely, rules determining applicability and substantive rules. Kolb and Hyde[1] distinguish between them with the help of an example that where a situation amounts to a non-international armed conflict according to the rules of international humanitarian law (IHL) determining applicability, the substantive rules of IHL containing rights and obligations apply; otherwise international human rights law become applicable.[2] Both of these segments of rules of IHL are founded on some principles.

Generally, the most talked-about and recognised principles of international humanitarian law (IHL) are four: humanity, distinction, military necessity and

* Assistant Professor, Campus Law Centre, Faculty of Law, University of Delhi.

1 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* 73 (Hart Publishing, Oxford, 1st edn., 2008).

2 *Id.*, at 74.

proportionality. They have been accepted as 'basic pillars'[3] of IHL because they are reflected in substantive rules of IHL. They regulate the conduct of belligerents during an armed conflict, and protect the victims, and violation of these principles may invite penalties. However, on the contrary, there are four other principles which determine and guide the way IHL should be applicable to the parties of an armed conflict. These principles maybe named as equality of belligerents, maximum applicability, sovereignty of States and automatic application. They are contained in the rules determining applicability, and it is only these principles which are the subject matter of this article. These principles come into operation when defences are raised to escape from the applicability of IHL. Contrary to the four humanitarian principles as mentioned above, violation of these principles does not attract any liability; rather, they are concerned with the way IHL applies. Therefore, the principles to be introduced here should not be confused with humanitarian principles. The reason why the expression 'Introducing the Principles of Application …' has been used in the title of the article is that despite forming the foundation of rules determining applicability of IHL, these principles have never been recognised and given importance to as such. Therefore, it seems necessary to recognise these principles as the application of substantive rules of IHL depends on them.

II
Principle of Equality of Belligerents

The principle of equality of belligerents connotes equal application of IHL to all belligerents irrespective of who instigated war or justness of cause of war. Each party to an armed conflict, irrespective of any other consideration, is equally subject to IHL.[4] The law is neutral towards just and unjust cause of war, and various categories of belligerents—States, organised armed groups or peoples fighting against colonial domination. Thus, a State which resorts to an armed attack in self-defence is as much bound by the IHL as the other State which has attacked the former to expand its territory. Consequently, both the States are, for example, equally bound to refrain from killing the protected persons of the other, attacking the civilian objects and using prohibited weapons. However, the principle should not be taken to mean that the State who initiates

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[3] Jens David Ohlin, "The Inescapable Collision" in Jens David Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* 15 (Cambridge University Press, New York, 1st edn., 2016).

[4] Yves Sandoz, Christophe Swinarski, *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* para. 1927 (ICRC/Martinus Nijhoff, Geneva, 1987).

war shall not be liable for breach of international law norms prohibiting use of force.[5] Iraq did face sanctions in 1991.

Primarily, the principle appears to be unfair. It looks to be against the general principle of law that one cannot claim a legal advantage from his own illegal act,[6] however, this is where the humanitarian character of IHL comes into play. The law is simply concerned with restraints on war. It seeks to ensure, *inter alia*, protection of civilians and prisoners of war, humane treatment with sick and wounded soldiers. Doing this, IHL does not judge the innocence or guilt of a belligerent before it becomes applicable. This is the fundamental difference between the humanitarian law (*jus in bello*) and *jus ad bellum*, the law which determines the legality of war.[7] If humanitarian law is made to apply to a belligerent fighting an unjust war keeping the other party free, the interests of the protected persons of the former will be jeopardised, which is against the spirit of the IHL. Furthermore, '... a subjective appraisal of the situation leads each belligerent to conclude that it has the privilege which flows from unlawful resort to the use of force, while its adversary is under the burdens imposed upon a State that goes to war in violation of law.'[8] Therefore, the principle is considered as the strongest practical basis to maintain certain elements of moderation in war.[9]

(i) *Equality of belligerents in international armed conflicts*

Four Geneva Conventions of 1949[10] except Article 3 common to these

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5 *Supra* note 1 at 23.

6 Marco Sassòli, "*Ius ad Bellum* and *Ius in Bello* - The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in War: Crucial or Outdated?" in Michael N. Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict, Exploring the Faultlines: Essays in the Honour of Yoram Dinstein* 245 (Martinus Nijhoff, Leiden, 2007); Also see, Mary Ellen O'Connell, "Historical Development and Legal Basis" in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 10 (Oxford University Press, Oxford, 3rd edn., 2013).

7 Jonathan Somer, "Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict", 89 *International Review of the Red Cross* 659 (2007); Also see, *Supra* note 4 at para. 1928.

8 Richard Baxter, "A Skeptical Look at the Concept of Terrosim" in Detlev F. Vagts, Theodor Meron, *et al.* (eds.), *Humanising the Laws of War: Selected Writings of Richard Baxter* 214 (Oxford University Press, Oxford, 2013).

9 Adam Roberts, "The Equal Application of the Laws of War: A Principle under Pressure", 89 *International Review of the Red Cross* 659 (2008).

10 The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (First Convention); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (Second Convention); the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Convention), and the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Convention).

Conventions, and Protocol I[11] additional to these Conventions generally regulate the conduct of parties to an 'international armed conflict'.[12] The principle of equality of belligerents derives its origin from these IHL treaties. Article 1 common to the four Geneva Conventions of 1949 says that the High Contracting Parties undertake to respect and to ensure respect for the present Convention in *all circumstances*. (Emphasis added). However, the principle is reflected in clearer terms in the preamble to Protocol I as given below:

> the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the *nature or origin* of the armed conflict or on the *causes espoused by or attributed to* the Parties to the conflict ... (Emphasis added).

The ICRC (International Committee for the Red Cross) commentary on Protocol I explains the paragraph in the following words:

> The fact of being the aggressor or the victim of aggression, of espousing a just or an unjust cause, does not absolve anyone from his obligations nor deprive anyone of the guarantees laid down by humanitarian law, even though it may be relevant and have an effect in other fields of international law.[13]

(ii) *Equality of belligerents in non-international armed conflicts*

At present, Article 3 common to four Geneva Conventions of 1949 and Protocol II[14] additional to these Conventions provide for restraints on 'non-international armed conflicts'.[15] As a mark of equality of parties, Common Article 3 uses the

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[11] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977.

[12] In an international armed conflict either the parties are States (Article 2, common to the four Geneva Conventions) or there is one or more States on one side and, on the other side, there peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination (Article 1(4), Protocol I). The term 'peoples', as used in Article 1(4), Protocol I, refers to groups of people of different cultures or ethnicity whether or not represented by a State, as opposed to the term 'State' which has many political powers as an actor. See, John Rawls, *The Law of Peoples* 27-28 (Universal Law Publishing Co., New Delhi, Indian Rep., 2012, originally pub. by Harvard University Press).

[13] *Supra* note 4 at para. 32.

[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

[15] A non-international armed conflict is one in which either all the parties are organised armed groups, or there is State on one side and an organised armed group or dissident armed forces on the other. See, Art.1(1), Protocol II.

words 'each Party to the conflict shall be bound to apply', and thus, provides for equal application of the law.[16] In this way the obligations created in Common Article 3 are equal for both sides in an insurgency, notwithstanding the innate imbalance between the Parties from the vantage point of domestic law.[17] The expression 'each Party to the conflict', as used in Common Article 3, is though absent in Protocol II, the ICRC has clarified its position in this respect in the commentary saying that these rules grant the same rights and impose the same duties on both the established government and the insurgent party.[18] Nevertheless, it has been argued that the concept of equality of belligerents is *limited* in non-international armed conflicts because of asymmetry of parties and impracticability of Article 3(1)(d), which requires passing of sentences and executions thereof in accordance with judgments pronounced by a regularly constituted court.[19] In this connection, it is submitted that the argument is absolutely irrelevant so far as the principle of equality of belligerents is concerned because the principle plainly seeks to bind both the parties to the conflict, and factors like armed opposition groups not being signatory to the treaties, or non-feasibility of an obligation, or effect on sovereignty of States do not establish unequal application of the law.

The equal application principle becomes important in both international and non-international armed conflict 'because 'innocent' civilians or other protected persons, such as injured or ill military personnel, should not be treated unfavourably simply because they happen, by mere chance, to be a citizen of the State that has been qualified as the aggressor.'[20] Despite this justification, some doubts have been raised as to the applicability of the principle, after the formation of the League of Nations and United Nations Organisation.[21] The drafting history of IHL treaties also reveals that few negotiating States asked for making different humanitarian rules for an aggressor State and a State victim of the aggression, though, such claims were opposed by other States.[22] In the end, humanitarian considerations prevail.

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16 ICRC, *Commentary on Art.3, First Geneva Convention* (2nd edn., 2016) para. 504, *available at*: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument (Last visited on March 08, 2018).

17 Yoram Dinstein, *Non-International Armed Conflicts in International Law* 133 (Cambridge University Press, Cambridge, 1st edn., 2014).

18 *Supra* note 4 at para. 4442.

19 Jonathan Somer, *supra* note 7 at 656-57.

20 Kolb and Hyde, *supra* note 1 at 25.

21 *Id.*, at 23.

22 *Supra* note 4 at para. 1928.

III
Principle of Maximum Applicability

States generally suffer from 'denial syndrome' in respect of violence perpetrated by them. Instances of such denials are several: Turkish government's denial of the genocide of Armenians in 1915, Nazi denial of extermination of Jews in early 1940s, Serb denial of genocide committed in Bosnia and Herzegovina in 1992.[23] According to Richard Baxter, the first line of defence against IHL is to deny that it applies at all.[24] Such a denial is an effort to avoid or delay responsibility or action by international community.[25] But, humanity suffers meanwhile. Therefore, it is imperative that the rules determining applicability of IHL should be framed in such a way that substantive humanitarian rules can be easily applied to an armed conflict.

The discussion on the principle of maximum applicability is concerned with only those rules of IHL which determine its applicability, as contrast to those which seek to protect the victims. The rules determining applicability are comprehensive enough to ensure wider application of the substantive rules of IHL. Thus, the rules echo the principle of maximum applicability. The principle is evident in the rules providing for material, personal, temporal and geographical scope of its operation.

