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## ARTICLES



## CASE COMMENT

Patwardhan Mangesh, *Marriage beyond Procreation- In Search of a Regulatory Paradigm,* 3(2) NLUJ Law Review 33 (2016)

# MARRIAGE BEYOND PROCREATION - IN SEARCH OF A REGULATORY PARADIGM

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ABSTRACT

*Today, a conception of marriage that is based on procreation as its central defining feature would be unacceptable to many. In this article, the author does not take any position on this issue. Rather, the focus of this article is to explore the very rationale for the State's involvement in marriage. Drawing on the notion of a paradigm case in philosophy, it is argued that it is procreation in a comprehensive sense, as it happens in the real world - a fairly long gestation period, the process of birth and a fairly long period of the offspring's dependency on adult support - that provides a coherent and compelling regulatory paradigm case for the State recognition and regulation of marriage. For this purpose, the author has analysed the content of current "marriage law" and offer a thought experiment regarding procreation. Based on this, it has been demonstrated that if the conception of marriage is extended beyond the context of procreation, the case for the State's recognition and regulation of marriage can no longer be supported - in particular, its prohibition on multi-person and polygamous marriages. Consequently, if continued State involvement in marriage is still advocated, it can only be done based on the articulation of an alternative regulatory paradigm. No such proposal is currently on offer, leaving the issue in a state of regulatory paradigmatic limbo.*

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## I. INTRODUCTION

**In** August 2012, two Taiwanese women entered into a friendship through a formal ceremony. Alas, their friendship is not valid in law. Yet, the event received quite positive media coverage and was a cause for celebration by many, in spite of its non-recognition under Taiwanese law.

Of course, even someone who is not well versed in law will be able to see through this (sham) example. In general, there is no regulatory legal framework governing friendship nor does the law prescribe any means of recognizing such relations.

Well, this is a mutilated version of an event that did take place in Taiwan and which did receive positive media coverage. It actually was about two Taiwanese women marrying in a Buddhist lesbian wedding. Such weddings were not recognized by Taiwanese law at that time. More to the

point, the event as well as the fact of its legal non-recognition was thought to be significant enough to warrant scholarly attention.[1]

It should be noted that the law is not entirely "friendship blind". It does take judicial notice of such a relationship in certain specific contexts. In *Dirks v. United States,* the US Supreme Court held that when a company insider makes a gift of confidential information to a trading relative *or friend* and such relative or friend trades in securities based on this information, it amounts to a violation of the insider trading prohibition (emphasis added).[2] Thus, in "tipping" insider trading cases, the trial Court may need to go into the factual question as to the existence of a friendship relationship between the tipper and her tipee.

In spite of this, there are two factors that are unique to the legal treatment of marriage. One, the validity of a marriage is a matter of law and (therefore) an all-or-nothing matter - a marriage is valid, or it is not. Friendship is factual, and comes in degrees. More important(unlike in case of friendship),along with the legal recognition of marriage comes an elaborate framework specifying the distribution of rights and responsibilities of persons so married, and even a substantive and procedural framework for the dissolution of such marriage.

This paper proceeds as follows. In Part II, it is argued that it is procreation in a comprehensive sense - a fairly long gestation period, the process of birth and a fairly long period of the offspring's dependency on adult support- that currently provides the only coherent and compelling regulatory paradigm case for the State recognition and regulation of marriage. Part HI analyses the content of current "marriage law" to flesh out this argument. Part IV looks at two other bases of marriage - loving unions and childrearing and argues that these do not provide a compelling rationale for State regulation of such relationships, as marriages. Part V explores certain other contexts of marriage, such as marriage as a political speech act. Part VI touches upon the relevance of this issue in the Indian context. Part VII summarizes the earlier discussion and concludes.

[1] *See, e.g.,* Susan B. Boyd, *Marriage is More Than Just a Piece of Paper: Feminist Critiques of Same Sex Marriage,* 8 NTU L. REV. 263, 265 (2013) [hereinafter Boyd].
[2] Dirks v. United States, 463 U.S. 646, 664 (1983).

## II. A PARADIGM CASE RATIONALE FOR REGULATION OF MARRIAGE

Today, anyone who mentions procreation as the basis for marriage is likely to be scoffed at. It seems that the link between marriage, sex and procreation has been severed. A couple not married to each other can have a sexual relationship, and a couple can be in a sexual relationship, choosing not to have children. It is also pointed out that this procreation-based conception of marriage proves too much, as infertile heterosexual couples are not barred from marrying.[3]

In the opinion of the author, this view is not the appropriate way of framing the issue. The question here is not whether procreation is the necessary condition implicit in the institution of marriage. The issue is whether it can serve as the rationale behind *the legal recognition and regulation of marriage* in the first place. In particular, the author would like to emphasize that the position here is not a version of the "slippery slope" argument against same-sex marriages. According to the proponents of this argument, once same-sex marriages are recognized, it would make it more likely that the law would one day recognize polygamy. Even if legal action A today- recognizing same-sex marriage wouldn't be that bad, or would even be moderately good, it should be opposed because it will increase the likelihood of a supposedly much worse legal action B in the future- recognizing polygamy.[4] Such arguments purport to show that once we accept same-sex marriages as real marriages, there is no principled way to decide as to where we draw the line.

In this context, the concept of "paradigm case" in philosophy, as suitably modified for legal analysis, could be relevant. Paradigm cases are typical situations or cases to which anyone who understands a certain descriptive expression would be prepared to apply it unhesitatingly.[5] As applied to

[3] *See, e.g.,* Andrew Koppelman, *Judging the Case against Same-Sex Marriage,* U. ILL. L. REV. 431, 449 (2014) [hereinafter Koppelman].

[4] *See, e.g.,* Eugene Volokh, *Same-Sex Marriage and Slippery Slopes,* 33 HOFSTRA L. REV. 1155 (2005).

[5] J. W. N. Watkins, *Farewell to the Paradigm-Case Argument,* 18 ANALYSIS 25,26 (1957). As the title suggests, Watkins himself is sceptical of this argument. I cite him due to his perspicuous formulation of the argument. The argument itself continues to play a significant role in philosophical debates, *see, e.g.,* Sally Parker-Ryan, *Ordinary Language*

the issue currently under discussion, it can be taken to mean a typical marriage "situation or context" wherein one would be prepared to accept unhesitatingly that there is a strong and cogent policy rationale for State regulation of such marriages.

The conceptualization of marriage in terms of a paradigm has been advocated in the literature. For example, Dane states that marriage is a paradigmatically heterosexual institution. However, his understanding of the paradigm here is either linguistic (by which he means that currently the typical linguistic understanding of the term marriage refers to only heterosexual marriages), or sociological (currently, the sociological consensus about a typical marriage implicitly refers only to heterosexual marriages).[6] As against this, the author's formulation amounts to what may be termed the regulatory paradigm. The only relevant issue here is: what is the typical marriage situation wherein there is a clear and cogent need for State regulation.

It is author's argument here that marriage in the context of procreation is such a paradigm case. To see this, it is useful to start with a thought experiment often offered in the literature.[7] Imagine that human beings reproduced asexually and that human offspring were self-sufficient. In that case, would *any* culture have developed an institution anything like what we know as marriage? It seems that the answer is no.[8]

Based on this thought experiment, Girgis *et al.* conclude that if human beings reproduced asexually, then "organic bodily union" would be impossible which, according to them, is the central feature of marriage. Therefore, there would be no human need that only marriage could fill.[9]

Their argument is open to criticism. It seems to presuppose that "organic bodily union" is the only defining feature of marriage and must necessarily involve procreation. Therefore, according to them,

*Philosophy*, INTERNET ENCYCLOPAEDIA OF PHILOSOPHY, http://www.iep.utm.edu/ ord-lang/.

[6] Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFF. L. REV. 291, 303 (2014).

[7] Sherif Girgiset. al, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245 (2010).

[8] *Id.* at 286-87.

[9] *Id.* at 287.

procreation is the defining feature of marriage. Thus, the whole argument seems to rest on the normative assumption that "organic bodily union" ought to be the only defining feature of a real marriage. However, they do not offer any rationale for this position.

However, the author's claim here is much weaker. I have nothing to say as to what is, or should be, the defining feature of a "real marriage". The argument here is merely that procreation offers a compelling rationale for the legal recognition and regulation of marriage, without claiming its inherent centrality to the institution itself. Koppelman approvingly discusses the view that marriage has no essence at all. It is a socially constructed practice, like chess, with goods that are internal to it. That practice can be changed when this conduces to human well-being.[10] However, even if one accepts this view, the crucial question that still remains is why it should be a legally constructed practice.

Therefore, for the purpose of analysis, the author offers a variation of the above mentioned thought experiment. In the author's thought experiment, it is proposed, to drop the first condition (asexual reproduction) entirely. Thus, human reproduction may be sexual, thus keeping the "organic bodily union" element intact. The second condition holds. Human offspring becomes self-sufficient almost immediately. Since the author allows for sexual reproduction, thereby adding another condition. The gestation period is also considerably shortened (say just a day). Further, the birth of an offspring requires little or no medical attention.

This formulation avoids the problem of the original thought experiment. It does not purport to assign centrality to "organic bodily union" (or any other factor) in the context of the institution of marriage itself. It merely asks the question whether, if the conditions under current version of the thought experiment held, there would still be any policy rationale left for the legal regulation of the marriage relationship.

Incidentally, there is some debate on the issue whether the US Supreme Court's opinion in *Loving v. Virginia*,[11] may serve as an authoritative

[10] Koppelman, *supra* note 3, at 447.
[1] Loving v. Virginia, 388 U.S. 1 (1967).

analogy to support the recognition of same-sex marriage.[12] In that case, the Court invalidated the anti-miscegenation laws in several US States that criminalized interracial marriages. Interestingly, one of the grounds on which Virginia opposed decriminalization of interracial marriages was its concern about procreating interracial couples, and its purported interest in maintaining the purity of the races and in preventing the propagation of half-breed children.[13] Ironically, the State's argument for prohibiting interracial marriages was based on an inverse version of the procreation argument. Precisely because such relationships had the potential for procreation of the (supposedly) undesirable kind, it was argued that the State had a legitimate interest in regulating such marriages (by prohibiting them). However, as will be discussed later, this argument fails as an argument specifically for the prohibition of interracial *marriages.*,[14] But the reason why Virginia invoked it at all could be that procreation has been the implicit basis for State involvement in marriage all along.

Same sex marriages are generally not criminalized; instead they are simply not recognized by law. This non-recognition may be by explicitly restricting the definition of a valid marriage as that between one man and one woman, as in the case of (now invalidated) Proposition 8 - a ballot initiative in California that amended the State Constitution. Alternatively, it may be woven into the very fabric of marriage laws, as seems to be the case in India. Therefore, the current debate over same sex marriages is not so much about whether such marriages can be performed at all but rather about the legal recognition (and regulation) of such marriages.

At this stage itself, it may be intuitively clear to some that the question that was posed earlier regarding the rationale for the State regulation of marriage outside the context of procreation should be answered in the negative. It is procreation, in a comprehensive sense, as it happens in the real world - a fairly long gestation period, the process of birth and a fairly long period of the offspring's dependency on adult support - that

[12] *See, e.g.,* Ronald Turner, *Same-Sex Marriage and Loving v. Virginia: Analogy or Disanalogyf,* 71 WASH. & LEE L. REV. ONLINE 264 (2015).
[13] *Id.* at 270. *See also* Brief and Appendix of Appellee at 50, *Loving,* 388 U.S. 1 (1967) (No.395).
[14] *See* the discussion at the end of Section III below.

underpins much of the regulation of marriage. In the next Section, I take a closer look at the interface between marriage and law to flesh out this bare intuition.

## III. MARRIAGE AND LAW

What really is the nature and scope of the "law of marriage"? Cusack takes this issue head on.[15] She argues that modern understanding of marriage is based on family and love. Since loving unions cannot be regulated, current marriage laws rest on legal fiction. She concludes that these laws are mainly a set of property laws that subsidize binary reproduction.[16] However, for our purpose, what is important here is her insight that current marriage laws are anchored on procreation and actually deal with property rights.

Holzer is even more helpful in this regard.[17] As he mentions, civil marriage is an institution that confers a unique legal status recognized by governments all over the world. It brings with it a host of reciprocal obligations, rights and protections.[18] He further enumerates some of these legal rights. These include social security benefits upon death, disability or retirement of spouse, as well as benefits for minor children, family and medical leave protections to care for a new child or a sick or injured family member, workers' compensation protections for the family of a worker injured on the job and the right to visit a sick or injured loved one, to have a say in life and death matters during hospitalization.[19] While these legal rights are cast in US specific terms, they would be largely applicable to a large number of other jurisdictions as well.

It is now easy to see that such legal rights have economic and social value only in the context of the nature of procreation referred to in the previous Section - a long gestation period, the process of birth and a long period of the offspring's dependency on adult support. On the other hand, if the

[15] Carmen M. Cusack, *To-Get-Her ForEver: A Man Hater's Right to Same-Sex Marriage,* 10 RUTGERS J. L. & PUB. POL'Y 63 (2013) [hereinafter Cusack].
[16] Mat68.
[17] Shannon Holzer, *Natural Law, Natural Rights, and Same-Sex Civil Marriage: Do Same-Sex Couples Have a Natural Right To Be Married?*, 19 TEX. REV. L. & POL. 63 (2014).
[18] *Id*. at *77*.
[19] *Id.*

conditions as suggested by our thought experiment came to prevail, these legal rights would become meaningless, with no social or economic purpose that they can possibly serve.The entire cycle from conception to the offspring becoming self-sufficient would be over almost immediately, with all parties involved going their own way at the end.

In fact, the world according to our thought experiment would give a whole new dimension to Kahlil Gibran's famous lines,

*Your children are not your children.*
*They are the sons and daughters of Life's longing for itself.*
*They come through you but not from you,*
*And though they are with you yet they belong not to you.*[20]

As per the earlier mentioned thought experiment, the children may not even be with the parents as they would already be self-sufficient. This is a crucial departure from Gibran's perspective.

One possible objection against this argument could be that some of these rights could be relevant in the context of childrearing and an enduring bond of relationship. In the current analysis, the author has implicitly assumed these two to be merely derivative aspects of procreation. In particular, this approach presupposes the raising of children, till they become self-sufficient, by their biological parents, only as a natural next step after giving birth to them. However, one may argue that these can have independent value, untethered to procreation *per se*. Interestingly, the US Supreme Court, in *Obergefell v. Hodges*,[21] in holding that the Fourteenth Amendment to the US Constitution requires a State to license a marriage between two people of the same sex, seems to have relied on this argument. It recognized that throughout history, US States have made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. It gives a laundry list of these. Its ultimate conclusion, however, is that there is no difference between same- and opposite-sex couples with respect to these rights, benefits, and responsibilities.

[20] Kahlil Gibran, *On Children*, available at http://www.katsandogz.com/onchildren.html.
[21] Obergefell v. Hodges, 576 U. S. (2015) [hereinafter Obergefell v. Hodges].

The Court identifies four principles to support its point - the right to personal choice regarding marriage that is inherent in the concept of individual autonomy, marriage supports a two-person union unlike any other in its importance to the committed individuals, it safeguards children and families and is a keystone of social order. The first three principles in particular imply that two autonomous individuals forming a committed association as well as child rearing are valuable in themselves. By implication, the same rights and benefits are valuable to same-sex couples as well, procreation or no procreation.

This is surely an attractive argument. It is arguable that while a long term bonding relationship and childrearing first acquired significance in the context of procreation, these can be valuable on their own terms. However, the issue here is whether the State has any legitimate interest in regulating relationships based on these, *as marriages.* As it shall be argued in the following two Parts, if one accepts that forming an enduring bond of relationship and child rearing can be valuable outside procreation, it logically entails that there is no reason why marriage should be restricted to a two-person union. Further, even apart from bonding and childrearing, there could be several other diverse legitimate ends that individuals may wish to achieve through marriage. Taken to its logical end, this leads to the position that marriage, after all, has no essence.[22] A marriage is what one intends it to be. While this may be perfectly acceptable, there is no principled basis for the State's regulation of such marriage.

## IV. LOVING UNION AND CHILDREARING AS BASES FOR MARRIAGE

In this part, the author takes it as a given that forming a loving union and /or childrearing can be valuable in themselves, even apart from any context of procreation and explore the consequences of this assumption from the viewpoint of the State's role in marriage.

### *A. Marriage and Lovine Unions*

First, consider marriage in the context of entering into a loving union. This, in itself seems to be a misnomer. People do not enter into a friendship in the same manner in which they enter into marriages, they

Koppelman, *supra* note 4.

simply become friends. Similarly, two people fall in love with each other and are united in a bond of mutual love and respect. Therefore, such a union seems to be closer to friendship, rather than traditional marriage. Further, in case of friendship and loving union, there could be very diverse ways in which the persons may choose to actualize the relationship. Some friends may be in close contact with each other (face-to-face or online), others may not be in touch for years, and still regard themselves to be friends. Some friends may help each other financially; other friendships may have no financial element.

Similarly, there is no reason why different loving unions may not be actualized in widely diverse ways. Some loving couples may choose to stay together, others may not. Some couples may pool their financial resources; others may consciously choose to keep the financial element totally out of the relationship. The natural question here is who is the State to say as to how two individuals who discover themselves to be in a loving union should actualize their relationship? This seems to be the essence of Cusack's comment that loving unions cannot be regulated.[23] To paraphrase *Obergefell,* two autonomous individuals who are committed to each other should surely be in a position to be in a two-person union. However, contra *Obergefell,* there seems to be no rationale for why such unions should be supported by State recognition of their relationship *as marriage.* Further, it is not clear why the State should specify how this relationship should be actualized and further why it must necessarily involve the same allocation of rights, benefits and responsibilities as in case of marriages traditionally recognized by the State, in the context of procreation.

One objection to this analysis could be that even though State recognition has no bearing on the existence and functioning of a loving union, it enables the couple to announce to the whole world that they are in such a relationship. However, as noted earlier, same sex marriages are not criminalized. As in the example of the Taiwanese women quoted at the beginning of this essay, a couple is free to make a formal announcement to that effect and may even label the relationship as marriage. State recognition (or lack of it) should not really matter.

Cusack, *supra* note 16.

There also seems to be no reason why the recognition of such unions as marriages should be restricted to two-person unions. If more than two autonomous persons genuinely believe that they are in a mutual loving relationship and would want to formalize the relationship, they should be free to do so. Saying that such a relationship cannot exist is merely begging the question - why not?

At this stage, arguments regarding the adverse effects of polygamy can be marshalled. However, the concept of a multi-person marriage is a distinct one. In case of a polygamous marriage, one man is in a simultaneous marriage relationship with multiple women. In effect, it is a collection of several "one man, one woman" relationships. In case of multiple person marriages, all or any of them could be of either sex (or going beyond the binary characterization, of *any* sex). More importantly, they would all be mutually married to each other simultaneously.

Even the impact of polygamous marriages may not be uniformly adverse. Ghercites research that concludes that women in American polygamous communities benefit from the female companionship and friendship that polygamy affords, as well as the sharing of child rearing and household responsibilities.[24] Of course, it has been argued that polygamy has particular deleterious effects on women and children's economic security as well as on women's psychological, reproductive, and sexual health.[25] However, it may not be polygamy *per se* that is responsible for these effects. As Gher notes, women's experiences of polygamy are highly dependent upon the socio-cultural context in which their marriages are situated and the relationships within their family units.[26] In fact, women's experience of plural marriages may be similar to those in monogamous marriages.[27]

It is in this context that some feminist commentators have attempted to analyse how marriage (even in its traditional one man, one woman version) as a socio-legal institution relates to inequality based on factors such as sex, race and class. Therefore, they believe that placing marriage at the centre of the lesbian and gay movement for equality and

[24] Jaime M. Gher, *Polygamy and Same-Sex Marriage - Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 585 (2008).
[25] Mat 584.
[2b] *Id.* at 583.
[27] *Id.* at 584.

recognition is a misguided move.[28]Thus, any argument against polygamy threatens to collapse into a general argument against the institution of marriage itself - surely a consequence not palatable to supporters of same-sex marriage! In addition, one may plausibly argue that at least polyandrous marriages would not pose the same concerns as polygamous marriages and therefore should be valid.

In fact, opposition to multi-person (or polygamous) marriages even by those who support same-sex marriage may underlie a hidden assumption. The assumption is that the loving union must necessarily involve romantic love, and a further judgment that multiple persons cannot be in such a mutual romantic relationship.

As discussed above, one may question the merits of this very judgment. Further, one may ask why it should necessarily involve romantic love. To quote Cusack, bromances, which are nonsexual relationships between men, have become increasingly popular. There is a deep level of intimacy and care between the bros.[29] Therefore, there seems to be no reason why two persons in such platonic relationships should be denied to enter into a State-recognized marriage, by stipulating that a loving union must mean romantic love. If two autonomous, committed individuals exercise their personal choice to formalize their relationship as marriage, should the State not respect their choice? Further, in case of such platonic union, the argument against multi-person marriages is even weaker, if ever there was one.

### ***B. Marriage and Childrearine***

What about those relationships that involve childrearing (but minus procreation)? Here, the State surely has a role to play in ensuring that the interests of the children are well protected. However, this issue is totally distinct from recognizing the relationship *between the adult caregivers themselves as marriage.* The relevant issue here would be to ensure the financial and emotional well-being of the children to be raised. A minimal level of understanding between the caregivers would, of course, be essential to achieve this objective. However, the adults themselves need not be in a loving (romantic or otherwise) relationship with each other.

Boyd, *supra* note 1 at 263.

Cusack, *supra* note 16, at 72.

In other words, they may come together even in the absence of any loving union between them, because childrearing itself promises to be a fulfilling experience for them- as is the case with single person adoptions - and they feel they can do this better by collaborating with each other. The relevant issue that the legal framework here needs to address is the children's protection and welfare. Thus, the law may stipulate the substantive and procedural requirements before two persons (of the same or opposite sex) may enter into a "child rearing arrangement". Clearly, such an arrangement has nothing to do with "marriage", as traditionally recognized or its extension to same-sex loving relationships. In particular, such caregivers need to have the flexibility to structure the distribution of their legal rights and responsibilities in relation to such child rearing arrangement in such a way so as to ensure the welfare of the children raised by them. Imposing the same distribution as in a traditional marriage may or may not be suitable in the context of such arrangement centred around child rearing.

It may be argued, as the *Obergefell* Court did, labelling such relationships as "marriage" allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. In particular, marriage affords the permanency and stability important to children's best interests.[30] If this is so, such permanency and stability may be better achieved in a multi-person marriage, as the death or disability of one caregiver is not likely to have as great an effect on the children's welfare as in case of a two-person marriage. Multiple caregiver parents may also afford the advantage of specialization as each can concentrate on whatever he or she can do best. At the very least, it is not an open and shut case that raising children by two parents is always a superior alternative to raising them by multiple parents. The extended family system in some countries such as India is probably close to this model wherein the grandparents and other relatives act at least as "quasi parents". In particular, the model wherein both parents work and are income-earners for the family and the grandparents stay at home and become homemakers has become prevalent in urban

Obergefell v. Hodges, *supra* note 22.

India. A multi-person marriage can be seen as a logical extension of this system.

*C. Summing Up*

To sum up the discussion in this Section, it must be said that there can truly be no objection to the position that loving unions and childrearing can be valuable even outside the context of procreation. However, the rationale for strict State regulation of such relationships *as marriages* is highly questionable, to say the least. In particular, there is a strong case for recognizing multiple-person marriages (and even decriminalizing polygamy) in such contexts. As the Chief Justice Roberts pointed out in his dissenting opinion in *Obergefell*, while the majority opinion randomly inserts the adjective "two" in various places, that there is no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not.

This discussion also brings out the fallacy in Virginia's argument in *Loving.* Virginia's concern was all about procreating interracial couples, and its purported interest in maintaining the purity of the races. The only way to achieve this would be a total prohibition on interracial couples from procreating. The existence (or lack of it) of any marital relationship between them was beside the point. It is easy to see that even if all the conditions in author's thought experiment came to be true, Virginia would still have felt the need to prevent the so called "propagation of half-breed children", for its own sake. Thus, based on the discussion of the regulatory paradigm, it is clear that Virginia's argument fails as an argument for the prohibition of interracial *marriages.*

## V. BEYOND LOVING UNION AND CHILDREARING - WHAT IS MARRIAGE, AFTER ALL (OR RATHER, WHY SHOULD IT BE REGULATED)?

Once we move beyond the (regulatory) paradigm case of marriage-procreation in the comprehensive sense - there is no reason to hold that loving unions and childrearing are the only legitimate bases for marriages. Recall the point discussed earlier. The argument is that while these two initially may have acquired significance in the context of procreation, this fact is irrelevant for the current conception of marriage. These can be and

for many people are valuable in themselves. The State must respect their choices. The natural question to ask here is - why limit individual choices to only these two? Other individuals may legitimately wish to actualize other choices that they deem to be valuable, through the institution of marriage.

This thought is not as fanciful as it may seem at first glance. Indeed, such a position has been advocated in literature. Cusack frames the right to marry as a free speech issue. She asserts that marriage is symbolic speech and further such symbolic speech is protected by the First Amendment to the US Constitution if it is imbued with the elements of communication and has a particularized message, such that the likelihood is great that the message would be understood.[31]

She considers an expression of "political lesbianism" as an example of such speech. She argues that when the Court fails to allow two heterosexual women to symbolically express political lesbianism, the Court has failed to uphold these women's right to free speech.[32] Thus, the fact that two heterosexual women can live in a domestic partnership and mimic every benefit of marriage is irrelevant. Denying them the right to institutionalize their relationship as marriage infringes on their right to free speech.[33]

Extending this argument further, it may be asked as to why such an act of free speech must necessarily entail mimicking the benefits of marriage? It is possible that two women may enter into a marriage as symbolic speech (say against patriarchy) without ever intending to replicate the benefits of a traditional marriage. If so, the State should not force on them the same distribution of rights and responsibilities as in a traditional marriage. A further logical consequence of this position is that a person may enter into several marriages simultaneously, for different symbolic acts of free speech - say one each to express support for secularism, pacifism, abolishing the death penalty and what-have-you. Again, there is no reason why such marriages should be restricted to two-person unions. In fact, hundreds of people simultaneously marrying each other as a

[31] Cusack, *supra* note 15 at 83-84.
[32] *Id.* at 84.
[33] *Id.* at 83.

particularized act of free speech wduld be far more expressive and ought to be protected and recognized.

