

THE CONSTITUTIONAL VALIDITY OF A STATE TAX ON CONSUMPTION OF ELECTRICITY SOURCED FROM OUTSIDE THE STATE

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Abstract

The Karnataka Electricity (Taxation on Consumption or Sale) Act, 1959 (“Act”), by virtue of the 2013 amendment (“Amendment”) in its Section 3, imposes tax not only on the sale but also on the consumption of “electricity” within the state. As per the Supreme Court’s judgment in State of Andhra Pradesh v. National Thermal Power Corporation Limited (“NTPCL”), State is not competent to levy taxation on inter-state sale of electricity.

The present paper argues that this provision of the Amendment is unconstitutional because: first, the decision of the Supreme Court in NTPCL is a precedent on the competence of the State to impose tax on inter-State sale and consumption of electricity. Second, the State of Karnataka is not competent to enact the said Amendment because of lack of “territorial nexus” to impose taxes on inter-State sale and consumption of electricity, especially when the electricity is sourced from open access grid. Third, the said Act is unconstitutional since it violates the rights enshrined in the Constitution. The vires of State’s Act to levy a tax not only on “sale” but also on “consumption” is critically examined using these above-mentioned constitutional law principles.

Further, Karnataka High Court in its ruling in 2016 upheld the impugned provision of the Amendment on the ground that levy of tax is not on inter-State transaction, but on the “consumption” of electricity within the State. The article argues that this judgment is per incuriam because of the NTPCL judgement holding that the sale and consumption of electricity cannot be separated.

Keywords: Electricity, Taxation, Territoriality, Lists, Constitutionality, Per Incuriam

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Introduction

Article 245 of the Indian Constitution is the *fountainhead* of the legislative powers of both the Centre and the State.¹ The Legislature of a State can only make laws for “*whole or any part of the state*.”² The respective law must conform to other provisions of the Constitution, otherwise, the same can be declared unconstitutional by courts by exercising the power of judicial review.³ Hence, the law must comply with the distribution of legislative powers so provided within the Constitution, i.e., Article 246.⁴ There is a three-fold distribution of power prescribed, one under the exclusive domain of the Centre, second under the exclusive domain of the States, and the third being common to both Centre and State with the supremacy of the Centre, and this distribution is exemplified with the three lists in the seventh schedule of the Constitution, namely, Union List (**List I**), State List (**List II**) and the Concurrent List (**List III**) respectively.⁵

In light of such clear distribution of legislative powers, the present paper argues that there is no legislative competence with the State of Karnataka to impose inter-state tax on “consumption” of electricity through the Amendment. The paper would address this argument in the following manner; *first*, given the nature of electricity, its sale and consumption would constitute single transaction, as has been noted by the Supreme Court of India in *State of Andhra Pradesh v. NTPCL*. *Second*, this entire inter-state transaction of electricity including its consumption would come within the legislative domain of the Centre. *Third*, there is a requirement of degree of relationship or “Nexus” for legislative competence, which is not getting established because of the inter-state transmission system in place. *Fourth*, State of Karnataka does not have legislative competence as per Interpretation of the Three Lists in Seventh Schedule, in terms of, doctrines, namely, colourable legislation, pith and substance, and harmonious construction. *Fifth*, the Amendment is unconstitutional, because, it contravenes right to equality (Article 14), right to carry on any occupation, trade or business

¹ *Jindal Stainless Limited and Anr. v. State of Haryana and Ors.*, (2017) 12 SCC 1.

² INDIA CONST. art. 245, cl. 1.

³ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27; *Atiabari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232; *Golak Nath v. State of Punjab*, AIR 1967 SC 1643; *State of Bihar v. Bal Mukund Sah*, (2000) 4 SCC 640; VS DESHPANDE, JUDICIAL REVIEW OF LEGISLATION 55 (Eastern Book Company 1975); DD BASU, LIMITED GOVERNMENT AND JUDICIAL REVIEW 291 (Eastern Book Company 1972).

⁴ *Synthetics and Chemicals Ltd. v. State of U.P.*, (1990) 1 SCC 109.

⁵ *State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal*, AIR 2010 SC 1476.

(Article 19), right to life (Article 21) and freedom of trade, commerce and intercourse (Article 301). *Finally*, it is argued that the judgment given by Karnataka High Court in *Vijaya Steels Limited v. Bangalore Electricity Supply Company Limited*, wherein the inter-state taxation on “consumption” of electricity was held valid, is *per incuriam* in law.

Nature of Electricity

Electricity coming under the category of goods, being movable in nature,⁶ is of a special type since its sale and consumption cannot be separated. This is because:

*Electricity is assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the pores of all bodies, and is capable of motion from one body to another.*⁷

Electricity is lost in its course of transmission and does not remain uniformly available between sale and consumption.⁸ It is a commodity that cannot be stored in the grid where demand and supply have to be continuously balanced.⁹

In *Indian Aluminium Co. v. State of Kerala*¹⁰, the Supreme Court had observed that the continuity of supply and consumption commences the very moment electricity passes through the meters and the sale of such electricity takes place as soon as the meter reading is recorded. These three steps, namely supply, sale and consumption take place without any interruption.¹¹ The Court further noted that the term ‘supply’ in the case of electricity is inclusive of sale as well as consumption.¹² This view was reiterated in *NTPCL*¹³ wherein the Court stated that a sale of electricity cannot be effected without its consumption “*as it cannot be stored.*”

⁶ Commissioner of Sales Tax, Madhya Pradesh v. Madhya Pradesh Electricity Board, 1969 (2) SCR 939; State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203; INDIA CONST.art.366, cl.12

⁷ Spensley v. Lancashire Ins. Co, 54 Wis. 433, 442, 11 NW 894.

⁸ State of Mysore v. West Coast Papers Mills Ltd., (1975) 3 SCC 448.

⁹ National Electricity Policy, 2005, Policy 1.5, Gazette of India, pt. I sec. 1 (Feb. 12, 2005); Harsha Rajwanshi, *Electricity is Different— A legal commodity*, SCC ONLINE (Oct. 17, 2020), <https://www.sconline.com/blog/post/2020/10/17/electricity-is-different-a-legal-commodity/>.

¹⁰ Indian Aluminium Co. v. State of Kerala, (1996) 7 SCC 637.

¹¹ *Id.*

¹² *Id.*

¹³ State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.

As these two activities form one transaction, when occurring across States, it still would remain a single inter-State transaction. The state legislature is not legislatively competent to bring this within its purview. Further, it leads to the violation of certain fundamental rights, which would be examined in the later part of the article.

