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SALUS POPULI EST SUPREMA LEX

SERVICE OF THE PEOPLE IS THE SUPREME LAW

SATYAMEVA JAYATE

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EDITORIAL NOTE

Research is an important aspect of the academic life of a teacher. The ever changing socio-legal dynamics present an opportunity to all the teachers to undertake research by writing scholarly articles on several issues and thereby contribute in furthering knowledge and promote future research.

We convey our sincere gratitude for the support and guidance of Jurists, Senior Professors and Former Principals and Chairmen of University Law College and Department of Studies in Law in successful publication of the Bangalore University Law Journal. We thank all the contributors for their research articles.

The BULJ is a peer reviewed refereed journal containing scholarly articles from faculty and scholars across the country. We hope that this issue of BULJ would benefit the readers.

Prof. Dr. V. Sudesh
Former Principal & Dean

Prof. Dr. Suresh V. Nadagoudar
Principal, Chairman & Dean, Faculty of Law

CONTENTS

RIGHT TO DIE WITH DIGNITY- AN ASSESSMENT OF PREVAILING LAW ON EUTHANASIA IN INDIA

-Prof. (Dr.) T.R Subramanya[*]
Ms. Arpitha H.C[**]

INTRODUCTION

All of us are aware that Life is precious and there is nothing else that has been discovered that can substitute life. Talking about Death and Dying in today's Health care is a very complex subject that not only challenges one Physically, Emotionally and Ethically but gets even more complicated when issues such as withholding and withdrawing life sustaining treatment and Physician assisted suicide are considered. These were all formerly termed Euthanasia. Right to die can be used to denote the concept of Euthanasia, Mercy Killing, Physician Assisted Suicide and Suicide etc. Here we are dealing with the fundamental ethical principles of Autonomy, Non-maleficence, Beneficence, Justice and Dignity, Paternalism, Personhood and life, each of which may pull in conflicting directions. Euthanasia is a subject that encircles Ethics, Law, Philosophy and Medical practice.

Right to Life is one of the most Important Fundamental Right and the Constitution of India under Article 21[1] has imposed an obligation upon the state to take steps to ensure good quality of Life and Dignity to People. The context in which it is being used has been a matter of Intellectual discussion till date. There has been constant debates on whether this right to life be fetched to such an extent so as to include within its purview, the right to die?

Medical decision making at the end of life of a person is a very Controversial Issue in India. It conflicts between religious beliefs on Sanctity of Life and the Right to Autonomy and Personal choice of a person. Then there are the questions of who owns life and who has the right to decide when to end it. One of the Productive ways to engage with this issue is to understand what the requirement of appropriate End of life care implies for the State.

'Dying is inevitable but a bad death is not' proclaimed an Economist cover! These were best captured and analyzed by the Economist surveys on

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[*] Dean, CMR School of Legal Studies, Bengaluru
[**] Research Scholar, CMR University, Bengaluru

[1] "No Person shall be deprived of his life or personal liberty except according to procedure established by law"

Quality of Death published in 2010 and 2015. In both these reports India scored badly, last out of 40 large countries in the first and 67th out of 80 in the second. A joint report by the World Health Organization and the World Bank revealed that 49 million Indians are pushed into poverty every year due to out-of-pocket expenditure on healthcare, which accounts for half of the 100 million who meet this fate worldwide. Another factor that has been very concerning is India's spending on Health. Though the objective of the National Health Policy, 2017 seems to be promising in terms of the government expenditure of 2.5 percent of the Gross Domestic Product by 2025 it is too less.

HISTORICAL PERSPECTIVE

Most of the Legal literature uses the term Euthanasia synonymously with Right to Die and End of life care and hence it is pertinent to discuss its Historical perspective. The word 'Euthanasia' is derived from the Greek word 'euthantos' (eu- good and Thanatos- death) meaning the actions or omissions that result in the death of a person who is already terminally ill by a physician, usually through a lethal injection or by withholding or withdrawing ventilatory support[2]. The Encyclopedia of Crime and Justice defines Euthanasia as an 'Act of Death which will provide Relief from a distressing or intolerable condition of living.[3] According to Black's Law Dictionary (8th edition), Euthanasia means the Act or practice of killing or bringing about the death of a person who suffers from an incurable disease or condition, especially. a painful one, for reasons of mercy. Euthanasia or mercy killing is the practice of killing a person for giving relief from incurable pain or suffering or allowing or causing painless death when life has become meaningless and dis- agreeable[4].

The Institution of Self-Destruction is as old as mankind. Going back to the Literature, Human Beings are captured in endless cycles of Rebirth and Reincarnation according to both Buddhism and Hinduism wherein the ultimate goal of a mortal life is to achieve Moksha. Prayopavasa or fasting to death is an acceptable way for a Hindu to end their life, provided it is non-violent. The Jain religion also recognises fasting to death in order to attain

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2 Jonathan Moreno, "Arguing Euthanasia: The Controversy over Mercy Killing, Assisted Suicide and the "right to Die",1995

3 Sangeetha Mugunthan, "A Constitutional perspective on Euthanasia and 'Right to Die', Karnataka Law Journal, 2006, pg. 10.

4 Nandy, Apurba. "Principles of Forensic Medicine", 1st. ed., 1995, p.38, New Central Book Agency (P) Ltd.

moksha. "Willful death is traceable to Socrates and Plato[5]. Christianity, Judaism and Islam do not permit any of these concepts and recognize only 'natural' death believing that human life given by God is sacred[6] . Euthanasia has been classified[7] as follows:

A. <u>on the basis of the Nature of Act being done:</u>

i. Active: It is a positive merciful Act, to end useless suffering or a meaningless existence, For example, when a doctor administers Medication knowing it will shorten a patient's life.

ii. Passive: Passive Euthanasia occurs when the Medical Professionals either don't do something necessary to keep the Patient alive, or when they stop doing something that is keeping the Patient alive. for e.g switching off life-support machines, disconnecting a feeding tube, not carrying out a life – extending operation etc.

B. <u>on the basis of Consent:</u>

i. Voluntary- It includes those Instances of Euthanasia in which a clearly competent person makes Voluntary and enduring request to be helped to die. The choice to die is made by him voluntarily rather than imposed on him by legal or social rules.

ii. Involuntary: in these cases, the person on whom Euthanasia is committed is Mentally Incompetent to make a decision and the decision needs to be done by a surrogate.

ii. Non-voluntary: it refers to ending the Life of a person who is not Mentally Competent to make an Informed request to die, such as a Comatose patient. In Non-Voluntary euthanasia the patient has left no such living will or given any Advance Directives, as he may not have had an opportunity to do so or may not have anticipated any such accident or eventuality. In cases of non-voluntary euthanasia, it is often the family members, who make the decision.

Brassington[8] provides a clearer definition for euthanasia and he also sharply criticizes the way the Indian legal system persists in its loose usage of this term which is considered obsolete by the medical profession. [9]

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5 *Ibid* 283.

6 Sujata Pawar, "Right to Die, How far Right? Judicial Responses", Criminal Law journal, 2010 Pg. 281.

7 Sarabjeet Taneja, "Should Euthanasia be legalized?", Journal of Constitutional and Parliamentary Studies.

8 Brassington I. "What passive euthanasia is", BMC Med Ethics, 2020 May 14;21(1):41.

LEGAL FRAMEWORK IN INDIA

The Present Legal Framework on Euthanasia is only a Patchwork of Judicial Pronouncements, Constitutional Provisions, The Human Organ Transplant Act and Professional Guidelines. So far, we have no Legislation on this very pertinent Area. In addition, the Registration of Births and Deaths Act, the Indian Penal Code, the Mental Healthcare Act, the Indian Medical Council (Professional Conduct, Etiquette, Ethics) Regulations and the Consumer Protection Act also have some bearing.

So far as the Constitutional mandate goes, Right to Life is an important right enshrined in the Constitution of India. Article 21 guarantees the Right to Life in India. The Courts have interpreted this liberally in order to achieve the ideals of a Welfare State. The importance given to Dignity compels us to ask what we mean by Dignity and the Right to Die a Dignified Death. The question whether Right to Die is included in Article 21 of the Constitution of India, 1950 came for discussion for the first time before the Bombay High Court in *State of Maharashtra v. Maruti Sripati Dubal*.[10] The Bombay High Court held that the right to Life guaranteed by Article 21 includes a Right to Die and consequently the Court struck down Section 309 of the Indian Penal Code, which makes Attempt to commit suicide a criminal offence with Imprisonment for a Term which may extend up to One year or Fine or both as unconstitutional.

Generally, there is a lot of confusion on whether Suicide and Euthanasia are the same. They are completely different from one another. Suicide as mentioned in Oxford Dictionary means the act of killing yourself deliberately. Therefore, suicide could be termed as the intentional termination of one's life by self- induced means for various reasons, such as, frustration in love, failure in examinations or in getting a good job, but mostly it is due to depression.

In *P Ratinam v. Union of India*[11], a Division bench of the Supreme Court agreeing with the view of the Bombay high Court in Maruti Sripati held that a Person has a right to die and declared unconstitutional under section 309 of the Indian Penal Code. However, *Gian Kaur v. State of Punjab*[12] is considered to be one of the Landmark judgements wherein the court held that 'Right to

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9 Brassington I, " How not to talk about passive euthanasia: A lesson from India. Indian J Med Ethics", 2021, Jan-Mar; VI(1):1-11.

10 1987 Cri LJ 549

11 (1994)3 SCC 394

12 AIR 1996 SC 946

Life' under Article 21 does not include 'Right to Die'. Though the controversy before the court did not involve Euthanasia, the court expressly noted the debate on Physician- assisted termination of Life to be inconclusive. The court held that Article 21 of the Indian Constitution is a provision guaranteeing 'protection of life and personal liberty' and by no stretch of the imagination can extinction of Life be read to be included in the protection of life. The Supreme Court while making the distinction between Euthanasia/ Assisted Suicide and Withdrawal of Life-support was of the opinion that Euthanasia /Assisted Suicide can be legalized only by Legislation.

In *Naresh Marotrao Sakhre v. Union of India*[13], Lodha J observed that Euthanasia and Suicide are different. "Suicide by its very nature is an act of self- killing or self-destruction, an act of terminating one's own life and without the aid or assistance of any other human Agency. Euthanasia or Mercy killing on the other hand means and implies the Intervention of other Human Agency to end the Life. Mercy killing thus is not suicide and Attempt at Mercy killing is not covered by the provisions of Section 309.

Even the Indian Medical Council Act, 1956 discusses on the above Issue. Section 20A read with section 33(m) of the Act mentions as to the role of the Medical Council of India in prescribing the standards of Professional Conduct and Etiquette and a Code of Ethics for Medical Practitioners[14]. Exercising these powers, the Medical Council of India has amended the Code of Medical Ethics for Medical Practitioners. Under the said Amendment, Act of Euthanasia has been classified as unethical except in cases where the Life Support system is used only to continue the Cardio-Pulmonary actions of the body. In such cases, subject to the certification by the team of doctors, life support system may be removed.

It is argued from the Criminal Law perspective that Since in cases of Euthanasia there is an Intention on the part of the Doctor to kill the Patient, such cases would clearly fall under clause first of Section 300 of the Indian Penal Code, 1860. However, as in such cases there is the valid consent of the deceased Exception 5 to the said Section would be attracted and the doctor or mercy killer would be punishable under Section 304 for culpable homicide not amounting to murder. But only cases of voluntary euthanasia (where the

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[13] 1995 Cri LJ 96 (Bom).

[14] Indian Medical Council (Professional Conduct, Etiquette and Ethics) (Amendment) Regulations, 2016.

patient consents to death) would attract Exception 5 to Section 300. Cases of Non-voluntary and Involuntary Euthanasia would be struck by proviso one to Section 92 of the Indian Penal Code and thus be rendered Illegal. In India, Right to Suicide is not an available "right" in India and it is punishable under the Indian Penal Code, 1860. Provision of punishing suicide is contained in sections 305 (Abetment of suicide of child or insane person), 306 (Abetment of suicide) and 309 (Attempt to commit suicide) of the said Code. Section 309, IPC has been brought under the scanner regarding its constitutionality in most of the Judicial Pronouncements.

In the U.K the Bland Case[15] caused a great deal of hue and cry especially in the Media. The House of Lords allowed for the withdrawal of feeding tubes although the patient was neither brain-dead nor was he on artificial respirators. He was diagnosed as being in a Persistent Vegetative State and the Doctors affirmed no chance of recovery. However, we are yet to see the Judicial Pronouncements by our Courts in India.

The Aruna Shanbaug's judgement[16] is a historic case which brought to limelight the Legal aspects related to End-of -life care. It is through this Judgement that Passive Euthanasia came to be legalized in India. Aruna Shanbaug, a nurse working in the King Edward memorial hospital was thrown into a Permanently vegetative state because of Sexual Assault by one of the staffs of the same Hospital. She ended up surviving in that state for 42 years, only to die naturally. The Supreme Court headed by a division bench established a committee for Medical Examination of the patient for ascertaining the issue. Lastly the Court dismissed the petition filed on behalf of Shanbaug and observed that Passive Euthanasia is permissible under supervision of Law in exceptional circumstances, but Active Euthanasia is not permitted under the Law. The Supreme court also directed that the guidelines given by the court will stand hold until the Parliament makes a specific Law in this regard.

In another Landmark Judgement, *Common cause v. Union of India*[17], a Writ Petition was filed by a Society, Common Cause praying for declaring 'Right to Die with Dignity' as a Fundamental Right within the fold of 'Right to live with Dignity' guaranteed under Article 21 of the Constitution. The

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[15] John Keown, "Euthanasia ethics and public policy, Cambridge University press, 2002 pp.12-14.

[16] *Aruna Ramchandra Shanbaug v. Union of India, (2011) 4 SCC 454*

[17] (2014) 5 SCC 338 along with the judgement on March 9,2018.

Society also prayed that the Government shall adopt suitable procedures to ensure that the persons with deteriorated health or terminally ill should be able to execute a document 'My Living will & attorney authorisation' which can be presented to the hospital for appropriate action in case of the patient being admitted to the hospital with serious illness. The Constitution Bench transferred the burden on the Parliament to come up with a Draft Law on End-of-Life care. As a response to this, the Health Ministry proposed the Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2016. This was a Model Law proposed under the 241st report of the Law Commission of India in 2012.[18]Unfortunately, the present form of the Bill fails to address some of the Pressing concerns that surround End of life care in India. However, through this Judgment, the Court laid down detailed procedures for both making Advance Medical Directives as well as for Foregoing Life Saving Treatment, with a process that involves the jurisdictional Judicial Magistrate First Class, the District Court and the District Collector. This process is so impractical that the judgment is practically inoperative if read in both letter and spirit.

There are several Guidelines[19] issued by National Medical Societies (Intensivists, Palliative care Practitioners) as also by AIIMS, Delhi and Manipal Hospital systems on Foregoing Life Support Treatment: The first of these guidelines were issued in 2014, jointly by the Indian Association of Palliative Care and the Indian Society of Critical Care Medicine. This provides a flow chart for this decision-making beginning with a confirmed consensus in the Treating Team and the Surrogates. The most recent is the AIIMS document which is available on their website. It discusses due process for recognizing Medical Futility, Mandatory Institution of Palliative care if futility is confirmed, Documentation of Family/Surrogate Consensus, withholding of further Escalation of LST, allowing Natural Death and Audit by an Institutional End Of Life Care Advisory Committee. Interestingly neither the ISCCM-IAPC nor the AIIMS guidelines have any mention of Advance Medical Directives.

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[18] "Passive Euthanasia-A relook", Report No. 241, Law Commission of India, Government of India, August 2012.

[19] Myatra SN, Salins N, Iyer S, et al., " End-of-life care policy: An integrated care plan for the dying: A Joint Position Statement of the Indian Society of Critical Care Medicine (ISCCM) and the Indian Association of Palliative Care (IAPC)", Indian J Crit Care Med. 2014 ,Sep;18(9):615-35.

The most recent document is on Do-Not-Attempt-Resuscitation guidelines from ICMR.[20] If the end is near, it is good medical practice to inform the patient (if possible) and/or the surrogates about this possibility and the likely outcome of the procedure of cardio-pulmonary resuscitation in that patient.

LAW COMMISSION OF INDIA RECOMMENDATIONS AT A GLANCE

The Law Commission in its 42nd Report[21] recommended the repeal of Section 309 of India Penal Code. The Indian Penal Code (Amendment) Bill, 1978, as passed by the Rajya Sabha, accordingly provided for Omission of Section 309. Unfortunately, before it could be passed by the Lok Sabha, the Lok Sabha was dissolved, and the Bill lapsed.

The Law Commission in its 210 Report[22] submitted that Attempt to Suicide may be regarded more as a manifestation of a diseased condition of mind deserving treatment and care rather than an offence to be visited with Punishment. The Commission has resolved to recommend to the Government to initiate steps for repeal of the anachronistic law contained in section 309, IPC, which would relieve the distressed of his suffering.

The 196 Report of the Law Commission on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)' [23] is undertaken by the Law Commission of India. This Report is relating to the Law applicable to Terminally ill Patients (including patients in persistent vegetative state) who desire to die a natural death without going through modern Life Support Measures like Artificial Ventilation and Artificial supply of food. The Commission did suggest Legalisation of passive euthanasia in a strict and controlled mechanism.

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[20] Mathur R, "ICMR Consensus Guidelines on 'Do Not Attempt Resuscitation'", Indian J Med Res. 2020 Apr;151(4):303-310.

[21] "Indian Penal Code, Forty second Report, Law Commission of India, 1971.

[22] "Humanization and Decriminalization of Attempt to Suicide", Report No. 210, October 2008, Law Commission of India, Government of India.

[23] "Medical Treatment to Termin ally Ill Patients (Protection of Patients and Medical Practitioners), 196th Report, March 2006, Law Commission of India, Government of India.

MEDICAL TREATMENT OF TERMINALLY ILL PATIENTS (PROTECTION OF PATIENTS AND MEDICAL PRACTITIONERS) BILL, 2016- A CRITICAL ANALYSIS[24]

The Draft Bill in its present form suffers from basic lacunae such as

- It does not define 'Death' or resolve the inconsistency between the different Laws in this context such as the dichotomy of the Definition in the Indian Penal Code and the Registration of Births and Death Act. It only attempts to lay down the process by which the Medical Practitioner can withhold or withdraw life support for 'terminally ill Patients'.
- Clause 2 defines 'Advance Medical Directive' and 'Medical Power-of-Attorney' respectively. However, Clause 11 of the Bill states that such Instruments 'shall be void and of no effect and shall not be binding on any Medical Practitioner.' By declaring Advance Directives null and void, the Bill if in case gets the power of a Legislation would be against the right to Die with Dignity that has been recognised as a part of the right to life in *Aruna Shanbaug* and *Gian Kaur*.' As recognised by the Common cause judgement, The right to refuse life-saving treatment is constitutionally guaranteed, and advance medical directives are an extension of this right. The Bill must thus create a Legal Framework for the Operation of these Directives.
- In Clause 6[25], even though Medical Treatment has been withheld or withdrawn by the Medical Practitioner, he or she is not debarred from administering Palliative care. Therefore, it is desirable that the Express Immunity provided to Medical Practitioners under Clause 8 of the Bill for withholding or withdrawing medical treatment is also to be extended to the administration of Palliative care. Palliative care is the minimum care that ought to be given to patients, even if their treatment has been withheld or withdrawn, and an essential aspect of the Right to Die with Dignity. Therefore, the scope of protection afforded in Clause 8 of the Bill ought to be expanded to allow Medical Practitioners to administer Palliative care.

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[24] Dr David Staunton, Dhvani Mehta et al., Analysis of the Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2016, Vidhi Centre for Legal Policy, 2017.

[25] David Staunton, Dhvani Mehta et al., Analysis of the Medical treatment of terminally-ill patients (protection of patients and medical Practioner's bill,2016, Vidhi centre for Legal Policy, January 2017, Available at https://vidhilegalpolicy.in/wp-content/uploads/2019/05/AnalysisoftheMTTPBill_Vidhi.pdf .

- The Regulatory body should frame Standard Treatment Guidelines for the Administration of Palliative care.
- The Bill creates an irrational distinction between patients who are competent at the time at which a decision has to be made about refusing or withdrawing life-sustaining treatment, and those who are incompetent at such time, even though they might have expressed their decision earlier in the form of an Advance Directive. Clause 3 of the Bill states that the decision of the former category of patients to refuse such treatment is binding on their medical practitioners. For the second category of patients, Clause 9 of the Bill requires Medical Practitioners or relatives to move the High Court for permission to withdraw Treatment.

The Bill of 2016 is yet to see the light of the day as it is yet to be passed as a Legislation. The Bill needs a total relook to bring it in accordance with the judgement of the Supreme Court in *Common Cause v. Union of India.*

INTERNATIONAL TREND ON EUTHANASIA

The Dutch Parliament passed the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002.This Legislation codified a twenty-year-old convention of not prosecuting doctors who were involved in Physician Assisted Suicide in very specific cases, under very specific circumstances. However, it is required that the physician who helps his patient to die must comply with due care requirements set forth in the Act and the Criminal Code. The Legislation does make an explicit recognition of the validity of a written Declaration of Will regarding Euthanasia.

The Northern Territory of Australia became the first State in that country to Legalize Physician Assisted Suicide by passing the Rights of the Terminally Ill Act, 1996. It was held to be legal in the case of *Wake v. Northern Territory of Australia*[26] by the Supreme Court of Northern Territory of Australia. But later a subsequent Legislation that was the Euthanasia Laws Act, 1997 made it again illegal by repealing the Northern Territory legislation.

The Belgium Parliament legalized Physician Assisted Suicide in 2002.Although Euthanasia and Assisted Suicide are illegal in Switzerland, Assisted Suicide is penalised only if it is carried out "from selfish motives". In United States of America, Oregon state passed the Orgon's Death with

[26] (1996) 109 NTR 1

Dignity Act in 1994 which legalises physician assisted dying with certain restrictions.

27 In England, the House of Lords in *Airedale NHS Trust* v. *Bland* permitted withdrawal of life sustaining treatment in case of patients in a persistent vegetative state.

CONCLUSION

Presently the Constitutional Basis for Healthcare Autonomy for Indian citizens is in place. However, the situation is confused and replete with potential for misinterpretation. A comprehensive legislation on deciding the Right to Die aspect and the whole field of End-of-Life care would be ideal. It is time for the Government to create public awareness, apart from a well-planned legislation, effective implementation, and strict adherence. There is also a need for amending the relevant provisions of Indian Penal code. Advances in palliative care could be an option to patients whose quality of life is negligible.

27 1993(1) All ER 821 (HL)

A RE-VIEW OF COPYRIGHT OWNERSHIP

-Arathi Ashok*

INTRODUCTION

Art and literature are part of every civilization and essential for human beings to grow and survive as a species. Realizing its significance, with the evolution of society and particularly the legal structure, legal instruments for the protection of creative works started to evolve. One of such major instruments is copyright. What is interesting to note is that the evolution of copyright legal regime is not parallel to the growth of art and literature but with the growth of technology. The system of copyright as we see today was warranted with the invention of printing press. Thus, we can see that the need to legally protect art and literature evolved only with the possibility of commercial large-scale exploitation of the work which also brought in large scale unauthorized use of the work. Thus, we can conclusively assume that copyright is a commercial instrument. Copyright protection is generally afforded for the creation of an original work.[1] Under copyright regime the notion 'originality' means that the work from have originated from the author and must possess a modicum of creativity and not be copied from anywhere.[2]

Through this paper the author attempts to analyze on whom this right of copyright is vested, how is copyright ownership acquired and how can this right be transferred particularly in the context of changes in technology.

OWNERSHIP OF COPYRIGHT

In common parlance ownership is the right of a person to control the usage of the objects that he owns. There are multiple facets in understanding what ownership is. Some of those facets include exclusivity, indefinite use, unrestricted disposition and unlimited duration. It has to be noted that this proposition of ownership evolved in the context of physical tangible property. Hence when the same is applied to intangible property like intellectual property all the facets of ownership does not manifest. For example, in the case of copyright the ownership does not exist for unlimited duration. On the

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1 Berne Convention for the Protection of Literary and Artistic Work (herein after Berne Convention), 1886,
Article 2; Copyright Act, 1957, No. 14, Act of Parliament, 1957, §.13(1).

2 *Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991).*

contrary, for most copyright works in India the term of copyright protection is only sixty years from the next calendar year after the death of the author.[3]

Ownership of copyright brings with itself all privileges which can be exercised under the copyright regime. The owner is conferred with the copyright which comprises of the right to reproduce the work,[4]the right to communicate the work to the public,[5] the right to distribute the work,[6] the right to translate the work,[7] the right to adapt the work into other formats,[8] and in certain cases the right to give the work on commercial rental.[9] The owner is vested with the right to assign[10] and licence the copyright.[11] On registration of any copyright, the name of the owner shall be mandatorily entered into the Register of Copyright.[12] An act is understood as infringement of copyright if it the exclusive right conferred on the owner is violated.[13] The owner alone has the right to take actions to stop importation of infringing copies[14]and sue for civil remedies.[15]Hence acquisition of ownership of copyrighted work is of much significance.

ACQUIRING OWNERSHIP

There are majorly three ways of acquiring ownership over a copyrighted work. They are:

- **Initial Ownership**

The first way of acquiring ownership is by way of creating the work whereby the initial ownership is conferred on the author.[16]Author in common English means the writer of a work or the originator or creator of something.[17] Though the law was enacted to protect authorial interest, it has not elaborated the concept of 'author'. In spite of this, the Act has defined the term author.

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3 Copyright Act, 1957, No. 14, Act of Parliament, 1957, §.22.
4 Sections 14(a)(i), (c)(i), (d)(i), (e)(i), Copyright Act 1957
5 Sections 14(a)(iii), (c)(ii), (d)(iii), (e)(iii), Copyright Act 1957
6 Sections 14(a)(ii), (c)(iii), (d)(ii), (e)(ii), Copyright Act 1957
7 Sections 14(a)(v), Copyright Act 1957
8 Sections 14(a)(vi), Copyright Act 1957
9 Sections 14(b)(ii), (d)(ii), (e)(ii), Copyright Act 1957
10 Section 18, Copyright Act 1957
11 Section 30, Copyright Act 1957
12 Section 44, Copyright Acy 1957
13 Section 51, Copyright Act 1957
14 Section 53, Copyright Act 1957
15 Section 55, Copyright Act 1957
16 Section 17, Copyright Act 1957
17 https://www.merriam-webster.com/dictionary/author

The 1955 Bill defines author in relation to literary or dramatic work as the author of the work itself,[18] thereby giving no clarity as to what it actually means. The same language is available in the 1957 Act too which is carried to this date.[19] In *Rupendra Kashyap v. Jiwan Publishing House*[20] and *Agarwala Publishing House v. Board of Higher Secondary & Intermediate Education & Ors*.[21] the court held that the author is the person who set the question paper, after recognising question paper as a literary work. Here we can see that though the Act has not given any guideline as to who the author is, the judicial interpretation has made it abundantly clear that it is the person who creates the work. In *Academy of General Education v. Smt. B. Malini Mallya*,[22] it was held that the author of the dramatic work is Dr. Karnath who evolved a new distinctive dance by bringing in changes in the traditional form of Yakshagana on all those aspects viz., raga, tala, scenic arrangement and costumes. Here again the notion of creator is attached with the legal notion of author.

The authorship in relation to musical works is conferred on the 'composer.'[23] The law as initially enacted had not clarified who is the 'compose' but via Copyright (Amendment) Act, 1994 this was clarified by introducing definition to the term 'composer' as the person who composes the music.[24] Here again the legal notion of author is akin to that of creator. In relation to artistic works, other than photograph, the authorship is conferred on the artist[25] which is also akin to that of the creator. In all these works we can see that author is necessarily a human person who creates the respective works.

Authorship in relation to photograph was initially vested on the owner of the negative or the devise from which such photo is taken.[26] But when the Act was enacted there was a change in the notion of authorship where it was recognised that the author of the photograph would be the person who takes such photograph.[27] No cogent reason could be traced for the shift in the notion of authorship in relation to photographs but it has brought the notion of

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18 Section 2(c)(i), Copyright Bill 1955
19 Section 2(d)(i), Copyright Act 1957
20 1996 (38) DRJ 81
21 AIR 1967 All 91
22 MIPR 2008 (1) 373
23 Section 2(c)(ii), Copyright Bill 1955; Section 2(d)(ii), Copyright Act 1957
24 Section 2(ffa), Copyright Act 1957
25 Section 2(c)(iii), Copyright Bill 1955; Section 2(d)(iii), Copyright Act 1957
26 Section 2(c)(iv), Copyright Bill 1955
27 Section 2(d)(iv), Copyright Act 1957

authorship for photographs in line with that of authorship in other artistic works.

The authorship in relation to cinematograph film and records are vested on the owner of the film at the time of its completion[28] and the owner of the original plate from which the record is made[29] respectively. In both these situations, authorship is vested with the person who owns the mechanical device and not on anyone who does some kind of creative contribution. This also goes to show that the law does not envisage any kind of creativity from the creator of these types of works. This raises the question as to what is the yardstick to be recognised as author for these categories of works.

Vide the Copyright (Amendment) Act of 1994 the wordings in relation to authorship of cinematograph film and sound recording has been altered and conferred on 'producer'. This approach cannot be understood as in derogation with India's international obligation under Berne Convention as it provides that every country has the freedom to determine via legislation as to who shall be treated as the author and initial owner of a cinematograph films within their territory.[30]The term producer has been defined as a person who takes the initiative and responsibility for making the work.[31] To examine whether there has been a change in the notion of authorship, it is pertinent to undertint the meaning of 'person who takes initiative and responsibility.' In *Ramesh Sippy v. Shaan Ranjeet Uttam Singh*[32] the contention of the plaintiff was that he was the director of the film and very closely involved at every stage of the film, the finalizing of the script, the screenplay, finalizing the star cast, the location for shoot, getting the film shot at location, dubbing and editing after the shooting was over[33] and hence needs to be recognised as the author of the film. Rejecting the argument, the court held that

"An owner is therefore a person who has spent towards the production of the film and who has not merely arranged for the funds but in fact has taken the risk of commercial failure, i.e. one who will lose money if the film flops and who will reap the fruit of commercial success if the film is a hit."[34]

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28 Section 2(c)(v), Copyright Bill 1955; Section 2(d)(v), Copyright Act 1957
29 Section 2(c)(vi), Copyright Bill 1955; Section 2(d)(vi), Copyright Act 1957
30 Berne Convention, 1886, Art. 14^{bis}.
31 Section 2(uu), Copyright Act 1957
32 MIPR 2014 (1) 32
33 MIPR 2014 (1) 32 at para. 41
34 MIPR 2014 (1) 32 at para. 42

In other words, 'taking initiative and responsibility' is viewed in terms of financial responsibility and risk that is tied to the success of the film and authorship of the film has nothing to do with the creative contribution that has gone into the making of the film. Moreover, there is no legal requirement that the authorship of films needs to be vested on a natural human person as the entity that takes the initiative and responsibility can very well be a non-human legal entity.

To remedy this situation the Copyright (Amendment) Bill 2010 introduced a change to the definition of 'author' to include principal director along with producer as the author of cinematograph film. This introduction was taking into account the flexibility the Berne Convention norm[35] which permits the countries to determine who can be the author of cinematograph films. The proposed amendment was vehemently opposed by the Film and Television Producers Guild of India, Indian Motion Picture Producers Association, South Indian Film Chamber of Commerce and Indian Broadcasting Foundation. It is interesting to note that there was no organisation or individual to support the claims of directors. It was not the least surprising that the amendment was dropped and never made it into enforceable law. Thus, the authorship of films remains with producers itself.

With the statutory regime remaining the same, it would not be fair to expect that the judicial approach would change in any manner. The decision in *Ramesh Sippy v. Shaan Ranjeet Uttam Singh*[36] was reiterated by the judiciary in *Kabir Singh Chowdhry v. Sapna Moti Bhavnani*[37] when the court held that

> "… contribution as a camera person, as a creative director, as an editor are one deserving of special thanks. (But this) does not in and of itself translate into him being one who could be said to have taken the initiative and responsibility for making the work…… taking the initiative in conceptualising the work and bringing it into existence, and also accompanied by the risk-taking element of responsibility, then and only then does one become a co- producer entitled to protection under the Copyright Act for the purposes of a cinema film."

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35 Art. 14 Berne Convention1886

36 MIPR 2014 (1) 32

37 Interim Application (L) No. 5420 of 2020 in Commercial IP Suit (L) No. 5415 of 2020,February 10-11, 2021 para 78

In short, no creativity is required from the person recognized as 'producer' and we see a total de-linking with the notion of romantic author with that of the legal notion of author of cinematograph films. The same seems to be the understanding in relation to sound recordings too.

The 1994 Amendment Act also introduced a new works and its author. The new authorship recognised was in relation to literary, dramatic, musical or artistic work which is computer-generated and states that it will be vested on the person who causes the work to be created.[38] It is interesting to note that there are no judicial pronouncements as to who would constitute 'the person who causes the work to be created.' This 'person who causes the work to be created' can be understood in multiple ways. Firstly, it could be the person who puts in the financial investment and entrepreneurship for the creation of the work or secondly, it could be the creative person who designs as to how the computer-generated work may be structure or thirdly, it could be the person who provides the technical assistance in the creation of the new work and fourthly, it could be the person who created the software which generates the new work. But as in the case of cinematograph films and sound recordings, computer generated works also require substantial investments and in all probabilities the interpretation of the producer might be followed here too. If "person who causes the work to be created" is equated with "initiative and responsibility" financial responsibility will be given more weightage than creativity.This provision is of much significance when we look into the new technologies that are developing, particularly artificial intelligence (AI) and works starts to be created by these software.

Though the concept of authorship has not been legislatively elaborated, it has incorporated the idea of joint authorship. Joint authorship is recognized when works of two or more authors is fused as one in such a manner when the work of one person cannot be distinguished from the work of the other.[39]Though not directly, the concept of joint authorship has been recognized under the Berne Convention too. It provides that the term of works created through joint authorship shall be determined on the basis of the last surviving author.[40]The concept was subject to judicial clarification in *Najma Heptulla v. Orient Longman Ltd. and Ors*.[41] where agreement highlighted that Maulana Azad had dictated and given notes to Prof. Kabir who composed the

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38 Section 2 (d)(vi), Copyright Act 1957
39 Section 2(z), Copyright Act 1957
40 Art 7bis, Berne Convention, 1886
41 AIR 1989 Delhi 63

same in the form of a book which was reviewed and altered by Maulana Azad who later approved for its publication. The question before the court was whether it was one of sole authorship or joint authorship between Maulana Azad and Prof. Kabir. The court recognised joint authorship and held that

> "It is difficult to comprehend, or to accept, that when two people agree to produce a work where one provides the material, on his own, and the other expresses the same in a language which is presentable to the public then the entire credit for such an undertaking or literary work should go to the person who has transcribed the thoughts of another. To me it appears that if there is intellectual contribution by two or more persons pursuant to a reconverted joint design, to the composition of a literary work then those persons have to be regarded as joint authors."[42]

The same logic was extrapolated to the notion of joint authorship in the case of films in *Kabir Singh Chowdhry v. Sapna Moti Bhavnani*[43] where it was held that when a film is produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors, it amounts to joint authorship in films.The statute has provided that in cases of joint authorship all conditions regarding conferring copyright have to be satisfied by all authors of the work.[44] Applying this principle along with that of 'first author as the first owner' would give rise to joint ownership in situations like these where each owner would have absolute and collective right over the work.

