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Towards better enforcement by regulatory agencies

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Abstract

This paper studies the enforcement process at the Securities Exchange Board of India (SEBI) and the Competition Commission of India (CCI) on two questions of natural justice the right to be heard and separation of powers. The paper finds evidence of several procedural failures at both the regulators. The paper argues that this is because the Indian law just assumes that process of natural justice will be followed, and does not codify the same. In other countries, these processes are codified in laws, regulations and process manuals. The paper then presents recommendations on how processes of natural justice should be codified within the legal and regulatory framework of the proposed Data Protection Authority (DPA).

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1. Introduction

India is on the verge of establishing yet another regulator - the Data Protection Authority (DPA) - that will implement the provisions under the Personal Data Protection Bill, 2019. As per the Bill, the DPA will regulate anyone who collects data for commercial use, with a turnover of more than INR 20 lakh annually. This would cover entities from small time telemarketers to social media behemoths. The scope of its regulated entities will thus be more extensive than any of the regulators previously established in India.[1] The DPA has the power to either *suo motu* or on a complaint take action against an entity violating the law. It can, among other things, issue directions, call for information, conduct inquiries, issue orders for injunctive relief, suspend or cancel the registration of businesses.

If regulated entities do not perceive a sense of "fairness" as well as "predictability" about these processes, then this subjects them to harassment, and potentially disincentivises several businesses from entering the market in the first place. Failures of following due process may be damaging to the ease of doing business, to the digital and start-up ecosystem and damage India's chances of dominance in these spheres.[2] Most importantly it will have adverse consequences on the justice and dignity of the regulated entities. With such an expansive responsibility, it is important to get the design of the enforcement processes of the DPA right.

The discussions on the design of the DPA suggest that the regulator will be modeled along the lines of other Indian regulators. Understanding how enforcement is taking place in existing regulators, and whether there is an inherent problem in the structure of enforcement is important to study as we build regulators and place cross-sectoral mandates on them. This is especially important as state capacity is known to be weak in India, suggesting the need to move beyond existing models of regulatory design. For example, Roy, Shah, Srikrishna, and Sundaresan (2019) argue that Indian regulators have too often veered into controlling as opposed to regulating, and that enforcement has been selective and weak, and failed to adequately follow the rule of law especially on due process.

In this paper we evaluate how the Securities Exchange Board of India (SEBI) and the Competition Commission of India (CCI) fare on issues of *natural justice* as they perform their enforcement functions. The Justice Srikrishna Committee Report on data protection refers to a number of Indian regulators, such as TRAI, SEBI, CCI etc, when making recommendations for the DPA. Among the regulators discussed in the report, we found that SEBI has been considered the most effective, as far as its enforcement actions are concerned. CCI is relevant as it is a more recently established regulator. A study of CCI comes at an interesting checkpoint in the development of regulatory governance, to understand whether it has imbibed and benefitted from the lessons, thus far. Moreover, CCI's mandate is akin to the DPA's, in so far as protection of consumer interests is concerned.

Natural justice is a vast area, and we focus on three elements of natural justice - how are notices served, whether parties are allowed to examine material and cross-examine witnesses, and whether there is separation of powers, especially between the investigation and adjudication functions. We use data on cases at appellate forums of both the regulators and find evidence of several procedural failures. However, CCI maintains separation of powers with a far greater degree as compared to SEBI. There is also application of mind by the Commission at multiple stages - at the time of formation of prima facie

[1] Existing regulators in India are sector specific, such that specifically deal with the financial sector (SEBI, PFRDA, IRDA etc) or the infrastructure sector (TRAI, CERC, AERA etc).

[2] For example, Dima, Barna, and Nachescu, 2018 study forty five countries over a five year period and find a positive link between market development and rule of law.

opinion, at the time of issuance of direction for investigation and lastly, at the time of penalty proceedings.

We then ask why is it that there are such procedural failures? Legislation in India confers certain powers of a civil court to a regulatory agency, and expects that the regulator will comply with the principles of natural justice. There is, however, no guidance on how regulators should comply with these principles (Burman & Krishnan, 2019 and Sundaresan, 2018). There is also very little by way of standardised procedures that an administrative body can source from common law.

What would improve these processes? We look at the structure of regulators in other countries We look at the structure of regulators in other countries namely the US and the UK, and find that the processes that Indian law just assumes will be followed, are actually codified in laws, regulations and process manuals in these countries. Since the main regulator studied here was SEBI, our international comparison mostly emphasises comparable regulators in the US and the UK such as the Securities Exchange Commission and the Financial Conduct Authority respectively. We also study the ICO which is a data protection regulator in the UK. We find that the processes that Indian law just assumes will be followed, are actually codified in laws, regulations and process manuals in these countries. Codification is important as a study of CCI also shows.

While the CCI does better in terms of structural separation, issues of due process continue to remain due to scanty guidance available in the Competition Commission of India (General) Regulations, 2009 on other aspects. Codification of processes on legislative powers, such as having more prescriptive rules on the requirements of consultation, have led to better regulation making processes (Burman & Zaveri, 2018). We then present some recommendations on how processes of natural justice should be codified within the structure of the DPA. This will provide adequate guidance to the regulator as it discharges the enforcement function, as well as to the broader community as it continuously evaluates the performance of the regulator on these counts.

It is not as if these concerns have not begun to be recognised in India. For example, in 2011, the Financial Sector Legislative Reforms Commission (FSLRC) Report laid out a regulatory framework imbibing the principles of natural justice in the proposed financial regulator's enforcement functions.[3] More recently, in 2019, the Report of the Competition Law Review Committee, reviewed the enforcement processes in the CCI.[4] Similarly, the Sahoo Committee Report set up to examine development and regulation of valuation professionals, while laying out the regulatory design for the said purpose, emphasises on the need of principles of separation of powers, reasoned orders, independence and accountability.[5] The follow through on the recommendations, however, has been scarce.

Our paper connects with this discussion in India. It also connects to a larger literature across the world on the dilution of accountability of the “new administrative state”.[6] Administrative agencies are increasingly built with legislative, executive and judicial mandates. Such agencies are expected to draft subordinate legislation, be responsible for licensing and enforcement actions, and also adjudicate on investigations usually carried out by itself. Questions on checks and balances and due process that were reasonably settled in liberal democracies when it came to government functioning are now being debated once again with respect to regulators.

[3] Government of India, Report of the Financial Sector Legislative Reforms Commission 2011 available at https://dea.gov.in/sites/default/ les/fslrc_report_vol1_1.pdf.

[4] Ministry of Corporate A airs, Report of the Competition Law Review Committee 2019 available at http: //www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.

[5] Ministry of Corporate Affairs, Report of the Committee of Experts to Examine the Need for an Institutional Framework for Regulation and Development of Valuation Professionals 2020 available at https://www.ibbi.gov.in/uploads/whatsnew/ed6bf110d4c26d3dc9a2e40053cf53c6.pdf.

[6] Some examples include (DeMuth, 2016; Giandomenico, 1998; Scott, 2000).

2. Principles of administrative law

An enforcement proceeding has multiple steps - from the choice of whether to investigate a complaint, the process of investigation itself and the final order. Studying whether enforcement is working requires us to study each phase of the regulatory activity that culminates in the final order, and not just the final order. After all, an order is good or bad depends on whether it is a product of following "due process" .

The underlying principle of due process is "rule of law". Broadly, rule of law means exercise of public power without arbitrariness. The Constitution of India embodies this rule under Article 21, which provides that no person will be deprived of his life and liberty without procedure established by law. Article 14 of the Constitution was initially narrowly formulated to guard against differential treatment of similarly placed entities. In *E.P. Royappa* v. *State of Tamil Nadu*[7] it was decided that the fairness principle would operate against any action of the state that is arbitrary. The Court expanded protection of Article 14 considerably by holding that Article 14 is an antithesis to "arbitrariness".

That power should not be exercised "arbitrarily" has been formulated in a variety of ways. First, power should be exercised for the purposes it has been conferred. Second, power should be exercised within its statutory ambit. Indian courts have gone further than this simple negation to insist on specific positive content of the rule of law obligations. In relation to quasi judicial action of administrative agencies, this takes the form of insistence of following the principles of natural justice.

The classical formulation of natural justice encompasses two principles, first, *audi alteram partem* i.e. a person affected has a right to be heard. Second, *nemo judex in re sua* i.e. the authority deciding the matter should be free from bias. Both these principles have encompassed judicially formulated components over the years. In the subsequent section, we discuss each in greater detail.

2.1 Right to be heard

An action, through the use of public power, that adjudicates over one's rights requires that there be a right to a hearing. Indian courts have devoted considerable time in assessing whether or not a right of hearing is warranted in certain administrative proceedings.[8] This includes two elements: notice and examination of materials.

2.1.1 Notice

A proper defence can be made only if allegations are known. A notice serves this function. It informs the accused of the case it has to meet. The Supreme Court has dealt with the issue in several cases concerning various aspects of the notice. The following general principals can be culled regarding a valid notice:

- Notice must be properly served to the concerned person i.e. it must give sufficient time to enable the individual to prepare his case.[9]

[7] E.P. Royappa v. State of Tamil Nadu, MANU/SC/0380/1973.

