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EDITORIAL

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INTERNATIONAL SPACE LAW AND COMMERCIAL OUTER SPACE ACTIVITIES THE RULES ARE APPLICABLE

SOURISH RAY & SARONI DUTTA CHOWDHURY*

Introduction

Many fictional stories had come out during the nineteenth century in France which were to be published all over the world. Jules Verne, the famous author was the writer of all these works of his in which his "De la Terre a la Lune" was the mostly appreciated and known worldwide in the year 1865. Jules power of advocating strong, powerful feelings and graphical representations which used to come in his mind regularly seemed to have overshadowed, almost an event that was to come out of the dark dimensions of fantasy land nearly a century later: man's first approach into the dark spectrum of outer space.

In 1903, the Russian space elite Konstantik Tsiolkovsky had published a research paper in which he had explained how we can expand the territory of human beings in outer space by the proper and practical usage of liquid fuel rockets.[1] 1932 was the year in which, Vladimir Mandl, published his and the first work on the mono graphical study and wider research on space law.[2] Before, the Second World War took place, noteworthy progress had already started in the chapter of space technology in countries like Germany, USA and the USSR. Undoubtedly, their activities gained publicity after and during the war which eventually lead to their clear breakthrough, by the sending of Sputnik 1, the world's first satellite to orbit planet Earth. After this breakthrough, a series of experiments were done, research was carried out in this segment of international law, which all aimed at exploring and understanding this new spectrum which has unfolded in front of the human race.

Commercial Space Activities

These days' commercial space activities are beginning to multiply and are holding great commitments for the actual growth of human and robotic activities in outer space. There are companies and entities like Space X, Orbital Sciences who deliver commercial cargo missions to the International Space Station (ISS) who is under contract with NASA, and other organizations, such as the Sierra Nevada Corporation, who are planning to start commercial crewed flights to the ISS as well. Beyond providing services to the ISS, companies are planning to provide human lunar landings, missions to extract minerals and resources from asteroids, and also a planned human flyby of Mars set to launch in 2018 which is going to be the first of its kind. Operations in

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[1] B.V. Rauschenbach, Thirty Years of the Space Age, Invited Paper for the Congress of the International Astronautical Federation, (Brighton, 1987).

[2] V. Mandl, Das Weltraum-Recht: Ein Problem der Raumfahrt, 1932. On his life and work see V. Kopal, 'Vladimir Mandl: Founding Writer on Space Law , in Smithonian Annals of Flight, Number 10, 1974, pp. 87-90.

outer space are presently running after commercial aims and targets in a considerable scale, as seen by increasing activities on the satellite launching pads.

A really noteworthy legal backdrop is existing in the United States of America to set off commercial space activities such as the Commercial Space Launch Act of 1984. However, many legal practitioners of commercial space activities do not even understand that the current forum of international space law is relevant to commercial space activities and has the power to both facilitate commercial space activities and the archaic to hinder them as well. This essay is going to take an attempt to elaborate the relationship of international space law to federal law and commercial space law and illustrate how non-binding methods might affect commercial space activities.

A major situation which is prevailing amongst commercial space advocates is that the Outer Space Treaty and the body which is existing of international space law is secured only for the United States government and it does not extend to private individuals, which includes commercial space actors as well.

The Outer Space Treaty and Constitutional Law

A theme which does the rounds amongst commercial space advocates is that the Outer Space Treaty and the existing body of international space law is intended only for the United States government and does not extend to private individuals, which includes commercial space actors. Going by this line, with this assertion there are commercial space advocates who also dispute that commercial space matters are not a power which is given to the federal government and so is a right conferred upon private citizens under the Constitution, which means that the United States government will not be permitted to prohibit or interfere with commercial space activities. These two conceptions which are highly disputed are best dealt with simultaneously by bringing together federal powers delegated under the Constitution with the effect of laws derived from the treaties on the United States law.

The Tenth Amendment

First, there is again a misunderstanding that the United States government will not or cannot interfere with commercial space activities which is sanctioned by quoting the 10th Amendment of the Bill of Rights to the United States Constitution, which states, that the powers which are not delegated to the United States under the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The 10th Amendment is saying that if a certain power is not specifically delegated to the federal government by the Constitution, then that power is reserved to be enforced by the states or its people. This is intervened by some legal advocates who deal with commercial space activities to mean that private legal entities like individuals or corporations, who are already involved in commercial space matters, have the right under the 10th Amendment to perform certain commercial space activities without any interruption from the federal government because commercial space activities is not a delegated power to the federal government under the Constitution.

If we still keep on building to this misconception the belief is that international space law, which has in its ambit the Outer Space Treaty, will apply only to the United States government and not

to any private individual. The reasoning is deeply embedded in a misunderstanding of legal effects of a ratified treaty. Article VI of the United States Constitution says in part that:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties thereby made, or which shall be made, under the Authority of the

United States, is going to be the supreme Law of the Land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

Fundamentally, this means when the United States is ratifying an international treaty like the Outer Space Treaty and its descendent, the sections of those treaties have the same legal effect as a federal statute which is passed by the Congress and which is thereby signed into law by the President. Therefore, the federal government is not legally bided to go by the terms of a treaty like the Outer Space treaty, the same goes for the private individuals which falls under the domestic jurisdiction of the United States of America. The Outer Space Treaty's standing as the ruling law of the land propagates to the federal government of the United States the power over commercial space matters that some legal practitioners claim is reserved only for private citizens by the 10th Amendment.

If we are to consider, Article VI of the Outer Space Treaty, which states that:

"States which are a party to the Treaty shall be burdened with international responsibility for national activities in outer space, which comprises the moon and other celestial bodies in outer space, whether or not these activities are carried on by governmental agencies or by non-governmental entities, and for ensuring that national activities are carried out in accordance with the provisions set forth in the current Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall be needing authorization and shall be under the radar all the time by the appropriate State which is party to the Treaty. When activities are carried out in outer space, which is again including the moon and the other celestial bodies, by an international organization, responsibility for compliance with this Treaty is going to be borne both by the international organization and by the States who are parties to the Treaty in such an organization."

The main intention of inserting this article is that, Article VI of the Outer Space Treaty means in part that, as a State which is party to the Outer Space Treaty, the United States government has continuous jurisdiction over its private individuals who are performing space activities, also will be highly responsible for authorizing space activities which will be carried out by them, and has a moral duty to continually keep a check over their activities to ensure that they are carried out in affirmative with the Outer Space Treaty and international law in general. Accordingly, the Outer Space Treaty's status as a treaty which is ratified by the United States of America makes it the supreme norm of the land which is pursuant to Article VI of the Constitution of the United States of America. That, in return does the favor of delegating the authority and implications which are within the ambit of the Outer Space Treaty to the federal government of the United States.

The end result of this is that, instead of delegating a private right to private individuals under the 10th Amendment, commercial space activities became a private interest which is being vested upon non-governmental, private citizens who are subject to the federal government's power

delegated to it through Article VI of the Outer Space Treaty.[3] Going in consistency, with the authority and obligations empowered upon the United States of America by the Outer Space Treaty, the Congress certified a series of federal statutes which dealt specifically with commercial launch activities.[4] Under Title 51, Chapter 509 of the United States Code, titled "Commercial Space Launch Activities", which is more commonly known as the Commercial Space Launch Act of 1984, the federal government, through its agent, the Department of Transportation, enforces the authority to permit and oversee commercial activities carried out in outer space.[5]

Chapter 509

The Department of Transportation's authority to foresee commercial space activities under Chapter 509 encompasses the launch and the re-entry of space missions carried out for commercial purposes which also includes the authority to restrict launches, operations and re-entries;[6] The authority to monitor launch or re-entry activities;[7] The authority to amend, revoke or suspend a license;[8] The authority to acquire scheduled launches or re-entries;[9] Restrict, suspend, and to shut down launches, operation of launch sites and re-entry sites, and re-entries;[10] The authority to demand a commercial operator to obtain third-party liability insurance or demonstrate the financial methods to pay compensation to an aggrieved party;[11] The authority to consult with foreign nations to carry out this sector which is consistent with an obligation the United States government pre-assumes in a treaty, convention, or agreement in force between the

[3] A "private interest" is in effect a privilege granted by an executive authority. A private interest is sometimes granted ancillary to a "right" with the caveat that the private interest is subject to oversight of the authority granting it. For example, there is a fundamental right to free movement and ancillary to that right States through their executive agents grant the private interest of operating motor vehicles on state roads and highways. A private interest cannot be deprived without due process, and the same is true for the private interest of performing commercial space activities. The Department of Transportation can deny, revoke or suspend a launch or reentry license, but it must provide the licensee due process to contest that decision, which it does under 51 U.S.C. § 50912.

[4] 51 U.S.C. § 50901(a)(1) states that "Congress finds that the peaceful uses of outer space continue to be of great value and to offer benefits to all mankind..." This is consistent with Article I of the Outer Space Treaty.

[5] The branch of the Department of Transportation that is responsible for implementing Chapter 509 is the Federal Aviation Administration (FAA). The current regulations to carry out Chapter 509 can be found at 14 C.F.R. Chapter III, Parts 415, 420, 431 and 435.

[6] 51 U.S.C § 50904 Restrictions on launches, operations, and reentries

[7] 51 U.S.C. § 50907 Monitoring activities

[8] 51 U.S.C. § 50908 Effective periods, and modifications, suspensions, and revocations, of licenses.

[9] 51 U.S.C. § 50910 Preemption of scheduled launches or reentries

[10] 51 U.S.C. § 50909 Prohibition, suspension, and end of launches, operation of launch sites and reentry sites, and reentries.

[11] 51 U.S.C. § 50914 Liability insurance and financial responsibility

government and the government of a foreign country; and[12] The power to create regulations to enforce the statute mentioned.[13]

Agreed, chapter 509 is not completely convincing and has an ample amount of benefits and due process methods and mechanisms for procuring launch licensees; but, chapter 509's practical effect is that it dawns a private interest to perform commercial space activities and provides the Federal government the means to successfully fulfil its obligations under the Outer Space Treaty and its descendants. The Department of Transportation goes by these obligations through its authority to allow, suspend, or restrict any existing or any commercial space activities carried out in the future, which includes suborbital, orbital, space debris removal, extra-terrestrial resource ,mineral extraction, and colonization activities.

[12] 51 U.S.C. § 50919 Relationship to other executive agencies, laws, and international obligations

[13] 51 U.S.C. § 50922 Regulations

The Code of Conduct for Outer Space Activities

The suggested Code of Conduct for outer space activities is going to be another spectacular illustration of how an international accordance could actually influence commercial space activities. The European Council had introduced the Code of Conduct in 2008. Among the various concepts which are adopted by the Code of Conduct are those that call for nations to stop actions that could actually damage or destroy other satellites or might interfere with their communications and other mechanisms available, and also to reduce the risk of collisions, as well as to reduce the formation of orbital debris.[14] The initial Code of Conduct effort did not go as planned and was unsuccessful, but it reached the zenith when the European Council again introduced the proposal in 2012. It is currently the ultimate focus of multilateral negotiations and discussions at the United Nations.

Unlike the Outer Space Treaty and its fellow compatriots, the Code of Conduct is not really intended to be a legally binding treaty. This attribute only allows the Executive branch to unilaterally negotiate the measure without any congressional intervention and involvement, nor does it require any ratification by the Senate. Moreover, because the Code of Conduct is particularly not intended to have a legally binding effect and it will not have the legal standing as a ratified treaty on the legal system of the United States of America. However, even if the Code of Conduct and other transparency and confidence-building measures would not be legally binding on the United States in the international forum, to assert the assurances contained within the Code of Conduct will be requiring that those assurances become legally binding upon the private individuals of the United States of America. The executive branch is going to successfully accomplish this by introducing the necessary regulations through its agencies, which also includes the Department of Transportation.

Ranking members of both the House of Representatives and the Senate had raised this issue in a written letter which had been sent to President Obama on the 18th of January, 2012, where they had wilfully expressed their concerns and worries that the potential implications of domestic regulations which were created to implement the Code of Conduct may implicate and destroy the commercial sector, especially if we are to go by the terms of the growing commercial space market and the job opportunities that are created from it.[15] Specifically, the Department of Transportation could be directed to use its authority under 51 U.S.C. § 50922 to enforce changes to bring the commercial space sector into concurrence with the assurances made by the executive branch through a signed Code of Conduct.

This privilege granted to the executive branch to enter into measures like the Code of Conduct has precedents and falls within its enumerated domain of powers, so it is not going to be deemed unconstitutional by any federal court. Therefore, if the future of international space law and

[14] This author, along with Tommaso Sgobba and Chris Kunstadter, suggested that commercial space actors could take a proactive tack and propose self-regulation of the industry in lieu of government sponsored regulation created by the FAA. See "Taking a page from maritime practice to self-regulate the commercial space industry", The Space Review, March 4, 2013.
[15] See "Congressional opposition to a code of conduct for space", The Space Review, February 6, 2012.

security moves toward the usage of non-binding measures just like the Code of Conduct, commercial space actors can be expected to be subjected to domestic regulations which are created to meet assurances within the ambit of those measures. This, adding to the laws and regulations created to meet legal obligations under the international space law treaties through Article VI of the Constitution, will be ensuring that international concerns and entities about non-governmental entities demonstrating space activities will flow down through federal agencies like the Department of Transportation and will in return influence commercial space activities in the future.

Space Traffic Management

One of the major international issue that may implicate commercial space activities in the near future is the growing congestion along the Earth's orbit, particularly in certain, the most commonly used ones. International space traffic management has been the core topic for research and discussion for the past few years as a means to address the present and the future orbital congestion from the increasing human and robotic space activities and space debris. There are quite a few suggestions for space traffic management which includes increased sharing of space situational awareness data, combined multinational space situational assets, and also an international legal routine is to be created and enforced for outer space performers.

It is highly unlikely that space traffic management will be facilitated through legally binding treaties, but the potential does exist that measures which are similar to the Code of Conduct could have been employed with the resultant regulatory implications for commercial space actors. Either way, the effect on commercial space activities is the potential for more and more increased regulation. Even if an international regime for space traffic management fails to take shape, the possibility exists that the Congress could unilaterally extend Chapter 509 to facilitate space traffic management on its own. This is going to mean an additional foresight by the Department of Transportation beyond its launch and re-entry of commercial spacecraft which is to include commercial operations in outer space as well. Without paying much heed to whether space traffic management conjoins at the international or domestic level, or at all, commercial space actors and legal practitioners should be more aware that their practiced activities could be affected in the long run.

Multi-Lateral Moves – United Nations Committee on the Peaceful Uses of Outer Space

The General Assembly in the United Nations, is faced with the much elevating challenge poised by the SRS, which had requested the Scientific and Technical Subcommittee of UNCOPUOS in 1970 to set up the Special Working Group on remote sensing. Its mandate, in return sanctioned by the General Assembly, was constructed in a very systematic manner in which the main and ultimate aim will be to promote the optimum usage of this space application, which includes the monitoring of the total Earths environment, for the better benefit of individual states and the International communities, taking into picture, as relevant, the sovereign rights of states and the sections of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, which includes the Moon and the other celestial bodies.[16]

[16] UN Doc. A/AC 105/125 (17 March 1974), p. 4.

The Present Legal Position

Commercial activities, like all the other operations which involve the usage of outer space, are subjected to the principles of the Outer Space Treaty of 1967, so all the states party to this treaty, are bided by its given provisions.[17] The issue is that the Liability Convention is an equally important instrument of legislation to be dealt with in this context. All the states who have made up the international community have not signed any of those treaties, and this is where issues and problems will arise for commercial entities, as stated by Wassenburg. There are certain situations in which complications might happen such as in the case of an inter-governmental organization, and if only a minority of the members are parties to the above mentioned treaties or in the case of a non-governmental organization of a state which is not a party to the Outer Space Treaty.[18]

Conclusion

Commercial space holds great promises for the utilization and the growth of human and robotic outer space activities, but upcoming commercial actors must value that foreign policy concerns, as well as obligations to the international community as a whole, ensure that commercial space activities will not operate in a legal and regulatory vacuum. As commercial space develops, the law and accompanying regulations will most certainly mature, but that does not mean that it will be excessive or over-burdensome.

Commercial space actors have two choices with themselves that is they can acknowledge the fact that international law will influence their activities as the industry evolves and chooses to become participants in the inevitable evolution of law and regulations. The alternative is for commercial space actors to treat the present and future legal realities as a chain and pull against it. Either way, not taking into consideration the influence of international law and the federal government over the commercial space industry will do nothing to benefit the industry in the eternal future.

[17] Authors point out, however, that the private law tradition must be effective if private industry is to be a significant presence in the development of space.
[18] H.A. Wassenbergh, Principles of Outer Space in Hindsight, 1991, p. 23.

A LEGAL PARADIGM ON FREE & OPEN SOURCE SOFTWARE

RAJDEEP GHOSH & PRINCE RAJ *

What is Open Source?

OSS or Open Source Software is slowly but gradually becoming the most exciting latest phenomenon of the information technology environment, creating a level of curiosity similar to that of the initial instants of the Internet. Yet, the open source software trend is not historically new, even though in recent years it has reached a critical popularity, which has allowed it to come into the mainstream software market.

The effect of open source softwares is likely to be quite visible in the software industry, and also in society as a whole. It lets for new development standards, which have already been verified to be especially well suited to proficiently take benefit of the work of developers spread worldwide. It also facilitates completely new business models, which are influential in network of corporations based on open source software development.

And it has, in general, a very positive impact as an enabler for the formation of new marketplaces and business prospects. In spite of these, many think that the OSS movement is simply another temporary craze in the software industry. In the contrast, many other think the opposite and assert that the changes caused by OSS will be so profound that they will completely mould the software industry. This article tries to provide some information, suggestions and opinions, and also reckoning the prevalent law dealing with Open Source and its utilities in India.

Simply put, open source enables the users to view and modify the source code. Source code is a set of computer instructions used in the creation and development of software. When the source code is viewed by other users and developers, who can make improvements to it, the modified versions of the same software are then further re-distributed with authorizations to subsequent to subsequent users to do similar work. The rationale behind the open source philosophy is simple-collaborative efforts and co-creation by different people sharing their individual knowledge enhances progress and facilities development of better software.

A user of a proprietary software program is unable to see the source code and is totally at the mercy of the commercial software developer to rectify bugs or provide updates which , frequently costs money . Thus, in the long term, proprietary software can become costlier. In fact, Microsoft charges money for providing technical support to users who have purchased their software. The cost factor of proprietary software, has in fact, been the principal reason for rampant piracy globally, but especially in Asian countries including, India and China.

According to FSF, free software is matter of the user's freedom to run, copy, distribute, study, change and improve the software.[19]

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[19]Martin Seaman," What is Free Software", available at http://www.fsf.org/licensing/essays/free-sw.html (Visited on 29 August 2013).

Economic Benefits to Indian Business

Speaking in the jargon of a financial advisor, computer hardware and software are capital goods. So, effectively if the price of software drops to zero, it means that IT can be made available at a lower cost. This improves the speed at which India's economy can grow and leads to an increase in the number of people who can afford to access the technology and employ their brains towards the development of the same. [20]However, most large companies are increasingly unwilling to take the risk of using pirated software as no one wants to be liable for a potential action for infringement that may arise from the use of stolen software. Further, there is also a potential threat that disgruntled employees of the organization may make anonymous phone calls revealing the use of pirated software hence every firm would need to exercise caution in using pirated software.