- **Ownership *Via* Automatic Transfer**

Apart from above stated method, the law envisages a second way of acquisition of copyright ownership comprising of situations where the initial ownership is vested with persons or entities other than the author of such work. These situations can be broadly classified into three and they are:

1. **Works created in course of employment**

   There are two instances which can be covered under this category. The first one deals exclusively with work created in newspaper, magazine or similar periodical.[45] It provides that if any literary, dramatic or artistic work is created by any person while in employment under a contract of

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42 AIR 1989 Delhi 63, para 27

43 Interim Application (L) No. 5420 of 2020 in Commercial IP Suit (L) No. 5415 of 2020, February 10-11, 2021

44 Section 13(2), Copyright Act, 1957

45 Section 17(a), Copyright Act, 1957.

service or is an apprentice, then the initial ownership of copyright of such literary, dramatic or artistic work belongs to the proprietor of the newspaper, magazine or the similar periodical as the case may be. The law also provides that the actual the author – creator can retain his copyright by entering into an agreement with the proprietor of the newspaper, magazine or periodical. The scope of this provision was put to test in *V.T Thomas v. Malayala Manorama* [46] where the respondent wanted to restrict the appellant, prior employee, from using certain cartoon characters on the ground that the ownershipof those characters belongs to them. The question considered by the court was if the cartoon is developed during the course of employment whether the author can use it after his termination from such employment. The court came to the conclusion that the appellant was free to use the characters as they were created prior to his employment with the respondent. The second instance of 'work created in the course of employment' is all encompassing. It applies to any categories of work created in course of employment under a contract of service and the ownership of such works is initially vested with the employer.[47] Here too the scenario can be changed with the help of a contact.

What is interesting to note is that both scenarios can be invoked only when a contact of service is in effect while if the contract involved is one 'for service' the ownership of the work created would initially remain with the author of the work itself. One of the fundamental tests applied to find out if the nature of the contract is one 'of service' or 'for service' is this: "'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' Ifthe answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases."[48]A different test was considered and laid down by the court in *Zee Entertainment Enterprises Ltd v. Gajendra Singh and ors.*[49]Where the question before the court was whether the defendant was in contract of service or contract for service. After going through the employment agreement of

[46] *V.T Thomas v. Malayala ManoramaAIR 1989 Ker 49.*
[47]Section 17(c), Copyright Act, 1957
[48]*Market Investigations Ltd. v. Minister ofSocial Security [1969] 2 Q.B. 173*
[49]*Zee Entertainment Enterprises Ltd v. Gajendra Singh and ors. (2008) 53 PTC(36)(Bom).*

1994 the Court held that the contract was one 'of service' taking into consideration factors like signing of the voucher by the defendants on behalf of the plaintiff to make payments, TDS certificate indicates him as contractor, letters send to defendants by the plaintiff seeking his career progress, gross salary package revised, etc. and consequently ownership of the copyright automatically vested with the employer.

In other words, where a man employs another to do work for him under his control, so that he can direct the time when the work shall be done, the means to be adopted to bring about the end, and the method in which the work shall be arrived on, then the contract is contract of service and consequently ownership of copyright vest in the employer. If, on the other hand, a man is employed to do certain work and has the freedom to determine how such work has to be done including the structure and pattern to be followed in such situations we can safely concludeit is a contract for service and consequently the ownership of copyright vests in author – employee itself and not the employer. This 'Control test' is a useful way of determining whether a person is an employee where the parties are in master -servant relationship.[50]But this test is not of much guidance in relation to those professions when the employee is vested with substantialautonomy as long as the result is achieved. In determining whether someone is an employee the Court looks at nature of relationship and what it is that a person does in day-to-day activities. Also factors like their responsibility, provide their own equipment, hire their own helpers, take financial risk and have opportunity of profiting from the task they perform along with financial arrangement between the parties etc.The modern approach has been to abandon the search for a single test, and instead to take a multiple or ' pragmatic ' approach, weighing upon all the factors for and against a contract of service and determining on which side the scales eventually settle.[51] Factors which are usually of importance are as follows - the power to select and dismiss, the direct payment of some form of remuneration, deduction of payment and national insurance contributions, the organization of the workplace, the supply of tools and materials and the economic realities (in particular who bears the risk of loss and has the chance of profit and whether the employee could be said to be 'in business on his own

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[50] N.S. Gopalakrishnan & T.G. Agitha, Principles Of Intellectual Property Law, (Eastern Book Company,2009)

[51] *Workmen of Nilgiris Co-operatives Marketing Society v. State of Tamil Nadu, 2004 (2) L.L.N. 68.*

account').[52]A further development in the recent case law (particularly concerning atypical employments) has been the idea of 'mutuality of obligations' as a possible factor, i.e. whether the course of dealings between the parties demonstrates sufficient such mutuality for there to be an overall employment relationship.[53]

2. Certain works created for hire

The second instance where ownership of a work is automatically transferred from the author is under the principle of work for hire or commissioned works. Unlike most other countries[54] where this principle is recognized, it must be noted that the work for hire principle under the Indian law applies only to certain types of works.[55] Under the Indian law, the ownership of copyright automatically gets transferred to the person who has engaged another person to take photographs or make a painting, portrait, engraving or cinematograph film for a valuable consideration. The scope of this provision was the pivotal consideration in the case of *IPRS v. Eastern India Motion Pictures*[56] where the question before the court was whether the producer of a cinematography film can defeat the rights of composer of music or lyrist as the initial owner of the work. The court here relied on sections 17(b) & (c),where there is automatic transfer of all rights of the authors of literary and musical works to the producer who has paid valuable consideration for its creation and automatic transfer applies when a work is created under a contract of employment respectively. But this does not seem to be the right position of the law for multiple reasons. Firstly, the statutory language of section 17 itself makes it clear that there can be no automatic transfer of ownership in relation to literary and musical works, it only applies to certain kinds of artistic works and cinematograph film as a work. In other words, even if a person pays valuable consideration for the creation of literary or musical work the ownership over copyright of the works created will initially rest with the author of such work itself. Secondly, the Copyright Act specifically states that the copyright in a cinematographic film or a sound recording shall not affect the separate copyright in any work in respect of it or a substantial

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52 *Workmen of Nilgiris Co-operatives Marketing Society v. State of Tamil Nadu, 2004 (2) L.L.N. 68*.

53 *Workmen of Nilgiris Co-operatives Marketing Society v. State of Tamil Nadu, 2004 (2) L.L.N. 68*.

54 § 101, 17 U.S.C.Copyright Act, 1976

55 Section 17(b), Copyright Act

56 *IPRS v. Eastern India Motion Pictures(1977) 2 SCC 820*.

part of which, the film or the sound recording is made.[57] Therefore, the producer of the cinematograph film cannot be understood as the initial owner of literary and musical works incorporated in the film unless some other proviso under section 17 can be attracted. It is surprising to note that while coming to the conclusion that producer will be the initial owner of the literary and musical works encompassed in the film the court did not consider section 13 at all.The consequence created by this decision was that the producer startedto be considered as the sole entity that can determine the enjoyment of the film and consequently all economic benefits from the work accrues on the producer to the disadvantage of the composer and lyrist. The producer also got the right to exploit the literary or musical work incorporated in the cinematographic film through other channels of revenue, for example revenue generated from ring tones.To some extent this injustice has been corrected via the 2012 amendment of the Copyright Act where an explanation was introduced to section 17 whereby it was clarified that automatic transfer of ownership cannot be used to defeat the autonomous rights guaranteed to author – creators of literary, dramatic, musical and artistic works recognized under section 13, thereby overcoming the anomaly created by the Supreme Court.

3. **Works created for or on behalf of certain institutions**

The third series of scenarios where the ownership of the work is automatically taken off the author – creator is when such work has been created for or under the direction or control of any of the following agencies:

- Government and falling under the category of government work;[58]
- Public undertaking;[59] or
- International organization[60]

When works are being created at the behest of any of these agencies, the law presumes that the ownership of such works shall also belong to these agencies. It is also interesting to note that this presumption of change in ownership equally applies to all categories of works. It must also be noted that the law has retained the possibility of authors entering into contrary agreements with these organizations for the purpose of retaining their initial ownership. In *BM Piros v. State of Kerala*[61] the Government of Kerala, as part of information technology implementation at its various departments,

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57 Section 13(4), Copyright Act 1957
58 Section 17(d), Copyright Act, 1957
59 Section 17(dd), Copyright Act, 1957
60 Section 17(e), Copyright Act, 1957
61 *BM Piros v.State of Kerala,2004 IPLR 26*.

commissioned a software development project which was entrusted to CDIT and they in turn entrusted the work to plaintiff. On completion of the work plaintiff filed a suit claiming to be owner of the computer program. The court came to the conclusion that the provision of section 17(d) would apply and held that the initial ownership of the computer program was with the Government of Kerala.

- **Ownership Via Contractual Transfer**

The third mechanism for acquiring copyright ownership is by transferring the right from an existing owner. This is known as assignment of copyright and brough into effect with help of a contract and on such assignment the assignee becomes the owner of the copyright.[62] It is interesting to note that due to the non-rivalrous nature of copyrighted works, it can be simultaneously enjoyed by multiple persons and consequently it is possible to transfer the different rights attached to the same work to different persons. Hence the ownership of a work can be transferred by divesting all or some of the rights; for the whole term of copyright or for any specified term; throughout the whole of the territory of India or any particular region in relation to existing works of future works.[63]No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorized agent.[64] Such contract shall identify the work on which the rights are being transferred; specify the rights assigned, duration, territorial extent of such assignment,[65] amount of royalty and other considerations payable to the author.[66] If the period of assignment is not stated it shall be deemed to be five years from the date of assignment[67]and if the territorial extend is not prescribed in the contract it is presumed to extend within India.[68]

If the assignee does not exercise such rights within one year from the date of such assignment it shall be deemed to have lapsed unless otherwise specified in the assignment.[69] The assignor can file a complaint to the Commercial Court if the assignee fails to make sufficient exercise of the rights assigned, failure not attributable to the act or omission and then after such enquiry as it deems necessary the Court may revoke the assignment[70], or

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62 Section 18(2), Copyright Act, 1957
63 Section 18(1),Copyright Act, 1957
64 Section 19(1),Copyright Act, 1957
65 Section 19(2),Copyright Act, 1957
66 Section 19(3),Copyright Act, 1957
67 Section 19(5), Copyright Act, 1957
68 Section19(6), Copyright Act, 1957
69 Section19(4), Copyright Act, 1957
70 Section19 A (1),Copyright Act, 1957

order for recovery of any royalty payable.[71]But no order for revocation shall be made within a period of five years from the date of such assignment.[72]

The Act initially provided that transfer of right can be only in relation to technologies known at the time of entering into such agreement.[73]But when scope of the right granted expands due to technological developments and consequently new rights gets created, problem arises as to the ownership of these new rights regarding whether the assignor who assigned already all the existing rights on the work or the assignee shall be the owner of these new rights. This question came before the court in *Raj video vision v. K. Mohanakrishnan*,[74] where the producer of a film 'Pasamalar' assigned all rights to the defendant in 1988. But later the producer entered into agreement with plaintiff and assigned video right of same film in India and Sri Lanka. The defendants sent a notice to the plaintiff alleging infringement of copyright and the plaintiff filed a suit for declaration of the assignment between them and the film producer as valid in law and to restrain the defendant from interfering with their video rights. After going through the agreement, the court held that as per section 14(1)(ii) and Sec.2(d)(v)of copyright at the producer as the original owner and had all rights before entering into agreement with the defendant. At that point of time the technology of video cassettes were not there and consequently the video rights were also absent. Consequently, on the date of assignment in favour of defendant when the producers themselves were not aware of their future rights that would accrue due to scientific advancement, it cannot be said that they have already transferred those rights by way of assignment. Hence the subsequent assignment in favour the plaintiff was held valid. The same view was taken by the Madras high Court in its earlier decision of *Raj Video Vision* v. *M/s. Sun T.V.*[75]

But in *Maganlal Savany v. Rupam Pictures*[76]the plaintiff was given wide rights for exploitation of the film' Chupke Chupke' by the producer and the agreement read that "the assignor here by agrees and undertake that the said picture shall not be exploited or distributed or exhibited commercially, non-commercially or in any other manner what so ever in the contracted territory."At the time when the assignment was executed, the technology of

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71 Section19 A (2), Copyright Act, 1957
72 Section19 A (2), Copyright Act, 1957
73 Section18(1), Copyright Act, 1957
74 *BM Piros v.State of Kerala,AIR 1998 Mad 294.*
75 *Raj Video Vision v. M/s. Sun T.V. (1994) 2 LW 158.*
76 *Maganlal Savany v. Rupam Pictures2000 PTC 556 (Bom).*

satellite transmission was not available. Subsequently the Producer assigned satellite rights to the defendant. The plaintiff wants to restraint the defendants by injunction. Here the Bombay High Court held that the term "exploitation" has to be given a wider meaning and such exploitation of a film takes into account all the scientific and technological device that may be invented in future. Consequently, the right over satellite transmission also belongs to the plaintiff.This view was repeated by the Bombay High Court in *Maganlal Shivani v. Uttam Chitra*.[77]

When a similar matter came before the Delhi High Court in *A.A. Associates v. Prem Goel & Ors*,[78]it took the same view as that of the Bombay High Court. This was repeated again by the Delhi High Court in *M/s International Film Distributors v. Shri Rishi Raj*.[79] This confusion created by conflicting decisions from different jurisdictions with co-equal powers have been put to an end by the 2012 amendment.

The problem of conflicting judgements from various High Courts regarding recognition of new rights as a consequence of upgradation of technology was overcome by introducing amendments to sections 18 and 19. The newly introduced provision clearly states that assignment will be applicable only in relation to medium and mode of exploitation which exist and is in commercial use at the time such assignment is being made.[80] The amendment also provides an exception whereby the parties can specifically state that the assignment shall apply to medium and mode of exploitation which does not exist at that point of time.[81] This has been specifically introduced for the protection of producers from being exploited by other entrepreneurs like broadcasting organizations.

THE WAY FORWARD

In spite of the introduction of these positive aspects towards the protection of legitimate ownership, the Amendment Act has a substantial lacuna. One of the major amendments that was introduced via the 2010 Amendment Bill was to the definition of author in relation to cinematograph films. The Bill introduced 'principal director' along with producer as the author of cinematograph work.[82]The rational for the introduction of this was

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77 *Maganlal Shivani v. Uttam Chitra2008 (Vol. 110) B.L.R. 925.*
78 *A.A. Associates v. Prem Goel & OrsAIR 2002 Delhi 142*.
79 *M/s International Film Distributors v. Shri Rishi RajMIPR 2009 (2) 108*.
80 Section 18(1), Copyright Act 1957
81 Section 18(1), Copyright Act 1957
82 Section 2, Copyright Amendment Bill, 2010

to recognize the creative contribution of the director as the purpose of copyright is to protect creativity. The Standing Committee also noted that joint ownership between producer and principal director is available in most jurisdictions including the United States and the European Union.[83] The recognition of the principal director as the joint owner was also in line with the flexibility afforded to India under the combined reading of the TRIPS Agreement and the Berne Convention. In spite of all this, bending to the strong opposition raised by organizations like Film and Television Producers Guild of India, Indian Motion Picture Producers Association, South Indian Film Chamber of Commerce and Indian Broadcasting Foundation this amendment was dropped. Hence even today the author of cinematograph film is solely its producer. Apart from the stark deviation from the philosophy of copyright, this incident also highlights certain other significant issues. Firstly, though in theory all stakeholder interest gets representation at Parliamentary Standing Committee the experience of the Copyright Amendment Bill shows that there was no representation of 'directors' as a player in the media and entertainment industry. In such situations it becomes the duty of the Sate to warrant that it becomes the voice of the voiceless and ensure adequate protection of their legitimate interest, which unfortunately did not happen with the 2012 Amendment.

Another important take away from the Standing Committee Report is that the entire system understands 'producer' as the person who makes financial investments in the creation of different types of works. This is of much significance today because the ownership of 'computer generated works' is on the 'person who causes the work to be created.' As producer who is defined as the person 'who takes the initiative and responsibility for making the work' is understood as the person who invest money, the same interpretation could creep into the understanding of 'person who causes the work to be created.' This could have significant adverse impact on the creative artist who is using artificial intelligence to create more unique works. Conversely, this would seem more in line with entrepreneur protection and moving further away from the justifications of recognition of copyright as an intellectual property. In other words, these interpretations and understandings of copyright will only enable it to be taken out of the regime of intellectual property protection and into a regime of investment property protection, which is not appreciable for any society that enjoys and finds meaning of life in art and literature.

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[83] 227th Report on the Copyright Amendment Bill, p.11 (July 31, 2021, 3:30 PM) https://prsindia.org/files/bills_acts/bills_parliament/SCR_Copyright_Bill_2010.pdf

LAW RELATING TO TRADITIONAL KNOWLEDGE- AN OVERVIEW

- Lohith. R[*]
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INTRODUCTION

The indigenous people possess an immense knowledge for their environment based on close contact with nature for centuries. Indigenous people and local communities have shared much of their knowledge and reasons with the global community. Forced disclosure of and access to Traditional knowledge and resources without the prior consent of the traditional community amounts to misappropriation of Traditional knowledge. Patenting of Traditional knowledge has to be protected in the interest of indigenous people in particular and the entire mankind in general.

In the national and international level various measures have been taken for the protection of traditional knowledge from misappropriation in the form of bio piracy. This article focus only on the legal measures taken in India and international level for the protection of traditional knowledge. The measures taken so far to safeguard the interest of indigenous people and the knowledge possess by them is not satisfactory. Effective measures have to be taken for the protection of traditional knowledge. The traditional knowledge available within the territory of India should be protected by legislative measures not only for the present generation but also for the benefit of the future generations as they are also equally entitled for the benefits of the traditional knowledge.

TRADITIONAL KNOWLEDGE DIGITAL LIBRARY (TKDL)

The recent measure taken up by India was the creation of TKDL for the purpose of documenting traditional knowledge. The Government of India has set up a traditional knowledge digital library for traditional medicine, plants, and systems which will also lead to traditional knowledge resources classification. It is an initiative taken by India to prevent misappropriation of country's traditional knowledge at International patent offices. Traditional knowledge Resource classification has structured and classified the Indian traditional Medicinal system is approximately of 25000 subgroups for Ayurveda, Unani, Siddha and Yoga.

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With an object of preventing bio piracy Traditional Knowledge Digital Library was initiated by Government of India. According to the information provided in the digital library TKDL is based on 359 books of Indian systems of medicines. TKDL acts as a bridge between these books and international examiners of patent.[1]On the basis of prior art evidences pre grant objections are being filed at various international patent offices. The very first objective of this digital library is to ensure that wrong patents are not granted due to lack of access to the prior art for patent examiners.

The important characteristics of traditional knowledge digital library are:

- It records approximately 35000 ayurvedic medicinal formulations based on traditional knowledge.
- The recorded medicinal formulations include descriptions, methods of preparation and claim and the healing effect of the medicinal formulations.
- Formulations which are available in the Sanskrit text has been translated to many foreign languages. This recorded information is made available in almost all the patent offices in the world which helps in preventing bio piracy.
- TKDL Prevents grant of wrong patents.

BIOLOGICAL DIVERSITY ACT, 2002

India is one of the parties to United Nations Convention on Biological Diversity signed at Rio de Janeiro on 5th June 1992. To give effect to this international convention India enacted Biological Diversity Act 2000. According to section 4 of the Act without the previous approval of the National Biodiversity Authority, no person shall transfer the results of any research relating to any biological resources occurring or obtained from India for monetary consideration. This section confers power on NBA to give approval to transfer any results of any research relating to biodiversity[2]. The act provides for the establishment of National Bio Diversity Authority (NBA) and State Bio Diversity Boards to protect biodiversity and to prevent bio piracy.

India is very rich in biological diversity and associated traditional knowledge. The foremost objective of the above said act is for the conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources. According to section 2(d) benefit claimers means the conservers of

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*[1] Traditional Knowledge Digital Library(TKDL).

[2] See section 4 of the Biological Diversity Act,2002

biological resources, their byproducts, creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application.[3]

NATIONAL BIO DIVERSITY AUTHORITY

The NBA is the main body for granting approval for access to biological resources, for applying for any IPR for IPR'S on any invention based on any research or information on a Biological Resources obtained from India and for transferring the results of any such research. The Authority can oppose granting of IPR on any invention based on Biological Resources obtained in India.

PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT 2001

The Protection of Plant Varieties and Farmers Rights Act was enacted to fulfil India's obligations under Article 27 (3) (b) of the TRIPS agreement.[4] The Act provides for the establishment of the protection of Plant varieties and farmers rights Authority which is also concerned with protection of Traditional Knowledge. The functions of the Authority in connection with Traditional Knowledge are:

1. Documentation, indexing and cataloguing of farmers' varieties.
2. Registration of extant varieties.
3. Maintenance of the National Register of Plant Varieties.
4. Recognizing and rewarding farmers, community of farmers, particularly tribal and rural community engaged in conservation, improvement, preservation of plant genetic resources of economic plants and their wild relatives.

Some of the provisions relevant to Traditional Knowledge are:

1. The Act provides for benefit sharing between provider and recipient of plant genetic source.
2. According to Section 26(1) sharing of benefits accruing to a breeder from a variety developed from indigenously derived plant genetic resources.
3. If the application fails to disclose the contribution of farming community and source of genetic resources, his registration will be cancelled.[5]

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3 Section 2(d) definition of Benefit Claimer

4 Article 27(3)(b) of the TRIPS Agreement

5 See Sec. 26(1) of the Protection of Plant Varieties and Farmers Rights Act 2001

PATENT AMENDMENT ACT 1970

Section 3(p) clearly says that, an invention which in effect, is Traditional Knowledge or which is an aggregation or duplication of known properties of traditionally known component or components is not patentable. This provision aims at protecting the Traditional Knowledge from being patented[6]. The patent applicant has to disclose the source and geographical origin of biological material used in invention, it is compulsory as per the provisions of this Act. Non-disclosure of source and geographical origin of biological material used in invention is a good ground for opposing granting of patent.

GRANTING OF WRONG PATENTS

Patent granted for the inventions which are not novel or not inventive having regard to traditional knowledge already in the public domain amounts to bio piracy. It is the duty of the patent examiner to examine carefully while processing the patent application. Bio piracy is a threat to the protection of traditional knowledge. Many such wrong patents had been successfully challenged by India in international patent offices.

SCHEDULED TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT, 2006

The Indian Parliament enacted this legislation in the year 2006 to recognize and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations. The recognized rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers include the responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance, thereby ensuring livelihood and food security of the forest dwelling Scheduled Tribes and other traditional forest dwellers

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According to Section 3 (1) (k) of this Act the Forest Dwelling Scheduled Tribes and other traditional forest dwellers have the right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity. This is an exclusive right given to Tribal Community who are living in the forest for generations to have access to biodiversity and sustainable use of such biodiversity.[7] Forest

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[6] See section 3(p) of the Patent Amendment Act 2005

[7] Section 3(1)(k) of the Scheduled Tribes and other forest dwellers(Recognition of Forest Rights) Act, 2006.

Rights Act is the first legislation in India that involves the village assembly in the exercise of delineation of forest rights.[8]

NATIONAL BIO-DIVERSITY ACTION PLAN

Under the obligation of Convention on Biological Diversity all state parties are required to prepare biodiversity strategies and action plan and National reports. The Action plan of India has specific provisions for protecting Traditional Knowledge such as developing sui generis system of protection of Traditional Knowledge and related rights and documenting Bio resources and associated knowledge, promoting and strengthening Traditional Knowledge and practices and harmonizing provisions concerning disclosure of source of biological material and associated knowledge used in the inventions under the Patents Act and Bio logical Diversity Act, to ensure sharing of benefits by the communities holding Traditional Knowledge, from such use.

NATIONAL WILDLIFE ACTION PLAN

The important features of the plan are;

- Protection of threatened species of flora such as medicinal plants and orchids.
- Identification of Traditional Knowledge available in various parts of the country.

THE FOREST CONSERVATION ACT, 1980

This Act was enacted by the central government in the year 1980. The provisions of the Act makes it clear that for using the forest land for non-forest purpose prior approval of the central government is mandatory and the act lays down the pre-requisites for diverting forest land for non-forest purposes. One of the objectives of the act is to protect and conserve medicinal plants. This act is more important for the conservation of plants in the forest area which are having medicinal value.

INTERNATIONAL EFFORTS ON TRADITIONAL KNOWLEDGE: UN CONVENTION ON BIOLOGICAL DIVERSITY

United Nations Convention on Biological Diversity was held at Rio de Janeiro. It is an international agreement adopted at the Earth Summit in Rio de Janeiro, in 1992. Article 1 reveals the objectives of the convention, they are:

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[8] Siddiqui, S. and Chohan, S. India Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. Available at http://www.cisdl.org/aichilex/Target14-India2006

1. Conservation of Biological Diversity
2. Sustainable use of its components.
3. Fair and equitable benefit sharing arising from the utilization of genetic resources.

According to Article 6 of the Convention each state party according to its capabilities has to develop national strategies, plans or programs for the conservation and sustainable use of biological diversity. Under Article 8 (j) of the Convention Parties are required to respect and maintain knowledge held by indigenous communities. Article 10 deal with sustainable use of components of biological diversity. Under this article each contracting party is obligated to adopt measures with regard to use of biological resources to minimize or to avoid adverse impact on biological diversity.[9]

CBD recognizes Traditional Knowledge as a crucial 'technology' for effective practices of conservation and sustainable use of biodiversity[10] with the procedural requirements established[11] for access to genetic resources including access to be based on prior informed consent and mutually agreed terms. The convention on Biological Diversity and 2010 Nayogya protocol on access to Genetic resources and the Fair and Equitable benefit sharing arising from their utilization establishes the leading international regime for protection of Traditional Knowledge and recognition of the rights of the knowledge holders.

TRIPS AGREEMENT

TRIPS is the most important international treaty on IPR. There is no direct provision included in the treaty for the purpose of protecting the Traditional Knowledge. According to the provisions of the treaty for granting of patent one of the pre-requisites are:

1. Novelty
2. Inventive step
3. Industrial application
4. Written Description or Deposit of the Invention

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9 Article 8(j) of United Nations Convention on Biological Diversity.

10 Article 16(1), See Lyle Glowka and others, ' A Guide to the convention on Biological Diversity' (1994) IUCN Environmental Policy and Law Paper No 30, 84-85.

11 Article 15(4-5) CBD.

NOVELTY

The invention must be new and hitherto not in existence. The inventor shall demonstrate that his invention is novel, which is not in the public domain or in the public knowledge. Inventions cannot be granted patent if are in the public domain.

INVENTIVE STEP OR NON-OBVIOUSNESS

The invention should involve certain inventive steps, which takes it further from the existing knowledge in the society. Inventions must involve certain creativity and innovation, which adds to the knowledge of the society. An invention which does not demonstrate inventive step remains obvious and does not quality for patent grant.

UTILITY OR INDUSTRIAL APPLICATION

Invention should be capable of industrial application or the invention should be commercially viable. Inventions, which are of just theoretical, interest without any commercial application, are not encouraged in the patent system.

WRITTEN DESCRIPTION OR DEPOSIT OF THE INVENTION

Invention should be capable of being described in written form. The Inventor needs to disclose and describe the invention in written form while applying for patent in order to see that public can use the invention on the basis of disclosure once the invention falls into public domain after the patent monopoly granted to the inventor/owner expires. However, in case of living invention where written description is not possible depositing the invention could satisfy this requirement.

The object of granting patent is to encourage and develop new technology and industry. An inventor may disclose the new invention only if he is rewarded, otherwise he may work it secretly. Acquisition of exclusive rights in an invention stimulates technical progress in four ways:

1. It encourage research and invention.
2. It induces an inventor to disclose his discoveries instead of keeping them as a trade secret.
3. It offers a reward for the expenses of developing inventions to the stage at which they are commercially practicable.

4. It provides an inducement to invest capital in new lines of production which might not appear profitable if many competing producers embarked on them simultaneously.[12]

UNIVERSAL DECLARATION OF HUMAN RIGHTS

UDHR is an international document. It is expressly saved in this document that indigenous people have ownership rights. According to Article 27 everyone has the right to freely participate in the cultural life of the community and to enjoy the arts and to share in scientific advancement and its benefits and everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Indigenous knowledge is generally preserved through indigenous customs and traditions like oral histories, craftsmanship and everyday life practices.

WIPO (WORLD INTELLECTUAL PROPERTY ORGANISATION)

WIPO is the global forum for intellectual property (IP) services, policy, information and cooperation. It is a self-funding agency of the United Nations with 192 member states. WIPO is offering a wide range of demand-driven capacity building assistance activities and services on Traditional Knowledge, Traditional cultural expression and genetic resources[13]. WIPO inter-governmental committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is negotiating international legal instruments on Intellectual Property and Genetic resources, Traditional Knowledge and Traditional cultural expressions. Indigenous peoples and local community portal has been created by WIPO which provides access to information relating to indigenous people and local community.

WIPO intergovernmental committee on intellectual property and genetic resources, Traditional knowledge and folklore was established in the year 2000. It is a forum where Wipo member states discuss the intellectual property issues that arise in the context of access to genetic resources and benefit sharing as well as protection of traditional knowledge and traditional cultural expressions. IGC holds formal negotiations with the objective of reaching an agreement on one or more international legal instruments that would ensure the effective protection of Traditional Knowledge and Traditional cultural expressions. Such an instrument or instruments could range from a recommendation to WIPO members to a formal treaty that would bind countries choosing to ratify it.

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[12] P. Narayanan, Intellectual Property Law, Third Edition, Eastern Law House.

[13] World Intellectual Property Organization.

NAYOGYA PROTOCOL

Article 1 says the objective of Nayogya Protocol is the fair and equitable sharing of benefits arising from the utilization of genetic resources and including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking in to account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components[14].

Article 7 deal with access to Traditional Knowledge associated with genetic resources. This article says in accordance with domestic law, each party shall take appropriate measures to make sure that Traditional Knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established[15].

MEMORANDUM OF UNDERSTANDING BETWEEN INDIA AND SWITZERLAND

This MOU was signed between Ministry of Commerce and Industry of India and The Federal Department of Economic Affairs of Switzerland on Intellectual Property. Article 1 of this MOU says that the parties should establish a joint committee to develop a dialogue on issues of intellectual property that will encompass, Exchange of views, information and experiences regarding the protection of intellectual property at the national level and exchange of experience and dialogue on cooperation in the area of protection of Traditional Knowledge.[16]Article 3 says the joint committee should meet once in a year in India or Switzerland alternatively. MOU contains 5 articles and it was signed on 7th August 2007 in New Delhi.

QUEST FOR INTERNATIONAL PROTECTION

Municipal law and regional laws that governs the protection of traditional knowledge can be applied only within the territory of the particular country or the countries in which they have enacted, but as far as municipal law and regional laws are concerned both are limited in terms of application of Traditional Knowledge laws because they are restricted to their boundaries. To protect the Traditional Knowledge beyond national level and regional level

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14 See Article 1 of the Nagoya protocol.
15 See Article 7 of the Nagoya protocol.
16 MOU between India and Switzerland

there is a need of international IP regime through which unauthorized use of Traditional Knowledge can be prevented. Developing an international IP regime to protect Traditional Knowledge is challenging but can be done through the cooperation of the members of the international community.

The principle of prior informed consent must be included in the international IP regime, according to this principle the holder of Traditional Knowledge and Traditional cultural expressions or genetic resources should be consulted before their knowledge is accessed or used by third parties. The holder of such knowledge should know the consequences of the intended use of such knowledge held by him. There should be equitable benefit sharing between the holder and user of the Traditional Knowledge.[17]

EXAMPLES OF TRADITIONAL KNOWLEDGE

1. Use of tulsi for cough.
2. Use of turmeric to heal wounds.
3. Use of neem as a pesticide and as a cosmetic.
4. Hoodia Cactus eaten by the people of Kalahari Desert in southern Africa to suppress hunger and thirst.
5. Use of Arogyapacha by the Kani tribes to help them during physical exertion in Western Ghats in the state of Kerala.
6. Jeevani is a restorative, immuno enhancing, anti-stress and anti fatigue agent, based on the herbal medicinal plant arogyapaacha used by kani tribes in their traditional medicine.

CONCLUSION

Traditional Knowledge has played and still plays, a vital role in the daily lives of vast majority of people. In many developing countries, traditional medicines provide the only affordable treatment available to the poor people. In developing countries 80 ./. of the population depend on traditional medicines to meet their healthcare needs. Government of India enacted legislations which are not directly connected with traditional knowledge but some of the legislations are concerned in protecting the traditional knowledge. The importance of Traditional Knowledge has to be discussed and debated effectively in legislative forum like the Indian Parliament for the purpose of bringing effective and exclusive piece of legislation to protect the Traditional Knowledge and rights of the indigenous community of this country.

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[17] Dr.marisella ouma, intellectual property consultant, Kenya.

Traditional Knowledge holders are to be suitably rewarded for the sharing of the valuable knowledge possessed by them and which has been passed on from generation to generation so that economically they can move forward which would help in the process of bringing economic equality in the society. The Government has to consider equal benefit sharing system while framing legislation regarding protection of Traditional Knowledge in the interest of indigenous community. Besides, MNC'S should be regulated from exploiting the Traditional Knowledge from the Indigenous people. Traditional Knowledge should be documented for the protection of future generation. Since Traditional Knowledge is more useful for the preservation of our Traditional Culture and to protect healthcare of the people. This Traditional Knowledge should be preserved, protected and documented. Unfortunately the existing Traditional Knowledge with the indigenous people in India has not been adequately protected from the monsters of MNC'S as there is no equitable benefit sharing between the users of Traditional Knowledge and the possessors of Traditional Knowledge.