The view of Supreme Court on inter-state taxation

The question before the Supreme Court in the *NTPCL* case was whether the sale of electricity by NTPCL to the Electricity Boards situated outside the State of Andhra Pradesh and to the State of Goa, attracted taxation under Section 3 of the Andhra Pradesh Electricity Duty Act, 1939. Supreme Court held that the taxation on sale or purchase which takes place in the course of an inter-State trade is excluded from the competence of State legislature.¹⁴

Even as per the Central Sales tax Act, all that is required to be seen is whether the movement of goods itself or the transfer of documents of title to the goods during its movement is taking place or not.¹⁵ If either of the two is satisfied, then the sale or purchase shall be deemed to be an *inter-State trade* upon which Article(s) 269 and 286 of the Constitution shall be applicable.¹⁶ Hence, it shall be beyond the legislative competence of a State to tax the sale or purchase of electricity. This prohibition works irrespective of whether it is provided in the description of legislative entries (which are to be seen as legislative heads and not the source of legislative empowerment) in Seventh Schedule or not.¹⁷

The Supreme Court relied on this reasoning in *NTPCL* to note that the Entries in List-II of the Seventh Schedule shall always remain subject to the limits set by the Constitution and these barriers created by the Constitution should not be spilt over based on these entries.¹⁸ The Apex Court thus concluded that there are twofold limitations upon the State's power to impose taxes as per List II: *first*, arising out of the entry itself; *second*, arising out of the restrictions

¹⁴ Tata Iron and Steel Co. Ltd. Bombay v. S.R. Sarkar and Ors., 1961 (1) SCR 379.

¹⁵ 20th Century Finance Limited v. State of Maharashtra, AIR 2000 SC 2436.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.

enumerated in the Indian Constitution.¹⁹

NTPCL is a reasoned judgment based on law set in the legislation and judicial pronouncement and not *per incuriam* in law. As noted by the Supreme Court in *B. Shama Rao v. Union Territory of Pondicherry*²⁰, a judgment is binding because of its rationale and the principles laid down therein and not the conclusion. The principles laid down by the Apex Court in *NTPCL* are directly applicable as they deal with the same issue of imposition of taxes by the State on inter-State sale and purchase of electrical energy.

*NTPCL*²¹ is a precedent on the issue of taxability on inter-State electricity and therefore owing to the principle of *stare decisis*, the law set by the Supreme Court in the said judgment shall prevail. The meaning of the principle, *stare decisis et non quieta movere* is “to stand by the decisions and not to disturb what is settled”.²² Those issues which have been adjudged ought to rest in peace.²³ This principle has found a place in the Indian Constitution under Article 141 as per which *a law declared by Supreme Court shall be binding on all courts within the territory of India*.²⁴ Accordingly, a principle laid down in the judgment of the Supreme Court shall be binding law under Article 141 of the Constitution.²⁵ In fact, such precedents are not only binding on the judgments of smaller strength but also on the judgments of a co-equal strength bench.²⁶

Determining legislative domain for Inter-state transaction of electricity

1. Sale and consumption of electricity through open access grid

Regulation 2 (qq) of the Grid Code Regulation defines an inter-State transmission system as per which, it is a system for the conveyance of electricity from one State to another

¹⁹ *Id.*

²⁰ *B. Shama Rao v. Union Territory of Pondicherry*, 1967 SCR (2) 650.

²¹ *State of Andhra Pradesh v. National Thermal Power Corporation Ltd.*, (2002) 5 SCC 203.

²² *Waman Rao v. Union of India*, (1981) 2 SCC 362.

²³ *Id.*

²⁴ INDIA CONST. art. 141.

²⁵ *Dr. Shah Faesal and Others v. Union of India and another* (2020) 4 SCC 1.

²⁶ *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others*, (2011) 1 SCC 694.

via a main transmission line.²⁷ It further involves the conveyance of electricity across an intervening State as well as within the State incidental to such transmission.²⁸ Interstate trade and commerce is defined in Section 3 of the Central Sales Tax Act as aforementioned.²⁹

An inter-State trade thus has three key ingredients. *First*, a contract of sale stipulating inter-State movement of the goods; *second*, such movement must take place in pursuance of the contract wherein the sale is the cause behind the movement; *third*, the movement must be to another State where the Sale concludes.³⁰

Electricity's coming into existence and its consumption takes place simultaneously. Thus, the generation of electricity in one State from where it is supplied to another where it is received and consumed, is in its entirety a single transaction which is nothing other than an inter-State trade taking place through the instantaneous movement of goods from one State to another.³¹

The position of law with respect to the imposition of taxes on an inter-State sale was made clear by the Supreme Court in the case of *Bengal Immunity Company Limited v. State of Bihar and Ors.* It was held that until the Parliament has exercised its power under the then clause (2) of Article 286 to state otherwise, a State cannot impose or authorize the imposition of any tax on sale or purchases of goods taking place in the course of inter-State trade.³² It is imperative to note that the *situs* of sale or purchase is entirely immaterial in cases involving inter-State trade³³ since an inter-State sale or purchase is a single transaction irrespective of the State where the sale can be under the general law or by fiction which is created by the explanation of Article 286(1).³⁴ Further, Article 269 prohibited the levy and collection of tax by State on that sale or purchase which takes place in the course of inter-State trade or commerce.³⁵ This position of law was further elucidated by the Apex Court in *Iron and Steel Co. Ltd., Bombay*

²⁷ Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010, Regulation 2(qq) (i), Gazette of India, pt. III sec. 4 (Apr. 28, 2010).

²⁸ *Id* at Regulation 2(qq) (ii).

²⁹ Central Sales Tax Act, 1956, § 3, No. 74, Acts of Parliament, 1956 (India).

³⁰ *State of Andhra Pradesh v. National Thermal Power Corporation Ltd.*, (2002) 5 SCC 203.

³¹ *Id.*

³² *Bengal Immunity Company Limited v. State of Bihar and Ors.*, 1955 (2) SCR 603.

³³ *20th Century Finance Limited v. State of Maharashtra*, AIR 2000 SC 2436.

³⁴ *Bengal Immunity Company Limited v. State of Bihar and Ors.*, 1955 (2) SCR 603.

³⁵ *Gannon Dunkerley & Co. v. State of Rajasthan*, (1993) 1 SCC 364; *M/S. Kalpana Glass Fibre Pvt. Ltd. Maharashtra v. State of Orissa*, (2013) 57 VST 357.

*v. S.R. Sarkar*³⁶ wherein it was held that *the field of taxation on sale or purchase in course of an inter-State trade is entirely excluded from the competence of the State Legislature.*

2. Tussle between Centre and State over Inter-State Trade and Commerce

Before 1956, states applied the doctrine of territorial nexus and levied taxes on a taxable event, which was a single ingredient out of the multiple ingredients which constituted the said transaction.³⁷ Hence to restrict this multiple taxation, Constitution restricted States from imposing taxes on the sale and purchase of goods taking place outside the State or the country as per the then existing Article 286.³⁸ *Explanation* in the said article allowed for considering a State in which goods arrived for consumption from outside the State to levy tax on the involved traders, which was ultimately struck down by the Supreme Court in the case of *Bengal Immunity Co. v. State of Bihar*.³⁹

In light of ensuring free flow of trade and commerce and to protect the traders from undue harassment, the court took the subject of inter-State trade and commerce out of the State's purview for legislation. So as to not let the local trade be adversely affected at the cost of inter-State trade; Taxation Enquiry Commission recommended inter-State taxation to be under Union's power and the revenue be devolved upon States.⁴⁰ Hence, Parliament brought inter-State taxation under the Union list.⁴¹

Accordingly, in the context of a sale, by virtue of the Central Sales Tax Act, 1956,⁴² Parliament determined the principles for determining when sale or purchase takes place in inter-State trade or commerce.⁴³ The test to determine if a transaction is inter-State or not, the court sees, if there is a movement of goods from one State to another, or is effected through a transfer of

³⁶ *Iron and Steel Co. Ltd., Bombay v. S.R. Sarkar*, 1961 (1) SCR 379.