The savings involved in using OSS are not trivial. It is a well-known fact that hardware costs have dropped sharply over the decade and the government has drastically reduced custom duties on the import of computer hardware. Today, software costs of many IT implementation firms exceed the hardware costs to the extent that if they start using free software, it can lead to major cost savings. The typical cost of computerization for a five person office goes down by 25% if free software is used.[21]

Some of the obvious advantages to Indian businesses of the OSS would be:

(1) Expensive foreign software: Foreign software are expensive and every organization, especially small businesses, are reluctant to spend huge amounts on the software.\

(2) Customising to organizational needs: One of the basic factors that may motivate the Indian companies for using OSS is that customizing foreign software to the need of Indian customers requires specialized knowledge of that foreign software.

(3) Professional Expertise: Big companies have experts and professionals who can work on development of these projects as the skills required in implementing solutions in small business are different from those required to implement complex programs. On the other hand, it will broaden the customer base of the Indian IT Companies and create more job opportunities for future IT professionals.[22]

(4) Social Welfare: One obvious angle involved to support the development of OSS is the welfare of society. For example, the compiere software is used by consultants to provide implementation, training and service to user organization. It is a commercial venture which encourages resellers to partner with the company.

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[20]AJAY SHAH," What Open Source Software Means To India available at http://www.mayin.org/ajayshah/MEDIA/1998/free-sw.html (Visited on 5th September 2013.

[21]"Brief Note on Status Regarding Information Technology Agreement" available at http://commerce.nic.in/wtoit_2.html (Visited on 5th September 2013).

[22]ANIL SETH "Why Indian Companies Should Sponsor Open Source Projects" available at http://www.expresscomputeronline.com/20040719/opinion04.html, (Visited on February 27, 2014)

(5) Cater to professional Requirement: It is not only business but professionals like lawyers, architects, doctors who may initiate the use of OSS and get them modified in many ways which are more customized to their needs as the professional organization evolve. This

(6) would not only facilitate the work but also provide added security from their work being copied as the features of the software are as their specific needs.

A couple of organizations employing the open source Red Hat Linux are Hikal's Limited, UTI Bank. UTI bank has decided to set up a state of the art call centre. By selecting RedHat Linux to power its infrastructure on low cost Intel servers, UTI Bank has received immense freedom to dynamically scale up its resources as the call volume expands. [23]

[23]"Red Hat Powers UTI Bank to Gear Up For the Future" available at http://in.redhat.com/about/news/press-archive/2006/2/456 (Visited on February 27, 2014).

FOSS in Different Countries

South Africa defined an OSS strategy on 11June 2003.The Minister of Public Services and Administration, Geraldine Fraser-Moleketi, stated that the government is looking forward to the benefits of OSS. The United Kingdom has been pursuing an OSS policy. The first paper of the government was published way back in 2002 by the Office of the e-envoy which set the target 'to promote the use of OSS in the public sector and e-government best practice through exchange of experiences across the union'.[24] Further, the policy openly stated that security is one of the foremost requirements for the software and that 'properly configured OSS can be at least as secure as proprietary system, and OSS is currently subject to fewer internet attacks'.[25] The Denmark's Board of Technology, published a report[26] in October 2002 on the benefits of using OSS over proprietary/commercial software, use of these software in desktop and serve and also took into consideration pricing, ease in usage and support systems.The report stated that OSS was an excellent alternative to commercial software primarily because of the following factors.

(1) Open standards supported by OSS

(2) Lower costs involved when upgrading

(3) Security of OS better when compared with proprietary software.

In Brazil, a great number of computers in the Brazilian government use the Linux operating system that is available freely. Increasingly, Brazil's government ministers and state-run enterprises are abandoning Windows in favour of 'open source' or 'free' software, like Linux.[27]

India -There is no specific legislation in India dealing with OSS though Free Software foundation of India submitted an opinion in the year 2003 under sec 87(2) of the Information Technology Act 2000[28] to the department of Information Technology, Government of India. In spite of no specific government policy, OSS has been able to make significant inroads in the country. Corporations like Eveready Industries India Ltd. And Indiabulls, nationalized banks like Central Bank of India, Canara Bank , public sector undertakings like Delhi Municipal Corp., to name a few are already using OSS. Certain state governments have been entering into agreements with private companies, for instance; the Centre for Development of Advanced Computing(C-DAC), IIT Bombay and IBM India have signed agreements to institute an Open Source Software Research Centre to facilitate and foster OSS development and understanding by

[24] Extracted from Introduction part of Policy paper by Office of Government Commerce, Open Source Software use within UK government, 28 October 2004, available at www.ogc.gov.uk (Visited on February 28, 2014)

[25] Policy paper by Office of Government Commerce, Open Source Software-Guidance on implementing UK government Policy, available at www.ogc.gov.uk (Visited on March 2, 2014)

[26] 'Open Source Software in e-Government'- Analysis And Recommendations Drawn Up By A Working Group Under The Danish Board Of Technology, available at www.tekno.dk/pdf/projecker_opensource (Visited on March 2, 2014)

[27] 'Brazil Adopts Open-Source Software', available at http://news.bb.co.uk/1/hi/busines/4602325.stm (Visited on March 1, 2014)

[28] IT Act of 2001, Sec-87(2).

imparting training.[29]In addition, the state government of Madhya Pradesh has also decided to use Linux software in its official IT program, which includes its e-governance and computer-enabled school education initiatives to bring benefits of IT right to the doorsteps of people.[30]

The State of Uttaranchal signed an e-governance MoU with IBM in 2004 to focus on OSS technology. The state government has focused on evolving a strategy to make available more resources for critical sectors like infrastructure, education, health etc.

In 2003, Government of Maharashtra introduced OSS for e-governance areas like treasury management, citizen facilitation centres, document journey management system and the land record management system.[31]The use of Linux OSS and commodity hardware has helped the Government provide "Anytime, Anywhere, Anyhow"[32]

Shiksha India Trust, an initiative if Confederation of Indian Industry has signed a MoU with RedHat Inc. And will make the latest in IT and educational content available to educational institutions across India.[33]

The Ex-President of India, Dr Abdul Kalam Azad is also a supporter of OSS.[34] He has called for the usage of non-proprietary software especially by the military to ward off cyber security threats.

Recommendations -

(1) Government may promote software based on OSS especially if these software like Linux are useful for society at large.

(2) A nodal agency of department should be established to focus on OSS and interoperability in e-government applications. This agency should work towards bringing together a draft paper on guidelines for the development, use and sharing of low cost interoperable applications of OSS across public agencies as well as oversee enforcements.

(3) Government should sponsor computer education programs at grass root level. It should encourage mas shift to cost effective open source software. It should encourage mass shift to cost effective open source software.

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[29]"IBM, C-DAC, IIT BOMBAY to Set up OSSRC" available at http://www.cdac.in. (Visited on March 1, 2014)

[30] "The Two Faces Of Mr. Gates" available at http://www.hinduonnet.com (Visited on March 1, 2014)

[31] Vaishnavi C Sekhar, 'State govt logs on to cost-cutting' available at http://articles.timesofindia.indiatimes.com/2005-04-19/mumbai/27840810_1_open-source-red-hat-software (Visited on February 26, 2014)

[32]"Quoted from the report prepared by Red Hat India", available at www.in.redhat.com/casestudies/GoM.pdf (Visited on February 26, 2014)

[34]"President Calls for reform", available at http://news.com/Indianpresidentcallsforopensourceindefence.html (visited on February 27, 2014)

(4) Government can support organization like FSF that set the standard for OSS and its usage .If promoted well, these organization can then come forward to facilitate its open source program.

The Perils of Open Source Software

Before discussing the perils of OSS, it is important to understand the concept in a comprehensible manner. An OSS model has striking similarities with various known theories and concepts. One may draw analogies with the theory of evolution, whereby, continuous advancement takes place, albeit gradually. To ensure that the continuous development of the software takes place, it became mandatory through the license agreements that the licensee gets access to the source code of the software and is also able to modify it. Such license agreements also state that the licensor shall transmit the same rights to the licensee, thus making it a continuing process. The developers who develop these softwares are, more often than not, computer virtuosos, who seek to prove their prowess over computers by trying to identify the problems in the software and then zealously plug those making further developments thereon.

One of the gravest legal concerns about OSS Is the potential infringement of intellectual property rights. These rights include trademarks, patents, copyrights, industrial designs, geographical indications and trade secrets. For computer software, the relevant intellectual property is patent, copyright and trademark. Nevertheless, it would be worth giving a brief overview here as well.

Infringement of Intellectual Property

An OSS may be built up of several modifications or derivative works.. It becomes very difficult to audit the various patches for any kind of intellectual property infringement. An open source project provides multiple opportunities for such developers to include or introduce in source code any infringing code or application. Computer professionals working on such software are free to do any kind of modifications in a free software. The members of the community are at times absolutely unknown to each other and any one of them may, knowingly or unknowingly, introduce a code which violates copyright or patent of an existing software.

The severity of the consequences may be analysed by undertaking that OSS is like a chain. If a infringing code is introduced, anywhere in this chain, then all the users, who join the chain after this link, and who use the polluted (infringing) software may be sued under their respective local laws. The longer the chain after the infringing code, the more severe the consequences could be, by involving many users who could be sued for infringement. A third party patent holder can thus, make life very difficult for the author or the licensed user of an OSS package. Though, this holds true for authors of commercial software as well, the open source authors usually do not have sufficient means to defend and protect themselves. Neither do they have deep pockets nor big patent portfolios, as in the case of big proprietary software firms, so as to bargain out a settlement and avoid undue litigation which may turn out to be very costly. And to worsen the situation of the open source authors, the free availability of the source code makes proving infringement very easy. The patent holder would just have to prove that software contains his patented technology and is thereby infringing on his rights. However, it may not be the case that the patent holder approaches just the author only, who had introduced the infringed code, other users in line may also be affected. Distributors of CD-ROMs with OSS also face claims from patent holders. A recent example is the Linux distributor Red Hat which had to remove all MP3

software from its distribution because of potential conflicts with the MP3 licensing program of the Farunhofer Institute and Thomson multimedia.[35]

Copy Left Licensing

Copy left licensing is the spirit behind OSS. But simultaneously, it has been one of the major deterrents in the use and propagation of the software model itself. An open source license, for eg, GPL[36], developed by Richard Stallman of FSF,[37] forbids imposing any restriction whatsoever on the rights granted by the license to the recipients of the software. If a distributor imposes any restrictions, his license under the GPL is automatically cancelled.

Each time you redistribute the Program (or any work based on the Program), The recipient automatically receives a license from the originally licensor to copy, distribute or modify the Program subject to these terms and conditions. You may not impose any further restrictions on the recipients' exercise of the rights granted therein. You are not responsible for enforcing compliance by third parties to this license.[38]

Judicial & Enforcement Aspect

Open source has existed for more than 30 years and there has been almost no challenge to its validity during this period. Litigation proceeding between SCO and IBM have been perceived as a direct challenge to the existence of open source. Beyond that, it is difficult to find litigation cases concerning open source per se. It is well known that proprietary software leads to wide spread litigation concerning globally involving commercial vendors.

In SCO v. IBM[39]On 7 March 2003, Caldera System Inc.(now SCO) , initiated a civil lawsuit against IBM with damages ranging around USD 3billion .SCO alleged that it was successor in title of all rights and interests in UNIX, which it derived from AT&T , through a series of corporate acquisitions. SCO's cause of action and alleged that IBM had dishonestly used UNIX code and the expertise developed by SCO in developing some aspects of the LINUX kernel.

The case highlighted the intellectual property risks in Linux and other free software, especially for the software developers using Linux. The whole software community feared the probability of SCO claiming IP rights over their individual work too, which is primarily based on Linux. Due to such apprehensions some companies resorted to taking insurance coverage against any alleged software related legal claims. If SCO succeeds in establishing its claims of alleged

[35] "Open Source Utilities " http://www.entropy.at/content.php?action=show&c_id=738 (Visited on February 26, 2014)
[36] "Gnu Operating System" available at http://www.gnu.org/copyleft/gpl.html (Visited on February 26, 2014)
[37] "Gpl History of Use" available at http://www.free-soft.org/gpl_history/ (Visited on February 27, 2014)
[38] GNU General Public Licnese, section 6
[39] "2:03CV00294 dak", available at htttp://www.utd.uscourts.gov/documents/ibm.html (Visited on March 1, 2014)

infringement of its source code for UNIX, possibilities are that it might affect the complete freedom to access and use a code under OS without having paid any licensing fee for the same.

The concept of open source is new in India and is still in its nascent stages of development. The concept is being advocated by the open source community, to people in general, to encourage its use. The same was reflected in the matter of Manish Kumar v Union of India.[40] In this case a PIL was filed to direct the Union of India to encourage utilization of open source in the computerization of government records and to promote the use of open source so that costly expenditure on proprietary software could be curtailed. Further it was pleaded by the petitioner that the amount saved by the implementation of open source would enable India to develop an indigenous computer system, which in turn would go way in reducing the financial burden arising out of expensive license fee for proprietary software during the process of computerization of the country. The court in this matter observed that open source was a technical matter and required detailed analysis by the government.

Open Source is an important flattener because it makes available for free, many tools, from software to encyclopedia, that millions of people around the world would have had to buy in order to use, and because open source network associations with their open boundaries and come-one-come-all-approach can challenge the hierarchical structures with a horizontal model of innovation that is clearly working in a large number of areas. [41]

[40]Manish Kumar v Union of India, 2004 (2) Cri LJ 372 (Jhr).
[41]Priti Suri & Associates **"** Open Source And The Law" (LexisNexis Butterworths,2006)

"CORPORATE GOVERNANCE REGIME IN INDIA – ITS NEED AND IMPORTANCE"

Sonali Kumari & Kashish Pasha*

Introduction

Do we really need corporate governance? First question which comes in our mind.

Corporate governance is needed to create a corporate culture of consciousness, transparency and openness. It refers to combination of laws, regulations, rules, procedures and voluntary practices to enable the companies to maximize the shareholders long term value. It should lead to increasing customer satisfaction, shareholder value and wealth.

India's corporate governance codes are best in the world, the importance of continuing to access against international best practice to suit the Indian culture. The Corporate Governance initiatives in India began in 1998 with the desirable Code of Corporate Governance – a voluntary code published by CII.

This paper attempt to discuss about the various fundamental principles of Corporate Governance, brief description of four Committees set up for the growth of Corporate Governance, current initiatives taken by SEBI in Corporate Governance and Implementation of Clause 49-Listing Agreement. Lastly some cases like Satyam Computers and its guidelines, the Cobbler's scam, Dinesh Dalmia's stock scam, Union trust of India scam etc. Hence we conclude that "**Risk is what you have to take for the growth of our country**"

Corporate governance is the application of best management practices, compliance of law in true letter and spirit and adherence to ethical standards for effective management and distribution of wealth and discharge of social responsibility for sustainable development of all stakeholders. The origin of corporate governance is taken from word "GUBERNATE" which means to steer i.e. to steer an organization in the desired direction by the board of directors or governing body, it is concerned with a set of principles, ethics, values, morals, rules and regulation and procedures etc for governing and controlling the corporate bodies.

Historical Development of Corporate Governance

The history evolves from the principles given by great kautilya's in his "Arthashatra" which speaks that all administrators including the king are considered as servants of the people, and they should be responsible and accountable for the welfare of the mass. There were certain duties associated to king namely:

- Raksha – Protection – Risk Management aspects in Corporate Governance

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- Vridhi - Growth – Stakeholder value enhancement in Corporate Governance
- Palana - Maintenance – Compliance to the law in letter and spirit in Corporate Governance
- Yogakshema - Well-being or social security – Corporate Social Responsibility (CSR) in Corporate Governance

After this certain development and Committees were made for the economic liberalization and globalization of the domestic economy as well as for the commencement of reform process in India. They are:

1. CII Desirable Corporate Governance Code

   This is the first institutional initiatives in an Indian Industry. It was been established to develop and promote a code of Corporate Governance to be adopted and followed by Indian Companies, contains recommendation from I to XVI.

2. Kumar Mangalam Birla Committee (1999)

   This committee was set up by SEBI under the chairmanship of Kumar Mangalam Birla in order to promote and raise standards of Corporate Governance. The recommendation of the committee led to inclusion of Clause 49 in the Listing Agreement in the year 2000.

3. Task Force on Corporate Excellence through Governance (2000)

   In May 2000, the Department of Company Affairs formed a broad based study group under the chairmanship of Dr. P.L. Sanjeev Reddy, Secretary, and DCA in order to examine the ways to operationalize the concept of Corporate Excellence on a sustained basis so as to sharpen India's global competitive edge and to further develop corporate culture in the country.

4. Naresh Chandra Committee (2002)

   After Enron debacle in 2001, Scam of World com, Qwest, Global Crossing and enactment of Sarbanes Oxley Act- 2002(SOX) in USA, all have promoted Government of India to wake up and form Naresh Chandra Committee in order to examine and recommend, inter-alia, amendments to the law involving the auditor client relationships and the role of independent directors.

5. N. R. Narayana Murthy Committee Report (2003)

   In the year 2002, SEBI analysed the statistics of compliance with the Clause 49 by listed companies and felt that there was a need to look beyond the mere systems and procedures if Corporate Governance was to be made effective in protecting the interest of investors. This committee was made under the chairmanship of Shri N.R. Narayana Murthy, in order to review the implementation of the corporate governance Code by listed companies and issued revised Clause 49.

6. Dr J. J. Irani Expert Committee Report on Company Law (2005)

   In 2004, the Government constituted a committee under the chairmanship of Dr J.J. Irani, Director, Tata Sons, with the task of advising the Government on the proposed revisions to the Companies Act, 1956 to have a simplified compact law that would be able to address the changes taking place in the national and international scenario and also to enable adoption of internationally accepted best practices and to recommend the formation of Limited Liability Partnership(LLP) and one person company in India .

7. Corporate Governance Voluntary Guidelines (2009)

   The ministry of corporate affairs issued the corporate Governance Voluntary Guidelines in 2009. These Guidelines were drawn from the report of the Task Force of CII on Corporate Governance headed by Shri Naresh Chandra and the recommendations of the ICSI for strengthening Corporate Governance framework.

8. Corporate Social Responsibility (CSR) Voluntary Guidelines (2009)

   The ministry of corporate Affairs (MCA) also issued the csr voluntary guidelines in December, 2009. This was the first step towards mainstreaming the concept of business responsibilities. The ministry urged the business sector to adopt the principles contained in the guidelines for responsible business practices.

9. Guidelines on Corporate Governance for Central Public Sector Enterprises (2010)
   The Department of Public Enterprises (DPE) which is the nodal department for laying down policies and guidelines concerning Central Public Sector Enterprises (CPSEs) has issued the Guidelines on C/G for Central Public Sector Enterprises.
10. National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business
    Keeping in view the feedback from stakeholders, review of 2009 Guidelines was undertaken by the Guidelines Drafting Committee (GDP) constituted by the Indian Institute of Corporate Affairs, resulting into the formulation of these guidelines.