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5. *Protection Of Plant Varieties and Farmers' Rights Act,2001.*
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7. *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act,2006.*
8. *Universal Declaration of Human Rights.*
9. *Trade Related Aspects Of Intellectual Property Rights.*
10. *World Intellectual Property Organization.*
11. *Nayogya Protocol.*
12. *Memorandum Of Understanding between India and Switzerland.*

RIGHT TO EQUALITY AND SOCIAL JUSTICE: RESERVATION IN PROMOTION

- Dr. Janhavi S S*

INTRODUCTION

Social justice is an inseparable component of human rights it is also essential concomitant of sustainable development of nation. Social justice brings equality in a society of unequals and everyone has equal opportunities in all aspects of life such as social, economic and political. Social justice is different from mere justice. Providing equality will not help to bridge the gap between have and have nots, therefore weak should be provided with some allowance and benefits for equality to be meaning for them.

In India large group of people have been enslaved as perpetual bonded labor and ostracized from the society as untouchable. They levied in inhuman conditions of extreme poverty and have been subjected to torture, rape and other physical abuse. Presently, they have called scheduled casts and Dalits. After independence India has tried to ameliorate their conditions through some positive affirmation and positive discrimination. Reservation is one such affirmative action taken by the government. Reservation is not poverty upliftment programme but it is meant to equal representation for all communities, hence, social justice is now recognized with reservation.

CONCEPTUALIZATION OF SOCIAL JUSTICE

Here the question arises what is social justice? Definition of Social Justice cannot be put in a strait jacket. In fact it is not only difficult, but is hard to define the term social justice[1]. Social justice or distributive justice or compensatory justice is a quest for justice. It is a challenge to equality liberty and justice[2]. Social justice is understood as the right of the weak, aged, destitute, poor, women, children and other under – privileged persons. It gives the necessary adventitious aids to the under-privileged so that, they may have equal opportunity with the more advanced sections of the society in the race of life. In start it is the balancing wheel between "haves "and "have notes".[3] It is not aimed to pull down the advanced sections of the society but only to

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1 Mohammad Shabbir, 'Ambedkar on Law,Constitution and Social Justice', Rawat Publications, 2005, New Deihi, P-305.

2 *Ibid* at 306

3 C.B. Raju., ' Social Justice and The Constitution of India', Serial Publication, 2007, New Delhi, P-2

uplift the backward sections thereof without unduly and unseasonably affecting the interests of the haves. Besides it ensures balanced development between rich and poor, equal opportunity for the under-privileged in public employment and education in various public institutions.[4] Social justice will undoubtedly involve or require the sacrificing of some rights of individual in the interest of society. Justice V.R. Krishna Iyer opines that the concept of social justice thus takes within its sweep the objective of removing all inequality and affording equal opportunities to all citizens in social affairs as well as economic activities.[5]

SOCIAL & ECONOMIC JUSTICE AND INDIAN CONSTITUTION

A careful reading of the Indian Society and polity unravels this fact that deprived and marginalized segments of the Indian population is subjected to institutionalized injustice, Because institutional frameworks and structural adjustment benefit the ruling castes and classes, the poor and the downtrodden are structurally reduced to poverty and inhuman living.[6] Poverty is both the greatest impetus and the greatest impediment to the economic and social progress.

Social justice, as provided in the constitution is so distinctive and expressive that no one is required to search for it. We find the concept of social justice in the preamble itself. It speaks of justice social, economic and political. The sequence shows that without social and economic justice, political justice will be illusory. In the background of cast bound social states in Indian society, one cannot have adequate means of livelihood, in the society. Thus, birth decides the source or means of wealth too. In the absence of both, social and economic justice, the political justice remains a mirage. To achieve the social and economic justice, we have the concept of protective discrimination, as provided under Articles 15, 16 and 355 of Indian Constitution.[7]

In the area of economic justice, we have article 39 (B) and (c), which obliges the state to see that source of wealth should not be allowed to concentrate in a few hands only. The economic system should be so operated that it does not result in the concentration of wealth and means of production to the common detriment. The apex court has upheld the amendment in the constitution i.e., Article 31 (c) which protects economic legislations enacted

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4 *Ibid* at 3
5 *Supra* note1, at 306
6 *Supra* note1, at 198
7 *Supra* note1, at 179

to fulfill the objectives of Article 39 (b) and (c), even if such legislations is violate of Article 14 and 19 of the constitution.[8]

However, the opponents opposed the protective discrimination on the ground that relaxation standards in the name of social justice would prove dangerous to the health of nation. While, theoretically the argument may have its logical merits, in practice it has been proved illogical. The experience shows that people from this disadvantaged group are not only hard working but also are relatively efficient & competent. [9]

RESERVATION

Reservation policy is an instrument of social justice. Reservation policy has remained an integral part of public policy, since it is a means to achieve the social justice.[10] Declaration of rights and equality of opportunity would be rendered ineffective if adequate safeguards for the protection and promotion of weaker sections were not provided in the constitution. Reservation would be, and has also proved to be the most effective such measure.[11] Generally it is understood as involving three aspects- positive discrimination, reverse discrimination and compensatory discrimination. Positive discrimination means providing special treatment to those who are susceptible to exploitation. Reverse discrimination means discrimination against those who had discriminated a particular class for decades. Compensatory discrimination means to safeguard the interests of historically disadvantaged sections of people.[12] Reservation in appointments & promotion under article 16 (4) is not aimed at economic upliftment or alleviation of poverty. Article 16 (4) specifically designed to give due share in the state power or equal representation in public service because they are not adequately represent in public service and they remained out of it mainly on account of their social backwardness.

Dr. Ambedkar was clear that reservation in job is not a concession or a privilege extended to depressed classes. It is their legitimate right. It is in recognition of their fundamental right to equality (Article 16 (1). He said, "We have to safeguards two things namely, principle of equality of

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8 *Supra* note 1 at 180

9 *Supra* note1, at 180

10 Mohammad Shabbir, 'Ambedkar on Law,Constitution and Social Justice',Rawat Publications, 2005, New Delhi, P184.

11 *Supra* note1, at 241

12 *Santhosh Kumar v. 'Social Justice and The Politics of Reservation in India', A Mittal Publication, 2008, New Delhi, P-61*

opportunity and at the same time satisfy the demand of communities which have not had so far representation in the state. His stand has been vindicated by various Supreme Court judgments. In *State of Kerala v. N. M. Thomas*[13] supreme court held that Article 16 (4) is a facet, an illustration or a method of application of Article 16 (1), because opportunity can never be equal among human being who have unequal capacities to grasp it. Hence, reservation in jobs is not a permissible exception but a necessary ingredient of the right to equality of opportunity.[14] However, reservations for disadvantaged groups is not a fundamental rights, is left at the discretion of the State and Articles 16(4) & 16(4A) only enabling provision.[15]

RESERVATION TO SCHEDULED CASTES AND SCHEDULED TRIBES IN PROMOTION

One of the most debated issues in service jurisprudence has been whether reservation benefits should be limited to the initial appointments or it should also be allowed in promotions. The issue of reservation at promotional stage has created heart burning and dissatisfaction between reservationists and anti –reservationists. The reservationists insisted that reservation should be at every stage, i.e., from initial appointment to top promotions. On the other hand, the argument of anti-reservationists has been that reservation should be limited to initial appointments. Upto Mondal case the judiciary had supported the view of reservationists.[16]

The story started with judicial approval of governmental move to provide reservation to SCs/ STs at all level of promotion too. In *General Manger; Southern Railway v. Rangachari*[17] the main issue for consideration is whether benefit of reservation is intended to be applicable only initial stage appointment or it can be extended to selection posts or promotional posts?. By mayoralty held that power of reservation which is conferred on the state not only by providing for reservation of appointment but also by providing reservation at promotion.[18] Of course, what Rangachari did was that it paved way for reservation at promotional stage.

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13 AIR 1976 SC 490

14 *Supra* note 12 at 242

15 *Mahesh Kumar and Anr v. The State of Uttarakhand: Civil Appeal No. 1226 of 2020*

16 Anirudh Prasad, 'Reservational Justice to Other Backward Classes(OBC)', Deep & Deep Publications, 1997, New Delhi, p-148

17 1962 AIR 36

18 *Supra* note 16 at149 &150

This was further reaffirmed in *State of Punjab v. Hira Lal*[19] and *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India.*[20] In *Comptroller and Auditor General v. K S Jagannathan*[21] S/C ruled that reservation in fevour of backward classes of citizen, including the member of the scheduled castes and scheduled tribes, as contemplated by article 16(4) can be made not merely in respect of initial appointment but also in respect of promotion.[22]

The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. Supreme Court in Mandal case[23] departed from Rangachari case and gave verdict against reservation at the stage of promotion. Kania C J Venkatachalaiah and Jeeven Reddy Judges drew the conclusion that reservation of appointments or posts under article 16 (4) is confined to initial appointment on and cannot be extent to reservation in the matter of promotion.[24] If authority thinks that adequate representation is not there in any class or category of service, it is necessary to provide for direct recruitment therein[25] and reservation contemplated under article 16(4) should not exceed 50% the appointments or posts, barring certain extraordinary situations. Extra ordinary situations may exceed the 50% of reservation means every excess over 50% will have to be justified on valid grounds specifically made out 50% rule applicable only to reservations proper and not to exemptions concessions or relaxation give under Article 16(4)[26]

Supreme Court decision in Mandal case applied prospectively and it continued the provision of reservation in promotion to Scheduled Castes and Scheduled Tribes for five years from the pronouncement of the judgment i.e. upto15.11.1997. Mandal case decision adversely affected the interest of Scheduled casts & scheduled tribe. Therefore, to protect the interest of Scheduled Casts and Scheduled Tribes the Government has decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To nullify the effect Supreme Court judgement parliament brought 77th amendment to the constitution it was made

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19 (1970) 3 SCC 567.
20 (1981) 1 SCC 246.
21 (1986)2 S.C.C 679 at p.694(para 92)
22 *Supra* note 16 at 154
23 *Indra Sawhney v. Union of India and others AIR 1993 SC 477, 1992 Supp 2 SCR 454*
24 Supra note 16 at 158 7 159
25 *Supra* note 16 at 161
26 *Supra* note 16 at 176 & 177.

to incorporate clause (4A) in article 16 to provide for reservation in promotion for the ScheduledCastes and the Scheduled Tribes.

RESERVATION & BACKLOG VACANCIES (81ST AMENDMENT)

The Supreme Court of India in *Indra Sawhney v. Union of India* case held that the number of vacancies to be filled up on the basis of reservations in a year including carried forward reservations should in no case exceed the limit of fifty per cent. Prior to August, 29, 1997, "Backlog Vacancies" vacancies were treated as a distinct group and were excluded from the ceiling limit of reservation. To overcome the effect of Indra Sawhney case 81st Amendment Act, 2000 was made to insert a new clause (4B) in Article 16 of the Indian Constitution. The new clause 4(B) provides that unfilled vacancies of a year reserved for SC/ST kept for being filled up in a year were treated as "Backlog Vacancies". These "Backlog vacancies were excluded from the 50% reservation of the respective year limit and were considered a distinct group. Hence Article 16 clause (4B) had been inserted to separate the vacancies of a particular year reserved for SC/ST for that particular year from the previous list of unfilled vacancies to reach the 50% quota of that respective year.

82ND AMENDMENT

In centre and states the Scheduled Castes and the Scheduled Tribes had been enjoying the facility of relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion. Supreme court in *S. Vinod Kumar v. Union India*[27] held that such relaxations in matters of reservation in promotion were not permissible under article 16(4) of the Constitution in view of the command contained in article 335[28] of the Constitution, court also referring judgement of the Supreme Court in Indra Sawhney case. To implement Supreme Court judgement Government withdrawn the such relaxations with effect from 22.07.1997. It has adverse effect on the interest of Scheduled Caste and Scheduled Tribes with a view to restore the relaxations and concession in promotion 82nd Constitutional amendment was made to insert the proviso[29] to Art.335 which led that article 335 will not apply to the State relaxing evaluation standards 'in matters of promotion'.

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27 (1996) 6 SCC 580.

28 According to Article 335, the claims of SCs/STs to services and posts have to be consistent with overall administrative efficiency. Article 335 mandates that reservations have to be balanced with the 'maintenance of efficiency'.

29 Proviso to the Article 335 provides that nothing in article shall prevent the state from making any provisions favoring members of SC & ST community for relaxation in qualifying marks in aspect of examination/job/promotion.

RESERVATION IN PROMOTION AND CATCH-UP RULE

After the constitutional recognition of reservation in promotion, the Government servants belonging to the Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation since 1955. Karnataka Government Servants (Seniority) Rules, 1957 provide reservation in promotion in fovour of government servants belong to scheduled cases and scheduled tribes. In *M G Badappanavar and Others v. state of Karnataka*[30] Supreme Court examined the rule 2(C) rule 4 & rule 4A of KGSs Rules 1957 held that there is no specific rule therein permitting seniority to be counted in respect of a person promoted against a (reserved) roster point by referring the Catch up Rule[31] established by the Supreme Court in *Virpal Singh Chauhan v. Union of India*[32] and *Ajit Singh Janjua v. State of Punjab*[33] cases.

Subsequently, parliament brought an 85th amendment to the constitution in 2001. The amendment has substituted, in clause (4A) of Article 16 of the Constitution, for the words "in matters of promotion to any class" the words "in matters of promotion, with consequential seniority, to any class" with retrospective effect from 17.6.1995 since 77th amendment. This amendment led to provide consequential seniority in the case of promotion on the basis of reservation. 85th amendment negated the Catch-Up Rule it diluted the rule of reservation to promotional posts.

Seniority of the Government Servants promoted on the basis of reservation (to the Posts in the civil Services of the State) Act 2002, which has been enacted to remove ambiguity and provide clarity that the Government Servants belonging to the Scheduled Castes and Scheduled Tribes promoted in accordance with policy of reservation in promotion. In *M. Nagaraj v. Union of India*[34] the petitioners challenged the validity Seniority of the Government Servants promoted on the basis of reservation (to the Posts in the civil Services of the State) Act 2002, and Constitutional amendment to Article 16 (4A) and 16 (4B). Supreme Court upheld the Consequential Seniority Rule under article 16(4A), the Carry Forward Rule under Article 16(4B) and the Proviso to Article 335 and it held that it is not mandatory for the State to make reservations for SC/ST in matter of promotions, if they wish to exercise

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30 2001 2 SCC 666; 2001 (1) KarLJ 236

31 Catch up Rule' did away with the *principle* of consequential seniority

32 (1995)6 SCC 684.

33 (1996) 2 SCC 715

34 (2006) 8 SCC 212

their discretion subject three controlling conditions. Accordingly reservation in promotion to be valid, the State has to meet three compelling requirements:

1. Demonstrate the backwardness of the SC/ST
2. Prove that the SC/ST is inadequately represented in relevant public employment
3. Maintain the overall efficiency of administration.

In *Jarnail Singh v. Lachhmi Narain Gupta* many States along with the Centre challenged the judgement of Naagaraj case and they had argued that the Court ought to review the three controlling conditions laid down in Naagaraj case because they found that it difficult to satisfy the conditions and had made it unjustly difficult to grant reservations in promotion. In this case question was whether the court in Nagaraj case failed to recognize SC/STs inherent underprivilege, by requiring the State to reassess the backwardness of SC/STs. Supreme court refused to review judgement of *Nagaraj* and it struck down the demonstration of backwardness provision from *Nagaraj.* As an alternative this it introduced the creamy layer exclusion principle, it requiring the State not extend reservations in promotion to SC/ST individuals who belong to the creamy layer of the said SC/ST. However, till the date no state extends creamy layer exclusion principle to SC/STs.

BK PAVITRA v. UNION OF INDIA - II

The constitutional validity of the Reservation Act 2002[35] was challenged in *B K Pavitra v. Union of India*[36]. On 22 March, 2017 the Court struck down the Reservation Act, 2002 on the ground that the State had failed to provide compelling evidence justifying the consequential seniority policy. It granted the State of Karnataka 3 month time to take further action. Following the decision, the Government of Karnataka created the Ratna Prabha Committee to submit a quantitative report demonstrating the three criteria laid down in Nagaraju case. On the basis of the report submitted by the Ratna Prabha Committee regarding (i) current backwardness of SC/STs, (ii) cadre-wise representation of SC/STs in Government Departments, (iii) effect on administrative efficiency due to reservation in promotion, Karnataka Government passed the 2018 Reservation Act. Again petitioner challenged the 2018 Karnataka Reservation Act in B.K. Pavitra-II case. The Supreme Court upheld a reservation in promotion policy on the ground that the State had furnished sufficient data to demonstrate both that SC/STs are inadequately represented and that the policy would not adversely affect efficiency. The

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[35] The Karnataka Determination of Seniority of the Government servants promoted on the basis of reservation (to the posts in Civil Services of the State) Act, 2002

[36] *(2017) 4 SCC 620*

2018 Act introduces consequential seniority[37] for SC/STs in State Government Services.

CONCLUSION

Uplifting of people from backwardness and social disability is a complex social policy and social action programme further complicated by the demographic enormity of the target population. The present Reservation Policy merely helps to co-opt a small minority of the SCs & STs into main stream. Uplifting of the remaining huge mass of the SCs & STs is a stupendous revolutional exercise which cannot be consider by the government. Reservation, while it is laudable in its conception alone it is insufficient to meet the challenge of structured inequalities and inequities of the society. A social justice measure like reservation is considered an easy, symbolic, or soft option of the state lacking in the political will to bring in and enforce more radical and structural reform/development measures. Further such drives cannot emanate from the state. In the absence of complementary, or alternative radical promotional/developmental measures, the distortions, parodies and paradoxes of the Reservation Policy continue to remain. In the absence of development supplements and/or alternatives, people will bank upon and politicize the Reservation Policy unrelentingly and unremittingly.

Reservation in appointment to meet equality is a part of the basic structure doctrine because equality is the part of our constitution and cannot be violated at any cost. However, the idea of reservation in promotions cannot be equated with the concepts of equality, thereof. State is not bound to make a reservation for SCs and STs in promotion but if it so wishes to do, it must be based on quantifiable data shows backwardness and inadequacy in public employment. Since the 1950s we have been following a policy of reservation in promotions in favours of SC and ST communities on the ground that they are not adequately represented in public services. The question of adequate representation of an SC/ST community ought to be left to the respective States to determine, no prescribed yardstick for determining the inadequacy of representation, hence it is left to the subjective satisfaction of the state government. While giving consequential seniority based on quantifiable data satisfaction of the government must be objective. Second generation reservation arises inequality among themselves, therefore, by extending creamy layer exclusion' principle to SCs and STs we will achieve social justice in the real sense.

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[37] Sections 3 and 4 of the Reservation Act 2018 came into force on 17th June 1995 to validate consequential seniority already granted to government servants belonging to the SCs and STs.

SELF-REGULATION OF MEDIA IN INDIA-ISSUES AND CHALLENGES

-Dr. N. Sathish Gowda[*]
Smt. Ashwini P[**]

INTRODUCTION

Media is the powerful social institution which brings changes within societies, sub-cultures, families and individuals. It plays important role in shaping opinions, beliefs and attitudes. It is primary source of information in modern democratic society. People of this fast moving post-modern world solely rely on the media for first hand information. It makes their judgment concerning home, family, education, institution and societies on the basis of information provided by the media. Furthermore media plays an important role in fashioning our tests and moral stands. It has the significant role in socialization of young generation. Moreover, media has been called as the fourth pillar of democracy. It is the nervous system and the backbone of democracy. It is media which help democracy become 'of' and 'by' the people. It facilitates democracy by making interaction between the governed and the governor. However, media is pervasive in our life. It has tremendous impact on our life, our government and our society as a whole. In view of the deep penetration in society and in our life, we must be vigilant and conscious of its negative impact. As saying goes everything has got its two sides negative and positive. So this equally applies to media[1]. No doubt it has positive contributions and positive impact on our society but its negative impact can also be not denied as people have raised their voices against media at several occasions. Apart from this media have got potential to be used for some negative activities such as propaganda, character assassination, invasion of privacy etc. And in view of the fact media has been used as an instrument for propaganda, character assassination and invasion of privacy at different times by different groups, political parties and countries. Seeing the other side of media's negative impact or potential to have negative impact, we must use this powerful instrument with great caution and control. In view of the caution

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[1] Retrieved from https://shodhganga.inflibnet.ac.in/bitstream/10603/70234/3/chapter1.pdf (visited on 10/06/2019)

taken to control media is not legal, rather moral or ethical. Media practitioners and media organizations themselves resolved to come out with 'codes of conduct' or 'canon of journalism' known as media ethics or journalism ethics as controlling measures. At this juncture, At this juncture, the paper evaluates the question about ethical or self-regulation of media in the light of the fundamental public purposes and social responsibilities[1].

MEANING OF 'ETHICS'

'Ethics' is a system or Code or morals, of a particular person, religion, group, profession etc. Ethics is defined as "that branch of philosophy dealing with values relating to human conduct, with respect to rightness and wrongness of certain actions and to the goodness and badness of the motives and ends of such actions". By dictionary definition ethics and morality are interchangeable. Media ethics apply mostly to case not specifically covered by law. At present sub-standard journalism exists everywhere. Journalists and other media persons operate without any guidelines at all. There is need for a Code of ethics for media persons. The Code of ethics for media persons is a statement of broad moral principles which will aid and guide the media persons and which will help them in the process of self-appraisal and self-regulation.

STATUTORY REGULATION OF MEDIA IN INDIA

Law consists of rules made by authority for the proper regulation of community or society. According to Austin, "Law is a rule laid down for the guidance of a being by an intelligent being having power over him". Law means any set of uniform principles which is generally followed. It is referred to those rules which are issued by the State for determining the relationship of men in organised society. The purpose of law is to regulate and control human action in society. Law is enacted to regulate the social and economic acts of individuals or organizations. The ultimate end of the law is the welfare of the society.

Some propagate self-regulation for media following their own code of ethics. Disagreeing with the concept of self-regulation by the media. Chairperson of the Press Council of India Justice Markandeya Katju said that he favoured only regulating media, not controlling it. But regulation should be by an independent body and not by the Government. He says that "self-regulation is not always enough and that is why we have law". He further says, "Normally, negotiating with the media (on the content) should be the

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1 *Supra* Note 1

way, but we do need laws under some extreme situations... I believe 90% of the people are incorrigible for whom we need laws[2].

In a free society, public opinion reflects the mood of the majority of the people, especially their reactions to the governmental activities. Usually, people look forward to the media for critical comments on contemporary events. This is all the more significant during elections. But the nexus between business and press/media often colours the opinions. "Big business invaded the field of journalism and the monopoly check to manifest in press ownership. The octopus of newspaper chains with control over news agencies as well spread its tentacles far and wide"[3]. Therefore, it is suggested that there should be suitable laws to curb cross-media ownership as well as business houses owning newspapers[4].

For instance, there are certain laws which directly affect media. For instance, there are statutes like The Indecent Representation of Women (Prohibition) Act, 1986, the Young Persons (Harmful Publication) Act, 1956 and the Copy Right Act, 1957 etc. Legal awareness of these laws will guide a person in his work as a journalist[5].

CODE OF ETHICS FOR PERSONS IN MEDIA

There are various Codes of Ethics which have been formulated from time to time, such as the International Code, the Press Council's Code, the AINEC Code, and the Parliament Code etc. to guide journalists and the media. It is not possible in Code of ethics to detail grounds. To formulate a comprehensive, rigid Code of ethics for a journalist is neither feasible nor prudent. Yet, some organisations have adopted Codes of Ethics[6].

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2 The Hindu 19.04.2012

3 M.K Dharma Raja, *Opinion Journalism,* Mass Media in India, 11, (1991)

4 S Sivakumar, *Press law and Journalists: Watchdog to Guidedog,*195, Universal Law Publications, New Delhi, (2015)

5 *Ibid*

6 The Codes of Ethics and a Charter for Editors formulated by the All India Newspaper Editors Conference, 1953, International Code of Ethics, 1991,All-India Newspaper Editor's Conference Code of Conduct, 1968, National Integration Council Code Conduct for the Media, 1962, Press Council Code of Ethics, Press Council Code of Ethics on Communal Writings, Parliament Code of Ethics, 1976, Code of Ethics for Broadcasters, 1969, Code of Ethics adopted by the International Public Relations Association at Athens, 1963

The Code of Ethics is not legal documents but they are guidelines for the professional quality and efficiency. In order to carry his message effectively, and to maintain the credibility of his newspaper or magazine, a journalist has to disseminate news in accordance with established norms and traditions of the society. Despite all the provocations and dangers, journalists must function strictly within the framework of ethical norms. As the Codes of Ethics are not formulated by the State legislature they are not Acts and they cannot be enforced by law. Yet, the Code of Ethics makes a journalist a 'perfect professional' if he digests the codes of ethics and adopts them in his professional life.

In modern democracies Media play a significant role by presenting news as well as views. This is done with a view to creating, shaping or sometimes more importantly distorting public opinion. In this sense media is an unacknowledged legislator[7]. Media enjoys some respect in almost all democratic countries. But it is working within many constraints as well. The law as well as the enforcement agencies often impedes its work[8]. On the one hand the government, i.e. the three organs of the government, will try to use law to protect the interests of Media. On the other hand Media may have to face obstacles from within, because the Media as a business may not like to invite the wrath of those in power if it can be avoided[9]. Secondly, individuals and pressure groups in the society may also try to protect and defend their interests which might be threatened by the work of an investigative journalist.

A question about ethics of media needs to be evaluated in the light of the fundamental public purposes and social responsibilities of media[10]. All media

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7 Analyzing the place of journalism in the discipline of communication, especially in a democratic country like USA, Barbie Zelizer observed: Media power is one of the standing conundrums of contemporary public disclosure, in that we still cannot for the media's persistent presence as arbiters of events of the real world. Audiences tend to question journalistic authority only when journalist's versions of events conflict with the audience's view of the same events. And while critical appraisals of the media should be part of everyday life, journalistic power burgeons largely due to the public's general acquiescence and its reluctance to question journalism's parameters and fundamental legitimacy

8 In *Brannburg v. Hayes*, 408 US Supreme Court held that journalists did not have a First Amendment Right against forced disclosure of confidential source or information when summoned before grand juries investigating crimes. In countries following common law also such privilege is absent

9 Barbie Zelier, *Has Communication Explained Journalism,* 43, Journal of Communication, 80,(1993)

10 Stephen J. A. Ward, *Global Journalism Ethics: Widening the Conceptual Base,* 1, Global Media Journal, 137, (2008)

personnel need not be honest. Moreover, in the modern era communication, revolution he has become a 'walking paradox'[11]. This is because of "the contradictions involved in the very nature of journalism as a *profession* and *mission,* being with the anti-democratic tendencies associated with any strong profession"[12]. Ethical standards have come down.

Even though the print media is losing dominance with the advent of electronic one, it continues to be of vital importance in democratic societies. According to Kaarle Norden streng, there are four aspects or dimensions which are obvious: accuracy, rapidity, seriousness and autonomy[13]. It means that quite often the presentation of news and facts suffer from doctoring or colouring and consequently accuracy suffers[14].

Speed is the most essential requirement of journalism. With the development of electronic media the whole media environment has been overflowing with information. This offers many details about what is happening. But it may not present a true picture of fundamental developments. Thus, modern journalism is becoming more narrative than interpretative. Thirdly, the new media environment does not attach importance to seriousness. Rather the media caters to what is attractive for the readers[15].

Fourthly, autonomy[16] means a certain degree of independence of government, management and pressure groups etc. Which represent socio-politico-economic forces. The paradox that emerges here is the fact that autonomy will easily lead media into a self-centred fortress of journalism, alienated from people, it is supposed to serve.

In India the media enjoy lesser autonomy but the fortress of journalism is very strong because of the vertical movement of labour. To ensure "healthy public debate" media should be aware of this conundrum. Moreover, the situation becomes all the more complicated as the print media faces grave challenges from electronic media.

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11 Kaarle Nordensterng, *The Journalist: A Walking Paradox in Philip Lee (Ed.),* The Democratization of Communication, *114* (University of Wales Press, 1995)

12 *Ibid*

13 *Supra* note 9

14 *Ibid*

15 *Supra* Note 5

16 Owen M. Fiss, *Why the State,* 100 Harv. L. Rev. 781 (1986-87)

Media profession, like any other, has its own ethical[17]standards. A code of conduct distinguishes a profession from an occupation[18]. Profession of media is different from other professions because of its unique fourth estate role. It is singular because of its independence. In a profession it is necessary that a member should be judged by his peers and the function is to be so exercised as to maintain the objective of exemplary professional conduct.

ADVANTAGES OF SELF-REGULATION

Self–regulation has several advantages. A significant advantage is that it lends credibility and trust to the media. In jurisdictions where the media is seen as strictly regulated or not independent, citizens tend to loose interest in the media and the quality of freedom of expression and consequently public debates are diminished. A good example is the Nigerian media which is divided into state owned broadcast media and privately owned print media. The public media sector is dominated by the Nigerian Television Authority (NTA) which is spread across the country. However, due to its close association with the government and the perceived lack of independence in its news content, it has lost its audience to independent television stations considered more credible.

Another reason for self-regulation is the ease with which self-regulation responds to changes and new developments. Another good example of self-regulation is the way Press Complaints Commission (PCC) in the United Kingdom works and how it has responded to the criticisms of its operations following the phone hacking scandal. The unique nature of online media which operates without boundaries makes it almost impossible for statutory regulation, which makes self-regulation the best option[19].

PRACTICAL ASPECT OF SELF-REGULATION IN INDIA

The freedom of speech and expression or freedom of press is present in all statutes and constitutions but not appropriately practiced. Therefore, it is crucial to understand the importance of press freedom and the type of

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[17] Ethics is usually understood as something dealing with right or wrong in reference to determinative principles. In the Greek philosophical tradition, it means the systematic study of the principles that ought to underline behaviour

[18] V. S. Deshpande J, 'Preface' to *violation of journalistic Ethics and Public Taste (1984)*. It is said that the responsibility of journalist to the community grows every year in a fairly exact ratio to the way in which an educated democracy itself broadens its spheres of knowledge and interests.

[19] International Journal of Communication and Social Research, Vol. 2, No.2: July 2014 30

regulation followed in a country. The principle of self-regulation entails regulation by itself where the media does not have a regulatory body under it. The primary rights of reporters and editors under freedom of expression have to be acknowledged and at the same time their reports should not be detrimental to the functioning of state[20]. There comes the dilemma of who maintains the checks and balances in what is written and published. Theoretically speaking, leaving the regulations to the media itself would generate the likelihood that it may subjugate regulatory aims to its own business goals. For instance, cross-media ownership by big corporate companies has assumed alarming proportions. Early 2013 saw the leak of the *Radio* tapes which disclosed the shocking and unholy links between journalists and politicians, lobbyists and business groups. The Press Council of India through its Chairman addressed this issue; however, no stringent measures had been taken. That depicts the incapacity of Press Council of India. It cannot suspend the journalists for the unfair work they do[21].

Presently, there is no qualification prescribed by the Press Council for journalists, although there is such a situation prevailing in the Bar Council Act for advocates and Medical Council Act for medical practitioners. The Bar Council of India and the State Bar Councils have control to remove[22] a member from the profession for professional misbehaviour and infringement of professional principles. The Medical Council also has similar powers[23].But the Press Council does not have any power beyond warning or censuring[24]delinquent journalists. Thus in India, there is no self-regulation in reality. Proper self-regulation can be done in many forms, including information movement, examination charters, in-house complaints management division and procedures, accreditation, licensing and association certification, quality guarantee arrangement, standards, regulations and dispute resolution format. In fact, in India, there is no single medium on media regulation and redressal. The Press Council of India as discussed has very limited power.

The television media has associated its own 'self' regulatory mechanism - News Broadcasting Standards Authority (NBSA). However, there are issues

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[20] This is precisely how our Constitution has the reasonable restrictions provided under art. 19 (2)

[21] Dunja Mijatović, *Media Self-Regulation Guide Book,* (OSCE publication, Vienna, 2013)

[22] Advocates Act, 1961, S. 35

[23] Indian Medical Council Act, 1956, S.24

[24] Press Council Act, 1978, S. 14(1)

such as cross media ownership, inaccurate news being published, creating sensationalism, absence of journalistic ethics, paid news, advertisement oriented news being released for profit, privacy violation, unnecessary news on celebrities and superstardom being circulated, unethical sting operation being held for publicity and so forth that are never addressed[25].

CRITICISMS ON SELF-REGULATION

Several criticisms have been raised against the self-regulatory model not being effective. The recent example is the failure of the PCC in not stopping incidents like the phone hacking scandal in UK[26]. Criticisms include the fact that "self-regulation means that complaints are handled by an old boy network where journalists shrug off problems and defend the indefensible". Other criticisms include the fact that self-regulatory bodies are ineffective since they cannot impose penalties, and that corrections, which is the common type of remedy for complaints imposed by the press councils, are often buried in the publications. Further, the press councils and most self-regulatory models do not entertain third party complaints. Other criticisms of the self-regulatory model are that it allows newspapers to avoid ethical and legal responsibilities, allows the press to engage in excesses where there is no complaint, does not prevent excesses in the tabloids, is weak at safe guarding privacy and does not provide room for appeal. This has led to calls for statutory regulation[27]. Proponents of statutory media regulation argue that the government's power to impose penalties keeps the media in line. They also argue that a democratic government passing a legislation to control the media is in the public interest. However, they fail to disclose that in practice, the government is made of people and in most cases regulating the media has been used to protect the government in power and not public interest.

CRITICISMS AGAINST STATUTORY REGULATION

Freedom House, an NGO which advocates media rights globally published in September 2011 instances where statutory regulation has been used as tool for censorship. The three common ways in which statutory regulation is used to restrict press freedom include statutory controls on licensing and registration, the creation of nominally independent regulatory

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[25] S Sivakumar, *Press law and Journalists: Watchdog to Guidedog,* Universal Law Publications, New Delhi, (2015)

[26] Hadwin & Bloy, 2007

[27] Nielsen, 2004,defines statutory regulation as "The imposition of rules by a government backed by the use of penalties and the authority of the state, that are meant to change the behaviour of individuals or groups" or broadly as "any technique or approach designed to control, alter or influence behaviour."

bodies with built in avenues for political influence and legal imposition of vague or burdensome content requirements[28].

MEDIA AND CO-REGULATION

The tendency for statutory regulation to be abused and the perception that self-regulation is weak has led to calls for co-regulation by critiques of the statutory and self-regulatory models. A co-regulatory system combines elements of self-regulation as well as traditional statutory regulation to form a new and self-contained regulatory system[29]. An example of co-regulatory system is the proposed News Media Council (NMC) in Australia. The NMC, which was proposed by an independent media enquiry set up by the Australian government, will be statutorily backed but operate independently and be in charge of print, broadcast and online media regulation with the stated aim "to promote the highest ethical and professional standards of journalism"[30]. The government will fund the NMC while an independent committee is supposed to appoint members of the NMC. The proposal fails to state clearly the process for the appointment of the independent committee though they are expected to consist of senior lawyers and academics[31].