³⁷ *Municipal Corporation of Jullundur City v. Union of India*, AIR 1981 P&H 287.

³⁸ *State of Bombay v. United Motors Ltd.*, AIR 1953 SC 252.

³⁹ *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661.

⁴⁰ MP JAIN, *INDIAN CONSTITUTIONAL LAW* 704 (Lexis Nexis 2018).

⁴¹ INDIA CONST. sch. 7, list 1, ent. 92A.

⁴² Central Sales Tax Act, 1956, § 6, No. 74, Acts of Parliament, 1956 (India).

⁴³ *Ashok Leyland Ltd v. State of Tamil Nadu*, (2004) 3 SCC 1.

documents of title to the goods during their movement from one State to another.⁴⁴

The rationale for making **inter-State transactions** immune from State taxation is found in consumer welfare, which is evident from the court's interpretation of the earlier existing Article 286 of the Constitution, which restricted State taxation with regards to goods of special importance so declared by Parliament. The intention of the legislature was to protect important raw materials. Due to intra-State sales of such raw materials, the cost of manufactured articles could arise and since manufactured goods are sold directly outside the State, an increase in cost would be of direct concern to the consumers in other States.⁴⁵ After the One Hundred and First Constitutional Amendment also, inter-State supplies, supplies outside the State and those in the course of export and import from India are exempt from State taxation.⁴⁶ Position of law is well settled that in case of electricity, the word "supply" includes sale as well as consumption⁴⁷ and definition of supply in CGST Act and IGST Act is also inclusive hence illustrative.⁴⁸

Therefore, Karnataka cannot impose a tax on the consumption of electricity from an inter-State transaction, as constitutionally and as per the intention of legislature evident from the legislative history, inter-State transactions are kept out of the purview of State legislatures.

Degree of relationship or "Nexus" for legislative competence

A law having an extra-territorial operation can be only enacted by Parliament and not by the State, with the only exception of "territorial nexus."⁴⁹ For Parliament, extraterritorial operation of law is permitted.⁵⁰ Such laws were considered to be not directly enforceable rather with the machinery available within the territorial jurisdiction.⁵¹ But, a State can levy

⁴⁴ Cement Marketing Co. v. State of Mysore, AIR 1963 SC 980; State Transport Corporation v. State of Mysore, AIR 1967 SC 585; Ballabhadras Hulaschand v. State of Orissa, AIR 1976 SC 1016; State of Orissa v. K.B. Saha and Sons Industries (P) Ltd., (2007) 9 SCC 97.

⁴⁵ JAIN *supra* note 40, at 708; Satnam Overseas (Export) v. State of Haryana, (2003) 1 SCC 561.

⁴⁶ INDIA CONST. art. 286.

⁴⁷ Indian Aluminium Corporation v. Union of India, AIR 1996 SC 1431.

⁴⁸ Ramala Sahkari Chini Mills Ltd. v. Commissioner of Central Excise, (2016) 7 SCC 585; ESI Corporation v. High Lands Coffee Works, (1991) 3 SCC 617; CCT v. T.T.K. Health Care Ltd., (2007) 11 SCC 796; Ramanlal Bhailal Patel v. State of Gujarat, (2008) 5 SCC 449.

⁴⁹ State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.

⁵⁰ AH Wadia v. Commissioner of Income Tax, (1949) 51 Bom LR 287.

⁵¹ British Columbia Electric Railway Company Ltd. v. King [1946] 1 AC 527 (PC) (appeal taken from S.C.C.).

taxation on any person, object or transaction only when it is situated within its territorial limits or when it has sufficient and real territorial connection with the State.⁵² A State law would not be thus valid if it has an extra-territorial operation. To decide upon the same, courts have applied the doctrine of territorial nexus.⁵³ Illustration of the application of this doctrine is found in the case of *Wallace v. Income-tax Commissioner*,⁵⁴ wherein a company having its control and management exclusively situated in the United Kingdom was mandated to pay income tax on the income arising to the company since the court had found a sufficient territorial nexus in the form of a major portion of the profit arising from the Indian territory.⁵⁵

Broadly, the legal principle is that the object of the legislation has to be related to the territorial limits so that the extra-territorial operation has its provocation from within the territory.⁵⁶ In the case of *GVK industries v. ITO*,⁵⁷ the appellant company wanted to transfer its payment for financial consultancy received from a Swiss company, a tax was levied upon the transaction as being deemed to be accruing and arising from India. Question was to determine whether the extra-territorial operation of law is valid. The Court while answering the question evolved the test to establish a degree of relationship in the law.

Hence, an extra-territorial law would not be permitted but a law with extra-territorial operation would be allowed if that law is in respect of causes that arise, occur, exist or expected to arise, occur or exist within the territory. This is how the “nexus” with the territory would be established.⁵⁸ When the law strikes a sufficient territorial nexus between law and object, it is upheld.⁵⁹ Once this nexus stands established, the court even validates a prosecution of an offence for which the charge sheet was filed in another state.⁶⁰

⁵² JAIN, *supra* note 40, at 556.

⁵³ *State of Bihar v. Bhabapritananda*, AIR 1959 SC 1073; *Ananta Prasad v. State of Andhra Pradesh*, AIR 1963 SC 853.

⁵⁴ *Wallace v. Income-tax Commissioner*, AIR 1948 PC 118.

⁵⁵ *Id.*

⁵⁶ *Electronics Corporation of India Ltd. v. Commissioner of Income Tax and Anr.*, AIR 1989 SC 1707.

⁵⁷ *G.V.K. industries v. Income Tax Officer*, (2011) 4 SCC 36.

⁵⁸ *G.V.K. Industries v. Income tax officer*, [2015] 371 ITR 453 (SC); *Republic of Italy v. Union of India*, (2013) 4 SCC 721; *Vodafone International Holdings BV v. Union of India*, (2012) 6 SCC 613; *Securities Exchange Board of India v. PAN Asia*, AIR 2015 SC 2782.

⁵⁹ *Tata Iron and Steel Co. Ltd v. State of Bihar*, AIR 1958 SC 452.