Finally, there is no principled reason to restrict such marriages to only speech acts. In fact, both proponents and opponents of same-sex marriage see the institution predominantly in terms of *association.* While the proponents argue that a same sex couple should have an equal right to be united in a marriage relationship, the opponents disagree. If this is so, Cusack's argument applies, with even greater force, to recognizing marriage as a *symbolic associational act.* Thus, members of a trade union or a movement should have the right to marry one another, with or without mimicking benefits of marriage and regardless of any other marriage relationship^) they have entered into. Non-recognition of such marriages arguably denies such persons the exercise of their fundamental right to form associations or unions in a manner that they wish to.

In case of marriages as a symbolic speech or associational act, it may be crucial for those who enter into such marriages that such an act be made public. However, there is absolutely no role for State recognition or regulation of such marriages, as the parties have the total freedom to structure their relationship - they may choose to replicate or not replicate all or some of the benefits of traditional marriages. If at all, the State may chip in by providing a publicly accessible registry of such marriages which contains names of persons so married and the precise symbolic act for which the marriage has been performed.

## VI. THE INDIAN CONTEXT

At first glance, it may seem that this issue is largely irrelevant to India. As of now, there is no advocacy group arguing in favour of the recognition of same sex marriages. However, the reason for this may be that Section 377 of the Indian Penal Code currently criminalizes same sex relationships (at least among two males).[34]

[34] INDIAN PENAL CODE §377 (I860); Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Of course, it is arguable that the two issues are conceptually distinct. As discussed earlier, two (or more) men may want to enter into marriage in support of a political or social cause, without ever intending to have any sexual relationship. In such a case, there would be no conflict between the State recognizing such marriages, while at the same time keeping Section 377 on the statute book.

However, in practice, the most prominent argument in favour of recognizing same-sex marriages (even though not the only one) has been to enable two autonomous individuals who are in a romantic loving relationship to unite into a marriage relationship, regardless of their sex. In this context, decriminalizing such a relationship between two persons of the same sex may appear to many people a prerequisite for a possible recognition of same-sex marriages. In fact, a section of the Indian media, while commenting on the invalidation of the bans on same-sex marriages in the United States has taken the stance that the decriminalization of same-sex relationships in India, would be a logical first step towards the recognition of same-sex marriages.[35]

In *NAZ Foundation v Govt. ofNCT of Delhi,*[36] the Delhi High Court held that Section 377, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. In its challenge to the constitutional validity of this Section, NAZ Foundation had argued that it is based upon traditional Judeo-Christian moral and ethical standards, which conceive of sex in purely functional terms, i.e., for the purpose of procreation only. Any non-procreative sexual activity is thus viewed as being "against the order of nature".[37]

Of course, in *Suresh Kumar Koushal v NAZ Foundation,*™ the Supreme Court reversed the Delhi High Court judgment and upheld the

[35] *US legalises same-sex marriage, India has a long way to go,* HINDUSTAN TIMES, June 26, 2015, http://www.hindustantimes.com/world/us-legalises-same-sex-marriage-india-has-a-long-way-to-go/story-qOULwCTOIkPsboiBINOncK.html.

[36] Naz Foundation v. Govt. Of NCT Delhi, 160 D.L.T. 277 (2009).

[37] *Id.*

[38] Suresh Kumar Koushal v. NAZ Foundation, (2014) 1 S.C.C. 1.

constitutional validity of Section 377.[39] What is significant, however, is that the Court was careful to point out that is has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. It clarified that the legislature shall be free to amend or repeal the provision as it sees fit.

Therefore, there seems to be a distinct possibility that in not-too-distant-future, Section 377 may cease to be in force, so far as it criminalizes consensual, private conduct between two adults. This may happen either as a result of a legislative repeal or the Supreme Court holding it to be unconstitutional. Further, if one accepts the argument that the provision itself was based on the notion that non-procreative sex is against the order of nature, such repeal (or invalidation) would strike at this very notion. Non-procreative sex would be seen to be perfectly in order. In this situation, there is no reason why two autonomous individuals should not be permitted to actualize such a non-procreative relationship in the form of marriage. Once the link between sex and procreation is severed, so would be the link between marriage and procreation as well.

This brings us squarely back to the theme of this note. Once the Indian state recognizes that marriage need not be tethered on procreation, it has already gone beyond the regulatory "paradigm case". In such a situation, there is no reason why two or more individuals should not be permitted to marry for a diverse set of motivations - romantic love, non-romantic love or even espousal of one or more causes. As our analysis shows, this logically entails that the Indian state too ought to recognize multi-person marriages, or a person entering into several marriage relationships simultaneously. In that case, the argument for State regulation of marriages itself collapses. At that point of time, marriage in India should cease to be a legally constructed practice and should be seen merely as a socially constructed practice.

[39] *Five-judge Constitution Bench to Take a Call on Section 377,* HINDU, Feb. 2, 2016, *available at* http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench/article8183860.ece.

## VII. CONCLUSION

In this article, the author does not argue for or against the position that procreation is, or should be the central defining feature of a "real marriage". What the author has sought to demonstrate is that procreation in the comprehensive sense - a fairly long gestation period, the process of birth and a fairly long period of the offspring's dependency on adult support - currently provides the only coherent and compelling regulatory paradigm case for *the State recognition and regulation of marriage.* Therefore, those who argue in favour of moving beyond this paradigm to support marriage predicated on loving unions, childrearing or as a speech or associational act have the burden of showing why the State should have a role in recognizing and regulating such relationships *as marriages.* In particular, they also need to show why the State should refuse to recognize multi-person marriages. Two or more autonomous persons who discover themselves to be united in a loving union should be free to actualize their relationship in a way they choose, unconstrained by any State prescription. Similarly, multiple persons marrying each other with child rearing as the goal of such marriage would in fact impart greater stability to the arrangement and also afford the benefits of specialization, ensuring better protection and welfare of the children. Finally, multiple persons simultaneously marrying each other as a symbolic speech act would be far more expressive and ought to be protected. This argument applies, with even greater force, to marriage as a symbolic associational act, as both supporters and critics of traditional marriage cast the institution primarily in terms of association.

In other words, the continued role for the State under this expansive conception of marriage can only be based on the articulation of an alternative regulatory paradigm that provides a compelling rationale for State regulation. While I do not claim that this is impossible, no such proposal is currently on offer. While the search for such an elusive alternative continues, the issue of the State's role in marriage (beyond its traditional conception) will continue to be in a state of regulatory paradigmatic limbo.

Abhay Lunia & Itishri Upadhyay, *The Interface Between Competition Law and Intellectual Property Rights: Balancing the Pro and Anti-Competitive Strains* 3(2) NLUJ Law Review 75 (2016)

# THE INTERFACE BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: BALANCING THE PRO AND ANTI-COMPETITIVE STRAINS

ABHAY LUNIA* AND ITISHRI UPADHYAY[1]

ABSTRACT

*The interrelationship between Competition Law and Intellectual Property Rights is complex and is still evolving. The global expansion of intellectual property protection has only increased this complexity. In the past, these two fields of law have been in constant conflict with each other. While the former's end goal has been to promote healthy competition for public benefit, the latter aims to promote innovation and reward the creator by awarding him rights of a monopolistic nature. However, a shift in the objective of each field has been recognized in recent scholarly and judicial opinions, thus providing a common platform for both fields of law for the end goal of consumer welfare. This shift in both the branches of law towards a common primary objective, establishes the groundwork for a complementary relationship between Competition Law and Intellectual Property Rights. This paper focuses on the international developments in the United States and the European Union and finally makes recommendations for the Indian Jurisprudence, drawing from the international literature and experience.*

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## I. INTRODUCTION

Intellectual Property Rights ("IPR") is an area of law, umbrella which is divided into eight parts i.e. patent, trademark, copyright, designs, geographical indicators, protection of undisclosed information, protection of plant varieties and biodiversity and layout-design (topographies) of integrated circuits. The word 'property' in IPR has a different meaning as opposed to the word 'property' in general. Here, the word property is related with intellectual and human mind creation. The fundamental function of intellectual property law is to ensure the complete control of oneself over his/her ideas, thoughts and plans.

According to Black's Law Dictionary, "Intellectual Property" is "the categories of intangible rights protecting commercial valuable products of the human intellect. The categories comprises primarily trademarks,

copyright and patents rights, but also include trade-secrets rights, publicity right, moral rights, and rights against unfair competition."[1]

EPR includes the right to exclude others from exploiting the non-corporeal asset.[2] Competition, on the other hand, is an evasive term that broadly means a struggle or contention for superiority, and in the commercial world, this means striving for more customers and businesses in the marketplace.[3] In the past, the two fields have been pitted against each other, encouraging the misconception that the ultimate goals of the two differ. With increasing jurisprudential understanding of the two fields now, their complementary relationship is recognized in the end goal of consumer welfare. The main theme of this article is to establish this harmonious relationship, using the emerging tools under the guidance of the European Union and United States jurisprudence, to balance the pro[4] and anti-competitive[5] strains of such interface.

The foremost justification for grant of intellectual property right is the incentive to innovate. The temporary monopoly right awarded to the intellectual property right holder to recoup his costs acts as an incentive to the inventor. This encourages the right holder to disclose his invention to the public, which benefits the society in more than one way by increasing the common knowledge pool, by providing useful information

[1] Children's Hospital & Research Centre Oaklan, Frequently Asked Questions, http://www.chori.org/About_CHORI/Downloadables/FAQs.pdf (last accessed on Mar. 4, 2016).

[2] Valentine Korah, *The Interface between Intellectual Property Rights and Competition in Developed Countries*, 2:4 SCRIPTed 429 (2005) *available at* https://script-ed.org/wp-content/uploads/2016/07/2-4-Korah.pdf; VlNOD DHALL, ESSAYS ON COMPETTnON LAW AND POLICY (2007).

[3] RICHARD WHISH, COMPETITION LAW (2009); VINOD DHALL, COMPETITION LAW TODAY: CONCEPTS, ISSUES AND LAW IN PRACTICE (2007).

[4] "Increased competition- internal and external- helps those who are strong enough to benefit from the new opportunities. However, it can hurt those who are ill-equipped to face the challenges of competition. We must adopt concerted measures, both at the national and the international level, for an equitable management of increased global interdependence of nations." - Dr. Manmohan Singh, Statement at the Asian African Conference (April, 23, 2005), http://pmindia.nic.in/speech-details.phpPnodeid= 108.

[5] IPR by virtue of its inherent monopolistic right to exclude others from using the product embodying such IPR for a limited time can give rise to anti-competitive strains if the right holder chooses to abuse his dominant position in the market.

to other investors for development of other products and advances research and development. Further, IPR assists commercialization of inventions by licensing property rights for exploitation in an economically efficient manner.[6] Moreover, intellectual property increases dynamic efficiency in the market, which contributes to the development of new products and processes resulting in socially beneficial innovations. [7] In the long run, technological and other innovations which are the subject of intellectual property regime contribute immensely towards the progress and development of the society.

Competition law, on the other hand, is a tool for promoting social welfare by deterring practices and transactions that tend to increase market power.[8] It aims to maintain allocative as well as productive efficiency in the market (both of which together constitute static efficiency).[9] Simply put, production efficiency means production of output at the lowest possible cost and allocative efficiency refers to optimal allocation of resources to their most valued use. Static efficiency is the prerequisite to establish a free market where there are no barriers to entry in the market and the consumers have the widest possible choices at the lowest possible prices.[10]

Noted economist Joseph Schumpeter in his theory of *"Monopolies Leading to Invention"* has recognized the complementary nature of IPR and Competition law, by asserting that it is competition by innovation which truly improves social welfare.

[6] Robert Stoner, *Presentation at Federal Trade Commission/Department Of Justice Hearing on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, Intellectual Property and Innovation,* FEDERAL COMMISSION OF TRADE/ DEPARTMENT OF JUSTICE (Feb. 26, 2002), accessible at http://www.ftc.gov/sites/default/files/documents/public_events/competition-ip-law-policy-knowlec!ge-based-economy-hearings/020226trans.pdf [hereinafter Stoner].
[7] ABIR ROY & JAYANT KUMAR, COMPETITION LAW IN INDIA, (2008) [hereinafter Roy & Kumar].
[8] John. E. Lopatka and William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases,* 90 Cornell L. Rev. 617 (2005).
[9] Stoner, *supra* note 6.
[10] Roy & Kumar, *supra* note 7.

*"The competition that counts is competition from the new commodity, the new technology, the new sources of supply, the new type of organization...competition which commands a decisive cost or quality advantage and which strikes not at the margin of the profits and the outputs of the existing firms but at their foundations and at their very lives....the fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumer goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates.* "[n]

Thus, we see that dynamic efficiency, as advocated by Schumpeter, is a key element in a pro-innovation economy. Further, from an economist's perspective, intellectual property law is primarily concerned with the provision of appropriate *ex ante* incentive (and increasing competition in innovation markets), while competition law is concerned with *ex post* incentives (and increasing competition in product markets).[12] *Ex ante* incentive exists through legislation that provides limitations on intellectual property rights before the commitment to invest is undertaken, whereas *ex post* is whether such limitations are imposed on the rights granted after the investment by competition law. These work as safeguards for balancing the strains of such interface. Article 8.2, 31(k) and 40 of the Agreement on Trade Related Aspects of Intellectual Property **("TRIPS"),** also seek to balance the pro and anti-competitive strains of this interface by providing appropriate measures to remedy anti-competitive aspects of intellectual property.[13]

[1] JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY, (Harper and Row ed., 2nd edn., 1950) (Quoted in Competition Commission of India: Research Report on 'The Interface between Competition Law and Intellectual Property Rights).

[12] Patrick Rey, *Presentation at FTC/DO] Hearing on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*, FEDERAL TRADE COMMISSION/DEPARTMENT OF JUSTICE (May 22, 2002), accessible at http://www.ftc.gov/sites/default/files/documents/public events/competition-ip-law-policy-knowledge-based-economy-hearings/02 0522trans.pdf.

[13] Article 8.2: Appropriate measures may be needed to prevent the abuse of intellectual property rights by right holders;

Article 31(k): Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-

When we take a look at the ambit of competition law and intellectual property, it is clear that both these fields of law have their end goal as increasing efficiency in the market, the former static and the latter dynamic. It can be said that both sources of law tread on divergent paths to reach the same destination - consumer welfare, through an efficient market. The complementary relationship between the two is reflected in their end goal of consumer welfare. The paths of the United States, European Union and India have been charted out in this paper to understand the nuances of this interface.

## II. Refusal to License and Compulsory Licensing vis-a-vis Competition Law

A significant aspect of the interaction between the two fields is the 'duty to license' and 'compulsory licensing' of such property. Compulsory licenses are "involuntary contracts between a willing buyer and an unwilling seller imposed or enforced by the State."[14] They are often used as a remedy to redress unreasonable refusals to license. There are many reasons for a firm to grant a license. A patentee may lack resources to produce in quantity and consequently may choose to limit its own production to a particular geographical area and to grant licenses for other territories; or it may wish to apply a patented process for one purpose and allow licenses to use it for others. Licensing arrangements which do not affect the position of third parties such as parallel importers and licensees for other territories, are necessary to provide fair rewards to licensors to enable them to penetrate a new market, encourage inter brand competition, relate to new technology, or are justified by other general characteristics of the industry and the technology, and have a duration

competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;
Article 40: Some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

[14] Christopher A. Cotropia, *Compulsory Licensing under TRIPS and the Supreme Court of the United States' Decision in eBay v. MercExchange*, http://www.cotropia.com/bio/Chapter26-Cotropia-PatentLawHandbook.pdf.

which is not too lengthy.[15] However, in tune with the licensing freedom of a firm or individual patent holder, the refusal to license is at the core of intellectual property right. While refusal to license by a dominant firm is not by itself anti-competitive or abusive, the manner in which such a refusal occurs often concerns competition law and policy. Some typical licensing clauses such as territorial exclusivity, royalty terms, duration of license, field of use restrictions, non-compete clauses, no challenge clauses, grant back terms, price terms and other conditions may easily fall in the web of competition law if their effect is anti-competitive. The widespread distrust of IPRs results from the misguided notion that IPRs are monopolies and therefore dominant position in the market is a natural consequence of their position.[16] The different legal implications of this right have led to different approaches in countries as a consistent approach is not possible at this time.

The refusal to license envisaged under Article 31(b) of TRIPS is a prerequisite to compulsory licensing of the right.[17] However, is not to be understood that all refusals lead to compulsory licensing as that would undermine the IPRs. Broadly, there are two ways in which an IPR owner can refuse to license his/her right: a) Saying 'no' to the third party who takes the route of voluntary licensing. A variation of this way is not waiting to say no, but directly suing an alleged infringer or threatening a potential infringer.; and b) Asking for excessively high royalties or other unacceptable conditions. The latter form of refusal is clearly an abuse of the dominant position of the IPR. Saying 'no' might lead to abuse of an IPR if the refusal serves contrary to the objectives of the legal requirements of a jurisdiction, such as failure to commercially work the

[15] UNCTAD, Revised report on Competition Policy and the Exercise of Intellectual Property Rights, Inter-governmental Group of Experts on Competition Law and Policy (Apr. 19,2002), http://unctad.org/en/docs/ c2clp22rl.en.pdf.

[16] WIPO, *Refusals to License IP Rights - A Comparative Note on Possible Approaches,* WIPO SECRETARIAT, (Aug. 2013), http://www.wipo.int/export/sites/www/ip competition/en/studies/refusals_license_IPRs.pdf [hereinafter WIPO].

[17] Such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time.

patented invention, and also if it prejudices the establishment or development of domestic commercial or industrial activities.[18]

ESSENTIAL FACILITIES DOCTRINE

At this stage, it is important to introduce the doctrine of 'essential facilities' as it has been developed as the next logical step in major jurisdictions to harmonize refusal of license scenario. The doctrine requires a monopoly /dominant firm to grant access to a facility that it controls and that is necessary for effective competition. Simply put, "Essential facility" is a facility or infrastructure which is necessary for reaching customers and/or enabling competitors to carry on their businesses.[19] A facility is 'essential' if it is otherwise unavailable and cannot be reasonably or practically duplicated.[20] Different jurisdictions have expounded their own version of this doctrine and the test is whether an IPR falls under the category of 'essential facilities'. If it does and the natural consequence of refusal to license this essential facility cum IPR leads to barrier to entry in the relevant market, the courts have the option to remedy this by compulsory licensing of such facility.

This article sets out the legal framework in different jurisdictions of US, EU and India and analyses the judicial decisions there under on the issue of refusal to license and compulsory licensing, anti-competitive conduct and abuse of dominant position and finds that they have adopted similar methods, however, the US approach tends towards stronger intellectual property protection whereas the EU and Indian approaches adopt a pro-competition and consumer welfare attitude.

## III. INTERFACE IN THE UNITED STATES

The patent/copyright clause embedded in the constitution of the United States often puts intellectual property at a higher pedestal in the interplay of the two fields. However, consumer welfare is not overlooked either. In the United States, the Department of Justice and the Federal Trade Commission have stated that both intellectual property laws and anti-

[18] WIPO, *supra* note 16.

[19] H.MCQUEEN, CHARLOTTE WAELDE & GRAEME LAURIE, CONTEMPORARY INTELLECTUAL PROPERTY - LAW AND POLICY,(2007).

[20] Image Technical Services v. Eastman Kodak, 125 F.3d 1195,1210 (9th Cir. 1997).

trust laws "share the common purpose of promoting innovation and enhancing consumer welfare."[21]

The antitrust law of the United States is primarily found in the Sherman Act, 1890 ["Sherman Act"] and the Clayton Act, 1914 ["Clayton Act"]. The most significant American cases which deal with the interplay of intellectual property and anti-trust law have been framed by tying cases under section 1 of the Sherman Act,[22] section 3 of the Clayton Act[23] and the attempt to monopolize under section 2 of the Sherman Act.[24] Under the Sherman Act, some agreements in restraint of trade (e.g., price fixing cartels) are treated as illegal *per se.* Most agreements, however, are scrutinized under the rule of reason. The rule of reason implies that a fact based approach should be adopted for the purpose of evaluating the reasonableness of the alleged anti-competitive conduct. It is in the form of weighing the pros and cons of the purpose and consequence of the conduct and if the pro-competitive effects outweigh the anti-competitive harm, then the conduct is deemed reasonable. Section 2 of the Sherman Act creates two types of offences: one is to monopolize and the other is an attempt to monopolize. The offence of monopoly has two elements:[25] (1) the possession of monopoly power in the relevant market,[26] and (2) the wilful acquisition or maintenance of the power as distinguished from growth or development as a consequence of a superior product, business

[21] Antitrust Guidelines for the licensing of Intellectual Property, DEPARTMENT OF JUSTICE (1995), http://www.usdoj.gov/atr/public/ guidelines/0558.htm; US Antitrust Modernisation Commission 2007 [hereinafter Department of Justice and Federal Trade Commission].

[22] § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[23] The Clayton Act of 1914 declares that tying, exclusive dealing and stock mergers are illegal where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

[24] § 2 of the Sherman Act prohibits conduct that monopolizes, or attempts to monopolize any part of trade or commerce.

[25] Emanuela Arezzo, *Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European Approaches Compared,* 24 J. MARSHALL J. COMPUTER & INFO. L. 455 (2006) [hereinafter Arezzo].

[26] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985).

acumen or historic accident.[27] Mere possession of monopoly power does not *per se* render the behaviour anti-competitive under this section. However, when a firm enjoying this position of strength in a market adopts anti-competitive exclusionary strategies to the ultimate goal of preserving such position or further enlarging it,[28] such conduct would fall within the ambit of section 2. The attempt to monopolize is understandably harder to establish. Further, section 5of the Federal Trade Commission Act, 1914, covers unfair methods of competition and unfair or deceptive practices.[29]

Additionally, The Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property, 1995,[30] issued by the Department of Justice, accentuates the nexus between intellectual property and competition law, highlighting the congruence rather than the tensions between the two. The existence of intellectual property does not automatically confer market power; it is the exercise of such right which has to be approached with caution. The most pernicious horizontal agreements such as price fixing, market or customer allocation or agreements to reduce output are deemed per se illegal under the per se rule. Other horizontal agreements must be scrutinized under the rule of reason. Thus, if the efficiencies of the licensing agreement outweigh the anti-competitive effect, then the agreement is generally not challenged. The guidelines have prescribed other additional criteria as well to ensure that licensing does not lead to anti-competitive conduct in the market.[31] The Antitrust-IP Guidelines also clarify that as with any other tangible or intangible asset that enables its owner to obtain significant supra-competitive profits, market power

[27] U.S. v. Grinnell, 384 U.S. 563, 570-71 (1966).
[28] Arezzo, *supra* note 25.
[29] §5. 15 U.S.C. 45(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
[30] Department of Justice and Federal Trade Commission, *supra* note 21.
[31] The licensor and its licensees should not collectively account for more than 20 percent of each relevant market affected by the restraint, in case of goods market; At least four independently controlled substitute technologies must exist in the technology market; In case of innovation market, there should be at least four additional independently controlled entities capable of conducting research and development that would be a close substitute for the licensing parties' activities.

or (even monopoly) that is solely the 'consequence of a superior product, business acumen, or historic accident,' does not violate antitrust laws per se.[32] The 2007 Department of Justice-Federal Trade Commission, (Joint) Report on Antitrust Enforcement and IP Rights,[33] also supports the complementary interplay of both IPR and antitrust law. This Report is almost entirely dedicated to licensing practices, with specific focus on hard-core restrictive practices, such as patent pool, cross-licensing, grant-back, etc., but also on Standard Setting Organizations and tying.

JUDICIAL TREND IN US

The underlying ideology of the Sherman Act was based upon the belief that "great industrial consolidations are inherently undesirable, regardless of their economic results."[34] Witnessing a shift, today the judiciary is reluctant to hold conduct as anti-competitive unless it has a direct adverse effect on consumer welfare. The court's progression is not straight; different courts have granted IP owners diverse degrees of immunity from antitrust enforcement, ranging from absolute immunity to the denial of any immunity whatsoever, although with a clear bias in favour of IP.[35] The following judicial decisions highlight the bias.

The essential facility doctrine was first elaborated in *United States* v. *Terminal Railroad Association,*^ where it was first applied to physical assets rather than IPR. The Court had enunciated the following

[32] Department of Justice and Federal Trade Commission, *supra* note 21 at § 2.2.
[33] U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (2007), http://www.usdoj.gov/atr/public/hearings/ ip/222655.pdf.
[34] United States v. Aluminium co. of America, 148 F.2d 416, 427-428 (2nd Cir. 1945).
[35] Rita Coco, *Antitrust Liability For Refusal To License Intellectual Property: A Comparative Analysis and the International Setting,* 12 INTELLECTUAL PROPERTY L. REV. 1 (2008).
[36] 224 U.S. 383 (1912) where a group of railroads which jointly owned the only railroad switching yard across the Mississippi River at the important city of St. Louis prevented competing railroad services from offering transportation to and through that destination. The Supreme Court required the railroads group to give access to non-members and held that such conduct constituted both an illegal restraint of trade and an attempt to monopolize under the Sherman Act.

requirements as necessary for an essential facility claim:[37] "1) control of the essential facility by a monopolist; 2) a competitor's inability practically or reasonably to duplicate the essential facility; 3) the denial of the use of the facility to a competitor; 4) the feasibility of providing the facility and (5) the elimination of competition in the downstream market." The remedy of compulsory licensing often follows after applying this doctrine and concluding that an essential facility is being unreasonably denied to a competitor. A catena of cases brings to our understanding the birth and development of this doctrine.

The pro-IP attitude of the US judiciary is evident in the case of *Hartford-Empire Co.* v. *United States?** which involved the grant of use of patents to others. The court asserted that the patent owner was under no obligation to either use it or grant its use to others. The court, however, noted the use of the essential facilities doctrine which imposes duty to deal or decrees compulsory licensing. It thus observed the inextricable connection between this doctrine and the grant of compulsory licenses. In another case, a pro-competition attitude is visible where the Supreme Court held that the only local newspaper in northern Ohio violated the Sherman Act by refusing to accept advertisements from businesses that placed advertisements from a small radio station.[39] The newspaper was held to be an indispensable medium of advertising and hence, violating an essential facility.