RECOMMENDATIONS

- There is a need for having the contracts made and drafted among media and journalists or guest contributors that lay prominence on clear requirement to follow the Code of Practice. Each media establishment should have concerned branch to see if it is followed strictly.
- Sufficient amendments are to be incorporated and that are to be put up under the Data Protection[32] which must be an indispensable part of contracts of employment service for journalists, editors, freelancers who write as guest columnists.
- There should be a universal code of ethics made and those should be distributed to staff journalists without impediment; assets and income or

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28 Karlekar, Radsch, & Sierra, 2011)

29 Palzer &Scheuer, 2004

30 Ramsay, 2012

31 International Journal of Communication and Social Research, Vol. 2, No.2: July 2014 30

32 Information Technology Act, 2000, s. 43A of provides for the protection of sensitive personal data or information ('SPDI'). Also, s. 72A protects personal information from unlawful disclosure in breach of contract. The author feels that these sections need to be interpreted widely

earnings of the news paper company, the editors, journalists are to be made public. There should be meticulous appraisal controls for cash payments[33].

- There should be an independent ombudsman appointed to solve any issues pertaining to newspapers and channels. This can be done assessing the circulation or viewership and further on the basis of revenue threshold[34]. The ombudsman should act as a support system for reporters who are asked to refrain from covering any matters, and additionally for readers to lodge complaints[35].
- There is a necessity for media training that can be commenced by media establishments as part of journalism courses. New approaches need to be developed where students will be well informed about the current affairs, the working of press, media and that inculcates interests in them[36].
- In the discharge of their duties, journalists shall attach due value to fundamental human and social rights and shall hold good faith and fair play in news reports and comments as essential professional obligations.
- All persons engaged in the gathering, transmission and dissemination of news and in commenting thereon shall seek to maintain full public confidence in the integrity and dignity of their profession. They shall assign and accept only such tasks as are compatible with this integrity and dignity and they shall guard against exploitation of their status.

CONCLUSION

Media ethics has to be flexible in the ever-changing scenario of the world. Media possess a wide area of discretion in news gathering and in publishing the same. A judicious exercise of this discretion, keeping in mind the 'guide-dog' role of the media is desired. The objective is to make the

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33 *Supra* Note 23

34 *Ibid*

35 Keval J Kumar, Media Education, Communications and Public Policy: An Indian Perspective, (Himalaya Publishing House, Bombay, 1995). Available at : http://www.diplomatie.gouv.fr/fr/IMG/pdf/KevalKumar.pdf (visited on Aug. 25, 2016)

36 Here, the author means training and not marketing by media. There was an allegation that some news paper publishers, under the pretext of doing 'media education' have entered schools to market their products. Such is the attempt of The Times of India, one of the foremost national dailies, (with a circulation of over a million copies every day), to market the paper in the schools of New Delhi, Bombay, Pune and Bangalore. The experiment is termed 'Newspapers in Education' (NIE), and is taught during regular school hours, not by school teachers but by young men and women carefully recruited by the response department

stream of public debate flow unobstructed. Determining the content of a critical, global media ethics is a work-in-progress. According to Aristotle, moral virtue is a mean between two extremes. When this principle is applied to media it may be said that the media should not do anything in excess. It means that it should not sensationalize the news or probe too much into private affairs. Newsworthiness is to be decided based on the virtues of balance and fairness.

Therefore, the Media can only be regulated cannot be controlled. But regulation should be by an independent body and not by the Government. Despite the difficult questions and daunting problems such as self-regulation being ineffective and unsatisfied statutory regulation, the future of journalism ethics requires nothing less than the construction of a new, bolder and more inclusive ethical framework for a multi-media, global media amid a pluralistic world or a co-regulatory system combining elements of self-regulation as well as traditional statutory regulation to form a new and self-contained regulatory system as an appropriate solution to overcome the negative impact of media on society.

CONSTITUTIONAL INTERPRETATION: A STUDY IN COMPLEXITY

-Dr. Chanjana Elsa Philip[*]
Mr. Sreenidhi K.R.[**]

INTRODUCTION

In recent times any attempt at understanding Constitutional Interpretation, has come to mean, negotiating the complex, cumbersome and unyielding pathways created by multiple approaches advocated by the various different schools of thought which are often at loggerheads against each other[1]. The attempt is further complicated by the fact that these approaches are at times overlapping and at other times diametrically opposed to each other. However, it is not only the structural, historical, philosophical, practical, ontological, teleological or semantic contentions that muddle this complex landscape. The constantly changing, shifting and often perplexing political rhetoric have not only ensured further polarization of views and perspectives, but have also rendered constitutional interpretation utterly chaotic[2]. The way these debates have progressed has resulted in the process becoming increasingly abstract[3].

However, before commencing a discussion of the various approaches to interpretation, let us examine an interesting example by Ronald Dworkin, of the kind of dilemma that arises during interpretation. Dworkin examines two instances which are strikingly similar, yet quite different. One wherein the judge grants a mother emotional damage for having watched her child run down by a negligent driver and second where an aunt claims emotional damage for having heard her niece being hit from miles apart through the telephone. The question that arises is whether the aunt is entitled to damages.[4]

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1 See generally, Redish, M.H. and Arnould, M.B., 2012. Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a Controlled Activism Alternative. *Fla. L. Rev.*, *64*, p.1485.

2 See generally, Kaplin, W.A., 1989. The Process of Constitutional Interpretation: A Synthesis of the Present and a Guide to the Future. Rutgers L. Rev.

3 *Ibid* at p 984

4 Ronald Dworkin, *Law as Interpretation 60* Tex. L. Rev 527 (1981-82)

In coming to a conclusion, the lawyers will go through the previous decisions and analyse the approach taken by the courts before. This brings up the doubt as to whether, the judge while laying down the rule regarding the mother claiming damages kept in mind the situation of the aunt as well. Accordingly, " any judge who is forced to look at a law suit will find … records of many arguably similar cases decided over decades or even centuries past by many other judges…Each judge must regard himself … a partner in the complex chain enterprise of which those innumerable decisions structures, conventions and practices are the history… so he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole really is".[5] It is to be noted that law is a legislative initiative with the intention of coordinating between society and individual, among individuals, between individuals and government etc. So, an interpretation must reflect the value of the law keeping in mind the best policy it can serve.

INTERPRETING CONSTITUTIONAL TEXT: THE TRADITIONAL APPROACHES.

TEXTUALISM

The best way to define Textualism according to Akhil Reed Amar[6] is to understand what the American People meant and did when '**We ratified and amended the document**'. Textualism presupposes that the specific constitutional words ultimately enacted were generally chosen with care. It is looked upon as an approach which acts as a tool to restrict judges to interpret the Constitution .To understand it better, principles of textualism will not give room to any interpretation which was not foreseen by the makers of the Constitution. It speaks more about reconstruction of what the makers or founders had in mind while drafting the Constitution. But many authors argue that they provide only the weakest of restraints. According to David Strauss[7] *The textualist approach is an invitation to judicial creativity***.**

One of the major arguments put forth by the Textualists while interpreting the Constitution is that it is the most democratic and it reflects the proper expression and will of the makers during the time of making. It is looked upon as what the people have adopted, compared to the gleam given by the unelected judges which will not reflect the will of the people. But the principal questions that still remain open are - Firstly, would the intention that

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5 *Ibid* at 542

6 Akhil Reed Amar, The Document and the Doctrine, 114 Harv. L.Rev. 26 (2000)

7 David A. Strauss, *The New Textualism in Constitutional Law*, 66 The George Washington Law Review 1152 (1998)

the makers had in their mind while drafting a constitution during the eighteenth and nineteenth century meet the needs of changing situations and thoughts of present generations. If not, will this approach hold good if it really restricts a judge from interpreting the provisions of the Constitution from a modern age perspective. Secondly, if the judge is given the opportunity to interpret the provisions according to the time that is changed, keeping in mind the makers of the Constitution, would it amount to Textualism at all or does it completely destroy the fabric of the principle. A general reading on the approach throws light on the fact that the attributes brought about by the judiciary passes the test of textualism because they bring out the principles by convincing the popular demand that it was the intention of the Constitution makers at the time of drafting the Constitution thereby reflecting them as heroes.

To understand it better, we would like to quote the example of the Equal Rights Amendment Clause of the American Constitution which prohibits denial of equal rights based on gender[8]. The clause was rejected as it was not ratified by three fourth of the States within the given time. However, later on, the Courts interpreted facts and situations before it to uphold the necessity of equality which they believed were already there in the minds of the constitution makers.[9] Hence, whenever a judge reads the text of the Constitution, he tries to read more into it by expanding the doctrines beyond what was foreseen by the makers. This expansion, according to the prominent exponents of Textualism like Justice Black and Justice Scalia, will give judges an extra advantage to interpret ideologies and principles to suit their thoughts and ideas. Moreover, if it is a judge who weighs precedents more than the document itself, he would obviously get influenced by it and apply the law laid down in the precedent.

In both these we find the judicial law taking prominence over the text which is vehemently objected to by scholars who argue for judicial restraint in certain matters of constitutional interpretation. However, a comparative analysis of the constitutional laws globally reflects the fact that the development and expansion of basic natural rights, economic freedom, gender equality, social justice etc. have mostly cropped up, especially in democratic countries, not because the constitutional text specifically granted them but because the judicial boundaries were torn apart to leap towards a new world

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[8] See Generally, Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 Texas Law Review 919 (1979)

[9] See Generally, *United States v. Virginia,518 U.S.515 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976)*

of rights and liberties. To sum up the discussion on this approach, it is necessary to understand that the modern textualist approach is not to determine the content of the Constitution by a heroic decision by drafters or ratifiers by adding text to the Constitution, but by a chaotic, more complex and prolonged process.

The Supreme Court of India too followed the approach of textualism seeking to understand the plain meaning of the actual text of the Constitution in the earliest of instances. In *A.K. Gopalan v. State of Madras*[10], the court was faced with a choice between interpreting the text of Article 21 either literally or purposively, so as to either refuse or include the doctrine of Due Process, in the Indian context. The court however, did not hesitate in being quite literal, when it refused to go beyond the letter of the law in its landmark judgment. This method did indeed find favour for the next few decades, with the Supreme Court continuing to engage with the traditional approaches to Constitutional Interpretation[11]. In the Indian context, this has been perceived as the 'black letter law', that attempts to interpret the law as an independent and separate reality and runs the inherent risk of creating a situation where interpretation is confined to a narrow approach of engaging with the law in order to fulfill the mundane requirements of routine administration[12]. At best, this approach may encourage an attempt at understanding law from a doctrinal perspective, subject however to the strict separation of law from morality. Therefore, the same has been referred to as a positivist approach to interpretation as well[13].

ORIGINALISM

Robert Bork's argument in favour of morality of the framer rather than the morality of the judge[14], Scalia's reluctant confession of being a faint-hearted originalist[15] and Edwin Messe's belief of, 'the sense in which the Constitution was accepted and ratified'[16], during the 1980s sparked of an

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10 AIR 1950 SC 27

11 Chandrachud, Chintan, Constitutional Interpretation (November 18, 2015). The Oxford Handbook of the Indian Constitution (2016)

12 Galanter, M. and Dhavan, R., 1989. Law and society in modern India (p. 279). Delhi: Oxford University Press.

13 *Ibid*, at p xvii

14 Bork, R.H., 1984. Tradition and morality in constitutional law (p. 8). American Enterprise Institute for Public Policy Research.

15 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989).

16 Scalia, A., 2007. *Originalism: a quarter-century of debate*. Regnery Publishing, P 47

intensive round of debates on how the American judges must understand and interpret the Federal Constitution[17]. However, originalism represents not one but a whole family of interpretational theories founded on the premise that, the various provisions of the Constitution are fixed in meaning as understood at the time of their framing and that all subsequent stakeholders must be constrained by this original meaning[18]. Another important argument favouring originalism is the one based on democracy, the idea of an appointed judiciary being allowed to deviate from the original mandate is considered unthinkable, as such judges do not represent the will of the people. It is therefore argued that the judges must stay within the original mandate as established in the original written Constitution[19].

A debate within the debate is the one between original meaning and original intention. Almost all modern originalists are agreed upon the central notion of originalism; the clear importance given to the original meaning of the text of the Constitution, although initially the reference to original intent makes its way into the rhetoric with Robert Bork referring to the same as "Framers Intent "[20]. However, the objective behind this approach has always been to unearth what was meant by the framers when they were originally drafting those particular provisions[21]. Wherefore, it may be argued that the objective might have always been to look at what was meant rather than what was intended. Raoul Berger, in his oft criticised work, 'Government by Judiciary', opines however, that the all-important original intent must remain central to Constitutional interpretation, emphatically stating that unquestioned implementation of 'draftsman's intention', is imperative in all documents, more so in the case of the Constitution[22]. Although originalists claim that one of the distinct advantages enjoyed by originalism is that it is based on apparently verifiable historical facts, ideology often gets sidelined in the process[23].

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17 Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

18 Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

19 Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

20 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

21 Supra Note 13 at p 380.

22 Berger, R., 2012. Government by judiciary. Liberty Fund, P 404

23 Adam M. Samaha, Originalism's Expiration Date, 30 CARDOZO L. REV. 1295 (2008).

The primary criticism against originalism is analysed and presented clearly and succinctly by Paul Brest who argued that it was impossible to ascertain and aggregate the actual individual voting patterns of the huge number of framers in order to understand the institutional intent. This would mean that the originalist must depend upon some form of circumstantial evidence in identifying the general intent, which would most certainly be of an abstract nature and therefore highly problematic to the originalist. On the other hand, where originalists depend upon the writings of the founders in determination of their intent, it still holds true that the understanding is of an abstract nature and therefore does not reflect the broader social consensus[24].

Powell has argued that approaching interpretation on the basis of 'intention of the framers' would suffer from an even more basic problem; the framers themselves would not have approved of such a strategy. The claim that the 'original understanding' shall be the ultimate guide in interpreting the constitutional provisions, is dismissed by Powell as a 'historical mistake'[25]. Further criticisms point at various other notable objections to originalism, including the fact that the 'framers' represented only white males and not all sections of the American people and further that the majority of the original founders were classists, racists and sexists and therefore lack the moral legitimacy to rule from the grave[26].

Most criticisms against the theory however, address directly, the concept of original intention which leads us to believe that the Originalism in its subsequent iterations, focusing on the concept of original meaning is not to be summarily dismissed. In fact, many of the apparently non-original scholars have acknowledged the relevance of original meaning. In fact, even Paul Brest acknowledges that for moderate originalists concerned only with the abstract generality, the strategy is justifiable indeed[27].

Judicial Constraint being the heart and soul of Originalism, its survival became difficult in the legal fraternity. The criticisms that stood against this approach helped it change the outlook, refine itself and become more mature. This new and improved originalism has self-consciously adopted a new

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[24] Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. REV. 204 (1980).

[25] H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885 (1985).

[26] Barnett, R.E., 1999. An originalism for non originalists. *Loy. L. Rev.*, *45*, p.611.

[27] *Supra* note 24 at p 214

label—'the New Originalism'.[28] which sacrifices the promise of judicial constraint and other theoretical sophistications.

MOVING BEYOND THE TEXT: THE NEWER APPROACHES AND THE WAY AHEAD

THE LIVING CONSTITUTION VIS A VIS PROGRESSIVE INTERPRETATION

Through this article we have attempted to give a brief idea of the Originalist and Textualist approach of constitutional interpretation which is generally looked upon as traditional approaches of constitutional interpretation. These approaches, particularly the originalist approach, has been criticized by scholars on the ground i) that they endorse frozen concepts and frozen rights; ii) that they are currently ruled by the dead hand of the past; iii) that they fail to properly accommodate contemporary values[29]. This brings us to the concept of the constitutional approach which has started since the one third of the twentieth century - the 'Living Tree Constitutional Interpretation'. As already discussed, a common question which arises in the mind of modern jurists is whether the intention of the makers of a constitution centuries before (for that matter even decades before) would be able to reflect the needs of the present generation keeping in mind the pace of development, both socially and economically. The answer would be a blatant 'No' if we were to follow the original or textual approaches of interpretation. Hence, it becomes important that the judge will have to breathe fresh/new life into the already existing rule/precedent to give it a contemporary meaning.

To us the 'Living Constitution' Approach' is the best remedy reinforcing the idea that constitutional law could and should progressively transform society.[30] This approach of interpretation has become the fundamental principle of *Canadian Constitutional Interpretation*. It all started with the attempt to interpret The British North America Act, 1867 which later on turned to be the Canadian Constitution Act. There are many objections to the thought that the living tree approach is fundamental to the Canadian Constitutional Order on the ground that it was nothing but a standard exercise of statutory interpretation and textual analysis when at first attempted in the Person's case which is discussed below. Though, after this case it was cited in

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28 *Supra* n 26 at 620.

29 Peter Martin Jaworski, Originalism All the Way down, Or: The Explosion of Progressivism, 26 CAN. J. L. & Jurisprudence 313 (2013)

30 See Generally, Eric M. Adams, *Canada's Newer Constitutional Law and the Idea of Constitutional Rights*, 51 MCGILL L.J. 435 (2005)

a handful of decisions[31] in the early 1930s, rarely did it re-emerge until the late 1970s.[32] This brings us to the '*doctrine of progressive interpretation*' a fundamental principle of constitutional interpretation which emerged in the modern era as one of the four central commitments to living tree constitutionalism in Canada; The others being (2)the use of a purposive methodology in progressive interpretation; (3) the absence of any necessary role for the original intent or meaning of framers in interpreting the constitution; and (4) the presence of other constraints on judicial interpretation[33]. Now that we mentioned that this approach stemmed in Canada, it becomes pertinent that we discuss a couple of landmark decisions of the country which upheld and discussed the doctrine. The doctrine had its origin in the historical judgment of *Edwards v. Attorney-General* [34] formulated by Lord Sankey also known as The Person's Case. The question that arose before the Court was whether women were 'persons' for the purpose of appointment to the Senate. Though in the ordinary parlance 'Persons' included members of either sex, in Common law women were not persons and hence were disabled to hold public office. But the Privy Council rejecting the traditional approaches of interpretation brought in a more realistic approach by adding a new thought. It observed that a constitution in all circumstances should be interpreted in a large, liberal and comprehensive way[35].

Although the Person's case tried to throw light on a new and deviant approach towards constitutional interpretation, in the landmark decision of Reference *re Same-Sex Marriage*[36], which was a matter referred by the Governor in Council concerning the Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes. The Court while dealing with the question put forth held that:

"The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation,

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31 See generally, Reference as to the Jurisdiction of Parliament to Regulate and Control Radio Communication, [1931] SCR 541 at 546

32 Asher Honickman, The Original Living Tree, 28 Const. F. 29 (2019) at 30

33 See Generally, Bradley W. Miller, Beguiled By Metaphors: The Living Tree and Originalist Constitutional Interpretation in Canada, 22 CAN. J. L. & Jurisprudence 331 (2009)

34 [1930] A.C 124 (PC) at 136.

35 *Ibid*

36 [2004] 3 SCR 698.

accommodates and addresses the realities of modern life".[37] The law, if it is ultimately to be respected, must be prepared to see itself adapted to the new realities which inevitably surface as society evolves.[38] By the way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted[39]. At this juncture it is important that we make a mention of the landmark case of *Navtej Singh Johar and Ors*[40].wherein the hon'ble Supreme Court of India, the guardian of the Constitution, reiterating the above mentioned cases observed that "A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings, for it has been created in such a manner that it can adapt to the needs and developments taking place in the society."[41]

Furthermore, in the case of *Joseph Shine v. Union of India*[42] observed that:

"When a constitutional court faces such a challenge, namely, to be detained by a precedent or to grow out of the same because of the normative changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different, more so, where the emerging concept recognises a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution. In such a backdrop, when the constitutionality of a provision is assailed, the Court is compelled to have a keen scrutiny of the provision in the context of developed and progressive interpretation.[43]

The view that the Constitution should not be "frozen" in time but it should be capable of adjusting to new circumstances keeping abreast of developments in society has now become the new thought of the era. However, one has to keep in mind that the creative dimension taken by the

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37 *Ibid* at Para 22

38 Christopher Barbara, International Legal Personality: Panacea or Pandemonium - Theorizing about the Individual and the State in the Era of Globalization, 20 SRI LANKA J. INT'l L. 243 (2008).

39 *Ibid* at Para 23

40 *Navtej Singh Johar and Ors. v. Union of India and Ors,MANU/SC/0947/2018*

41 *Ibid* at Para 82

42 MANU/SC/1074/2018

43 *Ibid* at Para 3

judiciary does not endorse upon them unrestrained power to interpret[44]. Having said this, the general understanding is that the mode of constitutional interpretation is reflecting a wave of chaos and constitutional adjudication should be done with caution as they are mostly in conflict or at least are in tension with each other.

Living Originalism

An interesting follow up to the ensuing argument between originalism and living constitutionalism was attempted in 'Living Originalism', by Jack M. Balkin who proposed that the diametrically opposed concepts are not in conflict, but really compatible. Balkin painstakingly attempted to demonstrate how many of the seminal modern conceptions under the Constitution of the United States of America were actually consistent with its original meaning. Seeking to eventually prove that the makers envisioned both the originalist and the living constitutionalist perspectives coexisting under a larger constitutional scheme, by ensuring that the constitution was founded on abstract principles with a great deal of flexibility in interpreting the same[45]. Further explaining his premise, Balkin proposes that the best kind of originalism is one that he calls 'framework originalism', one that presumes that the original text of the Constitution is merely a basic plan which establishes the framework for a government, deliberately kept incomplete by the founders on the supposition that, it could then be built upon by future, successive generations through a process he classifies as construction[46].

Colby & Smith[47], in their critique, suggest that originalism is not one theory but a "broad tent"[48] and that originalists, having given in to excessive use of judicial discretion have created their own version of 'living constitutionalism' consequently undermining originalism[49]. However, Balkin's living originalism has itself found its share of detractors who maintain that in some ways, the theory may be too good to be true and mostly

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44 Aileen Kavanagh, The Idea of a Living Constitution, 16 CAN. J.L. & Jurisprudence 55 (2003) at 87.

45 Balkin, J.M., 2011. Living originalism. Harvard University Press.

46 Jack M. Balkin, Nine Perspectives on Living Originalism, 2012 U. ILL. L. REV. 815 (2012).

47 Thomas B. Colby & Peter J. Smith, Living Originalism, 59 DUKE L.J. 239 (2009).

48 *Ibid*, at p 307

49 *Ibid*.

that his treatment of the various constitutional principles is ambiguous and clearly opposed to authentic originalism[50].

PURPOSIVE INTERPRETATION

Purposive interpretation represents another attempt by the Supreme Court of Canada in breaking away from the traditional methodologies of textualism and originalism. In several cases, the justices have sought to interpret the Charter of Rights by seeking to ascertain the purpose of the individual rights in question[51]. However, many argue that the same is nothing but another way of conducting a general interpretation and therefore enables the exercise of a great deal of discretion, not only with respect to the determination of the purpose, but also the level of generality that may be resorted to in expressing the same[52]. This approach to Constitutional Interpretation operates on the fundamental premise, that the objective behind interpretation is to ensure that the purpose behind the constitutional text is fully achieved: Such purpose sought to be understood in light of rule of law, democracy, separation of powers and other constitutional concepts[53]. 'Purpose' is indeed an abstract concept inclusive of both, subjective and objective components. While the subjective purpose is discerned from the maker's intent, the objective purpose reflects the fundamental values of the legal system and the interpreter's job is to strike a balance between the two[54].

One of the chief proponents of Purposive interpretation Justice Aharon Barak, seeks to present a holistic method of Constitutional Interpretation, by offering heuristic tools designed to elicit the same[55]. This approach considers the fact that although Constitutions are neither easily made nor frequently changed, they are made after considering the need for future change, in order to ensure that the primary framework is flexible enough to accommodate such change[56]. However, Barak's version of purposive interpretation seeks to emphasize the importance of judicial discretion in interpretation, defining the

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50 Jeffrey Goldsworthy, Constitutional Cultures, Democracy, and Unwritten Principles, 2012 U. ILL. L. REV. 683 (2012).

51 Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145

52 Goldsworthy, J. ed., 2006. Interpreting constitutions: a comparative study. OUP Oxford at p 89

53 Barak, A., 2011. Purposive interpretation in law. Princeton University Press. p 88

54 *Ibid*. at p 89

55 Barak, A., 1992. Hermeneutics and Constitutional interpretation. Cardozo L. Rev., 14, p.767.

56 Marinković, T., 2016. Barak's purposive interpretation in law as a pattern of constitutional interpretative fidelity. Baltic Journal of Law & Politics, 2016 vol. 9, iss. 2, p. 85-101.

same as the judge's power to opt between different approaches to interpretation[57]. He further clarifies that this is a subjective discretion defined more through an identification of its boundaries, which demarcate those areas of the law where actual judicial discretion is not to be found[58].

GERMAN APPROACH TO CONSTITUTIONAL INTERPRETATION

It is well understood and accepted that at any time law is interpreted, it keeps in mind the progressive development of the society and surroundings; it is all the more so when it comes to interpreting the Constitution. The previous approaches of interpretation that we have already discussed here reflects the American approach with a little comparison with India and Canada. However, on a general reading of the approaches of interpretation taken by each constitutional judge of various countries, it has to be accepted that the present scenario on constitutional interpretation is complex to the extent that there is chaos/confusion among judges themselves in applying the appropriate approach at a given time for a given set of facts before them. To substantiate this statement, we would like to bring forth the interpretation approach taken by the German Constitutional Courts.

It is well known that Germany, being a civil country, has a centralized system of judicial review. The traditional structure of the German judiciary and the unfamiliarity of its judges with constitutional adjudication has added to be a reason for the creation of a special court, the Federal Constitutional Court to adjudicate constitutional matters. The Federal Constitutional Court's approach to constitutional interpretation needs to be understood within the context of Germany's civilian legal culture where law rests on an independent foundation of reason and logic. In this mode of legal thought the judge does little more than mechanically apply fixed rules of law. Accordingly, fidelity to law as written is the judiciary's major commitment.

STRUCTURAL INTERPRETATION

The Basic Law of Germany[59] which came into force in 1949, created the Federal Constitutional Court and in establishing its jurisdiction, the provision lays down that this court shall rule upon the interpretation of the Basic Law[60]. This Court was convened on September 7, 1951, the very first time. On this day itself the "Southwest Case" was placed before it. Laying down that the

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57 *Supra* note 50 at p. 771

58 Bendor, A.L. and Segal, Z., 2011. The Judicial Discretion of Justice Aharon Barak. Tulsa L. Rev., 47, p.465.

59 Germany, O.F., 1949. Basic Law.

60 *Ibid*. Article 93

Constitution's unity is of categorical importance, the FCC declared that no single provision of the Constitution may be interpreted independently or taken out of context[61]. Each provision, the court held, must be interpreted so as to ensure compatibility with certain fundamental principles of the Constitution as a whole. The Germans also call this as systematic reasoning. This structural analysis focuses on the relative juxtaposition of each clause in relation to the constitutional whole[62].

TELEOLOGICAL APPROACH

Teleological interpretation, a favored form of judicial reasoning in Germany, represents a search for the goal, purpose, utility, or design behind the constitutional text. Here the Court seeks interpretive guidance from the history and spirit of the constitutional order. According to Kommers[63], What makes German Constitutional Interpretation less problematic is that there are a set of generally agreed-upon approaches to constitutional interpretation. These approaches might be brought together under the general heading of "constitutional textualism.[64]"The code law tradition, with its emphasis on specific norms and structures, leads to legal positivism in adjudication, and the Constitutional Court often talks as if it is adhering strictly to the constitutional text. But the Court also employs systematic and teleological modes of inquiry. The focus here is often on the unity of the text as a whole from whence judges are to ascertain the aims and objects - i.e., the telos - of the Constitution, a style of reasoning that allows judges to incorporate broad value judgments into their decisions."[65] Thus far, the teleological interpretation seeks to achieve the 'objective will' distinct from the subjective will of the framers of the basic law although the sources used in discovering the telos of the Basic Law are unclear[66].

To this extent the German approach of interpretation is the same as the U.S except that arguments grounded in text, structure, or teleology generally

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61 Leibholz, G. (1952). The Federal Constitutional Court in Germany and the "Southwest Case." The American Political Science Review, 46(3), 723–731.

62 *Supra* Note 47, at p 200

63 Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMORY L. J. 837 (1991).

64 *Ibid*

65 Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (2012)

66 *Ibid* at 90

prevail over those based on history[67]. Moreover, this approach of interpretation, though known in variants, is popularly accepted as the pluralist approach to constitutional interpretation with its defining characteristic being the recognition of multiple authoritative sources of constitutional meaning[68].

Karl Heinrich Friauf observed that the teleological approach is a "gateway through which consideration of social policy and even the political philosophy of the justices flow into the interpretation of the constitution."[69]

STRUCTURALISM: IN INDIA AND AUSTRALIA

Sathe, S.P., proposes that structuralist interpretation can also be called teleological, in the sense that it recognises that the Constitution is intended to achieve certain purposes[70]. However, Constitutional Interpretation in India, initially tended to be textual and positivist in approach[71]. The gradual shift towards structuralism in India had in fact been going on sporadically until the landmark case of *Kesavananda Bharati v. State of Kerala*[72] propelled it forward almost exclusively as the primary method of interpretation.

Since 1951 the Supreme Court had successively, in Shankari Prasad[73] Sajjan Singh[74] & many other cases, maintained the 'black letter law' approach to interpretation[75]. Golaknath[76], was where we may observe a decisive move against this tradition, through its openly counter- majoritarian judgment regarding the amending power of the parliament. The decision marks a shift in approach as the Supreme Court declared that no constitutional amendment may abrogate any of the fundamental rights guaranteed under part III of the Constitution[77]. A 13 judge bench constituted due to the prospect of overturning the 11 judge bench's verdict in Golaknath was established to

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67 See Generally, Benjamin S. DuVal Jr., Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication, 41 GEO. Wash. L. REV. 161

68 Andrew B. Coan, Irrelevance of Writtenness in Constitutional Interpretation, 158 U.PA. L. REV. 1025 2010).

69 *Supra* n.63

70 Sathe, S.P., 2006. India: From Positivism to Structuralism. In Interpreting constitutions: a comparative study (pp. 215-265). Oxford University Press.

71 *Supra*, note 12

72 AIR 1973 SC 1473.

73 *Shankari Prasad v. Union of India, AIR 1951 SC 458*.

74 *Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845*.

75 *Supra*, Note 12

76 *Golaknath v. State of Punjab, AIR 1967 SC 1643*

77 *Ibid*

discuss these issue in *Kesavananda Bharati v. State of Kerala.* The judgment is significant mainly because the court clarified that although the parliament could amend any part of the Constitution, it must ensure not to destroy the basic features of the Constitution. The judges in favour of the same even went on to describe the same with each one of them listing their own set of principles that form a part of the 'basic structure'[78].

The difference between the two judgements in Golaknath and Keshavananda proves the difference between the court's positivist approach in the former and the structural interpretation in the latter. Advocating the textual approach in Golaknath, the court had declared that the parliament was not empowered to amend fundamental rights as the text of Article 368 mentioned only the 'procedure' and as a consequence amending power emanated from the provisions concerning legislative power, invoking the restrictions imposed through Article 13[79]. The reliance on the text proved decisive as the judgment was indirectly overruled by amending the text of Article 368, whereas the interpretation adopted in Kesavananda could not be done away with in similar fashion[80]. This new approach found favour with the Indian Supreme Court in interpreting a host of other constitutional issues in a number of other cases that came after Keshavananda[81].

Originally called the Commonwealth of Australia Constitution Act, 1900 was drafted by the six independent colonies in Australia in several successive conventions and ratified by way of referendums in all the colonies, with the ultimate enactment by the parliament being merely a means of acquiring legitimacy[82]. Therefore, the High Court of Australia has long since considered the document to be a compact between the states rather than a mere statute[83]. It is a constitution that combines the British Westminster system along with an American style federalism. As a consequence, the approaches to interpretation have also followed similar traditions, oscillating between the methods followed by the British courts in interpreting colonial constitutions

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78 See Generally, Krishnaswamy, S., 2010. Democracy and Constitutionalism in India: a study of the basic structure doctrine. Oxford University Press.

79 *Supra* note 70

80 *Ibid* at 246

81 See, *Indira Gandhi v. Rajnarain, AIR 1975 SC 2299: Minerva Mills v. Union of India, AIR 1980 SC 1789,* etc

82 Lindell, G.J., 1986. Why is Australia's Constitution Binding?—the Reasons in 1900 and Now, and the Effect of Independence. Federal Law Review, 16(1), pp.29-49.

83 Aroney, N., 2009. Introduction: Australia as a Federal Commonwealth.

on the one hand and the methods followed by the American Supreme Court on the other[84]. However, in some cases the High Court has indeed referred to the fundamental principles and underlying parts of the Constitution[85]. Constitutional interpretation made on the basis of structural principles by the High Court have subsequently become common in several cases with structural analysis being one of the most helpful approaches to interpretation[86].

ECLECTICISM

A general reading of this article will reflect the fact that the authors here have tried to trace out the various approaches of Constitutional interpretation existing in different countries at different times according to the change in development of the society. The initial part of the article had mentioned about the approaches the various courts have taken in the initial years of constitutional interpretation; a period when most of the world were deliberating upon to formulate the intention behind such a basic document governing polity and culture.

The theory of Originalism started dying in the 1980's in the U.S when legal scholars realized that the key attempt of originalists was to attain purity and it is possible only through history. Many problems then arose like the difficulty in finding out what would be the attitude and understanding of the Constitution by the founding era public because history was to be relied upon for interpretation of a given situation[87]. Even if this was found out, it would end up in having a fixed meaning resulting in a mechanical interpretation by the judges and scholars.[88] When it was understood that many of the traditional interpretations that had evolved by then do not yield or answer the evolving unpredicted problems, it necessitated an eclectic approach towards interpreting the Constitution. This approach is most welcomed as it captures an appropriate pluralism in our aspirations for good government.[89] Stephen M. Feldman in his article titled Constitutional Interpretation and History: New

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84 *Supra* Note 47, at p 128

85 *Attorney-General (Cth) (Ex rel McKinlay) v. Commonwealth (McKinlay's case) [1975] HCA 53*

86 Kenny, S., 2003. The High Court on constitutional law: the 2002 term. University of New South Wales Law Journal, 26(1), pp.210-223.