[8] Mineral Development v. State of Bihar, AIR 1960 SC 468. *Also see*, Board of Mining Examination v. Ramjee, AIR 1977 SC 965.

[9] *See,* Canara Bank v. Debasis Das, (2003) 4 SCC 557.

- Notice must be adequate as regards the details of the case so that the noticee gets an adequate opportunity to represent against the impugned action.
- Notice must describe the factual details of the case in detail. For example, a notice in bare bone language of the statute i.e. which merely repeats the statutory language without giving any facts and other particulars is insufficient and inadequate.[10] Some illustrative conditions in which the notice is held to be suffering from vagueness are:
    - If the charge-sheet mentions action is being taken against the employee on the basis of fraud, without mentioning the particulars of fraud.
    - If the notice does not mention the date, time and location of the incident.
    - The notice should mentions the charges without mentioning the action proposed to be taken.
- It should fully mention all the grounds on which action is to be taken against the noticee. In case the notice mentions the ground, but action is taken on a different ground, the notice is not deemed to be valid.[11] It is invalid if it mentions several grounds without specifying the particular ground for the proposed adverse action.

2.1.2 Examination of material and cross examination

A fundamental principle of natural justice is that the adjudicatory body should decide the case only on the basis of material placed before it in the course of proceedings. The right to know what materials have been placed before the authority is crucial for the person to exercise his right to defend himself. This position in law is settled as evidenced by a litany of cases where quasi judicial proceedings have been struck down for non disclosure of material.[12]

While there is clarity on the issue of disclosure of material to the accused, there remains uncertainty in the Indian jurisprudence, on the extent and content of the material to be made available to the aggrieved party. Courts have typically decided the issue on a case-by-case basis. For example, it has been held that if the gist of documents against the party affected has been brought to his notice, then the non supply of copies would not violate natural justice.[13] The case dependent adjudication rather than rule based adjudication of the issue is inimical to a clear understanding of the scope of the materials to be disclosed. The standard of whether "prejudice is caused or not" leads itself to ad hoc approach based on the particulars of the case, thereby, hindering development of a cogent administrative practice around this issue.

The other component of fair hearing is to give the affected party an opportunity to rebut the material against it. As per existing case law, opportunity of cross examination is not considered an absolute right. Only when the court is of the opinion, that non availability of the right has resulted in prejudice to the party, can it lead to vitiation of the proceedings. The Supreme Court has led the following guidelines on the question of cross examination as a component of natural justice:

> *If the credibility of a person who has testified given some information is in doubt, or if the version or statement of the person who has testified, is in dispute, right of cross examination must inevitably form part of fair play in action but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirements of cross examination to be fulfilled to justify fair play inaction. [14]*

[10] Nasir Ahmed v. Asst. Custodian-General, Evacuee Property, (1980) 3 SCC 1.
[11] J. Vilangan v. Executive Engineer, AIR 1978 SC 930.
[12] M.A. Jackson v. Collector of Customs, (1981) 1 SCC 198; Chairman, Prathma Bank, Moradabad v. Vijay Kumar, SIR 1989 SC 1977; Vrajlal Manilal and Co. v. Union of India, SIR 1964 SC 1643.
[13] Dewan Singh v. State of Haryana, AIR 1976 SC 1921.
[14] K.L. Tripathi v. State Bank of India, AIR 1984 SC 273.

It is important that the noticee have a right to cross-examine the witness if records indicate that evidence has been collected by recording statements of witnesses. The witness may be lying; may have not understood the query well; may have an axe to grind; or may just be inaccurate. If a witness says something that is controverted by another witness, finding out what version is more reliable is the essential job of judging the case. Therefore, cross-examination is a vital facet of natural justice.

2.2 Separation of powers

Separation of powers is a principle of administrative law which ensures that persons in not a judge in his own cause. The independence and the objectivity of the adjudicative function is protected by not allowing it to combine with inconsistent functions such as prosecution, investigation or advocacy. Separation of functions serves to insulate judicial decision makers from off the record communications from executive staff members whose personal involvement in the proceeding is likely to impair their ability to give objective advice. Insulation of the judicial decision maker from the prosecutors and investigators also enhances parties' confidence in the impartiality of the decision maker and in the fairness of the proceeding (Scalia, 1982).

Indian courts have followed three basic categories when it comes to bias: personal, pecuniary and official or departmental. While the tests of personal or pecuniary bias can be adjudicated in standalone contexts, it is the doctrine of official bias that is structurally more significant. This is not an issue that has come up with the rise of independent regulators housing quasi judicial functions within the regulator itself, but has been dealt with in administrative functions of the traditional executive.

One of the foundational cases that dealt with official bias is that of *Gullapalli Nageswara Rao* v. *APSRTC*.[15] The case was as follows. A scheme for nationalisation of motor transport was notified by the State Government. As per the Scheme, any objections to nationalisation would be decided by the State Government, and the designated officer for the same was the Chief Minister. However, the officer who received objections from the parties against the scheme or nationalisation was the secretary of the Transport Department. One of the parties in the dispute was the Transport Department.

The Court considered case law on departmental bias and held that it was a fundamental principle of natural justice that the authority empowered to decide the dispute between opposing parties should not be biased towards one side or the other. Further, it is also required that a person interested in one party or the other, should not take part in the proceedings irrespective of proof being adduced as to whether he influenced the mind of the person who finally takes the decision. Based on this, the Court held that even if the order is formally passed by the Chief Minister, the hearings given by the Transport Secretary offends the principle of natural justice, and the proceedings conducted by him, in violation of that principle, are bad.

There has been an extension of this principle to statutory regulatory bodies, as well. The Supreme Court in *Clariant International Ltd. and another* v. *SEBI*,[16] observed, in the context of SEBI, that the vesting of legislative, executive and judicial powers in the same body could raise several public law concerns as it violates the separation of powers. Moreover, the Sahoo Committee on Valuation Professionals, also points out that in keeping with the spirit of constitutional provisions, a regulator should ensure that its quasi legislative, executive and quasi judicial powers should be independent. There should be no intra-institutional bargaining, and the units should operate at arm's length with each other, especially in the case of investigations and quasi judicial functions.[17]

[15] Gullapalli Nageswara Rao and others v. State of Andhra Pradesh, MANU/SC/0149/1959.

[16] Clariant International Ltd and another v. SEBI, MANU/SC/0694/2004.

[17] Ministry of Corporate Aairs, Report of the Committee of Experts to Examine the Need for an Institutional Framework for Regulation and Development of Valuation Professionals 2020 available at https://www.ibbi.gov.in/uploads/whatsnew/ed6bf110d4c26d3dc9a2e40053cf53c6.pdf.

3. How does SEBI perform on due process?

As we think about the enforcement functions of the Data Protection Authority (DPA), it is useful to reflect on the experience of the capital markets regulator, the Securities Exchange Board of India (SEBI) on the questions of natural justice discussed in the previous section. There are three reasons for the choice of SEBI.

First, SEBI is one of the oldest (other than the Reserve Bank of India) regulator in the country. It was instituted under under the Securities and Exchange Board of India Act, 1992, with a mandate of investor protection, regulation of the securities and the promotion and development of the securities market. It has considerable powers of enforcement and this experience has been used to design such functions at other regulators, such as the IRDAI and PFRDA. Second, when designing the legal and regulatory framework for new institutions, the practice in India has been to borrow from existing successful institutions. As SEBI is one of the oldest such institution in the country, it is highly likely that the regulations surrounding enforcement at the DPA will be similar to the one at SEBI. Third, the existence of the Securities Appellate Tribunal (SAT) where SEBI orders can be challenged provides an opportunity for orders of SEBI in appeal to be studied.[18]

A regulator's enforcement powers need to be exercised in a circumscribed manner because not only does its outcome have an impact on the regulated sector, but also the manner of its exercise. In the context of SEBI specifically, this was pointed out by SAT in the case of *DLF Ltd. and others* v. *SEBI*.[19] In this case, DLF had led an appeal to SAT, inter alia, on the ground that SEBI had not given it an opportunity of hearing. In relation to this order, SAT held:

> *"The impugned order caused such an adverse impact on the market that various shareholders, whose interest the impugned order claims to protect, lost Rs. 7 to 8 thousand crores in one day alone. This can never be compensated by anybody except the market mechanism, which takes its own time to do so. Creating such chaos in the capital market by passing a seemingly innocuous order, if not reckless, cannot be said to satisfy the twin objectives underlying the Sebi Act, 1992."*

It is pertinent to keep this observation in mind, to understand the ramifications that SEBI's quasi judicial powers can have on the regulated entities and the securities market, in general. We begin with a description of the SEBI enforcement process and then describe the problems in the separation of power. This is important as it is very likely the DPA will be modeled along similar lines.