(i) *Material scope*

Material scope or subject matter scope refers to the conditions which amount to international or non-international armed conflict. The treaty-law in this respect has been so phrased that IHL applies to maximum number of such conflicts. The conditions amounting to international armed conflicts reflect the principle of maximum application by using the following expression:

> ... *all* cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, *even if* the state of war is not recognised by one of them.[26] (Emphasis added)
>
> ... *all cases of partial or total occupation* of the territory of a High Contracting Party, *even if* the said occupation meets with no armed resistance.[27] (Emphasis added)

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[23] Irma Foley, "Can Perpetrators Really Suffer from "Denial Syndrome"" in John Carey, William V. Dunlap, *et al.* (eds.), *International Humanitarian Law: Challenges* 201-5 (Transnational Publishers, New York, 2004).

[24] Theodor Meron, *The Humanisation of International Law* 31 (Martinus Nijhoff, Leiden, 2006).

[25] *Supra* note 23 at 207, 210.

[26] Article 2, para. 1, common to four Geneva Conventions of 1949.

[27] *Id.*, at Art.2, para. 2.

Even minor border incursions also fall within the ambit of international armed conflicts in order to avoid any legal vacuum and safeguard the protected persons.[28]

The expressions as used in the conditions amounting to non-international armed conflicts are not as extensive as those of international armed conflicts, because of concerns of State sovereignty, however, the ICTY has interpreted the provisions determining the applicability of Common Article 3 in such a way that the threshold of applicability remains low and it applies to the greatest number of such conflicts.[29] It has been accepted that, as compared to Protocol II, Common Article 3 is wider in applicability[30] and provides for a lower threshold.[31] Thus, Common Article 3 displays the principle of maximum applicability.

(ii) *Personal scope*

In respect of IHL, the personal field of applicability is two-fold: those who are bound by it and those whom IHL protects. States, UNO and organised armed groups fall in the first category. States who are signatory to the treaty-law are bound by the treaties even if other party to the conflict has not signed the treaties.[32] States who are not signatory to the treaty-law are bound by customary international humanitarian law, as Russia was held to be bound by it by the International Military Tribunal at Nuremberg.[33] UNO which sends its forces to conflict zones is bound by IHL when the forces are authorised to participate in hostilities, for example in Iraq in 1991.[34] Armed opposition groups are also

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28 ICRC, *Commentary on Art.2, First Geneva Convention* (2nd edn., 2016) para. 243, *available at*: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument (Last visited on March 08, 2018).

29 *Prosecutor* v. *Dusko Tadiæ*, IT-94-1-AR72, Appeals Chamber, Judgment on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70, provides for two conditions for applicability of Common Article 3: organisation of armed group and intensity of violence.

30 Christine Chinkin and Mary Kaldor, *International Law and New Wars* 236 (Cambridge University Press, Cambridge, 1st edn., 2017).

31 Yusuf Aksar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court* 122 (Routledge, Abingdon, 1st edn., 2004).

32 Articles 1, 2 (para. 3), common to four Geneva Conventions of 1949. Such provision negates *si omnes* clause which means the treaty-law is applicable only if all the parties to war are signatory to it. See, Theodor Meron, *The Making of International Justice: A view from the Bench, Selected Speeches* 22-23, 55 (Oxford University Press, Oxford, 2011).

33 Theodor Meron, "Customary Humanitarian Law Today: From the Academy to the Courtroom", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* 37-38 (Oxford University Press, Oxford, 1st edn., 2014).

34 UN Secretary General's Bulletin on Observance by United Nations Forces of International Humanitarian Law, 1999, ST/SGB/1999/13; Article 20(a), Convention on the Safety of United Nations and Associated Personnel, 1994, 2051 UNTS 363, 34 ILM 482 (1995).

bound by treaty-law[35] despite not being member of IHL treaties, 'because the commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State'[36]. Similarly, they may be made liable for violation of customary humanitarian law,[37] as did the ICTY[38].

As regards the second category in personal scope, there are variety of persons who are protected under IHL, including civilians not directly participating in hostilities, medical personnel, ill and wounded soldiers, prisoners of war. The principle of maximum application applies in respect of them in the sense that they are entitled to humane treatment under the Geneva Conventions of 1949 and two protocols of 1977 without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[39]

(iii) *Geographical field*

Geographical or spatial scope indicates that part of territory of a State to which IHL is applicable. In respect of international armed conflict, applicability of IHL is not limited to war zone only, but it applies to the whole of the territory, because many rules of IHL are applicable to areas other than areas affected by hostilities, for example rules prohibiting attack on civilians, humane treatment with prisoners of war in prison camps.[40] This approach has been named as rule of 'unity of territory'.[41] Similar is the position in respect of non-international armed conflicts. In addition to that, the law governing non-international armed conflicts is not confined to the 'territorial State'[42] only. It is applicable to a non-international armed conflict which spills over into the territory of other States, such as US War on Terror against Al-Qaeda in Afghanistan and Pakistan.[43] This approach eschews gaps in regulation and protection.

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[35] Common Article 3 expression 'every party to the conflict', and Protocol II generally.
[36] *Supra* note 4 at para. 4444.
[37] Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* 76 (Cambridge University Press, Cambridge, 1st edn., 2014); Also see, "The Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties" (Session of Berlin, Institute of International Law, 1999), clause II and V, *available at:* http://www.idi-iil.org/app/uploads/2017/06/1999_ber_03_en.pdf (Last visited on September 08, 2018).
[38] Meron, *Supra* note 32 at 28-41.
[39] In law relating to international armed conflicts: Article 12, para. 2, First and Second Convention; Article 16, Third Convention; Articles 13, 27, para. 3, Fourth Convention; Article 9.1, 10.2, 69.1, 70.1, 73, 75.1, Protocol I. In law relating to non-international armed conflicts: Common Art.3; Art.2.1, 4, 7, 18.2, Protocol II.
[40] *Supra* note 29 at para. 68.
[41] *Supra* note 1 at 95.
[42] It is that State in which a non-international armed conflict begins.
[43] *Hamdan* v. *Rumsfeld, et al.*, 548 US 557 (2006); *supra* note 16 at paras. 466-7.

(iv) *Temporal scope*

It refers to the time of beginning and cessation of applicability of IHL. Apart from the rules of IHL which are applicable in peacetime,[44] other rules begin to be applicable as discussed earlier under the heading 'Material scope'. So far as cessation of applicability of the law in an international armed conflict is concerned, rules concerning active hostilities cease to apply at the 'general close of military operations'[45], however, rules providing for 'the final release, repatriation and re-establishment, as the case may be, of persons after fighting ceases'[46] continue to apply even after fighting stops. However, ICTY[47] is of the view that IHL applies beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Additionally, in case of non-international armed conflicts falling under Protocol II, some of its provisions continue to apply even after the end of the conflict.[48]

Thus, in every area of applicability, IHL seeks to apply to the maximum extent possible.

IV
Principle of Sovereignty of States

Sovereignty is supreme legal authority which is not in law dependent on any other earthly authority.[49] Therefore, any intervention in exclusively domestic matters of a State is prohibited.[50] Application of IHL in international armed conflicts respects the doctrine of sovereignty of States, because, first, States have 'freely'[51] assumed the obligations by signing the treaties; second, ratifying a treaty is an incidence of sovereignty; third, an armed conflict between two States is not an internal matter; fourth, States who are not signatory to the treaty-law are not bound by it unless the provisions reflect customary law[52].[53]

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[44] Rules providing for dissemination of the text of instrument: Art.47, 48, 127, 144, 83, and 19, four Geneva Conventions of 1949, and two protocols additional to them, respectively; Art.7, Additional Protocol III relating to the Adoption of an Additional Distinctive Emblem 2005 (Protocol III).

[45] Art.3(b), Protocol I.

[46] Arts.5, 5(1), 6(4) of Geneva Conventions I, III and IV respectively, and Art. 75(6), Additional Protocol I.

[47] *Supra* note 29 at para. 70.

[48] For example, Article 2.2, 5, 6.

[49] R. Jennings and A. Watts (eds.), *Oppenheim's International Law, Vol. I: Peace, Part I* 122 (Pearson Education, New Delhi, 9th edn., 1996, 1st Indian Rep., 2003).

[50] Arts.2, para. 7, UN Charter.

[51] Art.51 and 52, Vienna Convention on the Law of Treaties, 1969: Consent to a treaty obtained by coercion invalidates the treaty.

[52] Art.34, Vienna Convention on the Law of Treaties, 1969: A treaty does not create either obligations or rights for a third State without its consent.

[53] See, Kailash Jeenger, "The Concept of Sovereignty of States in Modern International Law and Globalization", 5 *NALSAR Law Review* 79 (2010).

The doctrine of sovereignty of States is much discussed and debated in connection with the law of non-international armed conflicts. 'In the pre-1949 period, many states preferred to remain completely free to treat rebellion and sedition as a crime under domestic law rather than to give international law rights and duties to the rebels under IHL.'[54] While negotiating Common Article 3 many of the States feared that it would extend to regulate 'any form of anarchy, rebellion, or even plain banditry',[55] which fall within their domestic jurisdiction, however, according to the criteria laid down by *Tadiæ*[56] and ICRC commentary[57], Common Article 3 does not extend to internal disturbances and tensions.

Respecting sovereignty of States, the same approach has been adopted by Protocol II also, but expressly. Article 1, paragraph 2 of Protocol II makes it clear that the Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts. Thus, IHL does not encroach upon the domestic sphere of a State until the conflict reaches a particular scale. Protocol II goes even one step further. Article 3 is specifically formulated to protect national sovereignty and forbid intervention:

Article 3 — Non-intervention:

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

V
Principle of Automatic Application

Principle of automatic application of IHL means the substantive rules of IHL automatically apply once the conditions constituting international or non-

[54] *Supra* note 1 at 257.

[55] ICRC, *Commentary on Article 3, First Geneva Convention*, (1st edn., 1952), *available at*: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument (Last visited on March 30, 2018).

[56] *Supra* note 29 at para. 70.

[57] *Supra* note16 at para. 386.

international armed conflicts, as the case may be, are met. Thus, what is required is the fulfilment of criteria of applicability. This, in turn, means that application of IHL depends neither on subjective assessment of situation by parties to conflict, nor on reciprocity.