A pro-IP bearing is further visible in *Intergraph Corporation* v. *Intel Corporation*^ where the ambit of essential facilities was narrowed down with the Court holding that only when the facility owner and the user compete in a downstream market that requires access to the facility, the doctrine will apply. Though Intel dominated the market with 80% share of microprocessor chips and Intergraph Corporation imposed an obligation on Intel to continue the supply of chips, technology and interoperability information, the markets were different and therefore no

[37] MCI Communications Corp. v. American Tel. And Tel. Co., 708 F.2d 1081, 1132, (7th Cir. 1983), and Alaska Airlines Inc. v. United Airlines Inc., 948 F.2d 536, 544-45, (9th Cir. 1991).
[38] 323 U.S. 386 (1945).
[39] Lorain Journal Case, 342 U.S. 143,146-49 (1951).
[40]195 F.3d 1346 (Fed. Cir. 1999).

abuse could be made out. In *Aldridge* v. *Microsoft Corporation,*[41] Aldridge was the producer of a utility program called 'Cache86' which worked to accelerate the working of MS-DOS. Microsoft, when it released its new Windows 95 cured this flaw in its system and thereby rendered the existence of 'Cache86' obsolete. Aldridge sued Microsoft for violation of section 2 of the Sherman Act relying on the essential facility doctrine. The court, while it considered the possibility of applying this doctrine to intellectual property, held that there was no violation of antitrust law because Microsoft was not a dominant market player at that time. Therefore, the product was held to be not essential to compete in the downstream related market and therefore it did not violate the antitrust law. In the case of *Data Gencorp* v. *Grumman Systems Support Corp.,*[42] the court considered the facts where Data General (computer manufacturer) allegedly refused to license its copyrighted software program to third party maintenance providers in the service market, allegedly monopolizing the service market for its own product. Here, the Court introduced the principle that the authors desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers.

In the landmark case of *Eastman Kodak Co.* v. *Image Tech. Inc.,*[4]* Kodak was charged under section 2 of the Sherman Act for refusal to supply its patented repair parts to independent service providers. Here, the Supreme Court emphasized that power gained through some natural or legal advantage such as patent, copyright or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'. Here, the court held in favour of compulsory licensing if the right holder does not genuinely exercise his rights. A contrasting decision to the Kodak case was found in *Re Independent Service Organizations Anti-trust litigation* ("the *Xerox* case").[44] The court

[41] 995 F. Supp. 728 (S.D. Tex. 1998).
[42]36F.3dll47(lstCir. 1994).
[43] 504 US 451, 482-3 (1992).
[44] 203 F.3d 1322 Fed Cir 2000; *Xerox* was charged with monopolizing the service market of *Xerox* High Speed Copiers and Printers (patented) and thus violated section 2 of the Sherman Act. The ISOs contended that refusing to supply their patented products prevented them from competing in the separate relevant market and would ultimately result in their elimination from the market.

held that even though IPRs do not have the privilege to violate antitrust laws, a patent holder is not obliged to license or sell its intellectual property under antitrust laws and there is no violation of section 2 for mere refusal to license. The court opined that Xerox's termination of supply of patented product did not constitute an antitrust infringement in the absence of any fraud on the patent office, tying or sham litigation. The conditions for licensing were thereby considerably reduced. The court upheld the presumption in the *Data general* case that preserving the faculties granted by IPRs always amounts to an objective business justification for exclusionary conduct.

The applicability of essential facilities doctrine has been further narrowed by the Court in the significant case of *Verizon* v. *Trinko,*[45] where it was asserted that dominant firms have no duty whatsoever to open their facilities to their competitors (in this case a tangible infrastructure) because compelling the firm to do so may lessen the incentive to innovate and invest in the economically beneficial facilities. It logically follows that the possession of monopoly power will not be found unlawful unless it is accompanied by an anticompetitive conduct. The Court has been sceptical about recognizing exceptions to the general rule under the Sherman Act which does not restrict the freedom to choose which parties to deal with. Therefore, as per this decision, unconditional refusal to license does not violate competition laws. Even though this case does not deal with IPRs it is bound to have a significant impact on refusal to deal and essential facility cases due to the expansive wording given by the court. The more recent decision of *Linkline*[4b] in 2009 endorses the same view that only under certain circumstances, refusal to deal constitutes anti-competitive conduct and that courts should be very cautious in recognizing such exceptional circumstances where monopolists may not deal with whom they decide.

[45] Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, (2004), The case involved a class action law suit alleging that Verizon by refusing to share its local exchange facilities with other providers as required under the Telecommunications Act of 1996, engaged in anticompetitive conduct i.e. "refusal to deal," (tangible infrastructure) and leveraged monopoly power to its advantage.
[46] Pacific Bell Telephone Co. v. LinkLine Communications, Inc., 555 U.S. 438 (2009).

The decisions of *Data General* and *Xerox* are emblematic of the change in economic theory towards a Schumpeterian view of intellectual property rights as necessary strategic tools that help big concerns to protect themselves against the "perennial gales of creative destruction".[47] The judgments of *Trinko* and *Linkline* indicate the courts leanings towards a pro-Xerox (pro-IP) attitude.

## IV. INTERFACE IN THE EUROPEAN UNION

The competition rules of the European Union are influenced by its basic policy objective of market integration as well as two prominent doctrines applied to the interface:[48]

a) The *existence/exercise* doctrine i.e. competition rules apply not to the existence but to the exercise of IPRs;[49] and
b) The *specific subject matter* doctrine i.e. restraints upon competition are justified when they are reasonably necessary to safeguard the "specific subject matter" of an IPR. This constitutes the core package of rights that makes up the IPR itself.

In practice, however, the European Court of Justice (ECJ) has not consistently based its reasoning upon the existence/exercise and specific subject-matter doctrines, relying instead upon a standard economic analysis of the type used in non-IPR cases.[50] An overview of the competition rules relating to IPR reveals the following provisions of EU law:

a) Article 101 of the Treaty on the Functioning of the European Union (Article 81 of the EC Treaty) prohibits joint conducts which has as its object or effect the prevention, restriction or distortion of competition in the internal market. However, Article 101(3) carves out

[47] Arezzo, *supra* note 25.
[48] UNCTAD, *supra* note 16.
[49] Consten & Grundig v. Commission, [1966] ECR 299, where the European Court of Justice distinguished between the existence and improper exercise of an IPR.
[50] UNCTAD, Competition Policy and the Exercise of Intellectual Property Rights, INTER-GOVERNMENTAL GROUP OF EXPERTS ON COMPETITION LAW AND POLICY, Ninth Session, Geneva (15th May 2008), http://unctad.org/en/docs/c2clpd68_en.pdf.

an exception to article 101 for agreements having a pro-competitive effect on the market.

b) Article 102 of the Treaty on the Functioning of the European Union (Article 82 of the EC Treaty) prohibits abuse of dominant position. It provides a non-exhaustive list of abusive conduct which is left open for the courts of the member States to elaborate upon. The commission is not restricted by this tentative list to find abusive behavior.

c) Relevant regulations and guidelines (such as the R&D Block Exemption[51] and the IPR Licensing Block Exemption[52]) provide exemptions that create a 'safe harbor' or a 'safety zone' for certain contracts. These are:

(i) *R&D Block Exemption:-* Enterprises invest huge amounts of resources in research and development which enhances innovation ultimately. The exclusivity offered by IPRs gives the investors an opportunity to recover the investment costs. The exemption to R&D ultimately results in technologically superior products and thus enhances consumer welfare.

(ii)77?e *IPR Licensing Block Exemption* also known as the Technology Transfer Block Exemption Regulation protects licensing agreements entered into by parties with smaller market shares. Undertakings with more than a 30% individual share of a relevant product market or a relevant technology market are unable to take advantage of the block exemption. If two undertakings are competitors on a relevant product market or a relevant technology market, their combined market share must be less than 20% in order to come within the block exemption.

*(ni)2004 Guidelines on Application of Article 81 of the EC Treaty:* Further, the European Commission has issued rules and guidelines as to when licensing agreements of IP rights are likely to be problematic from a competition perspective[53]

[51] European Commission Regulation (EC) No. 2659/2000, http://eurlex. europa.eu/LexUriServ/LexUriServ.do?uri
= CELEX:32000R2659:EN:HTML.

[52] *Id.*

[53] EU Guidelines, *Commission Notice - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements* (2004).

JUDICIAL TREND IN UK

An overview of the cases reflecting the interface between the specific intellectual property rights which give rise to competition concerns and the manner in which they do so is discussed hereunder.

In *AB Volvo* v. *Erik Veng*,[54] Volvo, a car manufacturer, held the design right over front wings for cars in the UK. On being charged with infringement of Volvo's intellectual property, Veng's defense was that Volvo refused to grant license which was an abuse of dominant position. It was held that a mere refusal to license cannot itself constitute an abuse of dominance but arbitrary refusal to supply spare parts to the independent repairers, the fixing of prices for spare parts at an unfair level, or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation would amount to abuse. Here, while determining what constitutes abuse of dominance, the court also determined the boundaries of compulsory licensing in so far that such refusal must be arbitrary in order to apply the remedy of compulsory licensing.

A broader approach was adopted in the landmark *Magill* case[55] wherein the ECJ upheld compulsory licensing of IPR in Competition law for the first time. The case involved the refusal to license copyright on TV listings by three television broadcasters to Magill, a small company, which wanted to produce and market a comprehensive TV guide containing information regarding the three broadcasters' programming, for which there was consumer demand. According to what has come to be known as the *Magill* test, the legitimate owner of an IPR who finds himself in a dominant position in the market is said to abuse such position if: a) he is found to be the exclusive holder of a raw material or input essential to run a certain business on the market and such input is not duplicable; b) his behaviours prevents the coming into the market of a product for which there is potential consumer demand; c) the refusal to license has no legitimate business justification; d) his behaviours had deliberately

[54] [1989] 4 CMLR 122.
[55] Joined cases C-241/91P and C-242/91P Radio Telefis Eireann and ITP v. Commission (1995) ECR1-743 (hereinafter *Magill).*

pursued the goal of reserving to himself a downstream market by foreclosing competition to other potential rivals. The commission has thus improved and added to the criteria provided in the *Volvo* case and has provided an exhaustive list (in their view) of what refusal will constitute abuse. It is interesting to note the parallel drawn between *Magill* and the essential facilities doctrine expounded in the United States. The court observed that the TV listing held by the three broadcasters was essential to compete in the derivate/secondary market but neither the commission nor the courts even mention this doctrine.

Further, *IMS Health GmbH & Co.* v. *NDC Health GmbH & Co. KG,*[56] affirmed the *Magill* case. In this case, the Commission was of the view that as the 1860 brick structure had become a market standard and therefore indispensable; the dominant firm was under a duty to license it even if it had copyright in it. The ECJ asserted that all the criteria of exceptional circumstances in the *Magill* case have to be fulfilled in order for a compulsory license to be granted. In the absence of such exceptional circumstances, a refusal to deal even by a dominant enterprise does not constitute abuse. The court reasserted three cumulative criteria of potential consumer demand, objective justification of refusal and exclude competition in a secondary/downstream market.

The factor of complete foreclosure of all competition in the secondary market as put forth by the *Magill* and *IMS* cases is stronger when compared to the weaker standard adopted by the Court in the *Commercial Solvents* case[57] to eliminate competition in the relevant market on the part of the competitor which requires access. Also, concept of a "new" product for the market for which there is potential consumer

[56] Case C-418/01, IMS was the largest supplier of sales data and other information on pharmaceutical services to pharmacies in Germany using a 'brick like' structure, which divided Germany into 1860 areas or 'bricks', corresponding to a particular geographical area. This structure became the 'market standard' for delivery of such pharmaceutical information and was protected by copyright. NDC developed a similar structure deriving from the IMS structure.

[57] Istituto Chemioterapico Itahano SpA and Commercial Solvents Corp v. Commission [1974] E.C.R 223. Even though the Commercial Solvents patent had expired, only it had the know-how to make the raw material for the drug. Its refusal to supply to Zoja, a former customer who competed downstream, would result in eliminating competition for this undertaking entirely.

demand was found in the Magill case only. The concept of 'new' product was not clarified in *IMS* case. The impact of this on compulsory licensing cases mandates the determining of this concept by using economic and other relevant factors by economic scholars.

The essential facilities doctrine was given a narrow interpretation by Advocate General Jacobs in *Oscar Bronner*[5]* where he set out the drawbacks of requiring supply to an essential facility as follows: compulsory licensing reduces the incentive to invest in the original facility or its duplication where that is practicable, and leads to detailed regulation to determine the amount of compensation payable. In AG Jacobs opinion, compulsory licensing should be granted only when there is an insuperable obstacle to enter an adjoining market. The court went a step further by holding that refusal to supply should be incapable of being objectively justified, thereby shifting from 'not justified' in IMS to being 'incapable' of objective justification. He thus advocated a more stringent approach for granting compulsory licenses.

The significant *Microsoft* case,[59] which came out a month before the IMS case, however, did not treat the Magill circumstances as exhaustive. Microsoft was held to abuse its dominant position and was mandated to provide the interoperability information to enable third parties to connect with the Windows operating system without loss of functionality. The Commission held that these conditions are merely sufficient in the following words:

[58] Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG, Case C-7/97, [1998] E.C.R. 1-7791.

[59] Microsoft v. Commission, [2007] 5 CMLR 846, The Commission found that Microsoft held dominant position in the market for operating systems. Not only did it supply over 90% of them, its dominance was protected by high entry barriers: the ability to leverage from existing products; indirect network effects; and learning or switching costs. The Commission decided that withholding the information necessary to design competing programmes was an abuse and risked eliminating competition from the server market, stifling innovation and reducing consumers' choice by locking them in. It further observed that Microsoft made it difficult for its competitors to operate limited technical development and markets, thus falling under the ambit of article 82 of the EC treaty. It rejected the view that the IPRs held by Microsoft justified the failure to supply the interface information.

*"There is no persuasiveness to an approach that would advocate the existence of an exhaustive checklist of exceptional circumstances and would have the Commission disregard a limine other circumstances of exceptional character that may deserve to he taken into account when assessing a refusal to supply."*

In a nutshell, the Commission held that a refusal to license on the part of a dominant undertaking is not an abuse by itself, but may be characterized as abusive when accompanied with exceptional circumstances. Either way, the cumulative finding of all exceptional circumstance in any one case is not an easy or practical matter. As far as the question of the refusal to license becoming harder for the IP holders, in view of the increase in the list of circumstances where a dominant holder cannot refuse, is concerned, the authors argue that the answer lies in the affirmative. This in fact indicates and confirms the pro-competitive approach of EU. Finally, the European Commission paper,[60] lays down five cumulative conditions to evaluate refusal: (a) the behaviour can be characterized as refusal to supply; (b) the company is dominant; (c) the input is indispensable; (d) the refusal is likely to have a negative effect on competition; and (e) there is an absence of an objective justification. In case of refusal to license an IPR an additional condition has to be fulfilled, that the license is an indispensable input to produce new products for which there is potential consumer demand.

## V. INTERFACE IN INDIA

Competition law and policy being at a nascent stage in India, has only now uncovered the difficulties posed by the intellectual property and competition law interface. It has yet to iron out the creases which the developed nations such as US and EU have already resolved. The tussle between innovation and competition was seemingly irreconcilable till a few years ago but now there is growing recognition of the complementary relationship between the two as both have as their ultimate aim, the interest of society, albeit one in the long run (IPR) and the other in the short (Competition law). India, already a signatory to the TRIPS Agreement, amended the IP laws of the country in tandem with the international standards under TRIPS at the same time. This emphasizes

[60] European Commission, *Directorate General for Competition Annual Activity Report* (2007), http://ec.europa.eu/atwork/synthesis/aar/aar 2007/doc/comp_aar.pdf.

the focus of the economy on both innovation and competition in the same time frame. Competition law has been given statutory recognition by the Competition Act, 2002. Section 3 of the Act contains criteria which declare certain horizontal and vertical agreements as anticompetitive in nature. Section 3(5) carves out an exception in favour of intellectual property right, keeping in mind the nature and requirements of such rights. As far as the first part of Section 3(5)(i) is concerned, we find no cause for concern as any right holder can and must take measures to avoid or restrict infringement of his IPR. The second part of this subsection permits 'reasonable conditions' to be imposed, by way of agreement, which are necessary to protect the bundle of rights granted under the respective intellectual property statutes. By implication, we can conclude that unreasonable conditions are not permitted upon the use of the IPR and they will fall within the ambit of section 3 of the Act (anti-competitive agreements). The problem in part arises because the Act does not define 'reasonable conditions' and that task is invariably left for judicial and scholarly elucidation. However, a long list of "unreasonable" practices is given in the Competition Commission's booklet on Intellectual Property Rights under the Competition Act, 2002.[61] This sub section along with the practices in the booklet aims to strike a balance between the legitimate interests of IPR holders and competition.

Section 4 of the Competition Act prohibits abuse of dominant position by enterprises and it lays down a list of factors constituting such abuse. This has relevance as enterprises owning IPRs tend to create a dominant position in the market by exercise of the right. Dominance is defined as a position of strength in the relevant market, capable of operating independently of market forces, or to affect its competitors or consumers in its favour. The Act does not prohibit the dominant position in the market but only the abuse of such dominance. Clearly, Indian legislators have been largely inspired by the EU Competition Laws. Sections 4(2)(c)[62]

[61] Competition Commission of India, *Intellectual Property Rights under the Competition Act*, 2002, http://www.competitioncommission.gov.in/advocacy/Intellectualjproperty_rights.PDF. Such unreasonable practices include *inter alia* patent pooling, tie-in arrangement, non-compete clause, unreasonable royalty terms, grant backs.

[62] Indulges in practice or practices resulting in denial of market access in any manner.

and 4(2) (e)[63] distinctly echo the principles enunciated by cases in EU and US discussed in this paper. In addition, section 5 and 6 of the Act which provides measures for combinations and regulation thereof may also be invoked for IPR related issues.

JUDICIAL PRONOUNCEMENTS IN INDIA

The litigation dealing with such interface is at a nascent stage in India as the Competition Act came into effect only in 2009 and the courts have gainfully applied the doctrines of EU and US jurisdictions, which have decided numerous cases on this issue. While in the EU, compulsory licensing is effected on the fulfillment of some exceptional circumstances, the criteria in the US in even more stringent. The question that arises is which model does the CCI and the Judiciary favour. This part of the paper looks at the few but relevant cases on the interface between the two fields of law and it is not restricted to licensing cases only. An overview of the landmark decisions hereunder reveals the trend towards pro-competition, consumer welfare and static efficiency.

In the landmark case of *FICCI - Multiplex Association of India,*[M] the Commission found that producers/distributors action in concert to determine revenue sharing ratio with multiplex owners amounted to limiting/controlling supply of films to multiplex owners which constitutes abuse under section 3 (3) (a) and (b) of the Competition Act. It further held that the non obstante clause in section 3(5) is not absolute and intellectual property laws do not have an absolute overriding effect on competition law. The copyright existing in a cinematograph film and the ensuing bundle of rights to communicate the work to the public are a creation of a statute *i.e.* the Copyright Act, 1957 and therefore not an absolute right. In fact, the multiplex industry did not infringe the copyright of the individual producers but facilitate the rights of owners by releasing films. This judgment has been hailed as a benchmark decision because of its attempt to end the abuse of dominant position in the film

[63] Uses its dominant position in one relevant market to enter into, or protect, other relevant market.

[64] FICCI Multiplex Association of India v. United Producers Distribution Forum, Case no 1 of 2009.

industry even though the Commission only fined a meagre amount of one lakh rupees to 27 film producers.

However, the Commission, took a different view in *Singhania & Partners LLP* v. *Microsoft Corporation (I) Pvt. Ltd.*,[65] where it ruled that Microsoft, which held 90% of the market share did not abuse its dominant position by refusing to sell OEM license to Singhania and Partners and only distributed the volume license which was placed at a higher price. Microsoft's refusal to deal OEM was alleged to be an abuse of dominant position under Section 4(2)(a)(ii) which prohibits discriminatory pricing. It is surprising to see this decision being upheld by the Competition Appellate Tribunal as Microsoft has already received adverse rulings on copyright/software issues in other jurisdictions such as EU.

Under the erstwhile Monopolies and Restrictive Trade Practices Act, 1969, excessive pricing was also considered to be a restrictive trade practice. Even though overpricing of a patented drug is not per se anti-competitive, keeping the pricing of patented and branded generic drugs, especially live saving drugs, would increase the danger of abuse of monopoly pricing.[66] The first instance of compulsory licensing in the post TRIPS era has been found in *Natco Pharma ltd.* v. *Bayer Corporation*,[67] in March 2012. The Controller of Patents granted the compulsory license to Natco (generic drug producer) to allow it to produce and sell Bayer's patented medicine *'Sorafenib Tosylate'* also known as *'Nexavar'* to treat cancer in the Indian Territory. On reflection, this decision attempts to balance the rights of the patent holder as well as promote and sustain competition in the market. Even in the controversial *Novartis* case, the court has recognized the need to prevent unwarranted extension of

[65] Microsoft licensed its products through three main channels of distribution being OEM license, volume license and retail chain. It contended that it had software (copyright) protection which governed the use and re-distribution of their intellectual property right. The prices charged by Microsoft differed for all three channels. It refused to sell OEM license to Singhania and only distributed the volume license which was placed at a higher price. Microsoft's refusal to deal OEM was alleged to be an abuse of dominant position by virtue of artificially controlling prices.

[66] Union of India v. Cyanamide India ltd, AIR 1987 SC 1802.

[67] C.L.A.No. 1 of 2011 (12 March 2012).

monopoly pricing by way of ever-greening.[68] From a competition perspective, not granting extended patent protection to the modified drug *'Imatinib Mesylate'*, also known as *'Glivec'*, has opened the doors for the generic industry to compete.

Ericsson Case Series:

*Ericsson has more than 100 patent licensing agreements and holds about 37,000 patents for mobile communication.*

- *Ericsson* has said that it had invited *Xiaomi* to use its patented technology by obtaining a license, but instead of doing so, the Chinese manufacturer launched its devices in India in July 2014. The order was passed on the plea of Ericsson that Xiaomi has been violating its eight patents pertaining to AMR, EDGE and 3G technologies in the field of telecommunication.
- Even in the *Ericsson v. Micromax case,* there was a case of SEP in Delhi High Court for infringement and amount and claimed Rs. 100 Cores as damages. But then Mircomax filed a complaint u/s 19 (l)(a) to CCI alleging the Ericsson demanded unfair, discriminatory and exorbitant royalty for its patents regarding GSM technology The CCI completely agreed with Micromax's arguments. It held *"that charging of two different license fees per unit phone for use of the same technology prima facie is discriminatory and also reflects excessive pricing vis-a-vis high cost phones and that confidentiality of royalty rates was discriminatory indeed.'*'[9]

## VI. Comparative Analysis and the Way Forward for India

It is clear from the plethora of cases discussed that the United States jurisprudence, while proclaiming that IPR and antitrust law both pursue the common objective of consumer welfare, starkly favours an innovation driven economy and the protection of intellectual property when the two fields are in unavoidable conflict. It is also clear that unilateral conduct is presumed legitimate, unless the plaintiff proves otherwise. The presumption that preserving the faculties granted by IPRs always

Novartis v. Union of India, AIR 2013 SC 1311.
Micromax v. Ericsson Case no, 76 of 2013.

amounts to an objective business justification for an exclusionary conduct, as shaped by the Court of Appeal for the Federal Circuit in *Xerox*, seems to leave little room for rebuttal.[70] The courts have repeatedly applied the rule of reason which evaluates the reasonableness of the alleged anti-competitive conduct by weighing the pro-competitive effects against the anti-competitive effects.

Moreover, after the thoughtless application of the essential facilities doctrine in doubtful cases and reviewing the criticism it has received from scholars,[71] the federal court has started narrowing the ambit of the essential facilities doctrine which ultimately increases the scope of refusal to license. Further, the criteria of novelty and non-obviousness have been approached with a liberal stance and trivial inventions such as the process of making jelly sandwich,[72] or a method for swinging on a swing are being given. The new orientation of the patent office combined with the judicial interpretations has made it much easier to get patents.[73] This puts competition authorities on higher alert to avoid market power and abuse by grant of excessive IPRs in the United States.

The European Union appears to have adopted a more balanced approach. Overall, EU antitrust enforcement is concerned about preserving a competitive structure of the market and when such scenario are at risk, they do not exclude the possibility to constrain the use of an IPR insofar

[70] Arezzo, *supra* note 25.

[71] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 841 (1989) wherein he suggests very restrictive criteria for its application in order to achieve the real goals of antitrust law; Allen Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities"Doctrine*, 1996 COLUM. BUS. L. REV.; HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, UNILATERAL REFUSAL TO LICENSE IN THE US, IN ANTITRUST, PATENTS AND COPYRIGHT: EU AND US PERSPECTIVES (Francois Leveque & Howard Shelanski eds. 2005).

[72] One example of a trivial patent affecting competition is the case of giant jam and jelly maker J.M. Smucker (which holds a patent for a "sealed crustless sandwich" with fillings in between pieces of bread) threatening to sue Albie's Food, a small grocery in Michigan state U.S. for selling crustless peanut butter and jelly sandwiches.

[73] Martin Khor, *Intellectual Property, Competition and Development*, THIRD WORLD NETWORK (fun. 2005), http://www.wipo.int/edocs/mdocs/mdocs/en/isipd_05/ isipd_05_www_103984.pdf.

as this would be the only feasible way to restore competition.[74] They do not focus on the business justification but on the overall market scenario. The European Commission, at first, aimed to protect competitors but now its stance on licensing agreements is clearly set out as pro consumer welfare as evidenced by the Commission guidelines. The Guidelines aim to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these needs since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the community for the benefit of consumers.[75] Economic theory states that the pro-competitive effects of compulsory licensing are largest when the following three factors are present: a) indispensability of intellectual property to compete; b) complete foreclosure of market on refusal to deal; and c) the refusal prevents the emergence of markets for new products for which there is potential consumer demand.[76] A bare perusal of the EU case laws and especially the *Magill* test informs us that the exceptional circumstances envisaged in these case laws are nothing but the incorporation of this economic theory. It follows that this test will lead to pro-competitive effects on the market.

While both the United States and European Commission aim at promoting consumer welfare, their approaches differ. The United States approach is pro-innovation and seeks to protect the long term interest of consumers by safeguarding the Intellectual property whereas the EU treads a different path. American jurisprudence is deeply influenced by 'innovation' competition as advanced by the noted economist Joseph Schumpeter, who has time and again asserted that it is competition by innovation that truly improves social welfare. India, at an infant stage in this increasing scope of interface, has for the moment adopted a pro-competitive approach as is evidenced from the judicial decisions discussed earlier. However, the fact that in India there are no 'exceptional circumstances' in which licenses must be granted, raises concern for

[74] Arezzo, *supra* note 25.
[75] EC Guidelines, *supra* note 57.
[76] Christian Ahlborn, David S. Evans, A Jorge Padilla, *The Logic and Limits of the "Exceptional Circumstances Test" in Magill and IMS Health*, 28:4, FORDHAM INTL L. J., 2004.

intellectual property holders. Some policy guidelines and directions are needed to steer competition law and intellectual property to their rightful complementary relationship.