3.1 The enforcement process at SEBI

The process of enforcement is governed by the following legal instruments:

- *SEBI Act*: The SEBI Act is the parent legislation under which SEBI was constituted. It defines various offences for which SEBI is the enforcement authority and the punishments it can levy. It also provides for the establishment and jurisdiction of the Securities Appellate Tribunal.
- *Rules and regulations* : Under section 29 of the SEBI Act, the Central Government has the power to make rules for the carrying out of the purposes of the Act. Under Section 30, SEBI has powers to issue regulations. With respect to SEBI's enforcement, the SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 are relevant.

[18]Regulators such as IRDAI and PFRDA came under Appellate Oversight of the SAT only in recent times.

[19]DLF Ltd. and others v. Securities and Exchange Board of India, Manu/Sb/0006/2015.

The process of enforcement at SEBI begins with either an inspection or investigation. Investigations are conducted when SEBI suspects a possible violation.[20] The decision on whether or not to undertake an investigation lies with SEBI. The member at SEBI has to write an order appointing the investigation authority, and clearly state the reason why this particular investigation is being conducted.[21]

During the investigation stage, the investigating authority is endowed with the following powers:

- *Ask for material* : The authority can require any person (and not just a regulated entity or the person who is suspected) to furnish books, information, records that it feels are relevant for the investigation. For example, in *Indian Council of Investors* v. Union of India[22], it was held that *SEBI* in exercise of its powers could seek call data records. These materials can be kept in custody for six months.
- *Examine persons on oath* : The authority can examine any person associated with the securities market in any manner on oath. It is required to make notes of this examination, and read the notes and get them signed by the person being investigated.[23]
- *Seizure of material* : SEBI can seize material (such as books, registers, or other documents) that it thinks constitute important evidence but can get destroyed in the hands of the accused. It, however, has to apply to the designated court to obtain such an order.

If a person does not comply with directions of the investigating authority, he could be criminally punished with imprisonment upto one year, along with fine, or both, with the fine being extendable to one crore rupees along with a further fine of five lakh rupees.[24] SEBI does not have to go to the court to impose such penalties. It is empowered by the Act to do so itself.

Once the investigation is complete, the authority submits an interim or final report that is circulated to senior officers of SEBI. These officers decide whether any enforcement action needs to be initiated. The report is then forwarded to the WTM to decide on the future course of action. On finding of evidence of misdemeanour, SEBI may issue a show cause notice to take action against the regulated entity.

None of these provisions provide any guidance on how the regulator should follow due process of law. It is left to the regulator to follow principles of natural justice in serving a notice, or allowing access to materials.

3.2 Separation of powers at SEBI

Before we examine the question of separation of powers, it is useful to briefly describe the enforcement structure at SEBI. There are two relevant authorities for enforcement proceedings the adjudicating officer (AO) and the Whole Time Member (WTM). Both of these are housed within the regulator.

- Adjudicating Officer : The adjudicating officer is appointed by the Board for the purposes of judging whether there has been a violation[25] and imposing monetary penalty. While conducting the inquiry, the adjudicating officer has the power of summoning, requiring attendance of persons and production of relevant records. The officer can also levy a penalty upto INR 25 crores.

[20] See Section 11C of SEBI Act, 1992 for conditions when the Board may direct an investigation.

[21] The authority is appointed depending on the nature of proceedings (such as remedial and preventive, civil penalties, and criminal prosecution).

[22] Indian Council of Investors v. Union of India, [2014] 186 Comp Cas 512 (Bom).

[23] *See* Sections 11c(7) and 11(7), SEBI Act, 1992.

[24] Section 11C(6), SEBI Act, 1992.

[25] Sections 15A-15HB, SEBI Act, 1992.

or upto three times of the profit made due to the contravention under various sections. An appeal from the order of the adjudicating officer can be made to the Securities Appellate Tribunal. The Board has been given the power to examine the record of any proceedings if it considers that the order passed by the adjudicating officer is either erroneous or not in interests of the securities market.

• WTM - The WTM exercises enforcement powers such as:

- Calling for information from persons associated with the securities market.
- Undertaking inspection of any document of a listed company / company intended to be listed on reasonable grounds of insider trading, fraudulent and unfair practices.
- Power to issue directions to persons associated with securities market in the interests of the market and the investors and order disgorgement of wrongful gain made or loss averted.
- Order investigation into the affairs of a person associated with securities market in case it has reasonable grounds to believe that there has been a violation of the Act or regulations made thereunder or that the transactions are done in a manner detrimental to investors.

For the purposes of calling for information and inspection, the Board itself gets the power vested in a civil court relating to discovery and production of records; summoning, enforcing attendance and examining persons on oath and inspection of documents. For conducting an investigation, the WTM appoints an Investigating Authority, who has to submit its report based on which the WTM will take decision. Unlike the adjudicating officer, the designation of the investigating authority is not mentioned in the Act, and may be gleaned from individual regulations. For example, the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 provide that "the investigating authority" means any officer not below the rank of Division Chief. Even as the investigation is pending, the WTM has been endowed with considerable powers of enforcement in the interim. For example, the WTM can suspend trading of a security on the stock exchange, restrain / prohibit persons from accessing the securities market, impounding and retaining proceeds or securities in respect of a transaction etc.

The structure of the Adjudication officer and the WTM, both, are problematic from a separation of powers perspective. First, the Division Chief who is designated as the adjudicating officer is a regular employee of the regulator, thereby, leading to a strong supposition of departmental bias. Second, the power to conduct an inquiry and pass an order have been concentrated in the same official. Third, the WTM has been given considerable powers of enforcement while itself being housed within the regulator. There is no indication of how independence of an entity that has almost penal powers may be maintained within the regulator.

3.3 Evaluating SEBI

We turn next to examine how SEBI fares on administrative law in its appellate tribunal i.e. the Securities Appellate Tribunal. We study six months of SEBI orders that have come in appeal to the SAT, to understand whether and to the extent natural justice issues form grounds of appeal. The period we undertake for assessment is between October, 2019 to March, 2020. In the said period, SAT has disposed almost 200 appeals. Table 1 shows us the overview of cases that were over-turned by SAT on grounds of notice and examination of materials.

As is seen in the Table, almost 33% of cases at SAT over the six months period were over-ruled. Of the cases over-ruled 86% were related to issues of notice and 14% to issues of examination of materials. In

what follows, we provide examples of gaps in the enforcement process at SEBI. It is important to bear in mind that these are just a few examples to illustrate the problem, and are not comprehensive in nature. It is our contention that a large number of these procedural problems emanate from the structure of the enforcement process described earlier.

Table 1 Summary of cases at SAT: October 2019 - March 2020

	Number
Cases at SAT	200
Cases overruled (for show-cause reasons)	66
notice	57
examination	09

In the following sections we focus on the aspects of notice, examination of materials and separation of powers. Issues of non application of mind and ad interim orders have not been detailed in this paper.

3.3.1 Notice

An infraction of principles of natural justice in SEBI enforcement proceedings is evinced at the first stage namely that of issuance of notice. In relation to notice, the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 provide the following guidance:

- Content of the notice - The notice shall indicate the nature of offence committed.[26]
- Opportunity to make a representation - The party shall be given a notice of fourteen days at least from the date of service of orders.[27] In case the party fails to appear, the adjudicating officer may pass an ex parte order.[28]
- Manner of service of notice and orders - The Rules specify three modes of service. First, delivering or tendering to the person or duly authorised agent, sending via registered post to the address where the party last resided or carried on business. In case both modes fail, the notice could be axed at a conspicuous part of the premises where the party last resided or carried on business.[29]

However, this threadbare guidance has not translated well for the agency, given the number of cases that continue being remanded due to notice related issues. In relation to issuance of notice, appellants have used the following two grounds to argue the setting aside of the whole time member's order.

- *Non service of show cause notice:* Issuance of show cause notice is a *sina qua non* in enforcement proceedings. It allows the party against whom proceedings are instituted to know the case it has to meet. While this argument relates to the content of the show cause notice, non serving of the notice obfuscates the factum of there being a case at all against the party under investigation.

[26] Regulation 4(2), Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995.

[27] Regulation 4(1), Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995.

[28] Regulation 4(7), Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995.

[29] Regulation 7, Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995.

In *Vipin Sharma* v. *SEBI* ,[30] it was found that the company was restrained for 5 years and the director for 1 year from accessing the securities market. The director had since resigned from the company. The show cause notice was sent to his address that was thought to be the corporate address of the company. The appellant argued that non service of show cause notice, in effect made the order, akin to an *ex parte* order. SAT agreeing with this contention, directed that the appellant be served a show cause notice by the WTM based on which new proceedings shall be initiated.

Similarly, in the case of *Romit Mehta* v. *SEBI*,[31] the appellant contended that he came to know of proceedings against him only on the receipt of a recovery certificate for the fine imposed. The postal service notice was returned undelivered, while the email was sent to a wrong email address. SEBI argued that since the emails did not bounce back it was presumed that the show cause notice was duly served. SAT held that the proceedings were vitiated in light of non service of notice and remanded the matter back to the adjudicating offcer for considering it afresh.