Importance of Corporate Governance

- Transparency, accountability and disclosure
- Enhancement of Customer satisfaction, shareholders value and wealth
- Prevent Corporate Frauds, Scams and Irregularities
- It helps to attract, motivate and retain talent
- To create a secured and prosperous operating environment
- Risk Management
- It enhances reputation of the company
- It enhances investors trust
- Easy finance from financial institutions

- Better access to global market
- Fulfils the expectations of different groups such as employees, vendors, customers, creditors , debtors and government as well as society
- Independent and Objective decisions
- Inculcate strong culture of core values, integrity and reliability
- Promotes sustainable development and inclusive growth of the companies
- Achieve a balance between protection of the investors and fostering fear in capital market

Fundamental Principles of Corporate Governance

1. Role and Power of Board - It must be clearly mentioned and must be communicated to all the stakeholders including shareholders.
2. Legislation: It must be clear and unambiguous in order to get good governance in the country.
3. Management Environment: It includes various aspects such as :
    - Setting up of clear objective and appropriate ethical principles
    - Providing for transparency and clear enunciation of responsibility and accountability
    - Implementing sound business planning
4. Board Skills: Board must be able to undertake its functions efficiently and effectively, they must have necessary qualities, skills, knowledge and experience.
5. Board Composition: The size of the board should neither be too small nor too big, it should strike a balance between executive and non-executive directors.
6. Board Committees: Different Committees were formed such as Audit, Remuneration, Nomination, and CSR Committee in order to improve board effectiveness and efficiency.
7. Board Appointments: Most competent people should be appointed, appointment procedure must be followed, and letter of appointment containing their duties and responsibility should be given to all the directors.
8. Board Induction and Training**:** Director must have clear understanding of the area of operation of the Company's business. He should attend continuing education and professional development programmed or any training programmed in order to be up-to-date or familiar with new developments.
9. Board Independence**:** Majority shareholder should be there which is essential for sound corporate governance.
10. Board Meeting: Director should attend Board Meetings regularly and prepare thoroughly because meeting is the platform from where shareholders will get chance to raise voice against corruption.
11. Code of Conduct: The Company must communicate to all stakeholders about the prescribed norms of ethical practices and code of conduct and each members of the organization must follow it.

12. Strategy Setting: "Aim of the Company"- it should be fixed for long term.
13. Business and Community Obligations: The Company must take care of community's obligations besides the basic commercial activity.
14. Financial and Operational Reporting: Also known as "Corporate Disclosure"- all the report should be available to Board members well in advance to allow informed decision making.
15. Monitoring the Board Performance: The Board of Director will monitor the board. Performance appraisal system should be there in the monitoring cell.
16. Lead Transparency Director: The Lead Independent Director serves as an important liaison between the Board and Independent Directors.
17. Transparency and Disclosure: it should include but not be limited to material information on Company Profile, Corporate Governance Report etc.
18. Audit Committees: Aim of the Audit is to bring transparency in the transactions.
19. Risk Management: Policy must be framed to manage the risk.
20. Shareholders Right: Right to vote, Right to get Dividend, Right to register ownership of shares, Shareholders rights must be respected.
21. Ethics and Integrity: Ethical principles are code of conduct which should be followed by all the institution to bring transparency in the transaction.

Initiatives and Implementation of Clause 49 of the Listing Agreement

The Indian corporate would appreciate the fact that the corporate governance in India has not been forced upon them by the government, but it was a voluntary and path-breaking initiative from the Indian industries association - Confederation of Indian Industry (CII). It was necessitated, for the fact that India Inc. was to move forward and globalize itself towards international standards in terms of disclosure of information by the corporate sector in order to develop a high level of public confidence in business and industry in the process of building large global conglomerates. Corporate governance initiatives in India began in 1998 with the "Desirable Code of Corporate Governance" – a voluntary code published by the CII, and the first formal regulatory frame work for listed companies specifically for corporate governance, established by the SEBI, known as **Clause 49** of the Listing Agreement. The first draft of the Code was prepared by April 1997, and the final document titled Desirable Corporate Governance: A Code was publically released in April 1998. The Code was voluntary, contained detailed provisions and focused on listed companies. Although the CII was welcomed with much fanfare and even adopted by new progressive companies, it was "felt that under Indian conditions a statutory rather than a voluntary code would be far more purposive and meaningful, at least in respect of essential features of corporate governance".

In the present form, Clause 49, called 'Corporate Governance', contains eight sections dealing with the Board of Directors, Audit Committees, Remuneration of Directors, Board procedure, management, shareholders, report on corporate governance and compliance. Firms that do not comply with clause 49 can be delisted and charged with financial penalties.

Implementation of Clause 49

The implementation of clause 49 came from the entities who were seeking listing for the first time , and for existing entities which were required to comply with Clause 49 is being revised i.e.

those having a paid up share capital of Rs. 3 crores and above or net worth of Rs. 25 cores or more. The companies which are required to comply with the requirements of the revised Clause 49 shall submit a quarterly compliance report to the stock exchanges within 15 days from the end of every quarter. The Stock Exchanges shall ensure that all provisions of the Clause 49 have been complied with by a company seeking listing for the first time, before granting approval for such listing. For this purpose, it will be considered satisfactory compliance if such a company has set up its Board and constituted committees such as Audit Committee, Shareholders/ Investors Grievances Committee etc. in accordance with the revised clause before seeking approval for listing. The Stock Exchanges shall set up a separate monitoring cell with identified personnel to monitor the compliance with the provisions of the Clause 49 on corporate governance. The cell, after receiving the quarterly compliance reports from the companies which are required to comply with the requirements of the revised Clause 49, shall submit a consolidated compliance report to SEBI within 60 days from the end of each quarter.

Clause 49 – Corporate Governance

Board of Directors

- Composition of Board

  BOD of the company shall have an optimum combination of executive and nonexecutive directors with not less than fifty percent of the board of directors comprising of non-executive directors.

  Where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent directors.

- "Independent Director" shall mean a non-executive director of the company who apart from receiving director's remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director and is not related to promoters or persons occupying management positions at the board. Has not been an executive of the company in the immediately preceding three financial years. He is not a partner or an executive or was not partner or an executive during the preceding three years, of any of the following:

a. The statutory audit firm or the internal audit firm that is associated with the company, and

b. The legal firms and consulting firms that have a material association with the company.

Non-Executive Directors' Compensation and Disclosure

All fees/compensation, if any paid to non-executive directors, including independent directors, shall be fixed by the Board of Directors and shall require previous approval of shareholders in general meeting.

Other Provisions

- The board shall meet at least four times a year, with a maximum time gap of three months between any two meetings.
- A director shall not be a member in more than 10 committees or act as Chairman of more than five committees across all companies in which he is a director.
- It should be a mandatory annual requirement for every director to inform the company about the committee positions he occupies in other companies and notify changes as and when they take place.
- The Board shall periodically review compliance reports of all laws applicable to the company, prepared by the company as well as steps taken by the company to rectify instances of non-compliances.

Code of Conduct

- The Board shall lay down a code of conduct for all Board members and senior management of the company.
- All Board members and senior management personnel shall affirm compliance with the code on an annual basis. The Annual Report of the company shall contain a declaration to this effect signed by the CEO.

Audit Committee

Qualified and Independent Audit Committee

- The audit committee shall have minimum three directors as members. Twothirds of the members of audit committee shall be independent directors.

- All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise.
- **"Financially literate"** means the ability to read and understand basic financial statements i.e. balance sheet, profit and loss account, and statement of cash flows.

- A member will be considered to have accounting or related financial management expertise if he or she possesses experience in finance or accounting, or requisite professional certification in accounting or any other comparable experience or

- Background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

- The Chairman of the Audit Committee shall be an independent director.

- The Chairman of the Audit Committee shall be present at Annual General Meeting to answer shareholder queries.

- The audit committee may invite such of the executives, as it considers appropriate to be present at the meetings of the committee (particularly the heads of the finance function).

- The Company Secretary shall act as the secretary to the committee.

Meaning of Audit Committee

The audit committee should meet at least four times in a year and not more than four months shall elapse between two meetings. The quorum shall be either two members or one third of the members of the audit committee whichever is greater, but there should be a minimum of two independent members present.

Power of Audit Committee

1. To investigate any activity.

2. To seek information from any employee.

3. To obtain outside legal or other professional advice.

4. To secure attendance of outsiders with relevant expertise.

Role of Audit Committee

- Oversight of the company's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible.

- Approval of payment to statutory auditors for any other services rendered by the statutory auditors.

- Reviewing, with the management, the annual financial statements before submission to the board for approval.

- Reviewing, with the management, the quarterly financial statements before submission to the board for approval.

- Reviewing, with the management, performance of statutory and internal auditors, adequacy of the internal control systems.

- Reviewing the findings of any internal investigations by the internal auditors into matters where there is suspected fraud or irregularity or a failure of internal control systems of a material nature and reporting the matter to the board.

- Discussion with statutory auditors before the audit commences, about the nature and scope of audit.

- To look into the reasons for substantial defaults in the payment to the depositors, shareholders (in case of non-payment of declared dividends).

Subsidiary Companies

- At least one independent director on the Board of Directors of the holding company shall be a director on the Board of Directors of a material non listed Indian subsidiary company.

- The Audit Committee of the listed holding company shall also review the financial statements and the investments made by the unlisted subsidiary company.

- The minutes of the Board meetings of the unlisted subsidiary company shall be placed at the Board meeting of the listed holding company.

Report on Corporate Governance

- There shall be a separate section on Corporate Governance in the Annual

  Reports of company, with a detailed compliance report on Corporate Governance. Non-compliance of any mandatory requirement of this clause with reasons thereof and the extent to which the non-mandatory requirements have been adopted should be specifically highlighted.

- The companies shall submit a quarterly compliance report to the stock exchanges within 15 days from the close of quarter.

- The report shall be signed either by the Compliance Officer or the Chief Executive Officer of the company.

Legislative Cases

1. Dinesh Dalmia Case

The CBI arrested the Director of DSQ software company Dinesh Dalmia here, ending a three-year search for him. Mr. Dalmia, against whom an Interpol Red Corner Notice had been issued, was taken on a transit remand to be produced before the Additional Chief Metropolitan Magistrate (ACMM), Egmore, Chennai, where a case against him is pending.

The accused was nabbed late on Saturday from a South Delhi location by the sleuths of the CBI's Bank Fraud and Securities Cell.

According to CBI the alleged fraud perpetrated to DSQ was to the tune of Rs. 630 crore, but Kolkata Police has brought him here in a separate case," he added.

Dalmia's lawyer, Bishnu Ghosh, pleaded that Dalmia be granted bail or at least jail custody as he has already been in police custody for the last 14 days, since his arrest by CBI.

The prosecution opposed the bail move citing Dalmiya has already taken seven anticipatory bails from Chennai High Court in the last three years. "He even violated a High Court order by going abroad while in bail," Bakshi said, thus arrested.

2. Satyam Computers and Its Guidelines

B. Ramalinga Raju was the founder and former chairman of one of the biggest I.T. giant of our nation namely “Satyam Computers”. Satyam overstated income nearly every quarter over the course of several years in order to meet analyst expectations. Satyam was listed on BSE in May 1992. Adjusted for a 5:1 split in July 2000 and a

1:1 bonus in October 2006, Satyam’s peak price was Rs.723 on 7 March 2000, before falling to Rs.11.50 in the days after Raju confessed to the accounting fraud. The shares ended Wednesday at Rs.115.30 apiece. On December 2008, Satyam's Board of Directors unanimously approved the purchase of Maytas Properties and Maytas Infrastructure, two companies unrelated to the information technology field. At the time, Mr. Raju stated that he and the Board anticipated that the market would "be delighted" by the two transactions as it would provide Satyam with greater diversification. However, investors were outraged over the transactions because Mr. Raju's family held a larger stake in Maytas Properties and Maytas Infrastructure than it did in Satyam. Shareholders viewed the transactions as an attempt to siphon money out of Satyam into the hands of the Raju family. Satyam quickly aborted the transactions, but the incident still caused significant damage to Satyam's reputation as a well-managed company. Raju claimed that he overstated assets on Satyam's balance sheet by $1.47 billion. Nearly $1.04 billion in bank loans and cash that the company claimed to own was non-existent. Satyam also underreported liabilities on its balance sheet.

Few Guidelines:

- Disclosure and transparency should not be violated
- Independent directors should functioning properly
- Auditor should not be discharged until the proper working of audit is done
- Director should follow their fiduciary duty
- Unethical practice should not be conducted

3. Cobbler Scam Case

The Cobbler Scam is one of the biggest multi million dollars scam in Indian History, is nicknamed The Great Cobbler Scam. What really happened in this Great Cobbler Scam was that various businessman & politicians had siphoned around $600 million US dollars from a scheme that was floated by the Government of India meant to benefit the poor cobblers of Mumbai. Instead, it went into the pockets of the elites who used this money to build luxury homes for themselves and also brought luxury cars, boats, arts, etc. The money of the scheme was meant to provide low interest loans and tax concessions to the Mumbai's poorest – cobblers who work 16-hours a day for less than $2. Not a single penny reached these cobblers.

The modus operandi of the mastermind was to float a cooperative society of cobblers to avail of soft government loans through various schemes. Several bogus societies of cobblers were formed only for the purpose of availing these soft government loans. The main heads Daya of Dawood Shoes, Rafique Tejani of
Metro Shoes and Kishore Signapurkar of Milano Shoes created fictitious cooperative societies for cobblers. On behalf of these non-existing cooperative societies they availed loans of crores of rupees from different banks. The accused created a fictitious cooperative society of cobblers to take advantage of government loans through various schemes. The banks involved in giving loans were also charge sheeted. The economic offences wing of the Mumbai police has filed the third charge sheet in the shoe scam against the Metro group and officials of various banks and Maharashtra State Finance Corporation (MSFC). A total of 33 persons have named as accused. The charge sheet was filed on Thursday in the Esplanade Court of additional chief metropolitan magistrate N B Pokharkar.

The accused named include Rafique Tejani of Metro Shoes and his wife. The others against from Metro Shoes against whom charge sheets have been flied include AM Tejani, Mrs M Z Kerawala and B. A. Inamdar.

The banks whose officials have been accused are Dena Bank, Bank of Oman International, and Bank of Bahrain & Kuwait, Saraswat Cooperative Bank.

4. UTI Scam

The Unit Trust of India is the largest mutual fund in the country created in 1964 through an act of parliament. The UTI (of which the US-64 scheme is the largest) was set-up specifically to

channel small savings of citizens into investments giving relatively large returns/interest. UTI have purchased 40,000 shares of Cyberspace on September 25, 2000 for about Rupees 3.33crore from Rakesh Mehta when there were no buyers for the script. At that time the market price was around Rupees 830.

Arvind Jodhari who was the promoter of Lucknow based cyberspace Infosys ltd held on charge for misappropriation unit trust of India to the tune of Rs.32.08crore. But he was released on bail by the special court in alternative Johari was allowed furnish cash bail of Rs.7.5lakh. Jhari was directed not to leave India without the permission of the court and to cooperate with the investors. He was also restrained from visiting UTI office and financial institution.

Conclusion

The development of corporate governance depends upon many aspects but most important the risk management aspect which a company has to take in order to enter into a market. When the companies is engaged in any activities which affect the growth of it , the shield of transparency must be there between the members and the duty of board of director is to disclose all the information to its shareholders , in order to prevent fraud or scam to happen . The paper has discussed the importance of corporate governance and principles also which clearly shows how much we need corporate governance as name suggests in order governing the company. If a company does not have proper regulations and rules of conduct that will never add a profit to the economy of India. Thus corporate governance should be there in order to govern the activities of the company and provide an overall development.

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FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW: INSTRUMENTS TO PROMOTE CONSTITUTIONALISM

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Introduction

"We the people are the rightful masters of both the Congress and the Courts, not to overthrow the constitution but to overthrow the men who pervert the Constitution"

- Abraham Lincoln

Constitutionalism is a concept which is still evolving and will continue to remain at this state in the long run because it changes with the change in the society. Constitutionalism makes democracy a democracy and let's it remain so preventing it from becoming Autocratic in nature.

This paper analyses the concept of Constitutionalism through the lens of Fundamental Rights and Judicial Review. This paper shall strive to achieve its goal by taking the readers through selected bits of Indian Constitutional history in the form of views and opinions of jurists, the landmark judgements by The Hon'ble Supreme Court and the conflicts and controversies surrounding the issue. This paper focuses on the aspects of Fundamental Rights, Judicial Review and Constitutionalism.

There are also comparisons and similarity established between the concepts of legal sphere and General awareness or Science at some complex points to increase the understanding of the

readers so that a clear image is formed in the mind of the reader and the readers do not get bored while reading. This paper has been formulated, keeping in mind the law students who have a lot to read and study in limited time.

Before establishing a relationship between Fundamental Rights, Judicial Review and Constitutionalism, we need to get a basic idea as to what these terms mean and how they evolved in order reach a stage where they presently are.

Fundamental Rights

"The justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society".

- Dr Amartya Sen, Nobel Laureate

A Fundamental Right when analysed is based upon the fact that man has certain basic, natural and inalienable rights which should not be taken away from him except for certain circumstances like emergencies[42] etc. These rights first appeared in the Constitution of United States Of America in the form of Bill Of Rights which was inserted in 1791, 4 years after the formation of the said Constitution. This was done after a lot criticism, which centred at the fact that without any guaranteed Fundamental Rights, a strong national government will be a threat to the individual rights and the President will become a King, a person who will be despotic and will rule with an iron fist. The Bill of Rights describe the nature of the Fundamental Rights as follows " The very purpose of the Bill Of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of the majorities and officials, to establish them as legal principles to be applied by the courts. One's right to life , liberty and property, to free speech, a free press, freedom of Worship and assembly and other fundamental rights may not be submitted to vote, they depend on the outcome of no election."[43]

The Bill of Rights was a mere document till the mid-19th century, but has started to feature prominently in the United States Of America Supreme court's decisions since 1950.The United States constitution and particularly the Bill Of Rights has been followed as a principal model for a lot of countries in Asia and Africa which gained independence in the 20th century and also the for the countries that were formed after the disintegration of Union Of Soviet Socialist Republic (USSR) and Yugoslavia.

Although fundamental rights appeared in a written and organized manner in the Bill Of Rights for the first time, they have been mentioned quite a few times in the past. They were an important part of the basic philosophy of the natural theorists such as John Locke and Rousseau. They can thus be said to be the brainchild of the natural law theories. They argued that certain rights are inherent and it is the duty of the government to protect man against legal or physical injury. John Locke expressed that a government is morally obliged to serve the people, namely

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[42] Const. Of India, Art. 352,356 and 360, Pat-XVIII

[43] West Virginia State Board Education Vs. Barnette, 47.SUPP, 319 U.S. 624

by protecting life, liberty and property. He insisted that when government violates individual rights, people may legitimately rebel.[44]

Fundamental rights in India

Seventy years ago, the world underwent fundamental political changes. The world war-II ended, which was marked by the dismantling of the British Empire. This gave birth to many independent nations, which were earlier colonies of Britain. India was one such nation. India was a colony of Britain for more than 150 years. After its independence, India was faced with a tedious task of formulating its own constitution. The constituent assembly was formed and met for the first time in 1946. The constituent assembly members were elected to it indirectly by the members of these newly elected provincial assemblies.

Our constitution is said to be a borrowed constitution. Various provisions have been taken from the various constitutions from all over the world. Fundamental rights are no exception in this case. The American bill of rights has been taken as the principal model for the development of such rights.

[44] John Locke, Two Treatises Of The Government, Awnsham Churchill,1689(Extracts Used)

A few good reasons made the enunciation of the fundamental rights in the constitution rather inevitable. Human Rights violation was a major problem during the British rule and the period before it. Proper organized fundamental rights were a major demand of the main political party, Indian National Congress, during the British rule as absence of such rights was the major reason for atrocities faced by the Indians.

Secondly, India is a country with diverse religious, cultural and linguistic groups who need an assurance regarding the fact that they can live peacefully and practice their religion without being bothered by any government change. This has been guaranteed in the articles 25[45], 26[46], 27[47] and 28[48] of the Part-III of our constitution and the main aim of this right is to promote secularism in India.