(i) *Objective criteria*

To constitute international armed conflicts, Common Article 2(1) uses the term 'armed conflict' besides the expression 'declared war'. It does so to dispense with the subjectivity and formalism attached to the notion of declared war and to ensure that the applicability of humanitarian law would mainly be premised on objective and factual criteria.[58] In line with this argument, Common Article 3 and Protocol II can also be said to be reflecting objective criteria in respect of non-international armed conflicts. During the drafting negotiations of Additional Protocol II, the argument that States would decide when the Protocol would become applicable, was rejected, and negotiating States agreed upon automatic application of the Protocol on the fulfilment of objective criteria as to existence of non-international armed conflict.[59] The ICTY and the International Criminal Tribunal for Rwanda (ICTR) have also used an objective test to determine the existence and character of an armed conflict.[60] The advantage attached to objective test is that the obligations under IHL become 'automatically applicable'[61] as soon as the test is satisfied. According to ICRC, the principle is based on humanitarian requirements, because the implementation of rules for the protection of victims should not be dependent on the subjective judgment of the parties.[62]

(ii) *Repudiation of reciprocity and si omnes clause*

Reciprocity here implies compliance in lieu of compliance, that is to say, a belligerent is obliged to follow the law vis-à-vis only that belligerent who has agreed to be bound by the same. The rule was present in the Medieval era, and in the Hague Convention of 1899 and 1907[63] also, which were binding on belligerents only if all of them were parties to these Conventions. Thus, the application of the Conventions was subject to adherence to them by all belligerents. Such a rule is called as *si omnes* or general participation clause.

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[58] *Supra* note 28 at para. 209.

[59] *Supra* note 4 at para. 4392.

[60] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* 308 (Cambridge University Press, Cambridge, 2010).

[61] *Supra* note 16 at para. 514.

[62] *Supra* note 4 at para. 4438.

[63] Art.2, Hague Convention with Respect to the Laws and Customs of War on Land, 1899 and 1907.

However, the Geneva Conventions of 1949 do not contain such a clause and thus, 'break new ground by imposing unilateral obligations'.[64] Erosion of *si omnes* clause secures automatic application of IHL. In the words of the ICTY:

> Instead, the bulk of this body of [international humanitarian] law lays down absolute obligations, namely obligations that are unconditional or in other words are not based on reciprocity. This concept is already encapsulated in Common Article 1 of the 1949 Geneva Conventions...[65]

Similar opinion has been expressed by the ICRC in respect of Common Article 3.[66] In fact, whole of the IHL applies without conditions of reciprocity.[67]

VI
Conclusion

Thus, the principles display the firm determination of State-parties to the treaty-law to give importance to humanitarian requirements. The principle of equality of belligerents seeks not to judge the belligerents, but to protect the victims. It prevents a party to an armed conflict fighting a just war from claiming any immunity from the substantive rules. The rules reflecting the principle of maximum application ensure that no armed conflict should be unregulated by law, though, the threshold of applicability of Protocol II is undoubtedly high.

The third principle, that of sovereignty of States, is also important in IHL, however, its applicability is much relevant in non-international armed conflicts. The fourth principle, which also deserves equal importance, is indeed very useful in respect of operation of IHL, as it sets the law in motion.

In this way, these principles form the soul of the criteria of applicability of IHL. They occupy a significant place in IHL looking to the frequent attempts made by parties to an armed conflict to evade any international responsibility that may arise from the breach of humanitarian law.

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64 Ingrid Detter, *The Law of War* 410 (Cambridge University Press, Cambridge, 2nd edn., 2000).

65 *Prosecutor* v. *Kupreškiæ*, IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, para. 517.

66 *Supra* note 55.

67 *Supra* note 4 at para. 4784, n. 21.

ACCESSIBILITY TO COPYRIGHTED MATERIALS FOR EDUCATIONAL PURPOSES: AN INDIAN PERSPECTIVE

*Priya Anuragini** and *Abdullah Nasir***

Abstract

In today's knowledge driven economy access to education has become one of the most rudimentary requirements of development. This essentially requires access to both the printed and digital educational material. It is here that copyright becomes significant as a restrictive copyright policy may significantly impair access to educational materials. Thus the copyright regime especially the framework for limitations which enables access to copyrighted materials for educational purposes needs to be evaluated in order to find whether it is dynamic enough to deal with the modern day challenges. After all, whether it is three step test or the fairness doctrines -all of them were envisaged not decades but centuries ago and do not specifically address issues such as use of digital technology to enhance accessibility to copyrighted educational content, creation of course packs, making of digital copies by libraries, use of digital technology by visually impaired population for enhancement of accessibility. Thus, it becomes important to evaluate whether the copyright regime may be interpreted to encompass the underlined issues. Also in light of new copyright treaties which are coming up or are being negotiated such as Marrakesh in 2013, or the proposed WIPO treaty on limitation for education, research, libraries it becomes essential to find out the grey areas in accessibility to copyrighted educational materials in the Indian legal regime circumscribed by TRIPS. To facilitate this objective this paper reviews enabling provisions in the Indian legal regime and judicial precedents including the recent developments that facilitate accessibility to copyrighted materials for educational purposes and analyzes the key issues that need to be addressed.

* Assistant Professor, Dr. Ram Manohar Lohiya National Law University, Lucknow
** Assistant Professor, Dr. Ram Manohar Lohiya National Law University, Lucknow

I
The Analysis of Three Step Test vis-a- vis Accessibility for Educational Purposes

Works involving use of intellect can be exploited umpteen number of times generation after generation without decreasing their potential to be communicated and are almost immortal in their potential to be exploited. Yet they are not as free as the air we breathe but scarcely notice. In fact their use is not just noticed but strictly regulated by their creators who are legally granted a time bound monopoly over their use. Almost all the categories of intellectual property in general and copyright in particular allow certain uses of the protected work without the creator's permission. It is this accessibility to protected material that balances the interests of the right holders and the social interests of the users in accessing knowledge and cultural goods and thus is pivotal in fulfilling the ultimate objective of the intellectual property regime. In case of copyrights what facilitates this accessibility is the paradigm of "three step test" which has been intrinsic to the copyright regime since 1967 Stockholm conference which revised the Berne Convention and subsequently found its way into TRIPS, WCT and WPPT[1] thus becoming an almost uniform instrument of international law. However the gradual but conclusive inclusion of three step test in the international copyright regime as the magic recipe for deciding almost all the cases relating to the limitations on the exclusive rights of the copyright creators questions does make it necessary to analyze whether the three step test can encompass within its ambit all the limitations on the exclusive rights of the creators which are essential to address the accessibility barriers to copyrighted educational material in different countries with different levels of socio-economic advancement and varying levels of digitisation. It is against this background that this part evaluates the utility of the three step test since its inception into the international copyright instruments.

II
The Holy Writ of limitations in the international copyright law: Three Step Test

The three step test is found in several provisions of the international law.[2]

[1] Art.13 of the Agreement on the Trade-Related Aspects of Intellectual Property Rights(TRIPS), Art.9(2) of Berne Convention for the Protection of Literary and Artistic Works, 10(2) of the WIPO Copyright Treaty (WCT), Art.16 of the WIPO Performances and Phonograms Treaty (WPPT)

[2] Art.9(2) of Berne Convention, Article 10 of WCT, Article of 13 TRIPs, Art.16(2) of WPPT, Article 13(2) of Beijing Treaty on Audio-Visual Performances and Art 11 of the Marrakesh Treaty to Facilitate Access to Published Works to Persons who are blind, visually impaired or otherwise print disabled.

The rule of the Three-Step-Test was introduced at the Stockholm Conference for the revision of the Berne convention on account of the newly recognized right of reproduction. However over the years the ambit of three step test has extended beyond the right of reproduction and it is invoked to prevent all kinds of limitations on the exclusive rights of the copyright creators. The 1967 Stockholm Revision of the Berne Convention[3] for the first time recognised the reproduction right of the copyright holders. However formal recognition of the reproduction entailed finding a satisfactory formula for permissible limitations. Though there was a minimum reservation doctrine[4] dealing with limitations in case of public performing rights but it was not thought to be sufficient to regulate heterogeneous set of exceptions that would necessarily be required in case of reproduction right . Also an agreement on the specific list of exemptions would not be feasible as there would essentially be disagreements between countries on what specific exemptions are allowed.[5] And thus came three step test clothed in three abstract criteria permitting reproduction of the literary and artistic work in certain special cases, where such reproduction would not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The cardinal principle that has to be followed in the interpretation of three important terms of the three step test, i.e. special cases, normal exploitation of the work, unreasonable prejudice to the legitimate interests of the author, has to be Article 31 of the Vienna Convention of the law of the treaties which lays down that the treaties shall be interpreted in good faith and ordinary meaning should be given to the terms in accordance with the object and purpose of the treaty. In keeping with this provision and article 32 of the same treaty primacy has to be given to the terms of the treaty. One of the most descriptive analysis of the terms of the three step test has come from WTO panel in *United States – Section 110(5) of the US Copyright*.[6] While analysing the three abstract

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[3] Berne Convention is revised every 20 years. The last revision was done in Paris in 1971.

[4] The *minor reservations* doctrine consists of a formal declaration made in the final Report of the Brussels Conference, 1948 which provided de-minimums or limited exceptions on the exclusive rights of the copyright holders for religious ceremonies, military bands and *the needs of child and adult education*

[5] Also it was feared that providing a full list of permissible limitations would encourage national legislators to transpose the whole list into their national laws and abolish the right of remuneration which was granted to authors in some countries. Thus three abstract criteria were thought to be more favorable to the authors than the specific list of exemptions

[6] (WT/DS160/R) of June 15, 2000. In the dispute resolution proceeding, initiated by the European Union at the behest of the Irish performing rights organization, the contested exception, which has been brought by amending section 110(5)(B) of the US copyright Act,

criteria of the three step test the panel observed that term special cases connotes the idea that scope of the exception must be well-defined i.e. certain and narrowly limited. However the panel stopped short of saying that for a use to come under special case it should be underlined by a special public purpose.[7] While deciding on what would constitute the " normal exploitation of the work the Panel first addressed whether the term "normal" was "empirical" or "normative," that is, whether it denoted the way in which the work is in fact exploited, or whether it also implied all kinds of exploitation that are potential, permissible or desirable. The Panel determined that both connotations were appropriate. The panel rejected US contention that package of rights in the work as a whole should be seen rather than addressing each right in isolation. the panel held that in case the use was in conflict with normal exploitation with one exclusive right of copyright holder then it cannot be justified merely on the ground that right holder has other exclusive rights whose normal exploitation is possible without conflicting with the use.[8] The Panel emphasized that the Berne Convention accords both primary and secondary transmission rights each of which may "normally" be exercised separately. The U.S. interpretation, however, would collapse the distinct rights, because it would disregard the conflict with individual rights, so long as exercise of the principal right were not compromised. In the Stockholm Conference where the three step test was "formally introduced

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1976, which exempted a broad range of retail and restaurant establishments from liability for the public performance of musical works by means of communication of radio and television transmissions. S.110(5)(B) embodied the exemption and applied to performances and displays of all types of works, and its purpose was to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use. "The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed." The panel interpreted art. 13 of TRIPS, or art. 9.2 of the Berne Convention the text of which TRIPs incorporates, and generalizes from the Berne Convention reproduction right to all TRIPs and Berne rights under copyright.