• *Inordinate delay in issuance of show cause notice* The second issue pertaining to notice was that of inordinate delay in issuance of show cause notice. Typically, in cases involving such a plea by the appellant, the show cause notice was issued years after in relation to when the infraction had occurred. For example, in the case of *Ashlesh G. Shah and others* v. *SEBI*,[32] 9 appeals were disposed off on the ground of delayed issuance of show cause notice. While the violations occurred in 2010, the show cause notice was issued in 2017, i.e. almost 7 years later, for which no explanation was given. SEBI took the plea that the delay was due to reasons of change in officers of the investigation department and delay in the approval of show cause notice. However, the SAT observed that the grounds shown by the respondent in its additional affidavit only indicates the lackadaisical attitude in proceeding against the entities. SAT further observed that no urgency was shown by the respondent to culminate the proceedings and it has moved at a "leisurely pace." SAT quashed the proceedings against the entities while noting that although there is no period of limitation prescribed in the Act and regulation for issuance of show cause notice or for completion of the adjudication proceedings, the authority is required to exercise its powers within a reasonable period.

3.3.2 Examination of materials

Being allowed to examine materials makes it possible for the party to know the evidence it has to refute. Non disclosure of materials negates the party a real and effective opportunity to meet the case against it. In relation to notice, examination of materials, the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 provide no guidance.

In the context of SEBI itself, it was a pivotal issue in the case of *SEBI* v. *Price Waterhouse Cooper* [33]. The case went up in appeal upto the Supreme Court on the question of whether PWC should be allowed to examine witness statements relied on in the show cause notice. The Supreme Court and SAT categorically concurred on the position that *materials relied on in the show cause notice should* be shared with the party.

Despite such categorical reiteration by the Supreme Court on examination of materials, we find that in the period under examination, pleas relating to violation of principles of natural justice have been taken

[30] Vipin Sharma v. Securities and Exchange Board of India, MANU/SB/0126/2020.
[31] Romit Mehta v. Securities and Exchange Board of India, MANU/SB/0692/2020.
[32] Ashlesh G. Shah and others v. Securities and Exchange Board of India, MANU/SB/0119/2020.
[33] SEBI v. Price Waterhouse Cooper, Civil Appeal numbers 6000-6004 of 2012.

by appellants on grounds of denial of examination of relevant materials. For example, in *Hemant Sheth and others* v. *SEBI*,[34] 12 appeals were clubbed together on the ground of non sharing of relevant materials by SEBI. SEBI did not share documents on which it calculated the penalty. The company's understanding of its profits was very different from SEBIs understanding of its profits. Therefore, on the question of penalty SAT ordered that SEBI shall provide date wise details of trading and bring out details of calculation of profits to all the appellants and thereafter recalculate the amount of disgorgement against the appellants and pass an order within three months from the date of this order after giving an opportunity of hearing.

Similarly, in the case of *Dhirajbhai Sanghvi* v. *SEBI* ,[35] 9 appeals were clubbed on the matter of non sharing of relevant materials. It was contended that the AO has relied upon order logs, trade logs and investigation report which was not part of the show cause notice nor were such investigation report, trade logs supplied. SAT without going into the veracity of the submissions made by both parties allowed the appeals on the short ground of violation of principles of natural justice.

3.3.3 Other issues

Illustratively, some of the other issues that we came across relate to non application of mind by the regulator while passing orders and the nature of powers exercised under ad interim orders. Under non-application of mind, there are two broad categories which emerged from the case law under observation. The first category relates to the imposition of penalty.[36] The second category under non application of mind relates to the substantive findings of holding the entities in contravention of the provisions.[37] On the ground of ad interim orders of SEBI, it was seen that these orders have been used to pass extremely harsh punishment. [38]

Another interesting case illustrates how the current structure, that anyway falls short on separation of powers, is also lax in exercising the internal checks is that of *Amit Jain and others* v. *SEBI*.[39] In this case, the contention of the petitioner was that there was no application of mind by the whole time member while appointing the adjudicating officer. Under the SEBI framework, a whole time member has been delegated the power for appointing an adjudicating officer. Before such appointment is made, the whole time member is required to form an opinion that there are grounds for adjudging. In this case, a group of Assistant General Managers recommended that adjudicatory proceedings be instituted against the petitioners. These recommendations were considered by a Committee of Division of Chiefs and the recommendations were endorsed. The said recommendations were submitted for the approval of the whole time member who made a noting to the effect that an adjudicating officer has been appointed. The

[34] Hemant Sheth v. Securities and Exchange Board of India, MANU/SB/0645/2020.

[35] Dhirajbhai Sanghvi HUF and others v. Securities and Exchange Board of India, MANU/SB/0207/2020.

[36] In 11 appeals disposed off, SAT found that a cogent rationale for the penalty was missing. *See,* Jigna Vipul Vora and others v. Securities and Exchange Board of India and others, MANU/SB/0644/2020.

[37] In 14 appeals disposed off, SAT found that there was non application of mind or the order was not reasoned. *See,* Securities and Exchange Board of India v. Rajeev Thakkar and others, MANU/SB/0211/2020, Ashok Dayabhai Shah and others v. Securities and Exchange Board of India, MANU/SB/1522/2019, Securities and Exchange Board of India v. Zenith Highrise, MANU/SB/0442/2020 and Pravin N. Gala v. Securities and Exchange Board of India, MANU/SB/0226/2020.

[38] Seven appeals in the sample period had been decided against SEBI on the ground of undue delay in conclusion of the proceedings. *See,* Nirmal N. Kotecha v. Securities and Exchange Board of India, MANU/SB/0582/2020 and Inventure Growth and Securities Ltd. and others v. Securities Exchange Board of India, MANU/SB/0125/2020.

[39] Amit Jain and others v. SEBI, MANU/DE/2408/2018.

noting only mentioned the appointment without putting on record the reasons, as per the whole time member, for why an adjudicatory officer was to be appointed. The Court agreed with the petitioner's contention that the appointment be rescinded because of non application of mind. The Court held that in this case not even a mechanical endorsement of the recommendations was made. It was held that formation of an opinion is a necessary pre-requisite for the Board.

This case helps make the following important observations. First, the satisfaction of the whole time member is not mechanical in nature. It has the function of being an additional check to test whether an enforcement proceeding is warranted or not. Second, it also points to the fact that these internal checks and balances may not be followed by the regulator very rigorously, thereby disregarding a statutory safeguard that is provided for the regulated entities.

4 How does CCI perform on due process?

In the Indian regulatory landscape, the Competition Commission of India, is a relatively new body. It was constituted in 2002 with the passage of the Competition Act, 2002. Its mandate is the maintenance of competition in the market in order to protect economic efficiency and making the market responsive to consumer preferences. The Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction. For the purposes of this paper, we specifically consider its adjudicatory function.

4.1 Enforcement process for the Commission

As per section 18 of the Competition Act, 2002, the objective is to eliminate practices that have an adverse effect on competition, promote and sustain competition, protect the interests of consumers. One of the way in which the Commission does so is by conducting inquiries into the alleged violations of its provisions.[40] On conclusion of the inquiry, if it is found that the contravention has occurred, the Commission has the power to levy severe financial penalties on the regulated entities.[41] Alongside the Commission, the office of the Director General of the Commission is the other relevant entity in the discharge of investigatory and adjudicatory functions of the Commission. It is important to obtain an overview of the two entities, to understand their interaction in the enforcement process.

- *Competition Commission* - The Commission is a body corporate[42] that consists of a chairperson and not less than two and not more than six members. The Chairperson and the members are whole time members.[43] The Commission has its own secretariat which coordinates with the Office of the Director General on its behalf. The relevant function of the Commission, from our standpoint, is issuing show cause notices to the regulated entities,[44] passing of interim orders[45] and final orders based on the inquiry report. These orders are appealable to the National Companies Law Tribunal (erstwhile, Competition Appellate Tribunal).

[40] Sections 26, Competition Act, 2002.
[41] Section 27(b) and Chapter VI, Competition Act, 2002.
[42] Section 7, Competition Act, 2002.
[43] Section 8, Competition Act, 2002.
[44] Regulation 48, Competition Commission of India (General) Regulations, 2009.
[45] Section 33, Competition Act, 2002.

• *Office of the Director General* - The Act also establishes the office of the Director General. The mandate of the Director General is to assist the Commission in investigating any contravention of the provisions of the Act.[46] The Director General is appointed by the Central Government[47] His office includes Additional, Joint, Deputy or Assistant Director Generals. This office, in totality, constitutes the investigation wing of the Commission. Its relevant function is to conduct inquiry and submit a report of its findings to the Commission.

Section 36 of the Competition Act allows the Commission to regulate its own procedure. In doing so, it requires that the Commission be guided by "principles of natural justice" in the discharge of its functions. Pursuant to section 64, that gives the Commission the power to make regulations, the Commission made the Competition Commission of India (General) Regulations, 2009. These along with the Competition Act lay down the procedure in the conduct of an inquiry before the Commission and issues attendant thereto.