Then it was thought that introducing certain rights for the people was necessary just in case the government becomes arbitrary. Though India has decided to take a democratic approach, the democratic traditions were absent and the danger always remained that the majority groups may pass laws that would quash the basic rights of the minorities.

The framers of the Indian constitution had to involve a great deal of deliberation when the thought of including the Fundamental Rights first came up. From the experiences of the Constitution of the United States and the long era of British rule, it became very clear that fundamental rights were needed in order to protect the rights of the people. At the same time it was also important that the guardians and the enforcers of these rights, i.e., the court system and the judges, do not get powers in such a manner that they turn despotic and it is impossible to remove them in case of any inappropriate decision that they take. So a proper balance had to be achieved in order to allow a functioning of both these elements in a proper manner so that both of them can perform the relevant functions.

Part-III of the constitution is made with the purpose to protect both the substantive as well as the procedural rights.[49] The Fundamental rights should not be read in isolation and should read along with the directive principles and the fundamental duties which are incorporated in Part-IV and Part-IV-A of the constitution respectively.

Although the Constitution has played its role in giving us the Fundamental rights, it is actually in the hands of the Hon'ble Supreme Court to see to it that relevant remedies are available in case the fundamental rights are infringed. Thus, it can easily be inferred that while the constitution is the giver of the fundamental rights, the Hon'ble Supreme Court is the protector of the constitution. In case a fundamental right is infringed, the aggrieved party can file a writ petition in the Hon'ble Supreme Court under article 32[50] of the constitution and under article 226[51] of the constitution in the high court. It is important to note here that a writ petition for the infringement of fundamental rights can be filed in a court of law only in a case where government is the wrongdoer. There are five types of writs, namely Habeas Corpus, Mandamus, Certiorari,

[45] Const. Of India, Art.25,Part-III
[46] Const. Of India, Art.26, Part-III
[47] Const. Of India, Art.27,Part-III
[48] Const. Of India, Art.28, Part-III
[49] Pratap Singh Vs. State Of Jharkhand, 2005 AIR SC 273(SC), 3 SSC 551(SC)
[50] Const. Of India, Art. 32, Part-III
[51] Const. Of India, Art. 226,Part-VI, Chapter-V

Prohibition and Quo Warranto. The importance of the above mentioned writs will be discussed in a later section.

The fundamental rights in the Indian Constitution can be grouped under seven heads which are as follows -

(i) Right to Equality comprising Articles 14 to18.

(ii) Right to Freedom comprising Articles 19 to 22.

(iii) Right against exploitation which consists of Articles 23 and 24.

(iv) Right to Freedom of Religion is guaranteed by Articles 25 to 28.

(v) Cultural and Educational Rights are guaranteed by Articles 29 to 30.

(vi) Right to constitutional remedies is secured by Articles 32 to 35 in the Supreme Court and Article 226 in the High Courts.

Constitutionalism

Constitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations[52].

Constitutionalism requires control over the exercise of governmental power to ensure that it doesn't destroy the democratic principles upon which it is based.[53]

According to the Hon'ble Supreme Court "The principle of constitutionalism is a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centres of decision making." [54]

[52] Waluchow, Wil, "Constitutionalism", The Stanford Encyclopedia of Philosophy (Spring 2014 Edition)
http://plato.stanford.edu/entries/constitutionalism/
[53] Wharton's Law Lexicon, Universal law publishing co., (15th edition,2012), pg. 379
[54] I.R. Coelho(Dead) by Lrs. Vs. State of Tamil Nadu, 1999 AIR 3179(SC), 1999 SCR 394(SC), 1999 SCC 598(SC)

Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law[55].

Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order[56].

So, in a layman's language or for the understanding of a person who is not well versed with the jargons of law, Constitutionalism is the limiting of the arbitrary actions of the government by the set of rules and principles laid down in the constitution of that nation.

Indian Approach

The Indian Constitution, as we all know, is the lengthiest written constitution of the world. Part III of the Indian Constitution contains fundamental rights granted to the citizens of India. When these Fundamental Rights of any citizen are infringed by the government, he/she can approach the Hon'ble Supreme Court under article 32[57] of the Indian Constitution to nullify the "arbitrary" action of the government and to declare that particular action of the government to be "unconstitutional" .Unconstitutional means contrary to or in conflict with the Constitution[58] thereby "limiting the action of the government".

Fundamental Rights as the means to achieve Constitutionalism

[55]Phillip P. Wiener, "Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas", (David Fellman, "Constitutionalism"),(1973–74) vol. 1, pp. 485, 491–92 ("Whatever particular form of government a constitution delineates, however, it serves as the keystone of the arch of constitutionalism, except in those countries whose written constitutions are mere sham. Constitutionalism as a theory and in practice stands for the principle that there are—in a properly governed state—limitations upon those who exercise the powers of government, and that these limitations are spelled out in a body of higher law which is enforceable in a variety of ways, political and judicial. This is by no means a modern idea, for the concept of a higher law which spells out the basic norms of a political society is as old as Western civilization. That there are standards of rightness which transcend and control public officials, even current popular majorities, represent a critically significant element of man's endless quest for the good life.")

[56] Walton H. Hamilton, Constitutionalism in Edwin R.A. Seligman Encyclopaedia of the Social Science, McMillan Publishing House, (1931) p. 255

[57] Const. Of India, Art. 32, Part-III

[58] Black's law Dictionary , West group, (7th edition,1999) pg. 1527

According to the Hon'ble Supreme Court "...the principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights.[59]"

Thus, in India the Supreme Authority on Constitutional matters and the guardian of the fundamental rights of the citizens i.e. Hon'ble Supreme Court feels that Indian Courts interpret legislation keeping in mind that the legislature will work in accordance with the fundamental rights and any action or legislation that violates the fundamental rights shall deemed to be void ab initio.

We shall now look at the controversy of the right to property to understand the relationship between Constitutionalism and fundamental rights more clearly.

Right To Property: Another Pluto?

Pluto and Right to Property share similar dents on their identity. Now a **dwarf planet**, Pluto was considered to be a planet until new complexities were discovered by our learned scientists that were not known until the last decade. Similarly Right to Property, which is now a legal right under Article 300A[60] was initially, a Fundamental Right (Article 31). It was after the 44th amendment that our "Pluto" of Constitutional Solar system became a **legal right**.

Now let's look at the journey of "Right to Property" from a Fundamental right to a legal right more closely for the understanding the relationship between Constitutionalism, Judicial Review and Fundamental Rights.

Right to Property: From Fundamental Right to Legal Right

The Constitution (First) Amendment Act, 1951

The first constitution amendment act was adopted as a result of concern of Parliament to protect the agrarian reforms legislation in Bihar, Madhya Pradesh and Uttar Pradesh from challenge in courts. The amendments became inevitable for achieving the objectives of agrarian reforms. As a result Indian Constitution got Article 31A and Article 31B so that the government could act in a certain way which wasn't possible earlier.

The Constitution (Fourth) Amendment Act, 1955

In Mrs. Bela Banerjee vs. State of West Bengal[61] the Hon'ble court said: "While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated,

[59] I.R. Coelho(Dead) by Lrs. Vs. State of Tamil Nadu, 1999 AIR 3179(SC), 1999 SCR 394(SC), 1999 SCC 598(SC)
[60] Const. Of India, Art. 300-A, Part-XII, Chapter-IV
[61] State Of West Bengal Vs. Mrs. Bela Banerjee & Ors., 1954 AIR 170(SC), 1954 SCR 558(SC)

such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of."

These kinds of observation of judiciary made the legislature feel that their powers were being limited regarding the compensation and to counter this legislature brought the Fourth Amendment, 1955 according to which the quantum of compensation for the land acquired, was for the legislature to determine and the question of adequacy of compensation was outside the ambit of Judicial review.

Article 31 (2A) was inserted in Article 31 (2) and alterations in Article 31B were made. Also 7 more acts were added to Ninth Schedule (articles immune from judicial review), so that the judiciary couldn't limit the power of the government.

The Constitution (Seventeenth) Amendment Act, 1964

After the Hon'ble Supreme Court's decision that the properties held on Ryotwari tenure wouldn't be considered as "estates" for the purpose Article 31A (2) (a) of the Constitution in the similar cases of Krishnaswami Naidu[62] which involved dispute regarding the Madras Land Reforms (Fixation of Ceiling of Land) Act, 1961 and of Karimbil Kunhikoman[63] which involved the constitutional validity of the Kerala Agrarian Relations Act, 1961, the legislature introduced the Seventeenth Amendment.

This amendment further added 44 more acts related to land reform to the Ninth schedule and also enlarged the scope and definition of "estate" as under Article 31A(2)(a) so as to cover the land held under ryotwari settlement as well as other lands for which provisions were made under land reform legislations.

The Constitution (Twenty-fourth) Amendment Act, 1971

This amendment declared that the Parliament has power to amend any provision of the Constitution, including Part III (Fundamental Rights) so as to attain the objectives given in the Preamble to the Constitution.

The Constitution (Twenty-fifth) Amendment Act, 1971

The Supreme Court's interpretation of "compensation", that is, equivalent in money of the property acquired in the Bank's Nationalisation Case[64] further created problems for the government and as a result Twenty-fifth Amendment was made to the Constitution. Through this amendment the word "compensation" in Article 31(2) was replaced by "amount". Article 31C was also introduced which further diluted the power of fundamental rights contained in Article 14[65], 19[66] or 31.

[62] Krishnaswami Naidu Vs. The State of Madras, AIR 1964 SC 1515(SC)
[63] Karimbil Kunhikoman Vs. State Of Kerala 1962 AIR 723(SC), 1962 SCR Supl. (1) 829(SC)
[64] RC Cooper vs. Union Of India, 1970 AIR 564(SC), 1970 SCR(3) 530(SC), 1970 SCC(1) 248(SC)
[65] Const. Of India, Art. 14, Part-III
[66] Const. Of India, Art. 19, Part-III

The Constitution (Twenty-ninth) Amendment Act, 1972

Government to immune the Kerala Land Reforms (Amendment) Act, 1969 and Kerala Land Reforms (Amendment) Act, 1971 from Judicial Review brought the Twenty-ninth Amendment. This amendment act added the Kerala Land Reforms (Amendment) Act, 1969 and Kerala Land Reforms (Amendment) Act, 1971 to the Ninth Schedule.

The Constitution (Forty-second) Amendment Act, 1976

The Parliament strengthened the scope of Article 31C. According to this, if any law of acquisition was made with the object of giving effect to any of the Directive Principles, the validity of such a law cannot be questioned under Article 14[67] or 19[68].

The Constitution (Forty-fourth) Amendment Act, 1978

The legislature after successive amendments of Article 31, finally removed the "Right to Property" from Part III (Fundamental Rights) of the Indian Constitution. Article 31(1) was made Article 300A[69] under Part XII. The argument advanced in the statement of objects and reasons of the 45th amendment bill for deleting the fundamental right to property is that it was only being converted into a legal right.[70]

And with this Amendment, finally the Pluto (Right to Property) was declared to be a dwarf planet (Legal Right) and not a planet (Fundamental Right).

Hence, from the example of "Right to Property" in the light of amendments and alterations to the Constitution, it is evident that the Fundamental Rights and Judicial Review restricts or limits the action of the government and thereby promote the spirit of CONSTITUTIONALISM ,thus acting as instruments to promote constitutionalism.

Let us now look at few other well-known examples in this context.

Kesavananda Bharati v. State of Kerala[71] : Supreme Court plays referee

In 1972, the Supreme Court again came into the contention to decide the validity of the twenty fourth amendment and hence we had the judgement in the famous Kesavananda Bharati case[72]**.** This case was decided by a bench of 13 Supreme Court judges, largest ever in the history of Indian legal system. The basic crux of this judgement was as follows:

The Twenty fourth Amendment was upheld and judgement of Golak Nath's case expressly overruled. The Honourable Supreme Court, however, laid down a much complex, complicated; and vague doctrine of basic structure. According to the court, the power of the Parliament to amend the Constitution under Article 368[73] did not extend to abrogating or destroying the basic

[67] Const. Of India, Art. 14, Part-III
[68] Const. Of India, Art. 19, Part-III
[69] Const. Of India, Art. 300A, Part-XII, Chapter-IV
[70] DD Basu, Introduction To The Constitution Of India,(1989) pp.119-120.
[71] Kesavananda Bharti Vs. State Of Kerala 1973 AIR SC 1461(SC).
[72] Ibid, 48.
[73] Const. Of India, Art. 368, Part XX.

features or framework of the constitution, what features were considered by the Supreme Court as 'basic' were not spelt out or enumerated consistently in the various opinions given in this case. The majority held that Article 368[74] even before the Twenty fourth Amendment, contained the power as well as the procedure of amendment. The Twenty-fourth Amendment merely made explicit what was implicit in the unamended Art. 368A. The twenty fourth Amendment does not enlarge the amending power of the Parliament. The amendment is declaratory in nature. It only declares the true legal position as it was before that amendment, hence it is invalid.

The Supreme Court held that "Parliament's amending power is limited, while Parliament is entitled to abridge any fundamental right or amend any provision of the Constitution, the amending power does not extend to damaging or destroying any of the essential features of the Constitution".

These essential features of the Constitution were termed as the basic Structure of the Constitution. Though, the court did not provide an exhaustive list as to what all constitutes the basic structure for which the judgment is often criticised, the case was significant as it put a check on the notion of uncontrolled and unnameable power of the Parliament to amend the Constitution to the extent of destroying it. In other words, the effect was that the amending power of the Parliament was made coextensive with the power of judicial review.

IR Coelho v. State of Tamil Nadu[75] : Ninth Schedule Laws open to Judicial Review?

The main issue before the court was, whether it is permissible to make the 9th schedule[76] immunized from judicial review. The court in this case cited extensively from Kesavananda Bharati case.

Hon'ble Khanna J. observed that the Legislature can frame any law for any part of the country, but that law should not violate the Fundamental Rights of the citizens of India. The power to make any law at will that transgresses Part III in its entirety or even partially, would be incompatible with the Basic Structure of the Constitution

As it has been said that the Doctrine of Basic Structure is the very essence of the Constitution of India and therefore, any Act, rule or regulation which runs contrary to the Basic Structure doctrine is bound to be void and unconstitutional. Since, the Fundamental Rights form a vital part of the basic structure, therefore, every act inserted in the Ninth Schedule has to be tested on the ground whether they are violative of Part III of the Constitution. If they are found to be so then that law, rule or regulation would be said to be inconsistent to the Fundamental Rights and hence liable to be struck down from the Constitution. Hence, Fundamental Rights guaranteed under the Constitution act as no less than a safety valve to promote constitutionalism and ensure accountability on the part of the executive.

This case is the Classic example of how Judicial Review and Fundamental Rights go hand in hand to promote Constitutionalism.

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[74] Ibid, 50.
[75] I.R. Coelho(Dead) by Lrs. Vs. State of Tamil Nadu, 1999 AIR 3179(SC), 1999 SCR 394(SC), 1999 SCC 598(SC)
[76] Const. Of India, Schedule Ninth

Minerva Mills Ltd. and Ors v. Union of India and Ors[77]: Basic Structure Doctrine Cemented

In this case, the Supreme Court provided key clarifications regarding the interpretation of the basic structure doctrine. The court unanimously ruled that the power of the Parliament of India to amend the constitution is limited by the constitution. Hence the parliament cannot exercise this limited power to grant itself an unlimited power. In addition, a majority of the court also held that the parliament's power to amend is not a power to destroy. Hence the parliament cannot emasculate the fundamental rights of individuals, including the right to liberty and equality.

The ruling struck down sections 4 and 55 of The Constitution (Forty-second) Amendment Act.

"Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual"[78] – Chandrachud J., Minerva Mills Ltd. & Ors. Vs. Union of India & Ors.

This case clearly shows the relationship between the judicial review, Fundamental Rights and Constitutionalism.

Judicial Review

A court's power to review the actions of other branches or levels of government, esp., the court's power to invalidate legislative and executive action as being unconstitutional[79].

As we all know, the main law making power in India is vested with legislature. Since the representatives in the legislative bodies are directly elected with an exception of the Rajya Sabha (the Upper house of the Indian Parliament) and Legislative councils in the state, it is normally a matter of fact that it is considered that the decisions made by these representatives actually voice the opinion of the people.

The members of such legislature change after a certain fixed tenure and the party with respect to majority in the house also changes. The legislature is entrusted with the responsibility of being compassionate towards the demands of every sect and community and is expected not to give into popular demand. It is also expected that the majority party in the legislature will never do any act that reflects its personal ambitions.

To stop the party in power from becoming autocratic and despotic, it was felt that a tab has to be kept on the ruling party by an agency that is out of its control and free to present a dissenting

[77] Minerva Mills Ltd. & Ors. Vs. Union Of India & Ors., 1980 AIR 1789(SC), 1981 SCR(1) 206(SC), 1980 SCC(3) 625(SC)
[78] Ibid, Paragraph 263
[79] Black's law dictionary, west group,7th edition,1999, pg. 852

opinion against a government policy or decision. It has come up when it was needed and has evolved since then. This practice is commonly called judicial review and is practised by judiciary.

America is said to be the home of judicial review. It was in the case of Marbury vs. Madison,[80] where this concept was given a concrete base. Judge John Marshall, the presiding judge, said that Constitutional interpretation by the courts does not by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.[81] From this day onwards, this system has been adopted as the principal model for keeping a check on the legislature. The concept of Judicial Review is one of the most distinctive feature of the American constitution. The most important function of judicial review is to -

1) Keep a check on the government action and legitimize government action

2) To protect the Constitution from any undue encroachment by the government.

Judicial Review: A Safety Device

The concept of judicial review can be compared to a **fuse** that we have in an **electric circuit**. As soon as the **electric current** goes beyond a designated limit, the fuse blows off and the whole circuit is disconnected so as to prevent a potential disaster like a fire or an electric shock. In the context of this example, the judiciary can be assumed as a fuse and the legislations passed by the government can be assumed as the electric current. As soon as the government goes beyond its ambit to pass a legislation that is beyond its authority, contravenes fundamental rights or alters the basic structure of the constitution, the fuse, i.e., the judiciary steps in so as to stop a smooth passage for any such legislation. If the judiciary is absent, an unconstitutional legislation can lead to havoc in the society, both due to the actions of the government and due to unrest caused by the people opposing such legislation.

Judicial Review and Constitutionalism in India

The first case where the process of judicial review first came up in India was Shankari Prasad vs. Union of India[82]. The question was whether the fundamental rights can be amended under Article 368 of the constitution.[83]This case was related to the First Amendment Act (1951), which curtailed the right to property as a fundamental right guaranteed by article 31. The question put up in front of the court was related to the fact that whether the first amendment infringed the article 13[84] of the constitution which said that any law abrogating the fundamental rights would

[80] Marbury Vs. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)

[81] Alexander Hamilton, The Federalist, Modern Library ed., 1937, No. 78 at 506 (Extracts Used)

[82] Shankari Prasad Vs. Union Of India,1951 AIR 458 (SC), 1952 SCR 89 (SC)

[83] Const. Of India, Art. 368, Part-XX

[84] Const. Of India, Art. 13, Part-III

be null and void, the word law in this article meant any law. It was argued that the "State in Article 12[85] included Parliament and the word "law" in Art. 13(2), therefore, must include constitutional amendment. The Supreme Court, however, rejected the above argument and held that the power to amend the constitution including the fundamental rights is contained in Art.368[86], and that the word 'law' in Art. 13(8) includes only an ordinary law made in exercise of the legislative powers and does not include constitutional amendment which is made in exercise of constituent power. Therefore, a constitutional amendment will be valid even if it abridges any fundamental rights.