87 See Generally, Ilya Somin, Originalism and Political Ignorance, 97 MINN. L. REV. 625 (2012)

88 Randy E. Barnett, The Misconceived Assumption About Constitutional Assumptions, 103 NW. U. L. REV. 615, 660 (2009)

89 PETER M. SHANE, Conventionalism In Constitutional Interpretation and the Place of Administrative Agencies, 36 American University Law Review 573 at p. 598

Originalism or Eclecticism? [90] argues that even in the early decades there were American scholars and lawyers who used an eclectic or pluralist approach of interpretation which was also called '**flexible pragmatism'**.[91] They argued that constitutional adjudication is eclectic and uncertain: it takes into account multiple sources, and rarely produces an unequivocal answer.[92]

To understand it better, an eclectic interpreter considered a shifting variety of factors, including original meaning, framers' intentions, practical consequences, judicial precedents, and so forth."[93] To be clear, eclecticism is closely related to what is currently called "living constitutionalism," which emphasizes that the meaning of the Constitution "evolves, changes over time, and adapts to new circumstances, without being formally amended.[94]Thus, an eclectic interpretive approach is likely to generate changing or variable constitutional understandings.

CONCLUSION

The foregoing brief and cursory overview of the various approaches to Constitutional Interpretation is in no way complete as there is a vast amount of detail that we have left unexplored due to the ever-present constraints of time and space. However, we have attempted to present a comprehensive view of the apparently chaotic and exceedingly complex world of Constitutional Interpretation. The frequent reference to the complex nature of this domain is, however, part of our premise. Elsewhere[95], we have discussed the notion that a perusal of complex systems science lends a fresh perspective in understanding Constitutional Systems as complex systems. The humble attempt herein is to extend the same premise in developing a novel approach to interpretation that takes into account, not only the complex nature of the system but also the need to attach due consideration to the key factors of complex systems science that help mitigate the apparent chaos resulting from the multiplicity of opposing perspectives.

The idea of complex constitutional interpretation, operates on the premise that constitutional systems are complex adaptive systems and that any approach towards interpreting the same should be systemic by nature. This means that the system is of primary importance. But this does not mean that

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90 28 BYU J. Pub. L. 283 (2014)

91 Daniel A. Farber, Legal Pragmatism and the Constitution, 72 MINN. L. REV. 1331 (1988)

92 *Ibid*

93 *Supra* note 83 at 288.

94 DAVID A. STRAUSS, The Living Constitution 1 (2010)

95 Sreenidhi K.R. & Chanjana Elsa Philip, Exploring Constitutional Complexity, III CMRU JCLA 151 Issue 1 (2021)

the proposed method is structural or teleological in any way. It is also equally important to note that this approach involves multiple perspectives and yet may not be considered the same as the eclectic approach. In undertaking an approach designed to interpret a complex system through a complex method, the key elements of complex systems must necessarily occupy a central role. It is therefore only natural that we commence our analysis of the same from this perspective. Complex Adaptive Systems exhibit certain characteristics which are typical to all such individual systems and consequently all such characteristics are exhibited in Constitutional systems as well[96].

1. At the outset, we must acknowledge that Constitutional Systems are self-organizing systems, prone to constant adaptation based on the frequent changes in the socio-political iterations of an evolving society. Interpretation therefore needs to pay homage to such evolutionary processes while engaging in dynamic construction of constitutional provisions.
2. Various constitutional concepts and doctrines when observed as the subsystems of a complex constitutional system, display sudden and dramatic changes which are seemingly unpredictable. Therefore, interpretation must accommodate the fact that constitutional systems and its subsystems are by nature path dependent and are therefore highly sensitive to minute changes which inevitably lead to large effects. The same is based on the famous *Butterfly Effect* proposition popularized by mathematician Edward Norton Lorenz[97].
3. The interdependence and interconnectedness between the various subsystems under Constitutional Systems is highly dynamic and susceptible to frequent change. Such change is often unpredictable and volatile, facilitating such systems to be self-organized. Interpretation must therefore account for the dynamic nature of the interconnectedness of such component subsystems, in light of the fact that the same often results in the emergence of new patterns of organization.

In conclusion we would like to hereby put forth our humble submission that a perusal of this approach in interpreting Constitutional text acknowledges the need to break away from our existing thought patterns and represents a small step towards reconciling traditional principles and notions with the modern and post-modern perspectives. This would undoubtedly ensure recognition, not only of the underlying core values but also of the various policies and goals looking to ensure appropriate course of action in the future.

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[96] *Ibid*

[97] Ambika, G. Ed Lorenz: Father of the 'Butterfly Effect' Reson 20, 198–205 (2015).

PRACTICE AND PROCEDURE OF 'ARREST AND DETENTION' IN INDIA: A NEW DIMENSION

- Dr.Mallaiah M.R*

INTRODUCTION

Arrest is the apprehension of a person suspected of criminal activities[1].The term Arrest in the Criminal Justice System signifies the deprivation of a person from his personal liberty by detaining him in custody. Such detention should be in accordance with the law and can only be exercised in public interest in connection with the prevention of offence and maintaining law and order in the society[2].

The word 'Arrest' is derived from the French word "Arreter" which means "to stop" or "stay" and signifies a restraint on a person's movement. In common parlance the word arrest means the 'apprehension or restraint or the deprivation of one's liberty[3]. In 1964, a Study conducted by the Human Rights Committee on the right of person free from arbitrary arrest, detention and exile23 defines the arrest and detention with a chain of terms revolves with arrest and detention. They are as follows;

"Arrest is defined as, "the act of taking a person into custody under the authority of the law or by compulsion of another kind and includes the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him".[4]

Further, arrest is defined as, "the act of taking a person into custody under the authority of the law or by compulsion of another kind and includes the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him".[5]

Arrest is undoubtedly a serious interference with fundamental right of the personal liberty of a citizen, which gives an arrestee or an accused, guaranteed

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1 Oxford Law Dictionary., (Fifteenth Edition,2001, Oxford University Press) London, P 32.

2 Law Commission of India (1969) 177th Report on Code of Criminal Procedure, 1773, New Delhi.

3 *Directorate of Enforcement v. Deepak Mahajan, (AIR 1994 SC 1775).*

4 United Nations Human Right Commission

5 *Supra* n6

protection under Articles 21 and 22 of the Constitution of India and specifically lays down that arrest has to be strictly in accordance with the law[6]. The purpose behind depriving a person from personal liberty under the Criminal Justice System is to prevent the person from committing a criminal offence or to ensure the presence of the accused at trial. Arrest is a discretionary power of the State, hence it should be exercised with due care and caution[7].

Detention is defined as, "Depriving a person of his liberty against his will following arrest[8]. the act of confining a person to a certain place, whether or not in continuation of arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational or social activities"[9]. The term arbitrary under International Law confirms that arbitrariness is not to be equated with something which is against the law but must be interpreted more "broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law"[10].

In the International domain, the law of arrest and detention originated with the concept of right to liberty and security. This right to liberty can be traced back to the English Magna Charta, in the year 1215 & the United States Declaration of the Rights of Man and Citizen in 1789[11]. The Protection against arbitrary arrest and detention is one of the main dimensions of the right to the liberty and security of a person.

The great *Charter of 'Magna Carta'*[12] had guaranteed the protection only to feudal noblemen did not provide any such safeguards to the others against any arbitrary exercise of their rulers, in cases of arrest and detention. In the 17th century, two major enactments surfaced one was the Bill of Rights[13] and the other was Habeas Corpus Acts,[14] to protect the individual from an illegal

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6 *Supra* n2

7 R.V. Kelkar, Criminal Procedure Code, p. 106 (Eastern Book Company, 2004).

8 *Supra* n3., p 147.

9 *Supra* n 16.

10 United Nation Human Rights Commission.

11 Icelandic Human Rights Centre at http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-liberty

12 The great Charter of Runnymede, acceded to by king John in 1215 after armed rebellion by his barons. It guaranteed the freedom of the Church, restricted taxes and fines, and promised justice to all .

13 *Supra* n 10 (1689).

14 *Supra* n 10 (1640, 1679).

or arbitrary arrest and detention. The right was further developed and the scope of its application was widened after the French Revolution, in the French Declaration of Rights in the year 1789 according to which the right to liberty was guaranteed in the constitutions of national states. The right to liberty played a major role in the Mexican revolution where 'land and liberty was the slogan of the revolution[15].

However, Article 9 of the Universal Declaration of Human Rights, was the first enactment which provided the protection of the right to liberty & security of the person and prohibited the State from arbitrarily depriving right to liberty and security of person by curtailing unlawful arrest, detention or exile[16]. Later on, this right to protection against illegal and arbitrary deprivation has been elaborated by a number of International Instruments at both International and Domestic level.

In India the safeguards against arrest and detention did not exist in the Draft Constitution, Article 22 was added only towards the end of the deliberations of the Constituent Assembly[17]. The reasons for the incorporation of this Article were explained by Dr. B.R. Ambedkar in the Constituent Assembly, he pointed out that Article 21 had been vehemently criticized by the people outside, since all that it did was to prevent executive from making any arrests.[18] What was being done by Article 22 was a sort of compensation for what was done in Article 21. The Constituent Assembly was providing the substance of "due process" by the introduction of Article 22[19]. This Article, in its first two clauses, merely lifted from the Code of Criminal Procedure and incorporated in Constitution as the most crucial fundamental principles which every civilized Country followed as principles of International Justice. By making them a part of the Constitution, the Constituent Assembly was making a fundamental change by putting a limitation on the authority of both Parliament and State legislatures not to abrogate those provisions. Hence Dr. B.R.Ambedkar in the debate argued that the provisions made in Article 22 were sufficient against illegal and arbitrary arrests[20].

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15 Uma Devi, Arrest, Detention, And Criminal Justice System (Oxford University Press, New Delhi) 2012.

16 http://www.un.org/en/documents/udhr/

17 Constitutional Assembly Debate, Vol. VII, 3rd Reprint (September, 15, 1949).

18 *Ibid*.,

19 *Ibid*.,

20 *Supra* n 16.

Article 22 is one of the groups of Articles in Part III of the Constitution of India, which have been collected together under the sub-heading "Right to Freedom". The subject- matter of the Article is personal liberty and proceeds to guarantee certain Fundamental Rights to every arrested person. These rights being guaranteed by the Constitution are of a higher status than rights which are merely conferred by the ordinary law and have no such constitutional guarantee[21].

Under the Criminal Procedure Code of 1973, the power to arrest is entrusted to a police officer, Magistrates and in some extraordinary circumstances also to private person[22]. But the Police officers are entrusted with wide powers of arrest under different circumstances as compared to several other classes of officers who also have power to arrest for the enforcement of other Penal Enactments such as Custom, Income Tax Railway etc.[23]. The power to arrest is a very crucial power, and has to be exercised with intelligent discretion and caution.

CURRENT PRACTICE AND PROCEDURE OF 'ARREST AND DETENTION'- INDIAN PERSPECTIVE

The Criminal Law is a replica of imperial era, which makes our Criminal Justice System and majority of its laws are an old inheritance from the British forefathers. However, some of the Criminal Laws have been adapted by our Constitutional Assembly, Legislators and the Judiciary to suit the needs of the country[24]. The police are authorized to protect the rights of a person and maintain peace in the society. But the rules by which the police are governed are based on the old laws made by British which depict traces of autocracy and arbitrariness[25].

Despite the passage of time, the law remained unchanged and continued to be followed in the archaic form making the police resort to corrupt practices and brutal ways[26]. Today, the police seems to have by -and large lost the faith of the public who are otherwise expected to repose in them. There is ample evidence to the show that the police have blatantly infringed the law

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21 *Supra* n 14.

22 R.V. Kelkar, Criminal Procedure Code, p. 106 (Eastern Book Company, 6th ed., 2004).

23 A.B.Srivastava, Commentaries on Police Diaries, (Law Publisher India Pvt. Ltd, 12 ed., 2012) p 184.

24 *Supra* n 14.

25 *Ibid*.,

26 *Supra* n 10.

themselves, under the cover of duty and effectuated arbitrary arrests and detention, despite various safeguards under the Constitutional and Statutory Law, being in place. Therefore, it is necessary to understand that, right to personal liberty is one of the most important rights guaranteed to every individual and it is eventually the State, which is to ensure a check on efforts towards encroachments on the same.

The Human Rights Committee, has stated that under arbitrary arrest and detention the problem is not with depriving a person of his liberty but with the word 'arbitrary' hence to make the deprivation of liberty legal there is need to eliminate all forms of arbitrariness and for that the State, should not continue the detention of a person beyond the period as assigned by the legislation. The detention should be consistent with the law and is based on "reasonableness"[27]. The notion of "arbitrary detention" can arise from the law itself or from the particular conduct of Government officials. A detention, even if it is authorized by law, may still be considered arbitrary if it is premised upon an arbitrary piece of legislation or is inherently unjust, relying for instance on discriminatory grounds[28]. An overly broad Statute authorizing automatic and indefinite detention without any standards or review is by implication arbitrary. Legal provisions incompatible with fundamental rights and freedoms guaranteed under International Human Rights Law would also give rise to a qualification of detention as arbitrary[29].

1) Provisions Relating to 'Arrest and Detention' Under Cr.P.C

Chapter V of the Code of Criminal Procedure, 1973 contains the provisions relating to 'Arrest and Detention'. The Indian criminal laws do not define the term 'Arrest' anywhere. However, in *Joginder Kumar v. the State of UP*[30]., it was held that "arrest is an important tool in criminal laws and its purpose is to present an offender before the court and prevent him from escaping. The arrest also helps to prohibit the accused from committing any subsequent crime. Power to arrest under Cr.P.C. is lawful. Arrest does not mean that being a lawful act any person will be arrested without any reasonable cause. There has to be a justifiable cause to arrest any person.

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[27] Laurent Marcoux, Jr., Protection from Arbitrary Arrest and Detention Under International Law, 5 B.C. Int'l & Comp. L. Rev. 345 (1982); The word reasonableness means having a reasonable suspicion on a person that he has committed an offence which depends on the existence of certain facts and circumstances.

[28] *Ibid*.,

[29] *Ibid*.

[30] AIR 1994 SC 1349.

Under Cr.P.C. arrest can be effectuated by the following persons:

- Police officer
- Magistrate or,
- Any private person

a) **Arrest by Police Officer:** A police officer may arrest[31] any person without the order of Magistrate and warrant if the said person has committed any cognizable offence; or has been declared as an offender either under Cr.P.C. or by the order of the State Government; or is reasonably suspected to be in possession of any stolen property or having suspected of committing any offence relating to such thing; or from the lawful custody, has escaped or attempts to escape; or restricts any police officer in the execution of his lawful duty; or is suspected to be a deserter from any Armed Forces of the Union; or is been concerned under any law relating to extradition; or being a released convict commits the breach of any rule mentioned under Cr.P.C.[32] or whose requisition to arrest has been received from another police officer specifying the person to be arrested and the grounds of his arrest.

A police officer is also empowered to arrest[33] any person, who has been accused of committing a non-cognizable offence and refuses to provide his name and residence on the demand of such officer or the officer has the reasons to believe that such information is false, in order to ascertain such information.

b) **Arrest by Magistrate:** A Magistrate, within his local jurisdiction, may arrest any person who has committed the offence in his presence and can also commit him to custody.[34] Further, a Magistrate may also arrest any person for which he is competent and is also permitted to issue a warrant.[35]

c) **Arrest by Private Person:** A private person is also authorized to arrest any person who in his presence commits a non-bailable and cognizance offence or who is a proclaimed offender.[36] A private person, however, is required to hand over the arrested person, without any unnecessary delay, to the police officer or to the nearest police station.

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31 Section 41 of The CrPC, 1973.
32 Section 356(5) of the CrPC, 1973.
33 Under section 42 of Cr.P.C, 1973.
34 Sec. 44(1) of The Criminal Procedure Code, 1973.
35 Sec.44(2) of The CrPC, 1973.
36 Sec. 43(1) of The CrPC, 1973.

However, the member of Armed Forces of the Union is exempted from being arrested for anything done by them in the discharge of their official duties.[37] They can only be arrested after obtaining the consent of the Central Government.

2) How an Arrest is Effectuated Under Cr.P.C.?

Section 46 of Cr.P.C. prescribes the procedure to arrest. Arrest being deprivation of liberty of a person can be affected by actually touching the body of the person. As per section 46(1) of Cr.P.C, the person making the arrest shall actually touch the body of the person to be arrested unless he himself submits to the custody by action or word. Mere an oral declaration of arrest without actually submitting to custody does not amount to an arrest[38]. However, if a person makes a statement to the police accusing himself of committing an offence, he would be considered to have submitted to the custody of the police officer[39].

However, Sec. 46(1) of Cr.P.C also provides that where a woman is required to be arrested, her submission to the custody shall be oral. A police officer is not required to touch the woman except the circumstances require or where the police officer is female. Further, as per section 46(4), no woman shall be arrested after sunset and before sunrise. However, in exceptional circumstances, it can be done so if the prior permission of the Judicial Magistrate of the first class is obtained by a female police officer by making a written report.

Furthermore, Sec. 46(2) of Cr.P.C. provides a wider power to the person in the matter of arrest. If a person tries to escape the arrest, the person making the arrest may use all necessary force to effectuate the arrest. Section 46(3) of Cr.P.C.restricts the person making the arrest to cause the death of a person who is not accused of an offence which is punishable with death or life imprisonment. Thus, no person has the right to cause the death of a person while effectuating lawful arrest.

Generally, a police officer has the power to arrest a person within his jurisdiction but section 48 provides an extension to such powers. A police officer who has authority to arrest a person without a warrant may pursue such person into any place in India, in order to arrest the person. Further,

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[37] Section 45(1) of The Criminal Procedure Code, 1973.
[38] *Harmohanlal v. Emperor,* (1929) 30 Cri LJ 128.
[39] *Bharosa Ramdayal v. Emperor*,(1941) 42 Cri LJ 390.

according to section 49 the person arrested shall not be restrained more than that is required to prevent his escape.

3) Special Procedures to be followed for arresting Special Persons

Under this head it is argued that when the Court is talking about value of liberty, it is talking in general terms i.e. about all person but when the Court is actually comes down to translating the rights, it gives special privileges to some person as oppose to others which shows that the Court is creating a distinction among person by laying down specific guidelines to arrest certain categories of person which categorized the procedure of arrest into parts i.e. arrest of general person and arrest of special person. This attitude of Court raised a contention that do the Judiciary is creating a class biased society? Hence, the researcher has tried to find out why these special groups have been given special rights with respect to law of arrest. Is it not a clear violation of principles of equality under Article 14 of the Constitution? As it provides for 'equality before the law and ,equal protection of law, which means everybody in the eyes of law are equal and it is the duty of law to treat them equally there shall not be any discrimination on any basis. Is this not creating of a class element in society?

The following are the categories of persons[40] who are given special procedures to arrest- Judges, M.P/MLA, Doctors, Women, Children, arrest under 498A, arrest under Schedule Caste and Schedule Tribes under Prevention of Atrocities Act.

a) Arrest of Vulnerable Person

The Criminal Procedure Code has also provided a separate procedure for arresting a women that they could not be arrested between sunset or sunrise except in exceptional cases and in presence of women constable with strict sense of decency any bodily searches of females can only be carried out only by a women police officer with decency. The Supreme Court in *Sheela Barse v. State of Maharashtra* [41], has laid down various guidelines for arresting women. It was held by the Court that women dignity and modesty shall not be infringed. Women in custody are particularly vulnerable to physical and sexual abuse. Courts take a very serious view of complaints about custodial rape or harassment. The National and State Human Rights Commissions and the Women's Commission are also playing an increasingly proactive role to

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[40] For example-vulnerable person, person under protected legislation, public servant and others enjoy the special privileges and protections under various legislative and Constitutional provisions.

[41] 1983(2) SCC 96.

see such instances do not go unpunished. It is the duty of the officer in-charge ofa police station to ensure that women are not harmed and searches of their person are carried out only by women with strict regard to decency.[42]

Therefore, it can be said that women and children are vulnerable section of the society and hence shall be protected from the any kind of abuse and exploitation. Hence, in case of *Christian Community welfare council of India v. Govt. of Maharashtra* [43]The Court has directed the State Govt. to constitute a committee to see that females cannot be arrested without presence of a lady Constable and no female shall be arrested after sun- set and before sunrise and further provides that females are to kept in separate lock ups.

However, in cases of arrest of children the police can never use force against them. The police are not allowed to take children under the age of 15 years to the police station for questioning and if a child has arrested then they will sent to the "special juvenile police unit" or a designated officer and information of such arrest should be immediately given to parents and guardian of the child and juvenile justice board.[44]

b) Arrest under Protected Legislation

Some of the protected legislations[45] have also provided safeguards from arrest of a person who commits a crime under these legislation.[46]These legislations provides special procedures to be followed in making arrest of a person who commits any crime. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, provides that the police officer, before making any arrest should have to make a preliminary inquiry in the matter of the offence and can only arrest as directed by the provisions of this Act and any violation will make the officer liable for punishment for neglecting their duties. The reason for specifically providing protection is to protect the SC/ST people from discrimination.

While arrest under Section 498A of IPC, the Police officer should exercise due care and cautious while arresting a person, guilty of domestic violence. The reason for exercising due care is that it is case of domestic life

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42 Section 51 (2), CrPC, 1973.

43 1995 CrLJ.4223 (Bom).

44 The provisions of Juvenile Justice Act are to be followed strictly in all cases of arrest of children below the age of 15 years.

45 Sec. 498A of Indian Penal Code, 1860.

46 See The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

of a person here the wrong doer is the one who is connected with the victim and any negligent act will demolish the scared thread of marriage and it has been witnessed that once a person arrested under the said section, he will never take back their wives. So giving special provision to the individual under the protected legislation is fully justified.

c) Arrest of Public Servant

Public servants can be arrested when it is required in the interest of investigation or he is trying to abscond from the prosecution and action against him.

d) Arrest of Judicial Officer

The Court has provided special safeguards to some special group of persons these are Judicial Officers, CBI, MP /MLA.

In the case of *Attorney-General v. Times Newspapers* [47] the Court held that a Judicial Officer cannot be assaulted, handcuffed when arrested by police. While the Supreme Court in Delhi Judicial Service Association, and in *Delhi v. State of Gujarat* [48] and others observed that in no case a judge cannot be handcuffed, if there is any violent resistance from the judge to escape then the officer shall have to report the immediately his reason for handcuff to the District and Sessions Judge or to the Chief Justice of the High Court and if handcuffed he should have to prove such necessity of handcuffing otherwise he would be guilty of misconduct and have to compensate the judicial officer.

e) Arrest in CBI Cases and of Members of Parliament

It is provided that Superintendent of Police and Investigating Officers has discretion to arrest the CBI personnel and due care should be taken in making such arrest. It is also provided that the arrest should not be done publicly, the officer arresting CBI personnel should have to avoid unnecessary publicity and embarrassment.

As in the case of arrests of Members of Parliament and Legislatures some safeguards are given to them that they cannot be arrested under the precincts of the house of Parliament without the permission of the Speaker and if arrested outside the house then information to the speaker should be given immediately as this is the requirement provided by the rules of Lok Sabha manual.

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47 [2001] EWCA CIV 97.

48 AIR 1991 SC 2176.

4) After arrest procedures: Rights of an arrested person

This is an important area to be addressed here in connection with procedure to be followed by police officer after making arrest of a person. In this regard, The Criminal Procedure Code, 1973, has given very wide power to any police officer in matters of arrest. In order to ensure that this power is not abused and used arbitrarily, there are certain rights of an arrested person embodied in the Code. Following are the rights of an arrested person:

a) Right to be informed about the grounds of Arrest:[49]it is the duty of the person making the arrest to inform the arrested person the grounds of his arrest. The communication of Arrest must be made in the language which is understood by the accused and his relative/friends.[50] *In Harikishan v. the State of Maharashtra*[51] Supreme Court held that the grounds of arrest must be communicated to the person in the language that he understands otherwise it would not amount to sufficient compliance with the constitutional requirement. Further, it was held in the case of *Joginder Kumar v. State of U.P.* that a detained person should know the cause of his detention and is entitled to let any third person know the location of his detention.

b) Right to be informed of Right to Bail: If a person has been arrested for a bailable offence, it is the duty of police officer to communicate to him that he is entitled to the right to bail.

c) Right not to be detained more than 24 hours:[52] A person arrested without a warrant will not be detained in custody for more than 24 hours. Within 24 hours the accused shall be produced before the Magistrate. It is also, a fundamental right guaranteed under the Constitution. If a person is not produced before the court within the said period the detention will be said to be illegal. In the case of *State of Punjab v. Ajaib Singh*[53], it was held that cases of arrest without warrant require greater protection and production of the accused within 24 hours ensures the legality of the arrest, not complying with which would deem the arrest unlawful.

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49 Article 22 (1) of the Constitution.

50 Sec.50-A (1) of The Code of Criminal Procedure Code,1973.

51 (1962) 64 BOMLR 522.

52 Article 22(2) of the Indian Constitution: The right available to the accused at the first stage of production before the Magistrate is not stated directly in Article 22. It is rooted in Section 167 of the CrPC and states that no magistrate can authorize the detention of the accused in police custody unless the accused is produced in person before the magistrate. This right protects the accused from being detained on wrong or irrelevant grounds.

53 AIR 1953 SC 10.

d) Right to be defended by a legal practitioner:[54] provides the fundamental right to the person arrested to consult a legal practitioner of his choice. Further, it is also the duty of Court to engage a pleader at expense of the State for accused if he has no sufficient means to engage.[55]

Further, in *Khatri (II) v. the State of Bihar*, [56]Supreme Court has strongly urged upon the State and its police to ensure that this constitutional and legal requirement of bringing an arrested person before a judicial magistrate within 24 hours be scrupulously met. This is a healthy provision that allows magistrates to keep a check on the police investigation. It is necessary that the magistrates should try to enforce this requirement and when they find it disobeyed, they should come heavily upon the police. Also, in *Sharifbai v. Abdul Razak,* [57]the apex court held that if a police officer fails to produce an arrested person before a magistrate within 24 hours, he shall be held guilty of wrongful detention.

INDIAN JUDICIARY ON 'ARBITRARY ARREST AND DETENTION' PRACTICES

The judiciary in every country is the last resort to come to the rescue of arrested persons. It plays a significant role in protecting the rights and interests of arrested persons. The judiciary has interpreted and incorporated a number of provisions against the arbitrary arrest and detention. In a plethora of cases the judiciary has gone to the extent of interpreting the laws to meet

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[54] Article 22(1) of the Constitution: There are a few rights which are not explicitly mentioned but are interpreted by the Supreme Court in certain cases. In the case of *Hussainara Khatoon & Ors v. Home Secretary, State Of Bihar* (AIR 1979 1369), the courts observed that a large number of people were arrested awaiting their trial in a court of law. The arrests were made irrespective of the charge and its graveness. The accused were under arrest, deprived of their freedom even before the commencement of their trial and the charge actually being proved which stands unreasonable. The Supreme Court showing concern over the matter interpreted that speedy trial is a constitutional right although it is nowhere explicitly mentioned. It was held that an investigation should be held as soon as possible and in no case is the state permitted to deny speedy trial on any grounds. It was also stated that in cases of arrest for trivial charges the trial must be completed within six months. It was also declared that the right to free legal aid is a fundamental right which was later expressly mentioned through amendments. It was also observed that the Supreme Court had powers to enact a DPSP into a fundamental right.

[55] Section 304 of The Cr.P.C. 1973.

[56] [1981] 1 SCC 627.

[57] AIR 1961 Bom 42.

international standards and fulfil the aspirations of International Organizations to which India is also one of the party.

In this Context, it is necessary to focus on some of the leading case which shows that the judiciary has been vigilant towards the protection of rights being violated and taking a commendable part in incorporating the international standards in cases of arbitrary arrest and detention. In *Maneka Gandhi v. Union of India*[58] the Supreme Court observed that the every person has right to a fair trial, which includes just, fair and reasonable procedure under Article 21 and it should not be taken away by any one in any case. Hence, the derivation of liberty should also be within the parameters of the just, fair and reasonable principle.

Further, the judiciary in number of cases asserted that right to liberty is paramount right of an individual which cannot be taken away by state under any circumstances, until there is no other option left but to restrain the liberty.

In *Joginder Kumar v. State of U.P*[59] showed a concern towards the abuse and misuse of the power to arrest and issued some guidelines to the police to prevent the State from arbitrary deprivation of liberty. However, the Court laid down that arrest should be made in a routine manner and it should only be done after some preliminary investigation. The Court held that unnecessary and unjustified arrests will lead to undue harassment and will result in the loss of faith of the citizens in the criminal justice system. Further, in *R.C. Cooper v. Union of India* [60]declares that the fundamental rights are very important and focusing mainly on the power of State to arrest and the object of State's action in exercising that power is the ignorance of the true intent of the Constitution of India.

The apex court while emphasizing on the preservation of personal liberty of a citizen observed in the case of *Prabhu Dayal Deorah v. The District Magistrate, Kamrup* [61] held that, "We say, and we think it is necessary to repeat, that the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedures established by the Constitution and the other laws. The history of personal liberty is largely the history of insistence on observance of procedure. Observance of procedure

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[58] AIR 1978, SC 597.
[59] AIR 1994 SC 1349.
[60] AIR 1970 SC 564.
[61] AIR 1974 SC 183.

has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution, the only guarantee of the personal liberty of a person is that he shall not be deprived of it except in accordance with the procedure established by law."[62]

On the other hand, the Apex Court in *D.K Basu v. State of West Bengal* [63] also added in the context of importance of personal liberty a detailed guidelines for making arrest of a person and while referring to Article 22 (1) of the Constitution which lays down that a person has right to be informed about the grounds of his arrest immediately after his arrest, and also the right to consult and to be defended by a legal practitioner of his choice. It reads as no "person shall be detained in custody without being informed about the grounds of arrest and their rights in connection with such detentions and insists on other requirement while arresting a person". However, maliciously detaining people without recording an arrest is punishable by a maximum sentence of seven years as mentioned in Indian Penal Code.[64]

Despite of these categorical judgments of the Supreme Court, the police are still not implementing it. In the recent case of *Lalita Kumari v. State of Uttar Pradesh*,[65]the question was whether a police officer is bound to register an FIR when a cognizable offense is made out. The Court said that police has to register an F.I.R but they should not arrest a person so easily, they have to conduct a preliminary inquiry before arresting a person. The right to liberty under Article 21 of the Constitution is a valuable right, and hence should not be taken lightly.

Thus, Indian judiciary has played a very crucial role to lower the risk of arbitrariness in the arrest procedures through 'Judicial Activism'. Despite having various Constitutional and Legal provisions to prevent the arbitrary arrest and detention, and the practice of abuse of power to arrest in India. The Judiciary has taken a proactive stand to protect the rights of an arrested person and to prevent the arbitrary arrest by police. The protection of the individual from oppression and abuse by the police and other enforcement officers is a major interest in a free society. Hence, it said that Judicial Activism has become an essential feature and one of the fundamental principles of a democratic society, which intends to preserve the fundamental rights of the citizens and prevent the arbitrariness of State in any matter. The Judiciary has

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62 *Arvinder Singh Bagga v. State of Uttar Pradesh*, AIR 1995 SC 117.
63 AIR 1997 SC 610.
64 Section 220, IPC, 1860.
65 AIR 2012 SC.

been exercising its control on the police or other law enforcement agencies to preserve the individual's right to liberty.

CONCLUSION

The act of 'arrest and detention' is an integral part of the process of every criminal justice system around the world. Every state has to ensure that the rights and interests of the arrested persons are safeguarded by the state authorities while making an arrest. The Indian criminal justice system, in fact, has failed to curtail the rising cases of 'arbitrary arrest and detention' and needs to move beyond the out-dated law of arrest and incarceration, and introduce a legally feasible and scientifically effective method of dealing with arrest and detention of persons.

SOCIAL MEDIA AND RIGHT TO BE FORGOTTEN- AN OVERVIEW

-Ms. Sharada KS*

INTRODUCTION

Right to privacy and freedom of speech and expression are two constitutional freedoms that are intertwined. These two are the rights or interests of the individual, sometimes in the same breath as the rights or the interests of the whole community.[1]Freedom of the press is included in the freedom of speech and expression. Press is a "species of which freedom of expression is a genus".[2]Media in a broader sense includes press, television, radio and internet, and other social networking sites. Social media is more interactive than traditional media. It is a platform to connect people with every individual, or agency to communicate, interact, and enables the exchange of user-generated content.

The right to be forgotten has originated in western countries. The interference of this concept was placed under Article 6(1)(e) and 12(b) of the personal data protection i.e. Directive 95/46/EC. It was the first legislation enacted by the European Union. The intention of the legislation is to dispose of emails and text messages online after an agreed time at the request of the concerned individual[3]. Recognizing the "Right to be forgotten" on social media is a great initiation and significant alteration to the online privacy jurisprudence.

SOCIAL MEDIA AND ITS ROLE

Prior to the development of new technologies, people used to communicate through the public broadcast mediums and electronic media like print media, television, and radio. But there was no control on the audience, however, there were one-to-one private conversations, and it is called "Dyadic Communication"[4]. The public and private media have transformed due to development in the field of internet technology and resulted in the emergence

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1 Raymond Wacks," Privacy- A very short Introduction" 2nd Edition, Oxford University Press, 2015 p.84.

2 Sakalpapers v. Union of India, AIR 1962, SC 305: (1962) 3 SCR 842

3 Rolf H. Weber, "The Right to be Forgotten more than a Pandora's Box?" 2, (2011) JIPITEC, 120 para1.

4 Daniel Miller, Elisabetta Costa et,al, "How the world changed social media" UCL press. P.1 to 8. Available at https//about. Jstor.org/terms last Modified on Mar 4, 2021.

of a new form of social media. These new entities who use the internet as a platform play an important role in a way developing dyadic communication via audio, video, and live chat. In the modern-day, it has become the main source of communication, interaction, and disseminating information. Now social media is an integral part of our life and we live most of the time in the virtual world.