⁶⁰ *State (NCT of Delhi) v. Brijesh Singh alias Arun Kumar and Anr.*, (2017) 10 SCC 779.

In the case of *State of Bombay v. RMDC company*, the company running crossword lottery competitions, though established in Bangalore, was having an extensive presence in Bombay, through its wide circulation in a local newspaper and had earned profits. The Supreme Court thus held that the connection with the territorial limit which must be established, has to be real and not illusory. Hence, the liability sought to be imposed upon the subject matter must have a connection with the territory.⁶¹

This principle of territorial nexus has been applied in further cases where a trust whose properties were located outside the state's territory were also held to be falling within the purview of taxation because the trust itself was created within the State, wherein the creation of the trust was mentioned in the respective statute, hence invoking the degree of relationship and establishing the nexus.⁶²

The concluding test for determining the territorial nexus, formed by courts through the catena of judgments as discussed above is involving two elements:

- a) Connection with the territory has to be real and not illusory.
- b) Liability sought to be imposed under the law must be relevant to that connection.⁶³

Due to the differentiating nature of electricity, the same position of law cannot be applied. In line with the decision of *NTPCL*,⁶⁴ as the acts of sale and consumption remain inseparable, owing to the special nature of electricity as a good, a state cannot have territorial nexus in a case where these two acts take place in separate jurisdictions. Liability sought to be achieved travels beyond the scope of the permissible Constitutional limit of state jurisdiction. Merely by picking one ingredient of an entire transaction⁶⁵, the state cannot bring a non-permitted subject matter within its jurisdiction. Hence, it is submitted that state law is without legislative competence.

The reason for allowing open access or non-discriminatory access to the transmission and

⁶¹ Shrikant Bhalchandra Karulkar and Ors. v. State of Gujarat and Anr., (1994) 5 SCC 459.

⁶² State of Bihar v. Charushila Dasi, AIR 1959 SC 1002.

⁶³ Shrikant Bhalchandra Karulkar v. State of Gujarat, (1994) 5 SCC 459.

⁶⁴ State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.

⁶⁵ Tata Iron And Steel Co., Limited, Bombay v. S.R. Sarkar and Others, AIR 1961 SC 65.

distribution system by an entity⁶⁶ is the “freeing” of avenues of procurement and sale of power (as per the Statement of Objects and Reasons of the Electricity Act, 2003).⁶⁷ Supervision and control over inter-State transmission system is vested in the Regional Load Despatch Centres⁶⁸ and for collective transactions, it is the National Load Despatch Centre.⁶⁹

The Inter-State transmission system is defined⁷⁰ in three components:

“(a) by means of main transmission line from the territory of one State to another State;
(b) Conveyance of electricity across the territory of an intervening State as well as conveyance within the state which is incidental to such inter-State transmission of energy;
(c) Transmission of electricity within the territory of State on a system built, owned, operated, maintained or controlled by Central Transmission Utility.”

Since tax can only be imposed by virtue of the force of law⁷¹ which has to be valid under the Constitution otherwise it would be struck down,⁷² the Amendment in question becomes *ultra vires* due to lack of legislative competence. Therefore, the aforementioned legislation cannot be levied on consumers taking in electricity from outside the State.

Interpretation of the Three Lists in Seventh Schedule

The distribution of legislative powers among different lists is interpreted and constructed by courts to decide upon their constitutionality.⁷³ It has been held that the entries provided in the three lists are mere outlines of the respective matters of legislation concerned; hence, the entries are given the widest amplitude.⁷⁴ It is because entries are *enumeratio simplex*

⁶⁶ Electricity Act, 2003, § 2, No. 36, Acts of Parliament, 2003 (India).

⁶⁷ IIT Kanpur, *Indian Power Markets and Open Access*, INDIAN ENERGY EXCHANGE (Oct. 14, 2006, 09:00 AM), https://www.iitk.ac.in/ime/anoops/for16/photos/PPTs/IITK_Day_2/Mr.%20Rajesh%20Mediratta%20-%206%20-%20Indian%20Power%20Markets%20&%20open%20Access.pdf.

⁶⁸ Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010, Regulation 2.3.1(3)(d), Gazette of India, pt. III sec. 4 (Apr. 28, 2010).

⁶⁹ *Id.* at Regulation 2.2.

⁷⁰ *Id.* at Regulation 2 (qq).

⁷¹ INDIA CONST. art. 265; *Kunnathat Thathunni Moopil Nair v. State of Kerala*, AIR 1961 SC 552.

⁷² *CIT v. B.C. Srinivasa Setty*, (1981) 2 SCC 460; *Sunil Sidharthbhai v. CIT*, (1985) 4 SCC 519; *PNB Finance Ltd. v. CIT*, (2008) 13 SCC 94.

⁷³ *Federation of Hotel & Restaurant v. Union of India*, AIR 1990 SC 1637.

⁷⁴ *Karnataka Bank Ltd. v. State of Andhra Pradesh*, (2008) 2 SCC 254.

of broad categories.⁷⁵ But, it is also held that an entry would extend only to those ancillary and subsidiary matters which can be fairly and reasonably be said to be comprehended within it.⁷⁶ The meaning so arrived at after applying liberal construction must be one that is fairly capable.⁷⁷ Thus, the legislatures are not empowered to make law regarding a matter which has no *rational connection* with the subject matter mentioned in the respective entry.⁷⁸

It has been stated that:

*“The duty of Courts is to interpret and it cannot rewrite, recast or redesign the section because it is not for the Court to reframe the legislation for the very good reason that the powers to ‘legislate’ have not been conferred on the court.”*⁷⁹

Interpreting the legislative entries in light of the contemporary position would be in line with the constitutional principle of interpretation, allowing for such interpretation which serves the needs for the day as well as moves ahead with changing scenarios.⁸⁰ The constitutional ideal of establishing a common market free of all restrictions and barriers must be sought to be the primary goal of such interpretation.⁸¹

Entry 92A of the Union list reserves power in favour of the Union to levy taxes for sale and purchase for goods other than newspaper in the course of inter-State trade and commerce. Entry 53 of the State list permits the State to levy tax on sale and consumption of electricity⁸² and entry 54 permits tax on the sale of specified goods subject to Union taxation.⁸³ Thus, the taxation on consumption of electricity not sourced from within the State is not within the scope of legislative Competence of the State of Karnataka.

⁷⁵ State of Rajasthan v. G. Chawla, AIR 1959 SC 544.

⁷⁶ Hans Muller v. Superintendent, Presidency Jail, Calcutta, AIR 1955 SC 367; Navinchandra Mafatlal v. Commissioner of Income-tax, Bombay, AIR 1955 SC 58; Welfare Association ARP v. Ranjit P. Gohil, (2003) 9 SCC 358.