7 Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions* (January 2001), *available at:* http://dx.doi.org/10.2139/ssrn.253867 (Last visited on April 29, 2018)

8 The Panel observed, inter alia, that rights owners license business establishments to play live and recorded music, while § 110(5)(B) eliminates the basis for licensing the same establishments with respect to performing works via broadcast radio and Television. If the market as a whole is music performed in business establishments, then the exemption of broadcasts significantly compromises the copyright owner's opportunity for commercial gain. Even were the markets separated into live and pre-recorded music on the one hand, and broadcasts on the other, the exemption for broadcasts competes with the exploitation of the other market because it provides business establishments an incentive to shift from paying modes of exploitation to exempt modes of exploitation

into the international copyright law regarding the interpretation of the term " normal exploitation of the work" it is noted:

"Common sense would indicate that the expression normal exploitation of a work refers simply to the ways in which an author might reasonably be expected to exploit his work in the normal course of events. Accordingly, there will be certain kinds of use which do not form part of his normal mode of exploiting his work—that is, uses for which he would not ordinarily expect to receive a fee- even though they fall strictly within the scope of his reproduction right."Only those uses that would deprive the owner of "significant" or "tangible" commercial profits may be deemed to "conflict" with the normal exploitation. In short, "normal" exploitation should be something less than the full scope of the exclusive right.[9]

Thus it can be easily inferred that WTO panel has given a narrow interpretation to the three step test than was intended at the Stockholm conference. The panel did not take into account the objective behind giving an exclusive monopolistic right to copy only to copyright holders is to facilitate creation of works of science or art which would after some time come in the public domain and benefit larger public interest and not assisting them in extracting whatever little they can out of the work that they have created regardless of its impact on the accessibility to the general users. Thus narrow interpretation of the three step test by the WTO panel would have an adverse impact when accessibility to copyrighted material is needed for educational materials.

Coming to the third step of the analysis that focuses on unreasonable prejudice to the legitimate interests of the author, the focus of the analysis would be on what would be the scope of the terms prejudice, interests and legitimate. Then it has to be seen as to what prejudice would be unreasonable and what interests are legitimate. As far as the WTO panel's opinion on the issue is concerned. It gave a wide interpretation to the term interests and held that interests need not be limited to economic considerations and may extend even to non-economic considerations. Though it was not specified as to what those non-economic considerations would be. As for "legitimate," the Panel again gave a very broad interpretation adducing both a "legal positivist" perspective (authorized or protected by law), and "a more normative perspective and called for protection of interests that are justifiable in the light of objectives that underlie the protection of exclusive rights. "Prejudice" would connote any

[9] WIPO, "Study on Copyright exceptions and limitations for educational activities in North America, Central Asia & Israel" 2009, *available at:* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_8.pdf (Last visited on March 15, 2018)

damage, harm or injury. However, the key question is whether the prejudice is "unreasonable". Degree of prejudice that is unreasonable can only be decided taking into account not only the importance of the other interests at stake (i.e., normative reasons that justify the exception) but also the real prejudice (economic or moral, etc.) that such an exception may cause to the author. In many cases, the unreasonableness of the prejudice may be minimized (and rendered "reasonable") by means of a fair compensation scheme in favour of the author and in such cases it may be safely said the use would not unreasonably prejudice the author.

Also as per the copyright panel the three conditions of the three step test apply on the cumulative basis and each requirement is a separate and independent requirement that must be satisfied. And failing even one step would mean failing the entire test. And exception provided under article 13 would be disallowed. However it is contended that to infer that the ordinary meaning of the sentence that has a number of elements would be that each of the elements must be considered separately and cumulatively would actually be case of overemphasis. If a separate analysis of completely unrelated requirements are essential then it could have been made explicitly clear by providing clearly that each of the requirements are distinct and needs to be fulfilled separately.[10]

III

Indian Counterpart of Three Step Test and implications for accessibility in India

The copyright Act, 1957[11], which is the oldest extant intellectual property right legislation in India, is the legislative authority in India for deciding the limits on the exclusive rights of the copyright holders. Section 52 of the Indian copyright act, 1957 enumerates the limitations on the exclusive rights of the copyright holders, the majority of the provisions are borrowed from the UK copyright Act, 1956. This section embodies what has been described as the doctrine of fair dealing.[12] In fact the section is titled as certain acts not to be infringement of copyright and as per clause (a) of the section it could be fair dealing in literary, dramatic, musical, artistic work for the purposes which are

[10] Martin Senftieben, *An analysis of the three step test in international & EC copyright law* (Kluwer Law International, 2004)

[11] The act has been amended five times prior to 2012, once each in 1983, 1984, 1992, 1994, 1999 to meet the national and international requirements.

[12] The defense of "fair dealing" initially originated and emanated as a doctrine of equity which allows the use of certain copyrightable works, which would otherwise have been prohibited and would have amounted to infringement of copyright.

enumerated in the following clauses. Thus Indian law allows fair dealing as a defence for exhaustive set of acts that would not be deemed as infringement for the four specified categories of copyrighted works (*viz.* literary, dramatic, musical and artistic works). However the section unlike its USA counterpart[13] does not provide for any guidelines which the courts may consider to evaluate whether the use of the copyrighted work is fair or not in case the use is not specifically covered in one of the clauses. In fact the Kerala High Court in *Civic Chandran v. Amini Amma*[14] took the view that in case the purpose of the reproduction of the copyrighted work is not the same as mentioned in the statute the defence of fair dealing does not arise. However considering the importance s.52 has for the free dissemination of ideas and information in a country like India courts have given it a broad interpretation. India, however unlike USA, does not have plethora of cases dissecting the impact of provision on myriad uses in variety of areas. This problem was aptly noted by the Calcutta High Court in *Barbara Taylor Bradford v. Sahara Media Entertainment*[15] wherein it said there is a dearth of jurisprudential materials on copyright. In fact the court went to the extent of admitting that since *R.G. Anand*[16] there is not a single material worth citing and so statutes are the first things to see. As far as definition of the term "fair dealing" is concerned Indian courts have hitherto referred to the Lord Denning's formulation in English case *Hubbard v Vosper*[17] on the subject matter in which he termed impression as the most

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[13] *Copyright Act of 1976*, 17 U.S.C. § 107. Section 107 of the Copyright Act provides: Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phone records or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
(4) the effect of the use upon the potential market for or value of the copyrighted work.
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[14] (1996)PTR 142 (Ker.)

[15] 2004(28) PTC 474 (Cal) at para 56.

[16] *R.G Anand v. Delux Films*, AIR 1978 SC 1613.

[17] (1972) 1 All ER 1023 at p. 1027. *As per Lord Denning:* "It is impossible to define what is "fair dealing". It must be a question of degree. You must first consider the number and extent of the quotations and extracts.... then you must consider the use made of them. . . . Next, you must consider the proportions...other considerations may come into mind also. But, after all

important factor in determining whether the use is fair or not. It has been observed in *M/s. Blackwood & Sons Ltd. v. A.N. Parasuraman*[18] one of the leading cases on the subject:

"That in order to constitute a fair dealing there must be no intention on the part of the alleged infringer, to compete with the copyright holder of the work and to derive profits from such competition and also, the motive of the alleged infringer in dealing with the work must not be improper".

The Apex court regarded the purpose for which a copyrightable material was used as an important factor in determining fair dealing. In *The Chancellor Masters and Scholars of the University of Oxford v. Narendera Publishing House & Ors*[19] the quantum and value of the matter taken and the effect on the market share of the prior work was considered while evaluating the fairness of the use. From these cases we may come to the conclusion that Indian judiciary also relies on the four fair use factors of U.S.A. in decision making on allowing uses of the copyrighted work

However, the recent decision of the Delhi High Court in *Masters & Scholars of University of Oxford* v. *Rameshwari Photocopy Services*[20] famously referred to as the Delhi University Photocopy case has steered clear of reliance on fair use factors for deciding permissible uses of copyrighted content by third parties. The Court opined that "reference to foreign case laws while interpreting a municipal statute has to be with care and caution".[21] And accordingly while deciding the legitimacy of course pack created by compiling copyrighted content sometimes to tune of 35%, the court instead of being limited by American fair use factors justified the course pack on the plank of educational purpose being covered by Section 52. Thus as long as purpose of the use is covered by Section 52, there are no fetters on the quantum.

While the judgement may have significant implications for reducing accessibility barriers, its exact ambit particularly in the digital context remains uncertain.

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is said and done, it is a matter of impression. See Vaibhavi Pandey, "Fair Dealng, "Fair Dealing in Copyrights: Is the Indian Law competent enough to meet the current challenges" Mondaq, March 13,2014, *available at:* http://www.mondaq.com/india/x/299252/Copyright/Fair+Dealing+In+Copyrights+Is+The+Indian+Law+Competent+Enough+To+Meet+The+Current+Challenges (Last visited on March 25,2018)

[18] AIR 1959 Mad. 410.

[19] 2008 (38) PTC 385 Del.

[20] 2016 SCC Online Del 6229.

[21] *Id.* at 13.

IV
Impact of Digital Technology on accessibility to copyrighted content in Indian legal regime

Digital technology to begin with shifted the delicate balance of copyrights in the favour of the users as it bestowed upon them newer, improved techniques of copying the copyrighted content. Thus it became possible to take advantages of the uses that were hitherto exempted. In fact improvement in reproductive techniques in the digital environment was perceived as the threat to the creators' exclusive right of reproduction. The development of end user accessible reproduction technology thus has significant implications for the reproduction rights of the copyright creators on one hand and the fair use limitations of the users on the other. All the international conventions on copyrights and the bulwark of the copyright limitation have been envisaged from the perspective of printed copyright materials. Are they sufficiently flexible and dynamic to be expanded to the digital works? What would be the implications of the three step test for access to digital copyrighted material for access to copyrighted material? Does the reproduction right need to be reformed in case of digitisation so that its huge potential can be harnessed for fulfilling the access needs to educational materials of developing countries without adversely impacting the interests of the interests of the copyright holders?