The same decision was taken in the Sajjan Singh vs. State of Rajasthan[87]. It was held that any legislation passed by the Parliament is outside the purview of judicial review. (Unlike Shankari Prasad's case, this was not a unanimous judgement. Only 3 out of 4 judges who constituted the bench for the purpose held that Shankari Prasad's case was rightly decided. The remaining two judges Madhokar J. and Hidayatullah J. did not express any opinion). Afterwards, there was a total change in the decision making with regards to this aspect. The next case that came up before the Supreme Court was Golak Nath vs. State Of Punjab[88]. The Supreme Court also had an opportunity to reconsider its earlier decisions in Shankari Prasad's Case and Sajjan Singh's Case. The Supreme Court in its decision overruled the decision in the previous two cases with a majority of 6 to 5 and said that no legislature can be passed in contravention to the part-III of the Constitution.

After this judgement, the legislature brought in 24th amendment to counter the difficulties thrown by Golak Nath case. Under the amendment, the Parliament primarily inserted a new clause in Article 368[89]. The new clause (1) in Article 368[90] provides:

"Notwithstanding anything in this constitution, Parliament may in exercise of its constituent power amend by way of addition variation or repeal any provision of this constitution in accordance with the procedure laid down in this Article." This is where the things really went out of hand and we got a glimpse of the tyranny and autocratic nature that a government may start to profess if its powers are kept unchecked."

The Infamous Indira Gandhi Case[91]

In 1971, Raj Narain had contested the general elections against Indira Gandhi, who represented the constituency of Rae Bareilly at Lok Sabha , the lower house of the Indian Parliament. Indira was re-elected and her party won majority at the Parliament. Raj Narain filed a petition alleging that Indira Gandhi used bribery, government machinery and resources to gain an unfair advantage in contesting the election. Narain specifically charged Indira of using government

[85] Const. Of India, Art. 12, Part-III
[86] Const. Of India, Art. 368, Part-XX
[87] Sajjan Singh Vs. State Of Rajasthan, 1965 AIR 845 (SC), SCR(1) 933 (SC)
[88] I.C. Golaknath & Ors Vs. State Of Punjab & Anr, 1967 AIR 1643 (SC), 1967 SCR(2) 762
[89] Const. Of India, Art. 368, Part-XX
[90] Ibid, 21
[91] Raj Narain & Ors Vs. State of Uttar Pradesh 1975 AIR 865(SC), 1975 SCR(3) 333(SC), 1975 SCC(4) 428(SC)

employees as election agents and for organising campaign activities in the constituency while still on the payroll of the government[92].

On June 12, 1975 Justice Jagmohanlal Sinha found Indira Gandhi guilty of electoral malpractices. Sinha declared the election verdict in the Rae Bareilly constituency "null and void," and barred Indira from holding elected office for six years[9394].
While Sinha had dismissed charges of bribery, he had found Indira guilty of misusing government machinery as a government employee herself. The court order gave the Congress (R) twenty days to make arrangements to replace Indira in her official posts. Indira appealed the verdict to the Supreme Court of India, which granted a conditional stay of execution on the ruling on June 24, 1975[95] .On November 7, 1975 the Supreme Court of India formally overturned the conviction[96].

In all the above cases, we see the judiciary acts like a watchdog to keep a check in the powers of the Legislature. It has been doing so in the present times in cases related to public and social welfare. By keeping a tab on the power of governments, it acts as a very important instrument of promoting the constitutionalism and in the past has protected the fundamental rights and the basic structure when they were under blatant attack by a haughty government that was under no control whatsoever.

Conclusion

Landmark judgements related to Fundamental rights which limit the power of the government and the process of Judicial Review clearly indicate the need and importance of a whip on the government. These judgements have also assisted in understanding the relationship between the Fundamental Rights, Judicial Review and Constitutionalism. Constitutionalism becomes increasingly important as people are now more and more aware of their legal rights and a government may now have a strong revolution to deal with if it steps beyond its ambit. A clear authority has now been laid down by the Judiciary and it is an assurance to the people by the Courts that the judiciary will always stand for the welfare of the people even in tough times when the government threatens to be despotic and autocratic. This paper has clearly succeeded in its objective of showing how and why the system of checks and balances is necessary. It was necessary to set a clear example to state that no government can come in and change the basic structure as per its whims and fancies. An elaborate information about the basic concepts such as fundamental rights also goes a long way in helping us understand the topic on the whole.

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[92] Ghosh ," Indian Emergency of 1975-77" , Mount Holyoke College, http://mtholyoke.edu/ ~ghosh20p/page1.html
[93] The Library of Congress, American Memory, "The Rise of Indira Gandhi", http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+in0029)
[94] Katherine Frank, Indira: The Life Of Indira Nehru Gandhi. Houghton Mifflin Harcourt (2002), p. 371
[95] Ghosh ," Indian Emergency of 1975-77" , Mount Holyoke College, http://mtholyoke.edu/ ~ghosh20p/page1.html
[96] G. G. Mirchandani, 320 Million Judges. Abhinav Publications (2003) p 236

This paper has supplemented the hypothesis that Fundamental Rights and Judicial Review act as instruments to promote the Constitutionalism with suitable Cases, opinions of jurists, amendments. Each concept was adequately covered and we the authors of this paper hope that this paper has achieved its objective in a positive manner.

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E-SURVEILLANCE: USE OR ABUSE

ANKITA SINGH *

Introduction

We are living in the digital age where communication is happening through the internet whether through smart phones or computer system. According to the Oxford dictionary, Surveillance means close observation of a person or groups, especially the one who is under suspicion or the act or observing or the condition of being observed. The world is changing and so as criminals, especially terrorist activities and other cybercrimes. To counter crimes, government worldwide has launched surveillance schemes so as to keep a check on terrorist and criminal activities and India is not an exception to it. But with these surveillance policies another question arises and that is Privacy of the citizens because there data is accessed by the government authorities without their consent. Personal data is the incorporeal property of a person and it is the government's duty to protect this data by creating a strong legal framework for protection of right of privacy. India is lacking in all the requisites which are necessary for protection of netizens in cyberspace regarding their rights like privacy, protection etc.

Some rights are inalienable for humans and Right to privacy is one of them. Privacy is the ability to control the social information a person release to the public. Privacy isn't about keeping things away from the public eye; it's about choosing what the public sees. The right to privacy is guaranteed under the Universal Declaration of Human Rights, and the International Covenant on Civil & Political Rights, to which India is a state party. The Constitution of India does not patently grant the fundamental right to privacy to its citizens. However, the Courts have read the right to privacy into the other existing fundamental rights, i.e., freedom of speech and expression under Article 19(1) (a) and right to life and personal liberty under Article 21 of the Constitution of India.

Globally, the year 2012- 2013 has witnessed a new trend of governance related to the digital world and that is "surveillance systems". The world has noticed the global surveillance system of the United States of America (USA) which is known as PRISM by National Security Agency (NSA) which was revealed by Edward Snowden. Electronic Surveillance (E- Surveillance) is rampant all around the world and India is not an exception to it. After USA's PRISM revelation, the debate of Right to Privacy and Surveillance came into the

picture. The world is trying to find a right balance between them and the best example of it is, recently the United Nations General Assembly has adopted a resolution to protect the right to privacy in the digital age amidst the growing debate surrounding the controversial mass surveillance programs of the US spy agencies.[97]

Indian's legislative framework and surveillance policies are not adequate to deal with future threats and there is an urgent need to amend the existing legal framework as well as to introduce strong and effective policies in order to protect privacy of individuals in the country. In India, the legislature should pass such acts and rules in relation to working with agencies, powers and authorities under whom surveillance will be done, protection and destruction of such data collected during surveillance and how far the privacy of the individual is secured. To combat other criminal activities, government itself is committing an unconstitutional act i.e. infringing right to privacy by not clearly stating policies, objectives, and accountability of surveillance agencies.

Where the world is trying to move towards a more secure and safer digital world and how to protect digital rights of citizens, India is totally on different path and implementing a very comprehensive surveillance system in the country. E-Surveillance is very much rampant in India that also without any legal framework or we can say with a very weak legal framework. India has launched Projects like Aadhar (UID), National Intelligence Grid (NATGRID), Crime and Criminal Tracking Network and Systems (CCTNS), National Counter Terrorism Centre (NCTC), Central Monitoring System (CMS), Centre for Communication Security Research and Monitoring (CCSRM), Internet Spy System Network and Traffic Analysis System (NETRA) of India, etc. None of them are governed by any Legal Framework and none of them are under Parliamentary Scrutiny.

The two laws covering interception are the Indian Telegraph Act of 1885 and the Information Technology Act of 2000. There are no safeguards for right to privacy. IT Act, 2000 has been amended in 2008 which give enormous, unregulated, and unaccountable power to the government authorities for E- Surveillance. It is now wide open to misuse by Indian Government and its Agencies.

The Government defence of surveillance policies is always the security reasons, but surveillance without transparency and proper legal framework is unconstitutional in a democratic country like India.

This paper is explaining the present situation of Indian society, the concept of privacy and legal provisions, surveillance schemes in India, analysis, legal provisions dealing with surveillance, conclusion for maintaining balance between security and right to privacy.

Concept of Privacy in India

Before analysing Indian legal framework of surveillance, it would be appropriate to briefly understand the perception of privacy in India because its culture is very different from the

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[97]General Assembly backs right to privacy in digital age; 19 December 2013, Available at: http://www.un.org/apps/news/story.asp?NewsID=46780&Cr=privacy&Cr1=#.UuEkGxC6bIU

western world. Privacy as a concept has been slow to develop in India, because of historical and social origin of the Indian society and the adoption of the joint family system where sharing of information is a way of life. A marginal group of Indians is concerned about privacy and keeping digital information secure in respect with technology. Earlier the Criminal Law gave protection for the person, property, and dwelling house and made it punishable to impute un-chastity to a female. The law of Torts protects individual's reputation and the property.

In **the Indian Constitution**, no fundamental right to privacy was explicitly guaranteed but judicial activism has brought the Right to Privacy within the realm of Fundamental Rights. The

Supreme Court construed the Right to Privacy in Article 21[98] by giving an extensive interpretation of the phrase Personal Liberty. This right is limited in nature. No general right relating to personal data protection has been developed so far. The possibility of judicial developments must be kept in mind when considering the scope of the Indian Legal Privacy framework. Some decisions of the Supreme Court address privacy matters are:

- Kharak Singh vs. State of Uttar Pradesh[99]

The Supreme Court concluded that the Article 21 of the Constitution includes "right to privacy" as a part of the right to "protection of life and personal liberty." The Court equated 'personal liberty' with 'privacy', and observed, that "the concept of liberty in Article 21 was comprehensive enough to include privacy and that a person's house, where he lives with his family is his 'castle' and that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy".

- Malak Singh vs. State of Punjab & Haryana[100]

The Supreme Court held that while exercising surveillance over reputed bad characters, habitual offenders, and potential offenders the police should not encroach upon the privacy of a citizen so as to offend his rights under Article 21 and Article 19 (1) (d).

- R. Rajagopal vs. State of Tamil Nadu[101]

The Court held that "A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent- whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages."

In addition, the judiciary of India has come up with its own customized case law to deal with the issue of protection and preservation of privacy. In the landmark case of **Shashank Shekhar Mishra vs. Ajay Gupta**[102], the Hon'ble **Delhi High Court** has held as under:

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[98] Article 21 of Indian Constitution states "no person shall be deprived of his life or personal liberty except according to procedures established by law."
[99] (AIR 1963 SC 1295)
[100] (AIR 1981 SC 760)
[101] [(1995) 3 LRC 565; AIR 1995 SC 264]
[102] CS (OS) No. 1144/2011

"The right to privacy has been recognized as a valuable right of an individual which is implicit in his right to life and liberty which is guaranteed by Article 21 of the Constitution. The right of privacy does encompass and afford protection of personal intimacies of family, marriage, friendship and other matters which are of a private nature. It is a right to be let alone and everyone is entitled to safeguard his privacy irrespective of the kind of life he is leading. No one has a right to peep into the private life of another person without his consent and if he does so, he would be violating the right to privacy of the person concerned and would be liable to pay damages in an action under the law of torts….."

Above judgements shows that the right to privacy is recognized in Indian law and the Judiciary has played an important role in it, but no specific legislation pertaining to privacy has been enacted in India. However, one could claim that some statutes provide some kind of safeguards.

India is still at a very early stage of developing Privacy and data protection legal framework. In India, a survey has been done by 'PreCog' which is a group of researchers at the Indraprastha Institute of Information Technology, Delhi, which studies, analyses, builds and evaluates security and privacy aspects of complex networked systems like social networking sites, including Twitter and Facebook. Some observations of the report are:[103]

- "About 75 per cent of the participants had never read the privacy policy on any website that they interact with and they don't see privacy policy of a website before sharing his/her personal information."
- "Participants were not aware of various privacy issues related to cameras in public places, and others taking pictures in public places."
- Majority of them felt passwords to be the most protected Personally Identifiable Information (PII) and then, financial information (bank, credit card details).
- In the context of mobile phones, privacy invasion through somebody specifically taking picture of the individual is of more concern than pictures/videos taken through CCTV and the likes, while about 40 per cent of the participants would never save/share personal information in/through e-mails.
- The citizens have misinformed mental models of the privacy situation, as "participants felt there were privacy laws whereas there is no privacy law in India." One of the patterns that were observed across participants was that, all of them felt very concerned about financial privacy.

The above observation shows the reality of Indian society regarding knowledge about privacy and online privacy. The society needs to understand the concept and legal framework of privacy, especially in this era of digital and the true nature of surveillance policies of government and in which manner it is impacting our lives.

[103] 'Most Indians ignorant about privacy issues related to Internet: Study' (The Economic Times 2012) <http://articles.economictimes.indiatimes.com/2012-12-09/news/35705476_1_privacy-issues-personally-identifiable-information-privacy-invasion> (Last accessed 8 September, 2014)

India does not have a proper legal framework. India has adopted its own customized approach to deal with privacy. The first thing to note is that India does not have any dedicated legislation on privacy, unlike many other countries. With the advent of the electronic ecosystem in India, there has been an enhanced awareness about the need for protecting personal space. Consequently, in practical terms, privacy has been given a tremendous boost. However, the law in this regard has not yet matched the expectations of the people. The privacy protection bill is pending before the parliament.

Surveillance and India

Surveillance Industry in India

In light of whole surveillance regime in India, it is necessary to know the surveillance industry in India. Some of the major Indian surveillance technology companies are:

1. **ClearTrail Technologies**: It is an Indian company based in Indore. Com trail is an integrated product suite for centralized interception and monitoring of voice and data networks. ComTrail is deployed within a service provider network and its monitoring function correlates voice and data intercepts across diverse networks to provide a comprehensive intelligence picture. Its key features include the following:

    - Equipped to handle millions of communications per day intercepted over high speed STM & Ethernet Links
    - Doubles up as Targeted Monitoring System
    - On demand data retention, capacity exceeding several years
    - Instant Analysis, across thousands of Terabytes
    - Correlates Identities across multiple networks
    - Speaker Recognition and Target Location

2. **xTrail: Targeted IP Monitoring:** xTrail is a solution for interception, decoding and analysis of high speed data traffic over IP networks and independently monitors ISPs/GPRS and 3G networks. xTrail has been designed in such a way that it can be deployed within minutes and enables law enforcement agencies to intercept and monitor targeted communications without degrading the service quality of the IP network. This product is capable of intercepting all types of networks -including wireline, wireless, cable, VoIP and VSAT networks- and acts as a black box for "record and replay" targeted Internet communications. In short, xTrail's key features include the following:

    - Pure passive probe
    - Designed for rapid field operations at ISP/GPRS/Wi-Max/VSAT Network Gateways
    - Stand-alone solution for interception, decoding and analysis of multi Gigabit IP traffic

- Portable trolley based for simplified logistics, can easily be deployed and removed from any network location
- Huge data retention, rich analysis interface and tamper proof court evidence
- Easily integrates with any existing centralized monitoring system for extended coverage

3. QuickTrail: Tactical Wi-Fi Monitoring: QuickTrail is designed to gather intelligence from public Internet networks, when a target is operating from a cyber cafe, a hotel, a university campus or a free Wi-Fi zone. In particular, QuickTrail is equipped with multiple monitoring tools and techniques that can help intercept almost any wired, Wi-Fi or hybrid Internet network so that a target communication can be monitored. QuickTrail can be deployed within fractions of seconds to intercept, reconstruct, replay and analyse email, chat, VoIP and other Internet activities of a target. This device supports real time monitoring and wiretapping of Ethernet LANs. QuickTrail is an "all-in-one" device which can intercept secured communications, active and passive interception of Wi-Fi and wired LAN and capture, reconstruct and replay. This device also enables the remote and central management of field operations at geographically different locations. QuickTrail's key features include the following:

- Conveniently housed in a laptop computer
- Intercepts Wi-Fi and wired LANs in five different ways
- Breaks WEP, WPA/WPA2 to rip-off secured Wi-Fi networks
- Deploys spyware into a target's machine
- Monitor's Gmail, Yahoo and all other HTTPS-based communications
- Reconstructs web-mails, chats, VoIP calls, news groups and social networks

Law and Surveillance

India has five laws which regulate surveillance[104]

1. The Indian Telegraph Act, 1885

2. The Indian Post Office Act, 1898

3. The Indian Wireless Telegraphy Act, 1933

4. The Code of Criminal Procedure (Cr. PC), 1973: Section 91

5. The Information Technology (Amendment) Act, 2008

The Indian post Office Act does not cover electronic communications and the Indian Wireless Telegraphy Act lacks procedure which would determine if surveillance should be targeted or not. Any act does not cover mass surveillance. Moreover, targeted interception in India, according to these laws requires case-by-case authorization by either the home secretary or the secretary department of information technology. In other words, unauthorized mass surveillance is not

[104] Ramy Raoof, "Spy Files 3: WikiLeaks Sheds More Light on The Global Surveillance Industry".

technically permitted by law in India. The Indian Telegraph Act mandates that the interception of communications can only be carried out on account of 'public emergency' or 'public safety'. However, the Information Technology Amendment Act 2008 removed the preconditions of public emergency or public safety, and instead expanded the power of the government to order interception for the "investigation of any offense".

The interception of Internet communications is mainly covered by the Section 69 and Section 69B under IT Act, 2000, and 2009 Rules under IT Act. According to these Sections, an Intelligence Bureau officer who leaked national secrets may be imprisoned for up to three years, while Section 69 not only allows for the interception of any information transmitted through a computer resource, but also requires that users disclose their encryption keys upon request or face a jail sentence of up to seven years.

While these laws allow for the interception of communications and can be viewed as widely controversial, they do not technically permit the mass surveillance of communications. However, the Unified Access Services (UAS) License Agreement regarding the Central Monitoring System mandates mass surveillance and requires ISP and Telecom operators to comply. Through the licenses of the Department of Telecommunications, Internet service providers, cellular providers and telecoms are required to provide the Government of India direct access to all

communications data and content even without a warrant, which is not permitted under the laws on interception. These licenses also require cellular providers to have 'bulk encryption' of less than 40 bits, which means that potentially any person can use off-the-air interception to monitor phone calls. However, such licenses do not regulate the capture of signal strength, target numbers like IMSI, TIMSI, IMEI or MSI SDN, which can be captured through ClearTrail's mTrail product.