⁷⁷ United Provinces v Atiqua Begum, AIR 1941 FC 16; Calcutta Gas Co. v. State of West Bengal, AIR 1962 SC 1044; Waverly Jute Mills v. Raymon and Co., AIR 1963 SC 90; Harakchand Ratanchand Banthia v. Union of India, AIR 1970 SC 1453; Synthetics and Chemicals v. State of Uttar Pradesh, AIR 1990 SC 1927; Indian Aluminium Co. Ltd. v. Karnataka Electricity Board, (1992) 3 SCC 580; P.N. Krishan Lal v. Govt. of Kerala, 1994 Suppl. (5) SCR 526.

⁷⁸ Union of India v. Shah Goverdhan L. Kabra Teachers College, (2002) 7 SCALE 435.

⁷⁹ State of Kerala v. Mathai Verghese, (1986) 4 SCC 746.

⁸⁰ Ashok Tanwar v. State of H.P., (2005) 2 SCC 104.

⁸¹ INDIA CONST. art. 301; Jindal Stainless Ltd. v. State of Haryana, (2017) 12 SCC 1.

⁸² INDIA CONST. sch. 7, list 2, ent. 53.

⁸³ *Id.* at ent. 54.

1. Doctrine of colorable legislation

Courts have struck down the laws wherein legislatures have transgressed the limits of constitutional powers *patently, manifestly* and *directly*.⁸⁴ This test has evolved to be known as the doctrine of colourable legislation where only the competence of the legislature is investigated by the courts and the motive for passing the respective law remains irrelevant.⁸⁵ The legislature does not have any legislative competence, rather the same is pretended by the state to do indirectly what cannot be done directly. Apparently, the legislature purports to act within the constitutional limits but in substance and reality, transgresses the said limits, and veils this transgression by a pretence or disguise.⁸⁶

Courts thus read the true nature and character of the challenged legislation and accordingly determine if the same is within the legislative scope of the particular legislature, and if not, it cannot be saved from condemnation.⁸⁷ Hence, to decide whether the legislature did indirectly, what it could not do directly, the court examines whether the legislature had the competence to bring an enactment on the respective subject matter.⁸⁸ Once it is shown that legislative competence does not exist with the State, the law becomes void and it is of no relevance to test the intent of bringing the legislation.⁸⁹

It is exemplified from courts' decision wherein disguise of law, fields coming under other legislative heads is covered, for example, the US Congress enacting on Child labour tax, essentially legislates on labour regulations, coming under States' powers.⁹⁰ In India, when the State determined tax with deductions provided on the basis of subject matters of cost of works for the benefit of intermediaries and arrears of rent, these were beyond the State's legislative

⁸⁴ State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit, (2009) 8 SCC 46.

⁸⁵ R.S Joshi & Ors. v. Ajit Mills Ltd., (1977) 4 SCC 98.

⁸⁶ K.C. Gajapati Narayana Deo v. State of Orissa, AIR 1953 SC 375; Gullapalli Negeswara Rao v. A.P. State R.T.C., AIR 1959 SC 308; K. Kunhikoman v. State of Kerala, AIR 1962 SC 723; Jayvantsinghji v. State of Gujarat, AIR 1962 SC 821; Jalan Trading Co v. Mill Mazdoor Sabha, AIR 1967 SC 691; Jabalpur Bus Operators Ass. v. Union of India, AIR 1994 MP 62.

⁸⁷ Ashok Kumar v. Union of India, AIR 1991 SC 1792.

⁸⁸ Naga Peoples Movement for Human Rights v. Union of India, AIR 1998 SC 431.

⁸⁹ K.C. Gajapathi Narayandeo v. State of Orissa, AIR 1953 SC 375.

⁹⁰ Baillie v. Drexel Furniture Company, 259 U.S. 20 (1922).

powers, hence the law was struck down on the basis of colourable legislation.⁹¹ In the landmark case of *Prof. Yashpal v. State of Chhattisgarh*,⁹² the Court struck down the Chhattisgarh Adhnyam of 2002 permitting the creation of universities as a colourable piece of legislation, since university could not be established only to provide consultancy work to industry and public organizations.⁹³

The subject matter of inter-State trade and commerce remains solely under the purview of the Centre⁹⁴ and under the garb of consumption tax, Karnataka has levied a tax on the inter-State trade and commerce of electricity through the open-access regime. A licensee, so licensed to trade in electricity, is supposed to collect the tax and pay it to the State government.⁹⁵ Hence, the Amendment is a colourable piece of legislation liable to be struck down.

2. Doctrine of pith and substance

Another test evolved by courts to adjudge whether a law with respect to the matter in one list touching upon another matter from another list is bad or not is the doctrine of pith and substance.⁹⁶ Courts look into enactment as a whole, study its main objects along with the scope and effect of its provisions, and if the substance of the enactment falls within one list, its incidental encroachment on other lists would not make it invalid.⁹⁷ However, if the substance of the impugned law deals with a subject matter reserved for other legislature, it is liable to be struck down.

Courts have not interfered in the cases of incidental encroachment,⁹⁸ for instance in the case when the law concerned money lending but merely incidentally touched upon the subject of

⁹¹ *State of Bihar v. Kameshwar Singh*, (1952) 1 SCR 889.

⁹² *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420.

⁹³ *Id.*

⁹⁴ INDIA CONST. sch. 7, list 1, ent. 92A.

⁹⁵ Karnataka Electricity (Taxation on Consumption or Sale) Act, 1959, § 4, No. 14, Acts of Karnataka State Legislature, 1959 (India).

⁹⁶ *Citizens Insurance Company v. Parsons* [1881] 7 AC 96 (PC) (appeal taken from S.C.C.); *Russell v. The Queen* [1882] 7 AC 829 (appeal taken from S.C.C.); *Attorney General for Canada v. Attorney General for British Columbia* [1930] 1 AC 111 (appeal taken from S.C.C.); *Attorney General for Saskatchewan v. Attorney General for Canada*, AIR 1949 PC 190.

⁹⁷ *Bharat Hydro Power Corporation Ltd. v. State of Assam*, (2004) 2 SCC 553.

⁹⁸ *K.K. Bhaskaran v. State represented by its Secretary, Tamil Nadu and Ors.*, AIR 2011 SC 1485; *A.S. Krishna v. State of Madras*, AIR 1957 SC 297.

banking and negotiable instruments.⁹⁹ When the amplifiers around hospitals were regulated by the State, it was considered as a measure under “health”, as State’s power and not as “communication” which comes within Parliament’s power.¹⁰⁰

But for the instances of substantial encroachment, when a State devoid of legislative power tends to legislate on a Union matter, that law is liable to be struck down. In the case of *Association of Natural Gas v. Union of India*¹⁰¹ when the State law covered the subject of natural gas as well, which was under the Union’s power, apart from manufactured gas, this was held to be a substantial encroachment, thus, struck down by the court.