### THE WAY FORWARD

Reasserting the fact that India is at a nascent stage in this evolving and increasingly complex relationship between Competition Law and IPR, the author makes the following recommendations which can guide Indian policy on balancing the pro-competitive and anti-competitive strains of such interface:

1. In some foreign jurisdictions, competition authorities grant compulsory licenses under statutory provisions, notwithstanding existing provisions on compulsory licensing under Intellectual Property Laws. That is not the case in India yet. There are no determined circumstances under which the Competition authorities can grant such licenses. Even though the Indian Patent Act, 1970 and the Copyright Act, 1957 explicitly provide for compulsory licensing, the author suggests an additional ground of 'anti-competitive practices relating to IPRs' for the grant of compulsory licenses.
2. Learning from the evolution and application of the essential facilities doctrine in other jurisdictions, India needs to evolve its own factors and circumstances of 'essential facilities' with due regard to its socio-economic situation. The rule of reason approach is recommended to be adopted as it provides suitable flexibility to the essential facilities doctrine.
3. Lastly, the author advocates the adoption of guidelines or policy objectives on the same lines as the US Antitrust guidelines and the European Commission guidelines to regulate the increasing interface of IPR and Competition law in India.

## VII. CONCLUSION

Neither competition policy nor intellectual property policy must be pursued too strongly or weakly. This results in a balance between individual interests of the right-holders and the general interest of society in encouraging further innovation. If it becomes easy to obtain patents, for instance, then potential innovators will think twice before innovating

because it will be difficult and expensive to determine what licenses are needed when there are so many parties with so many patents. On the other hand, if competition policy is given the stronger say where firms are allowed to make unencumbered use of a company's innovation then there will be little incentive to innovate. Sections 1 and 2 of the Sherman Act does not provide any list constituting types of abusive behaviour, rather it seems keen on finding whether the conduct has an anticompetitive effect on the market by applying the rule of reason, instead of fitting such conduct in the specific categories laid out under the EU law.

The judicial trends of EU, US and India have each attempted to crease out the anti-competitive strains, in line with their policy objectives. As we witness in the course of this article, the US jurisdiction aims to enhance consumer welfare by promoting dynamic efficiency. The EU, on the other hand, emphasizes on short term gains to the consumer at the expense of more radical innovation and long run gains offered by dynamic efficiency. India, while drawing the underlying concepts from both jurisdictions, has followed an approach similar to that of the EU in promoting static efficiency and consumer welfare. The interaction of this paper thus reveals that intellectual property rights and competition law are indeed complementary in nature and that the strains between the two can be ironed out, as long as the common goal of consumer welfare is to be kept in sight.

# LAW RELATING TO PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE IN BANGLADESH

SHY AM KRISHAN KAUSHIK'AND PROF B P SINGH SEHGAL[2]

The problem of domestic violence is not alien to India's neighbouring country Bangladesh. Bangladesh ranks fourth among the world's nations with respect to violence against women. Majority of Bangladeshi men think that it is justifiable to beat up their wives. Most of the women in Bangladesh experience domestic violence in their lives which takes different forms of abuses i.e. physical (slapping, beating, arm twisting, stabbing, strangling, burning, choking, kicking, murder), psychological (threats of abandonment or abuse, to take away custody of the children, verbal aggression and humiliation, threats of killings), sexual abuse (coerced sex through threats, intimidation, forcing unwanted sexual acts), economic (denial of funds, refusal to contribute financially, denial of food and basic needs, controlling access to health care and employment) etc. In Bangladesh, though the magnitude of the domestic violence is alarmingly highly, till now there is no organized information on the extent, nature and context of domestic violence. Certain number of population have no clear idea as to what constitutes physical violence.[3] One of the primary reasons for the rise of domestic violence in Bangladesh seems to be strong patriarchal society. A lack of police cooperation with the victim and poor implementation of the laws results into a lack of deterrence. Failure in meeting dowry demands is another cause of violence against women in Bangladesh. There are multiple factors besides poverty that give rise to domestic violence in Bangladesh. Bangladesh has passed many legislations

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[3] See, Daily Star, 14th August 2003.

for providing protection to women. In the year 2000, the Suppression of Violence against Women and Children Act was passed. In 2009 the National Human Rights Act was passed. And then in 2010 the Domestic Violence (Prevention and Protection) Act 2010 was passed.

DEFINITION OF DOMESTIC VIOLENCE

In Bangladesh The Domestic Violence (Prevention and Protection) Act, 2010 defines domestic violence as physical abuse, psychological abuse, sexual abuse or economic abuse against a woman or a child of a family by any other person of that family with whom victim is, or has been, in family relationship.[4] Physical abuse is further defined as "any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the victim and includes assault, criminal intimidation and criminal force"[5]. Psychological abuse "includes but is not limited to:-

(i) verbal abuse including insults, ridicule, humiliation, insults or threats of any nature;

(ii) harassment; or

(iii) controlling behaviour, such as restrictions on mobility, communication or self-expression;"[6] Sexual abuse includes "any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of the victim".[7] And economic abuse "includes but is not limited to:-

(i) deprivation of all or any economic or financial resources or property to which the victim is entitled under any law or custom whether payable under any law or custom or an order of a court or any other competent authority;

[4] Section 3, The Domestic Violence (Prevention and Protection) Act, 2010 (of Bangladesh).
[5] Section 3, Explanation (a).
[6] Section 3, Explanation (b)
[7] Section 3, Explanation (c).

(ii) not allow to use the articles of daily necessities to the victim;

(iii) deprivation or prohibiting the victim from applying legal rights to her *stridhan* or dower or alimony or any consideration for marriage or any property owned by the victim;

(iv) transferring without consent of the victim or prohibiting the victim from applying legal rights to any assets whether movable or immovable owned by her;

(v) deprivation or prohibiting the victim from applying legal rights to continued access to resources or facilities which the victim is entitled to use or enjoy by virtue of the family relationship."[8]

GRIEVANCE REDRESSAL MECHANISM

Under this legislation women who have experienced domestic violence can submit complaints to the courts.[9] A victim or on her behalf, a police officer, an Enforcement Officer, a service provider or any other person, can apply to get remedy according to the provisions of this Act. It is important to note that it may be done on the behalf of the victim by the local protection officers as well.[10] A petition under The Domestic Violence (Prevention and Protection) Act, 2010 may be filed in any court under whose local jurisdiction the applicant resides; or the respondent resides; or the place where the domestic violence occur exits; or the place where the victim temporarily resides exits.[11] The Court is bound to fix up the date of hearing the victim within 7(seven) working days after receiving the application.[12]

The Court, upon receipt of an application under section 11, if satisfied by examining the documents submitted thereto that *prima*

[8] Section 3, Explanation (d).
'Section 11(1).
[10] Ibid.
[1] Section 12.
[12] Section 11(3).

*facie* the respondent has committed or that there is a possibility of his committing or abetting to commit domestic violence, may issue an *ex parte* interim protection order against the respondent.[13] It may also simultaneously issue a show cause notice to the respondent to reply within 7(seven) working days as to why a permanent protection order shall not be issued against him.[14]

ORDERS THAT MAY BE PASSED

The Court may, after giving the parties an opportunity of being heard, satisfied that domestic violence has taken place or is likely to take place, issue a protection order in favour of the victim.[15] The court can also issue order restraining the respondent from committing any act of domestic violence;[16] and from aiding or abetting in the commission of any acts of domestic violence;[17] and also prohibiting or restraining from entering any protected person's place of employment, business, or educational institution or other institution which the protected person ordinarily visits.[18] The court has also the powers to make orders prohibiting or restraining the respondent from making any personal, written, telephone, mobile phone, email or any other form of communication with the protected person.[19] An order prohibiting the respondent from causing violence to the dependants of the victim or any relatives or any person who gives assistance to the victim from domestic violence can also be passed.[20]

On receiving an application the court can also issue residence orders.[21] By virtue of the residence orders the respondent may be restrained from residing or visiting the *shared residence* or specified

[13] Section 13.
[14] *Ibid.*
[15] Section 14.
[16] *Id.* clause (a).
[17] *Id* clause (b).
[18] *Id* clause (c).
[19] *Id* clause (d).
[20] *Id* clause (e).
[21] Section 15.

part thereof where the victim resides.[22] Under The Domestic Violence (Prevention and Protection) Act, 2010 'shared residence' means a residence where the victim lives;[23] or where the victim has at any stage lived singly or along with the respondent in a family relationship;[24] or a place which is owned or tenanted either jointly by the victim and the respondent, or owned or tenanted by either of them;[25] or a place in which either the victim or the respondent or both jointly or singly have any right, title, interest or equity;[26] or a place which may belong to the family of which the respondent is or was a member, irrespective of whether the respondent or the victim has any right, title or interest in that.[27] The court may also issue orders restraining the respondent from dispossessing or in any other manner disturbing the possession of the victim from the shared household.[28] The court may also direct the Enforcement Officer to make arrangement for a safe shelter or safe place for the victim and her child/children, if the victim so consents to her placement in such alternative arrangement, during the existence of the protection order and if the continuous stay of the protected person at the shared residence is considered by the Court to be not safe for the protected person.[29] The court also has powers to direct the respondent to secure the same level of alternate accommodation for the victim as enjoyed by her in the shared residence or to pay rent for the same, if the circumstances so require.[30]

REALISTIC APPROACH OF THE LAW

The level of protection that can be made available to the victim is inclusive of taking care of many realistic needs. For example, the

[22] *Id* clause (a).
[23] Section 2(16)(a).
[24] Section 2(16)(b).
[25] Section 2(16)(c).
[26] Section 2(16)(d).
[27] Section 2(16)(e).
[28] Section 15(b).
[29] Section 15(c).
[30] Section 15(d).

court can issue orders requiring the respondent against whom the order is made to permit any protected person, accompanied by the Enforcement Officer, to enter the offender's residence, shared or not, for the purpose of collecting the protected person's personal belongings including her medical, educational and professional records, documents and certificates, passport, bank account documents, savings certificate and other investment papers and documents, personal income tax documents, jewellery, cash money, mobile phone, household goods and valuables of any description.[31] It can also order against the respondent to permit any protected person to have the continued use and expenses of a vehicle which has previously been ordinarily used by the protected person.[32] The Court can also make an order evicting the person against whom the order is made from the whole of a shared residence that is solely owned by him or her, if it is satisfied that there is no other way to secure the personal safety of the protected person for the time being.

In order to compensate the victim of the domestic violence a compensation order may be passed by the court. The compensation shall be for any personal injury or financial loss or trauma or psychological damage or damage to movable or immovable property or any possibility of such damage or loss as a result of domestic violence.[33] Before passing the compensation order the court shall take into account the pain and suffering of the victim and the nature and extent of the physical or mental injury suffered; the cost of medical treatment for such injury; temporary or permanent effect of such injury; any loss of earnings, present and prospective, arising there from; the amount and value of the movable or immovable property taken or transferred or destroyed or damaged and reasonable expenses already incurred by or on behalf of the victim

Section 15(e).
Section 15(f).
Section 16.

in securing protection from violence.[34] The court can pass maintenance orders as well.[35] Provision for lump sum payment or monthly payments can be made. If the respondent fails to pay the compensation according to the order made, the Court may direct the employer or a debtor of the respondent, to directly pay to the victim or to deposit in her bank account a portion of the wages or salaries or debt due to or accrued to the credit of the respondent.[36] Custody orders for the custody of any child or children of the victim can also be made in favour of the victim.[37]

Another very important feature of the Bangladesh law is that the disposal of domestic violence matters is required to be done in a time bound manner. The matter is required to be disposed off within 60 days of the issuing of the notice.[38] The orders though are appealable. The appeals are also to be disposed off within 60 days of its filing. Moreover, where the notice for appearance of the respondent was served properly and the respondent does not appear before the court or after appearing once remains absent at the subsequent date, the court may, issue warrant of arrest against the respondent or may proceed ex parte against the respondent.[39]

The offence of domestic violence is bailable and also compounda-ble.[40] A breach of protection order by the respondent is considered an offence under the Act and is punishable with imprisonment which may extend to 6(six) months, or with fine which may extend to 10(ten) thousand Taka, or with both and repetition of any offence is punishable with imprisonment which may extend to 2(two) years, or with fine which may extend to l(one) lakh Taka, or with both.[41] The Court, if it deems fit, instead of passing an order of

[34] Section 16(4).
[35] Section 16(5).
[36] Section 16(9).
[37] Section 17.
[38] Section 20.
[39] Section 26.
[40] Section 29.
[41] Section 30.

sentence against the respondent, may pass an order to perform various community welfare services by the respondent and responsibility may be vested upon any institution or organization to supervise such services.[42] From the income gained by the respondent due to the community welfare services under sub-section the Court may pass an order to pay such portion of the income to the victim and where applicable, to her child/children or any dependants as it deems appropriate.

Apparently the Act defines domestic violence in a wide manner. The persons who can seek protection under this Act could be any woman or child who is or has been at risk of being subjected to domestic violence. Any person can file a complaint on their behalf. There are two categories of persons against whom a complaint may be filed, firstly any adult person who has been in a family relationship with the victim and secondly relatives of the husband or intimate male partner including his male and female relatives. Various forms of relief are provided under the Act. The victim shall be informed about the availability of the services including medical and legal aid services by a Police Officer, Enforcement Order or Service Providers after receiving a complaint and also upon receiving complaint the first class Magistrate shall grant an interim Protection Order or any other order under this Act and multiplicity of forum reliefs can be sought in other legal proceedings such as petition for divorce. The Court may pass a decree of compensation after ascertainment of victim's injury or damage or loss as a result of domestic violence. The court may also pass at any stage of proceedings for a protection order or for any other relief under this Act. A temporary custody of children of the victim will grant to the victim or the applicant. Breach of Protection Order is a punishable offence. First contravention would be imprisonment of six months or fine up to ten thousand *taka* or both or engaging in a service benefitting to the community for a period. Subsequent contravention would be imprisonment up to twenty four months and fine up to *taka* one

[42] Section 31.

lakh or both or engaging in a service benefitting to the community for a period.

## CONCLUSION AND COMPARISON WITH INDIA

Under the The Domestic Violence (Prevention and Protection) Act of Bangladesh the definition of victim includes either a child or a woman, whereas in the Indian Protection of Women from Domestic Violence Act only women have been identified as an aggrieved person. In Bangladesh there is a possibility of appointment of Enforcement Officers by the government in each district, thana or in a metropolitan area; whereas in India there is a possibility of appointment of Protection Officers by the State Government in each district. In India the Protection Officers shall as far as possible be women; there is no such provision in Bangladesh. Indian legislation recognizes a relationship in the nature of marriage; Bangladesh legislation does not recognize such relationships. There are no duties imposed on the government of Bangladesh for the smooth implementation of the provisions of the law pertaining the domestic violence. This is one of the reasons that makes the law ineffective and the domestic violence is increasing in that country. The Indian legislation, on the other hand, defines the duties of the government exclusively.[43] There are better provisions for the proper implementation of the Act and for spreading broad awareness among the people in Indian legislation. Ex-parte proceedings; in camera proceedings; custody orders; time bound disposal of the matter (60 days); and compensation etc. are some of the similarities in both the legislations. However Bangladesh Act takes into account the possibility of false complaints. In case of false complaints there is a provision of punishment under section 32 of the Bangladesh Act. Indian legislation does not provide for any penalty for false complaints. Unlike Indian legislation, Bangladesh legislation also prescribes time bound disposal of the appeals from the orders under their Domestic Violence Act. The offence of domestic violence is com-

[43] Section 11, The protection of Women from Domestic Violence Act, 2005 (of India).

poundable in Bangladesh but not so in India. Clearly the law relating to the protection of women from domestic violence in Bangladesh is similar to that in India.

NLUJ Law Review

Aradhya Sethia, *Taxation of Personal Data Collection in India: A 'Taxing' Task*, 3(2) NLUJ Law Review 53 (2016)

# TAXATION OF PERSONAL DATA COLLECTION IN INDIA: A 'TAXING' TASK

ARADHYA SETHIA*

ABSTRACT

*Personal data collection is the bedrock of the economic activity of online platforms as their income earned from advertisements is directly related to the collection of personal data. Corporates that serve as online platforms and therefore, collect massive amount of personal data from Indian users can easily avoid income tax on personal data collection. The services of targeting the advertisements are technically delivered by the foreign entity controlling the platform. Further, the payment may be directly made to the foreign entity. This way, the income from advertisements is neither received in India, nor accrued in India. Therefore, this article aims at dual inquiry - first, normatively, should the collection of personal data be subject to income tax? Second, if the taxation on collection of personal data is normatively desired, how can it be justified under the existing framework of the Income Tax Act, 1961? It specifically focuses on %9(lXi) of the Act, to enquire if it provides sufficient statutory justification to deal with tax challenges posed by the data-driven digital economy.*

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## I. INTRODUCTION

The conventional policy principles that have guided the taxation systems are neutrality, efficiency, certainty and simplicity, effectiveness, fairness and flexibility.[1] These principles were the basis for the 1998 Ottawa Ministerial Conference and are since then collectively referred to as the Ottawa Taxation Framework Conditions. Most of the E-Commerce business models did not exist when these principles were laid down.[2] These principles were also adopted in the context of E-Commerce.[3] However, a principle, which did not form part of the Ottawa Framework, but is very relevant in the context of E-Commerce, is 'inter-nation' equity. According to this principle, each country should receive an equitable share of tax revenues arising out of cross-border transactions.[4]

^*Taxation and Electronic Commerce-Implementing the Ottawa Framework Conditions*, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, http://www.oecd.org/tax/consumption/Taxation%20and%20eCommerce%2020001 .pdf [hereinafter Ottawa Framework].

[2] T.N. Pandey, *The Changing Scenario Concerning Double Taxation Avoidance Agreements and Growing ECommerce Deals*, 125 TAXMAN 274 (2002); Sahil Aggarwal, *Taxing the Unseen - Tax in Digital Economy*, 56 TAXMANN.COM 243 (2015).

[3] Ottawa Framework, *supra* note 1.

[4] *Id.*

In other words, share of a country in taxation revenue should reflect the activities actually carried out in that country. The corollary to this proposition is that the division of taxing rights should reflect the role played by different activities in the value creation chain.

In 2014, the Organization for Economic Co-operation and Development (OECD), published a report on *'Addressing the Tax Challenges of the Digital Economy'* under its *'Base Erosion and Profit Shifting'* project.[5] One of the most significant aspects of the report was the challenge posed to the principle of inter-nation equity in income tax due to the increasing role of personal data in digital economy. The present article is aimed at addressing this very challenge, in the Indian context. Corporates that serve as online platforms and therefore, collect massive amount of personal data of Indian users can easily avoid income tax as their income is earned from the advertisements. The services of targeting the advertisements are technically delivered by the foreign entity controlling the platform. Further, the payment may be directly made to the foreign entity. This way, the income from advertisements is neither *received* in India, nor *accrued* in India.

This article examines whether the collection of personal data should be subject to income tax from a normative perspective and if so, examines the justification of the practice within the framework of the Income Tax Act, 1961. If data collection is not treated as a separate taxable event in the legislation, can it still be taxed through taxing income earned through other taxable events? This article argues that this is indeed possible within the contours of §9 of the Income Tax Act, 1961 as such taxes can be levied on income earned from advertisements.

This article is divided into three parts: the *first* part seeks to establish that the collection of personal data in multi-sided markets of digital economy performs a separate value creation role. In order to establish this, the economic theory of markets with network externalities (multi-sided platform markets), propounded by the economists JC Rochet and Jean

*"Public Discussion Draft- BEPS Action 1: Address The Tax Challenges of the Digital Economy,* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (Apr. 14, 2009), http://www.oecd.org/ctp/tax-chaUenges-digital-economy-discussion-draft-march-2014.pdf [hereinafter OECD Digital Economy 2014].

Tirole is relied upon. In the *second* part, the author lays down the ways in which the 'nexus' issues may arise in taxation of collection of personal data. *Finally,* the author enquires if §9(l)(i), as it exists, provides sufficient justification for dealing with the tax challenges posed by the data-driven digital economy.

## II. MULTISIDED MARKETS AND PERSONAL DATA COLLECTION

### A. ECONOMIST ROCHET 8C TIROLE'S TWO SIDED MARKETS THEORY

In a seminal academic piece written by J.C. Rochet and Jean Tirole in the year 2003, they explained the economics of the markets with network externalities.[6] Rochet and Tirole's theory on two-sided markets was essentially aimed at providing a new framework for competition policy for these markets. However, the author relies on this theory specifically to argue about the value creation role of data collection by drawing parallels from other industries which is extensively rely on by Rochet and Tirole. They took many case studies ranging from the video game industry to the credit card industry. According to the study, the economics of these industries in simple terms can be explained as such: *"Many, if not most markets with network externalities are characterized by the presence of two distinct sides whose ultimate benefit stems from interacting from common platform."*[7]

Platforms often treat one of these sides as a profit center and the other as a loss leader, or at best, as financially neutral.[8] In video games industry for example, the platforms make money because of game developers. The PC operating system platforms follow the other model where they make money because of consumers. The decision for platform based business model is essentially about deciding the sides, which will be either of these. The allocation of costs and profits on different sides is the core question in making the choice of business models in platform markets.[9] Price determination is not merely based on cross-elasticity, but also reflects each

[6] J.C. Rochet and Jean Tirole, *Platform Competition in Two Sided Markets,* 1 (4) J.L. EUR. ECON. ASS'N 990 (2003). [7]*Id.* at 990. *"Id.* at 991. [9]*Id.* at 992.

side's contribution to the other side's surplus.[10] They also extended this understanding to the cross-subsidization that occurs in the traditional industries such as newspapers, non-pay TV etc., where the content is free, but the revenue is derived from the advertisements.

The role of data becomes even more important in multi-sided business models. The ability of a business to attract one set of users is dependent on the ability of the business to attract another set of users. However, both of them may not be the direct source of revenue for the company. For instance, a social networking website may not charge the users that are registered on it. Therefore, the users are the subsidized side of the platform and the advertisers are the subsidizing part of the platform. However, this cannot negate the role of subsidized side value creation.

### B. THE ROLE OF PERSONAL DATA IN VALUE CREATION

The boundary between personalised data and non-personalised data is hazy. However, discussing their exact separation is beyond the scope of this paper. The growth in sophistication of information technologies has permitted companies in the digital economy to gather and use information across borders to an unprecedented degree. This raises the issues of how to attribute the value created from the generation of data through digital products and services.

Data can be gathered based on the explicit or implicit forms of agreements with the users. Broadly, personal data can be acquired in three ways: volunteered data (declared by the users voluntarily eg. personal details), observed data (eg. location history, browsing history) and inferred data (eg. profile built from online activities).[11] Subsequent to collection, this data may be further subject to many other uses ranging from storage to usage.[12] The chart below provides illustrative uses of personal data at different stages:[13]

***m.***

þOECD Digital Economy 2014, *supra* note 5, at 89.

[n] *Id.* at 131.

[13] *Personal Data: The Emergence of a New Asset Class,* WORLD ECONOMIC FORUM (Jan 2011),www.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf

***1. Personal Data Collection***

| **Collection/access** | **Storage and Aggregation** | **Analysis and Distribution** | **Usage** |
|---|---|---|---|
| Mobile Phones<br>User Generated Content | ISPs and Phone Providers<br>Government Agencies | Retailers and Service Providers<br>Public Administration | Businesses<br>Government Agencies |
| Smart Appliances<br>Applications<br>Sensors | **Online Social Networks**<br>**Financial Institutions**<br>**Medical Practitioners**<br>**Utility Service Providers**<br>**, Retailers** | **Financial Institutions**<br>**Healthcare Providers**<br>**Companies involved in Online Marketing and Advertising**<br>**Data analysts** | **End Users** |

The data gathered from various sources is often the primary input in the process of value creation in the digital economy. Data leverage generates direct value creation including targeted advertisements, to understand consumer decision making, to improve development of products and services, etc. Therefore, due to the great importance of the activity of data collection in subsequent value creation, it is very important to tax the collected data in the jurisdiction where the data is gathered, as well as to address the questions of whether the data is appropriately valued for tax purposes.

For the purpose of analysis of functions, assets, and risks, it is difficult to assign an objective value to the raw data itself as distinct from the processes used to collect, analyse and use that data.[14] The accounting principles do not incorporate self-created intangibles such as 'data' in the balance sheet. Therefore, data is not relevant to calculate the profits in the accounting. If the data is out rightly bought or sold, it may become

[14] OECD Digital Economy 2014, *supra* note 5, at 130.

relevant for tax purposes as it may be treated as an asset in the hands of the businesses. In that case, it is only the event of sale that will make the data relevant in value addition. At this juncture, it is important to understand how data protection jurisprudence interacts with the concerns of data and taxation. Many jurisdictions that have enacted data protection laws recognise that the ownership of personal data lies with the persons providing the same.[15] Therefore, it may be doubted as to whether data transfer can at all be seen as transfer of assets. However, economic literature dealing with intangible capital, in contrast, also values such assets, the ownership of which may not be protected by legal rules.[16] This raises some pertinent questions: can data be classified as an asset? If yes, can the ownership of this asset be transferred? These questions require one to delve deeper into the question of what constitutes 'asset.'
However, the transfer of ownership *oi data* is not directly relevant to the discussion on the role of data collection in value creation.

Even though the quantification of value addition by the collection of data may seem extremely difficult, there are few examples where some organizations have attempted to do so. For instance, a recent study by Data Driven Marketing Institute quantifies the value of the Data-Driven Marketing Economy (DDME).[17] Further, in a 2011 report on big data, the McKinsey Global Institute also estimated the value that could be created through the analysis and use of big data.[18] The Report notes five broad ways in which leveraging big data can create value for businesses:[19]

(i) Creating transparency by making data more easily accessible in a timely manner to stakeholders with the capacity to use the data; (ii)Managing performance by enabling experimentation to analyse

[15] *Id.* at 131.
[16] C. Corrado, *et al., Intangible Capital and Growth in Advanced Economies: Measurement and Comparative Results,* I2A Discussion Paper No. 6733 (2012).
[17] *The Value of Data: Consequences for Insight, Innovation, and Efficiency in the U.S. Economy,* DATA-DRIVEN MARKETING INSTITUTE (2013), https://thedma.org/wp-content/uploads/DDMI-Summary-Analysis- Value-of-Data-Study.pdf.
[18] Basel Kayyali *et al., The Big Data Revolution in US Health Care: Accelerating Value and Innovation,* McKlNSEY & COMPANY (Apr. 2013), http://www.mckinsey.com/insights/healthsystemsandservices/thebig-datarevolutioninushealthcare.
[19] *Id.*

variability in performance and understand its root causes;
(iii)Segmenting populations to customize products and services;
(iv)Improve decision making by replacing or supporting human decision making with automated algorithms; (v)Improve the development of new business models, products, and services.