More importantly, following allegations that the National Technical Research Organization (NTRO) had been using off-the-air interception equipment to snoop on politicians in 2011, the Home Ministry issued a directive to ban the possession or use of all off-the-air phone interception gear. As a result, the Indian Government asked the Customs Department to provide an inventory of all such equipment imported over a ten year period, and it was uncovered that as many as 73,000 pieces of equipment had been imported. Since, the Home Ministry has informed the heads of law enforcement agencies that there has been a complete_ban on use of such equipment and that all those who possess such equipment and fail to inform the Government will face prosecution and imprisonment. In short, ClearTrail's product, mTrail, which undertakes off-the-air phone monitoring, is illegal and Indian law enforcement agencies are prohibited from using it.

In short, the legality of ClearTrail's surveillance technologies remains ambiguous. While India's ISP and telecom licenses and the UAS License Agreement mandate mass surveillance, the laws - particularly the 2009 Information Technology Rules- mandate targeted surveillance and remain silent on the issue of mass surveillance. Technically, this does not constitute mass surveillance legal or illegal, but rather a grey area. Furthermore, while India's Telegraph Act, Information Technology Act and 2009 Rules allow for the interception, monitoring and decryption of communications and surveillance in general, they do not explicitly regulate the various types of surveillance technologies, but rather attempt to "legalize" them through the blanket term of surveillance. One thing is clear: India's license agreements ensure that all ISPs and telecom operators are a part of the surveillance regime. The lack of regulations

for India's surveillance technologies appears to create a grey zone for the expansion of mass surveillance in the country.

Surveillance has always been considered as an effective crime prevention and crime detention measure. The development of information technology has greatly facilitated surveillance not only of communication activities but also e-mails, file-transfers or location in cyberspace.[105]

The Indian Information Technology Act, 2000 is India's mother legislation dealing with electronic format as also use of computers, computer systems, computer networks, computer resources, and communication devices as also data and information in the electronic form. The said law enacted in the year 2000 did not deal with privacy. However, the Information Technology Act, 2000 was amended by the Information Technology (Amendment) Act, 2008 which carved out two provisions for protecting privacy.[106]

Further the Information Technology (Amendment) Act, 2008 has given various powers to the Government to make various rules and regulations to carry out the objectives and purposes of the Information Technology Act, 2000. Under those powers, Central Government on October 27, 2009, has passed Information Technology (Procedure and Safeguard for Interception, Monitoring, and Decryption of Information) Rules, 2009[107] in which it was laid down that no person shall intercept, monitor or decrypt any information available on any computer resources except an order from Home Secretary or Joint Secretary, Ministry of Home Affairs has been obtained to do so. According to Rule 4, the central government has power to delegate such authority to intercept, monitor or decrypt any information on any computer resource to any agency.

Also, Information Technology (Procedures and Safeguards for blocking of access of Information by Public) Rules, 2009[108] have been passed by parliament in order to block access of any information on any computer resource by public. According to the Rules, the government has the power to block any information, whether generated, transmitted, stored or received or hosted by any computer resource for any reasons mentioned in section 69A of the Information Technology Act, 2000 i.e. sovereignty and integrity of India, defense of India, friendly relation with foreign state, security of state etc.

The Central Government on 11th April, 2011, has come up with the Information Technology Rules, 2011 including the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 and Information Technology (Intermediary Guidelines) Rules, 2011. These Rules have a bearing upon the protection of privacy of data and information in the electronic form. According to 2011 rules, user are required to establish their identity proofs before using the computer system and cyber cafes are required to keep scanned copy or photocopy of the identity proofs and it should be retained for 1 year by them. In addition, the cyber cafe "may" photograph a user using a "web camera" and such photograph would be included in the log register maintained by the cyber cafe. The cyber cafe is required to maintain a detailed log of every user that includes the user's name,

[105] Dr. V Paranjape, 'Legal Dimensions of Cyber Crimes and Preventive Laws', 246, (Central Law Agency, 2010)
[106] Section 43A and 72A
[107] Available at: http://cca.gov.in/cca/sites/default/files/files/gsr780.pdf
[108] Available at: http://cca.gov.in/cca/sites/default/files/files/gsr781.pdf

address, gender, contact number, type and detail of identification document, date, computer terminal identification, log-in time and log out time. For at least one year, the cyber cafe must also retain the complete history of websites accessed using computer resources at the cyber cafe and all logs of proxy server installed at cyber cafe. Any officer authorized by the government has powers to check and inspect cyber cafes and the log registers maintained at any time. There is absence of any monitoring mechanism, due to which the data and personal details of the citizens are in danger. It is the privacy which ultimately suffered by a citizens.

The IT Act confers vast powers of interception and monitoring under Sections 66-69 of that Act. These powers extend to issuing directions requiring any person in charge of a computer to extend all facilities to decrypt information. In other words, the government may hack in order to gain access to information that it lawfully requires. Section 66 of the IT Act creates a broad offence of "dishonestly or fraudulently" hacking or tampering with source code, which applies to the government also but this is subject to Section 84 of the IT Act, which immunizes actions by officials undertaken in good faith and in pursuance of the provisions of the Act.

Various programmes of Surveillance in India

At the end of 2012, major telecom companies in India agreed to grant the government real-time interception capabilities for the country's one million BlackBerry users. The Indian government has consistently requested that major web companies set up servers in India to allow them to monitor local communications.[109] Pranesh Prakash, Policy Director at the Centre for Internet and Society, argues: "In India, we have a strange mix of great amounts of transparency and very little accountability when it comes to surveillance and intelligence agencies."[110]

India is one of the worst offenders globally both for take down and for user requests, though on user information it is ranked after the US. The Google Transparency Report shows that India ranks second – after the United States – in the number of government requests for users data.[111] In August 2013, Facebook released a similar report. During the first six months of 2013, India ranks second in number of total requests (3,245 requests) and Facebook produced data in 50 percent of the cases.[112] It is possible that the data requested by the government will be used in criminal prosecutions for defamation, hate speech, or harming "communal harmony". This is problematic because these laws themselves are too vague and broad and do not protect freedom of expression adequately, resulting in disproportionate arrests and prosecutions merely for the expression of views on a blog, liking a post on Facebook, or writing a political tweet. Without privacy law and safeguards to protect data, the collection and retention of such data can be misused and generate a chilling effect among the Indian population.

[109] Firstpost, 'Telecos agree to real-time intercept for Blackberry messages' (31 December 2012), http://www.firstpost.com/tech/telecos-agree-to-real-time-intercept-for-blackberry-messages-573612.html

[110] Pranesh Prakash, New York Times, India Inc. (blog), 'How Surveillance Works In India' (10 July 2013), <http://india.blogs.nytimes.com/2013/07/10/how-surveillance-works-in-india/?_r=0>

[111] 'Google Transparency Report', Available at: <http://www.google.com/transparencyreport/userdatarequests/IN/>

[112] Facebook, 'Global Government Requests Report', Available at: <https://www.facebook.com/about/government_requests>

UID (AADHAR): The **Unique Identity (Aadhar)** is another program which is introduced in India under which the whole data related to address, name, occupation, finger-prints, retina scan is registered with the government. The Unique Identification Authority of India (UIDAI) asserts to provide privacy and ensures data protection, but the mechanism through which these objectives will be secured is extremely unclear. The UIDAI's responsibility for privacy begins only from the moment the information is transmitted to it by the Registrars, by which time the information has already passed through many hands, including the Enrolling Agency and the Intermediary, who passes on information from the Registrar to the UIDAI. Rather than setting out an explicit redress mechanism and a liability regime for privacy violations, the UID's documents stop at describing the responsibility of the Registrars as "fiduciary duty" towards the citizen's information. The Registrars are tasked with maintaining records of the data collected for a minimum period of six months. No maximum period is specified and Registrars are free to make what use of the data they see fit. In addition, the Registrars are mandated to keep copies of all documents collected from the Resident either in physical or scanned copies until the UIDAI finalizes its document storage agency.

In September 2011, the National Human Rights Commission, set up under the Human Rights Act, issued an opinion cautioning against the potential harms of the Aadhar scheme. The Commission noted the possible discriminatory effects of the scheme and the fact that no provision had been made in the Bill for compensation to the victim in case of breach.

Central Monitoring System: On the one hand India is lacking behind in implementing an effective legal structure for Privacy and Data Protection and on the other hand, taking other worst steps for making mockery of individual's privacy and data by introducing Central Monitoring System (CMS). CMS enables comprehensive and legal interception. The CMS allows authorities to intercept emails, cyber chats, monitor voice calls, SMS, MMS, GPRS, fax communications etc. Through this system Government will not require permission of the user or the company on whose server the data are saved. And it is unclear how this data will be used by the government. While the CMS is in early stages of launch, investigation shows that there already exists, Lawful Intercept and Monitoring (LIM) systems, which have been deployed by the Centre for Development of Telematics (C-DoT) for monitoring Internet traffic, emails, web-browsing, Skype and any other Internet activity of Indian users. Eventually, it will be able to target any of India's 900 million landline and mobile phone subscribers and 120 million Internet users. Till 2015, two surveillance and interception systems will run in parallel — the existing State-wise, 200-odd Lawful Intercept and Monitoring (LIM) Systems, set up by 7 to 8 mobile operators in each of the 22 circles, plus the multiple ISP and international gateways — alongside the national rollout of CMS. The aim is to cover approximately one dozen State by the end of 2013-14.113 In January 2012, the government had admitted to intercepting over 1 lakh phones and communication devices over a year, at a rate of 7,500–9,000 per month. It is possible that the data kept by these bodies can be misused by any private entity for any political or terrorist purpose which can endanger public privacy and safety at large. Instead of safeguarding its citizen from USA's PRISM, India is creating its own surveillance program. CMS is a wrong step taken by government and Indian population is majorly digitally illiterate due to which there is not much protest against this policy.

[113] New Delhi, June 21, 2013; India's surveillance project may be as lethal as PRISM; http://www.wikileaks-forum.com/india/68/seo/19729/

Following the Mumbai 2008 terrorist attacks, the Telecom Enforcement Resource and Monitoring (TREM) cells and the Centre for Development of Telematics (C-DOT) started preparing the CMS. As of April 2013, this project is being manned by the Intelligence Bureau, while agencies which are planned to have access to it include the Research & Analysis Wing (RAW) and the Central Bureau of Investigation (CBI). ISP and Telecom operators are required to install the gear which enables law enforcement agencies to carry out the Central Monitoring System under the Unified Access Services (UAS) License Agreement.

The data monitored and collected through the CMS will be stored in a centralised database, which could potentially increase the probability of centralized cyber-attacks and thus increase, rather than reduce, threats to national security. [114]

[114] Spy Files 3: WikiLeaks Sheds More Light On The Global Surveillance Industry by RamyRaoof. http://cis-india.org/internet-governance/blog/spy-files-three

Opponents of the system and human rights advocates worry the government will abuse the CMS to monitor or arrest political critics rather than to enhance national security as intended.[115] http://www.indexoncensorship.org/2013/11/india-online-report-freedom-expression-digital-freedom-3/ - footnote37Arguably, CMS may violate Article 21 of the Constitution guaranteeing "personal liberty". Concerns remain that without comprehensive privacy laws in India, the system will not be sufficiently accountable, and could chill free expression. Cynthia Wong, senior Internet researcher at Human Rights Watch, says: "The Indian government's centralized monitoring is chilling, given its reckless and irresponsible use of the sedition and Internet laws. A new surveillance capabilities have been used around the world to target critics, journalists, and human rights activists."

According to Google's 10th Transparency Report,[116] the Indian government has the second highest number of requests for data on users. The Indian government is among the top five governments across the globe requesting Google for data on users. According to Google's 10th Transparency Report, when it comes to user accounts for which information was requested, the government of India ranked second in the world. The Indian government made 2,794 requests for the period January to June 2014 across 5,002 user accounts. The government request for data is classified under two segments - content removal and user data requested. Google is yet to update the data on content removal requests from the Indian government. India was second to the US government, which made 12,539 requests across 21,576 accounts for the same period. Google received around 32,000 data requests from governments in the first six months of 2014, an increase of 15 per cent when compared to the second half of 2013, and two-and-a-half times more than when Google first started publishing the data in 2009. The legal fraternity and cyber law experts feel the increase in requests by the Indian government can be attributed to the inability of the existing cyber laws to handle such situation. "It certainly is not good for the Indian government to be ranked second in terms of the user data request. What needs to be seen is the legal basis of these requests. More importantly, if you look at last year, one thing is clear - the Indian cyber law is incapable of handling issues emanating from usage of social media," said Pavan Duggal, cyber expert and Supreme Court lawyer. He said it was only Article 66A within the Information Technology Act that dealt with a phenomenon called the internet or 'communication services'. The other reason for the high number of data requests, say legal experts, is the fact that a vast majority of the requests will be beyond the scope of the law. "Our authorities do not have the maturity to handle such a situation. Most of the time, data request would be done after some users would have commented negatively about a political party or a popular leader, and they authorities use the state machinery to initiate action," said a leading cyber law expert. Twitter's transparency report said it received 16 account information requests for 44 user accounts for the period January-June 30, 2014. This number has almost doubled from 27 for the period of July-December 31, 2013. In case of the popular social media platform

[115] Mahima Kaul, Index on Censorship, 'India's plan to monitor web raises concerns over privacy', http://www.indexoncensorship.org/2013/05/indias-plan-to-monitor-web-raises-concerns-over-privacy/ accessed on 5 September 2013.

[116] Business Standard Reporter, "Indian govt second highest seeker of internet users' private info, says Google", Pune, September 23, 2014. Available at: http://www.business-standard.com/article/current-affairs/indian-government-second-in-user-account-info-requests-google-report-114092201361_1.html

Facebook, it claims that total requests made by Indian law enforcement agencies for the period July-December 2013 was 3,598 across 4,711 user accounts.[117]

According to a **UN Report,** the extensive communication surveillance makes CMS like PRISM and it is "out of the realm of judicial authorization and allow unregulated, secret surveillance, eliminating any transparency or accountability on the part of the state".[118]

The Office of the UN High Commissioner for Human Rights recently presented a report in UNGA in September, 2014. The report states, "the technological platforms upon which global political, economic and social life are increasingly reliant are not only vulnerable to mass surveillance, they may actually facilitate it" on an unprecedented scale (para 2). Critically, the High Commissioner found that many governments have failed to meet their obligations under the right to privacy. Practices in many states have revealed "a lack of adequate national legislation and/or enforcement, weak procedural safeguards, and ineffective oversight." Combined with a "disturbing lack of governmental transparency," these failings have "contributed to a lack of accountability for arbitrary or unlawful interference in the right to privacy" (paras 47-48). The research of many of the undersigned organizations confirms this finding. The report elaborated on several issues:[119]

1. States should adopt a clear, precise, accessible, comprehensive, and non-discriminatory legislative framework to regulate all surveillance conducted by law enforcement or intelligence agencies (para 50).

2. Surveillance should be undertaken under accessible law with foreseeable effects in accordance with the rule of law, including the right to an effective remedy. In many states, the legal frameworks governing surveillance fail to meet this standard, generating consequent accountability and transparency concerns.

3. The interception, acquisition, and retention of data amounts to an interference with the right to privacy, regardless of whether data is subsequently consulted or used (para 20). In the context of mass surveillance programs, "[e]ven the mere possibility of communications information being captured creates an interference with privacy, with the potential chilling effect on rights," including free expression and association (para 20). It also follows that mandatory third-party data retention requirements, where governments require Internet or mobile service providers to store data about all customers, "appears neither necessary nor proportionate" (para 26).

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[117] Ibid

[118] United Nations Report on Surveillance. Available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf

[119] The report on surveillance by the UN High Commissioner for Human Rights at the Human Rights Council, submitted to the 27th Session of the UN Human Rights Council on 11 September, 2014 https://www.privacyinternational.org/news/press-releases/joint-civil-society-statement-on-privacy-in-the-digital-age

4. States must ensure effective oversight and remedy for violations of privacy through digital surveillance (paras 37-41). The report states that oversight by all branches of government and an independent civilian agency is essential to ensure effective protection of law. Effective remedies can come in a variety of forms, but must meet criteria that are well-established in human rights law.

5. The private sector should respect human rights if asked to facilitate surveillance or data collection or when providing surveillance technology to states (paras 42-46). Where Internet or telecommunications companies comply with government requests for user data or surveillance assistance without adequate safeguards, they risk complicity in resulting violations.

Recently in September, 2014, the report, titled India's Surveillance State, was released by Legal Services organisation Software Freedom and Law Centre.[120] According to the report, the union Government of India issues 7500-9000 telephone interception orders on an average each month. It becomes clear that Indian citizens are routinely and discreetly subjected to government surveillance on a truly staggering scale. The numbers in the report have been taken from May, 2014 RTI reply from Union Ministry of Home Affairs.

Conclusion

Protecting our data is more important now than ever because global, indiscriminate, mass data collection is increasing day by day. The principles formulated by the Electronic Frontier Foundation and Privacy International on communication surveillance should be taken into consideration by governments and law enforcement agencies around the world especially India. These principles are[121]:

- **Legality**: Limitations to the right to privacy must be prescribed by law
- **Legitimate purpose**: Access to communications or communications metadata should be restricted to authorised public authorities for investigative purposes and in pursuit of a legitimate purpose
- **Necessity**: Access to communications or communications metadata by authorised public authorities should be restricted to strictly and demonstrably necessary cases
- **Adequacy**: Public authorities should be restricted from adopting or implementing measures that allow access to communications or communications metadata that is not appropriate for fulfilment of the legitimate purpose

[120] Kim Arora, "Govt taps 9,000 phones every month: Report", TOI, Thursday, September 4, 2014, New Delhi & NCR Edition, P. 11

[121] Centre for Internet Society, 'What Does NSA PRISM Program Mean To India?', Available at: http://www.medianama.com/2013/06/223-what-does-nsa-prism-program-mean-to-india-cis-india/

- **Competent authority:** Authorities must be competent when making determinations relating to communications or communications metadata
- **Proportionality**: Public authorities should only order the preservation and access to specifically identified, targeted communications or communications metadata on a case-by-case basis, under a specified legal basis
- **Due process**: Governments must respect and guarantee an individual's human rights, that may interference with such rights must be authorised in law, and that the lawful procedure that governs how the government can interfere with those rights is properly enumerated and available to the public
- **User notification**: Service providers should notify a user that a public authority has requested his or her communications or communications metadata with enough time and information about the request so that a user may challenge the request
- **Transparency about use of government surveillance**: The access capabilities of public authorities and the process for access should be prescribed by law and should be transparent to the public
- **Oversight**: An independent oversight mechanism should be established to ensure transparency of lawful access requests
- **Integrity of communications and systems**: Service providers are responsible for the secure transmission and retention of communications data or communications metadata
- **Safeguards for international cooperation:** Mutual legal assistance processes between countries and how they are used should be clearly documented and open to the public
- **Safeguards against illegitimate access**: Governments should ensure that authorities and organisations who initiate, or are complicit in, unnecessary, disproportionate or extra-legal interception or access are subject to sufficient and significant dissuasive penalties, including protection and rewards for whistle blowers, and that individuals affected by such activities are able to access avenues for redress
- **Cost of surveillance**: The financial cost of providing access to user data should be borne by the public authority undertaking the investigation

Applying these above principles is a prerequisite, but may not be enough. Now is the time to resist unlawful and non-transparent surveillance. Now is the time for everyone to fight for their rights.

Addressing mass surveillance and unwarranted digital intrusions in India are both necessary steps to fight self-censorship and promote freedom of expression.

"Surveillance without adequate safeguards to protect the right to privacy actually risk impacting negatively on the enjoyment of human rights and fundamental freedoms."