Presently, though the State can legislate upon consumption of electricity, it cannot legislate on inter-State trade and commerce, especially for electricity in an open-access inter-state framework, since its consumption is intrinsically connected with the sale, occurring simultaneously. Hence, in pith and substance, the Amendment is legislating on consumption in inter-State trade and commerce, devoid of legislative competence, and therefore is liable to be struck down. Further, the constitutional limit of Article 286 would apply in the present case, restricting the State of Karnataka from levying a tax upon the inter-State transaction, i.e., supply, including consumption.¹⁰²

3. Doctrine of harmonious construction

In a situation where the entries in different lists contradict and overlap due to a direct conflict with each other, courts reconcile the conflict through the doctrine of harmonious construction.¹⁰³ When such reconciliation fails, courts can give primacy to the Union over State, by virtue of the non-obstante clause¹⁰⁴ as “*a witness to the imperfections of human*

⁹⁹ Prafulla Kumar Mukherjee v. Bank of commerce, Khulna, AIR 1947 PC 60.

¹⁰⁰ State of Rajasthan v. G. Chawla, AIR 1959 SC 544.

¹⁰¹ Association of Natural Gas and Ors. v. Union of India and Ors., (2004) 4 SCC 489.

¹⁰² Indian Aluminium Corporation v. Union of India, AIR 1996 SC 1431.

¹⁰³ Harakchand Ratanchand Banthia v. Union of India, AIR 1970 SC 1453; Hoechst Pharmaceuticals Ltd. v. State of Bihar, AIR 1983 SC 1019; State of Bombay v. Balsara, AIR 1951 SC 318; State of A.P. v. K. Purushotham Reddy, (2003) 9 SCC 564; Calcutta Gas Co. v. State of West Bengal, AIR 1962 SC 1044.

¹⁰⁴ Waverly Jute Mills v. Rayman Co., AIR 1963 SC 90; K.S.E. Board v. Indian Aluminium Co., AIR 1976 SC 1031; The Elal Hotels and Investment Ltd. v. Union of India, AIR 1990 SC 1664; Ajay Kumar Singh v. State of Bihar, (1994) 4 SCC 401.

expression and the fallibility of legal draftsmanship".¹⁰⁵ In the case of *State of W.B. v. Kesoram Industries Ltd.*,¹⁰⁶ a conflict between the Union's power to tax on the capital value of assets and the State's power to tax on land and buildings was reconciled to mean that Union could levy tax on an aggregation of assets, whereas State was empowered to levy tax on separate lands and buildings.¹⁰⁷

Presently, reading both entries of Union list and State list together, since inter-State trade is fully vested within the power of the Union¹⁰⁸ and State can also tax on consumption, for electricity, considering its special nature, a State can thus tax on such consumption which is sourced from within the State so as to make both entries workable. In case the court does not find the construction workable, it is submitted that matter under the Union list must be allowed to supersede in light of the non-obstante clause.

Moreover, in the case of *Godfrey Phillips India Ltd. v. State of U.P.*,¹⁰⁹ the scope of an entry in the State list can be widened due to subsequent amendments, but the levy of tax would be subject to the corresponding constitutional limitations. In that case, List II, entry 54 concerning, as existing then, giving power to States to levy sales tax, was widened due to Article 366 (29A), which elaborately defined "tax on sale or purchase", but constitutional limit contained in Article 286 was applied with regards to restriction on State's power to levy such taxes.¹¹⁰

Unconstitutionality of the Amendment

To be valid in law, any legislation must satisfy that *first*, the appropriate legislature is within its legislative competence to formulate the law, and *second*, that the law does not abridge or take away any of the fundamental rights enshrined in Part III of the Indian Constitution.¹¹¹ Further, the fundamental rights, especially Article 14, 19 and 21, form the test to check the validity of any legislative or executive action on being subject to judicial scrutiny.¹¹²

¹⁰⁵ Ajay Kumar Singh v. State of Bihar, (1994) 4 SCC 401.

¹⁰⁶ State of W.B. v. Kesoram Industries Ltd, (2004) 10 SCC 201.

¹⁰⁷ *Id.*

¹⁰⁸ INDIA CONST. sch. 7, list 1, ent. 42.

¹⁰⁹ Godfrey Phillips India Ltd. v. State of U.P., (2005) 2 SCC 515.

¹¹⁰ *Id.*

¹¹¹ Kottarathil Kochuni & Moopil Nair v. State of Madras, AIR 1960 SC 1080.

¹¹² Maneka Gandhi v Union of India, (1978) 1 SCC 248.

1. Evaluation under Article 14

*Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being.*¹¹³ ‘Rule of law’ means that the exercise of powers of Government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Article 14 of the Constitution of India states that “*the State shall not deny any person equality before law or equal protection of the laws within the territory of India.*”¹¹⁴

Supreme Court has held that for the purpose of Article 14, classification must be based on an *intelligible differentia* which distinguishes persons or things that are grouped together from those that are left out of the group and such differentia must have a rational nexus to the object sought to be achieved by the statute in question.¹¹⁵ Further, the assumption in favour of the constitutionality of a law can be disproved if it is shown that there is no explicit order or distinction peculiar to any individual or class in the statute and yet the law hits a specific individual or class.¹¹⁶ It is necessary that the State action is fair, reasonable, transparent, non-capricious, unbiased, non-discriminatory, without nepotism or favouritism, in pursuit of promotion of healthy competition and equitable treatment for being valid in the eyes of law.¹¹⁷

However, the amendment does not create a reasonable distinction between those consumers of electricity who are buying electricity from outside the State and those within it while imposing taxes. Allowing the same shall expose the taxpayers to the burden of double taxation which violates the freedom of trade especially at an inter-state level since they would be required to pay Goods and Services Tax for the supply of goods simultaneously as well. This is a discriminatory burden that puts inter-State transactions at a disadvantage in competition with local trade.¹¹⁸

¹¹³ *Shrilekha Vidyarthi v. State of U.P.*, (1991) 1 SCC 212.

¹¹⁴ INDIA CONST. art. 14.

¹¹⁵ *D.S. Nakara v. Union of India*, AIR 1983 SC 130.

¹¹⁶ *Ram Krishna Dalmia v. Tendolkar*, AIR 1958 SC 538.

¹¹⁷ *Natural Resources Allocation, In re, Special Reference No.1 of 2012*, (2012) 10 SCC 1.

¹¹⁸ *State of Bombay v. United Motors (India) Ltd.*, AIR 1953 SC 252.