Receipt of information and prima facie opinion. The foremost stage of an inquiry proceeding is the receipt of information by the Commission of an alleged violation of anti competitive agreement, abuse of dominance or unauthorised combination.[48] This information may be received from any person, consumer or trade association or on reference made by the central government, state government or statutory body. Moreover, the Commission may come in knowledge of such information *suo motu.* On the receipt of such information, if the Commission is of the prima facie opinion, it is required to direct the Director General to conduct an investigation into the matter.[49]

Report on the alleged contravention. On issuance of the direction, the Director General is required to conduct an inquiry and submit a report on the findings to the Commission.[50] The Commission is then required to apply its own mind on the action it wants to take on the report. In case the report recommends that there is no contravention of the provisions of the Act it is mandatory for the Commission to invite objections and suggestions on the report from the concerned parties.[51] The Commission takes the decision to order an inquiry after considering these objections and suggestions. Alternatively, if the Director General's report recommends that a contravention has taken place, and the Commission is of the same opinion, it may order an investigation. Pursuant to this, the Commission is required to submit a supplementary report on specific issues.[52]

Powers of the Commission and Director General. Both the Commission and the Director General are vested with the same powers as a civil court, under the Code of Civil Procedure, for discharge of their functions.[53] This includes the power to summon and enforce attendance, examining a person on oath, requiring the discovery and production of documents and requisitioning any public record for any office.

Penalty proceedings. On receipt and consideration of the final report by the Commission, if it is of the opinion that a contravention has taken place, penalty proceedings occur. These are initiated with the issuance of a show cause notice and the provision of a reasonable opportunity to the regulated entity to

[46] Section 41, Competition Act, 2002.
[47] Section 16(1), Competition Act, 2002.
[48] Section 19, Competition Act, 2002.
[49] Section 26(1), Competition Act, 2002.
[50] Section 26(3), Competition Act, 2002.
[51] Section 26(5), Competition Act, 2002.
[52] Regulation 20(6), Competition Commission of India (General) Regulations, 2009.
[53] Section 36(2), Competition Act, 2002.

represent its case before the Commission. The entity has to be provided with at least 15 days to give its explanation. The granting of oral hearing is discretionary. On the basis of the explanation and oral hearing (if granted) the Commission decides the matter of imposition.[54]

Based on the aforementioned procedure, it can be concluded that separation of powers is maintained within the CCI, with a far greater degree as compared to SEBI. First, there is a dedicated wing under the Act, that is concerned with investigation. The investigation report is submitted to the Commission which takes action on it, unlike in the case of SEBI, where the inquiry officer conducts the investigation and passes the order. Second, there is application of mind by the Commission at multiple stages - at the time of formation of prima facie opinion, at the time of issuance of direction for investigation and lastly, at the time of penalty proceedings.

Further, the *Competition Commission of India* v. *Steel Authority of India Ltd*.[55] is also instructive in understanding the standards expected of a regulatory body in its internal functioning. In this case the primary issue was whether the prima facie opinion on the basis of which the CCI issues a direction to the Director General, was an appealable order or not. The Court held that the prima facie opinion of the Commission is in the preparatory stage. This function of the Commission is not adjudicatory in nature, and is in fact an internal departmental act. Even so, the Court held that in consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least reasons even while forming a prima facie view. Further, the Court also required that mind is required to be applied at the stage of issuance of notice with respect to whom the notice may be issued. As such, even the preliminary step of issuance of notice is not an automatic or obvious consequence.

Therefore, while the Commission does better in terms of structural separation, issues of due process continue to remain due to scanty guidance available in the Competition Commission of India (General) Regulations, 2009 on other aspects.

4.2 Due process issues in CCI orders

In *Competition Commission of India* v. *Steel Authority of India Ltd*.[56], the Competition Commission of India (General) Regulations, 2009 were reviewed by the Supreme Court. The Court considered, inter alia, the question of what directions need to be issued to ensure proper compliance in regard to procedural requirements while keeping in mind the scheme of the Act such that procedural intricacies (emphasis added) do not hamper achieving the object of the Act. In answering this question, the Court laid down timelines within which different stages of the inquiry need to be completed.

While the regulations provide that notice should be served on the initiation of proceedings and imposition of penalty, along with the mode of service of such notice, there is no guidance on the constituents of the notice. Further, there is discretion on the disclosure of materials with the Director General to the party for examination, such that the materials may be disclosed to the entity. This, along with the lack of general internalisation of fair administrative procedures, has resulted in several orders of the Commission being quashed by appellate forums.

[54] Regulation 48, Competition Commission of India (General) Regulations, 2009.
[55] Competition Commission of India vs. Steel Authority of India Ltd. and Ors. MANU/SC/0690/2010.
[56] Competition Commission of India vs. Steel Authority of India Ltd. and Ors. MANU/SC/0690/2010.

In *The Board of Control for Cricket in India* v. *The Competition Commission of India*,[57] an appeal was led before the COMPAT to set aside the Commission's order on the ground of violation of principles of natural justice. In this case, the Director General had defined the relevant market in a particular way and conducted the inquiry. The Commission differed from the Director General on the manner in which relevant market was defined and passed an order on the basis of this changed definition. This was done without giving the appellant any notice or opportunity of hearing. The tribunal noted that since a change in the definition would result in civil consequences for the appellant, the Commission is bound by the rule of *audi alteram partem* and give an effective opportunity of hearing to the person. The Tribunal noted after scrutinising the record that while directing the Secretary to forward the report of the Director General to the appellant, the Commission had nowhere indicated that it did not agree with the finding of the Director General. The appellant was only given the opportunity to file objections to the Director General's report, and not to the Commission's finding. The Tribunal also held that principles of natural justice were violated because of the Commission's failure to disclose the information/material proposed to be used by it for arriving at a finding on abuse of dominance.

Similarly, in *Interglobe Aviation Ltd.* v. *Competition Commission of India*[58], the Tribunal set aside the Commission's order imposing a penalty of Rs. 258 crores. This was on the ground that the Commission had failed to give notice to the appellant of its disagreement with the finding of the joint Director General's report. The Commission was directed to pass a fresh order on the ground that it resulted in gross violation of principles of natural justice.

On the specific issue of examination of materials, the Tribunal set aside the order of the Commission in *Himachal Pradesh Society of Chemist and Druggist Alliance* v. *Rohit Medical Store*.[59] In this case, the Director General had relied on the statements of the respondent and the unverified documents without giving the appellant an opportunity to cross examine it. Further, the Director General had relied upon his personal knowledge to record a finding against the appellant. In light of this, the order was remanded to the Commission to consider the pleas made by the appellants. The Commission's order was quashed on similar grounds in *Alkem Laboratories* v. *CCI*.[60] It was found that the appellants were not given the opportunity to explain their position or cross examine the complainant who had made unfounded allegations against the appellant.

There are also multiple instances where the Commission's order has been set aside because the members who were hearing the case were not the members who had signed the order. In *All India Organisation of Chemists and Druggists* v. *Competition Commission of India*,[61] the Tribunal set aside the order, because out of the five members who had signed the order, two were not present on the date of hearing, and two had joined the Commission after almost a month of the date of hearing. Similar ground was used to quash the order of the Commission in the cases of *M/s Sheth & Co.* v. *CCI* (the member signing the order had not heard the arguments),[62] *Indian Jute Mills Association and others* v. *CCI* (the member signing the order had joined the Commission after almost three years since the case was first led and had not been a

[57] The Board of Control for Cricket in India v. The Competition Commission of India, MANU/TA/0011/2015.

[58] Interglobe Aviation Ltd. V. The Secretary, Competition Commission of India, Appeal number 07 of 2016 (COMPAT).

[59] Himachal Pradesh Society of Chemist and Druggist Alliance and Ors. v. Rohit Medical Store and Ors, MANU/TA/0002/2016.

[60] Alkem Laboratories Limited and Ors. v. Competition Commission of India and Ors., MANU/TA/0028/2016.

[61] All India Organisation of Chemists and Druggists and Ors. v. Competition Commission of India and Ors., MANU/TA/0020/2015.

[62] Sheth and Co., In re suo motu case No. 04 of 2013, 2105 CompLR 715 (CCI).

part of initial hearings)[63] and *Coal India Limited* v. *CCI* .[64]

Therefore, a survey of the Tribunal orders shows that CCI orders have fared badly on principles of natural justice. Issues of notice, examination, cross examination of materials and fair hearing (person hearing should be the one deciding) continue to plague its orders.

5 International experience

To understand the manner in which investigative and enforcement powers are exercised by other similar organisations, the paper studies the Securities and Exchange Commission of the US and the Financial Conduct Authority of the UK. The Securities and Exchange Commission (SEC) is concerned with enforcement of the securities law. It was constituted under the Securities Exchange Act, 1934 with the aim to protect investors, maintain fair, orderly and efficient markets and facilitate capital formation.[65] The Financial Conduct Authority (FCA) was set up under the Financial Services and Markets Act (FSMA), 2000.