Therefore, in these platform markets, collection of personal data from one side (in this case - users), on the network forms the basis of income earned from the other side (for instance, advertisers, etc.). Thus, it is submitted that this data collection performs the function of value creation in various ways even though there is no tangible or direct consideration for collection of personal data by digital platforms.

In cases where the two groups of platform users (subsidized and subsidizing sides of market) are located in different jurisdictions, it is difficult to apportion the value creation. It raises the core question as to how to determine that where the value is created for tax purposes and how to apportion such value creation among various jurisdictions.

## III. THE 'NEXUS' ISSUES IN TAXING THE COLLECTION OF PERSONAL DATA

In the preceding section, it was argued that the collection of personal data is a value generation activity. However, the taxation framework may not reflect the economic realities of the digital economy. Therefore, this section seeks to discuss the nexus issues created by the collection of personal data.

The burgeoning growth of the Information and Communication Technology around the world poses serious challenges to both the domestic and international tax law. Principally, there are two challenges: the nexus of income and its characterization.[20] 'Nexus' pertains to the threshold connection with the income that a jurisdiction must satisfy in order to tax the income. Further, the income earned from E-Commerce activities may also raise the issues pertaining to characterization of income into a specific category of economic transaction (for example, as a free

OECD Digital Economy 2014, *supra* note 5, at 129.

supply of a good, as a barter transaction, etc). Though digital economy poses serious characterization issues, it is beyond the scope of this paper. In this context, the author's analysis will be restricted to the 'nexus' issues posed by digital economy, more specifically by the activity of personal data collection.

A pertinent question is whether the remote collection of data should give rise to nexus for tax purposes even in the absence of physical presence. The corollary issues pertain to the determination of location of data collection.[21] Location specific data is often collected using the technologies that developed in a different country. It may then be processed in the second country and subsequently used for improving product offerings or targeting advertisements to customers in the first country.[22] In practice, source determination of data may become very difficult as it may be collected from different sources for different purposes and it may be later combined.[23] The appropriate allocation of that profit between the first country and the second country raises the tax challenge.

As per the current tax structure, the digital companies mostly avoid the tax structure in the country where it may not have any presence, though it may derive its users from that country.[24] Most of the users of a platform website do not pay a price for subscribing to these websites as the revenue of these websites comes from advertisements. However, it would be a mistake to think that the value generation occurs only at the level of advertisements.[25] This is because, the collection and processing leads to separate value creation.

[21] ANKIT MAJUMDAR, *'Permanent'Establishment in Cyberspace, in* 5 LAW RELATING TO COMPUTER, INTERNET AND E-COMMERCE: A GUIDE TO CYBER LAWS, 365 (Nandan Kamath ed., 2012).

[22] CRETAN NAGENDRA, *The Net and the Tax Net - The Indian Tax Structure and the Challenged Posed by ECommerce, in* 5 LAW RELATING TO COMPUTER, INTERNET AND E-COMMERCE: A GUIDE TO CYBER LAWS, 346 (Nandan Kamath ed., 2012).

[23] OECD Digital Economy 2014, *supra* note 5, at 131.

[24] OECD Digital Economy 2014, *supra* note 5, at 129.

[25] *Id.*

*French Proposal*

In France, the similar concerns have been reflected in the tax policies. According to 2013 estimates, Google itself generates more than $30 billion a year in advertising revenue, including an estimated €1.5 billion, or $2 billion, in France.[26] Yet, like other American Internet companies, it pays almost no tax in France.[27]A report by the French Government proposes to take into consideration the so-called "free work" of users, which, in providing their data, form a strategic source of revenue for digital businesses.[28] There are a few issues that arise in its implementation. The most important issue is the non-uniformity of data; value addition from collection of data may differ on the basis of source, rarity, use etc. Therefore, it is often difficult to isolate the exact value addition that results from the event of collection, or even processing. Further, this policy may pose more issues in analyzing functions, assets, and risks, to assign an objective value to the raw data *itself*, as distinct from the processes used to collect, analyse and use that data.[29]

Therefore, there is often a mismatch between the jurisdiction where the data is collected and the jurisdiction that taxes the income derived out of this data collection. This has a direct impact on equity in international tax law. One way of remedying this loss of tax can be an overhaul as suggested in France. The other way can be to incorporate this value creation within the existing framework. §9 of the Income Tax Act, 1961 is relevant for testing the second approach under Indian framework and is examined in the following section.

[26]Eric Pfanner, *France Proposes an Internet Tax,* The New York Times (Jan 23, 2013) http://www.nytimes.eom/2013/01/21/business/global/2 liht-datatax21 .html?_r=0.

[27]*Id.*

[28] Primavera De Fillipi, *Taxing the Cloud: Introducing a New Taxation System on Data Collection?,* 2(2) INTERNET POLICY REVIEW (May 1, 2013), http://policyreview.info/ articles/analysis/taxing-cloud-introducing-new-taxation-system-data<ollection[hereinaf ter Fillipi].

[2,]0£CD *Communications Outlook 2013,* Organization for Economic Cooperation and Development (July 11, 2013), http://www.keepeek.com/Digital-Asset-Management/ oecd/science-and-technology/oecd-communications-outlook-2013_comms_outlook-2013-en#.V9uX2Jh97IU#pagel.

## IV. SECTION 9 OF THE INCOME TAX ACT AND DATA COLLECTION

This section enquires into the question of whether data collection be taken into account while taxing income earned through other taxable events (for instance, income earned through targeted advertisements).

Under domestic income tax laws, the taxation of cross-border income mainly has two concerns: (a) taxation of outbound investments by "resident" entities, and (b) taxation of inbound investments by "non-resident" entities.[30] The income is taxable in India when it is received in India, or it accrues in India, or it is deemed to accrue in India (the place of accrual being where the right to receive is located).[31] However, discussing the *situs* of accrual is the matter of private international law and not the concern of this paper. The paper specifically analyses §9 jurisprudence, to understand income deemed to be accrued in India." §9 is a deeming provision which *"operates only to shift the locale of accrual of the income'*[2]*and* has no application in the cases where the income actually accrues or is received in India.[33] Further, the section is equally applicable to the residents and non-residents. Therefore, it is submitted that the taxation on the activity of collection of data requires specific analysis with respect to §9.

### A. ISSUES RAISED BY THE 'RIGHT FLORISTS' CASE

An interesting trend that is being followed by Google in order to regularly avoid the tax in India and even other jurisdictions is the practice which is commonly also known as *Double Ireland?** Google Inc. cut its

[30] OECD Digital Economy 2014, *supra* note 5, at 34.
[31] ARVIND P. DATAR, KANGA & PALKHIWALA, THE LAW AND PRACTICE OF INCOME TAX, 335 (10th ed. 2014) [hereinafter Palkhiwala].
[n] *Id.* at 332.
*"CITv. Aggarwal*, 56ITR 20, 24.
[34] This is method of transferring profits by establishing two Irish subsidiaries. The parent subsidiary establishes two subsidiaries. One of these subsidiaries is controlled by managers elsewhere, like Bermuda. The other subsidiary is completely managed and controlled from Ireland. The tax location of a company under Ireland law is dependent on the location of management and control rather than incorporation. Therefore, the first subsidiary is a Bermuda company for the purposes of Irish law. When the same product is sold overseas, money from the sale is sent to a second Irish subsidiary. The profits are then transferred to the first Irish subsidiary. Low corporate income tax in

taxes by $3.1 billion in the last three years using a technique that moves most of its foreign profits through Ireland and the Netherlands to Bermuda.[35] This practice has also directly challenged the provisions of Income Tax Act of India.

The most prominent case on this issue has been the *'Right Florists'* case. Google generated some revenue through advertising from Right Florists, an online flowers and gift delivery website in India. The payment was directly made to Google Ireland and Overture Services Inc. USA (Yahoo USA), but no taxes were withheld from these payments. In 2011, the Income Tax Department issued a notice to Google India Pvt. Ltd. as it allegedly did not provide a true picture of business income.[36] The income earned from the targeted advertisements was directly credited to Google Ireland.[37] According to the Assessing Authorities, *"The entire activity of (Google's) AdWords Programme and the revenue earned thereon has happened in India with both the advertisers as well people making use of the*

Ireland along with that fact that its jurisdiction is based on management and control leads to a phenomenon where the companies can arrange their transactions in a manner where most part of their income is landed in a tax heaven. For details on how this complex arrangement is ordinarily structured Joseph B. Darby & Kelsey Lemaster, *Double Irish More than Doubles the Tax Saving: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation,* 11(9) Practical Us/International Tax Strategies, 2 (2007), http://www.gtlaw.com/News-Events/Publications/Published-Articles/83044/Double-Irish-More-Than-Doubles-the-T ax-Saving-Hybrid-Structure-Reduce s-Irish-US-and-Worldwide-Taxation.

*"Google 2.4% Rate Shows How $60 Billion Is Lost to Tax Loopholes,* BLOOMBERG BUSINESS, (Oct. 21, 2010), http://www.bloomberg.com/news/articles/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.

[%]*Google Faces Searching Queries From Tax Officials; Penalised Rs. 76 Crorefor Incorrect Accounting,* THE ECONOMIC TIMES (Nov. 13, 2012) http://articles.economictimes.indiatimes.com/2012-ll-13/news/35086617_l_google-india-tax-treaty-tax-office.

[37] *Google India Gets Income-Tax Dept Notice for not Revealing Correct Revenues,* THE ECONOMIC TIMES, (Dec. 8, 2011), http://articles. economictimes.indiatimes.com/2011-12-08/news/30490345_l_google-indi a-income-tax-dept-tax-office; Apurva Chaudhary, *IT Department Slaps Rs. 76 Cr. Penalty On Google India: Report,* MEDIANAMA, (Nov 14, 2012), http://www.medianama.com/2012/ll/223-it-department-slams-rs-76cr-penalty-on-google-india-report/.

*advertisements situated in India. To this extent, the income of M/s Google Ireland Ltd was held to be accrued as well as arisen in India itself."***

The question that was raised is whether the revenue earned by Google through *AdWords* is 'income' of a non-resident under §5(2)(b)? At this juncture, it is important to recognise that §5(2)(b) has two parts: (i) income accrues or arises in India, and (ii) income deemed to accrue or arise in India.[39] In the structured analysis carried out by the Tribunal, it divided the determination on the basis of these two parts of §5(2)(b). The term permanent establishment has its origin in the tax treaties but, by virtue of judicial interpretation of "accrual", it is used in the context of domestic law.[40] In §9 of the Income Tax Act, the restricted role of 'permanent establishment' is only for the first part of §5(2)(b) i.e. to determine 'income accrues or arising in India'.[41]

The argument of the assesse was that the payment was made to the foreign entity without any permanent establishment in India. Therefore, the entire tax was chargeable in the U.S. and not in India. The payment made to Google is for the services rendered in the form of placing advertisements on different websites using a software code.[42] The Tribunal relied on the Bombay tribunal decision of *Pinstorm*[4i] and *Yahoo*[44] where payments made to Yahoo were not made chargeable as Yahoo did not have any permanent establishment in India.[45] As per the tribunal, *"a website per se, which is the only form of Google's presence in India - so far as test of primary meaning i.e. basic rule PE is concerned, cannot be a permanent establishment under the domestic law."*[46]

[38] Google India, *supra* note 38.
"Income Tax Act, §5(2)(b), 1961.
[40] f 12, Income Tax Officer v. Right Florists Pvt. Ltd, http://www.itatonline.in:8080/ itat/upload/8275269052907025933l3$5[A] lREFNORight_Florist.pdf [hereinafter *Right Florists]*.
[41] CIT v. Hyundai Heavy Industries Limited [2007] 291ITR 450 (Uttaranchal)(India).
[42] *Right Florists,* [2013] 143 ITD 445 (Kol) (India).
[43] Pinstorm Technologies Pvt. Ltd v. ITO [TS 536ITAT (2012) [Mum] (India).
[44] Yahoo India Pvt. Ltd. v. DCIT [2011]46 SOT 105 (Mum) (India).
[45] *Id.* at 42; Rajesh Gosain, *Google Survives Googly Payment for Online Advertisement is not Royalty orFTS,* 34 TAXMANN.COM 201 [2013].
[46] *Income Tax Officer* v. *Right Florists Pvt. Ltd,* I.T.A. No.: 1336/Kol./2011.

This question was also raised in the case of *eBay*.[47] The court held that eBay India provides only marketing services for the company and makes collection from the customers to forward it to eBay AG (the parent foreign company). It has not negotiated a contract for or on behalf of eBay AG till now, due to which eBay India cannot be treated as the permanent establishment for eBay AG. Therefore, eBay did not have to pay any tax in India.[48]

In order to address these very questions, the OECD Digital Economy Report suggested a different framework for "fully dematerialized digital activities" which refer to the situations which are clearly exempt from the preparatory or auxiliary activities in context of conventional business models. Apart from doing away with the exemption of 'auxiliary' and 'preparatory' activities in the permanent establishment clause, the OECD guidelines also suggested a test of 'significant digital presence.' According to this test, the possible options for apportionment of value creation due to personal data can be measures of total contracts for digital goods and services that are concluded remotely and the active engagement of substantial number of users (eg. number of accounts for social network platforms, number of visitors to the websites, or the number of users of online tools) as well as the overall level of consumption of the digital goods or the services of the enterprise in the market country. It also includes the extent of personal data gathering from that particular jurisdiction.[49] The framework suggested by the OECD can be a long-term policy overhaul of Income Tax law, which has to be affected statutorily.

Though often confused, 'permanent establishment' determination, as rightly pointed out in the above judgments is separate from §9 as it is a deeming provision. §9 is triggered only in the context of the second limb of §5(2)(b) i.e. 'income deemed to accrue in India'. Though the tribunal conducted a very detailed analysis of 'permanent establishment', the analysis with respect to §9 was rather shoddy.

[47] Ebay International Ag, Mumbai v. Assesse, I.T.A. No. 6784/M/2010 (Mum).
[48] K.R. Srivats, *EBay International's Business Profits not Taxable in India*, THE HINDU BUSINESS LINE, Sept. 29,2012, http://www.thehindubusinessline.com/economy/article 3948596.ece.
[49] OECD Digital Economy, 2014, *supra* note 5, at 146.

B. SECTION 9(1)(I) ANALYSIS

Under §9(l)(i) income is deemed to accrue in India if *"all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India or through the transfer of a capital asset situate in India* (emphasis added).

Therefore, according to the first clause, there are four ways in which the income can be deemed to accrue in India: (a) through or from any business connection in India; (b) through or from any property in India; (c) through or from any asset or source of income in India; and (d) through the transfer of a capital asset situated in India.[50]

*a. Business Connection Test*

By holding, *"there is nothing on record to demonstrate or suggest that the online advertising revenues generated in India were supported by, serviced by or connected with any entity based in India",* the Tribunal in *Right Florists* seemed to have equated 'business connection' with 'permanent establishment', which has also been conflated in the past. However, 'business connection' test is wider than the 'permanent establishment' test. 'Business connection' may exist even without a 'permanent establishment'.[51] This section seeks to argue that 'data collection' is sufficient 'business connection' for the purposes of §9(l)(i), even if it doesn't satisfy the requirements of 'permanent establishment' test. Simply put, while permanent establishment test is used for proving that the *income accrued* in India [first limb of §5(2)(b)], business connection test is relevant for proving that the *income is deemed to have accrued* in India [second limb §5(2)(b) read with §9].

The expression *'business connection'*has a wide though uncertain meaning: it admits of no precise definition and solution as it depends on the facts of the case.[52] The 'business connection' is not established if the only activity that is carried on is canvassing or promotion activity. Based on the

Income Tax Act, §9, 1961.
In Re Al Nisr Publishing, (1999) 239ITR 879 (India).
CIT v. Aggarwal Co. (1965) 56 ITR 20, 24 (India) [hereinafter *Aggarwat]*.

decided cases, Kanga and Palkhiwala in their treatise,[53] adopt the essential features as laid down in *In Re Sutron Corporation:*^

(i) a real and *intimate relation* must exist between the trading activities by a non-resident carried on outside India and the activities within India;
(ii) the relation *contributes directly or indirectly to the earning of income* by the non-residents in his business;
(iii) a course of dealing and continuity of relationship and not a mere isolated or stray nexus between the business of the non-resident outside India and the activity in India, would furnish a strong indication of business connection, (emphasis added)

'Business Connection', as defined in C7Tv. *Aggarwal & Co}*[5] involves:

*"[AJrelation between a business carried on by a non-resident which yields profits and gains and some activity which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity: a stray or isolated transaction is normally not to be regarded as a business connections...[T]he expression "business connection" postulates a real and intimate relation between trading activity carried on outside and trading activity within India., the relation between the two contributing to the earning of income by the non-resident in his trading activity."* (emphasis added)

Though the presence of a branch, factory, agency, receivership or management strengthens the claim of satisfying the test of business connection, it may exist even without a definite organization. The mere fact that a substantial portion of the total sale of an enterprise occurs in a territory does not result into 'business connection'.[56] Further, mere rendering of services from outside India to a business in India does not amount to business connection.[57] Foreign supplier agrees to render certain services incidental to the contract is not business connection - for instance,

[53] Palkhiwala, *supra* note 31, at 337.
[54] In Re Sutron Corporation, (2004) 268ITR 156 (AAR) (India).
[55] *Aggarwal* (1965) 56 ITR 20, 24 (India).
[56] Hira Mills v. ITO, (1946) 14 ITR 417,430 (India).
[57] Jethabai v. CIT, 91951) 20 ITR 331(India).

supplying technical and personal services.[58]

In several cases where the tribunals/courts were faced with the question of whether the online platforms have sufficient 'business connection' with India, they have almost obsessively concentrated on some kind of physical presence. It is submitted in the platforms mainly sustaining through advertising revenue in a two-sided market (such as Google AdWords in the case of *Right Florists),* if it has a substantial number of end-users in India, satisfy the essential elements of 'business connection' as postulated in *CITv. Aggarwal & Co.*[59] and *In re Sutron Corporation.*[60] The data collection *contributes directly or indirectly to the earning of income.* Further, when the collected data is used for the purposes of advertising, there is *intimate relation* between the business activities by a non-resident carried on outside India and the activities within India. Further, such services, there is continuity between the business of the non-resident and the activity being carried out in India.

Thus, bringing data collection within the realm of 'business connection' is desirable because as far as the advertisements are targeted towards Indian users, it will not matter whether the entity paying for targeted advertisements is an Indian entity or a foreign entity. For the purpose of taxation of data collection, other elements of §9(l)(i) may also be relevant, which are analysed in the subsequent sections.

b. *Source of Income*

"Source" does not mean a legal concept as such, but something that a practical man would regard as a real source of income.[61] For instance, shareholding in itself can be a source of income.[62] In this regard, it was held by the court that if dividend is paid by the company from the profits earned and taxed in India, the source of the dividend income is also India for the source of the dividend income is same as the source of the income

[58] CIT v. Vishakhapatnam Port Trust, (1983) 144 ITR 146 (India); CIT v. Navabharat (2000) 244 ITR 261 (India).
[59] Palkhiwala, *supra* note *31*.
[60] *Aggarwal,* (1965) 56 ITR 20, 24 (India).
[61] Palkhiwala, *supra* note 32, at 342.
[62] Caltex (India) Ltd. v. CIT, (1952) 21 ITR 278 (India).

of the company.[63] This is another possible place where the activity of data collection can be brought for the purposes of taxation - if it can be established that data is the source of the income earned through the advertisements targeted towards Indian users. Apart from 'source of income' and 'business connection' test, §9(1)(i) also prescribes two other categories.[64] However, those categories are not directly relevant to the analysis in this article.

Once it is established that the income is 'deemed to have accrued in India' under §9(l)(i), the explanations to §9(l)(i) further limit the scope of §9(l)(i). The following parts would deal with the ways in which the specific explanations (a) and (c) will affect the taxation of data collection.

*c. Explanation (a) to Section 9(l)(i): Apportionment of value creation*

*"[I]n the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India,* "(emphasis added)

It is also well settled that if some operations of the business are carried within and some of the operations are carried outside India, only that portion of the profit, which is reasonably attributable to India should be taxed in India.[65]

In *Anglo French Textile Co. Ltd v. CIT,*[66] the position was clarified as to when the apportionment could be claimed. The court held that the explanation would not apply to every business activity of a manufacturer that comes within the scope of "operation". The particular activity

[63] *Id.*

[64] The phrase "property situated in India" should only be understood to mean something tangible. Intangible property or chose in action is not property for the purposes of this section (CIT v. Assam Tea, (1987)167 ITR 215 (India)) Asset or source of income was not included within the definition of property. The words "assets or source of income" were later inserted in §9(l)(i). Though data itself may be classified as an asset. It is submitted that since it already satisfies the requirement of 'business connection' and 'source of income', classifying data into the category of 'asset' is not required.

[65] CIT v. Skenando, (1976) 103 ITR 29 (India); 'Operations' referred to are those of the non-residents sought to be taxed (Great Lakes v. CIT, (1993) 202 ITR 64 (India)).

[66] Anglo French Textile Co. Ltd v. CIT, (1953) 23 ITR 101,107 (India).

should, according to the known and accepted business notions and usages, be regarded as a well-defined business operation, and activities that are not defined or are of a casual or isolated character would not ordinarily fall within the ambit of this rule. It was further held that this apportion should only be made for sufficient and cogent reasons. Further, the decision of the quantum of the profits should not be arbitrary, but should be on a rational basis.[67]

The principle laid down in this Explanation will definitely apply to a situation where the goods are manufactured in one place and are sold in the other place.[68] However, merely because the sale occurs in India, doesn't mean that entire profits accrue in India. Further, the apportionment of profit may occur in the cases where the goods are purchased abroad and sold in India, wherein the profits are further apportioned and a part of profit is attributable to buying operations.[69] However, in other businesses, the act of buying may be a negligible part of value creation.[70]

This analysis of the explanation (a) clearly shows that the Act recognizes the apportionment on the basis of the role of the activity in value creation. As explained in the above section, personal data collection is a recognizable business activity, not of a casual or isolated character. As personal data collection independently plays the most important role in the value creation in terms of advertising revenue, this provision prevents a situation where the entire income earned from advertising may be taxed in India for the reason that it is targeting Indian users. The income earned from the advertising should be reasonably apportioned for attributing it to the collection of personal data. Only that portion of the total income will be taxable in India.

[67] Annamalais v. CIT, (1993) 41ITR 781 (India).
[68] CIT v. Ahmedbai Umerbai, A.I.R. 1950 S.C. 134 (India).
[69] Rahim v. CIT, 17 ITR 256,267-68 (India); CIT v. Rodriguez, (1951) 20 ITR 247 (India).
[70] *Id.*

*d. Explanation (c) to%9(lXi): Drawing parallels between news and personal data*

In the case of *Time Inc. v. CIT,*[71] the Assesse-company had a Bureau in New Delhi and the main function of the Bureau was to collect news and report to the magazines published by the Assesse. During the pendency of the reference, Explanation (c) was added to §9(l)(i) by way of an amendment to the Finance Act in 1983, with retrospective effect from April 1, 1962. The effect of this amendment was that even if it was assumed that there was business connection in the hands of a nonresident, no income was deemed to accrue or to arise in India. Explanation (c) reads as follows:

/7/n *the case of a non- resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India."* (emphasis added)

This section specifically applies to *"publishing newspapers, magazines or journals".* As explained in section 1 of this paper, Rochet and Tirole drew parallels between the online advertising market and newspapers. The revenue that a newspaper may earn though advertisement is based on its circulation, which is in turn based on the news provided by the newspaper. Therefore, collection of news is in a way analogous to data collection for advertising revenue on online platforms. However, it is submitted that this section should be given a limited reading and should be restricted to the news sector and not extended to include other online platforms. It is submitted that a distinction can be made between collection of news for newspapers, and collection of personal data for online platforms, though it may be argued that both these markets have network externalities and hence, are the multi-sided markets. News forms the core of the freedom of press, which in turn is the essential part of freedom of speech. Therefore, even if we exempt the newspapers from taxation on collection of news, it is to prevent any unreasonable barrier to the exercise of such freedom. It is submitted that there is no such

Time Inc. v. CIT, 67 TAXMAN 518.

competing value at stake when it comes to the personal data collection. Therefore, both, on the plain reading of the statute as well as on policy, the taxation on data collection should not be excluded. Further, the nexus between revenue generation and personal data is closer than the nexus between revenue generation and news, as the data is directly used to target the advertisements, unlike news which is only indirectly related to the advertisement revenue.

Therefore, based on the analysis of §9(l)(i) and the explanations therein, in this section, it is submitted that creation of a separate taxable event may not be necessary for taxing data collection. Specifically, when it comes to the online platforms, data collection can be taken into account while taxing the income earned from advertising.

## V. CONCLUSION

Based on the economic theory and the available empirical studies, it cannot be disputed that in multi-sided online platform markets, the value creation occurs not just at the level of income directly earned from the advertisement revenues, but also at the stage of data collection and data processing. The income tax frameworks in most of the countries including India do not directly address this issue and hence, seem to be lacking far beyond the economic realities. As a result, many jurisdictions including India have suffered revenue loss due to tax avoidance practices by these platforms.

Though a comprehensive overhaul may be needed in order to tax the revenues earned by the digital companies without any physical presence in India, §9(1) (i) provides for a partial solution, wherein collection of personal data can be held to satisfy the test of *'business connection'*. The only reason that the tribunals have shied away in taxing data collection in some of the cases is that they have often confused 'permanent establishment' test with 'business connection' test. However, the business connection test is wide enough to cover data collection without any physical presence. Further, the apportionment as provided under explanation (a) to §9(l)(i) goes hand in hand with the establishment of business connection test to ensure that the principle of inter-nation equity is adhered to in taxing data collection.