Article 14 directly strikes arbitrariness in the actions of the State, be it for the legislature or executive or any other authority given under Article 12 of the Constitution,¹¹⁹ and also ensures equality and fairness of treatment.¹²⁰ Equality and arbitrariness are sworn, enemies.¹²¹ The Supreme Court laid down in a landmark judgment that if legislation is manifestly arbitrary, i.e. if it's not reasonable, fair or transparent, biased, discriminatory, capricious and not in pursuit of promoting equitable treatment, such legislation is violative of Article 14 and liable to be struck down.¹²²

Therefore, the State legislature has exceeded its realm of competence by entering into uncharted waters (i.e. inter-State sale and purchase of electricity) and creating a law imposing taxes in the arbitrary exercise of its power. The legislation is wholly non-rational, unreasonable and brought forth capriciously at the pleasure of State without reason or judgment but will alone, and is hence arbitrary.¹²³ Reasonability is like a brooding omnipresence and an essential feature of equality¹²⁴, and it can also be considered as a test that may be applied to see whether it has been satisfied by the impugned act to determine its validity.¹²⁵

A legislation must conform to the norms which are rational, informed with reasons and must be guided by public interest.¹²⁶ If a legislation is found to be arbitrary in the sense of being unreasonable, it can be struck down.¹²⁷ In the present case, the imposition of the tax was done in an unreasonable manner without taking into consideration its impact on public interest. As aforementioned, it shall result in double taxation and since electricity is an essential commodity, such tax shall affect the prices in all sectors. The burden of such an increase shall eventually fall on the masses being the consumer of various sectors of the economy.

¹¹⁹ *State of Tamil Nadu v. K. Shyam Sunder*, (2011) 8 SCC 737; *A.P. Dairy Development Corpn. Federation v. B. Narasimha Reddy*, (2011) 9 SCC 286.

¹²⁰ *Maneka Gandhi v Union of India*, (1978) 1 SCC 248.

¹²¹ *E. P. Royappa v. State of Tamil Nadu & Anr.*, (1974) 4 SCC 3.

¹²² *Shayara Bano and Ors. v. Union of India and Ors.*, (2017) 9 SCC 1.

¹²³ *Sharma Transport v. Government of A.P.*, (2002) 2 SCC 188.

¹²⁴ *Shayara Bano and Ors. v. Union of India and Ors.*, (2017) 9 SCC 1.

¹²⁵ *Kumari Shrilekha Vidyarthi v. State Of U.P.*, AIR 1991 SC 537.

¹²⁶ *Id.*

¹²⁷ *Air India v. Nergesh Meerza*, (1981) 4 SCC 335.

2. Evaluation under Article 19

Arbitrariness in law is also a facet of unreasonableness under Article 19(2) to (6) of the Constitution.¹²⁸ Thus, the imposition of a tax that is authorized by law may be challenged if it offends the fundamental freedom enshrined under Article 19 of the Indian Constitution.¹²⁹ The question to be determined when such challenge is brought is that whether the legislation imposes reasonable restrictions on the fundamental freedoms guaranteed under the Constitution or not.¹³⁰ A proper balancing of the fundamental rights with the restriction imposed is necessary.¹³¹ The burden of proof to show that the restriction is reasonable and not disproportionate lies upon the State.¹³²

The position of law is thus further solidified since the Apex Court has clarified that if a tax law is beyond the competence of legislature which has enacted it or is in violation of Article 276 or 286, then such law shall be invalid as being ultra vires and the assessee can approach the Court claiming that its fundamental right provided under Article 19(1)(g) is breached.¹³³ Thus, a tax imposed by an authority that does not possess the power to impose it shall be unauthorized and consequently the decision to impose such a tax would be a nullity.¹³⁴

Further, the imposition of restrictions that are unreasonable, arbitrary and beyond what is required in the interest of the public is not permissible.¹³⁵ The Apex Court has noted that a statute shall be hit by Article 19 if it is disguised as a taxation law but in substance is the law that is intended to destroy or even burden trade and not raise revenue.¹³⁶ This shall result in a colourable legislation that cannot claim the benefit of Article 265 and must be held to contravene Article 19(1)(g) unless it is in the public interest under Article 19(6).¹³⁷

The imposition of taxes on electricity shall result in a proportional increase in the rates by all

¹²⁸ Shayara Bano and Ors. v. Union of India and Ors., (2017) 9 SCC 1.

¹²⁹ Balaji v. Income-Tax Officer, 1962 AIR 123.

¹³⁰ Om Kumar v. Union of India, (2001) 2 SCC 386.

¹³¹ Union of India v. G. Ganayutham, (1997) 7 SCC 463.

¹³² Om Kumar v. Union of India, (2001) 2 SCC 386.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Chintamanrao v. State of M.P., AIR 1951 SC 118.

¹³⁶ Ujjam Bai v. State of Uttar Pradesh, AIR 1962 SC 1621.

¹³⁷ *Id.*

industries. Thus, the onus of such an unreasonable tax shall ultimately befall the end-user of goods, which is the general public. Therefore, the Amendment is not in the public interest and shall cause more harm than benefit to the public. Thus, the amendment is in contravention of Article 19.

3. Evaluation under Article 301

Trade and commerce are held to be free throughout India.¹³⁸ The constitution ensures an unhampered free flow of trade, commerce and intercourse from one territory to another. In case a state imposes a restriction upon this freedom, it must be reasonable and the bill cannot be moved in the state legislature without the previous sanction of the President.¹³⁹ It is a testimony to economic unity which is termed as essential to the stability and progress of federal polity.¹⁴⁰ It is a step towards fiscal integration taking into account the interests of India as a developing economy.¹⁴¹ Hence, when an individual or an entity is prevented from sending goods across the state, Article 301 concerning freedom of trade and commerce gets invoked to protect the right to trade in motion.¹⁴²

In the landmark case of *Atiabari Tea Co. Ltd. v. State of Assam*,¹⁴³ when the state of Assam levied a tax on the carriage of tea by road or inland waterways through its territory, merely on the basis of the movement of goods, the court held it against freedom of trade and commerce and thus struck it down.¹⁴⁴ To secure the financial autonomy of states, the Supreme court also evolved the concept of compensatory tax, allowing states to tax such movement of goods across states if they provide facilities for the better conduct of business, for instance, if the tax is used for maintenance of roads.¹⁴⁵ The Court further noted that the freedom enshrined under Article 301 would become imaginary and non-existent if the movement of goods is obstructed without meeting the criteria laid in Article 302 to Article 304 of the Constitution.¹⁴⁶ Therefore the levy

¹³⁸ INDIA CONST. art. 301, cl. 1.

¹³⁹ *Id.* at art. 304, cl. b.

¹⁴⁰ *Atiabari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232.

¹⁴¹ *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, AIR 1962 SC 1406.

¹⁴² *Bapubhai v. State of Maharashtra*, AIR 1956 Bom 21; *Usman v. State*, AIR 1958 MP 33.

¹⁴³ *Atiabari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232.

¹⁴⁴ *Id.*

¹⁴⁵ *Automobile Transport v. State of Rajasthan*, AIR 1962 SC 1406.

¹⁴⁶ *Id.*

of tax under the Amendment violates freedom of trade and commerce without any sound justification.