5.1 The structure of enforcement

The parent legislation of both the SEC and the FCA provide statutory authority to the agencies to conduct any investigation necessary to determine whether a person has violated the respective laws and the rules and regulations promulgated thereunder. However, the exercise of investigative and enforcement powers of a regulatory agency are tempered by various sources such as parent legislation of the regulatory bodies, regulations that they promulgate, best practice guides that direct internal procedures and the overarching administrative law of the concerned jurisdiction. The powers of the regulators, therefore, are either constrained through detailed procedures embedded in the parent legislation, or through what can be called as the invisible infrastructure that governs the actions of all State agencies. The following are examples of structures that guide investigation and enforcement in the SEC and FCA.

Overarching Acts An example of this invisible infrastructure, that drives behaviour at various government agencies is the Administrative Procedure Act, 1946 in the US. The APA classified different types of agency decision making and provided a set of procedural rules to govern that decision making in every respect. It treats agency actions as either quasi-legislative or quasi judicial, and requires agencies to follow several administrative procedures for both types of action, with more formal procedures for adjudicatory functions. By providing an effective method for regulating agency action, the APA preserved individual rights from being abused by exercise of administrative power.

Specific legislations pertaining to the Agency The Securities Exchange Act, 1934 is the primary constitutive legislation for the SEC. Section 21(b) and (c) of the Act provides the SEC with

[63] Indian Jute Mills Association and Ors. v. The Secretary, Competition Commission of India and Ors., MANU/TA/0034/2016.

[64] Coal India Limited (CIL) and Ors. v. Competition Commission of India and Ors., MANU/TA/0031/2016.

[65] The SEC is organised into four primary operating divisions, out of which the largest is its Division of Enforcement. Apart from the head office, headquartered in Washington DC, there are eleven regional offices, each of which has an Enforcement Division.

investigation powers.[66] Based on the information collected, under section 21(3), the Commission has been given the authority to bring an action in a United States District court to seek a civil penalty on the person committing any such violation. Alternatively, the Commission may begin an administrative action against the purported violators. The SEC is also required to set up *The Rules of Practice* which give a specific formulation to the broad powers enshrined in the Securities Exchange Act, 1934. This formulation is done in compliance with the Administrative Procedure Act, 1946 that is required to be followed by all regulatory bodies while undertaking adjudicatory functions.

The FSMA is more detailed than the SEC on the regulation of enforcement as there is no over-arching APA style legislation in the UK. The FSMA however, covers only certain aspects of the enforcement cycle, delegating the authorities to issue procedures and further rules on the matter. Under section 395 of the FSMA, there is an express requirement for the FCA to issue a statement of procedures relating to:

- the giving of supervisory notices, warning notices and decision notices;
- the publishing of information about matters to which certain warning notices relate.

What is important to note is that the law requires the regulatory agency to issue statements that outline the procedure of enforcement.

Guides and manuals In addition to the parent legislation, agencies in both the US and the UK are required to produce an Enforcement Manual in the public domain which contains contains various general policies and procedures and is intended to provide guidance to the Division staff. The UK in fact, has two manuals: a) the Enforcement Guide describes the FCA's approach to exercising the main enforcement powers given to it under the FSMA, 2000. It provides an overview of the enforcement policy and process, FCA's approach to enforcement, the use of its main information gathering and investigation powers under the Act, the conduct of investigations, settlement and publicity, and b) Decision Procedure and Penalty Manual which sets out FCA's decision making procedure for giving statutory notices, warning notices, decision notices and supervisory notices. It also lays down FCA's policy with respect to the imposition and amount of penalties under the Act.

The objective of this is to increase transparency and accountability in enforcement proceedings.

5.2 Processes for better enforcement

5.2.1 Notice

As discussed earlier, a notice is a critical component of any enforcement proceedings, as it conveys the allegations on which a defence can be made. Both the US and the UK have detailed guidelines on how a notice is to be written, and what constitutes a notice.

In the US, the Rules of Practice for the Commission specify the manner in which notice is to be served. These include rules on who should the notice be sent to,[67] the way in which a notice should be sent,[68] the

[66] The broad powers relating to this are: a) Administration of oaths and affirmations, b) Subpoenaing witnesses and compelling their attendance and c) Production of records.

[67] Rule 141 species who is an authorised person to send a copy of the order instituting proceedings.

[68] Rule 141 species different ways in which service may be made to individuals, corporations or entities, persons registered with the commission and persons in a foreign country.

specifics of what a notice must contain. It is important to elaborate on the specification of the contents of the notice, as this is an area where the Indian regulators have been found to be wanting. The specification of contents of the notice in the US SEC includes:

- The notice should state the nature of the hearing.
- It should state the legal authority and jurisdiction under which the hearing is to be held.
- The notice should contain a brief statement of the facts and law that is to be applied.
- In case, the party has a right to a hearing, the order shall set forth the factual and legal matters in a manner that would allow the party to give a specific response thereto.
- It should state the nature of any relief or action sought or taken.

The UK also has detailed processes embedded in the FSMA, 2000 for sending notices. The Act species what kind of a notice is to be issued, and who can be the issuing authority for a specific notice (the FCA or the RDC). The first of these is the warning notice[69] or the show cause notice in India. The warning notice is actually based on a preliminary investigation report that is led by the enforcement division of the FCA to the Regulatory Decisions Committee (RDC) The RDC is described in Section 5.2.2,[70] which then must decide, whether the enforcement division has made enough of a case for there to be a reason to serve a show cause notice. The FSMA Act also recognises that preliminary findings letters serve a very useful purpose in focusing decision making on the contentious issues in the case. This in turn makes for better quality and more efficient decision making.[71]

Once the RDC is convinced, and a notice has to be sent, the FSMA requires that such a notice must adhere to the following:

- State the action which the authority proposes to take
- Be in writing
- Give reasons for the proposed action
- State whether section 394 applies i.e. the party's right to access Authority material. [72]
- Reasonable period (not less than 28 days) within which the person is allowed to make representations which is extendable.

Many a times, the investigators may not know the identity of the perpetrator at the outset. In such a case, the FCA has to give indication of the nature and subject of its investigation to those who are required to provide information to assist with the investigation. Once the FCA knows the person it is investigating, the person will be notified.[73]

5.2.2 Separation of powers

One of the critical elements of better regulatory governance is separation of powers. This is maintained both in the US and the UK.

In the case of the SEC, the rule of separation of powers stems from the Administrative Procedure Act. Section 554(d) of the APA provides that an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision or agency review. In accordance with this

[69] Section 387, Financial Services and Markets Act, 2000.

[71] However, there are exceptional circumstances in which the FCA may decide it is not appropriate to send out a preliminary findings letter.

[72] Access to Authority material is explained in the following subsection.

[73] The only circumstance where this does not happen is if doing so would prejudice the FCA's ability to conduct investigation effectively.

Rule 121 requires separation of personnel involved in prosecutorial and investigative functions from decision making in those cases. In furtherance of this, the institution of the Administrative Law Judges has been set up for the SEC.

In the UK, while the judicial wing is part of the FCA, it is autonomous. It is called the Regulatory Decisions Committee (RDC). The RDC is an autonomous decision making body of the FCA. Technically, it is a committee of the FCA Board, but it is operationally separate from the FCA. Its autonomy is maintained via measures such as separation from executive management at the FCA, its own legal advisors and support staff being separate from the FDC, the power to ask FCA staff for additional information, explanations regarding any investigation or FCA recommendations.[74]

5.2.3 Examination of materials

There are detailed requirements in the FSMA Act on the material that the accused is allowed to access from the regulators to prepare his defence. Section 394 of the Act for example requires the Authority to give the party access to

- Material on which it relied in taking the decision which gave rise to the obligation to give the notice;
- Allow him access to any secondary material which, in the opinion of the Authority, might undermine that decision.

While the Act does allow for several grounds for this to be denied, the regulator has to give the party written notice of a) the existence of the protected item and b) the FCA's decision not to allow the party access to it along with the reasons for such refusal.

In the US as well, there are clear rules (Rule 230 of the Rules of Practice) that define the scope of documents that are to be made available for inspection and copying. The rule requires the Division of Enforcement to make available any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings. The rule provides an illustrative list of documents covered under its scope:

- subpoenas issued
- written requests to provide documents or to be interviewed
- documents turned over in response to such subpoenas or requests
- all transcripts and transcript exhibits
- any other documents obtained from persons not employed by the Commission

The Commission is entitled to withhold documents that are mentioned by the rules. [75]

5.3 ICO's enforcement powers under the DPA, 2018

We have so far discussed the processes at the SEC and FCA, both of which are not data protection regulators. We turn to examining similar issues in a data protection context.

[74] The RDC has no power under the Act to require persons to attend before it or provide information. It is not a tribunal and will make a decision based on all the relevant information available to it, which may include views of FCA sta about the relative quality of witness and other evidence.