Social media has a positive and negative impact on our life. Easy accessibility of information and staying connected with our family, friends, without restrictions of geographical boundaries is tectonic. There are negative impacts also, the most important and primary one is the breach of the right to privacy.[5] Social media applications like Facebook, Instagram, Twitter, Youtube, Whatsapp, etc., encourage individuals to showcase their talent and creativity skills and sharing (enable them to share) their opinions on social-economic or political issues. It is also a source of entertainment and empowerment for the youth. But many times individual's personal information is made available on the internet for public view and breaches the fundamental right of privacy.[6]Social media is a form of communication via the internet. Information technology together with the internet and social media and all their attendant applications have rapidly altered the course of life.[7]

Public and private interests always conflict with each other even on social media. Self-regulation is the best way of protecting our privacy right as the law on the protection of privacy of individuals has still not developed. Technological changes pose new regulatory challenges to privacy notions. Thus, people can control their private information to protect the privacy right. Predominantly privacy means "space" which is protected in terms of simple as well as social interaction. If the individual does not want his data controller to process or store his personal information, he can withdraw his consent and the data should be removed from the system.[8] Vivinance Reading Vice-

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5 Diganth Sehgal, " Media and the right to privacy the incursion of social media" Nov. 28. 2020. ipleaders, Intelligent Legal Solutions, available at: https://blog.ipleaders.in/media-right-privacy-incursion-social-media/(LastModified Feb. 26, 2021)

6 *Ibid*

7 main.sci.gov.in/supremecourt/2012/35o71/35071_2012_judgement_24-Aug-2017pdf (Last accessed on Feb. 24, 2021)

8 Vivinance Reading Vice- President of the European commission, EU Justice Commissioner. The EU Data Protection Reform 2012, making Europe the Standard Setter for Modern Data protection Rules in the Digital Age innovation

President of the European Commission, said: "People must be able to easily take their data to another provider or have it deleted if they no longer want it to be used…I want to explicitly clarify that people shall have the right – and not only the 'possibility– to withdraw their consent to the processing of the personal data they have given out themselves." Right to request the search engines on the internet to remove the search results directly related to their personal information, which is guaranteed by the European Union Court of Justice to its citizens, known as "Right to be Forgotten".[9] It is an important component of EU privacy law[10].

ORIGIN AND DEVELOPMENT OF RIGHT TO BE FORGOTTEN

The right to be Forgotten has originated from French law which provides a "right to oblivion" (*le droit a l'oubli*)- a right that allows a convicted criminal who has served his time and been rehabilitated to object to the publication of facts of his conviction and incarceration.[11]

The foundation of this right was laid down by the European Court of Justice in *Google Spainsl v. Agencia Expanola de protection de Datos case*[12]. Mario Gonzales had a newspaper article written about a state auction to raise money for back taxes he owed for Spanish social security. These articles were also placed in an online edition. In 2009 Gonzales discovered his name in the articles which were still online. He searched through Google search, he contacted directly the newspaper to remove the article, the newspaper declined. Gonzales contacted Google Spain to remove the links to the articles even Google Spain declined. Later on, Gonzales filed a complaint with Agencia Espanola de protection de Datos (AEPD) by arguing that he had a

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conference Digital, Life Design Munich 22 January 2012 (24 Jan. 2012). ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_26. (Last accessed on Feb. 22, 2021)

9 Katharine Sarikakis and Lisa Winter," Social media user's legal consciousness about privacy", Social Media + Society, January –March 2017, p. 1-14. Available at sagepub.co.uk/journals permission.nav

10 Ajay pal Singh and Rahil Setia" Right to be Forgotten- Recognition Legislation and Acceptance in International and Domestic Domain" Nirma University Law Journal: Vol.6, Issue.2, Dec-2018, Available at: https://ssrn.com/abstract=3442990 visited on 22-2-2021.

11 Jerrey Rosen" The Right to be Forgotten", Vol. 64, Feb. 2012, Stan Law Rev. Online 88, 88 (2012). Stanfordlawreview.org/online/privacy-paradox-the-right-to-be-forgotten/ (Last accessed at 22 Feb. 2021)

12 *Google Spain SL v. Agencia Espanola de protection de Datos, c-131/12, Decided on May 13, 2014.*

right to remove articles from online. Hence, Google spain had to remove the articles. But this decision of AEPD was appealed in the Spain's highest appeals court, the Audiencia Nacional and it referred the case to the Court of Justice.

The Court of Justice decided the two most important aspects of the case. Firstly, whether a company like Google can be held responsible as a data controller. Secondly, whether the right to be forgotten is allowed by the EU privacy directive. Responding to the first issue the Court held by quoting Article 2 of the Directive 95/45/EC, that search engines stored this information within their websites and they were the controllers of digital information. Therefore, the Court of Justice held that search engines had a responsibility to remove the information from the web when requested. For the second issue, the Court of Justice held the 'Right to be Forgotten' has existed in European Union Law.[13]

RIGHT TO BE FORGOTTEN

Right to be Forgotten generally means the right to erase or delete. It has been defined by various scholars. Under Personal Data Protection Bill, Right to be Forgotten,[14]refers, to an individual's ability to limit, delink, delete, disclose misleading, embarrassing, or irrelevant personal information on the internet.[15]

According to Weber "Right to be Forgotten was intended to require online and mobile service providers to delete emails and text messages after a certain period of time at the request of their customers"[16]

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[13] Cayce Myers, "*Digital Immortality v. "The Right to be Forgotten*": A Comparison of U.S. and E.U. Laws Concerning Social Media Privacy, Romanian Journal of Communication and Public Relations. Available at https://www.researchgate.net/publication/271645571_Digital_Immortality_vs_The_Right_to_be_Forgotten_A_Comparison_of_US_and_EU_Laws_Concerning_Social_Media_Privacy

[14] Personal Data Protection Bill 2018, Available at meity.gov.in

[15] Right to be Forgotten- Drishti the vision foundation, available at https://www.drishtiias.com.

[16] Martha Garcia- Murillo and Ian Maclnnes" Cosi Fan Tutte: why a right to be forgotten should not be pursued, International Telecommunications Societ Biennial Conference in Rio de Janeiro, Dec. 2014. available at https://ssrn.com/abstract=2529396

Privacy Directive[17] defined the Right to be Forgotten as the right of individuals to have their data deleted when they are no longer needed for legitimate purposes.[18]

SOCIAL MEDIA AND RIGHT TO BE FORGOTTEN

Freedom of Speech and expression is a basic human right which includes the right to communicate through print media or electronic or audio-visual means such as, advertisement, movie, article or speech, etc.[19]An explosion of visual, electronic media has facilitated an unprecedented information revolution, thus social media stood as a very powerful means of communication to bring the change. The object of social media is to disseminate information, create awareness, educate people and help them in general interactions. Through social media, we connect with people instantly. Technology has removed the traditional barriers. Social media enables greater transparency, but on other hand puts private life into the public domain and exposing him to the risk of an invasion of his space and his privacy. The purpose is to establish a balance between, right to privacy and the right of the public to demand information. The sophistication of search engines and social media has created challenges to privacy norms. Therefore, it is the important responsibility of social media to ensure the protection of the right to privacy of the users.

The privacy relations on social media are now governed by public law. Understanding defining and protecting privacy is traced back to the seminal work by the Boston lawyers, Samuel Warren and Louis Brandies article "The Right to Privacy".[20] They contributed to the legal recognition and protection of privacy. The Right to be Forgotten is based on "the right to privacy". The intention is to avoid any possible damages on reputation, personality identity, and recognition of the individuals.[21]

RIGHT TO BE FORGOTTEN UNDER GENERAL DATA PROTECTION REGULATION (GDPR)

European Union proposed the GDPR in January 2012. It was adopted on 14 April 2016 and came into force on 25 May 2018. The main purpose of

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17 Article 6 of European union privacy Directive

18 Robert Kirk Walker, "The right to be Forgotten", Vol. 64:101, Hasting Law Journal

19 M.P Jain "Indian Constitutional Law" Eighth edition, Lexis Nexis, 2019, P. 1066.

20 Vol. 4, Harv Law Rev. 1890, p.193.

21 Meg Leta Ambrose/Jef Ausloor, " The Right to be Forgotten Across the Pord, Journal of Information Policy, Vol. 3, 2013, Pp. 1-23.

GDPR is to protect 'fundamental rights and personal data, it expressly includes and codifies the most controversial provision "Right to be Forgotten" under Article 17, which became a privacy nightmare for social media sites and search engines.

New regulation created a privacy law within the European Union, commonly referred to as the Privacy Directive wherein individual privacy rights are protected. Article 26 expressly prohibits the dissemination of private information to a third party. Article 14 of the privacy Directive restricts search engines from using the information for direct marketing. Article 16 says the user can force the controller to remove any inaccurate information, immediately from the internet. GDPR dictates the organization to have internal policy rules on privacy. Article 17(1) states about the user's rights. The controller has to erase the personal data relating to the user and abstention from further dissemination of such personal data. And Article 17 (2) says the (controller) search engines and social media platforms are required to remove data on sites. They must also take all reasonable steps to inform third parties, and individual users such as a Facebook friend or Twitter followers to take technical measures to remove specific data.[22]

Under the GDP Regulation dissemination of personal information means sharing, comments, re-tweets, re-posting, or posting comments. The users can request for the removal of a picture, post, comment, or tag that the data subject no longer wants to be disseminated on the internet.[23]The controller has to remove information or limit access to data on request. The right to be forgotten is not an absolute rule there are some exceptions. Under Article 17(3) when it involves public interest such as issues of health, scientific research, legal requirements, or historically significant events, there is a necessity for preservation which requires the maintenance of data. [24]

RIGHT TO BE FORGOTTEN: INDIAN PERSPECTIVE

A. Constitutional mandate on Right to be Forgotten

In India Right to be forgotten is still in the infant stage. There are no express provisions on the right to be forgotten. The Indian Judiciary took the initiation and suggested that it can be included under Article 21 of the Constitution. In *K. S Puttaswamy* v. *Union of India*[25], the apex court

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[22] Article -17, Right to erasure('right to be forgotten'), Available at https://gdpr-info.eu/art-17-gdpr/

[23] *Supra note.13*

[24] *Ibid.*

[25] *Justice Puttaswamy (Redt). & Anr.v. Union of India and Ors. 2017 SCC 1462*

recognized the Right to be Forgotten, as under the European Union Regulation of 2016. It said that "it would only mean that an individual who is no longer desirous of his data to be processed or stored, should be able to remove it from the system where the personal data information is no longer necessary, relevant, or is incorrect and serves no legitimate interest.[26]But again this is not an absolute right, certain limitations were also observed by the court. It cannot be exercised where the information/ data is necessary,

1) for exercising the right of freedom of expression and information,
2) for compliance with legal obligations
3) for the performance of a task carried out in public interest, or public health
4) for archiving purposes in the public interest or scientific or historical research purposes or statistical purposes,
5) for the establishment, exercise, or defense of legal claims.[27]

In *Subhranshu Rout v. the State of Odisha*,[28]the Orissa High Court emphasized the need for statutory recognition of the right to be forgotten. The court observed that presently no statute in India provides for the right to be forgotten/getting the photos erased from the server of the social media platform permanently.[29] Orissa High Court is the first Constitutional institution that has deemed the need of Indians to get this right. Another case where the question of the right to be forgotten came, in *Dharmaraj Bhanushankar Dave v*. the *State of Gujarat*.[30] The Gujarat High Court is empowering the citizens to have control over their lives which is a prerequisite for the functioning of a democratic nation. The Court observed that " the Judgment in the appeal is part of the proceedings and the said judgment is pronounced by this Court and therefore, merely publishing on the website would not amount to same being reported as the word "reportable" used for judgment is in relation to it being reported in law reporter"[31].Similarly, an important decision was given by the Karnataka High Court in *Sri Vasunathan v. The Registrar General and ors*.[32] The Karnataka High Court recognized the right to be forgotten. In this case, the petitioner's daughter's name was appearing in the digital records maintained by the respondent. The petitioner contended before the court that the name-wise

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26 *Ibid.*
27 *Ibid*.
28 BLAPL No. 4592 of 2020, High Court of Orissa
29 Indiankanoon.org/doc/6266786/
30 SCA No.1854, 2015.
31 Kunika Khera-case Commentary RTBF, Jamia Law Journal 2018, Vol.3, p.8. Available at docs.manupatra.in
32 Writ Petition Number 62038 of 2016(GM-RES), Decided on January, 23, 2017.

search on search engines like, Google, Yahoo, etc. his daughter's name reflects in the results page. This may affect his daughter's relationship with her husband and her reputation in the public domain. The court recognizing the right to be forgotten principle directed the respondent to mask the name of the petitioner's daughter and to take other necessary steps. Justice Ananda Byarareddy concluded the case by saying that:

"*This would be in line with the trend in the Western countries where they follow this as a matter of rule "Right to be Forgotten" in sensitive cases involving women in general and highly sensitive cases involving rape and affecting the modesty and reputation of the person concerned*".[33]

In *Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd and Ors*[34], the Delhi High Court also recognized the Right to be Forgotten and said that the right to be left alone and right to be forgotten are the inherent facets of Right to Privacy[35]. The right to be forgotten is part of privacy law and the right to privacy is an integral part of the right to life and personal liberty under Article 21 of the Constitution.[36]

B. Right to be Forgotten and Information Technology Law

Information and Technology Act 2000 was enacted to protect the user from digital crimes, piracy, etc. Section 66-E of the IT Act eloquently states that 'whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person.'[37] This section deals with the punishment for the violation of privacy.[38] IT Act mentioned social media under section 79 of the Act,[39] and provides safe harbor protection to the intermediaries and also to any person providing services as a network service provider. In certain instances they are exempted from the liabilities, however, if any illegal content is posted online they are not protected under this section.

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33 Kunal Garg, "Right to be Forgotten in India: A Hustle over Protecting Personal Data Indian Law Journal. Available at https://indialawjournal.org/a-hustle-over-protecting-personal-data.php#:~:text

34 2019(175)DRJ.660

35 *Ibid.*

36 *Supra note.*26.

37 Shiv Shankar Singh "Privacy and Data Protection In India: A Critical Assessment", Journal of the Indian Law Institute[2011] Vol. 53:4, Page- 663-677

38 Section 66 E- Punishment for violation of Privacy under the Information Technology Act, 2000. Available at indiankanoon.org/doc/112223967/

39 Section 79(3)(b)of Information Technology Act, 2000.

Information Technology (Intermediaries Guidelines) Rules 2011 imposed certain obligations on Intermediaries, which turned has hot waves in the digital world. Rule 4 of the Information Technology (Intermediaries Guidelines) Rules 2011, says that any illegal content posted online or as per Rule 3(2) of the 2011 rules, the affected person could write to the concerned intermediary to remove the same. In 2018, Information Technology (Intermediaries Guidelines) Amendment Rules were prepared by the Ministry of Electronics and Information Technology to provide security to the internet users and also to prevent misuse of social media platforms. These Rules were drafted to explain the liabilities and functions of the intermediaries elaborately and also to make internet companies and social media accounts for their content.

On 25 February 2021, the Government of India enacted the Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules 2021. It categorized the social media intermediaries like social media intermediaries and significant social media intermediaries. Rule 3 of Part II mentioned certain duties on social media intermediaries, that they cannot host, display, upload, modify public transit, store, update or share any information that belongs to another person, on which the user does not have any right. Further, any information which leads to defamatory, obscene, pornographic, pedophilic, invasive of another's privacy, including bodily privacy, insulting or harassing based on gender, libelous racially or ethically objectionable content has to be removed. [40] The guidelines also provide that the rules and regulations, privacy policy, or user agreement shall be informed by the intermediaries.[41]

Rule 4 of the Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules 2021, imposed an obligation to observe the due diligence while discharging the duties by social media intermediary and significant social media intermediary. Further, it says to remove or disable access to the unethical information within 36 hours on the receipt of the court order or on notification of the appropriate government or its agency or on a voluntary basis. Furthermore, it makes the strict compulsion on an intermediary for removal of information portraying person in bad light or obscene acts. There is also a provision for the appointment of a Grievance Redressal officer to address the grievance. Though there are no specific provisions on the right to be forgotten, the government has taken crucial steps to make social media accounts under a legal framework.

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[40] it-rules-2021-389746.pdf

[41] *Ibid.*

The intermediaries have to remove content on the net after judging independently. They are required to play the onerous role of a 'content police'.[42] Social media and the internet can no longer take one's audience for granted. *Oliver Wendell Holmes J* once said 'that the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.[43]

C. Right to be Forgotten and Personal Data Protection Bill 2018

The Government of India set up the Srikrishna committee under the chair of retired Supreme Court Judge B.N Srikrishna in August 2017.[44] The committee prepared a report on "A Free and Fair Digital Economy- Protecting Privacy Empowering Indians".[45] With consultation of the committee, the Ministry of Electronics and Information Technology drafted the intended legislation "The Personal Data Protection Bill, 2018". The special attention of the bill was Section 27 which says about the right to restrict the disclosure of his/her personal data by 'data fiduciary' or in other words 'Right to be Forgotten'.

Section 27 of the bill listed out various circumstances wherein such a right can be exercised. They are as follows

a) If data disclosure is no longer necessary or
b) The consent to use data has been withdrawn or
c) If data is used contrary to the provisions of the law.[46]

The Ministry of law and justice, on the recommendation of the J.B.N Srikrishna committee, has included the right to be forgotten, which refers to the ability of an individual to limit, delink, delete, or correct the disclosure of personal information on the internet that is misleading embarrassing or irrelevant, etc, as a statutory right in personal Data Protection Bill 2019.[47]

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42 Madhavi Goradia Divan, "Facets of Media Law" Eastern Book Company publishers, 2018, p.422

43 *Ibid.*

44 *Supra, note* 10.

45 Payal Thaory- Informational Privacy: Legal Introspection in India. ILI Law Review. Vol. II, Winter Issue 2019, ili.ac.in

46 Aroon Deep, Srikrishna Committee Data Protection Bill released, media namma(Nov 18, 2018, 10:21pm). https://www.medianama.com/2018/07/223-live-justice-srikrishna-data-protection-report-being-submitted-to-it-ministry/

47 *Supra note 30.*

CONCLUSION

Social media enables greater transparency on one side but on the other side brings our private life into the public domain and exposing the risk of invasion of our privacy. Thus, it is the responsibility of social media to ensure the protection of the privacy rights of the people. In this direction 'Right to be Forgotten is a new approach to digital privacy to change social media. As technology develops in a unique way the dimensions of social media and the internet will be the continual discussion of national and international legal scholarship. The right to be forgotten is to be developed and elaborated furthermore to meet the privacy issues on social media. This right has been interpreted in a divergent manner. Law must provide solutions for new challenges before any substantial injustice.

But the right to be forgotten is also limited, legitimate and legally justified data can be permitted. So right to be forgotten is not a right of the total erasure of history, it cannot take precedence over the freedom of media. So, any legislation should strive to balance the two fundamental rights, the right to privacy as well as media freedom.

Like European Union, the USA, and other countries in the world, India also has made a sincere effort to recognize the concept Right to be Forgotten[48], but this right gets in conflict with the freedom of expression. In India, if we have to implement the right to be forgotten, privacy needs to be added as a ground for reasonable restriction under Article 19(2) by making necessary Amendments to the Constitution. Therefore the comprehensive law regarding privacy should balance the two fundamental rights by minimizing the conflicts and adopting the golden trinity (Article 14, 19, and 21) of the Constitution. [49]

The alternative suggestion to protect our privacy right on social media is to have a data tax. If social media companies had to pay a reasonable amount per unit of personal data they handle, they would think twice before storing and sharing the personal information about an individual.

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[48] *Supra note 14.*

[49] Right to be Forgotten, Drishti, the vision foundation. Available at https://www.drishtiias.com/daily-updates/daily-news-editorials/right-to-be-forgotten-2

MEDIA AND DEMOCRACY: EMERGING ISSUES AND CHALLENGES

-Dr. Ambedkar N.S.[1]

INTRODUCTION

The media is considered as the fourth pillar of any democracy. It is an inevitable part to keep check on the administration of government and its organs. But with the increasing boundaries of media it is overstepping its boundaries. It has been witnessed that the media pronounces its own verdict before the trial begins and ends up violating the principles of a fair trial. The accused persons are held guilty in the eyes of the public before a verdict is delivered in open court. Also, the sensationalism by media affects judges as they are human beings and the public opinion created by the media is bound to have an effect on them. Article 19(1) i.e., freedom of speech and expression, of the Indian Constitution remains an important facilitator for widespread engagement of the media within a democratic atmosphere. It is using this freedom that media is able to function. Media is regarded as one of the pillars of democracy. The freedom of press is regarded as "the mother of all liberties in a democratic society"[2]. A responsible press is a handmaiden of effective judicial administration. 'Trial by media' is a recently coined term and is used to denote a facet of 'media activism.' There is no legal system where the media is given the authority to try a case. In India, trial by media has assumed significant proportions. There have been numerous instances in which media has been accused of conducting the trial of the accused and passing the 'verdict' even before the court passes its judgment.

MEDIA: THE WATCHDOG OF DEMOCRACY

Media has undoubtedly played a tremendous role in bringing justice to the disadvantaged people. One cannot gag the press due to the heroic role it played in cases which are commonly known as 'Billa Ranga case', 'Baba Nirankar', 'Sudha Gupta' and of 'Shalini Malhotra'. Without an active media, the cries of the victims of brutal khap killings of Haryana would have gone unheard. Many other cases like the Arushi Murder Case, Jessica Lal Murder Case, Ruchika Girhotra Case and even the games played in IPL Row was brought out into broad daylight because of the laudable efforts of media.

ROLE OF PRINT MEDIA IN DEMOCRACY

Today, in this ultra modern world, the role of media and particularly of print media has been augmenting day by day. It has been serving as a vigilant watchdog of India. Print Media has created awareness among the people

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1 Principal, Government Law College, Ramanagara, Karnataka

2 In re Harijai Singh, AIR 1997 SC 73.

regarding their rights and duties. Print media as well as other media which forms fourth pillar of democracy has strengthened informed citizenry and worked as check and balance on the government. Our Constitution grants us the Right to Freedom of Expression which is manifested, in free press in our country. In a democracy, newspapers are the best way of educating people politically and socially. They play a decisive role not only in updating the public but also in formulating a well-balanced public opining. The public reads about the current event, interprets them and learns to intelligently participate in the political, social and economic affairs of the country. Print media also works as a bridge between the government and the people. People get to know about the latest policies of the government and it also builds up the public opining, there like, disliking or demands. In fact, Newspaper is the vox populi or voice of the people in any country. It is the common man's university, giving lesson on life at large. The international NGO, Reporters Without Borders, released its annual World Press Freedom Index (WPFI) in 2017 highlighting state of media in different countries in which India ranked 138 which was two point down from previous year.

INTERNET MEDIA AND DEMOCRATIC CHALLENGES

The advent of the computer and indeed the application of Information and communications Technology (ICT) in human relations have changed the face of social interaction. The Internet is transforming the use of traditional media and providing a new and interactive system of communication with the public sphere. Online news sources, social networking sites, YouTube videos and blogs are bypassing television as the main source of public information, and connecting citizens in an open and democratic way. Political candidates are starting to ride the wave of New Media, which has spurred some of the largest populist movements the world has seen. But the established systems of democratic rule are based on old values and no technology. Part of the new generation of Web 2.0 applications, social media is a catch phrase that describes technology which facilitates interactive information, user-created content and collaboration.[3] In simple words, social media are web based tools, sites and services that provide users with dynamic ways to interact create and share in read/write web culture, where users are also producers and interaction

[3] Prashant Sharma, 'Core Characteristics of Web 2.0 Service's (Tech Pluto Staff, 28 Nov. 2008) <http://www.techpluto.com/web-20-services/> accessed 23 February 2013

and participation is encouraged.[4] Social media exhibits unique characteristics when compared to 'traditional' media forms. Its speed and scope means that once content is published it is available instantaneously, to a potential global audience. Marketing savvy companies are finding creative ways to use social media to promote their products and services and enrich their brand. Social media sites have transformed society on both a micro and macro level by enabling perpetual communication.[5] On the micro level, individuals are able to keep track of their friends and family on a daily basis. People can upload pictures, offer commentary on a topic of their choice, or voyeuristically view the activity of others. Data contained within social network sites may assist law enforcement in gathering timely information in furtherance of crime prevention, preservation of public order, and the investigation of criminal activity, including suspected terrorist activity.[6] The technological affordances and communication dynamics of social media can help citizens disseminate information and reach the international community; and it can make it more difficult for repressive regimes to quell citizen's free speech. Social media has been hailed as the long awaited set of applications that will enable "Athenian style direct democracy", where every citizen is connected to the state and can participate directly in policy making.[7] The Narendra Modi prime minster ship campaign in India and Barack Obama presidential campaign in the U.S. is widely recognized for its innovative user of interactive communication tools including social networks, user content sites and websites to enable direct engagement between volunteers/voters and the campaign/candidate.

With new forms of 'social media' already playing an increasingly significant role in human interaction, a new phenomenon, often referred to as the "social media revolution," has greatly impacted political dynamics on a global scale. It is important, however, to emphasize that while there is much attention paid to the technological dimensions of social media as an agent of

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4 Robert Bodle, 'Social Media and Global Internet Governance: Innovations and Limitations' (Fourth Annual GigaNet Symposium, Sharm-El Sheikh, Egypt 14 November 2009)

5 Alexandra Paslawsky, 'The Growth of Social Media Norms and Governments' Attempts At Regulation' (2011-12) 35 Fordham Int'l L.J. 1485

6 NYPD, 'Use of Social Networks for Investigative Purposes – General Purpose' (Public Intelligence, 09 May 2012) <https://info.publicintelligence.net/NYPD-SocialNetworkInvestigations.pdf> accessed 03 January 2013

7 Anand Giridharadas, 'Democracy 2.0 awaits an upgrade' (New York Times, 11 September, 2009) <http://www.nytimes.com/2009/09/12/world/americas/12iht-currents.html?pagewanted=all> accessed 10 January 2013

change, it is still the individual man who remains at the center. The Arab Spring[8] of 2011 has just made the transcending national borders and connecting like-minded individuals within milliseconds more evident with new forms of interaction facilitated by social media which holds the power to shake the foundations of government itself. While the internet is rightly celebrated as a technology of liberty, it is just as often associated with increased threats to security, order and well-being. In this respect at least, the internet is much like earlier communication technologies. Just as audible speech has always carried the risk of harm to others, any method that makes communication easier brings a risk of amplifying that harm. Arguments about restrictions on freedom of expression in the internet era therefore merely carry forward ancient concerns about the damage that speech may cause to state, police and private interests.[9] For the state, these concerns are the familiar ones of unauthorised disclosure of secret information as well as seditious criticism and incitement of violence directed towards its institutions, leaders and personnel. The concerns of private individuals, associations, and businesses are also familiar: the unauthorised disclosure of personal or confidential information, defamatory criticism, incitement to hatred, and exposure to pornography and other harmful or unwanted content. Another major concern is the accuracy of the news floated in these websites which cannot be ascertained since any anonymous person can post, comment and disseminate news via social media. More broadly, accuracy is valued in tradition journalism because of its connection to truth telling. Yet characteristic of the internet- such as unlimited space to tell a story and unlimited participants in its telling accommodate an understanding of truth that is far more open and more fluid than the one enclosed by traditional journalistic structures.[10]

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[8] The Arab Spring, also known as the Arab Revolution is a revolutionary wave of demonstrations and protests occurring in the Arab world that began on 18 December 2010. The importance of the role of social media on the Arab uprisings has been largely debated. Some say that social media was the main instigator of the uprisings; while others claim that it was merely a tool. Either way, the perception of social media has changed; its role in the uprisings has demonstrated to the world its power. Such information allowed the world to stay updated with the protests and facilitated organizing protests. Nine out of ten Egyptians and Tunisians responded to a poll that they used Facebook to organize protests and spread awareness.

[9] Maricruz Diaz de Terin Velasco1, 'The Development of The Information Society: Pillars For Its Regulation' (2007) 2 J. Legal Tech. Risk Mgmt. 98

[10] E.g., CNN iReport is a citizen journalism initiative allowing ordinary people, worldwide, to provide pictures of breaking news, CNN`s iReport claims that its stories are not edited, fact checked or screened before posted. See more; CNN iReport <http://ireport.cnn.com/about.jspa> accessed on 15 June 2013

Further, it opened gates for fake Identities, pornography, religious hatred posts, illicit comments, abuse to the general public and govt. authorities, etc. Despite exciting developments social media has limitation for democratic participation and organization. The contingencies of offline world realities continue to discourage the use of online tools. Nation-states infiltrate social networking sites to misinform and surveillance and entrap.[11] Ad supported social media services bring uncertainty to user privacy, with social media companies accessing user data for secondary purposes. Intellectual property and failure to recognize fair use also places limitations on user generated content. The Internet is a universal structure through which information is transmitted and received in any of its forms - audio, visual or written - its origin and destination being anywhere in the world. It transcends state borders, reaching a vastness far greater than their own jurisdiction. This new mode of human interaction does not fit neatly into any discovery statutes, case law precedents, or ethics codes. Indeed, the administration of justice is struggling to adapt to this emergent reality with little guidance. The social networking era, marked by the creation of instant communities and depots of personal information, is pushing society towards the vanishing points for ethical and constitutional boundaries.[12]

India is witnessing a growing revolution of information, communication technology (ICT) and social media usage. However, till now there has been no policy as such to govern the same except *'the framework and guidelines for use of social media for government organisations*' which has been framed by Department of Electronics and Information Technology, Ministry of Communications & Information Technology, Government of India.[13] These guidelines however cater strictly to Governmental Organisations which means only the employees of the government and not the general public are to follow them. Further, the Press Council of India in its press release resolved for more power accreditation. It demanded for an adoption of a wider name in the form of the 'Media Council of India' from the present name of 'Press Council of India'. In its press release the Press Council by citing example of mischief

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[11] Fred Petrossian, 'Iran: myth and reality about Twitter' (Global Voices, 04 July 2009) <http://globalvoicesonline.org/2009/07/04/iran-myth-and-reality-about-twitter/> accessed 20 November 2013

[12] Ken Strutin, 'Social Media and the Vanishing Points of Ethical and Constitutional Boundaries' (2011) 31 Pace L. Rev. 228

[13] Department of Electronics and Information Technology, 'Framework & Guidelines for Use of Social Media for Government Organisations' (Guidelines, December 2012)

caused by social media in north east[14] stated that ".....claim of the broadcast media for self-regulation is futile and meaningless, because self-regulation is an oxymoron. All social activity has to be regulated. Regulation is different from control. In control, there is no freedom, while in regulation, there is freedom but it is subject to reasonable restrictions in the public interest. The Press Council is in favour of regulation and not control, and this regulation should be by an independent statutory authority like the Press Council of India and not the government."[15]

EXISTING LAWS ON MEDIA

1) Under article 19(1)(a)of the Constitution of India all citizens shall have the right to freedom of speech and expression. Although our constitution does not expressly guarantees freedom of press as compared to US Constitution but media`s right to freedom of speech and expression has been recognized within the ambit of Art. 19 (1) (a).
2) The pre independence era
   - In 1799 Lord Wellesley promulgated the press regulations- pre censorship on newspaper
   - In 1857- government passed the Gagging act-compulsory licence for running the newspaper.
3) After Independence
   - The press (objectionable matters act)1951- printing against publication of incitement to crime and other objectionable matters
   - The Cinematograph Act 1952-censor Board
   - The Newspaper Act 1956- To regulate the price of the newspaper
   - The Copyright Act 1957- a right to exploit the original literary, dramatic, artistic, musical work, sound recordings or cinematographic films

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[14] Following the riot situation in Assam, many North Easterners across various cities in India got death threats *via* SMS, social media pages and they were asked to head back to their states. The quick spread of these hatred messages and the chaos that ensued was shocking to the say the least, and was a matter of great distress for the government. The government responded by banning bulk SMS and urging the people via the TV medium to stay calm. The government also turned to Google and Facebook and sought their help to remove hateful content pertaining to NE from their sites. See, Chapter 6 for detailed discussion.

[15] Press Council of India, 'PCI resolves for more powers and conversion to Media Council of India' (Press Release, 28 August 2012) <http://presscouncil.nic.in/OldWebsite/Resolution.pdf> accessed on 17 September 2013

- The press council was established under Press Council of India Act of 1978- freedom of press for monitoring and improving the standards of newspaper.
- Cine workers and Cinema Theatre Act 1981- imposed certain obligation on the motion picture producer's and theatre.
- Cable Television Network Regulations Act 1995- Regulatory certainty to the cable market
- Cable television network amendment act 2011- TRAI implementation of the digital addressable cable system in India
- Social media Law in India is regulated by the information technology act 2000 to control and deal with the issues arising out of the IT.

CONCLUSION

From the foregoing discussion, it can be concluded that an independent and efficient media is a pre requisite for a healthy democracy. It makes citizens aware of the social, political and economic issues thereby empowering them to have better knowledge and understanding of the issues. The check and balances role played by media compels politicians and authorities to fulfill their promises. The role of the press as 'watchdog' is a traditional characterization of the role of the news media in particular. This watchdog role can take many forms depending on the nature of the medium concerned, as well as on the state of democracy and development in a particular country. Essentially, this role is to provide information – to be the 'eyes and ears' of the public in monitoring what is happening in public life by reporting on daily events as they unfold. For the said functions to be discharged efficiently by the media, it is necessary that it must enjoy freedom which must be free from political influence; therefore, media should be subjected to self regulation. Any attempt to regulate the media by the state will naturally result into suppression of the fair, efficient and transparent media. With regard to the question of media trial and its impact on judges, it must be borne into the mind that no judge is completely impervious from the influence of the hype created by the media. The media must exercise better self-regulation. It is expected of persons at the helm of the affairs in the field of media to ensure that the trial by media does not hamper fair investigation by the investigating agency, and more importantly does not prejudice the defence of accused in any manner whatsoever. If government starts regulating the media, the whole purpose would be defeated. Instead the better option would be robust and civic engagement by the people with their polity and political class. An educated, cultivated and engaged civil society can be the best watchdog over governments and the media. This would restore and balance the polity and accord a semblance of normalcy among the institutions of the country.

THE RULE OF LAW IN INDIAN ADMINISTRATION

Dr.Shivanand H.Lengati*

INTRODUCTION

Rule of law concept was introduced by Sir Edward coke CJ in King James first reign. In the battle against king he maintained successfully that king should be under god and law and he established the supremacy of the law against the executive[1].

The central purpose of administrative law is to promote good governance that includes efficient and honest action to be taken by administrative bodies for public good, to consider the opinion of the individuals likely to be affected by their decisions taking their view into account, to operate in fair, transparent and un biased fashion , to always seek to serve the public interest to respect the rights of the individuals

The constitution is the mandate. The constitution is the rule of law .there can be no rule of law other than the constitutional rule of law .there cannot be any pre-constitutional or post constitutional rule of the law which can run counter to the rule of law embodied in the constitution, nor be there any invocation to any rule of law to nullify the constitutional provisions during the time of emergency. Article 21 is out rule of law regarding life and liberty[2].