4. Evaluation under Article 21

Protection of life and personal liberty, except with procedure established by law, has been given wide interpretation by courts over the years. A law must be valid within the constitutional contours.¹⁴⁷ Life is something more than animal existence¹⁴⁸ which includes the right to live with human dignity and bare necessities of life such as nutrition, clothing, shelter and related facilities.¹⁴⁹ *Human dignity* is said to be existing in a society where economic, social and cultural rights are presented to an individual to realise the full potential and also when the economic inequalities disappear.¹⁵⁰

In the context of a welfare state, several protective measures are expected to ensure rights to persons in distributing the largess of the state.¹⁵¹ Accordingly, the socio-economic rights are read into the fundamental rights in the context of the humanistic approach of human dignity.¹⁵² Even a decent environment and a reasonable accommodation to live in have been construed to be falling within the scope of “right to life.”¹⁵³ The right to life of people would be violated if the state of Karnataka is allowed to levy consumption tax.

National Steel Policy, 2017 of the Government of India pushed for increasing the per capita steel consumption as steel demand would grow by 7.2% by 2020-2021, as per Indian Steel Association.¹⁵⁴ The per capita consumption of steel is an important index of the level of socio-economic development and living standards of the people in any country.¹⁵⁵ Due to enhanced power tariff, freight rates, coal prices, the input costs of steel are already on a hike.¹⁵⁶

¹⁴⁷ *Maneka Gandhi v Union of India*, (1978) 1 SCC 248.

¹⁴⁸ *Munn v. Illinois*, 94 U.S. 113 (1877).

¹⁴⁹ *Francis Coralie v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746.

¹⁵⁰ *Samatha v. State of A.P. and Ors.*, AIR 1997 SC 3297.

¹⁵¹ *Superintendent of Post Offices, Khammam Division and Ors. v. Kalluri Vasayya*, 1983 (3) SLR 629.

¹⁵² *Jeeja Ghosh and another v. Union of India and others*, (2016) 7 SCC 761.

¹⁵³ *Shantisar Builders v. Narayanan Khimalal Totame* (1990) 1 SCC 520.

¹⁵⁴ INDIA BRAND EQUITY FOUNDATION, <https://www.ibef.org/industry/steel.aspx> (last visited Mar. 11, 2021).

¹⁵⁵ MINISTRY OF STEEL, <https://steel.gov.in/sites/default/files/Chapter%20II.pdf> (last visited Mar. 11, 2021).

¹⁵⁶ *Id.*

Other industries are closely dependent upon steel producers which contribute to national development.¹⁵⁷ As steel is used in almost all products, from cars to refrigerators, along with extensive use in engineering and construction work, the production of steel is connected with the development of the economy and propelling of the market.¹⁵⁸ Due to this supply chain impact in a wide range of steel-using sectors, steel has an overall impact of US \$ 2.9 trillion value addition with 96 million jobs globally.¹⁵⁹

Hence, taxation on consumers of electricity for steel would further lead to an increase in prices of steel due to a hike in input cost, which would have a spiral effect on the prices of other manufactured goods in the market. Considering the COVID-19 pandemic which has already taken a huge toll on the industrial sector, this added onus shall further weaken the economy of the State, consequently affecting the right to life of citizens. Therefore, due to the aforementioned reason, this amendment shall be violative of Article 21, denying the public their Right to Life.

Assessing Karnataka High Court's judgment on inter-state taxation of electricity

The Apex Court in its recent decision deliberated upon the meaning of *per incuriam* to hold that the term “*per incuriam*” literally means “*through inadvertence*”.¹⁶⁰ The Court stated that “*a decision can be considered per incuriam if the Court of Record has acted in ignorance of any of its own previous decision, or a lower court has acted in ignorance of a decision of Court of Record.*”

The Karnataka High Court has erroneously interpreted in the *Vijaya Steels Limited v. Bangalore Electricity Supply Company Limited*¹⁶¹ that the tax is not levied on the inter-State

¹⁵⁷ Essington Lewis, *The Importance of the Steel and Iron Industry*, in 1 AUSTRALIA'S ECONOMY IN ITS INTERNATIONAL CONTEXT: THE JOSEPH FISHER LECTURES 603 (Joseph Fisher ed., 2009).

¹⁵⁸ Construction World, *Global and Indian Steel Industry and its Role in the Development of Economies*, CONSTRUCTION WORLD (Apr. 30, 2020, 08:00 AM), <https://www.constructionworld.in/steel-news/Global-and-Indian-steel-industry-and-its-role-in-the-development-of-economies/23547>.

¹⁵⁹ Eldar Askerov, *Economic Impact of The Global Steel Industry*, WORLD STEEL ASSOCIATION (May 28, 2019, 09:00 AM), <https://www.worldsteel.org/media-centre/blog/2019/economic-impact-of-the-global-steel-industry.html>

¹⁶⁰ Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189.

¹⁶¹ *Vijaya Steels Limited and Ors. v. Bangalore Electricity Supply Company Limited and Ors.*, 2017 (1) Kar LJ 7.

trade and commerce but it is levied only on the consumption of electricity in Karnataka. In its judgment, the Karnataka High Court pronounced that the electricity which is wired from outside on open access has not been taxed by the State Government but is taxed on its consumption within the State, which is permissible in law.

However, the position of the Supreme Court with respect to the law was evidently made clear in *NTPCL*, that sale and consumption with respect to electricity are inseparable. The Court clearly stated that any State legislation which levies a tax on the sale of electricity by either artificially or fictionally assuming that sale and consumption has taken place in separate States shall be invalid and consequently vitiated due to extra-territorial operation of State legislation.¹⁶² Thus the mentioned judgment of the Karnataka High Court is *per incuriam*.

Conclusion

As the decision of *NTPCL* applies in cases of inter-State sale and consumption of electricity, by virtue of *stare decisis*, the state legislature cannot levy taxes on such transactions. The Apex Court has not yet taken cognizance of and delved with the issue of consumption separately. Electricity comes under the category of “good” and is a subtle and imponderable fluid, where its sale and consumption takes place simultaneously; hence both these acts cannot be separated. When electricity is sourced from an inter-State open access grid, the transaction becomes inter-State in nature, not liable to be taxed by a State. This is because there is a lack of territorial nexus, due to sale and consumption being inseparable in the open-access regime. Matter of inter-State trade and commerce vests solely under the jurisdiction of Union government, hence by applying the doctrines of interpretation, namely, colourable legislation, pith and substance, and harmonious construction, the Amendment passed by the State of Karnataka is liable to be struck down.

The said Amendment contravenes Article 14 of the Constitution since it does not create a reasonable classification between consumers buying electricity from outside the State and those buying from within the State. This puts consumers sourcing electricity from outside at disadvantage and discriminates against them as they have to bear the burden of tax twice. The

¹⁶² State of Andhra Pradesh v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203.

State enactment is also in violation of Article 19 of the Constitution deterring the parties from conducting business through open access grid. The aforementioned legislation also directly infringes the movement of goods, i.e., electricity, and consequently is in violation of Article 301. Further, Article 21 is also contravened since the tax creates an additional burden upon persons who are already affected by the COVID crisis, thereby violating their right to life. Hence, it is concluded that the said Amendment is unconstitutional.