[75] These can include documents which are privileged, which are internal memorandums, that identify a confidential source. The hearing officer does have some discretion on whether to withhold a document subject to certain conditions. However, The rule specifically excludes from the list of exempted documents, documents that contain exculpatory evidence.

The Information Commission Office in the UK is the designated regulator for the enforcement of the Data Protection Act, 2018. Enforcement of the Act takes place either via regulatory proceedings conducted by the ICO or by criminal prosecution of offences under the Act. In the latter, the role of the ICO is that of the prosecutor. It has the discretion in deciding whether an offence is to be prosecuted. The procedure to be followed in such a case is the generic CPS Code for Crown Prosecutors. In regulatory proceedings, it is the ICO that conducts the regulatory proceedings and sits in adjudication of the proceedings.

The lack of separation of powers at the ICO is dealt with in two ways. The first is through a Detailed Regulatory Action Policy. The second is through the Right of appeal to the Tribunal.

Regulatory Action Plan The ICO uses its enforcement powers by way of issuance of a variety of notices, namely the information notice, the assessment notice, the enforcement notice and the penalty notice. Section 160 of the DPA, 2018 requires that the Commissioner publish guidance on how it would exercise its functions under its enforcement powers, with specific emphasis on providing guidance in relation to the notice. This is understandable because the four notices form the cornerstone of the enforcement powers of the ICO. Pursuant to this, the ICO has published the Regulatory Action Policy, which seeks to set out the nature of the ICO's various powers in one place and to be clear and consistent about when and how the ICO uses them. Given that the notices are issued by the same entity which conducts the proceedings post the issuance, it seems that such guidance documents reduce abuse of discretion by increasing transparency with the regulated entities. The nature of the notices also reflect a graded approach towards enforcement as outlined in the Regulatory Action Policy document.

Right of appeal A common right on the issuance of any of the notices is the right to appeal to the Tribunal. This is unlike the Indian jurisdiction where notices for providing information or inspection are not attached with a statutory right of appeal. The statutory right of appeal is a check against abuse of discretion by the Commissioner in issuing such notices. The right of appeal is made meaningful by requiring:

- First, that the period for compliance stated in the notice should not fall before the period within which an appeal can be brought against the notice.
- Second, in case an appeal has been led against the notice, pending the determination of the appeal, there is no requirement to comply with it.

However, these rights do not apply if the Commissioner designates the notice as an "urgent" notice.[76]

Therefore, even as the principle of separation of powers is not followed, given that the entity issuing the notice is the same as the one conducting the investigation, the appealability of the notices play an important function in curbing the discretion of the Commissioner. Apart from providing a right of appeal for notice issued before the penalty notice, the discretion of the Commissioner by requiring that the notices of information, assessment and enforcement carry the following information:

[76] A notice becomes urgent when the notice mentions that it is to be complied with urgently and the Commissioner provides reasons for reaching that opinion. In such cases of "urgent" notices, the entity issued the notice can file an appeal against the "urgent" designation of the notice. The provision of such statutory appeal protects the regulated entity against arbitrary designation of the notice as "urgent", which otherwise has an implication of reduced timelines for compliance and circumvention of rights of appeal. The entity issued an urgent notice can apply to the court for direction to vary the notice by changing the time provided for compliance or direct that the notice not contain the urgency statement.

- the reasons for issuance of the notice:
    - In case of information notice, the Commissioner is required to mention the specific grounds on which the notice has been issued along with the reasons for requiring such information.
    - In case of assessment notice, there is no express statutory requirement for mentioning the reason for inspection, examination of documents and search of premises.
    - In case of enforcement notice, the notice must state what the person has failed to do and the reasons for the Commissioner for reaching that opinion.
- specification of the period within which the requirement must be complied with
- the consequences of failure to comply with it
- the rights of the entity issued the notice to appeal against the notice

6 Implications for the design of the Data Protection Authority (DPA)

Our analysis suggests that Indian regulators do not have any guidance on processes to be followed during enforcement actions. Even the best of the regulators in India such as SEBI and CCI have failed at some of the most basic processes of sending notices, providing material and at the broader question of separation of powers. Our analysis also suggests that internationally, *due process* is codified in the law or the regulations, and is usually accompanied by process manuals as well as the ability to appeal decisions at the courts - all of which serve as a check on the regulator. In this section we turn to evaluating what changes we can add to the proposed Bill so as to embed principles of natural justice within the legal framework itself. Before we spell out the recommendations, we lay out the enforcement powers of the DPA to provide the context in which these principles have to be drafted.

6.1 Enforcement by the DPA

The Personal Data Protection Bill, 2019, envisages the setting up of a Data Protection Authority to enforce the provisions under the law. The Authority is vested with powers of enforcement that are similar to those of other Indian regulators. For example, the DPA has the power to either *suo motu* or on a complaint take action against a data fiduciary or a data processor who may be violating the law. As per the draft Bill, the Authority has three broad enforcement powers:

- *Issuance of directions* : Under section 62 of the Act, the DPA has the power to issue directions to data fiduciaries or data processors generally or to a class or individual data fiduciaries and data processors.
- *Power to call for information* : Section 52 gives the Authority the power (of a civil court) to call for information from any data fiduciary or data processor that may be reasonably required by the Authority to discharge functions under the Act.
- *Conducting inquiries* : Section 53 gives the Authority the power to undertake an inquiry, either on a complaint or *suo motu* if it has reasonable grounds to believe that the activities of the data fiduciary or processor are either detrimental to interests of data principals or being carried out in contravention of the Act. While conducting the inquiry, the assigned inquiry officer at the DPA will have the following powers:
    - Discovery and production of relevant documents
    - Summoning and enforcing the attendance of persons and examining them on oath
    - Inspection of any book, document, register or record of any data fiduciary

- Issuing commissions for the examination of witnesses
- Search and seizure powers by application to designated court

The report of the inquiry officer is to be forwarded to the Authority, who will give the party an opportunity to make a representation in a manner the Authority "deems reasonable" (emphasis supplied). On the basis of the report and the representations made, the Authority can issue an order of the following nature:

- *Injunctive relief* : Issuance of warning, reprimands, cease and desist orders, temporary suspension or discontinuance of business activity.
- *Issuance of directions* : Require the business activity be modified to bring it in compliance with the provisions of the Bill.
- Variation, suspension or cancellation of registration of significant data fiduciary.

In two cases - the right to be forgotten and levying of monetary penalties in case of failure of compliance with the directions of the Authority - the Adjudicating Officer is supposed to conduct his own inquiry and pass the appropriate orders. This goes against the rules of fair hearing, as the power of inquiry and adjudication in case of penalties are housed within the same entity i.e. the adjudication officer. The adjudication officer will first conduct the inquiry and based on the same levy financial penalty. These powers are similar to that of SEBI, and the law is equally silent on what processes will have to be followed by the regulator as it uses this powers to discharge its functions.

Also, similar to other regulators, the adjudication wing is to be housed within the DPA. Even though The Justice Srikrishna Committee on data protection had recommended that the *adjudication wing should function at arm's length from the remaining wings of the DPA which deal with legislative matters and executive enforcement*, the Bill has no details on how this is to be implemented.

Since the DPA is going to be a cross-cutting regulator across various sectors, it is extremely important to ensure that the regulator adheres to the principles of natural justice. There are some problems that are obvious with the proposed setting. For example, the Bill subjects everything to the discretion of the Authority on the presumption that the Authority will be fair. The structure of enforcement raises some questions from a separation of powers perspective. The power of inquiry and adjudication in case of penalties are housed within the same entity but the law is silent on any requirement to keep the two distinct and separate. The adjudication officer will first conduct the inquiry and based on the same levy financial penalty. This leads to a strong supposition of bias. It is also unclear how the independence of the adjudication is to be maintained when the wing is to be housed within the DPA. Moreover, there are concerns that the adjudication officers will not be judicially trained officers, but bureaucrats, which does not allay concerns of bias.[77]

6.2 Why is common law not enough?

An important question to ask is, why can questions of due process on administrative law not be dealt with through common law?

Common law in India has been consistent in the view that principles of natural justice, are not considered "embodied rules" that are to be followed in every case.[78] Their application has been made dependent on a variety of factors such as the nature of tribunal in question, the controversy in question and the facts and circumstances at hand. A possible explanation for this is the perception that imposing requirements of natural justice would impinge on the administrative efficiency of the quasi judicial process.

[77] M. Sridhar Acharyulu, "Data Protection Bill a Serious Threat to Press Freedom" TheWire (2018) available at https://thewire.in/rights/data-protection-bill-a-serious-threat-to-press-freedom.

[78] Chandra Bhavan Boarding and Lodging, Bangalore v. The State of Mysore, AIR 1970 SC 2042.

Moreover, given the varied contexts in which administrative law is applied, a heterogeneous mix of policy problems and issues arise. It is believed that judging each case on its own merits provides an easier way out. Any jurisprudence developed on the question of principles of natural justice in administrative law, therefore, has been primarily via case law. This mode of development of the law through solely judicial pronouncements further compounds the problem because of the fluctuating bench structure. The changing bench constitution permits little or no specialisation in the matter and variable judicial tenures contribute to diverse judicial styles or application of principles of natural justice to different domains. As a result, development around principles of natural justice in administrative law has been in an ad hoc manner.