The concept of Rule of Law is that the state is governed, not by the ruler or the nominated representatives of the people but by the law. The Constitution of India intended for India to be a country governed by the rule of law. It provides that the constitution shall be the supreme power in the land and the legislative and the executive derive their authority from the constitution. The King is not the law but the law is king[3]. It means that the law rules over all people including the persons administering the law. The law makers need to give reasons that can be justified under the law while exercising their powers to make and administer law. Rule of Law plays an important role in the democratic countries. It provides protection to the people against the arbitrary action of the administrative authorities. The expression 'rule of law'[4] has been derived from the French phrase 'la Principle de

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1 *C.K Thakwani, Lecture on administrative law ,page no 10*

2 *For a scathing criticism of majority view, see H.H Seevai, habeas corpus case, emergency and future safeguard, 1977*

3 "Common Sense", Thomas Paine < http://www.gutenberg.org/files/147/147-h/147-h.htm

4 see http://judis.nic.in/supremecourt/chejudis.asp

legality' i.e. a government based on the principles of law. In simple words, the term 'rule of law, indicates the state of affairs in a country where, in main, the law rules. Law may be taken to mean mainly a rule or principle which governs the external actions of the human beings and which is recognized and applied by the State in the administration of justice. It is impossible to get the supremacy of law without the rule of law. . In fact, the Supreme Court has declared the rule of law to be one of the „basic features" of the Constitution[5],

RULE OF LAW AND INDIAN JUDICIARY

Fundamental rights enshrined in part III of the constitution is a restriction on the law making power of the Indian Parliament. It includes freedom of speech, expression, association, movement, residence, property, profession and personal liberty. In its broader sense the Constitution itself prescribes the basic legal system of the country. To guarantee and promote fundamental rights and freedoms of the citizens and the respect for the principles of the democratic State based on rule of law. The popular habeas corpus case, *ADM Jabalpur v. Shivakant Shukla*[6] is one of the most important cases when it comes to rule of law. In this case, the question before the court was „whether there was any rule of law in India apart from Article 21". This was in context of suspension of enforcement of Articles 14, 21 and 22 during the proclamation of an emergency. The answer of the majority of the bench was in negative for the question of law. However Justice H.R. Khanna dissented from the majority opinion and observed that "Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning…"

Applied to the powers of the government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorized by law -and in nearly every case this will mean authorized directly or indirectly by Act of Parliament.

The secondary meaning of rule of law is that the government should be conducted within a framework of recognized rules and principles which restrict discretionary powers. The Supreme Court observed in *Som Raj v.*

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[5] *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2295; *SP Gupta v. Union of India*, *AIR 1982 SC 149.*

[6] AIR 1976 SC,1207

State of Haryana that the absence of arbitrary power is the primary postulate of Rule of Law upon which the whole constitutional edifice is dependant. Discretion being exercised without any rule is a concept which is antithesis of the concept. The third meaning of rule of law highlights the independence of the judiciary and the supremacy of courts. It is rightly reiterated by the Supreme Court in the case *Union of India v. Raghubir Singh* that it is not a matter of doubt that a considerable degree that governs the lives of the people and regulates the State functions flows from the decision of the superior courts.

Although, complete absence of discretionary powers, or absence of inequality are not possible in this administrative age, yet the concept of rule of law has been developed and is prevalent in common law countries such as India. The rule of law has provided a sort of touchstone to judge and test the administrative law prevailing in the country at a given time. Rule of law, traditionally denotes the absence of arbitrary powers, and hence one can denounce the increase of arbitrary or discretionary powers of the administration and advocate controlling it through procedures and other means. Rule of law for that matter is also associated with supremacy of courts. Therefore, in the ultimate analysis, courts should have the power to control the administrative action and any overt diminution of that power is to be criticized. The principle implicit in the rule of law that the executive must act under the law and not by its own fiat is still a cardinal principle of the common law system, which is being followed by India.

In the common law system the executive is regarded as not having any inherent powers of its own, but all its powers flow and emanate from the law. It is one of the vital principles playing an important role in democratic countries like India. There is a thin line between judicial review and judicial activism. Rule of law serves as the basis of judicial review of administrative action. The judiciary sees to it that the executive keeps itself within the limits of law and does not overstep the same. Thus, judicial activism is kept into check. However there are instances in India where judiciary has tried to infringe upon the territory of the executive and the legislature. A recent example of this would be the present reservation scenario for the other backward classes. The judiciary propagated that the creamy layer should be excluded from the benefits of the reservation policy, whereas the legislature and the executive were against it.

As mentioned before Dicey"s theory of rule of law has been adopted and incorporated in the Indian Constitution. The three arms judiciary, legislature and executive work in accordance with each other. The public can approach

the high courts as well as the Supreme Court in case of violation of their fundamental rights. If the power with the executive or the legislature is abused in any sorts, its malafide action can be quashed by the ordinary courts of law. This can be said so since it becomes an opposition to the due process of law. Rule of law also implies a certain procedure of law to be followed. Anything out of the purview of the relevant law can be termed as ultra vires.

No person shall be deprived of his life or personal liberties except according to procedure established by law or of his property save by authority of law. The government officials and the government itself is not above the law. In India the concept is that of equality before the law and equal protection of laws. Any legal wrong committed by any person would be punished in a similar pattern. The law adjudicated in the ordinary courts of law applies to all the people with equal force and bindingness. In public service also the doctrine of equality is accepted. The suits for breach of contract etc against the state government officials, public servants can be filed in the ordinary courts of law by the public.

In Chief Settlement Commr; Punjab v. Om Prakash, it was observed by the supreme court that, "In our constitutional system, the central and most characteristic feature is the concept of rule of law which means, in the present context, the authority of law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the matter into notice."

In India, the meaning of rule of law has been much expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. The ideals of constitution; liberty, equality and fraternity have been enshrined in the preamble. Constitution makes the supreme law of the land and every law enacted should be in conformity to it. Any violation makes the law ultra vires.

In Keshvanad Bharti v. Union of India, the Supreme Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure. In *Menaka Gandhi v. Union of India*, the Supreme Court declared that Article 14 strikes against arbitrariness. In *Indira Nehru Gandhi v. Raj Narayan*, Article 329-A was inserted in the Constitution under 39th amendment, which provided certain immunities to the election of office of Prime Minister from judicial review. The Supreme Court declared Article 329-A as invalid since it abridges the basic structure of the Constitution. In

the case of *Binani Zinc Limited v. Kerala State Electricity Board and Ors (2009)* Justice S B Sinha declare that "It is now a well settled principle of law that the rule of law inter alia postulates that all laws would be prospective subject of course to enactment an express provision or intendment to the contrary." In the case of *Gadakh Yashwantrao Kankarrao v. Balasaheb Vikhe Patil* the ratio laid down was "If the rule of law has to be preserved as the essence of the democracy of which purity of elections is a necessary concomitant, it is the duty of the courts to appreciate the evidence and construe the law in a manner which would sub serve this higher purpose and not even imperceptibly facilitate acceptance, much less affordance, of the falling electoral standards. For democracy to survive, rule of law must prevail, and it is necessary that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values who win the elections on a positive vote obtained on their own merit and not by the negative vote of process of elimination based on comparative demerits of the candidates."

In the case of *Sukhdev v. Bhagatram Mathew J.* declared that "Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set-forth by Harry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in "Democracy, Equality and Freedom," "substantial agreement is in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege." In Secretary, State *of Karnataka and Ors. v. Umadevi and Ors* a Constitution Bench of this Court has laid down the law in the following terms: "Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution."

In the case of *Amlan Jyoti Borooah v. State of Assam*, it was held by S B Sinha that: "Equity must not be equated with compassion. Equitable principles must emanate from facts which by themselves are unusual and peculiar. A balance has to be struck and the Court must be cautious to ensure that its endeavour to do equity does not amount to judicial benevolence or acquiescence of established violation of fundamental rights and the principles of Rule of law." Moreover, In the case of *Bachan Singh v. State of Punjab,* Justice Bhagwati has emphasized that rule of law excludes arbitrariness and unreasonableness. To ensure this, he has suggested that it is necessary to have a democratic legislature to make laws, but its power should not be unfettered, and that there should be an independent judiciary to protect the citizens against the excesses of executive and legislative power.

In addition to this in *P. Sambamurthy v. State of Andhra Pradesh,* the SC has declared a provision authorizing the executive to interfere with tribunal justice as unconstitutional characterizing it as "violative of the rule of law which is clearly a basic and essential feature of the constitution". Yet another case is of *Yusuf Khan v. Manohar Joshi* in which the SC laid down the proposition that it is the duty of the state to preserve and protect the law and the constitution and that it cannot permit any violent act which may negate the rule of law. Hence, it is quite evident that the concept of rule of law is gaining importance and attention and judicial efforts are made to make it stronger.

CASE STUDIES IN THE BOMBAY HIGH COURT

THE NATIONAL PARK: HOUSING FOR THE POOR VS. THE ENVIRONMENT

In 1995, the Bombay Environment Action Group (BEAG), an NGO specializing in matters of environmental concern filed a public interest case in the Bombay High Court, seeking the court's intervention to remove illegal encroachments in the National Park (SGNP) and for protection of the park. Covering 107 sq.kms. SGNP is a notified National Park under the Wildlife Protection Act. It is arguably the only National Park within municipal limits anywhere in the world. SGNP is a unique natural biosphere reserve. It is the home of a huge number of unique species of flora and fauna, including several large mammals such as the panther and, recently, even the tiger. The Bombay Natural History Society reports that SGNP boasts over 800 flowering plants, 274 bird species, 42 mammal species, 38 species of reptiles and a staggering 8000 insect species, including over 150 species of butterflies.

Thus, the court faced a delicate situation. On the one hand, the law mandated the clearance of illegal encroachments from the national park. On the other hand, there was the issue of rehabilitating the encroachers outside the park and doing so in a just and humane manner. The case presented a sensitive human conflict and required a careful balancing act between the preservation of the environment and the protection of the right to housing. But what makes this a truly remarkable case is the approach of the court itself, and of the petitioners. Though the BEAG's brief is focused on environmental protection, it approached the case as a human problem requiring a humane solution, and urged the court to evolve a scheme on those lines. This is precisely what the court did; at no time did the court venture into the realm of writing landmark decisions. Instead, it focused on solving the problem, one that was inherently huge and intricate. In doing so, it delicately balanced two competing public interests.

THE COURTS AND PROBLEMS OF THE PHYSICALLY CHALLENGED

In 1995 Parliament enacted the Persons with Disabilities Act (Equal Employment, Protection of Rights and Full Participation). The Act mandates an identification of jobs and reviews of employment under the state, and carves out reservations of not less than 3% of posts in public employment for physically challenged persons. There is a mandate under the Act to create schemes providing for training and welfare, age limits, health and safety measures and for the creation of a non-handicapping environment. The Act requires affirmative action in the allotment of land at concessional rates. The Act further requires non-discrimination in transport and on the road by adapting rail compartments, vessels and aircraft.

On 31st March 2004, an initial direction was issued by the Bombay High Court to the Municipal Corporation in public interest litigation to purchase 30 public buses capable of accommodating disabled persons, including those with wheel chairs. In a separate order, the court dealt with the problem faced by visually challenged hawkers at railway stations. A report was submitted before the court by an NGO, India Centre of Human Rights and the law which took note of grave acts of police brutality against visually challenged hawkers. Their goods were thrown on railway tracks and some were subjected to assault. 60% of the hawkers earned Rs.50/- to Rs.100/- every day, while the rest earned less than Rs.50/- every day. Most were found to hawk because of an inability to find gainful employment. The report complained of a discriminatory enforcement of law. Blind hawkers who were not in a position to pay bribes were the ones who were targeted for police action. The Court

issued several directions to the railway authorities seeking to protect the welfare of these hawkers.

The Bombay High Court was moved on an important issue involving the exercise of franchise by physically challenged persons. Despite an order passed by the Supreme Court mandating the provision of ramps in cities and metropolitan areas, no provision had been made to comply with the order. The Court was moved in order to facilitate the exercise of the right of franchise by visually challenged persons. The method which was followed earlier by the state involved a visually challenged voter appearing in person before the presiding officer of a polling station and being assisted to place his ballot against the name of a candidate of his choice on the electronic voting machine. This involved a serious infraction of the principle of secrecy of the ballot. On the suggestion of interested NGOs, the court found a low cost alternative to ensure the preservation of the secrecy of the ballot while at the same time enabling visually challenged voters to exercise their franchise. In short, the state was directed to print dummy ballot papers in Braille. Every visually challenged voter would be allowed access to this dummy ballot paper in Braille which would be at every polling station. This would indicate to him the position of each candidate on the electronic voting machine and enable the voter to exercise his franchise. In related areas, the Court has given directions to the state to constitute committees to identify the jobs where reservations in the form of affirmative action could be adopted for the physically challenged.

KERNELS OF ADMINISTRATIVE LAW

1. Rule of law: supremacy of law
2. Natural law: fairness and justness in law
3. Judicial review: when administrative and legislative authorities are subject of review and administration discretion.

RED LIGHT THEORY AND GREEN LIGHT THEORY

Red light theory emphasising on the judicial control over the activeness of authorities it tends to believe that power conferred may be misused. Approach of this theory is indirect, external 10 and with fear of action with arbitrariness of the authorities.

Green light theory it emphasizes on direct and internal action means in total control. As red light theory powers are given but they are under direct control of the upper hands. Green light theory allows intervention of the state

in large public interest ensuring the rights of the citizen and well-being of the society[7].

REMEDIES IN ADMINISTRATIVE AND CONSTITUTIONAL LAW

The impact of the Constitutionalization of administrative law is not limited to changing the understanding of constitutional rights; it has had significant consequences for how rights have been enforced as well. Article 32 of the Indian Constitution provides remedies for the enforcement of fundamental rights; indeed, taking recourse to the Supreme Court for such enforcement is itself a protected right.[8] These powers are separate and distinct from the Supreme Court's powers to address violations of other legal rights; fundamental rights, accordingly, stand on a separate footing, not only in terms of judicial review, but also in terms of the means available to the Supreme Court to enforce them.[9] Administrative decisions are usually challenged in lower civil courts as well as high courts, and then reach the Supreme Court by way of appeal. Violations of fundamental rights, on the other hand, can be directly challenged at the high courts or the Supreme Court, and need not go through the civil appellate system.[10]

Maneka Gandhi, [11] as I have discussed, made it apparent that a violation of administrative principles might conceivably amount to a violation of fundamental rights; however, this was not automatic and depended on the specific context of the case. However, the transformation of these administrative principles to components of constitutional rights has enabled litigants to move from a tiered appellate system to directly litigating administrative issues before the Supreme Court, in the guise of fundamental rights. "This Constitutionaliation of administrative law," argues one scholar, "ignores its common law roots and results in a top-heavy system where constitutional courts come to arrogate all administrative review powers."[12]

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7 C.K Thakwani, Lecture on administrative law, page no 10

8 India Constitution., Art. 32.

9 See generally Sathe, supra note 87, at 290–301; Subramanium, supra note 9, at 614, 615. This is not the case for the Indian High Courts, which can enforce fundamental rights through writ remedies but may also use those remedies to enforce other legal rights. India Const., Art. 226.

10 India does not have a separate system of administrative courts, although certain administrative bodies include tribunals, which can exercise some of the powers of civil courts in decision-making. Their decisions are appealable to high courts and the Supreme Court.

11 (1978) 1 S.C.C. 248.

12 Tarunabh Khaitan, Equality: Legislative Review under Article 14, in The Oxford Handbook of the Indian Constitution 699, 716 (Sujit Choudhry, Pratap Bhanu

The impact of this transformation raises a number of unanswered questions, ranging from structural issues of access to justice, to the manner in which rights are enforced as well as for the legality of administrative orders that are challenged under the guise of rights enforcement. In this section, I will attempt to address two of these issues, focusing on significant Supreme Court decisions on these points, and considering the impact of the judgment in Maneka Gandhi to their application.

CONCLUSION

The recent expansion of the rule of law in every field of administrative functioning has assigned it is a place of special significance in the Indian administrative law. The Supreme Court, in the process of interpretation of the rule of law Vis-a-Vis operation of administrative power, in several cases, emphasised upon the need of fair and just procedure, adequate safeguard against any executive encroachment on personal liberty, free legal aid to the poor and speedy trial in criminal cases as necessary adjuncts to rule of law. Giving his dissenting opinion in the death penalty case, Mr. Justice Bagwati explains fully the significance of rule of law in the fallowing words.

The rule of law permeates the entire fabric of the constitution and indeed forms one of its basic features. The rule of law exclude arbitrariness, its postulates is intelligence without passion and reason free from desire. Wherever we find arbitrariness or in reasonableness there is a denial of the rule of law. Law in the context of rule of law does not mean any law enacted by legislative authority, however, arbitrary, despotic it may be, otherwise even in dictatorship it would be possible to stay that is rule of law because every law made by the dictator, however arbitrary and unreasonable, has to be obeyed and every action has to be taken in conformity with such law. In such a case too even where the political step-up is doctorial it is the law that governs the relationship between men.

The modern concept of the rule of law is fairly wide and, therefore, sets-up an idea for the government to achieve. This concept was developed by the

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Mehta, & Madhav Khosla, eds.,2016) (discussing the use of administrative principles of unreasonableness in the context of the right to equality and equal treatment under article 14 of the Indian Constitution). See also Farrah Ahmed & Tarunabh Khaitan, Constitutional Avoidance and Social Rights Litigation, 35(3) Oxford J. Legal Stud. 607, 618 (2015) (making a broad case for the use of administrative law principles as an alternative to invoking constitutional rights in certain cases).

international commission of jurists, known as Delhi Declaration, 1959, which was later on confirmed at Lagos in 1961. According to this formulation, the rule of law implies that the functions of government in a free society should be so exercised as to create condition in which the dignity of man as an individual is upheld.

During the last few years, the supreme court in India has developed some fine principles of third world jurisprudence, developing the same new Constitutionism further, the apex court in *Veena v. state of Bihar* extended the reach of the rule of law to the poor and the downtrodden, the ignorant and illiterate, who constitute the bulk of humanity in India. When, it is ruled that the rule of law does not exit merely for those who have the means to fight for their rights and very often do so for the perpetuation of the status quo, which protects and preserves their dominance and permits them to exploit a large section of the community. The opportunity for this ruling was provided by a letter written by the free legal aid committee, Hazaribagh, Bihar drawing its attention to unjustified and illegal detention of certain prisoners in jail for almost two or three decades.

Recent aggressive judicial activism can only be as a part of the efforts of the constitutional courts in India to establish a rule of law society, which implies that no matter how high a person, may be the law is always above him. The court is also trying to identify the concept of rule of law with human rights of the people. The court is developing techniques' by which it can force the government not only to submit to the law but also to create conditions where people can develop capacities to exercise their rights properly and meaningfully. The public administration is responsible for effective implementation of the rule of law and constitutional commands, which effective fairly the objective standards laid down by law. Every public servant is a trustee of the society and is accountable for due effectuation of constitutional goals. This makes the concept of rule of law highly relevant to our context.

The founding fathers of India accomplished what the rest of the world though impossible establish a country that would follow the letter of the law and implement the rule of law, in all matters such as the protection of the rights of the people, equal treatment before the law protection against excessive arbitrariness, the constitution of India has provided enough mechanisms to ensure that the rule of law is fallowed.

Through its decision, the courts have strived to reinforce these mechanisms and ensure smooth justice delivery to all citizens. Problems such as out dated legislation and overcrowded courts are but small hindrance and bodies such as the law commission of India work towards ironing out these problems with the aim of a achieving a system where there are no barriers to the smooth operation of the rule of law.

SIGNIFICANCE OF STATUTORY REMUNERATION RIGHTS FOR FILM-CONTRIBUTING AUTHORS: AN INDIAN PERSPECTIVE

-Rukma George*

INTRODUCTION

One of the primary reasons which led to the 2012 amendments to the Indian Copyright Act, 1957 was the need felt for the introduction of an arrangement which ensured a continuing remuneration for film-contributing authors.[1] This became necessary given the fact that notwithstanding their long careers, film-contributing authors faced penury as producers refused to share profits from the exploitation of their works, on account of all-right one-time lump-sum transfers.[2] In this background, a new right was introduced *vide* proviso (3) to section 18 and section 19(9), and resultant thereto, authors contributing literary or musical works to a cinematograph film became entitled to receive an "equal share of royalty" from all modes of utilisation of the work except from the playing of the film in a cinema hall. The right being vested was qualified as both non-waivable and non-assignable which can be transferred only to a copyright society or a legal heir. The legislative structure of this right is such that it essentially guarantees to a contributing author an entitlement to receive remuneration without the author being able to establish or exercise any measure of 'control' in the exploitation of the work.[3] In

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1 Department-Related Parliamentary Standing Committee on Human Resource Development, "Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010" para 1.3 (Parliament of India—Rajya Sabha, 2010).

2 Anand Nair, "Royalties and Rights Sharing in Film Industry in India Post Copyright Amendment Act 2012—Impact on Contractual Freedom: A Comparative Study with the US and the UK Copyright Regimes" *WIPO Academy, University of Turin and ITC-ILO-Master of Laws in IP—Research Papers Collection* (2013); Renuka Medury, "Continued Economic Benefit to the Author: Royalties in the Indian Film Industry—Historical Development, Current Status, and Practical Application", in Kung-Chung Liu and Uday S Racherla (eds.), *Innovation, Economic Development, and Intellectual Property in India and China—Comparing Six Economic Sector* 195 (Springer Open, 2019); Prashant Reddy T, "The Background Score to the Copyright (Amendment) Act, 2012" 5(4) *NUJS Law Review* 474 (2012).

3 *See generally* Christophe Geiger and Oleksandr Bulayenko, "General Report: Scope and Enforcement Tools to Ensure Remuneration", in Silke von Lewinski (ed.), *Remuneration for the Use of Works, Exclusivity v. Other Approaches* 115 (De Gruyter, 2016).

copyright scholarship, a right which possess such characteristics is generally referred to as a statutory remuneration right.[4]

Although the 2012 amendments were enacted ten years ago, it does appear that the right has not turned out to be entirely beneficial for the film-contributing authors. There are several criticisms levelled against the drafting of the provision and its effectiveness,[5] and a real world example which can be cited is that of screenwriters in the film industry who recently commented that they are forced to fight for royalty as the law has purportedly not been implemented fully into their service.[6] In fact, the constitutional validity of the provision itself is under judicial challenge which is yet to be decided.[7] All of the above developments, when seen in sum beg the question whether a statutory remuneration right is an adequate legal measure to address the remuneration-related issues and concerns of film-contributing authors in

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4 *See generally ibid*.; Christophe Geiger and Oleksandr Bulayenko, "Creating Statutory Remuneration Rights in Copyright law: What Policy Options under the International Legal Framework", in A Metzger and H Grisse Ruse-Khan (eds.), *Intellectual Property Ordering Beyond Borders* 1, 4, 25–34 (Cambridge University Press, In Press, 2022); Raquel Xalabarder, "International Legal Study on Implementing an Unwaivable right of Audiovisual Authors to Obtain Equitable Remuneration for the Exploitation of their Works" 4, 34 (International Confederation of Societies of Authors and Composers, 2018).

5 Akshat Agarwal, "Report: Need to Revamp the Copyright Act?", *IPRMENTLAW*, Jul. 05, 2020, *available at*: https://iprmentlaw.com/2020/07/05/report-iprmentlaw-virtual-conference-21st-june-2020-topic-need-to-revamp-the-copyright-act/ (last visited on Sept. 02, 2021); Nandita Saikia, "The Bollywood Amendments: Film, Music and Indian Copyright Law (2010 to 2012)", *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566350 (last visited on Sept. 02, 2021) at 24; Udit Sood, "Touch of Jadoo in the Copyright (Amendment) Act, 2012: Assessment of the Amendments to sections 17, 18 and 19" 5 *NUJS Law Review* 529 (2012).

6 Dipti Nagpaul, "Copy Wrong: Why are Writers in the Film Industry Still Struggling?",*The Economic Times*, Feb. 28, 2021, *available at*: https://economictimes.indiatimes.com/magazines/panache/copy-wrong-why-are-writers-in-the-film-industry-still-struggling/articleshow/81253273.cms (last visited on Sept. 02, 2021).
Bharat Anand and Another v. *Union of India WP(C) No. 2321 of 2013*: By way of a judgement dated Aug. 07, 2015, the High Court of Delhi allowed applications filed by the petitioners seeking leave to withdraw the writ petitions with liberty to approach the High Court of Calcutta, *available at*: http://164.100.69.66/jupload/dhc/GRO/judgement/10-08-2015/GRO07082015CW23162013.pdf (last visited on Sept. 02, 2021).

India, or is there a need to enquire into the existence and effectiveness of other legal measures.

The scope and ambit of this article is limited to making an assessment of whether a statutory remuneration right can be considered a sufficient legal measure for the purpose of safeguarding the remuneration interest of film-contributing authors. In the above context, it is important to note that this article does not seek to engage in a deeper analysis of whether the right to "equal share of royalty" provision as it prevails in India requires any modifications or amendments. Furthermore, the relevant industry for the purposes of this article is the film industry and the observations have to be seen and understood in this context as and when relevant and applicable. Given this fact, this article's second part will examine the contractual relationship that exists between film-contributing authors and producers and briefly touches upon why their association is perceived as confrontational. The third part of this article will thereafter concisely discuss the relevance of prevailing legal measures which have been developed by different countries with the objective of securing fair remuneration for authors. The fourth part of this article will then go on to explore the significance of a statutory remuneration right as a legal measure in improving the financial well-being of film-contributing authors. The last part concludes this article.

COPYRIGHT CONTRACTS AND THE ISSUE OF FAIR REMUNERATION

It must be noted that through the statutory act of vesting legal entitlements in the form of exclusive rights, copyright law facilitates creative contributors to exploit their works *via* different modes and enables them to secure an independent livelihood for themselves.[8] Despite the good intentions, it appears that the economic reality is varied, as authors are seemingly not in a position where they are able to commercially exploit the works by themselves and quite often they end up transferring their rights to intermediaries such as publishers or producers who may be in a better position to exploit their works.[9] In return for this transfer of rights, authors then anticipate that a fair

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[8] Severine Dusollier, "EU Contractual Protection of Creators: Blind Spots and Shortcomings" 41(3) *Columbia Journal of Law and the Arts* 435 (2018); Richard Watt, "Copyright and Contract Law: Economic Theory of Copyright Contracts" 18(1) *Journal of Intellectual Property Law* 175 (2010).

[9] *Ibid*; *see also* Richard E Caves, "Contracts Between Art and Commerce" 17(2) *The Journal of Economic Perspectives* 73, 79–81 (2003); Martin Kretschmer, "Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda" 18(1) *Journal of Intellectual Property Law* 143 (2010);

share of the remuneration corresponding to the work's exploitation in different modes would be distributed to them.

However, very often these transactions which authors enter into with producers are a 'tricky episode'[10] for authors as there is a strand of literature which suggests that the end result of these negotiations are often unfavorable for authors owing to their weak negotiating position. It is understood that there are numerous factors which come into the fray in such situations which restrain authors from actively participating in discussions which relate to the scope and extent of use of their works or even the remuneration which must be paid on account of such exploitations. Some of the commonly cited factors include authors' lack of experience in the film industry, authors not possessing an adequate amount of information which is necessary for them to effectively determine the monetary value of their work, the general inclination and willingness of authors to consent to only upfront remuneration at an early stage of their career, their general lack of knowledge of the industry's functioning, the lack of a wherewithal or will to negotiate, unfamiliarity of the law, the significantly less demand as compared to the supply of creative contributors and the existence of fewer intermediaries *etc*.[11] The ramifications seen in such cases, more so in the audiovisual sector are that authors eventually sign boilerplate contracts which typically only offer a single whole-sum payment at the outset of the contract, with no further remuneration and there is rarely any room for authors to negotiate.[12]

Martin Kretschmer, Estelle Derclaye, *et. al*., "The Relationship Between Copyright and Contract Law" 1, 16 (Strategic Advisory Board for Intellectual Property Policy, 2010).

[10] Dusollier, *supra* note 8 at 436; Severine Dusollier, Caroline Ker, *et. al*., "Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States" 6, 16 (European Parliament Directorate-General for Internal Policies, 2014).

[11] *Ibid*.; Omri Alter, "Fairness Towards Authors: Does it Necessarily Mean Caring for the Weak?" 43 *Southern Illinois University Law Journal* 621–623 (2019); Yifat Nahmias, "The Cost of Coercion: Is There a Place for 'Hard' Interventions in Copyright Law?" 17(2) *Northwestern Journal of Technology and Intellectual Property* 162–163 (2020); Nancy S Kim, "Bargaining Power and Background Law" 12(1)(93) *Vanderbilt Journal of Entertainment and Technology Law* 97–102 (2009) *etc*.

[12] Xalabarder "AV Remuneration Study", *supra* note 4 at 11; *see generally* Silke von Lewinski, "Collectivism and its Role in the Frame of Individual Contracts", in Jan Rosen (ed.), *Individualism and Collectiveness in Intellectual Property Law* 117 (Edward Elgar, 2012).

The situation that has been discussed above rang true for many Indian film-contributing authors as well, who too faced similar circumstances, and which fact most clearly came out during the maiden speech of Shri Javed Akhtar to the Indian Parliament. His speech suggested that film-contributing authors in India had to, as a matter of practice, execute all-rights transfer agreements at the very outset. He observed that the consequence which followed such an agreement was that authors then were unable to receive any remuneration out of the revenues that are generated from the ongoing exploitation of the work, apart from their initial payments.[13] It must be noted that it was specifically in response to this predicament which authors faced that, Indian lawmakers introduced a legal solution which took the form of a statutory remuneration right.

PREVAILING LEGAL MEASURES TO SECURE REMUNERATION

The fact that authors are generally disadvantaged in most of the transactions that they enter into with intermediaries has not been completely overlooked by lawmakers. Most countries have developed different forms of "re-evaluation mechanisms" in an attempt to reconsider authors' settlements on terms which are most beneficial to them.[14] These legal measures range from imposing restrictions on the form as well as the scope of transfer to best-seller clauses and reclamation rights, amongst others. In other countries, the enforcement mechanism has involved strong guilds and well entrenched trade union systems which have negotiated and developed certain basic agreements which at their very least address issues such as payment terms and conditions of work *etc*. However, the reality was markedly different from what was expected, as most of the above re-evaluation mechanisms were not able to yield substantial results. In addition, there was the fact that guilds or union systems have shown positive impact only in certain specific circumstances such as, when market conditions are favourable and when they are a strong force on their own, that being quite a rare occurrence.

Some of the foremost *ex ante* legal measures seen to have been adopted in many of the countries[15] including India mostly address form requirements

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[13] Rajya Sabha Debates (Uncorrected) on May 17, 2012, *available at*: https://rsdebate.nic.in/bitstream/123456789/603476/2/PD_225_17052012_p443_p496_25.pdf (last visited on Sept. 02, 2021) at 453.

[14] Lucy Elizabeth Kenner, "Can Legislative Reform Secure Rewards for Authors? Exploring Options for the New Zealand Copyright Act" 48 *Victoria University of Wellington Law Review* 573 (2017).

[15] Germany, France, Belgium, Poland, United Kingdom *etc*.; *see generally* Lucie Guibault and P Bernt Hugenholtz, "Study on the Conditions Applicable to

which include aspects such as, that the transfer ought to be executed in the form of a written agreement; that it must clearly designate the scope and extent of transfer, including the territorial limits and duration of use; that it must specify the right that is transferred and the modes of exploitation; that it must clearly enumerate the royalty payable; and that, it must be duly signed by all the contracting parties *etc*. Even so, there was a 2014 study that had been prepared for the European Commission which after a detailed examination concerning the effectiveness of these measures arrived at a finding that these measures are not seemingly adequate in ensuring that authors receive a just remuneration or deal with unbalanced contracts which are tilted against authors.[16] In fact, there is yet another study that has been prepared by the European Commission in the year 2015, which had been conducted specifically in the context of the audiovisual sector of ten countries, and which had also arrived at a very clear finding that such contract regulating rules would play a very minimal role in offering assistance to authors during the process of negotiations as well as determining the remuneration payable.[17] Another study in the year 2018 has also pointed out that measures of such a nature have had "little impact on AV production contracts".[18] In fact, as mentioned, these measures are also visible in the Indian Copyright Act,[19] but given the fact that remuneration-related challenges of film-contributing authors have been a longstanding issue even in India, it may be safe to state that such measures have not been entirely beneficial to such authors. It would be apposite at this juncture to refer to certain observations that were made by Silke von Lewinski in her paper. She has expressed that several of the stipulations or measures that were discussed earlier were all bound for failure as all of them inherently sought resolution of the issue where the problem itself lay, *i.e.,* the agreements that were being signed between the authors and producers.[20] It was her strong conviction that given the deep imbalances between authors and producers, authors are unlikely to seek enforcement of

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Contracts Relating to Intellectual Property in the European Union" (Institute for Information Law and Commissioned by European Commission's Internal Market Directorate-General, 2002).

16 Dusollier, Ker, *et. al*., *supra* note 10 at 13.

17 Lucie Guibault, Olivia Salamanca, *et. al*. "Remuneration of Authors and Performers for the Use of their Works and the Fixations of their Performances" 4, 59 (European Commission Directorate General of Communications Network, Content and Technology, 2015).

18 Xalabarder "AV Remuneration Study", *supra* note 4 at 23.

19 Indian Copyright Act, 1957, s. 19.

20 von Lewinski "Collectivism and its Role in the Frame of Individual Contracts", *supra* note 12 at 118.

such provisions as it would have adverse consequences on their careers as producers may not engage them in future or prevent them from getting work *etc.*[21]

As has been mentioned earlier, in certain other industries, fair pay for film-contributing authors is secured by labour unions or guilds where they adopt the mechanism of collective bargaining. This has however, mostly been seen as a successful measure in the film industry of the United States where creative authors are members of organisations such as the Writers Guild of America, Directors Guild of America *etc*., all of which are well-regulated by strong labour laws. It must however be noted that the strength of these organisations was not gained overnight, but it was through several decades of hard fought strikes and negotiations that these guilds have been able to establish what can be called as 'basic agreements' with producers.[22] However, it is being reiterated on account of its importance that, this particular method of industry led regulation or control can become successful only in specific circumstances such as where these guilds or unions are powerful, united and willing to achieve their objectives through strikes or other similar industrial actions. There is a an opinion amongst scholars that the mode of functioning within the film industry in the United States is quite unique and that it would not be practical to expect a similar positive impact through guilds or unions in other jurisdictions where the market structure and industry functioning are different.[23] In fact, in this context it should be mentioned that supposedly, even in the United Kingdom, "collectively negotiated payments for secondary uses" have had only a very little effect.[24] Coming to India, it is a fact that there are hardly any trade unions or guilds in the Indian film industry which can be considered as even remotely strong enough to secure the interests of film-contributing authors and except for certain one-off instances, for interested parties to call for a strike to safeguard their remuneration interest in the film sector would be an extremely rare occurrence.