"Our data reflects our lives…and those who control our data, control our lives"

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Governments around the world have long sought access to personal information about individuals. The past half century witnessed the rise of what **Professor Paul Schwartz** has described as the 'data processing model of administrative control', in which data are routinely collected and used for many purposes including to deliver social services, administer tax programmes, and collect revenue, issue licences, support hundreds of regulatory regimes ranging from voter registration to employee identity verification, operate public facilities such as toll roads and national parks, and for law enforcement and national security. [122]

[122] Fred H. Cate, James X. Dempsey, and Ira S. Rubinstein; "Systematic government access to private-sector data"; Available at: http://idpl.oxfordjournals.org/content/2/4/195.full.pdf+html

There are no laws that allow for mass surveillance in India. The two laws covering interception are the Indian Telegraph Act of 1885 and the Information Technology Act of 2000, as amended in 2008, and they restrict lawful interception to time-limited and targeted interception.

Apart from bizarre provisions of IT Act, in the licenses that the Department of Telecommunications grants Internet service providers, cellular providers, and telecoms, that require them to provide direct access to all communications data and content even without a warrant, which is not permitted by the existing laws on interception. The licenses also force cellular providers to have 'bulk encryption' of less than 40 bits.

National security has widely been cited as the reason for this system, but having access to massive amounts of data is not necessarily going to make people safer, rather this has creating a sense of insecurity in the minds of citizens, and it could be a target of terrorists to have this data. According to Cynthia Wong, an Internet researcher at New York-based Human Rights Watch, " If India doesn't want to look like an authoritarian regime, it needs to be transparent about who will be authorized to collect data, what data will be collected, how it will be used, and how the right to privacy will be protected."

In India, legislature should pass such acts and rules in relation to working of agencies, powers and authorities under whom surveillance will be done, protection and destruction of such data collected during surveillance and how far the privacy of individual is secured, the provisions as to penalties for misuse of such information by any governmental body or person has not been given. It is possible that the information obtained can be used for illegal purposes.

There is also a need of defining the word privacy again in modern age as the development in IT sector and surveillance industry has changed the concept of privacy and laws governing it. Major constitutional and structural changes are needed in domestic legal systems as well as in the international arena so as to entrench the right to privacy as a basic right geared to protect citizens from intrusions into their privacy. An innovative and creative judiciary can also play an important role in developing privacy legal regime. The best possible step is to make and apply the laws more stringent.

In the contemporary surveillance state, we are all suspects and mass surveillance technologies, which can potentially pose major threats to our right to privacy, freedom of expression and other human rights. And probably the main reason for this is because surveillance technologies in India legally fall in a grey area. Thus, it is recommended that law enforcement agencies in India regulate the various types of surveillance technologies in compliance with the International Principles on Communications Surveillance and Human Rights.

Suggestions

- ✓ **Implementation of Law:** Although there is no or very weak legal system of privacy but effective implementation could be done of the present law. Loopholes should be removed in the law should be considered as foremost objective of the Government and departments dealing with it. While making cyber policy, Government should also include public participation, so that they could get a chance to understand and give suggestions for regulating cyber space.

- ✓ **Privacy Specific Legislation:** Privacy legislation would regulate the collection, access to, sharing of, retention, and disclosure of all personal data within India. Such legislation could also regulate surveillance and the interception of communications, in compliance with the right to privacy and other human rights. A Privacy Commissioner would also be established through privacy legislation, and this expert authority would be responsible for overseeing the enforcement of the Privacy Act and addressing data breaches. But clearly, privacy legislation is not enough. The various privacy laws of European countries have not prevented the NSA from tapping into the servers of some of the biggest Internet companies in the world and from gaining access to the data of millions of citizens around the world. Yet, privacy legislation in India should be a basic pre-requisite to ensure that data is not breached within India and by those who may potentially gain access to Indian national databases like government authorities or agencies.

- ✓ **Long Term Approach:** From seeing present situation in India, it seems as India is dealing surveillance and privacy issue on situational basis. Rather dealing with the whole problem and fix the legal ambiguity, it particularly deals with the case in the limelight. IT Act, 2000 did not incorporate the issue of Privacy and data protection originally. Through 2008 amendment in the act and Rules issued in 2011 incorporate the sections which in large extent deal with the issue. India needs long term approach/ framework to safeguards citizen's Privacy and Data Protection. Like USA and United Kingdom, India should also make a Privacy and Data Protection sector specific legislations.

- ✓ **Transparency and Accountability in Laws:** Surveillance is somewhat necessary in every society but without transparency and accountability it is a disastrous combination and it is unconstitutional for a democratic country like India where present laws are infringing very basic right of humans i.e. right to privacy. There is very urgent need for India to be transparent in terms of its surveillance programmes and it should make authorities accountable who are accessing data of citizens.

- ✓ **Public Participation and Awareness:** India needs to introduce some safeguards against abuse of the surveillance systems, such as strong privacy laws, as well as engaging the Indian public in an open debate about what exactly such extraordinary surveillance power might be used for.

The issue figured in a speech made by Navi Pillay, United Nations High Commissioner for Human Rights at the Council session, where she had said referring to the scope of the surveillance regimes of countries including United States and the United Kingdom, "Laws and policies must be adopted to address the potential for dramatic intrusion on individuals' privacy which have been made possible by modern communications technology. While national security concerns may justify the exceptional and narrowly-tailored use of surveillance, I would urge all

States to ensure that adequate safeguards are in place against security agency overreach and to protect the right to privacy and other human rights." [123]

[123] T. Ramachandran, , "Surveillance and the right to privacy", October 9, 2013, Available at: http://www.thehindu.com/todays-paper/tp-features/tp-opportunities/surveillance-and-the-right-to-privacy/article5215716.ece

PATENT EVERGREENING

"NOVRATIS AG CASE STUDY AND ITS IMPACTS ON INDIA"

ANIKET BHATTACHARYYA*

The Glivec Saga

Imatinib Mesylate (Glivec) is a cancer drug critical in prolonging the life of patients suffering from Chronic Myeloid Leukimia (CML)[124]. Imatinib Mesylate controls the cellular action that allows the cancer to grow but does not cure the disease[125], making this a drug which needs to be administered life- long unless an alternative treatment is found to be responsive. The Swiss giant, Novartis was producing and marketing this drug internationally, and Cipla, Ranbaxy, Natco and Hetero were all manufacturing the same drug within the domestic market. Novartis was selling the drug at a reported Rs.1.44 million (US 26,000 dollars) per patient per year[126]. The generic version of the drug in the Indian market was priced at Rs. 96,000 (US 2100 dollars) per patient per year[127]. Novartis had filed a mailbox application in 1998 in India for 'Glivec' in 2003 by virtue of section 92A of the Patents Act[128], and was granted EMR[129], pending the final decision in whether or not the patent would be granted. This EMR acted as a patent monopoly which led the generic manufacturers to stop selling or manufacturing 'Glivec'. Indian courts forbade most of the generic manufacturers from producing the medicine. With the over ten-fold increase in the price of the drug, Cancer Patients Association (CPAA) and various such other non-governmental organizations (NGOs)[130] had to withdraw their medical support. The patients of other countries who depended on the exportation of the medicine were also similarly affected.

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[124] Available at http://www.gleevec.com/index.jsp?usertrack.filter_applied=true&NovaId=293537695237201581

[125] Available at http://www.drugs.com/gleevec.html

[126] Novartis AG v. Union of India, 82, at 49 of the Judgment of 2013.

[127] Ibid.

[128] Novartis AG v. Union of India, 193, at 96, 2013. Also see, Mailbox Application: India amended her Patents regime in 1999 so as to be in sync with the provisions of the TRIPS agreement which came in to affect in 2005, and accordingly had incorporated this provision within its own legislature so as to protect pharmaceutical inventions. These applications were to be locked up in a 'mailbox' pending 'examination' which was to happen in 2005.

[129] 'Exclusive Marketing Rights ' This is a new provision was added in the Indian Patents Act 1970, as amended by the Act of 1999 w. e. f. 1995, granted for a period of 5 years till acceptance or rejection of patent application. The concept of Exclusive Marketing Rights has its origins in the Hatch – Waxman Act 1984, originally intended to give the inventor Exclusive Marketing Rights for a period of 5 years for an innovative drug. This provision was aimed at protecting the drugs which were either not patented or the ones whose had at the time of approval less than 5 years of protection remaining, available at http://ipindia.nic.in/ipr/patent/emr.htm. Also see, The Business Line, The Financial Daily from the Hindu Group of publications, Saturday, March 20, 2004, available at http://www.thehindubusinessline.in/2004/03/20/stories/2004032000220800.ht

CPAA hence moved to the Supreme Court against the EMR that was granted to Novartis[131]. It was claimed by these bodies that the substance that sought patent protection was nothing but a modification of an already existing substance and more over the applicants could not prove the enhanced efficacy clause[132]. Also, the non- availability and non- affordability of Glivec to the patients was a gross violation of Article 14, right to equality before law[133] and subsequently Article 21, right to life[134].

Novartis AG v. Union of India is a landmark judgment wherein the two judge bench of the Supreme Court of India denied the appellants patent protection for the product known as Imatinib[135]. India is widely known as the 'world pharmacy'[136], leading one to conclude that many of the underdeveloped nations rely on her and her generic market of drug manufacturers. The reason for denial of patent protection was that the product the Swiss company wanted to protect was a known substance and did not qualify as an invention under S. 2 (1) (j) and 2 (1) (ia) of the Patent Act[137]. Further the Supreme Court also considered the ambit of S.3 (d) of the Act[138], which prevents a person from getting patent protection for new forms of the same or already existing substance.

This means, if a person tries to patent an already existing product, he would be burdened with the proof for showing the enhanced efficacy of his invention over the already existing product. The Madras High Court in its judgment of August, 2007 upheld the constitutionality of section 3 (d), stating the "India was a welfare and developing country which is predominantly occupied by the people of the lower strata of society who are in fact below the poverty line, and hence have a constitutional duty to provide good health care to its citizens by giving them easy access to life saving drugs."[139] By doing so the Court would be condemning the possibility of 'ever- greening' by allowing the generic producers to keep on producing the drugs at a domestic level.

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[131] "According to CPAA there are 30,000 CML patients detected every year most of who are not covered by Novartis's drug donation program", The Times of India, Sunday Mailbox, and Apr. 22, 2007, available at http://www.cptech.org/ip/health/Glivec/amtc08072004.html

[132] Knowledge as Property; Issues in the Moral Grounding of Intellectual Property Rights, Chapter 6, at 224-226, Rajashree Chandra, Oxford University Press, 2010.

[133] Article 14, Right to Equality before the Law, Indian Constitution.

[134] Article 21, Right to Life, Indian Constitution.

[135] 4-(4-methylpiperazin-1–ylmethyl)-N-[4-methyl-3-(4-pyridin-3-yl,)(pyrimidin-2-ylamino);phenyl;benzamine. Derivative of N- phenyl -2 – pyrimidine amine, CGP 571481, 'Imatinib' as declared by the Word Health Organization.

[136] Chaudhuri, S. (2005). The WTO and India Pharmaceuticals Industry: Patent Protection, TRIPS and Developing Countries (Oxford: Oxford University Press.)

[137] Indian Patents Act, 1970.

[138] Ibid.

[139] Novartis AG v. Union of India & Others, (2007) 4 MLJ 1153.

Sarkaria, J. observed that "the object of patent law is to encourage scientific research, new technology and industrial progress"[140]. Patent protection is a kind of monopoly right conferred upon an inventor, it allows the holder to exploit his invention exclusively for a period of twenty years, within which period all others are excluded from using the invention. Patent protection not only gives an incentive to creativity, but serves as an inspiration for others. Patent finds itself a niche within the field of intellectual property. The risks of reverse engineering and disclosure of sensitive information are few of the many ways by which a non-registered invention can be commercially exploited by another, who is not the 'first' is or the 'true inventor'. The Allahabad High Court was of the same impression when it held; "that an invention is not a property right unless it has been patented."[141] In such a case, not being a registered patent further weakens the position of the inventor as no remedy will be available to him. Registration of patents allows the inventor to exert an authoritative exclusivity to his inventions. This essentially means that the inventor is entitled rightfully to claim the patent as his own property and use it in any manner he so pleases.

Patents: Then & Now

India being a part of the Commonwealth, inherited its intellectual property law from the English[142]. In 1970, the Indian Patents Act abolished product patents; subsequently in the 1990s during the Uruguay Rounds of the World Trade Organization India pledged to bring its Intellectual Property regime in tune with the TRIPS agreement[143]. In 1999 India allowed the filing of product and process patent for grant of exclusive marketing rights with retrospective effect from 1995. But the full product and process patent was reintroduced in 2005[144] during this lull the Indian pharmaceutical industry grew at rapid rate, ultimately becoming a net exporter and the fourteenth largest by value.

There has been a significant change in the economic, political condition of India since the enactment of the Act of 1911[145]. The Act of 1911 was unable to meet the needs of the society and was not keeping up with industrial development. Hence, in 1948 the Government appointed the Patents Enquiry Committee to review the working of patents in India. The final report of the Committee was submitted in 1950 and in 1953 the Patents Bill was introduced in the Lok Sabha. The Bill was largely modelled on the UK Patents Act 1949, however the Bill lapsed on the dissolution of the Lok Sabha.

Subsequently Ayyanagar, J. was appointed to study and examine afresh the patent laws in India in 1957 and advise the government on the changes required to be made. He submitted a comprehensive report in September of 1959 which essentially became the basis of the Patents Bill of 1965, this is typically viewed as the blueprint of Indian patent policy. However there still

[140] Biswanath Prasad Radhey Shyam v. Hindustan Metal Industries, (1979) 2 SCC 511, p.517.
[141] Shining Industries v. Shri Krishna Industries, AIR 1975 All 231.
[142] Laws Relating to Intellectual Property Rights, ¶ 392.Lexis Nexis Butterworths Wadhwa, Nagpur (Student Series) Dr.V.K Ahuja, 1st Edition, Reprint 2012.
[143] Trade Related Aspects of Intellectual Property Rights, Jan. 1, 1995.
[144] Amendment Act of 2005, Indian Patent Act, 1970.
[145] Indian Patents and Designs Act, 1911.

appeared to be some deficiencies in need of immediate attention, in particular, patent for food, drugs and medicine.

The Bill was again introduced in the Lok Sabha in 1965 for inspection by the Joint Committee of Parliament and after making due considerations it was decided to adopt some amendments. The amended Bill was then moved in Lok Sabha in 1966, but to no avail as it lapsed due to the dissolution of the Lok Sabha in 1967. The process in regard to laws on patents has been subjected to long developmental delay due to political instability at that time. However, finally in 1970, the Patents Bill was again introduced in the Parliament and was passed by both Houses of Parliament and officially came into force on April 20, 1972.

Further amended in 1999, 2002 and the latest being 2005, the Act specifies that an 'invention means a new product or process involving an inventive step and capable of industrial application'[146]. In order to be patentable, an invention should fulfill either criteria, it should either be new or novel, or result in a new product or process involving an inventive step and capable of industrial application.[147] The Supreme Court further clarified and observed that, "the fundamental principle of Patent Law is that a patent is granted only for an invention which must be new and useful"[148]. It was observed by the Cotton, L.J. "to be new in the patent sense, the novelty must show invention, the new subject matter must involve 'invention' over what is old"[149].

Talking of an inventive step literally means to modify an already existing invention and to attribute to it an additional benefit involving considerable advances as compared to the existing technological knowhow or having economic significance or both and that makes the invention not obvious to a person skilled in that art.[150] The patentee will have to show either that the invention includes elementary advancement or has economic significance or both.[151]

Oliver, L.J. identified the four-point test to check inventive step. The Court is supposed to firstly identify the inventive concept which is seeking patent protection, secondly the claim for patent protection must pass the test so as to not be pre-empted by any or all already existing knowledge, thirdly the Court must identify and highlight the difference between the already existing and the "inventive concept" and lastly the Court must understand if the inventive concept is beyond the perception of an ordinary person skilled in that art and hence in totem passing the 'non-obviousness' test.[152]

The House of Lords has observed, "Whether anything inventive is done for the first time it is the result of the addition of a new idea to the existing stock of knowledge. Sometimes it is the idea of using established techniques to do something, which no one had thought of before in that case

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[146] Indian Patents Act 1970, S. 2 (1) (j).
[147] Ibid, S. 2 (1) (l) 'New invention means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the filing of the application, i.e., subject matter does not form part of the state of art'.
[148] Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries, (1979) SCC 511,
[149] Blakey and Co v. Lathern and Co., (1889) 6 RPC 184 (CA).
[150] Indian Patents Act, 1970 S. 2 (1) (ja).
[151] (1985) RPC 59. Also see, Hallen v. Brabantia, (1911) RPC 195; PLG Research v. Ardon International, (1995) FSR 116 (CA).
[152] Ibid.

the inventive idea is dong that new thing, if someone devices a way of solving a problem, his inventive step would be that solution."[153]

In the United States patent law for a patent claim to pass the test for "non – obviousness" the invention in question must be non- obvious to the 'person of ordinary skill in that art'. This signifies that in order for the invention to be novel it must not be something that was pre-empted by an ordinary person working in the same field. This condition restricts the condition to a person of ordinary skill in that field in which the invention is worked. This test does not expressly but impliedly denounces the TSM[154] test, to check obviousness. Phosita[155] was analyzed in greater detail in KSR v. Teleflex.[156] The Federal Court of Appeals overturned the earlier decision of the District court made in 2005. Kenedy, J. opined that "a person of ordinary skill is also a person of ordinary creativity, not an automaton".

In India the question of "obviousness" is one, both of law and fact, and must be decided objectively after all relevant considerations are accounted for in deciding the same. "Objectiveness is judged by viewing the invention as a whole against the state of art as a whole."[157] The Supreme Court observed that it was important to bear in mind that in order to be patentable, an improvement on something known before or a combination of different matters already known, should be "something more than a mere workshop improvement"[158]; and must independently satisfy the test of invention or an 'inventive step'. Patent is granted either for a process or a product only if such process or product is new, involves an inventive step and is capable of industrial application.

In the Novartis case, the very elements mentioned above have been discussed at length. The Supreme Court reaffirmed the finding of the Madras High Court and finally came to the conclusion that the invention that Novartis was trying to protect was not enough of an improvement to an already known substance, and was hence denied patent protection.

The learned counsel had argued that the new form of the substance was both available biologically and had an 'enhanced efficacy'[159] as it was a more stable compound[160]. However the Learned Judges opined to the contrary, stating that the drug in its new form did not only qualify as an invention under S. 2 (1) (j) and 2 (1) (ja) of the Indian Patent Act[161] and subsequently was also found to be in contravention to S. 3 (d) of the Act, as it was understood to be a product that was already known. The matter of 'enhanced efficacy' was answered by the Madras High Court under whose jurisdiction the case was initially filled before filing for a Special Leave Petition (SLP) to the Supreme Court. The Madras High Court had used a medical dictionary to interpret

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[153] Biogen v. Medeva Plc. (1997) RPC 1.

[154]The Federal Circuit has consistently relied upon the Teaching Suggestive Method test for many years as the 'sine qua non' of an obviousness determination. The first case that is associated with this test is ACS Hospital Sys v. Montefiore Hospital, 732 F. 2d 1572, 1577.

[155] Person of Ordinary Skill that Art, standard condition of Patent Registration around the World.

[156] 550 U.S. 398 (2007)

[157] Martin v. Millwood, (1956) RPC 125, pp 133 -34; Illinois Tool v. Autobars, (1974) RPC 337.

[158] Biswanath Prasad Radhey Shyam v. Hindustan Metal Industries; (1979) SC 511, p.518.

[159] Indian Patents Act, 1970. S. 3 (d)

[160] Novartis AG v. Union of India, ¶168, at 87, 2013.