Thus, in order to cover the loophole that the online platforms are exploiting, §9(1)(i) may sufficiently address the immediate issues with respect to the advertisement revenue generated by targeting Indian users. However, in France; contrary to the contentions made in this article, collection of personal data is being made a separate taxable event, which is taxable in itself, irrespective of the revenue generation through advertisement., and the most interesting part of this proposed approach is that the taxation would be made in the form of a single tariff per user, which could vary according to the behaviour of businesses towards data protection, data security and data portability, thus acting as an incentive for desirable data protection practices.[72] Designing a separate tax policy for data collection is desirable as it can be an effective tool for promoting effective data protection practices, where a set of prohibitionist or regulatory approach may not be sufficient. Tax is not just a source of revenue, but also a tool for incentivizing *"virtuous behaviour"*. In this case, virtuous behaviour may be the data protection practices by the businesses. Tax policy would be adjusted to favour companies that comply with relevant data protection laws, respect individual liberties, and properly disclose their data to the individual concerned.[73] In the long run, India may have to follow France's example and design a separate tax policy for data collection as well.

[72] Gabriel Volsin, *A New Tax on Personal Data Collection?,* BIRD & BIRD, http://www.twobirds.com/en/news/
articles/2013/a-new-tax-personal-data-collectionO 113.
[73] Fillipi, *supra* note 28.

Ashray Behura, *The Russian Siege on Ukraine: An International Law Perspective*, 3(2) NLUJ Law Review 1 (2016)

# THE RUSSIAN SIEGE ON UKRAINE: AN INTERNATIONAL LAW PERSPECTIVE

ASHRAY BEHURA*

ABSTRACT

*The Russian siege on Ukraine comprised of flagrant violations of International Law, ranging from open and routine incursions, the annexation of Crimea (which was only recognized by one State i.e. Russia) and engaging in an armed conflict. Conspicuous violations included violations of principles enshrined within the U.N. Charter and various multilateral and bilateral treaties. A plethora of options in regards to recourse which can be taken by Ukraine to quell and circumvent Russia's armed intervention are present, however the same only presents itself as a paradox of choice. This is because even though a wide array of remedies are available to Ukraine, it is unlikely that it will materialize considering that Russia is a European powerhouse and due to the stature it commands. The likeliest remedy which can be provided to Ukraine is the provision of reparations by the ICJ in accordance with ARSIWA and other cases decided by this forum court such as the Rainbow Warrior case, Corfu Channel case etc.*

*Greater readiness to counter such blatant violations of fundamental international law principles are necessitated to be adopted by international organizations and other States alike or else this volatility which is seemingly ever-present in Ukraine which has endangered its territorial integrity, state sovereignty and political independence, has threatened to spill in the neighbouring countries, especially considering that no significant legal ramifications have been suffered by the Russian Federation going on to show the irrelevance of International Law.*

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## I. INTRODUCTION

*"War never changes. The Romans waged war to gather slaves and wealth. Spain built an empire from its lust for gold and territory. Hitler shaped a battered Germany into an economic superpower. But war never changes."*[1]

Ukraine has experienced tremendous volatility in recent times as can be conspicuously discerned with a marked increase in demonstrations which were carried out by separatist/pro-Russians and anti-government groups of individuals taking place predominantly in Donetsk and Luhansk. These demonstrations were subsequently followed by the annexation of Crimea which fell within part of the Ukrainian territory and lead to the same being "reunified" with Russia by the aid of well equipped, organized, and trained "self defence units" who were actually Russian special forces.[2] The formal annexation of Crimea from Ukraine took effect by way of a decree based on a referendum,[3] which was signed by the President of Russia Vladimir Putin which led to Crimea being recognized as an independent and sovereign State altogether, paving the way for it to be absorbed into Russia. The legality of the referendum itself is questionable in light of the International Court of Justice (or the World Court/ICJ) decision in the *Advisory Opinion on Kosovo,*[4] (the declaration of independence of Crimea was modelled after the one adopted in Kosovo),[5] wherein it was held that unilateral declarations of independence can be

[1] *Fallout Intro,* FALLOUT WlKIA, http://fallout.wikia.com/wiki/Fallout_ intro.

[2] Amanda Macias, *A Detailed Look at bow Russia annexed Crimea,* BUSINESS INSIDER (Mar. 24, 2015) http://www.businessinsider.in/A-detailed-look-at-how-Russia-annexed-Crimea/articleshow/46676200.cms.

[3] In which final results showed that 97% (or 96.8%) of the voters who took part in the "VO^.vrVQ_ "^re.T'e «a sw^»po*-t oi annexing C^.i-inrvea. Russia. However, Western leaders as well and Ukraine's new government (at the time) did not approve of the same, with officials going as far as dubbing the same to be a "circus"; *Crimea Referendum: Final Results Show 97 Percent Of Voters In Crimea Support Joining Russia*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/03/17/crimea-referendum-final-results_n_4977250.html?ir=India&adsSiteOverride=in.

[4] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403 (July 22).

[5] Christian Marxsen, *Crimea's Declaration of Independence,* 74 HEIDELBERG J OF INT'L L 372 (2014).

contrary or in violation of the principles of international law especially in circumstances where there has been an application of unlawful use of force. Other countries and prominent international organizations such as the EU did not recognize the legality of this decree and stated the same to be illegal and subsequently imposed sanctions on both officials in Russia as well as in Ukraine.[5] This soon led to an escalation of the already unstable situation in Ukraine to an outright armed conflict between pro-Russian forces or separatists and the armed forces of Ukraine. Two prominent pro-Russian forces or groups which took part in the armed conflict are those of Donetsk and Luhansk People's Republics (DPR and LPR respectively).[7]

Sanctions were imposed in the nature of diplomatic and financial costs, as well as other aggressive economic and widely-encompassing sanctions on Russia by the U.S. vide Executive Order 13660, Executive Order 13661 and Executive Order, "Blocking Property of Additional Persons Contributing to the Situation in Ukraine,"[8] which were adopted with a view to protect the democratic and sovereign integrity of Ukraine and to subsequently punish any threats to the "peace, security, stability, sovereignty, and territorial integrity" and the "misappropriation of its assets" as a result of the actions and policies adopted by the Russian Government.[9] Other sanctions imposed by the EU were adopted with a view to neutralize and stabilize the increasingly ominous situation in Ukraine, ranging from asset freezes and bans on visas on those individuals as well as entities which were responsible for the annexation of Crimea,[10]

[6] *Russia's Vladimir Putin recognises Crimea as nation,* BBC NEWS (Mar. 17, 2014) http://www.bbc.com/news/world-europe-26621726.

[7] Oksana Grytsenko, *Armed pro-Russian insurgents in Luhansk say they are ready for police raid,* KYIV POST (Apr. 12, 2014) www.kyivpost.com/content/ukraine/armed-pro-russian-insurgents-in-luhansk-say-they-are-ready-for-police-raid-343167.html.

[8] *Executive Order - Blocking Property of Additional Persons Contributing to the Situation in Ukraine,* THE WHITE HOUSE (Mar. 20, 2014) www.whitehouse.gov/the-press-office/2014/03/20/executive-order-blocking-property-additional-persons-contributing-situat.

*'Ukraine and Russia Sanctions,* U.S. DEPARTMENT OF STATE, http://www.state.gOv/e/eb/tfs/spi/ukrainerussia/.

[10] *EU sanctions against Russia over Ukraine crisis,* EUROPEAN UNION, http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm.

to bans on imports of materials from Crimea and Sevastopol, the only exception being that imports would be permitted when accompanied by a certificate of origin from the Ukrainian authorities.[11] The most significant of them was the suspension of Russia's membership in the G8 which took effect by a vote undertaken by all members of the G8 to the exclusion of Russia,[12] therefore, leading to the constitution of the G7 which is a self-proclaimed informal bloc of industrialized democracies.[13] In addition, the U.N. General Assembly adopted resolution 68/262 affirming the territorial integrity, unity, sovereignty, and political independence of Ukraine and calling upon States to "desist and refrain from actions that undermine the unity and territorial integrity of Ukraine."[14]

Blighted by severe accusations of constant violations of truce and ceasefire agreements by both the pro-Russian forces and the Ukrainian armed forces,[15] the shocking fragility of Ukraine's situation may soon spill into the neighbouring countries. Putin has been signalling for some time now that he sees re-establishing Russian influence over the political and economic development of neighbouring countries via the establishment of a Eurasian Union as the centrepiece of his third term in office.[16] The annexation of Crimea and the threat posed by Russian troops massing on

**1** *Information Note to EU business operating and/or investing in Crimea/Sevastopol,* EUROPEAN COMMISSION 0un. 10, 2015) https://ec.europa.eu/europeaid/sites/ devco/files/ swd-info-note-xcrimea-2014-updated_en.pdf.

[12] Julian Borger & Nicholas Watt, *G7 countries snub Putin and refuse to attend planned G8 summit in Russia,* THE GUARDIAN(Mar. 24, 2015) http://www.theguardian.com/world/2014/mar/24/g7-countries-snub-putin-refuse-attend-g8-summit-russia.

[13] Zachary Laub & James McBride, *The Group of Seven,* COUNCIL ON FOREIGN RELATION 0un. 2, 2015) http://www.cfr.org/international-organizations-and-alliances/group-seven-g7/p32957.

[14] Emily Crawford, *Introductory note to United Nations General Assembly Resolution on the territorial integrity of Ukraine,* 53 INT'L LEGAL MATERIALS 927 (2014).

[15] Christopher Harress, *Ukrainian Troops Quell Large Tank Offensive by Pro-Russian Forces as Donbas Conflict Worsens,* INTERNATIONAL BUSINESS TIMES (Oct. 8, 2015) http://www.ibtimes.com/ukrainian-troops-quell-large-tank-offensive-pro-russian-forces-donbas-conflict-2046614.

[16] Roger E. Kanet, *The failed Western challenge to Russia's revival in Eurasia?,* 52 INT'L POLITICS 503, 503-522 (2015).

the Russian side of the Ukrainian border are bringing what had been considered a thing of the past back to Europe: territorial conflict and the change of borders by force.[17]

This view is further solidified by the remarks passed by Michael Fallon, the Secretary of State for Defence of the United Kingdom. The Defence Secretary has acknowledged that Vladimir Putin could resort to similar tactics to destabilize other Baltic nations and members of the erstwhile Soviet Bloc, of which indigenous Russians form a part of.[18] An example can be seen with regards to Belarus where the President, Alexander Lukashenko, fearful of the intervention and hostilities directed towards Ukraine, has stepped up measures to counter such an event occurring within his own nation by sending envoys to European capitals and welcoming embassies from the EU and US.[19] Similarly, Estonia, which has common borders with Russia is also wary of the threat posed by the ever-dominating Russia, and a similar thought was echoed by the Hungarian Minister of Defence, Csaba Hende, who, considering the significant ethnic Russian population, stated that it could not be categorically ruled out whether Russia would take any hostile action with Russia in the forthcoming future.[20] Lastly, Georgia, which historically has been susceptible to Russian attacks (though thinly-veiled and colourfully described, the 2008 "Peace Enforcement" operation in Georgia),[21] has also adopted a cautious approach and has been extremely vocal of the Ukrainian situation. Davit Usupashvili, the Chairman of the Parliament of Georgia has categorically stated that Tbilisi's relations with Moscow

[17] Eugene Rumer, *What Are the Global Implications of the Ukraine Crisis?*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE(Mar. 27,2014) http://carnegieendowment.org/2014/03/27/ what-are-global-implications-of-ukraine-crisis.

[18] Michael Fallon, *Russia a threat to Baltic states after Ukraine conflict, warns Michael Fallon*, THE GUARDIAN (Feb. 19, 2015) http://www.theguardian.com/politics/2015/feb/19/russia-a-threat-to-baltic-states-after-ukraine-conflict-warns-michael-fallon.

[19] Mikalai Anishchanka, *Is Belarus and Russia's 'brotherly love' coming to an end?*, THE GUARDIAN (May 29, 2015) http://www.theguardian.com/world/2015/may/28/belarus-russia-brotherly-love-ukraine-crisis.

[20] *Should Ukraine's neighbours be worried about Russian intervention?*, DEBATING EUROPE (Sept 9, 2014), http://www.debatingeurope.eu/2014/09/15/ukraine-russia-crisis/#.VoPtMFIXfVI.

[21] George F. Oliver, *The Other Side of Peacekeeping: Peace Enforcement and Who Should Do It?*, 8 J. OF INT'L PEACEKEEPING 110 (2002).

are changing from "bad to worse, because what's happening in Ukraine is a continuation of the process which started in August 2008 in Georgia."[22]

## II. PROMINENT VIOLATIONS OF IL PRINCIPLES COMMITTED BY THE RUSSIAN FEDERATION: BLATANT VIOLATIONS BECOMING ROUTINE

The constant incursions of Russian armed forces into the Ukrainian territory, constitutes flagrant violations of a plethora of international law principles. To make matters worse, reports have further claimed that Russia has started digging trenches in the land bridge that connects Crimea with the rest of Ukraine, to add to the turmoil already existing in Ukraine.[23] The Russian Federation, has constantly flouted international obligations by their occupation of Ukraine by way of armed force and the same conspicuously constitutes a violation of Article 2(4) of the U.N. Charter.[24]

### ARTICLE 2(4) OF THE U.N. CHARTER

The U.N. Charter being the constituent treaty of the U.N., the members would be bound by all the articles contained within the U.N. Charter.[25] Both Ukraine and the Russian Federation have acquired membership to the U.N. and hence would be bound by all articles of the U.N. Charter, including Article 2(4) which contains the principles of the inviolability of the States' territorial integrity, political independence and prohibition of use of force.[26] Article 2(4) prohibits any use of force or threat against the territorial integrity or political independence of any other State and

[22] Luke Johnson, *Georgia's Parliamentary Chief Says Relations With Russia Deteriorating,* RADIO FREE EUROPE RADIO LIBERTY (Mar. 23, 2016) http://www.rferl.org/content/ geo rgia-russia-relations-ukraine-conflict/268 8 6772 .html.

[23] Ashley Deeks, *International Law on the Russian intervention,* NEW REPUBLIC (Mar. 3, 2014) http://www.newrepublic.com/article/116819/international-law-russias-ukraine-intervention.

[24] Charter of the United Nations, 1 UNTS XVI [hereinafter U.N. Charter].

[25] BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS 168 (3d ed. 2012) [hereinafter Simma].

[26] PAUL B. STEPHEN & BORIS M. KLIMENKO, INTERNATIONAL LAW AND INTERNATIONAL SECURITY: MILITARY AND POLITICAL DIMENSIONS 304 (2d ed. 2006) [hereinafter Klimenko].

constitutes a cornerstone of the modern international legal order.[27] The article has received a liberal interpretation and extends to all kinds of military force; the use of force in general is prohibited rather than only war.[28] This view is reiterated in the *Friendly Relations Declaration* which states "that States shall refrain in their international relations from the threat or use of force."[29] The prohibition of force in Article 2(4) comprises of both the threat and the use of force. However, the term "force" itself is not defined, and the same would not extend to political and economic coercion but signifies solely armed force.[30] Reference can be made to the case of *Nicaragua*,[31] wherein the ICJ supports the narrow conception of force. As is the case with the absence of the definition of "force", "indirect force" has also not been defined, and the *Friendly Relations Declaration* fills this gap. The use of indirect force is prohibited by way of imputation and is enumerated within the principle that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations." In the *Nicaragua* case, the Court had held that the act of the arming and training of the Contras by the US amounted to the threat or use of threat of force and that the act of supplying funds constituted as an act of intervention in the internal affairs of the country, hence laying the foundation for the term of "indirect force" and reaffirming that the formulation of indirect force is within the scope of Article 2(4).[32] It also contains within its ambit the elements of "territorial integrity" and "political independence" and the violation of Article 2(4) will occur whenever a State's territorial existence or the status of its political independence is altered or abolished.

[27] Armed Activities on the Territory of Congo (DRC v. Uganda), 2005 I.C.J. 168 pec. 19) [hereinafter *Congo]*.

[28] Klimenko, *supra* note 26, at 203.

[29] *Declaration on Principles of International Law concerning Friendly Relations and Co operation among States in accordance with the Charter of the United Nations*, U.N. G.A. RES. 2625(XXV).

[30] Simma, *supra* note 25, at 112.

[31] Military and Paramilitary Activities In and Against Nicaragua (Nicar. Vs. U.S.), 1986 I.C.J. 14 (June 17) [hereinafter *Nicaragua]*.

[32] Muge-Kinacioglu, *The Principle of Non-intervention at the United Nations: The Charter framework and Legal Debate*, 10 PERCEPTIONS 15, 18 (2005) [hereinafter Muge].

Reliance can also be placed to the *GA Definition of Aggression*[32] which serves as an extension of Article 2(4), wherein aggression has been defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." Hence, a broad conception of probation of armed intervention and aggression, which includes not only invasions, but also attacks or military occupations; sending armed bands or mercenaries to carry out violent acts; shelling another State's territory, blocking its ports, etc.[34]

Furthermore, not only is the direct use of force proscribed, i.e. the open incursion of regular military forces into the territory of another State, but also the use of indirect armed force.[35] This was adopted to prevent States from indirectly participating or providing assistance to acts of violence in another State's territory.[36] Indirect armed force does not involve direct military use by regular troops, but involves active military or other assistance to a State engaged in direct aggression which the aiding State often regards as the "enemy".[37] Under the aforementioned definition, the act of supplying the rebels with arms and ammunitions to act against the Ukrainian government, supporting other ethnic Russians separatists and mobilising greater units of armed force not only surrounding the border but also within Ukraine itself,[38]clearly constitute a breach of the provisions of use of force under Article 2(4).[39] Often, States endeavour to overthrow disliked governments or at least to destabilize them by regularly installing friendly forces in the other State and the same can be seen with Russia's incursions into Ukraine and tactically placing hostile forces within the Ukrainian territory.

[33] *Definition of Aggression,* U.N. G.A. RES.314 (XXIX).
[34] Simma, *supra* note 25, at 129.
[35] Lamberti Zanardi, *The Current Legal Regulation of The Use of Force 377* (1986).
[36] Simma, *supra* note 25, at 211.
[37] VILDAN SERIN, HIZIR MURAT KOSE & BERDAL ARAL, THE GEOPOLITICAL AND ECONOMIC TRANSITION IN EURASIA: PROBLEMS AND PROSPECTS 173 (2004).
[38] Daniel Wiser, *How Russia Invaded Ukraine,* FREE BEACON, (Sept. 18, 2015) http://freebeacon.com/national-security/how-russia-invaded-ukraine/.
[39] HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 173 (2000).

A problem arose when Russia, through Putin, had only accepted a limited involvement in Ukraine and the same extended only to the annexation of Crimea. Putin had not explicitly accepted that any intervention by Russian forces in Ukraine had occurred and had exercised abundant caution by refusing that Russia had supplied any of the rebels/separatists with weapons, ammunition etc.[40] However, with the passage of time and further developments, Putin fell back upon his refusal to accept the existence of Russian forces in Ukraine and conceded the existence of personnel acting in varying capacities. He conceded that Russian military intelligence officers were operating in Ukraine however they were in no manner related with the regular armed forces.[41] Furthermore, troops consisting of the "the little green men", who were armed forces, armed with Russian firearms and unmarked green military uniforms, carrying out operations within Ukraine were supposed to be functioning without any orders and directions from Russia, however, the same was only a facade to maintain anonymity and confirmed reports claim that they were Russian.[42] Putin later admitted that they were, in fact, Russian forces operating behind enemy lines.[43] Putin's recognition of the these "little green men" belonging to the Russian military also entail his recognition of the hostilities that they have engaged in, namely those of taking over and occupying the military bases in Crimea and also seizing the building which housed that Crimean Parliament by way of exercising force.[44]

Therefore, the constant incursions of Russian armed force within Ukraine as well as Crimea which, as no State apart from the Russian

[40] Jeremy Bender, *Here Are The Arms Russia Has Given To Rebels In Ukraine To 'Create A Proper Army'*, BUSINESS INSIDER Qui. 24, 2014)http://www.businessinsider.in/Here-Are-The-Arms-Russia-Has-Given-To-Rebels-In-Ukraine-To-Create-A-Proper-Army/articleshow/38980812.cms.

[41] Shaun Walker, *Putin admits Russian military presence in Ukraine for first time*, THE GUARDIAN (Dec. 17, 2015) http://www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine?CMP=share_btn_tw.

[42] Steven Rosenberg, *Ukraine crisis: Meeting the little green men*, BBC NEWS (Apr. 30, 2015) http://www.bbc.com/news/world-europe-27231649.

[43] Nadia Khomami, *Vladimir Putin press conference: 'Russian military personnel were in Ukraine' - as it happened*, THE GUARDIAN (Dec. 17, 2015) http://www.theguardian.com/world/live/2015/dec/17/vladimir-putins-annual-press-conference-live.

[44] Vitaly Shevchenko, *"Little Green Men" or "Russian Invaders"?*, BBC NEWS (Mar. 11, 2014) http://www.bbc.com/news/world-europe-26532154.

Federation recognized the independence of and hence, would still constitute as a part of the Ukrainian territory, would serve as violation of Article 2(4) but also of the definition of Aggression adopted through the *GA Resolution 3314(XXIX)*, as the presence of an armed force within Ukraine has drastically altered the territorial integrity as well as the political independence of Ukraine and the same is evident from the annexation of Crimea by the Russian Federation from Ukraine.

## PRINCIPLE OF GOOD FAITH AS ENSHRINED WITHIN ARTICLE 2(2) OF THE U.N. CHARTER

The principle of good faith is contained within Article 2(2) of the U.N. Charter. It underlines the view that its members have to fulfil their obligations deriving from the Charter honestly and seriously.[45] Article 2(2) lays down the obligation for all members of the U.N. to fulfil their obligations under international law 'in accordance with the U.N. Charter'.[46] Therefore, all international obligations of the members of the UN have to be fulfilled in accordance with the U.N. Charter.[47] The ICJ has defined this principle in the *Nuclear Tests Case* as, "[o]ne of the basic principles governing the creation and performance of legal obligations".[48] In the case of *Cameroon vs. Nigeria: Equatorial Guinea intervening*, the ICJ observed that the principle of good faith is a well-established principle of international law and that it is "one of the basic principles governing the creation and performance of legal obligations."[49]

Similarly, the principle of good faith is enshrined within the provisions of *Friendly Relations Declaration* which obliges the States "to comply fully and in good faith with its international obligations and to live in peace with other States". This declaration stresses upon the principle of good

[45] FRANZ CEDE & LILLY SUCHARIPA-BEHRMANN, THE UNITED NATIONS: LAW AND PRACTICE, 274 (2001) [hereinafter Sucharipa-Behrmann].
[46] Simma, *supra* note 25, at 168.
[47] *Id.* at 170.
[48] Nuclear Tests (Aust. v. Fr.) 1974 I.C.J. 253 pec. 20); (N.Z. v. Fr.) 1974 I.C.J. 457 (Dec. 20).
[49] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.: Eq. Guinea intervening), 2002 I.C.J. 303 (October 10).

faith and makes it clear that the member States are bound to meet their obligations not only in a legalistic fashion.

Therefore, this paper will enumerate the various obligations which the Russian Federation is burdened with and how the principle of good faith has been breached by way of Russia's malafide armed intervention in Ukraine.

## THE DOCTRINE OF NON-INTERVENTION

The doctrine of non-intervention in domestic affairs is the logical corollary of the principle of sovereignty. The U.N. Charter does not explicitly spell out the principle of non-intervention as a rule governing relations between member States, but the same is rather implied within the various provisions of Article 2 of the same.[51] The doctrine of non-intervention is also enshrined within the *Friendly Relations Doctrine* which proscribes any State or group of States from intervening, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Oppenheim. laid, down the threshold for noninterference by stating that the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the State intervened against of control over the matter in question. Interference pure and simple is not intervention."[52] Oppenheim further says, that the prohibition of intervention "is a corollary of every State's right to sovereignty, territorial integrity and political independence,"[53] In the *Nicaragua* case, the ICJ elaborated on the principle of non-intervention, holding that it involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law."[54]

[50] United Nations: Conference on an International Code of Conduct of the Transfer of Technology, 19 INTER'L LEGAL MATERIALS 789 (1980).
[51] Muge, *supra* note 32.
[52] SIR ROBERT JENNINGS, OPPENHEIM'S INTERNATIONAL LAW 432 (9th ed.2008) [hereinafter Jennings].
[53] *Id.*, at 428.
[54] *Nicaragua*, 1986 I.C.J. 14 (June 17), *supra* note 31.

The *Venice Commission* has already discussed upon the principle of non-intervention in regards to the escalating situation in Ukraine and has generically stated that if one State incorporates within it a part of another State without the valid consent of the latter, then the same serves as a violation of the principle; moreover, if the means of threat or use of force is adopted, then the same would serve as a prohibition under Article 2(4).[55] Hence, the annexation of Crimea falls in tandem with the *Venice Commission's* view which serves to prove a violation of the principle on non-intervention.

HELSINKI ACCORDS

The *Helsinki Accords* was the final act of the *Conference on Security and Co-operation in Europe* (OSCE) and was primarily an effort to reduce tension between the Soviet and Western blocs by securing their common acceptance of the post-World War II status quo in Europe.[56] The agreement recognized the inviolability of the post-World War II frontiers in Europe and the 35 signatory nations pledged to respect human rights and fundamental freedoms and to cooperate in economic, scientific, humanitarian, and other areas. The *Helsinki Accords* do not have treaty status,[57] and hence, do not confer upon the signatories any legally binding obligations.[58] However, the view echoed by Schachter is that even non-binding agreements can be authoritative and controlling for the parties.[59] He states that, "there is no *a priori* reason to assume that the undertakings are illusory because they are not legal." A non-binding document may reflect one or more legal norms that are recognized in customary law, some authoritative legal instrument or both and the *Helsinki Accords* do

[55] Venice Commission, *Whether Draft Federal constitutional Law No. 462741-6 on amending the Federal constitutional Law of the Russian Federation on the procedure of admission to the Russian Federation and creation of a new subject within the Russian Federation is compatible with international law*, 98th Plenary Session (Mar. 21-22, 2014).
[56] *Helsinki Accords*, ORGANISATION FOR SECURITY AND Co-OPERATION IN EUROPE, https://www.osce.org/mc/39501Pdownload-true [hereinafter Helsinki Accords].
[57] *Id.*
[58] Jordan J. Paust, *Transnational Freedom of Speech: Legal Aspects Of The Helsinki Final Act*, 45 L. & CONTEMP. PROBS. 53,53-70 (1982).
[59] Oscar Schachter, *The Twilight Existence ofNonbinding International Agreements*, 71 AM.J.lNT'LL.296(1977).

contain such recognized legal norms.[60] To conclude, the view espoused by Paust is of immense relevance, which is that the *Helsinki Accords*, reflect or restate customary norms of international law and hence, the same forms a part of customary international law and therefore it is unimportant whether the given provision is itself binding.[61] Hence, even if the same does not have a treaty status, it does impose legally binding obligations on the member States.