While digitisation is effective tool of knowledge dissemination, right of reproduction is one of the most important rights of the copyright holder. However the exact notion or interpretation of what would constitute reproduction is not provided in any major international copyright instrument. Even the Berne convention which was the major convention to formally recognise the right of reproduction only talks about the exclusive nature of the right rather than defining it.[22] However the freedom to developing countries to determine the ambit of what would constitute reproduction some form of fixation of the work in material form is essential so as to claim copyright in the work and consequently reproduction right. Under the 1976 USA Copyright Act, copies and phone records can be considered to form the equivalent of reproduction. Its Indian counterpart Indian copyright Act, 1957 provides reproduction right in to almost all categories of copyrightable work, but nowhere defines reproduction and merely the work should be conveyed in a form suitable for reproduction.[23] This was the traditional

[22] As per art. 9(1) of the Berne Convention: Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

[23] Section 2(iii) of the Indian Copyright Act, 1957 lays down that in relation to a literary or dramatic work, any abridgement of the work or any version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical.

reproduction right before the advent of computer age. The technologies facilitating reproduction have come a long way since Gutenberg's Printing Press.[24] In fact the printing press was the instrument which not only controlled author's intellectual property but also controlled the work on its passage from authors' hand to readers' hand. Thus printing press was mode of reproduction which could be regulated. In case the mode of reproduction could not be as easily controlled as printing press then reproduction right did not altogether exist.[25]

With the arrival of digitisation which is almost similar to word of mouth communication every act which would have been regarded trivial in offline analogue context suddenly takes on a new context in the light of new technologies. This difference or transformation has been very well illustrated by one of the judges as follows:

Consider the crucial distinction in copyright law between reading and writing. To read a copyright law is no violation only to copy it in writing. The technological basis for this distinction is reversed with a computer text. To read a text stored in electronic memory one displays it on screen i.e. the text has to be written to be read. However to transmit the text one does not need it; one only gives others a password to own computer memory. One must write to read but not to write."[26]

Thus to determine what would constitute reproduction of copyrighted material becomes very important so as to clearly distinguish between whether providing mere access to digitised material would constitute infringement or copying is the violation of the reproduction right.

In case of internet the transmitted data is temporarily on intermediate computers such as the access providers' servers. In fact in many cases servers make copies of the documents and keeps it for a short period even though it may not enable the users to copy the document.[27]

In case if such copies which are only transient and needed to provide access come within the reproduction right then it significantly impacts accessibility to copyrighted educational material and also impairs the fair use

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[24] Stanley Bai, "*The role of computer software copyright in relation to new media*" (Sweet & Maxwell ltd., 2000)

[25] For instance the concept of reproduction right was not applied to speeches, singing of songs in private

[26] *Matrox electronic systems v. Gaudreau,* R.J.J.Q 2449, CS (1993)

[27] P. Brent Hugenhold (ed), *The future of copyright in digital environment* 71 (Kluwer Law, 2005)

accessibility to educational material. this however is the case today with section 1201 of Digital Millennium Copyright Act of USA criminalizing the act of circumventing an access control, whether or not there is actual infringement of copyright itself thus overstretching the reproduction right.[28] Effectively this means that even reading a copyrighted material is equivalent to infringing it. And as far as Indian position on the subject is concerned after the 2012 amendment to the Copyright Act,1957 introduced section 65A[29] and 65B[30] for Digital rights Management in India

While Section 65A provided for protection of Technological protection measures, Section 65B protects Rights Management Information.[31] Though

[28] As per 17 U.S. Code Section 1201 "no person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

[29] Section 65A provides "(1) Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.
(2) Nothing in sub-section (1) shall prevent any person from:
(a) doing anything referred to therein for a purpose not expressly prohibited by this Act: Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or
(b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or
(c) conducting any lawful investigation; or
(d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator; or
(e) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or
(f) taking measures necessary in the interest of national security.

[30] Any person, who knowingly
(i) removes or alters any rights management information without authority, or
(ii) distributes, imports for distribution, broadcasts or communicates to the public , without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine; Provided that if the rights management information has been tampered with in any work, the owner of copyright in such work may also avail of civil remedies provided under Chapter XII of this Act against the persons indulging in such acts described above.

[31] Section 2(xa) defines RMI to mean the title or other information identifying a work or performance, the name of the author or performer, the name and address of the owner of rights, terms and conditions regarding the use of the rights, and any number or code that represents this information (although it does not include any device or procedure intended to identify the user).

India was under no International obligation to enact the above mentioned provisions, it went ahead to protect the interests of the right holders in the digital content of course such swiftness has not been seen in areas which could enhance educational accessibility by the use of digital technology in areas such as distance education and distance learning. Though the sections are not as limiting as USA DMCA but there are lot of ambiguities. For instance the provisions prohibit circumvention of an effective TPM but do not define what would constitute an effective TPM. While in USA effective TPM would mean that which effectively controls access in Indian context protection of TPMs would not impair fair dealing provision as the Act clearly states that circumventing for "a purpose not expressly prohibited by this Act" will be allowed. Also, it does not criminalise the manufacture and distribution of circumvention tools (including code, devices, etc. however the Act does not obligate the copyright holders who encrypt their digital content to provide information as to how it can be circumvented in for the use to be made under fair dealing provisions. moreover India does not have any legislation/provision in place to facilitate distance/ online learning thus even fair dealing limitations quite narrow. Thus though the provision is not as draconian as its USA counterpart it is still not sufficient to take into account the bulk access needs to copyrighted materials for educational purposes.

V

Implications of the Marrakesh Treaty on accessibility barriers in India

India has the largest number of blind population in the world. However prior to 2012 amendments in the copyright Act, there was no provision in the Act that dealt with conversion of literary or other works in an accessible format copy for the visually impaired population. In fact any alternate format creation would have been a copyright infringement unless backed by the written permission by the right holder.[32] "In order to make an accessible copy of a work, even a library for the blind or any other producer of that accessible copy must obtain a license from the copyright holder that permits it to do so. Otherwise, however laudable the purpose of making an accessible copy, the accessible copy is an infringing copy, i.e. a copy that infringes on the copyright of the right holder. But all that is set to change with the final Copyright Amendment Act No. 27 of 2012 which has included special provisions for the benefit of persons

[32] India has an estimated 70 million persons who cannot read printed matter (for reasons of blindness and otherwise). These persons have limited or no access to information which is available to the public. Perversely, even material in the "public domain"—such as that created by government—is often not available in accessible formats.

with Disabilities. The new Sections 52(1)(zb) and 31B facilitates access to copyrighted works by persons with disabilities provided that the reproduction of accessible formats is on 'a non-profit basis'[33] and the accessible formats are used only by persons with disabilities and reasonable steps are taken to prevent their entry into ordinary channel of business. This section very widely defines both who could be authorized entities and what would be the scope of its functions and includes within its ambit

- Conversions by the disabled person for his/her own use and for sharing with others in the community;
- Conversions by third parties (individuals or organisations) working for the benefit of the disabled on a non-profit basis;
- Conversions by 'for profit' organisations who need to obtain permission from the copyright board on a work – by work basis[34]

Even the term accessible format is very broadly defined and includes any accessible format. Thus when it comes to substantive provisions the Indian law now is in sync with Marrakesh and in fact, in many aspects is broader than

[33] Under section 31B even those entities that are working for profit are allowed to do so if they obtain a compulsory license on a work-by-work basis, and pay the royalties fixed by the Copyright Board.

[34] As per Section 31B of the Act: (1) Any person working for the benefit of persons with disability on a profit basis or for business may apply to the Copyright Board, in such form and manner and accompanied by such fee as may be prescribed, for a compulsory license to publish any work in which copyright subsists for the benefit of such persons, in a case to which clause (zb) of sub-section (1) of section 52 does not apply and the Copyright Board shall dispose of such application as expeditiously as possible and endeavour shall be made to dispose of such application within a period of two months from the date of receipt of the application.
(2) The Copyright Board may, on receipt of an application under sub-section(1), inquire, or direct such inquiry as it considers necessary to establish the credentials of the applicant and satisfy itself that the application has been made in good faith.
(3) If the Copyright Board is satisfied, after giving to the owners of rights in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, that a compulsory license needs to be issued to make the work available to the disabled, it may direct the Registrar of Copyrights to grant to the applicant such a license to publish the work.
(4) Every compulsory license issued under this section shall specify the means and format of publication, the period during which the compulsory license may be exercised and, in the case of issue of copies, the number of copies that may be issued including the rate or royalty: Provided that where the Copyright Board has issued such a compulsory license it may, on a further application and after giving reasonable opportunity to the owners of rights, extend the period of such compulsory license and allow the issue of more copies as it may deem fit.