[161] Indian Patents Act, 1970.

what was meant by the words 'enhanced efficacy' and finally came to the conclusion that this meant there must be some 'therapeutic efficacy'[162] in order to fulfill the condition under S. 3 of the Act[163].

Thus the word 'efficacy' is the dividing line between a substance being and not being eligible as the subject matter for the grant of a patent. The efficacy clause is not a product of the Indian patent law jurisprudence. This provision, interestingly finds its origin in a directive by the European Parliament relating to drug regulation of the medicinal products for human use[164].

Hence patent protection is granted only to those members of the class that can demonstrate a new use or form. It needs to be emphasized that novelty is derived from the use, not the product[165]. Therefore Section 3 (d) is an endeavor to ensure the 'novelty of the use', emphasizing use as an inventive step in absence of newness of form. The Indian Patent Act[166] as a statute therefore relies upon "utility" as the criterion for patentability to transform non-patentable inventions into patentable inventions. However another very vital aspect that this proviso relates to is in regard to public health. This proviso has been included so as to prevent the 'ever greening'[167] and the 'tweaking of old medicines to make or extend patent claims'. The term efficacy has been utilized in a 'drug regulatory' sense, in essence the effect of section 3 (d) is that it has a delimiting effect with regard to patent claims thereby ensuring the continued supply of generics at cheaper prices.

June 8, 1995 can never be forgotten as it was the deadline for GATT/ TRIPS in the United State. One of the most significant changes brought by this amendment to the US laws is that it extended the life of a patent to a period of 20 years from the date of first filing the application for the patent. This shift had led to some taking advantage of pre-GATT filing date[168], which in essence leads to the protection of a patent for 17 years plus 20 years. This strategy has led to a number of patent applications to get protection for a period longer than those given to other industrial patents. This in essence can be understood to be similar to the concept of 'ever greening' as the protection extended to it provides for exclusive marketing rights for a considerable period of time; which can legally be extended so eventually granting patent

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[162] Novartis AG v Union of India. ¶ 180, at 90, Judgment of 2013.

[163] Indian Patents Act, 1970.

[164] Article 10 (2) (b) of Directive 2004 / 27 / EC of the European Parliament states that, 'the different salts, esters, ethers, isomers, mixtures of isomers, complexes or derivatives of an active substance shall be considered to be the same active substance, unless they differ significantly in properties with regard to the safety and / or efficacy.

[165] See, Catherine Colston & Kristy Hiddleton, 2005, Modern Intellectual Property Law, London; Cavendish Publishing Ltd., pp.163-4.

[166] The Indian Patent Act, 1970.

[167] "Ever greening is a strategy used by pharmaceutical companies to keep their market share after the expiry of the patent term for the exclusive marketing rights." BMJ 2013; 346:f3869, available at http://www.bmj.com/content/346/bmj.f3869

[168] US Patent No 6051757, Regeneration of plants containing genetically engineered T- DNA. The application for patent was filed on 5th June 1995 and stands protected up till April 18, 2017. This is a perfect example of having taken advantage of the pre – GATT filing date and hence stands to get patent protection for a period of 22 years, available at http://www.patentlens.net/daisy/patentlens/2727.html

protection for its entire life, and excluding all others from commercially exploiting such a creation.

To understand the right to life, right to health must be considered, as opined by Kathrine Young, it is 'strategically sound'[169] as it focuses attention on the most urgent steps necessary for the satisfaction of the 'basic rights'.[170] The expanding of the TRIPS Agreement[171] has led to more definitive rights of intellectual property now having the legal teeth to often trump rights which are vital and are, in a sense, prior rights of people. Henry Shue referred to these rights as moral minimums[172]. However attempts are being made both at the national and international levels to institutionalize the right to health and give it more legal relevance. These attempts have been made in few countries however special mention must be made to India[173], Venezuela[174], Bangladesh[175], South Africa[176], and Ecuador[177], as all of them fall within the category of developing nations. The product patent regime that India is now a part of, has led to significant implications for the Indian health industry and more importantly for the supply of affordable drugs to the rest of the world, the new patent regime will have an exponential impact on the generic market in India, which in turn will have a global impact on the availability of cheap and affordable local versions of medicines.

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[169] Kathrine Young, 2008, THE MINIMUM CORE OF ECONOMICS AND SOCIAL RIGHTS: A CONCEPT IN 'SEARCH OF CONTENT'; Yale Journal of International Law, 33 (1), p.129, available at http://www.yale.edu/yjil/PDFs/vol_33/Young%20Final.pdf. Also see, http://opiniojuris.org/2008/06/11/the-minimum-core-of-economic-and-social-rights-a-concept-in-search-of-content-abstract/

[170] Ibid.

[171] Trade Related Aspects of Intellectual Property Rights Agreement; w.e.f. Jan. 1, 1995.

[172] Shue's Analysis; Henry Shue qualified these rights as entitlements to basic needs that is, food, shelter, clothing, clean water, health care and minimum standards of education, 1996.

[173] The Indian Supreme Court held in numerous cases that the right to life, enshrined in Article 21 of the Indian Constitution does not stand for animal existence but the right to life with human dignity, it is regarded as a fundamental right in India, a relation could be brought out with the Directive Principles of State Policy embodied within Part IV of the Indian Constitution. In Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802, State of Punjab v. Mahindrasingh Chawla, AIR 1997 SC 1225, Similarly in Paschim Banga Khet Mazdoor Society v State of West Bengal, AIR 1996 SC 2426.

[174] Cruz Bermude v. Ministerio de Sanidad y Asistecncis Social, July 17, 1999. The Supreme Court of Venezuela held that rights to health, to life and to have access to scientific and technological advances are closely related.

[175] Dr Mohinudin Farooque v. Bangladesh & Others, Writ Petition No, 1576, 1994, where it was held by the Supreme Court that the importer who had sent radiation affected milk was in violation of the constitutional right to life.

[176] Treatment Action Campaign v. Ministers of Health, Constitutional Court of South Africa, 5th July 2002.

[177] Mendoza and Others .v. Minister of Public Health and the Director of the National AIDS-HIV – STI Programme, (2004) Tribunal Constitutional,3ra Sala , Equador, Resolution no. 0749-2003-RA, Jan. 28, 2004.

Growth in the Field of Pharmaceuticals

A survey conducted by Towers Watson, a global professional service company, reveals that India's pharmaceutical industry is considered the world's third largest by volume[178].British colonial rule brought Western allopathic medicine to India, but the drug discovery remained primitive throughout the pre independence era, even much of the developed countries were relying on plant extracts as the source of medicine.

Before independence there were a few multinational pharmaceutical companies who had managed to set up in India, included the likes of Parke -Davis, Burroughs Welcome, and Glaxo. However the interesting point of this was except a few none of them actually produced any medicines, but instead focused on the marketing of the drugs in India. A number of indigenous Indian firms were also formed to produce the drugs, many of them by doctors and chemists trained in British medical colleges in India. These indigenous producers counted for about 13 % of the Indian market in 1939. However World War II stopped the supply of pharmaceutical products in to India and this actually spurred the Indian market to grow exponentially, by 1943 Indian indigenous firms accounted for an approximate of 70 % of the market[179].

But the growth of the German pharmaceutical markets by the late 1940s left India in a disadvantageous position as now the Indian industry which had optimum resources in relation to extraction and the bulk production of drugs but lacked the skill of synthetic production, and also lacked innovation.

In the 1950s and 60s the government launched various initiatives to attract multinational investment, presumably with the notion that knowledge spillovers from these activities would benefit indigenous firms. Even though some multinationals entered the Indian market but however focused on formulation production, and did not bring with them the capabilities that were missing from the Indian market. This reluctance from the entering into the Indian market is due to it being too small to warrant separate manufacturing facilities. When such multinationals did not venture in to the Indian pharmaceutical market the Indian government established several public – sector pharmaceutical firms, most prominent of them being Hindustan Antibiotics Limited (HAL) and Indian Drugs and Pharmaceuticals Ltd (IDPL)[180]. This was essentially was an initiative taken by the Indian government with the full support of the World Health Organization (WHO) and UNICEF as a response to the MNC's hiking the prices of essential drugs and making them unaffordable to the mass. The amendment to the Indian patent regime in 1970 was what was referred to as the 'Golden Age'[181] of the indigenous pharmaceutical industry. The removal of product patents led to new companies venturing into the market and also augmented the growth of the existing Indian firms, competing to reverse engineer the drugs and produce in bulk. In fact it is statistically proven that in the from the 70s to 2000 the foreign firms

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[178] PHARMA TO TOPPLE IT AS BIG PAYMASTER, the Economic Times. June 8, 2010 (Retrieved on Sept 9, 2013).

[179] Chaudhuri, S. (2005) The WTO and India's Pharmaceuticals Industry: Patent Protection, TRIPS and Developing Countries (Oxford: Oxford University Press).

[180] See Id.

[181] As opined by Yusuf Hamied, the Founder of Cipla. His corporate profile is available at: http://www.cipla.com/corporateprofile/financial/cm69.htm.

shares in the market dropped at a consistent rate to render most of the foreign firms to struggle to survive in the market[182].

'Glivec': The Global Perspective

National Patent Laws particularly of the developing countries like India, Thailand, Brazil invoke the right to health either to delimit patentability of pharmaceuticals or interpret the TRIPS provision of compulsory licensing more liberally to address health needs. These laws reflect the dilemmas of developing countries as they struggle between the claims of public health and intellectual property protection. Health being a fundamental need of all human beings, human rights treaties recognize the right to 'enjoyment of the highest attainable standard of physical and mental health'.[183]

Life altering diseases like HIV/AIDS, cancer, tuberculosis, malaria and a whole host of infectious diseases are considered to be on the agenda, which such a right is standing to represent. The right to health has come to be crucially linked to the right to life itself.

The issue of access of drugs is fundamental to the claim for health as a basic right. It is in this context that this particular case has assumed importance, and has also become the face of the global campaign to save generic production of drugs in India. India has always been a key player in the export and manufacturing of generic versions of medicines the world over.

The following list establishes further the view that India has a pivotal role in regard to producing and making essential drugs available to the mass at a cheaper rate, especially drugs for life threatening diseases:

i. 67 percent of the medicines produced in India are exported to developing countries.

ii. 75 – 80 percent of all medicines distributed by the International Dispensary Association (IDA) to developing countries are manufactured in India.

iii. In Zimbabwe, 75 percent of tender for medicines for all public sector health facilities come from Indian manufacturers and 90 percent of drugs of the Anti-Retroviral Drugs (ARVs) used in Zimbabwe come from India.

iv. The state procurement agency in Lesotho, NDSO states it buys nearly 95 percent of all ARVs from India.

v. India also ranks second on the list of countries from which United Nations International Children's Emergency Fund (UNICEF) purchases medical supplies.

[182] In the 1970s the foreign firms accounted for only 70% and this was 20 % drop from its prior holdings in the Indian market, in 1981 this figure was further diluted to 60-70%, in the 1990s that percent further slipped to 49-55% and finally in 2000 it was estimated at about 28 -35 %. Mani, S. (2006) The Sectorial System of Innovation of Indian Pharmaceutical Industry. (Working paper series, 382; Trivandrum: Centre for Development Studies.)

[183] See, Article 12 International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, Dec. 15 1966.

vi. 80 percent of the ARVs MSF uses are purchased in India, and are distributed in treatment projects in over 30 countries.

vii. Globally, 70 percent of drugs for the treatment for patients in 87 developing countries, purchase by UNICEF, IDA and the Global Fund to Fight AIDS, Tuberculosis and Malaria and the Clinton Foundation since July 2005 have come from Indian suppliers.

viii. US Presidents Emergency Plan for AIDS (PEPFAR), also purchases ARVs from India for distribution in developing countries, thus resulting in cost-savings of up to 90 percent. 89 percent of the ARVs approved by the US Food and Drug Administration for PEPFAR are from India[184].

Globally lifesaving drugs remain beyond the reach of the majority of people, for example as can be understood from a study conducted to see the distribution of ARVs.[185] In 2003 6 million people worldwide needed ARVs but fewer than 8 per cent were on them.[186]

The pharmaceutical giants hiking prices for essential medicines is in essence threatening the lives of millions dependent on these drugs in order to live for a little longer. As has already been mentioned the affect that a drug like 'Glivec' has on the patient is to control the cellular action that causes the cancer to grow, but does not under any circumstance cure the cancer. So this drug can be understood to be the bare minimum which helps in prolonging the life of a patient suffering from Chronic Myeloid Leukimia. So there is no doubt that on a completely moralistic level this sort of denial by the Pharma giant's amounts to mass murder.

[184] Examples of the importance if India as the 'Pharmacy of the World'. (Medicines Sans Frontiers, Campaign for the Access to Essential Medicines), Knowledge as Property; ISSUES IN THE MORAL GROUNDING OF INTELLECTUAL PROPERTY RIGHTS, Ch. 6, at 223, Rajashree Chandra, Oxford University Press, 2010.

[185] Antiretroviral Drugs are used to treat HIV infections. This is the definition used by the US Food and Drugs Association; available at, http://www.fda.gov/ForConsumers/byAudience/ForPatientAdvocates/HIVandAIDSActivities/ucm118915.htm

[186] K.. Attawell and J. Mundy, 2003, 'Provision of Antiretroviral Therapy in Resource Limited Settings; A Review of Experience up to August 2003' A Health Systems Resource Centre, Department for International Development, London, available at, www.healthsystemsrc.org

'Glivec'& beyond

The ramifications of this case are large and wide and transgress way beyond India, and beyond the drug 'Glivec' bringing the ethics in patenting medicinal drugs into focus and questioning the fundamental basics of IPR in medical field. The need to adopt a system of priority in adjudication, the claims between competing rights, such as the right to health and life, and the right to intellectual property. For adjudication of these claims require clear and justifiable articulation of laws that protect and prioritize 'basic' or 'prior' rights, like health before 'innovators' right. Significantly also brings into focus the right of sovereign countries to grant, uphold or delimit rights in consonance with the socio-economic imperatives[187] .Intellectual property in fact co-exist with these other rights and often rely on them a great amount for contextual interpretation.

The moral claim to a right derives from its ability to enhance conditions of life and its prospects, where ever there exists competing rights claims, the priority needs to be to health care rights as they are 'special'. The right to health implies freedom from diseases, so as to in no way endanger one's life, the moral priority of health care rights is determined by the fact that good health preconditions the enjoyment of all other rights. "Good health is a fundamental element in the realization of equality of opportunity"[188].

The Glivec judgment is significant for three reasons, firstly; it ensures that availability of generic version of 'Glivec' at cheaper prices to be given to the CML[189] patients, secondly; it has enabled the Indian generic producers to make available the drug at nearly one tenth of the price charged by Novartis[190]; and thirdly it has set a precedent for future conflict between an Indian manufacturer of generic drugs and the patented drugs.

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[187] Doha Declaration on TRIPS and Public Health adopted on Nov. 14, 2001, 4**:** We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all. Also see, **5** (c) & (d). Knowledge as Property**.** Issues in the Moral Grounding of Intellectual Property Rights, Ch. 6, at 208, Rajashree Chandra, Oxford University Press, 2010.

[188] Norman Daniels, 1981, Health – Care Needs and Distributive Justice, Philosophy and Public Affairs, 10 (2), at 146 -179, Distributive Justice in Social and Political Philosophy, available at http://philpapers.org/rec/DANHNA.

[189] Chronic myeloid leukemia (CML), also known as chronic myelogenous leukemia, is a type of cancer that starts in the blood-forming cells of the bone marrow and invades the blood, available at http://www.cancer.org/cancer/leukemia-chronicmyeloidcml/detailedguide/leukemia-chronic-myeloid-myelogenous-what-is-c-m-l.

[190] "Novartis makes 'Glivec' available for Rupees 125,000 a month, whereas the Indian generic manufacturers make 'Glivec' at one tenth the cost……." Novartis AG v. Union of India, 82, Judgment of 2013. Also see, Knowledge as Property; Issues in the Moral Grounding of Intellectual Property Rights, Ch. 6, at 223, Rajashree Chandra, Oxford University Press, 2010.

The drugs which are not really innovative[191] stand to be the ones most affected by this judgment, such is the case with the patent application filed by Abbott Laboratories Inc. for 'Aluvia', an anti – HIV drug. Opposition have already been made in the United States on the grounds that it is nothing but a new version of an existing drug. The drug sold under the name of Aluvia is a combination of lopinavir and ritonavir drugs, both of which are pre 1995 drugs and hence not admissible for patent protection.

Of 7000 applications pending in the 'mailbox' around 2000 drugs may come under the purview of section 3 (d) of the Patent Act[192] an hence be rejected for patent protection. The Novartis judgment has huge ramifications upon the supply of affordable medicines to the African countries and other developing countries and is not restricted to India.

In India 25,000 patients are diagnosed with CML and it would seem entirely impossible to provide all the sufferers with 'Glivec' which is priced ten times higher than its generic version[193], so the Indian judiciary's rejecting the claim made by Novartis is a decision which is well founded and has been delivered keeping in mind the obligations India has in regard to providing affordable drugs to the masses.

'Glivec' is a medical marvel for treatment of leukaemia, it was developed jointly by Dr Druker the director of the Oregon Health and Science University Knight Cancer Institute, in collaboration with Nick Lyndon of Novartis. Dr Druker himself welcomed the decision made by the Indian Supreme Court, he in fact criticized the Pharma major's predatory pricing and enormous profits made of a blockbuster drugs in his interview with the Times of India[194].

Doctors without Borders (Medicines Sans Frontier), also expressed their gratitude when the Supreme Court of India finally after a long drawn trial denied Novartis's patent claims.

"The Supreme Court's decision now makes patents on medicines that we desperately need less likely"[195].Both health rights and intellectual property rights have been accorded the status of human rights in the UN covenants[196]. The relation between intellectual property and proprietary knowledge system that it advances, and public health needs to be considered in detail. Patents increase the threshold of accessibility and reduce the number of people who can afford them. Denial of access is the denial of the right to health. So the TRIPS agreement cannot be enacted in

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[191] See, 'Changing Patterns of Pharmaceutical Innovation.' Research Report, The National Institute for Health Care Management, May 2002, available at, http://www.nihcm.org/pdf/innovation/pdf

[192] INDUSTRY HAILS NOVARTIS DECISION, Aug. 7, 2007, Times of India, available at, http://www.timesofindia.com/industryhailsnovartisdecision/

[193] Sarah Hiddleton, 'Patents Issue: Beaten Challenge', Frontline, available at http://www.hindu.com/thehindu/thscrip/print.pl?file=20070824503410500.htm&date=fl2416/&prd=fline&

[194] http://articles.timesofindia.indiatimes.com/2013-04-03/us/38247803_1_glivec-gleevec-indian-patent-law

[195] As Opined by Dr. Unni Karunakara, MSF's International President. Ibid.

[196] Art. 25, Universal Declaration of Human Rights; Art. 12, ESCR Covenant; Intellectual Property as a Human Right; Article 15 (1), ESCR; Article 27 (2), Universal Declaration of Human Rights, 1948.

isolation as there are various other international obligations in the field of health and human right which need to be considered equally[197].

[197] We reaffirm the commitment of developed-country members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country members pursuant to Article 66.2. We also agree that the least-developed country members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until Jan. 1, 2016, 7Doha Declaration on TRIPS and Public Health, adopted on Nov. 14, 2001. Also see, Art. 27 of Trade Related Aspects of Intellectual Property Rights, which allows member countries to exclude from the patentable subject matter any therapeutic or diagnostic or any surgical method utilized for the treatment of humans and animals.