With the Russian Federation's armed intervention and incursions in Ukraine and Crimea, fundamental elements of the agreement have been violated, such as that of the signatories being required to refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights[62] and the requirement for signatories to refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.[63] The Crimean annexation form Ukraine constitutes a breach of an obligation on Russia's part to refrain from any act which would so lead to the usurpation of part of the territory of the participating State, especially since no State, apart from Russia has recognized the Crimean annexation and reunification with Russia. Similarly, the presence of Russian forces installed within and increased numbers of troops being stationed at the borders have conspicuously lead to a systematic destabilization of Ukraine as a sovereign nation, hence violating the abovementioned element.[64]

Therefore, noticeable breaches of the obligations with which the signatories are burdened, such as the inviolability of borders, non-intervention of domestic affairs, sovereign equality and good faith of obligations under international law have occurred.[65] Furthermore, it is

[60] Myres S. Mcdougal, *Human Rights and World Public Order,* 14 THE VA. J. OF INT'L L. 387 (1974).
[61] Anthony D'Amato, *The Concept of Custom in International Law,* 63 AM. J. INT'L L. 153,153-54 (1971).
[62] Helsinki Accords, *supra* note 58, at Part II, §1 and 2.
[u]2tf.,at$3.
[64] *Nato accuses Russia of violating Ukraine sovereignty,* BBC NEWS (Aug. 29, 2014) http://www.bbc.com/news/ world-europe-28984241.
[65] Sucharipa-Behrmann, *supra* note 45.

pertinent to mention that this very international instrument came into existence to remedy and to ensure that there was greater conformity of States in regards with the obligations mentioned above.

THE TREATY REGULATING THE POST- SOVIET UNION

The Constituent Act of the Community of Independent States *(Minsk Treaty* - 8th December 1991), which set out the post-USSR, an empire built by force and dismantled due to failure, guaranteed the new States the respect of their borders, with Russia relinquishing any challenge to them. Moreover, Ukraine, unlike other countries in Europe, had always maintained the facade of independence and had a seat at the UN, even though it had no choice but to vote in line with the USSR. Article 3 of the GTS *Charter* (adopted in 1991) gives a list of Commonwealth Principles, which includes basic principles of international law, supplemented by some more specific fundamental rules.[66] The predominant rationale for the adoption of such a Charter was to ensure the protection of each individual State's sovereignty and independence. By virtue of the same, it effectively abolished the Soviet Union. The role played by such a Charter was that the facade of independence of such beleaguered erstwhile USSR States was finally lifted and hence, such States could exercise their own independence. Therefore, the Russian occupancy and the siege on Ukraine's sovereignty constitute blatant violations of the principle enumerated within the aforementioned provision.

THE COUNCIL OF EUROPE

Russia is a member State of the Council of Europe,[67] of which the constituent treaty is the *Treaty of London.*** The Council of Europe (COE) has been proactive in circumventing Russia's growing dominance and has issued no less than 17 requests reproaching Russia's armed incursion and involvement in Ukraine and further calling upon the Russian Federation to meet and abide by its commitments that it willingly took upon or

[66] Segei A. Voitovich, *The Commonwealth of Independent States: An Emerging Institutional Model,* 4 EJIL 409 (1993).

[67] *Member States of the European Union and the Council of Europe,* STRASBOURG L'EUROPEENE, http://en.st rasbourg-europe.eu/member-states,44987,en.html.

[68] *Treaty of London,* COUNCIL OF EUROPE, http://conventions.coe.int/Treaty/ Commun/QueVoulezVous.aspPNT = 001&CM = l&CL- ENG.

subscribed to when it first joined the COE.[69] After a failure on the part of Russia to heed to these requests, a resolution was passed (in Strasbourg), to the effect of suspending Russia's voting rights in the council's parliamentary assembly.[70] In January 2015, the Assembly renewed sanctions against the Russian delegation. Historically, the council's parliamentary assembly had suspended the voting rights of the Russian delegation once before, from April 2000 to January 2001 over the aggravated situation in Chechnya.[71]

THE FRIENDSHIP AGREEMENT SIGNED BY RUSSIA AND UKRAINE

The *Friendship Agreement* is a bilateral agreement signed in 1997 which guaranteed the people of Sevastopol that the city would not simply degenerate into a military forward base of the Russian Federation.[72] The treaty codified principles of the two countries' unconditional guarantees for each other's territorial integrity and the inviolability of borders.[73]Adding to this, erstwhile President of the Russian Federation, Mr. Boris Yeltsin, issued a statement in relation to the agreement that Russia would "respect and honour the territorial integrity of Ukraine."[74] However, Vladimir Putin in the March of 2014, submitted a proposal to the State Duma for the unilateral termination of the agreements which

[69] *Contestation, pour des raisons substantielles, des pouvoirs non encore ratifies de la delegation de la Federation de Russie,* COUNCIL OF EUROPE, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-fr.asp?fileid=21538&lang -fr.

[70] Luke Harding, *Russia Delegation Suspended from Council of Europe over Crimea,* THE GUARDIAN (Apr. 10, 2014) http://www.theguardian.com/ world/2014/apr/10/russia-suspended-council-europe-crimea-ukraine.

[71] *Citing Ukraine, PACE renews sanctions against Russian delegation,* COUNCIL OF EUROPE 0an. 28, 2015) http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=54 lO&lang=2.

[72]Michael Specter, *Setting Past Aside, Russia and Ukraine Sign Friendship Treaty,* N. Y. TIMES (Jun. 1, 1997) http://www.nytimes.com/1997/06/01/ world/setting-past-aside-russia-and-ukraine-sign-friendship-treaty.html.

[73] D. B. Stewart, *The Russian-Ukrainian Friendship Treaty and the Search for Regional Stability in Eastern Europe,* 73 AM. J. OF INT'L L. 53 (1990).

[74] *A Resolution Condemning Illegal Russian Aggression in Ukraine,* U.S. CONGRESS, https://www.congress.gov/bill/113th-congress/senate-resolution/378/text.

were signed in *1997*™ and this denouncement was unanimously adopted by the State Duma on the 31st of March 2014.[76]

Hence, to conclude, not just the U.N. Charter has been violated, but also a vast multitude of bilateral, as well as multilateral treaties by virtue of the Russian Federation's constant armed incursions and occupancy of Ukraine and the armed annexation of Crimea from Ukraine.

## III. REMEDIES AVAILABLE TO UKRAINE WITHIN THE CONTOURS OF INTERNATIONAL LAW; THE PARADOX OF CHOICE?

The situation in Ukraine has often been termed as a "civil war involving rebels,"[77] however, this term by itself is drastically misleading, and the same is coloured as if it is a purely domestic affair and misrepresents the armed conflict ongoing between Ukraine and the Russian Federation and the subsequent defence carried by Ukrainian armed forces against Russian troops. This conflict has claimed the lives of 6,000 individuals as reported by the Human Rights Office and has displaced countless others.[78] Vladimir Putin, has himself candidly expressed that he carefully planned and orchestrated the military takeover of the Crimean peninsula.[79] Several incursions have been made by Russian troops into Ukraine, severely undermining the ceasefire agreement which came into being by way of discussions held between leaders of Russia, Ukraine, France and Germany in Minsk, Belarus and the same also involved the withdrawal of heavy weapons from the front line.[80] NATO further levelled accusations against

[75] *Putin submits proposals on denouncing some Russia-Ukraine agreements on Black Sea Fleet,* TASS RUSSIA (Mar. 28, 2014)http://tass.ru/en/russia/725725.
[76] *State Duma approves denunciation of Russian-Ukrainian agreements on Black Sea Fleet,* TASS RUSSIA (Mar. 31, 2014) http://en.itar-tass.com/ russia/725964.
[77] Alexander Ermochenko, *Don't call it a Civil War - Ukraine's conflict is an act of Russian aggression,* THE CONVERSATION (Aug. 25, 2015) http://theconversation.com/dont-call-it-a-civil-war-ukraines-conflict-is-an-act-of-russian-aggression-46280.
[78] Frank Jordans, *Ukraine Conflict Death Toll Passes 6,000, UN Human Rights Office Says,* THE HUFFINGTON POST (Mar. 2, 2015), http://www.huffingtonpost.com/2015/ 03/02/ukraine-conflict-death-toll_n_6782010.html
[79] Alina Polyakova, *How Putin Ignited a Civil War in Ukraine,* NEWSWEEK (May 7,2015) http://www.newsweek.com/how-putin-ignited-civil-war-ukraine-349954.
[80] Matthew Weaver & Alec Luhn, *Ukraine ceasefire agreed at Belarus talks,* THE GUARDIAN (Feb. 12, 2015) http://www.theguardian.com/world/ 2015/feb/12/ukrai ne-crisis-reports-emerge-of-agreement-in-minsk-talks.

Russia by reporting that Russia has sent troops, artillery and air defence systems across the border into Ukraine despite the ceasefire agreement.[81]

In view of these drastic measures adopted by the Russian Federation, which has been termed as a thinly-veiled "stealth invasion,"[82] and the constant violations of the principles of international law as aforementioned, a plethora of remedies are available to Ukraine to which they must have recourse to. Hence, a conspicuous paradox is created, where even though a vast array of choices is available to remedy the situation in Ukraine; recourse to them is highly unlikely.[83]

THE INTERNATIONAL COURT OF JUSTICE OR WORLD COURT

The most obvious interstate court that might be used by two governments to address claims arising from their international armed conflict is the ICJ, which is based in the Hague and serves as the principal judicial organ of the U.N.[84] The jurisdiction of the Court comprises of all cases which the parties refer to it[85] and the same can be invoked unilaterally by way of a written application addressed to the Registrar.[86] Furthermore, the ICJ in the cases of *Nicaragua*[7]*, Application of Genocide Convention (Bosnia),* ™ and the *Oil Platforms*™ has already decided several cases addressing transnational use of force and law of war violations. The jurisdiction of the Court can further be invoked by way of a *compromis* executed by both the parties involved i.e. Russia and Ukraine. However,

[81] *Ukraine crisis: US accuses Russia over 'incursion'*, BBC NEWS (Nov. 13, 2014) http://www.bbc.com/news/world-europe-30032564.

[82] Andrew E. Kramer & Michael R. Gordon, *Ukraine Reports Russian Invasion on a New Front*, N. Y. TIMES (Aug. 24, 2014) http://www.nytimes.com/2014/08/28/world/europe/ukraine-russia-novoazovsk-crimea.html.

[83] BARRY SCHWARTZ, THE PARADOX OF CHOICE - WHY MORE IS LESS 10 (2004).

[84] Sean D. Murphy, *The International Court of Justice, in* 3 THE RULES, PRACTICE AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 228, 228 (Chiara Giorgetti ed., 2012).

[85] U.N. Charter, *supra* note 21, at Article 36(1).

[86] *Id.*, at Article 40(1).

[87] ***Nicaragua,* 1986 I.C.J. *14* (June *7), *supra note* 31.**

[88] Application of the Convention on the Prevention and Punishment of the Crime of Genocide ((Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 191 (July 11) [hereinafter *Genocide]*.

[89] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6) [hereinafter *Oil Platforms]*.

in recent times, States are taking lesser recourse to such mechanisms and instead using diplomatic means of addressing interstate disputes.[90] Both Russia and Ukraine have not executed any declaration recognizing the ICJ's jurisdiction as compulsory,[91] in furtherance of paragraph 2 of Article 36 of the ICJ statute.[92] The cumulative effect of executing such a declaration would be that the State which has recognized the compulsory jurisdiction of the Court would have, in principle the right to bring a dispute against one or more than one other States which has accepted the same obligation before the Court by filing an application instituting proceedings with the Court. This restrains the jurisdiction of the Court as neither Russia nor Ukraine has accepted the ICJ's jurisdiction compulsorily and hence the Court's jurisdiction would have to be executed by way of a written *compromis* by both countries.[93]

Due to this hindrance arising out of the restriction upon the ICJ's jurisdiction, Russia can block Ukraine from invoking the Court's jurisdiction by not executing any *compromis.* In the *Nicaragua* case,[94] the US sought to do the same by arguing that the Court did not possess the jurisdiction. After this line of argument was rejected by the Court, the US subsequently refused to participate in further proceedings.

However, such a move can easily be countered by Ukraine by invoking the provisions as contained within paragraph 1 of Article 36, which provides that the ambit of the Court's jurisdiction extends to matters provided in treaties or conventions in force.[95] Reference can be placed upon *International Convention for the Suppression of the Financing of Terrorism,*^ to which both Ukraine and Russia are parties. Ukraine's top officials have maintained that Ukraine had clear evidence that Russia had

[90] Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States,* 64 L. & CONTEMP. PROBS.16 (2001).
[91] *Declarations Recognizing the Jurisdiction of the Court as Compulsory,* INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/Ppl = 5&p2= l&p3 = 3.
[92] ANDREAS ZIMMERMAN, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 155 (2 ed. 2012).
[93] *Id.,* at 660.
[94] *Nicaragua,* 1986 I.C.J. 14 (June 17), *supra* note 31.
[95] U.N. Charter, *supra* note 21, at Article 36(1).
[96] Klimenko, *supra* note 26.

provided weapons, equipment and money to terrorists in the east of Ukraine. This is further supplemented by the comments passed by the Minister of Justice of Ukraine.[97] Article 24(1) of the said convention provides that "any dispute between the State parties concerning the interpretation or application of the convention may be referred to the ICJ by any State if it was not settled through negotiations within a reasonable time and if within six months the arbitration was not organized after that."

Therefore, invoking the Court's jurisdiction on the basis of this instrument is highly feasible especially since it provides a way around Russia's reluctance or unwillingness to execute a written *compromis.*

A prominent case, which has similar facts to the conflict arisen between Ukraine and Russia, to which reference must be drawn to is the *Armed Activities on the territory of Congo case.*[9S] In this case, Congo invoked the ICJ's contentious jurisdiction by way of a unilateral application with regards to a dispute arising out of acts of armed aggression committed by Uganda on its territory. The Court found in favour of Congo, holding that acts of killing, torture, and inhumane treatment had been committed by Uganda apart from other flagrant violations of law such as obligations under international human rights law and international humanitarian law. However, the reparations phase of the case is still pending.

THE INTERNATIONAL CRIMINAL COURT (ICC)

The International Criminal Court was established through the provisions of the Rome Statute (the constituent treaty) with a jurisdiction to try cases pertaining to the commission of crimes such as genocide, war crimes and crimes against humanity and crime of aggression.[99] The Court is mandated to exercise jurisdiction only over "the most serious crimes of concern to

[97] Jeremy Bender, *Here Are the Arms Russia Has Given to Rebels in Ukraine to 'Create a Proper Army'*, BUSINESS INSIDER Qui. 24, 2014) http://www.businessinsider.in/Here-Are-The-Arms-Russia-Has-Given-To-Rebels-In-Ukraine-To-Create-A-Proper-Army/articleshow/38980812.cms.

[98] Congo, 2005 I.C.J. 168, *supra* note 27.

[99] The Crime of aggression has been defined and adopted by consensus at the Kampala Review Conference, 2010 by the state parties of the ICC. Furthermore, explicit reference has been made to it in Article 5 of the Rome Statute.

the international community."[100] Thcabovementioned crimes constitute *jus cogens* crimes as they threaten the peace and security of humankind and because they shock the conscience of humanity. *Jus cogens* are characterized explicitly or implicitly by State policy or conduct, irrespective of whether it is manifested by commission or omission.[101] They constitute peremptory norms in international law and hence obligations permeating through the same are non-derogable i.e. the obligations have to be met both in times of peace as well as in times of war.[102]

The situation unfolding in Ukraine falls squarely within the domain of a war crime (constituting an armed conflict), hence falling under Article 8(2)(b). Conspicuous violations such as attacks against the civilian population, attacking/bombarding towns, villages, buildings which are undefended and killing and wounding treacherously individuals belonging to the hostile nation have been committed. The crime of aggression, defined as the "planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another State," has also been committed by the Russian Federation against Ukraine.

*Prima facie*, it seems that the situation in Ukraine constitutes *the jus cogens* crime iterated above, the ICC would have jurisdiction to bring the principal perpetrators to justice. However, there are certain bars to jurisdiction which pose a major concern. The principal perpetrators are identified on the basis of investigations conducted by the Prosecutor (investigations are carried out only when the prosecutor concludes that there is a reasonable basis to proceed with an investigation; the permission of the judges of the Pre-Trial Chamber before initiating an investigation

[100] Roberto Belleli, *International Criminal Justice: Law and Practice From The Rome Statute To Its Review* 29 (2010).
[101] M. Cherif Bassouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L & CONTEMP. PROBS. 63, 69 [hereinafter Bassiouni].
[102] M. CHERIF BASSIOUNI, NON-DEROGABLE RIGHTS AND STATES OF EMERGENCY 125 (2d ed. 1996).

under such circumstances is also absolutely essential),[103] highlighting the decisive role played by the Prosecutor in the process of identification.[104] The prosecutorial policy of the Office of the Prosecutor is to focus its investigations and prosecutions on those who, having regard to the evidence gathered, bear the greatest responsibility for such crimes.[105] The premise upon which the ICC's jurisdiction is based is that the same would extend only to State parties to the Rome Statute or parties must accept the Court's jurisdiction.[106] Neither Ukraine nor Russia is party to the Rome Statute and therefore, recourse to the ICC would not only be feasible, but rather impossible.[107] However, a way around this limitation and the same can be found within the bare provisions of the Rome Statute. Firstly, the UN Security Council has the power to refer a fitting case to the ICC prosecutor for any crime which has been committed by a national of a non-member State as per the provisions of Article 13. This would enable the ICC to have jurisdiction over the crimes committed in Ukraine, regardless of whether the States are parties to the Rome Statute. Secondly, if the aggrieved State accepts the jurisdiction of the ICC in regards to the crimes committed against it, then nationals of a non-party would be subject to the ICC's jurisdiction for crimes committed on the territory of such a State.[108] However, the U.S. which is the world's economic powerhouse, has been vocal in its objections with regards to conferring the ICC with the jurisdiction to try cases involving individuals

[103] Laura Barnett, *The International Criminal Court: History and Role*, LIBRARY OF PARLIAMENT BACKGROUND PAPERS (NOV. 4, 2008), http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0211-e.htm#ftnbp.

[104] CHRISTOPH SAFFERUNG, INTERNATIONAL CRIMINAL PROCEDURE 94 (2012).

[105] *Frequently Asked Questions*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/index.aspx.

[106] U.N. Charter, *supra* note 21, at Article 12; See Madeline Morris, *The Jurisdiction of the International Criminal Court over Nationals of Non-State Parties*, 6 ILSA J. OF INT'L & COMP. L. 363-369 (2000) [hereinafter Morris].

[107] Karen Alter, *Has Putin Broken International Law?*, NORTHWESTERN UNTV. (Mar. 5, 2014) http://www.northwestern.edu/newscenter/stories/2014/03/opinion-cnn-alter-ukraine.html.

[108] Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, J. INT'L. CRIM. J 1 618, 619 (2003).

of non-consenting non-party States and that the treaty would bind non-parties leading to a vehement violation of the law of treaties.[109]

However, the nature of remedy provided by the ICC and the ICJ would be a stark contrast to one another. The ICC Prosecutor would open investigations and prosecute the principal perpetrators and if they are found guilty, only then can victims who suffered any harm as a result of the crime would be eligible to bring a claim for reparations.[110] This is based on the principle of ensuring that the offenders account for their acts. Whereas, the ICJ on the other hand, has no power to prosecute individuals; however, if it does find in favour of one country, it may issue reparations for any damage suffered.[111] Therefore, while the ICJ may hold particular States to be liable for any unlawful actions, the ICC can only prosecute the individual perpetrators and hence in such prosecutions, the State itself would not enter the fray. Therefore, recourse to the ICJ is not only convenient but also more suitable as Ukraine's predicaments would be directly remedied in seeking reparations as against the circuitous and indirect approach which would have to be adopted by Ukraine before the ICC, through which reparations would be provided only once the guilt of the principal perpetrators is ascertained.

REGIONAL COURTS

The most likely regional courts that might address a series of war related claims are the regional human rights courts, such as the European Court of Human Rights.[112] Each institution has jurisdiction over interstate claims (as well as petitions by individuals against States) and each

[109] David Scheffer, U.S. Ambassador at Large for War Crime Issues, *the International Criminal Court: The Challenge of Jurisdiction,* Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999) http://www.iccnow.org/ documents/DavidSchefferAddressOnlCC.pdf.

[110] The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842 Judgment Pursuant to Article 74 of the Statute (Mar. 14,2012) [hereinafter *Lubanga]*.

[111] Juan Pablo Perez-Leon, *The Emerging Reparations Case-Law of the ICC Appeals Chamber in Comparative Perspective,* EJIL TALK, www.ejiltalk.org/the-emerging-reparations-case-law-of-the-icc-appeals-chamber-in-comparative-perspective.

[112] SEAN D. MURPHY, WON KIDANE & THOMAS R. SNIDER, LITIGATING WAR: MASS CIVIL INJURY AND THE ERITREA-ETHIOPIA CLAIMS COMMISSION 39 (2013) [hereinafter Snider].

institution is empowered to decide claims that can lead to the payment of compensation, for both pecuniary and non-pecuniary damages.[113] However, recourse to these courts has its own drawbacks in relation to the adjudication of war-related crimes as these courts only have jurisdiction with respect to claims by two States which have accepted the relevant instruments that accord to the court its jurisdiction.

INTERSTATE ARBITRATION

The ability to anchor interstate arbitrations in a permanent institution crystallized in 1899 with the creation of the Permanent Court of Arbitration (PCA) located in The Hague.[114] The PCA assists States in the identification and selection of arbitrators, crafts a set of rules that optionally may be used for disputes, provides registry services and hosts oral hearings.[115] The PCA has continued to administer arbitrations that touch upon issues of use of force. For example, in September 2007, an arbitral panel convened under the UNCLOS (UN Convention on the Law of Sea) and administered by the PCA, found that Suriname's conduct with respect to an oil platform located in disputed waters constituted a threat to 'use of force' violation of Article 2(4) of the U.N. Charter.[116] One of the main advantages of having recourse to arbitration instead of interstate courts is that a greater amount of flexibility is available for disposing of claims. Another advantage is that while judges of a permanent court, when disposing of any case, would focus in part on the implications upon the entire docket, arbitrators are less concerned with institutional effects of their work and more on the completion of their work in a timely albeit credible manner. However, one of the most prominent disadvantages of having recourse to arbitration is that it isn't cost-effective in nature as the same requires funding from both the States involved and that the overall cost of the process will depend on various

[113] Christina M. Cerna, *The Inter-American Commission of Human Rights and the Inter-American Court on Human Rights, in* THE RULES PRACTICE AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 365 (Chiara Giorgettied., 3d ed. 2012).
[114] Sucharipa-Behrmann, *supra* note 45, at 41.
[115] Brooks W. Daly, *Permanent Court of Arbitration, in* THE RULES PRACTICE AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 37 (Chiara Giorgettied., 3d ed. 2012).
[116] Award of Arbitral Tribunal (Guyana vs. Suriname), 47 I.L.M. 164 (2008).

factors such as the number of years the process will take for its completion, the hiring of registry staff etc.

MASS-CLAIM REPARATION PROGRAMS

As post-war claims programs normally involve loss, damage, or injury that has occurred on a massive scale, traditional dispute resolution processes are sometimes viewed as a poor fit as they do not provide cost-effective remedies on an individualized basis, at least not in a reasonably short period of time.[117] Consequently, in modern times, mass-claims reparations programs in post-conflict situations have emerged, that seek to address large numbers of claims through innovative techniques, often involving the grouping of comparable claims into categories, the use of standardized claims forms, the cross-checking of claim against independent data etc.[118]

The principal example of a mass-claims reparation program, especially for war-related claims, is the UN Compensation Commission (UNCC).[119] The UNCC was established as a subsidiary organ of the United Nations Security Council (UNSC), in 1991, to process claims and pay compensation for losses resulting from Iraq's 1990-1991 invasion and occupation of Kuwait.[120] One of the basis for the establishment of the UNCC for Iraq's notoriety of Iraq's conduct and the subsequent harm caused by the conduct to numerous States and their nationals,[121] found in favour of Kuwait, holding Iraq responsible for damages and harm as a result of Iraq's unlawful invasion and occupation of Kuwait. The UN Secretary General, clarifying upon the functions and the nature of the UNCC, stated that it is not a Court or even an arbitral tribunal but is rather a political organ that performs "an essentially fact-finding function

[117] Bassiouni, *supra* note 101, at 45.
[118] *See* REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES (The International Bureau of the Permanent Court of Arbitration ed., 2006) [hereinafter Mass Claims].
[119] Timothy G. Feighery, *The United Nations Compensation Commission, in* THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 575 (2012).
[120] U.N. S.C. Res. 687, para 16-19 U.N. Doc. S/RES/687 (April 3,1991).
[121] HANS VAN HOUTTE, HANS DAS AND BART DELMARTTNO, THE HANDBOOK OF REPARATIONS 321-326 (2006).

of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims."[122] The scope of the jurisdiction of the UNCC was not circumscribed, rather it was wide and vastly-encompassing and contained within its purview claims relating to deaths, injury, property loss, commercial loss and environmental damage.

In relation to the abovementioned case of invasion and occupation, similarities can be drawn with the present case of the siege on Ukraine lead by the Russian Federation and the present circumstances further warrant for an organ such as the UNCC, to be reinstated again in light of the similarities not only in regards to the facts, but also in the nature of the damage suffered and in furtherance the subsequent reparations.

## IV. REPELLING THE RUSSIAN FEDERATION'S ARMED DOMINANCE IN UKRAINE: COUNTER ATTACK UNDER ARTICLE 51

By virtue of the violation of Article 2(4) of the U.N. Charter by the Russian Federation, the Ukrainian armed forces can defend themselves by way of the principle of self-defence contained within Article 51.The right of self-defence is an inherent right of all members of the U.N. and is restricted to those cases in which "an armed attack occurs against a member of the U.N."[123] The ICJ, in its Advisory Opinion on the *Legal Consequences of Construction of a Wall on Occupied Palestinian Territory*, held that this right is available only to a State and can be exercised only against another State i.e. international organizations cannot invoke the right of self-defence.[124] In the *Nicaragua* case,[125] the ICJ held that the existence of an armed attack is a condition *sine qua non* for the exercise of the right to self-defence under the provisions of Article 51 and the same was reaffirmed by the ICJ in its *Oil Platforms* judgment,[126] where it was held that the right of self-defence cannot be asserted against acts which do not reach the threshold of an armed attack. This right is not

[122] Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687, U.N. Doc. 22559, par. 20 (May 2,1991).
[123] D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187-193 (1958).
[124] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 0uly 9, 2004).
[125] *Nicaragua*, 1986 I.C.J. 14 (June 17), *supra* note 31.
[126] *Oil Platforms*, 2003 I.C.J. 161 (Nov. 6), *supra* note 89.

unencumbered and is limited by the principle of proportionality.[127] Therefore, a lawful exercise of self-defence is restricted to what is necessary to repel an armed attack and must not acquire a retaliatory, deterrent or punitive character.[128] The quantum of reasonable force is therefore, only restricted to repelling such an attack and any force exercised beyond quelling such an attack would not fall within the purview of Article 51.