Marrakesh.[35] However signing of MARRAKESH may be significant for India in the sense that it would enable India to share, export, import accessibility format copies thus allowing it to access the already available accessible format copies in the developed nations which have had these exceptions and limitation in place since a long time. It would also facilitate sharing of digital content as both the Marrakesh treaty and Indian limitation are quite broad in providing access to the digital content. However for the treaty to significantly enhance access it needs to be ratified immediately by both developing and developed countries and the procedures regarding sharing, exporting, importing of accessible format copies may be decided upon in an agreement so that beneficiaries around the world enjoy uninterrupted access to the copyrighted material

VI
Conclusion & Suggestions

The Copyright regime of today has significant wherewithal to enhance accessibility to affordable and equitable educational materials and there is a gradual recognition of this both nationally and internationally. The manifestation of the recognition of this potential can be seen in number of international instruments that specifically focus on extending copyright limitations in specifically defined area such as education, libraries and archives, distance education and for selected group of beneficiaries such as visually impaired population in case of Marrakesh in 2013. Even the focus of access to knowledge movement has been primarily on making intellectual property laws especially copyright and patents more enabling to facilitate access which further corroborates the importance of copyrights for educational purposes. These treaties some of which are still being negotiated such as the one on Exceptions and Limitations to copyright for libraries, archives, education and research may be instrumental in significantly enhancing accessibility to copyrighted materials for educational purposes. However this also points out that hitherto this potential of copyrights has remained untapped. In fact even Marrakesh came as late as 2013 after years of negotiations. One of the basic reasons for this has been that copyright debates have always been shaped up from the perspective of the right holders. So Berne came to provide protection to authors of literary and

[35] On April 30th, 2014, in a big step towards facilitating access to published works by the visually impaired or print disabled, India signed the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT). In her statement, Joint Secretary, MHRD (India), Smt Veena Ish highlighted that India's Copyright Amendments which came into effect on June, 2012, are already in complete harmony with the Marrakesh Treaty, thus putting India in a good position to implement the treaty. She also stated that India will be ratifying this treaty 'very soon'.

artistic works and only exception for the users. The right in copyright has traditionally been seen as the forte of content creators or distributors but not of users. The trend has somewhat changed with the "Miracle of Marrakesh". Moreover the negotiations on proposed limitations for education and research, libraries and archives may also play a key role in mitigating the accessibility barriers to copyrighted educational materials by incorporating specific limitations in key areas which may include educational photocopying, library copying, reforming and defining the exact ambit of reproduction right and limiting TPMs to copy control measures.

BOOK REVIEWS

Appointment of Judges to the Supreme Court of India, Edited by Arghya Sengupta and Ritwika Sharma, Eastern Book Company, 2018, Pg.324.

"Independence of Judiciary is a necessary but not a sufficient condition for good judgements"

Allow me to start with an instance from personal experience. In April 1997 when I was engaged in Narasimha Rao JMM bribery case, I was offered a bribe of 50 crores, either in cash or in cheque, inside India or outside India. I did not take even a few seconds to refuse it. But now if we fast forward by two decades in 2018 and I were to be offered 50 crores today, I am not sure which side I will choose.

Why this radical change? In 1997 I have had complete trust in our judicial system, but two decades of legal practice have taught me to be more skeptical. Why such a decline in the credibility of the judiciary over last two decades? This is precisely what one of the contributors to this remarkable book. Professor Pratap Bhanu Mehta is pointing out in his excellent piece on NJAC and crisis of trust. He argues that both Supreme Court judges and Government of India are claiming that people should have trust in them in protecting the constitutional values. Both are claiming that they should be given the last word on the interpretation of the constitution. But my friend Prof. Mehta unhappily concludes that, that there is 'a plague on both houses' and people have difficulty in trusting either.

The book contains twenty more excellent articles on the debate regarding who should appoint the judges of the Supreme Court of India and why? The book is divided in three parts. Part I deals with historical background of judicial appointments in India. The very first article by Suchindran B.N discusses the judicial appointments from 1950 to 1973. Second article by an eminent lawyer and formers Solicitor General of India T.R. Andhyarujina takes up the period of emergency era pointing out how Prime Minister Indira Gandhi tried to create "a committed judiciary." The article highlights the dark period of our democracy's history and discusses the infamous case of *ADM Jabalpur* where the Supreme Court, barring courageous dissent of Justice HR Khanna, succumbed to the pressure of the day.

Next article by MR A.K Ganguli deals with the case of the curious eighties terming it as recovering loss ground and the emergence of PIL and populist judgments recovering the trust of people which was lost in emergency era. The

next article by famous lawyer and current finance minister Mr. Arun Jaitley discusses about issues and controversies relating to Judicial collegium. He comes to the following conclusion "The Collegium system, as formulated by the judgements in the *Second* and *Third Judge's cases*, has been mired in controversy for manifold reasons. It is time that the collegium system opens itself to reform if it is going to deliver the judges that India deserves."

Part II deals with analysis of the National Judicial Appoint Commission Judgement (NJAC) where the majority opinion represented by Justice Madan Lokur is analyzed by Alok Prasanna Kumar and a historic dissent of Justice Chelameshwar is analyzed by the editor Arghya Sengupta. The above remarkable essays are followed by an excellent piece by eminent lawyer Mr. Gopal Subramanium emphasizing on contours of judicial independence. Finally, part III deals with comparative perspectives. Seven articles in part III take us to through the experience of United Kingdom by Chintan Chandrachud, Commissioner model of South Africa by Chris McConnachie, Judicial appointment in Sri Lanka by Rehan Abeyratne. Even the experience of our neighbors Nepal and Pakistan are discussed at length.

The book emphasis upon three dimensions of appointment of judges to the Supreme Court. They are transparency, accountability and independence. I would add on more, namely effectiveness. Let me point out that one of the most significant achievements of last six decades since the creation of the Supreme Court of India 1950 is the achievement of independence of Judiciary. To give only one example as to how much important is the independence of the judiciary for the maintenance of the democracy, look at our neighbor Pakistan where in absence of an independent Judiciary, Military dominates the Government. Still independence of judiciary is a necessary but not a sufficient condition for good governance. Equally important are accountability, transparency, and effectiveness of the system. It is possible to be independent and full of integrity and yet ineffective. I have seen many independent and honest people who are highly ineffective. We must not forget masterly good sense that whether it is judiciary or any other branch of the government, power is given to achieve certain purposes it is the achievement of those purposes which should be the parameter of sound judiciary. But in India, by and large we are too much personality focused rather than purpose focused. Our vision of civic virtue is very poor and myopic. Our egos are not sufficiently mature and robust to set us free to look beyond our personal concerns. What we need is not judicial clerkship or judicial section officer-ship. What we need is Judicial Statesmanship. As it has been said about the difference between a politician and a statesman, a politician looks at the next election, but a statesman looks at the next generation.

Same applies to judicial statesmanship as opposed to merely appointment of judges.

It is true that the Supreme Court of India is one of the most powerful courts of the world. But as we were taught at Oxford, higher the privilege, heavier the responsibility and one of the most important qualities of any august office including that of Supreme Court judge is whether the officeholder is big enough to transcend his petty ego and personal or clannish interests while making important decisions.

But apart from the personal qualities of a Supreme Court judge, I would suggest that a judicial appointment commission should be broad based. There is a dire need to make collegium system more inclusive. I would suggest that there should be 7 members. 3 seniors most Supreme Court judges, Union Law Minister, leader of opposition and an eminent person representing the civil society which will be chosen by Supreme Court Bar Association. The commission would be headed by the Chief Justice of India but all the members will have the right to write their opinions even if they dissent. But since there is a clannish tendency in human beings, to reduce the tendency of the 4 judges queuing up against 3 non-judge members, there should be a clause of compulsory consultation by judiciary members with non-judicial members. The decision will be made by majority 5. It is necessary so that 4 judicial members are compelled to persuade remaining 3 non-judicial members. In the present system, there is too much of narrow judicial input and too little extra jurisprudential input. Since life is bigger than law, interpreter of law should come from bigger than legal background. The above system will be a right balance between the fair representation of judiciary and meaningful contribution from other segments of society.

The above nook contains a lot of material to provoke thoughts on such lines. Thus, we notice that the above book is remarkable contribution to the domain of appointment of Supreme Court judges, highlighting the main issues, political context, struggle of power over having the last word on constitution and effort to preserve or promote their domain of influence. It is very refreshing to see that now Indian scholarship is going beyond memorization of text and compilation of other authors work and blinkering of black letter of law.

When I was writing my doctoral thesis at Harvard law school in 1990, I searched out 246 books on the Constitution of India and 23 books on Supreme Court of India. Barring few Hon'ble exception like Professor Upendra baxi's entitled Supreme Court and politics and incisive articles by Professor P.K. Thripathi critically analyzing the Supreme Court judgements, most of these books were merely reproduction of constitutional articles or reproduction of excerpts

from Supreme Court judgements. But things have changed with new generation. It is heartening to see that a lot of healthy empirical, sociological and doctrinal analysis of the judiciary and the Indian constitution are coming out in print. Notably Abhinav Chandrachud's *The Informal Constitution* (Oxford University Press, 2014), George H. Gadbois Jr's, *Judges of the Supreme Court of India: 1950-1989* (Oxford University Press, 2011) and Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016)

So, the present book Appointment of Judges to the Supreme Court of India edited by Arghya Sengupta & Ritwika Sharma (oxford university press 2018) is a welcome contribution. I recommend it heartily to anybody who is interested in improvement of governance and public policies of the largest democracy of the world

Surat Singh*

* International Lawyer & Advocate, Supreme Court of India.

BOOK REVIEW

Create, Copy, Disrupt: India's Intellectual Property Dilemmas. Prashant Reddy T. &Sumathi Chandrashekan. Oxford University Press, 2017, Pg.372.

The book under review fills a potential gap in intellectual property literature by unfolding the backdrop story of Indian IP law and policy that was restricted to policy makers, legislators and IP scholars and untold to public at large. The authors made a sincere attempt to transform the language of this story from a complex legalese to a comprehensive language that is legible to the people with non-law background too. This transformation creates a range of audience for the book including lawman as well as layman. This is in tune with one of the objectives of IP policy to extend the reach of the subject to the gross root level and generate awareness among the people. The protection and enforcement of IPR cannot be ensured without generating respect and value for these rights. The book not only generates interest among the general audience but also enlightens lawyers, legal researchers and academics by providing the missing links. The authors provide diverse perspectives on the subject by lifting the veil from historical, constitutional and socio-economic backdrop, responsible for making laws and policies. The authors maintain the objectivity in the discussion while placing the facts and arguments in a balanced manner.

In the hindsight of IP discourse, lobbying influenced the legislative process and policy formulations significantly and therefore, the authors explain these underpinnings in the book by making a proper inquiry. The authors explained at the outset that the book is not a comprehensive work on all the aspects of India's IP regime but a sincere attempt to convey the IP evolution and development in India to the public at large. The book is an outcome of a good research made by both the authors by collating the fragmented information over IP and presenting it in a coherent, legible and interesting form. The authors provide an organised structure to the book and maintain the flow and consistency among the chapters. The book consists of Introduction and eleven chapters on different aspects of IP in India. As explained in the introduction, the title of the book is based on a play on the usual slogan of "Create, Protect and Innovate" that has been adopted by IP agencies and IP conferences across the world. The title was chosen to reflect the issues of accessibility of the IP protected work to stakeholders to get their due under the copyright regime in a developing country like India. The authors maintain that the IP policy cannot restrict itself to creation and innovation alone, but consider those situations also where a policy of imitation can be allowed to serve the country's economic interest by making best use of the exemptions under IP laws.