Within the context of SEBI itself, the long drawn out proceedings in the case of *SEBI* v. *Price Waterhouse Cooper*[79] are illustrative of this confusion. As mentioned earlier, the question for appeal to the SAT and the Supreme Court was on the scope of materials to be disclosed to the respondent Price Waterhouse Cooper. The inquiry was initiated against Price Waterhouse Cooper by SEBI in February 2010, and could not be concluded even by January 2017, as almost seven years went by in parleying with SEBI on the material to be disclosed and the subsequent appeals to SAT and the Supreme Court. Further, even as the Supreme Court ruled in favour of disclosure of all materials to Price Waterhouse Cooper, it did not record reasons for its order. It observed that it finds no justification to examine the matter in detail and disposed off the appeal with some simple clarifications. This approach hampered the settlement of the issue of inspection and cross examination for future cases, leading to the same questions coming up again in subsequent cases, as it can be argued that the order is specific only to the *Price Waterhouse Cooper case.*

Therefore, there is very little by way of standardised procedures that an administrative body can source from common law. For example, that notice is to be provided is a fundamental principle, however, the adequacy of content of the notice or the reasonableness of the time in which it is to be issued, is unclear. In an analysis done on the legislative power of the regulators, it was found that regulators whose statutes had more prescriptive rules on the requirements of consultation, fared better on regulation making processes (Burman & Zaveri, 2018). Taking a cue from this, especially given the non uniform development of principles of natural justice in India, we understand that a statutory formulation of the administrative law requirements would strengthen the rule of law in enforcement actions.

6.3 Recommendations

While the meta solution lies in fixing administrative law in general by attempting to have context neutral resolution of the status of natural justice rights, our immediate focus is on the lessons that the DPA can learn to not repeat mistakes of the existing Indian regulators. In this context, the foremost, is to understand first, which constituents of the enforcement process benefit from the exercise of regulatory discretion and which do not, and second, the safeguards for such discretion to not be abused. Based on this classification, the regulatory approach to be taken to these issues become clearer.

Clear formulation of procedural rights. It is critical to include a clear formulation of procedural rights. Both the SEC and the FCA, have these included within their regulations and statute respectively. The reason for inclusion in statute by one and regulations by the other seems to be two fold.

1. In the US, the Administrative Procedure Act, 1946 requires that the federal agencies formulate rules of practice based on it. UK has no general overarching statutory law on administrative law. Administrative law in the UK is sourced in common law, therefore, each regulator is required to provide its own procedural rules.

[79] SEBI v. Price Waterhouse Cooper, Civil Appeal numbers 6000-6004 of 2012.

2. The SEC is governed by the Securities Act, 1933 as compared to the FCA whose enforcement is governed by the relatively recent Financial Services and Markets Act, 2000. The intervening 70 years have seen the rise of regulatory agencies and a related development of discourse on enforcement processes followed by these agencies. This is also reflected in the Data Protection Act, 2018 of the UK which embodies similar rules on procedure.

In the context of the DPA, an inclusion of the procedural rights in the statute itself would be relevant. These provisions would specify a detailed outline of the show cause notice, the scope of the right of examination of materials, the procedure to be followed in case of ex-parte orders and the timelines of providing representation against each of the processes where such representation can be made.

Qualitative content of the rights. Apart from the issue of inclusion of these rights in the statute, the other, and more basic issue, is the qualitative content of these rights. Since there is considerable confusion within the domestic law on this, reference is made to the Financial Sector Legislative Commission's report. The mandate of the FSLRC was to comprehensively review and redraw the legislation's governing India's financial sector. In doing so, the FSLRC provided for a draft legislation of a consolidated financial regulator.

The enforcement provisions of this draft legislation provide guidance on the questions of show cause notice and examination of materials. First, it requires that the show cause notice be in writing, state the action proposed to be taken and give the causes that inform such proposed action. Second, the action outlined in the decision order must relate to that in the show cause notice. It further provides that the notice should be confidential. Confidentiality of the show cause notice is an important issue tackled by other regulators also given the ramifications it could have on the reputation of the businesses. Roy et al. (2019) also argue that the stage of issuance of the show cause notice needs to be altered in India. Currently, it is issued at the stage of penalty requiring the party to show why penalty should not be levied against it. This goes against the presumption of innocence and the onus of proof is reversed. As opposed to this, Roy et al. (2019) argue that the show cause should be issued to allow the regulated entity why a case against it should not be pursued.

On the issue of cross examination, the FSLRC requires that the scope of show cause notice is to first, allow access to all material relied upon in issuing the show cause notice, and second, to allow access to any material that may undermine the decision that is taken by the regulator. These statutory provisions should be detailed in the regulations. The regulations would include the manner in which notice is to be served, the manner of providing opportunity of hearing (written submissions), the form in which materials are to be submitted to the regulated entity under its right of examination of materials etc.

Public access to manuals and enforcement guides. While statutes and regulations are available in the public domain, there is merit in providing public access to the manuals and enforcement guides. Publication of manuals has an important information function. This is recognised by the regulatory statutes in UK, which require the agency to provide guidance on how the regulator proposes to exercise its enforcement functions. For example under the Data Protection Act, 2018, the Commissioner is required to provide guidance on the issuance of its notices. For all such notices, the statute also provides the outline as per which the guidance has to be made. This includes factors considered in determining whether to give a notice, the nature of inspections and examinations that are to be carried and the manner in which the regulator will proceed in case of non compliance with a notice. Apart from information to the public, it also creates regulatory certainty and reduces deviation from established and best practices. For the agency, this translates into institutional memory and reduces scope for challenge to the procedure followed in enforcement actions.

Separation of the investigative and adjudicative wings. Lastly, our recommendation relates to the requirement of separation of the investigative and adjudicative wings of the agency. As seen in the FCA and the SEC, the separation of functions is followed seriously. Although the Administrative Law Judges and the Regulatory Decisions Committee is housed within the SEC and FCA, a structural separation is maintained such that independence in functioning is ensured. The staffing and financing are independent of the regulator. Moreover, for the FCA, the distinction between the investigation and adjudication wings is maintained to such an extent that the inquiry report is provided by the investigation officer to the Regulatory Decisions Committee who then decides whether a case is made out for the issuance of a warning notice. This distinction is not maintained in the Data Protection Act, 2018, but as pointed out earlier, the discretion of the Information Commissioner has been kept in check by making all types of notice appealable. In the Indian context, both in SEBI and the proposed DPA, the inquiry officer is the same as the one levying penalty, with only the decision order being challengeable before the Tribunal.

In proposing the ideal exercise of the functions and powers of the regulator, the FSLRC provides that once the investigation has taken place, the actual order should be written by a disinterested party. For this, the report proposes the creation of a cadre of administrative law officers who would not be engaged in any functions of the regulator except performing the quasi judicial functions. Currently, such distinction is not reflected in the Data Protection Bill. The Bill provides for assignment of an officer as the investigation officer. As gleaned from the SEBI experience, this officer is not structurally different from the rest of the organisation. The designation happens on a case to case basis, and the officer is involved in general functions of the regulator, as well. This leads to dilution of the separation between the investigation and adjudication wings. The FSLRC proposes that there should be an Administrative Law Member in the Board of the agency whose specific task would be to manage the cadre of administrative law officers. This would lead to the insulation of quasi judicial functions of the regulator from executive, investigation and inspection functions. Appeals from the decisions of the administrative law officers would lie to the administrative law member. This process would act to reduce the number of appeals to the tribunal by weeding out flawed orders.

7 Conclusion

As per the draft Data Protection Bill, a new regulator, the Data Protection Authority (DPA) will have the power to either *suo motu* or on a complaint take action against a data fiduciary or a data processor who may be violating the law. The DPA can, among other things, issue directions, call for information, conduct inquiries, issue orders for injunctive relief, suspend or cancel the registration of businesses. The DPA is also in a unique position given that the scope of its "regulated entities" will be, arguably, more extensive than any of the regulators previously established in India. This raises concerns about how principles of natural justice will be followed when discharging these functions.

In this paper we evaluate how the capital markets regulator, the Securities Exchange Board of India (SEBI) and the Competition Commission of India (CCI) fare on issues of natural justice as they perform their enforcement functions. Natural justice is a vast area, and we focus on three elements of natural justice - how are notices served, whether parties are allowed to examine material and cross-examine witnesses, and whether there is separation of powers, especially between the investigation and adjudication functions in the structure of the two regulators. We use data on cases at the respective Appellate Tribunals and find evidence of several procedural failures both at SEBI and the CCI.

What would improve these processes? We look at the structure of regulators in other countries - namely the US and the UK, and find that the processes that Indian law just assumes will be followed, are actually codified in laws, regulations and process manuals in these countries. This codification of processes for natural justice is an important lesson as we design the new data protection regulator.

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