The ICJ in *Nicaragua* held that an attack is imputable to the 'sending' State if the latter has 'effective' control of it.[129] This view was disputed in the *Tadic case,* which considered 'overall' control sufficient.[130] The ICJ subsequently reaffirmed the former opinion in the *Genocide case.*[m] Another pre-requisite which must be satisfied before the right of self-defence can be invoked, as laid down by the ICJ in the *Oil Platforms case,* was that the attack must be undertaken with the 'specific intention of harming'.[132] Therefore, regardless of the dispute over degrees in the use of force, or over the quantification of victims and damage, or over harmful intentions, an armed attack even when it consists of a single incident, which leads to a considerable loss of life and extensive destruction of property, is of sufficient gravity to be considered an 'armed attack' in the sense of Art. 51 U.N. Charter.[133]

To conclude, Ukraine can use a reasonable amount of force without any legal ramifications by invoking the right of self-defence as contained within Article 51, to quell the armed attacks of the Russian Federation directed against them. Furthermore, when Ukraine exercises the right to self-defence, it is not limited to expelling the attacking forces from their

[127] Judith Gardam, *Necessity, Proportionality and The Use of Force By States* 138 (2004); T.M Franck, *On Proportionality of Countermeasures in International Law,* 102 AM. J. INT'L. L.715 (2008) [hereinafter Gardam].

[128] Jeremy Rabkin, *A Return to Coercion: International Law and New Weapon Technologies,* 42 HOFSTRA L. REV. 1187 (2014).

[129] *Nicaragua,* 1986 I.C.J. 14 0une 17), *supra* note 31.

[130] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Prosecutor v. Dusko Tadic), 1996 35 ILM 32.

[131] *Genocide,* 2007 I.C.J. 191 (July 11), *supra* note 88.

[132] *Oil Platforms,* 2003 I.C.J. 161 (Nov. 6), *supra* note 89.

[133] AVRA CONSTANTINOU, THE RIGHT OF SELF-DEFENCE UNDER CUSTOMARY INTERNATIONAL LAW AND ARTICLE 51 OF THE UN CHARTER 64 (2000).

territory, but they may also, in principle, pursue them across the border in order to secure an end of the attack.[134]

## V. REPARATIONS PROVIDED BY THE ICC AND ICT

Depending on the forum's jurisdiction which the aggrieved/injured party (in the present case, Ukraine), may invoke, reparations which are granted can be divided into two broad categories. Firstly, the reparations granted by the International Court of Justice and secondly, the reparations granted by the ICC only after an individual is found guilty for a certain set/type of offences. The main difference between these categories is that under the second category, prosecution and conviction is a must and only certain individuals would be held liable for compensation/reparation, while under the first category, the wrongful acts are attributable to the States and hence, a State as a whole would be held liable.

### THE INTERNATIONAL COURT OF JUSTICE

Reparations are contained within Part Two of the ILCs 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Rome Statute. Therefore, in the event of an internationally wrongful act by a State of international law, other States or subjects may be entitled to respond.[135]Article 1 of the ARSIWA lays down the principle that every internationally wrongful act of one State would entail the international responsibility of the same. The PCIJ, as early in 1934, in the *Phosphates in Morocco case* affirmed that when an internationally wrongful act is carried out by one State against the other, then international responsibility is established.[136] This principle was reaffirmed by the ICJ in a plethora of cases such as the *Corfu Channel,*™ and the *Gabcikovo-Nagymaros case.*[liS] Similarly, in the *Rainbow Warrior* case, it was held that whenever a violation of an international obligation occurs due to an act

[134] Snider, *supra* note 112, at 198.
[135] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 566 (8th ed. 2013).
[136] Phosphates in Morocco (Italy v. Fr.), (1938) P.C.I.J., Ser. A/B, No. 74 (June 14,1938).
[137] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 244 (Dec. 15).
[138] Gabcikovo-Nagymaros Project (Hungary/Slovakia), *Judgment,* (1997) *I.C.J. 7* (Sept. 25).

of one State, the same would give rise to State responsibility.[139] Reparations are used to refer to all measures which may be expected from the responsible State, over and above cessation and it includes within its purview measures such as restitution, compensation and satisfaction.[140]

While delineating the extent of reparations, the Permanent Court in the *Factory at Cborzow (merits)* case is that reparation should wipe out all the consequences of an illegal act and re-establish the situation which would have in all likelihood existed had such an illegal act not have been committed.[141] Likewise, as was put forth by ITLOS in *M/VSaiga (no 2)* that if a State suffers damage due to an internationally wrongful act then the State is entitled to receive reparation for the damage suffered from the State which committed the act.[142] Article 1 of the ARSIWA, which lays down the definition State responsibility, is important in this aspect, so as to delimit which wrongful acts require reparations.

Therefore, even though the ICJ seldom awards reparations, their jurisprudence has served as a basis for both lump-sum agreements and for awards by other international bodies such as the UNCC,[143] Eritrea-Ethiopia Claims Commission,[144] etc. and hence, recourse can be had to the World Court.

THE INTERNATIONAL CRIMINAL COURT

The ICC, through its preamble, recognizes that the victims of crimes would themselves constitute stakeholders in international criminal proceedings and the Rome Statute enshrines numerous articles relating to victim participation and protection, as well as their right to reparation.[145]

[139] Rainbow Warrior (N. Z. v. Fr.), 82 I.L.R. 500 (April 30).
[140] Gardam, *supra* note 131.
[141] The Factory at Chorzow (Germ. v. Pol.), (1928) PCIJ Ser A no 17, 47 (Sept. 13).
[142] M/V Saiga (no. 2) (Saint Vincent and the Grenadines v. Guinea), (1999) 120 I.L.R. 143,199 (July 1).
[143] Veijo A. Heiskanen, *The United Nations Compensation Commission,* 296 HAGUE RECUEIL 255 (2002).
[144] Christine Gray, *The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Awardf,\7* EJIL 699 (2006).
[145] CHRISTINE EVANS, THE RIGHT TO REPARATION EST INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 99 (2012).

Reference can be drawn to Article 75 of the Rome Statute, which bears the heading of "Reparations to Victims" and through the provisions of the same, upon conviction of an accused, the individual may be made to provide appropriate reparations of victims, including restitution, compensation and rehabilitation.[146]

Although, the Rome Statute makes explicit references to victims, the same has not been defined. However, in accordance with Rule 85 of the Rules of Procedure and Evidence, a "victim" is defined as "a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the court."[147] The ambit of the definition of "victims" has not been delimited and is to be understood as those who are not only directly affected by a particular crime, but would also contain within its ambit the family members and successors of victims.[148]

The ICC has been afforded with a vast amount of discretionary powers by virtue of which awards can be determined upon an individualized basis, collective basis or both.[149] Rule 86 establishes the principle that the needs of all victims in particular, children, elderly persons, persons with disabilities, and victims of sexual or gender violence should be taken into account during the discharge of the duties of the various organs of the court.

Due to the introduction of the right to victim participation in international criminal law, a large number of victims have filed requests to participate in the various stages of a prosecution as can be seen in the case of *Prosecutor vs. Lubanga,*™ and *Prosecutor vs. Katangaand Chui.*[m] Victims file to participate in the early stages of a prosecution out of a

[146] Statute of the International Court of Justice 1945, Article 75(2).
[147] ICC Rules of Procedure and Evidence, Adopted by the Assembly of State Parties, New York, 3-10 September 2002, ICC-ASP/1/3.
[148] OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 969 (2th ed. 2008).
[149] Morris, *supra* note 106.
[150] *Lubanga,* ICC-01/04-01/06-2842, *supra* note 110.
[151] The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07 OA 8 (Sept. 25 2009).

growing concern that they may not be otherwise considered for the reparation stage.[152]

Therefore, to conclude, the victim does not have to refer to a specific investigation in his/her reparation claim,[153] nevertheless, the request for reparations must ultimately be linked to criminal proceedings against the person responsible for the harm. Lastly, reparation orders can only be issued once a case is decided and hence, if the defendant is acquitted, there would be no reparations for the victims.[154]

## VI. CONCLUSION: THE (IR)RELEVANCE OF INTERNATIONAL LAW

The situation in Ukraine can be best described with one word- grim. Escalating violence, growing incursions and constant flouting of territorial integrity and sovereignty have left Ukraine a hapless figure. To add to Ukraine's misery, the growing irrelevance of international law is evident as, apart from individual countries and prominent international organizations imposing sanctions, no legal ramifications of a magnitude severe enough has been suffered by the Russian Federation. Strictly speaking, even though a vast plethora of options with regards to recourse which can be taken by Ukraine have been listed above, unfortunately, only invoking the ICJ's jurisdiction is feasible. Since the Russian Federation is a European powerhouse, it is unlikely that prosecution would be initiated against the principal perpetrators within this forum (i.e. the ICC). Furthermore, Russia's reluctance to explicitly accept their participation and involvement in the annexation of Crimea and armed conflict in the Donbass area between pro-separatists and Ukrainian armed forces, makes it even more unlikely that there would be any formation of a mass claim reparation program or any arbitration between the two States or would be resorted to. Thus, herein lies the paradox of choice. Therefore, even though the individuals responsible for the violations of the principles of international law would not be directly prosecuted and punished, Ukraine can have recourse to the ICJ and the best they can hope is the grant of reparations in accordance with the ARSIWA.

[152] Snider, *supra* note 112, at 104.
[153] Mass Claims, *supra* note 118.
[154] *Id.*, at 317.

Therefore, to summarize, the conspicuous violations of the principles of international law serve a reminder that brute power triumphs, and that the principles of international law are applied only when it serves the interests of certain States (such as the permanent members of the UNSC; one example is when the U.S. lost a 1984 International Court of Justice case filed by Nicaragua, it blocked the ruling's implementation).[155] The siege on Ukraine demonstrates the growing irrelevance of international law and efforts to remedy the same must be adopted expeditiously. This would prevent an already volatile situation from intensifying into something worse and from spilling into the neighbouring States which have been left extremely vulnerable and susceptible to Russia's readiness in blatantly violating the very principle of State sovereignty and territorial integrity.

[155] Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L.815 (2008).

Geetanjali Sharma, *Evolving Competition Law Jurisprudence In India: Role Of Procedural Justice*, 3(2) NLUJ Law Review 103 (2016)

# EVOLVING COMPETITION LAW JURISPRUDENCE IN INDIA: ROLE OF PROCEDURAL JUSTICE

## (CASE COMMENT ON BCCI V. CCI & SURINDER SINGH BARMI)

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## INTRODUCTION

The year 2015 has been instrumental in the development of competition law jurisprudence in India. Whilst the competition regulator, the Competition Commission of India ("CCI") regularly draws head-lines for being an aggressive regulator which imposes severe fines for competition law contraventions; the Competition Appellate Tribunal ("COMPAT") in the year 2015 became an equally active tribunal which reviews the orders of CCI and decides on crucial questions of competition law both on substantive as well as procedural grounds. In 2015, some of the landmark cases decided by CCI against big entities including- Board of Cricket Control in India ("BCCI");[1] cement companies such as Lafarge;[2] and hospitals such as Hiranandani[3] have been overturned by COMPAT.

The present article presents implications of one of the COMPAT orders rendered in the BCCI case. COMPAT's decision in the BCCI order started the trend of overturning a CCI decision purely on procedural rules, a practice which was later followed by COMPAT in other landmark decisions such as the cement cartels case, as discussed above. COMPAT's order in the BCCI case laid down the broad principles regarding the role of the competition regulator in India; standard of proof and other procedural requirements in the adjudication of competition law cases as well as the role of both investigating authority, i.e. the Director General ("DG") and the role of CCI placing reliance on the report of the DG. Therefore, the implications remain vital for future cases to be decided both by the CCI as well as COMPAT.

Whilst some may claim that the trend of conflicting orders between CCI and COMPAT would lead to fragmentation of competition law jurisprudence, thereby affecting the credibility of the competition regulator in India; such a trend is likely to continue as the competition

[1] The Board of Control for Cricket in India v. The Competition Commission of India and Ors.,(2015) 128 C.L.A. 186 (CAT), [hereinafter *BCCI Order* (2015) 128 C.L.A. 186 (CAT].

[2] Lafarge India Ltd. and Ors. v. Competition Commission of India and Ors., Appeal No. 105/2012, (2015).

[3] L.H. Hiranandani Hospital v. Competition Commission of Indian and Ors., Appeal No. 19/2014, (2015).

law jurisprudence is still evolving, and standards and practices of competition regulator may also evolve with changing times.

## **BCCI** v. **CCI** & SURINDER SINGH BARMI:[4] AN ANALYSIS

### BRIEF BACKGROUND

In February 2015, COMPAT had rendered the decision in the appeal filed by the BCCI against the order of the CCI dated 8 February 2013.[5] The case was instituted before the CCI based on an information filed by Mr. Surinder Singh Barmi, a cricket fan, who complained against practices including bid rigging in allotment of franchisee rights for Indian Premier League ( **"IPL")** teams, BCCFs conduct in favouring near and dear ones in the bidding process, unfair manner in which bids were organized for television rights, sponsorship, etc. in relation to IPL all of which diluted fair competition in organization and distribution of the IPL event. CCFs focus was on the underlying economic activities which are ancillary for the organizing the sports events. CCI concluded that the BCCI was found to be in abuse of its dominant position in relation to its activities in organizing the IPL matches. This decision was appealed before COMPAT, where the appellate tribunal allowing the appeal overturned the CCI's order which had imposed a penalty of Rs. 52.24 crores on BCCI and thereafter remanded the matter for fresh hearing before CCI.

Without delving much into the substantive issues of the case, the focus of the present article is to highlight the relevance of the COMPAT decision in light of its discussion on the aspect of procedural fairness and conduct of a competition regulator. COMPAT's order is likely to have vital implications in respect of some of the following issues of competition law jurisprudence in India, as set out below:

### FUNCTIONS OF THE **CCI** AND RECOGNIZING THE GROUNDS FOR SETTING ASIDE AN ORDER

The debate on the nature and judicial character of CCI has been a matter of debate under the present competition law regime in India. Whilst on

[4] BCCI Order, (2015) 128 C.L.A. 186 (CAT), *supra* note 1.
[5] *Id.*

one hand, under Chapter III of the Competition Act, 2002 **("The Act"),** CCI is established as a 'body corporate' functioning largely under the vestige of the Central Government; on the other hand, it also performs functions whereby the rights and liabilities of parties are decided in relation to contravention of the Act. Accordingly, heavy penalty may be imposed both on companies and specific individuals who have contravened the Act in certain cases. Therefore, whilst Chapter III of the Act gives CCI an executive flavour, provisions of the Act such as Section 27 where power to impose penalty is laid down gives CCI a judicial/quasi-judicial flavour. Pursuant to COMPAT order in the BCCI case, it is clear that an order passed under Section 27 of the Competition Act, 2002 imposing civil consequences on parties makes the functions of the Commission adjudicatory/quasi judicial. The tribunal has relied on authorities including decisions of various High Courts and Supreme Court which emphasize that if there is power to decide and determine to the prejudice of any person, the duty to act judicially is implicit in exercise of such a power.[6] Based on this, COMPAT concluded that the Commission is required to comply with the rule of *audi alteram partem* and provide an effective opportunity of hearing the person against whom a finding is likely to be recorded in contravention of Section 3 and 4 of the Act in relation to anti-competitive agreements and/or abuse of dominance. COMPAT also underscored that if the essentials of justice are ignored and an order to the prejudice of a person is made, such an order would be a nullity.[7] In the present case, the COMPAT found that since the Impugned clause 9.1 (c) (i) of the media agreement between BCCI and broadcasters was neither referred to in the Section 26(1) order of the Commission nor in the Director General's findings, BCCI was not awarded an opportunity to defend itself against the Impugned clause which in-turn amounted to a breach of natural justice.[8] One must note that the in a competition law dispute, an order under Section 26(1) of the Act (prima facie order) is a first step which triggers the investigation by the DG which is an investigating organ of CCI. After the completion of

[6] ***Id* at 118-19;** *see* also, State of Orissa vs. Dr. (Miss) Binapani Dei and Ors., A.I.R. 1967 SC 1269; *see* also, Rajesh Kumar vs. CIT (2007) 2 S.C.C. 181.
[7] BCCI Order, (2015) 128 C.L.A. 186 (CAT), *supra* note 1 at 115-18.
[8] Wat\37.

DCs investigation, the DG formulates a report which is thereafter passed on to the Parties of the dispute and especially the defendant is given an opportunity to rebut the claims made against it, if any, in the DG report. The initial order under Section 26(1) of the Act may or may not be provided to the defendant depending on the nature of the case, till the stage of DG report. After the DG report is provided to all parties and they have furnished their responses upon the DG report, CCI thereafter decides the case based on all records before it placed by all Parties to the dispute. Hence, if a party especially the defendant was never provided an opportunity to review an evidence against it in relation to a specific contravention of the Act either at the prima facie stage of the order, or in the DG report, the same Party cannot be expected to rebut such an evidence. Hence, it is not viable on part of the CCI to rely on such evidence and draw an adverse inference against such Party. The BCCI's order underscores this aspect by clarifying that since BCCI never received an opportunity to defend itself against the impugned clause 9.1 (c) (i) of the media agreement between BCCI and broadcasters, a decision of CCI upon this aspect violated the principles of natural justice. The COMPAT emphatically recognized that breach of natural justice is a ground for setting aside the impugned order of the CCI. Since COMPAT acknowledged the expansive scope of natural justice,[9] this case may have implications on the on-going cases challenging the impugned order of CCI in other matters, e.g. the Automobiles dispute where breach of natural justice is pleaded as one of the grounds in a writ petition before the Delhi High Court.[10]

## IMPLICATION ON THE COMMISSION; GOING BEYOND ITS SPECIFIED MANDATE

The COMPAT decision highlights the concerns when the Commission goes beyond the DG report in determination of certain issues (the issue of relevant market in this case), which in turn goes beyond the *prima-facie* findings recorded by the Commission under the Section 26(1) of the Act.

[9] *Id* at 116-22.
[10] Mahindra and Mahindra Ltd. v. Competition Commission of India and Anr., W.P.(C) 6610/2014, (2016).

The COMPAT analysed that in the present case, the DCs report, especially its determinative findings pertaining to the relevant market were prepared based on the *prima facie* order of the Commission under Section 26(1) of the Act. The relevant market determined by DG was the ' *underlying economic activities which are ancillary for organizing the IPL twenty-20 cricket tournament'}*[1] However, the Commission without indicating that it disagreed with the DCs report chose a different relevant market, *'Organization of private/professional cricket league/events in India'*.[11] The COMPAT found that by making such a choice, the CCI did not award any opportunity to BCCI to contest the proposed determination of the 'relevant market' chose by the Commission. The COMPAT clarified that it was natural for BCCI to file a reply only with reference to the findings and conclusions recorded by the DG. Further, the Commission was expected to hear the BCCI within the contours of the objections/suggestions filed in context of such recorded findings of the DG. The COMPAT emphasized that if the Commission wanted to differ with the DG on the issue of 'relevant market' then it should have given notice spelling out its intention to do so and ought to have given an opportunity to the other party (BCCI in the present case) to accordingly respond. Since it failed to do so in the present case, the COMPAT vitiated the relevant market analysis of the Commission on the grounds of violation of the rule of *audi alteram partem.*[n]

Furthermore, the COMPAT clarified that its previous decision in the *National Stock Exchange v. Competition Commission of India &MCX Stock Exchange,*[1]***'("NSE case")** does not stand for the proposition that the Commission can record finding on any particular issue different than the one recorded by the DG without giving notice and opportunity of hearing to the affected party.[15] In the *NSE* case, the DG had proposed that the *'exchange business as a whole constituted the relevant market'* whereas CCI opined that *'the stock exchange services in respect of CD segment in*

[1]BCCI Order, (2015) 128 C.L.A. 186 (CAT), *supra* note 1 at 18.
[12]/^atl4.
[13] *Id* at 124.
[14] National Stock Exchange of India Ltd. v. Competition Commission of India and MCX Stock Exchange Ltd., Appeal No. 15/2011, (2012).
[15] *Id* at 125.

*India was clearly an independent and distinct relevant market.'* The present case emphatically implies that even though the CCI is free to record its own findings on issues, including the relevant market analysis, the same must be brought to the adequate notice of the Opposite Party who should be awarded an opportunity to rebut such findings apart from its original rebuttals made to the DG report's findings.

The COMPAT decision underlines the principle that the CCI at the final stage of determination of dispute may not be allowed to intervene in the chain of investigations broadly set out in its *prima-facie* Order, which triggered the investigation by the DG. The COMPAT's reasoning is more so substantiated, as it is an established principle that the investigation by the DG depends upon the nature of the opinion formed by the Commission at a prima facie level, on consideration of reference or information received by it under Section 19 of the Act. If the DG investigates any information which the Commission did not consider in the first instance, while forming an opinion with respect to existence of a *prima facie* case, such an act on his part shall be *ultra vires to* his power under the Act.[16] Therefore, since the DG findings are premised upon the original *prima facie* order under Section 26(1) of the Act which is available to the Opposite Party and the overall statutory framework of Section 26 (Clauses 4 and 5) further protects the rights of the Opposite Party to object to the DG findings, such rights remain sacrosanct and the CCI at the final determinative stage may not be allowed to rely on evidence obtained at a later stage and/or ascertain its own relevant market without putting the Opposite party to notice. Such practices would affect the broad scheme of the Act and the structured methodology designed for adjudication or disposal of competition claims before the CCI.

## STANDARD OF PROOF BEFORE CCI: IMPLICATIONS

The COMPAT's decision holds twin implications on the issue of standard of proof and evidence before the CCI.

First, the COMPAT's reasoning weaves the application of natural justice principles at the stage of evidence taking before the CCI. The COMPAT

[16] Grasim Industries Ltd. v. Competition Commission of India, (2014) 206 D.L.T. 42 at 19.

termed CCI's reliance on information available in public domain to ascertain abuse of dominance, without disclosing the same to the party (BCCI), as amounting to not just the violation of the principles of natural justice but also an occasioned failure of justice.

Second, the COMPAT clarified that the information available in the public domain could not have been used in the first place, as it remains uncorroborated evidence *(no one appeared in the witness box to prove the same).The* COMPAT placed reliance on several Apex Court decisions which stand for the propositions, *inter-alia* that- information downloaded by the Commission from the internet and other similar sources, fall in the same category as the newspaper report and therefore such reports have no evidentiary value without further proof;[17] and an electronic record by way of secondary evidence shall not be admitted unless the requirements under Section 65B of the Indian Evidence Act, 1882 are satisfied.[18]

Therefore, by implication (i) CCI ought not to have placed reliance on information downloaded from the net and similar other materials which are presented without corroboration and (ii) in any event, since an effective opportunity was not provided to the Opposite Party (BCCI) to rebut this evidence, CCI should have precluded itself from relying on such evidence.[19]

The COMPAT's reasoning covertly underlines the statutory framework of the Act as Section 36(2) of the Act provides adequate power to the CCI for requisition of public records or certified documents and pursuant to Section 36(3), the Commission may call upon experts from the field of economics, commerce, accountancy, international trade or any other discipline, for further assistance.

In a similar context, it is noteworthy to mention the recent decision of the CCI pertaining to the alleged cartelization amongst real estate players. The CCI, in establishing a standard of proof for the requisite evidence set out the following:

BCCI Order, (2015) 128 C.L.A. 186 (CAT), *supra* note 1 at 128. *Id* at 134-35. *Id* at 136.

*338. [EJven if the competition agency discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it is normally only fragmentary and sparse, so it is often necessary to reconstruct certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement.*

In a Section 43A order (the Combinations case) under Section 6(2) of the Act, CCI had further opined:

" *With regard to admissibility of television interview as evidence, it is noted that televised interview must be differentiated from a news article wherein the author using unnamed sources writes a report. A televised interview wherein the Chairman of an enterprise provides information pertaining to the enterprise cannot be treated as mere hearsay. Further, it is observed from the existing jurisprudence on admissibility of television interview as evidence, that television interview is admissible as evidence provided the parties are afforded an opportunity for a* A&m>zg."[20]Therefore, both the Informants and the Defendants before the CCI would now be expected to adhere to certain standards of proof while submitting evidence. For example, affidavits of officials shall be required when submitting information downloaded from the internet; media reports shall be required to be supplemented with testifying evidence, e.g. cross-examination of certain witnesses; rules under Evidence Act may be required to be adhered to, such as, in case of contract, grant, or any other disposition of property, true or original copies of these documents are required to be produced (Section 91 of the Evidence Act); and oral agreements, customs and usages are need to be proven (Section 92 of the Evidence Act).

## CONCLUSION

Thus, COMPAT in the BCCI order has clarified on several procedural issues grappling the CCI as well as the competition law litigants in India. To a great extent, COMPAT's order puts finality on the status of CCI that it performs a judicial/quasi judicial function. By virtue of this, CCFs orders must also adhere to the principles of natural justice, which must be

Combination Registration No. C-2014/06/181, 2015.

complied at every stage of CCI's proceedings including at the time of DG report or providing an opportunity to the opposite party to rebut the evidence furnished against it. Similarly, it has been clarified that CCI is free to deviate from the findings recorded in the DG report as it ought to neutrally evaluate the case before it. However, if there has been a deviation from the specific findings of the DG report, e.g. determination of relevant market which is the core pillar in any competition law claim of abuse of dominance, the opposite party must be put to notice and to that extent sufficient opportunity must be given to the parties to rebut such findings. CCI must also refrain from concluding on contraventions of the Act based on media reports and data downloaded from the internet which remain uncorroborated without affidavits and other testimonies. These further raise the standard of proof for litigants as the Commission may now be more pro-active in involving technical experts and/or relying on evidence which is more conclusive. Therefore, COMPAT's order in the BCCI case has paved a path for competition litigation where procedural fairness gains paramount importance, equivalent to the substantive issues of law, economics and policy enumerated in the Act.