Chapter 1 depicts India's journey of establishing patent autonomy through the Patents Act 1970. It reflects the flipside of the British Patent Act 1911 that was inclined in favour of foreign investors against the interest of Indian stakeholders. The authors discuss the post-independence scenario of patents when experts were making attempts to draft a patent law much suited to India's socio-economic conditions. The Chapter throws light upon the legislative debates over patent law and political overtones created by political parties. It also focuses upon the IP wavelength of foreign countries that was making impact on India's patent law drafting. In chapter 2 the authors examine the undercurrents responsible for India's reversal of policies to surrender its previous autonomous position to the Uruguay Round of GATT Negotiations. The ultimate reason for India's adoption of TRIPS Agreement was not clear but two immediate reasons can be traced from the book: one to neutralise the trade sanction and the second to get aligned with the world trade market. The Chapter provides a sequential thread of events responsible for the adoption of TRIPS Agreement.

The authors describe the TRIPS compliance journey of India in Chapter 3 through the Amendments of 1999, 2002 and 2005 in the Patents Act 1970, highlighting the legislative debates and political restraint. The Chapter throws light upon the background story behind the insertion of Section 3 (d) and its revision to effectively deal with the ever-greening problem. It reveals the underlying reasons for creating a safety valve for patents in the form of efficacy, setting high standards for pharmaceutical patents. Though the immediate reason widely known for incorporating Sec 3(d) was to secure pharmaceutical inventions by extending the protectionist policy, however, there were other reasons also including the convenience of the patent office to administer chemical and pharmaceutical patents. Chapter 4 presents the legal journey of *Novartis* case and analyses its impact on the future trend of pharmaceutical patents and innovation. The Case establishes the efficacy of section 3 (d) in regulating the ever greening of product without prescribing any parameter for "efficacy" or "therapeutic efficacy" of the said product. The chapter explains that how Section 3 (d) became the poster child for other developing countries to combat ever greening of pharmaceutical patents.

In Chapter 5, the authors provide a comparative study on copyright development in various countries and explain how this development was making an impact on India regarding fair use and fair dealing provisions. The Chapter throws light upon contentious issues of translated works and compulsory licensing. The liberation of countries from colonial regime was setting new dynamics in copyright regime with a demand for lowering the standards of copyright protection in the favour of developing countries' concerns. The Chapter

covers the Delhi Photocopy case and its potential impact on copyright trend in India and also its illustrious effect on other countries. In Chapter 6 the authors trace the copyright odyssey of Indian Cinema from British India to the current scenario in Independent India, highlighting the struggles in getting cinematographic work recognised as copyright subject matter. It describes the importance of *R.G. Anand v Delux Films* (AIR 1978 SC 1613), a verdict that established the tests and principles for determining the copyright infringement with a far-reaching implications for law and industry. The verdict still acts as a guiding force for such determinations. The authors categorically pointed out the changes which occurred in 1970s and 1980s with the introduction of a new way of cinema clubbed under art movies/ non-commercial cinema dealing with the nitty-gritty of common man and its interface with the fair dealing provisions under the Copyright Act 1957. In 1990s Indian movies started losing originality in its content as the same was borrowed from the other works published in foreign countries. As a result, the reciprocal promises made by India under the multilateral treaties were at stake. The same things started happening in musical works too that led to a huge number of infringement cases. This made the courts busy, enriching the judicial decisions as to the copyright violations. Broadcasters' rights were recognised through various court decisions as the courts in India started playing a proactive role in giving true meaning to India's copyright regime. The authors indicate that a proper understanding of the nuances of new film technology and its interaction with the law will set the future trend of copyright in cinema and curb copyright piracy.

In Chapter 7 the authors trace the background story and circumstances responsible, for the Copyright Amendment Act, 2012. They explain that though both the movie industry and music industry exist independently, however, these are deeply connected and exert great influence on the success of each other. The exact scope of various rights involved in music and cinema were not properly recognised as it had been the normal practice before 2012 Amendment in the Indian film industry that an author and lyricist used to assign away the copyright in their works to the film producer for a single lump-sum payment. The authors discuss the role played by one of the most reputed lyricists and poets of India, Javed Akhter in bringing the reform through 2012 Amendment, which recognises the copyright ownership of lyricists, composers and performers and enables India to deal with copyrights issues involving digital technologies. Chapter 8 covers discussion on copyright issues relating to Internet and explains the intermediary liability and safe harbour provisions under 2012 Amendment in the light of a case relating to a site Guruji.com in 2010. The authors also discuss the interrelation of Copyright Act and Information and Technology Act 2000 and

highlight the persistent ambiguities. In Chapter 9 the authors provide a detailedstudy of the traditional knowledge-patent interface in India through three important case studies viz. Neem, Turmeric and Basmati in the light of Traditional Knowledge Digital Library (TKDL). The authors critically analyse the protectionist approach of India maintained through TKDL by placing the same in patent offices of other countries, which have no effect on India's IP jurisdiction.

Chapter 10 focuses on the Basmati episode of India by providing a detailed study on the interface of trademarks and geographical indication pertaining to it. It traces the origins of geographical indications in India and explains India's legal journey to file GI applications. Chapter 11 deals with the religious sensitivities and traditions as a barrier to IP protection in India. The religious sensitivities in selecting a symbol or a name come frequently in the domain of trademarks and the rest falls in the form of expressions under copyright domain. The authors discuss the IP dilemma of Yoga at length, highlighting the complexity in establishing ownership over it in the existing IP framework. They maintain that Religion and traditions will keep on posing tough questions as to IP protection in India and demand a satisfactory answer through long discussions and deliberations.

The authors have been successful to a great extent in unfolding the evolution and development of India's IP law and policy in a lucid manner. The value of the book resides in the collection of legislative debates and background story of India's IP journey that usually doesn't form part of the regular IP literature. The language of the book and its presentation style make it an interesting reading. The book is strongly recommended to a range of readers including students, academics, policy makers and IP professionals to grab the background story of India's IP law and policy.

Kshitij Kumar Singh*

* Assistant Professor, Campus Law Centre, Faculty of Law, University of Delhi

TRIBUTE TO RETIRING COLLEAGUES

Prof. S. C. Raina : A BRIEF PRIFILE

It gives me immense pleasure that I am given the privilege to write this column about my mentor and guide Professor (Dr.) S.C. Raina. Professor Raina completed his graduate studies from the University of Kashmir and his graduate and post graduate studies in law from Aligarh Muslim University. Owing to his merit both at LL.B. and LL.M. levels, Professor Raina was offered the position of Lecturer at the Faculty of Law, Aligarh Muslim University itself. Afterwards, he joined University of Delhi on 22 January, 1997 and subsequently in the year 1998 he was selected as Professor of Law in Delhi University, Campus Law Centre. He served as the Head & Dean, Faculty of Law, University of Delhi for the academic year 2016.

He is the Founder, Vice chancellor of the Himachal Pradesh National Law University, Shimla, India and served from September 5, 2016 to April 30, 2018 wherein he started the First Batch for B.A. LL.B. (Hons.) with 57 students. Furthermore, he also established Centre for Post Graduate Legal Studies for running one-year LL.M. course and initiated the process for establishing 4 Centre for Advance Learning and Research at HPNLU, Shimla. He formulated All India National Law Entrance Test (termed as HPLNET), separate from CLAT in the year 2017 for admission to B.A./B.B.A. LL.B. (Hons.), along with LL.M. and Ph.D. course.

Professor Raina has a cumulative teaching Experience of 38 years at various State and Central Universities. He has to his credit three post doctoral research projects sponsored by various organization in India. In addition, he has contributed in the project on "Re Statement of Laws-Public Interest Litigation" a project undertaken by the Hon'ble Supreme Court of India itself. Another notable academic achievement lies in the fact that he was offered fellowship from the Max Planck's Institute of International Criminal Law Freibur Germany in the year 2009 as well as 2010 to work on project *Cross Boarder Organized Crime*. His intellectual contributions have earned him the honour of international recognition as a scholar of great esteem and repute.

He has been a founder member of Indian Society of Criminology and Victimlogy. He was facilitated with the title of "fellow" by the Indian Society of Criminology. It is noteworthy to mention, he was also decorated with Harish Chand Hakirwal Award by the Indian Society of Criminology as recognition of

young social scientist. Also, he was declared as "Career Awardee" by University Grants Commission for 3 years, that is given to the researchers who show aptitude in research below the age of 40.

Professor Raina is a well recognized expert in the area of Criminal law, Criminology and Legal Research Methodology. As a teacher he has supervised 18 Ph.D. Scholars in his illustrated academic career. Most of Ph.D. thesis he has guided are of empirical nature. His Ph.D. scholars readily perceive the compelling quality of his through methods, they respect his passionate insistence of accuracy, respond to his infinite patience and above all, they come to understand and to apply logic in their reasoning. As his Ph.D. Scholar I appreciate his continuous advice, inspiration and encouragement. He has been a continuous source of inspiration for me which enabled me to complete my research in time.

After years of intelligent and devoted professional career, Professor Raina retired in May 2018. He has made an enduring impact on the lives of so many students and colleagues. May his special wisdom bestow on us even after his retirement.

*Anju Sinha**

[1] Assistant Professor, Law Centre-I, University of Delhi, Delhi-7

Prof. J. L. Kaul : A BRIEF PROFILE

Professor J.L. Kaul represents an altogether different generation of academicians who not only excelled in his professional career, but also maintained a healthy relationship with his peers as well as students. After an illustrious career spanning over three decades in various capacities at different places in India, he retired from Campus Law Centre in April 2018. On the occasion of his retirement from professional career in Campus Law Centre, I bow down my head, as one of his former students and ex-colleague, remembering his sincere contributions to the enrichment of academic discourse and leaving behind a legacy of his brilliance in the hearts and minds of future generations.

It is impossible to express in few words his varied contributions in different spheres of academic and professional life. However, I would just highlight some of his contributions which might enable the prospective readers to make up one's mind to his legacies. First and foremost is his thought process. He excelled in thinking, what he called "out of box". He did not beat the trodden path, or ring the usual beats, but he thought ahead of his contemporaries. At the time when his native state Kashmir was experiencing internal strife and turmoil and was deprived of his ancestral comforts, he did not allow himself to be embroiled into those conditions. Rather he moved away from his state and devoted himself to the tough journey of legal studies in the Campus Law Centre. Since then, he was attached to this Centre so much so that when he pursued his higher studies in law from Chandigarh and from Rohtak, he always thought of coming back to the Campus Law Centre anytime in his life.

It is said that when you believe in yourself and have faith in God, your wishes are fulfilled. So happened to Professor Kaul when he got that opportunity to join the Centre in the year in which I happened to join LL.B. in the Campus Law Centre in 1997. Since then, he committed himself to the upliftment of the academic and Student welfare in the Centre. At the time he joined the Centre, he had the challenge of proving himself better than the galaxy of Professors at the Centre, namely, Professor M P Singh, Professor P.N. Singh, Professor M. C. Sharma, Prof B. B. Pandey. These Professors had made their mark in teaching and research publications not only in Campus Law Centre, but also all over the country and abroad. Professor Kaul accepted this challenge gladly and I was one of the fortunate ones who got the opportunity to be taught by him in my very first year in Campus Law Centre. He became one of the sought after Professors by the students of the Centre in due course of time.

As a student of Campus Law Centre and later one of his first batch of Ph.D. Student, I can say that if you had any opportunity to interact with him, he

would leave a lasting impression in your mind by his thoughts and wise counsel. He had ample interests in sports, business, and cultural developments not only in India but also outside. While sipping tea and puffing out cigarette smoke (absolutely not in the classroom), he would let you think out of the box and read the latest literature on the subject. I remember myself, Dr. Mahavir Singh, and Dr. Niraj (now faculty member in NLU, Delhi) chatting with Professor Kaul in his chambers for hours after our teaching assignments.

Later, he became Professor-in-Charge of Campus Law Centre where he tried to ensure that the classes are held regularly and students develop in an environment where they could think creatively. He ensured that he remained accessible to all the Faculty members and students of the Centre. Many faculty members and students remember him as a kind hearted person who had the courage to speak his mind in the open. Rewarding him for his abilities, he was awarded Hague External Programme Fellowship of India Society of International Law in 1990. In the same year, he was also awarded fellowship by the International Institute of Public Law and International Law of Greece. In the year 2013, he was appointed as the Vice-Chancellor of one of the public Universities of Central India, i.e., Vikram University. He resigned from this post when he was appointed as the Vice Chancellor of one of the Central Universities in North India by the President of India in 2014, namely, H.N.B. Garhwal University.

Professor Kaul remained associated with the learned societies in the field of law. He has been the President of All India Law Teachers Congress (AILTC) since 2005. The AILTC aims to protect and promote the rights and interests of law teachers across India. I remember AILTC because it organizes a good national conference annually on International Humanitarian Law, one of my favourite subjects. He has also been associated with Indian Society of International Law (ISIL), where he held several important positions, including the member of its Executive Council. The ISIL has emerged an important think-tank to the Government of India in the field of international law. He was also Visiting Fellow to the Institute of Globalization and International Relations, Maastricht University, Netherlands. Later, he was given the honour of Visiting Fellowship by Bangor University Law School, Wales, and St. Thomas University School of Law, Minneapolis, USA.

He was an excellent teacher of Constitutional Law, International Trade Law, and Public International Law. His name and fame spread so much so that he was invited for guest lectures at different Universities in India and outside as well as by Indian Society of International Law. He authored books and

articles in the areas of Human Rights, International Law, International Trade Law, and Constitutional Law. One of his first books, solely edited by him, was titled "Human Rights: Issues and Perspectives", was published in 1995 by Regency Publications, New Delhi. Through this book, he was able to highlight the importance of human rights protection in India. At the same time, he argued that "the stream of thought conditioning the evolution of human rights in a particular country is reflective of the particular socio-economic conditions operative at the relevant time". Observing further, he added that the subject of human rights in developing countries should be approached keeping in view their socio-economic circumstances.

One of his co-edited books with Dr Manoj K. Sinha, titled "Human Rights and Good Governance: National and International Perspectives", published in 2008 by Satyam Law International, New Delhi, explored the various aspects of human rights and of the good governance. It evaluated many facets of good governance both at national and international levels in a scientific way. In the sixth chapter on 'Good Governance and Human Rights: Some Remarks', he remarked that human rights are more than the proclamation of splendid international instruments. Good governance within each nation is vital to the effective delivery of human rights. However, he added that 'despite the growing strength of the human rights movement, there is still a wide gulf between the articulation of global principles and their application because of the serious crisis of state capacity and governance'. In this chapter too, he reiterates his argument that good governance practices vary according to the needs of different societies and circumstances.

The latest book which he co-edited was with me in the year 2018. It is titled "Shifting Horizons of Public International Law: A South Asian Perspective", published by Springer (India). This book was conceptualized in the chamber of Professor Kaul in the chilling winter season of 2013, and which finally saw the light of the day after four years of hard work, constantly cajoling the authors from different nations of South Asia. Writing a foreword for this book, eminent jurist Professor Upendra Baxi observed, "in an era of exponential expansion of public international law marked by fragmentation and specialization where *lex specialis* prevails and *lex generalis* seems to be all over, this excellent work by Vice Chancellor J.L. Kaul, Dr. Anupam Jha, and the learned contributors tells us a special story". He further adds, "the unusual story is about how the SAARC region may have contributed to the progressive development of late post-Westphalian international legal development". This book has 15 chapters, including chapters on UN Security Council, Regional Trade in South Asia, Sharing of trans-boundary rivers, UNCLOS dispute settlement, International Crimes

Tribunal of Bangladesh, State Responsibility, International Criminal Court, and privileges of diplomats.

Fondly remembered as J.Kal (pronounced as 'jackal') by his contemporaries and many students, he stood tall amongst the Professors of the Faculty of Law at the time of his retirement in April 2018 from Campus Law Centre, University of Delhi. Having blessed with homely wife and a son and a daughter, he always showed a contented smile on his face. He led a simple lifestyle. If you happen to go to his home even after he became the Vice-Chancellor, you could notice that he was not ostentatious. For long years, he drove Maruti Zen and refrained from buying high end cars. Notwithstanding his simplicity, he was fond of good dresses, cigarettes, and chilled beer. Once I wanted that he should quit smoking. I was returning from the U.S.A. after completing my fellowship. I bought for him an e-cigarette which did not contain caffeine. He liked it for a day or two only. After that, he told, "this e-cigarette is a waste of time and fun". I was disappointed by my failure.

Professor Kaul was a public speaker of sorts. Give him any topic of your choice, and he would not need any prior preparation for at least an hour of lecture. At the same time, he was so honest that if he was not in the mood to take classes, he clearly told his students to study in the library or attend somebody else's classes. These memories flood my mind at this time when I write few lines in his honour in the year of his retirement as I am indebted to him for showering his blessing upon me every time. I wish him a healthy and smiling life.

Anupam Jha[*]

[*] Assistant Professor (Selection Grade), Law Centre-II, University of Delhi, Delhi-7

MR. SK Gupta : A BRIEF PROFILE

To pay tribute on the retirement of a teacher so astute and learned as Sh. S.K.Gupta who surpasses any comparison when it comes to teaching law is a mammoth task beyond the path of words. Anyhow, having recourse to worldly convention, the Campus Law Centre would like to briefly highlight his academic journey, teaching career and other related achievements prior to and during his 40 years of teaching at the Campus Law Centre. We pay our rich tribute to his unwavering and dedicated service in the building of this institution. It is worth mentioning that many of his former students are occupying high public offices including Hon'ble judges of the High Courts and the Supreme Court of India.

Before embarking on his legal journey Sh.SK Gupta has completed his B.Sc. from Hansraj College, Delhi University in 1972. Later on he completed his LLB and LLM from the Faculty of Law, Delhi University respectively in the year 1995 and 1977. He has an experience of 40 years and his areas of interest are family law and labour law. He worked as research associate in Indian Council for Social Science Research (ICSSR) project on "Law and Urban Development" under School of Planning and Architecture, New Delhi. His teaching association with Delhi University dates back to September 1978 when he joined as an *ad hoc* lecturer in Campus Law Centre. He was later appointed as a permanent lecturer in Campus Law Centre in 1992. He became Associate Professor in Campus Law Centre in 2006.

In the history of Campus Law Centre Sh. S.K. Gupta has treaded the path and walked the corridors with the greatest legal luminaries of our era such as Professor Lotika Sarkar, Prof.Mata Din, Prof. Upendra Baxi, Prof. N.R.Madhava Menon, Prof. M.P.Singh Prof.Moolchand Sharma, Prof. P.K.Tripathi, Professor Parmanand Singh, Prof BB Pande, Dr.S.K.Kuba just to name a few. In fact Prof. Rajiv Khanna was his teacher who would later become his colleague and contemporary.

In his farewell speech Sh. SK Gupta attributed his success of 'being a teacher' foremost to his students which bears testimony to his down to earth attitude and high regard towards the student community. As the 'Guru shishya parampara' so sacrosanct to Indian ethos and tradition it deserves to be mentioned here that Sh. S.K. Gupta considers Prof. J.N Saxena as his mentor. It is from Prof. B Sivaramayya that he has learnt the art of teaching family law and from Prof. P.G. Krishnan, the art of teaching labour law. If one is to decipher the secret as to why during his classes there used to be 'pin drop silence' one need not go further than to appreciate his commitment to the 'Guru Shishya principle'. His colleagues who has worked with him for many years

speaks highly of his punctuality and impeccable sense of dressing which are his hall mark thus earning him the epithet 'SKG', an acronym of his name with which he is fondly addressed.

The Campus Law Centre extends greetings and congratulations on his retirement. We all wish him and his family a happy and prosperous life ahead. It is our sincere hope that just as he had made a mark for himself in the field of teaching, may he also succeed in making a comeback in another area of life, field, sphere or position. It befits here to end the tribute from a line from George Eliot, "Blessed is the man who, having nothing to say, abstains from giving us wordy evidence of the fact—from calling on us to look through a heap of millet-seed in order to be sure that there is no pearl in it."

*Stanzin Chostak**

*Assistant Professor, Campus Law Centre, Faculty of Law, University of Delhi

FORM IV

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I, Prof. Usha Tandon, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Nov., 2018

Sd/-

Prof. Usha Tandon

Campus Law Centre
University of Delhi
Delhi-110007