As mentioned, apart from the above, there are also certain *ex post* measures that take the form of best-seller clauses or revocation rights as have been included in the copyright laws of countries like Germany, France, US, Canada *etc*. In fact, the copyright directive of 2019 also proposes certain

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21 *Ibid*.

22 Amit Datta, "Collective Bargaining Agreements in the Film Industry: US Guild Agreements for Germany" 2(1) *Berkeley Journal of Entertainment and Sports Law* 203–207 (2013).

23 Xalabarder "AV Remuneration Study", *supra* note 4 at 24–25.

24 *Ibid*.

forms of these measures in order to secure fair remuneration for authors.[25] Briefly put, a best-seller clause provides an author an opportunity to seek additional remuneration over and above what had initially been agreed upon with the producer, in the event that the work attains a surprise success, and the transferee thereafter achieves a disproportionate commercial advantage from exploitation of the work. By way of a revocation right, authors would be entitled to reclaim their transferred rights in the event the work was left unused or had not been screened after the expiration of a particular duration of time. However, according to the findings arrived at in a European study, even these measures have apparently failed to create any "direct and upfront effect on remuneration" for audiovisual authors.[26] Similarly, researchers in New Zealand and Australia who have examined the efficacy of these legal measures in enhancing the author's ability to receive remuneration have also not found in favour of these measures on account of their lack of legal and social effectiveness.[27] In sum, as these studies and papers point out, a predominant reason which results in their unsuitability is the fact that these measures would almost always require authors to renegotiate with producers and as discussed earlier, this increases the chances of authors facing boycotts or losing prospective works. In fact, in some cases such re-negotiations may even result in litigations which are often expensive, arduous and a time-consuming endeavour as far as individual authors are concerned.[28] On an interesting side-note, it may be mentioned that a reversion right did exist in the Indian Copyright Act, 1914, however the stipulation was removed after the adoption of the Copyright Act, 1957.[29]

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[25] Directive (EU) 2019/790 of the European Parliament and of the Council of Apr. 17, 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, *available at*: https://wipolex.wipo.int/en/legislation/details/18927 (last visited on Sept. 02, 2021), art. 20 and 22.

[26] Guibault, Salamanca, *et. al*. "Remuneration of Authors and Performers for the Use of their Works and the Fixations of their Performances", *supra* note 17 at 59.

[27] Kenner, *supra* note 14 at 571, 597; Rita Matulionyte, "Empowering Authors via Fairer Copyright Contract Law" 42(2) *The University of New South Wales Law Journal* 708–714 (2019).

[28] *Ibid*.

[29] Indian Copyright Act, 1914, *available at*: https://www.wipo.int/edocs/lexdocs/laws/en/in/in121en.pdf (last visited on Sept. 02, 2021), art. 5(2); *see generally* Upendra Baxi, "Copyright Law and Justice in India" 28(4) *Journal of the Indian Law Institute* 497, 499–500 (1986); Lionel Bently, "Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries" 82(3) *Chicago-Kent Law Review* 1224–1232 (2007).

RISING SIGNIFICANCE OF STATUTORY REMUNERATION RIGHT

In contrast with the measures that have been discussed above, it must be noted that the statutory remuneration right has for quite some time gained increasing attention as a legislative measure which can effectually and realistically address remuneration-related issues of film-contributing authors. It also appears that this realization has come to the fore amongst both lawmakers as well as within the author communities in different parts of the world. Even though it may be stated that this legislative measure was formally designed for being introduced into the Rental and Lending Directive, 1992, there are studies on Spain's audiovisual sector which note that audiovisual authors in Spain have been vested with a statutory remuneration right since at-least the year 1966.[30] More specifically, the relevant provision which presently confers this particular right is article 90.3 of the copyright law of Spain which guarantees to audiovisual authors a right to claim remuneration from box-office returns and as stated above, had been introduced as far back as 1966 and has remained on the statute book despite numerous subsequent amendments made to the law.[31] To the extent that the Rental and Lending Directive is to be considered, article 4 of the directive now verbatim reproduced and identified as article 5 of the Rental and Lending Directive, 2006, stipulates that, authors (and performers) who transfer their rental right to producers would stand entitled to claim an 'equitable remuneration' from the revenues that are earned on account of the rental of the work.[32] And, in what may be termed as the most important stipulation in the context of the right being discussed in this article, the directive specifies that the equitable remuneration right cannot be waived and also that the right may be administered by collective management organisations. In terms of implementation, it would be worthwhile to note that member states of the European Union, including the United Kingdom[33] have transposed the

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30 International Confederation of Societies of Authors and Composers, "Case Study on Spain's Audiovisual Sector: Fair Remuneration and Economic Growth" 1–8 (CISAC, SAA, W&DW, 2021).

31 *Ibid*. at 2.

32 Council Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property now codified as Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, *available at*: https://wipolex.wipo.int/en/legislation/details/5815 (last visited on Sept. 02, 2021).

33 Copyright, Designs and Patents Act, 1988, art. 93B.

directive and as a consequence this article as well into their domestic copyright laws.

Discussing further on the point of implementation, there are a good number of countries which have now stipulated a statutory remuneration right, which operates in the form of an non-transferable and non-renounceable remuneration right that is collectively managed and paid by user, to their film-contributing authors.[34] Some of the notable examples of countries which have implemented this right include Italy, Mexico, Chile, Colombia, Estonia *etc*.[35] To further substantiate the argument that this legal measure has been gaining increasing significance,[36] some of the notable campaigns, proposals and legislative initiatives that have been undertaken in this sphere merit a brief discussion.

It may be relevant to note that there are reports and studies which have been prepared by and on behalf of the European Commission that have time and again suggested vesting in authors contributing to audiovisual works, a non-renounceable and collectively administered statutory remuneration right, such that they are able to derive a source of remuneration when their works are utilised, not only in traditional modes but also in digital platforms.[37] There are societies and associations representing audiovisual authors who have also in the past decade alone released white papers,[38] manifestos[39] and entered into campaigns[40] specifically requiring national governments to guarantee such

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[34] *See generally* Xalabarder "AV Remuneration Study", *supra* note 4 at 69.

[35] *Ibid*.

[36] *See generally* Geiger and Bulayenko "Creating Statutory Remuneration Rights in Copyright Law", *supra* note 4 at 1, 4.

[37] KEA European Affairs and CERNA, "Multi-Territory Licensing of Audiovisual Works in the European Union" 10, 172, 199 (European Commission, DG Information Society and Media, 2010); Dusollier, Ker, *et. al*., *supra* note 10 at 15, 104.

[38] Society of Audiovisual Authors, "White Paper: Audiovisual Authors' Rights and Remuneration in Europe" 14, 26 (SAA, 1st edn., 2011); Society of Audiovisual Authors, "Audiovisual Author's Rights and Remuneration in Europe" 20, 38 (SAA, 2nd edn., 2015).

[39] Writers and Directors Worldwide Launch "The Mexico Manifesto", *available at*: https://www.writersanddirectorsworldwide.org/Newsroom/council-news-latin-america-lobbying-events-lobbying-latin-america/writers-directors (last visited on Sept. 02, 2021).

[40] Writers & Directors Worldwide Launch "The Audiovisual Campaign" in Beijing, *available at*: https://www.writersanddirectorsworldwide.org/Newsroom/council-

authors a non-renounceable right to receive remuneration from the ongoing exploitation of their works which may be collected from users and administered by collective management entities. It is also pertinent to note that there are labour organisations representing audiovisual authors who have also taken steps such as writing representations to their respective governments seeking the amendment of their domestic copyright laws. These representations seek a law that explicitly recognises a non-transferable statutory remuneration right that operates in favour of creative contributors, and which right is also to be administered by collective management societies.[41] There are instances of federations representing audiovisual authors from Latin American regions which have been instrumental in organizing global discussions to press for the implementation of the statutory remuneration right as well as the need to pursue it with their respective national governments.[42] In addition, it is noteworthy to mention countries such as Chile,[43] Colombia,[44] and Uruguay[45] all of which have recently amended their laws to specifically introduce legislations which offer film-contributing authors the right to receive a remuneration from the ongoing exploitation of the filmic work. In this context, one of the most significant developments was an international legal study released in the year 2018 which exclusively dealt with the remuneration-related challenges faced by audiovisual authors.[46] This study, after a comprehensive analysis of the various legal measures currently prevailing worldwide, proposed the

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news-lobbying-uncategorized/writers-directors-worldwide-launch-audiovisual (last visited on Sept. 02, 2021).

41 Australian Writers' Guild and Australian Writers' Guild Authorship Collecting Society, "Submission to the Productivity Commission—Intellectual Property Arrangements" 2, 5, 9–10 (AWG-AWGACS, 2015).

42 The 2021 AVACI International Congress was Held—Audiovisual Authors International Confederation, *available at*: https://www.fesaal.org/post/the-2021-avaci-international-congress-was-held-audiovisual-authors-international-confederation?lang=en (last visited on Sept. 02, 2021).

43 The Audiovisual Campaign: The Ricardo Larrain Law in Chile, *available at*: https://www.cisac.org/Newsroom/studiesguides/audiovisual-campaign-ricardo-larrain-law-chile (last visited on Sept. 05, 2021).

44 CISAC Welcomes Court Decision Validating Pepe Sanchez Law in Colombia, *available at*: https://www.cisac.org/Newsroom/articles/cisac-welcomes-court-decision-validating-pepe-sanchez-law-colombia (last visited on Sept. 02, 2021).

45 Uruguay Approves New Laws on the Right to Remuneration for Audiovisual Creators, *available at*: https://www.fesaal.org/post/uruguay-aprueba-nuevas-leyes-de-derecho-de-remuneraci%C3%B3n-para-los-creadores-audiovisuales (last visited on Sept. 02, 2021).

46 Xalabarder "AV Remuneration Study", *supra* note 4.

introduction of a non-transferable and non-waivable statutory remuneration right, that is administered by collective management organisations and paid to the author by the user as the only feasible solution in light of all the challenges authors face. In fact, it is for the first time a European directive has specifically addressed the issue surrounding fair remuneration for authors and most notably, amongst the slew of measures that it had introduced, article 18 specifically adverted to the principle of "appropriate and proportionate remuneration".[47] A consortium of legal scholars while discussing their opinion as to the steps to be taken for the implementation of this article, have specifically mentioned that member states may consider implementing the principle that has been laid down in the said article by way of a statutory remuneration right.[48] In fact, there are ongoing discussions or legislative actions which show the necessity to introduce the statutory remuneration right in Africa, Netherlands, Poland, France and China *etc*.[49] In this context, special mention must be made to the recent legal developments in the United Kingdom where a bill had been introduced which sought to guarantee performers a statutory remuneration right.[50]

Given the fact that this right has been implemented previously, not only is a statutory remuneration right to be considered as just a widely accepted legal measure that can be resorted to for remuneration-related issues faced by film-contributing authors, but it has also presented itself as a measure which can produce a significant impact. There are recent case studies from Spain and Italy which are countries that have implemented this measure for some decades now, which seem to indicate that not only has this measure significantly increased the earnings of film-contributing authors but it has also had a major role to play in the growth of the film industry itself.[51] In addition

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[47] Directive (EU) 2019/790, *supra* note 25, arts. 18–23.

[48] Severine Dusollier, Lionel Bently, *et. al*., "Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market" 16 (European Copyright Society, 2020).

[49] *See generally* Society of Audiovisual Authors, Implementing Article 18 for Audiovisual Authors, *available at*: https://www.saa-authors.eu/en/pages/682-implementing-article-18-for-audiovisual-authors#.YbrbxrlByUn (last visited on Sept. 02, 2021).

[50] Copyright (Rights and Remuneration of Musicians, Etc.) Bill, *available at*: https://publications.parliament.uk/pa/bills/cbill/58-02/0019/210019.pdf (last visited on Sept. 02, 2021): However, the Bill did not pass in that session.

[51] Case Study on Spain's Audiovisual Sector, *supra* note 30; International Confederation of Societies of Authors and Composers, "Italian Audiovisual

to the above data, global collections report that has been released by the International Confederation of Authors indicates that audiovisual authors' remuneration has increased in those regions where the copyright law incorporated provisions containing a statutory remuneration right.[52] In fact, there is data to suggest that this legal measure has had positive results in the case of performers as well.[53] Several related rights' treaties,[54] regional directives,[55] and preferential trade agreements[56] that are in force today enshrine a statutory remuneration right.

CONCLUSION

It is quite clear from the above discussions that amongst the various measures that have been adopted by countries to address remuneration-related challenges of film-contributing authors, a statutory remuneration right can be considered as the only one which has gained some measure of importance. Unlike the other legal measures so discussed, it is also seen that a statutory remuneration right has generally shown positive results and is favoured by many countries today. The case studies which have been referred to above with respect to Spain and Italy, which have adopted this measure for audiovisual authors a few decades ago show good evidence of how the

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Sector: Fair Remuneration and Economic Growth" 1–9 (CISAC, SAA, W&DW, 2021).

[52] International Confederation of Societies of Authors and Composers: Global Collections Report, *available at*: https://www.cisac.org/services/reports-and-research/global-collections-report (last visited on Sept. 02, 2021).

[53] Association of European Performer's Organisation-ARTIS, "Study on Performers Rights in in International and European Legislation: Situation and Elements for Improvement" (AEPO-ARTIS, 2018).

[54] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961, art. 12; WIPO Performances and Phonograms Treaty, 1996, art. 15; Beijing Treaty on Audiovisual Performances, 2012, art. 12(3).

[55] Directive 2006/115/EC, *supra* note 32 as well as Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission now codified as Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights, *available at*: https://wipolex.wipo.int/en/text/443292 (last visited on Sept. 02, 2021).

[56] EU—Ukraine PTA of 2014 and EU—Andean Countries PTA of 2012; *see* Geiger and Bulayenko "Creating Statutory Remuneration Rights in Copyright Law", *supra* note 4 at 29.

measure has not only helped such authors but also the industry as a whole. Therefore, it is the opinion of the researcher that a statutory remuneration right is the best available option to safeguard the interest of film-contributing authors and Indian lawmakers have in fact taken a step in the right direction by giving due recognition to such a right in the statute book, although the manner in which it has been implemented may require further reconsideration, which is however beyond the scope of the instant article.

APPREHENSION AND BAIL TO CHILDREN IN CONFLICT WITH LAW: A CRITICAL ANALYSIS

- Hilal Ahmad Najar[1]

INTRODUCTION

The rehabilitative and restorative justice is the foundation philosophy of juvenile justice system in India. The Juvenile Justice (Care and Protection of Children) Act (JJ Act 2015, hereafter) envisions an approach which could lead to holistic development of the child. Every participant within the system must be a person of good quality having developed professionalism and adopt a child-friendly approach for the care, development, treatment and social re-integration of the child[2]. The JJ Act, 2015 lays down a robust mechanism for establishing different institutions within the system for dispensing justice to children in conflict with law. The procedure for handling children in conflict with law from first confrontation with police to institutionalisation or release has been mentioned within the provisions. Since the focus is on the dispensation of justice and rehabilitation which is highly associated with Juvenile Justice Boards and Observation or Special Homes, the apt focus on the Special Juvenile Police Units is missing. This oblivious approach towards an important organ which forms the corner stone of juvenile justice system has been probably because of the perception that police juvenile interaction is for a minimum period. This perception is appropriate only in theory but not in practice. The minimum intervention model and labelling theory has led to development of one the basic principles of the juvenile justice that "detention shall be the measure of last resort." Meaning thereby that liberty of children shall be given precedence over institutionalisation. The best interest of the child shall be given utmost importance while taking decisions regarding any child in conflict with law.

The "best interest of the Child" is the fundamental philosophical principle underlying all actions and decisions taken for the juveniles in conflict with the law. Every action and reaction shall be measured and weighed with this all pervasive principle. The approach of all stakeholders shall be child friendly *sine qua non* with the international and national statutory and non-statutory norms. The best interest of the child means "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development[3]." The

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2 Preamble, The Juvenile Justice (Care & Protection of Children) Act, 2015

3 Section 2(9), The Juvenile Justice (Care and Protection of Children) Act, 2015

child friendly means "any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate, and in the best interest of the child[4]." Thus the actions and decisions must be child-friendly to promote, in all circumstances, the best interest of the child. The stakeholders under the juvenile justice system must take decisions in the best interest of the child. It has been observed that most stakeholders under juvenile justice system act callously and use their powers arbitrarily. The police exercise unbridled discretion during apprehension and post apprehensions heavily casting upon the rights of the individuals. The criminal law and penal procedural laws does not empower the police but curb their discretion to safeguard the rights of individuals. This jurisprudence of the rights of the accused or arrested person has been further developed and shaped by the various decisions of the Supreme Court of India. The juvenile justice system is coming with all promises not to comprise the welfare of the juveniles in conflict with law. It is additional protection emphasising on a "treatment that is humane, considerate and in the best interest of the child." The juvenile justice system, together with, international norms, national laws and judicial safeguards create an umbrella protection for saving the rights of the young delinquents from arbitrary apprehension and intents to secure liberty of children with emphasis on pragmatic philosophy of institutionalisation as a measure of last resort. The analysis of norms pertaining to apprehension and bail along with judicial interpretation is presented below.

Apprehension

The criminal laws are set in motion once the First Information Report (FIR) is registered against any accused or alleged delinquent. The police have been empowered to make arrests or apprehend all those for whose apprehension sufficient grounds exist[5]. The law regulating the manner of apprehension have been laid down under section 10 of Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015, hereafter) and Rules 8 and 86 of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (JJ Model Rules, 2016, hereafter) The JJ Act is special legislation having precedence over all other laws like Cr.P.C. and law of evidence. The police must exercise powers as per the provisions of this special legislation unless it is silent on any point. The police power of apprehension has been quite broadly curtailed and police has been empowered to make arrests only in case of heinous offences with a rider that such apprehension must be in the best interest of the child[6]. Keeping in view the immature psychological

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4 Section 2(15), The Juvenile Justice (Care and Protection of Children) Act, 2015

5 Section 23, Police Act 1861

6 Proviso to Rule 8, JJ Model Rules, 2016

development of the children and to avoid any kind of stigmatisation the police officers are directed to interact with children in plain clothes. The statute is also gender sensitive[7] making it mandatory that women police personnel shall handle the girls[8]. The police, child and Special Juvenile Police Unit (SJPU) shall interact with child in plain clothes at the time of apprehension, interrogation and production of the child before different forums. The law states that arrest can be made only in the best interest of the child in heinous offences. Further it states that FIR shall not be registered in case of petty and serious offences[9]. Thus in case of offences committed or alleged to be committed by a child the non-apprehension is the rule while as apprehension is an exception restricted to heinous offences. "The best interest of the child" is the governing principle for exercise of discretion of apprehension in heinous offences which law enforcement agencies exercise very callously. Most children in conflict with law are falsely charged for heinous offences to register FIR against them. The documentary "***Ek Tha Bachpan***"[10] translated as "Childhood Lost" developed by Human Rights Law Network is a classic example of misuse of discretion by the law enforcement agencies. The power of police to arrest a person (child) is further regulated by section 41(ba) Cr.P.C which states that "any police officer may without an order from a Magistrate and without a warrant, arrest any person…against whom credible information has been received that he has committed a cognisable offence punishable with imprisonment for a term which may extend to more than seven years…police officer has a reason to be believe that on the basis of that information that such person has committed the said offence." The law requires that police must exercise due diligence not arbitrary exercise of powers while apprehending or arresting a person and only on credible information and having reason to believe such person has committed the offence. The law gives effect to the directive of international norm under Article 37(b) of CRC that children in conflict with law shall not be subject to arbitrary arrest and detentions.

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7 Shailesh Kumar, Shifting Epistemology of Juvenile Justice in India, *Contexto Internacional*, vol. 41(1) Jan/Apr 2019, available at http://dx.doi.org/10.1590/S0102-8529.2019410100006 (last visited on 18.08.2022). In his article the author has pointed out that hitherto the Juvenile Justice Laws in India were not gender sentive.

8 Section 107 (5), Section 86 JJ Act, 2015

9 Section 2 (54) JJ Act , 2015: "serious offences" includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years;
Below three years are considered petty offences and above seven the serious offences.

10 ***Ek Tha Bachpan,*** available at https://www.youtube.com/watch?v=GBMBO0DUlxk (last watched on 23.08.2022)

"Reasonability and Sufficiency of information is a factual question, the answer to which must be based not on mere absence of suspicion but, on honest belief of commission of an offence based on the facts assessed with due care and caution. It is only when apprehension of juvenile is made on such bona fide belief formed fter due care and caution that the action is presumed to be taken in 'good faith' and the officer making arrest is protected from any legal action vide section 67 of JJA, 2000 [Now section 100[11] of JJ Act, 2015 (*Emphasis supplied*). Otherwise, under section 220, IPC, the officer must be liable to be prosecuted for keeping juvenile in confinement (for howsoever small duration may be) in maliciously acting contrary to law[12]." In all those cases where apprehension of child is not necessary the SJPU or CWO is bound to forward the information to JJB about the nature of offence and his social background report. They are further required to inform the parents of the child about his apprehension and date of hearing before the board[13]. The child shall not be subjected to any kind harassment during apprehension, journey to place of safety or JJB or during interrogation. Every child shall be treated humanely taking the needs of child in consideration[14]. The police shall not use stigmatising semantics during or after apprehension.

Most human rights violation does happen within closed walls of the police custody leaving no iota of evidence to proceed against police. The law enforcing agencies exercise utmost force to extract the confession and to recover materials having evidentiary value adduced to secure the conviction of the accused. Every conviction is hailed as a win and every acquittal is mourned as a loss. This aptitude of the law enforcement agencies often results in human rights violation. The custodial torture is something with which the law enforcement agencies are often associated. This has created an impression that police station is a place where angels fear to tread and crooked man jump. The custodial torture during interrogation has also resulted in custodial deaths in India. According to National Human Rights Commission (NHRC), only in 2020, 1,569 judicial custodial deaths occurred in the country despite COVID

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11 Section 100 JJ Act, 2015: No suit, prosecution or other legal proceeding shall lie against the Central Government, or the State Government or any person acting under the directions of the Central Government or State Government, as the case may be, in respect of anything which is done in good faith or intended to be done in pursuance of this Act or of any rules or regulations made thereunder.

12 Vishrut Kansal, Special Juvenile Police Unit, *National Law School of India Review*, 2015, Vol. 27, No. 1 (2015), available at https://www.jstor.org/stable/44283649 (last visited on 15.08.2022)

13 Proviso to Rule 8, JJ Model Rules 2022

14 Article 37(c), International Convention on the Rights of the Child, 1989

restrictions. The NHRC reported 90 deaths police custody whiles as National Compaign against Torture (NCAT) reported 111 deaths in the police custody[15]. Further, the "data culled from the annual reports of the National Human Rights Commission (NHRC) from 1996-97 to 2017-18 have revealed that 71.58% of the custodial deaths in India were of people from poor or marginalised sections of society[16]."

The custodial torture is not a something only associated with the adult offender but alleged child delinquents are not even spared. These instances are seldom reported and go unheard and unaddressed. The NCAT reported four death of four children in police custody due to torture in 2020. Also report reads that two deaths of children has happed in juveniles homes due to torture and a number of torture cases to children which did not result in the deaths. This happens despite a compassionate treatment envisioned under the JJ Act, 2015. Most deaths occur during interrogation by using the third degree means to extract the confession. The torturious interrogation takes places within police stations despite the law that confession to a police officer in not relevant in the court of law. Even the Supreme Court has made it clear that even a confession to an officer under the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) and directed the for installation of CCTV cameras in all interrogation rooms as a safety measure against the police torture[17].

The latest illegal apprehensions of children by the police, followed by inhuman treatment in the Police Lockup[18] and denial of legal counsel and medical help[19] are some glaring examples of how JJ Act, 2015 is followed by the law enforcing agencies in India. The Supreme Court of India after taking

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15 India: Annual Report on Torture, *National Compaign Against Torture*, available on http://www.uncat.org/wp-content/uploads/2021/03/IndiaTortureReport2020.pdf (last visited on 28.08.2022)

16 **Poor Account for 71% of custodial deaths in Inda, *The Hindu***, 10 December 2020, available at https://www.thehindu.com/news/national/poor-account-for-71-of-custodial-deaths-in-india/article61940135.ece (last visited on 29.08.2022)

17 *Paramvir Singh Saini v. Baljit Singh case*. Available at https://indiankanoon.org/doc/88573149/ (last visited on 29.08.2022)

18 The UP Police accused of Stripping Cleric; The Telegraph Online; 29 December, 2019; https://www.telegraphindia.com/india/uttar-pradesh-police-accused-of-stripping-cleric/cid/1731127 (last visited on 07.07.2022)

19 How detainees were denied legal counsel, medical help at the Daryaganj police station; The Caravan; 25 December, 2019; https://caravanmagazine.in/politics/detainees-denied-legal-medical-help-daryaganj

note of these illegal detentions and inhuman treatment directed that Juvennile Justice Boards can not be mute spectators:

"*All JJBs in the country must follow the letter and spirit of the provisions of the Act. We make it clear that the JJBs are not meant to be silent spectators and pass orders only when a matter comes before them. They can take note of the factual situation if it comes to the knowledge of the JJBs that a child has been detained in prison or lock up. It is the duty of the JJBs to ensure that the child is immediately granted bail or sent to an observation home or a place of safety. The Act cannot be flouted by anybody, least of all the police*"[20].

The complete protection has been given to all offenders including young delinquents from any kind of inhuman treatment. Article 37(a) of the United Nations Convention on the Rights of the Child, 1989 (UNCRC) states that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment." There are end number of examples of serious abuse and torture of children in police custody as well as torture by inmates and officials of observation homes during judicial custody[21]. Further Article 19 (1) UNCRC also obliges state parties to take "appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation…" The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (Havana Rules) prohibits use if restraint or force and directs that children should not be subject to any humiliation of degradation[22]. Article 37 (c) of UNCRC enjoins upon the state parties that children shall be treated with humanity and respect for the inherent dignity of the human person keeping in consideration the specific needs of each individual. The domestic legislations are not oblivious of fact that the children are a class different from others and Article 15(3) empowers the states to make laws for the children. Article 21 guarantees that none shall be deprived of his life and liberty except as per the procedure set under the law. The words "life" and "liberty" and "procedure established liberty" have received a wide interpretation from the Supreme Court of India ensuring that humans must

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[20] *Re Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India & Ors*.; Writ Petition No. 102/2007; available at https://indiankanoon.org/doc/139894183/ (last visited on 07.07.2022)

[21] Yogesh Snehi, State and Child Justice: Stories of Delinquent Juveniles, *Economic and Political Weekly*, Oct. 9-15, 2004, Vol. 39, No. 41 (Oct. 9-15, 2004), available at http://www.jstor.com/stable/4415641 (last visited on 11.06.2022)

[22] Rule 63, Havana Rules

live a dignified life. Thus the power to apprehend and interrogate a juvenile must be exercised in a "just, fair and reasonable manner".

Bail

The jurisprudence of criminal justice system in India has a well-founded judicially recognised constitutional norm that "bail is right and jail is exception." This fundamental right of accused person has become sacrosanct in the criminal judicial process. For the juvenile justice system this principle has found its place in international norms and national legislation in these highly appealing words "detention shall be the measure of last resort that too for minimum possible time." This principle is echoing in UNCRC and United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules) as well as in respective juvenile justice legislations. The detention followed after apprehension has been discouraged at all levels. The UNCRC under Article 37 (b), although does put an absolute bar on the detention of child but urges that same shall not be arbitrary and shall in all circumstances be used as a "measure of last resort and for the shortest appropriate period of time." Further right to challenge the legality of such detention has been enshrined as one the rights of young delinquents[23]. The Beijing Rules are exclusively envisaging that children shall not be deprived from liberty. The detention shall be for the shortest possible period and as a measure of last resort has been time and again stressed in a number of guidelines[24]. Further the Havana Rules define the deprivation of liberty as "any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority[25]." The Havana Rules have been framed solely to "counteract the detrimental effects of deprivation of liberty by ensuring respect for children's rights[26]." The Riyadh Guidelines enjoin the states to take highest possible measures for prevention of delinquency among the young state that "formal

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23 Article 38 (d), UNCRC

24 Beijing Rules, (Rules 1 & 2): "deprivation of liberty should be a disposition of last resort and for the minimum period", (Rule 13.1): "detention should be used only as a last resort, and for the shortest possible period", (Rule 17.1): "deprivation of liberty should be used only for extremely serious cases", (Rule 19): "institutionalisation should be used only as a last resort".

25 Rule 11, Havana Rules

26 Matti Joutsen, *UN Standards and Norms on Juvenile Justice: From Soft Law to Hard Law,* available at https://www.unafei.or.jp/activities/pdf/Public_Lecture/Public_Lecture2017_Dr.Joutsen_Paper.pdf (last seen on 12.08.2022)

agencies of social control should only be utilized as a means of last resort[27]." The guidelines further prescribe as a measure of social policy that the institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance…[28]" The Committee on the Rights of the Child after analysing the compliance report of states observed with respect to Article 37 UNCRC that "in many children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC…the States parties should take adequate legislative and other measures to reduce the use of pretrial detention. Use of pretrial detention as a punishment violates the presumption of innocence. The law should clearly state the conditions that are required to determine whether to place or keep a child in pretrial detention, in particular to ensure his/her appearance at the court proceedings, and whether he/she is an immediate danger to himself/herself or others. The duration of pretrial detention should be limited by law and be subject to regular review[29]." It is estimated that more than one million children are deprived of their liberty by law enforcement officials[30].

The domestic laws recognise the bail as a matter of right and jail shall be used only in the exceptional circumstances. The juvenile justice laws does affirm these international principles and recognise that detention shall be used as a measure of last resort[31]. The matters of "apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law" are exclusively to be governed under the JJ Act, 2015[32]. Thus the procedure established under the Cr.P.C and any other detention law detrimental to the interest of child shall always be governed by the provisions of JJ Act, 2015[33]. The bail is a right of every child delinquent irrespective of his age or nature of offence. The bail cannot be denied only for the reason that the juvenile delinquent has committed a heinous offence in a

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[27] Rule 6, Riyadh Guidelines

[28] Rule 46 Riyadh Guidelines

[29] Para 80, General Comment No. 10, "Children's Rights in Juvenile Justice" , Committee on the Rights of the Child, available at https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf (last visited on 15.08.2022)

[30] Justice for Children, available at https://www.unicef.org/protection/justice-for-children (last visited on 28.08.2022)

[31] Section 2(xii), *Principle of institutionalisation as a measure of last resort:* A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry

[32] Section 1 (4)(i), JJ Act, 205

[33] Sections 22, JJ Act, 2015, see also section 6(3) JJ Act, 2015

gruesome manner. The bail provisions under juvenile justice system are not akin to the provision in criminal justice system for adult offenders[34]. Under the criminal justice system the grant of bail is largely governed by the nature of the offence which cannot become a ground under the juvenile justice system[35]. In *Nimmagadda Prasad v. C.B.I., Hyderabad*[36]the court observed that "while granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations." Thus, under criminal justice system the bail can be denied on ample grounds. But under the juvenile justice system the bail can be denied only on three grounds that too in the interest on the juvenile delinquent. Section 12 reads that irrespective of the fact that offence committed by a young delinquent is bailable or non-bailable offence; the bail shall be granted with or without surety. The Board has also been empowered to place the juvenile offender under the supervision of a probation officer or under the care of a fit institution. The bail shall not be denied except for the benefit of children in conflict with law on three grounds[37]:

a) If there appears a reasonable ground for believing that the release is likely to bring that person into association with any known criminal

b) Expose the said person to moral, physical or psychological danger or the person's release

c) Would defeat the ends of justice

Further, the JJB is obliged to record the reasons and material facts for denying bail. Thus under the juvenile justice laws denied of bail has been made stringent while as grant of bail has been made more flexible.

POLICE CAN GRANT BAIL TO CHILD DELINQUENTS

Whether police has the power to grant bail or not has not been directly mentioned. A reply in affirmative comes from the section 12 (2) of JJ Act, 2015 which reads as "when such person having been apprehended is not released on bail under subsection (*1*) by the *officer-in-charge of the police station*, (emphasis supplied) such officer shall cause the person to be kept

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[34] Kumar Askand Pandey, *Juvenile Justice: A Commentary* 87, (Eastern Book Company, 1st Edition, 2019)

[35] *Rakesh Kumar Paul v. State of Assam,* (2017) 15 SCC 67

[36] *Nimmagadda Prasad v. C.B.I., Hyderabad* on 9 May, 2013 available at https://indiankanoon.org/doc/40654916/ (last visited on 06.06.2022

[37] Proviso to section 12, JJ Act, 2012

only in an observation home in such manner as may be prescribed until the person can be brought before a Board." However, the question of grant of bail by police arises in only heinous cases committed by the juvenile. The Proviso to Rule 8 of the JJ Model Rules 2016 provides that "the power to apprehend shall only be exercised with regard to heinous offences, unless it is in the best interest of the child. For all other cases involving petty and serious offences and cases where apprehending the child is not necessary in the interest of the child, the police or Special Juvenile Police Unit or Child Welfare Police Officer..." The conjoint reading of section 12 (2) of JJ Act, 2015 and Proviso 8 of the JJ Model Rules 2016 makes out the following legal points:

a. The non-apprehension shall be the rule in all cases except in heinous cases.
b. The apprehension power of the police shall be exercised in heinous cases when it is in the best of the child.
c. The police can grant bail to juveniles in conflict with law
d. Since police cannot apprehend in petty and serious offence, question of grant of bail shall not arise in these cases before the police.

In case the juvenile delinquent has not releases on bail either by police or JJB, it has been made mandatory for the Board to send such a child to an observation home or a place of safety[38]. However, first preference shall be for the bail than the institutionalisation. In case the bail has been granted but child because of some reasons is not in a condition to fulfil the conditions within the seven days of the grant of bail, the Board has to modify the condition of the bail to secure his/her release.[39]

The power of police to grant bail has been incorporated with a view to safeguard the child from stigmatisation and provide the child the chance for rehabilitation and reformation. The police seldom use such power or don't invoke such provision for obvious reasons[40]. The police have been found booking children for unseen offences called towel cases[41] in Karnataka. Almost all arrests are done on suspicion which cannot be questioned in any court of law. "Police haul up the kids on suspicion and book them for unseen thefts and then the process of 'justice' starts. The trial begins. Juvenile boards, observation homes, judicial magistrates are all of them culprits. Endless

[38] Section 12(3), JJ Act, 2015
[39] Section 12 (4), JJ Act, 2015
[40] Kumar Askand Pandey, *Juvenile Justice: A Commentary* 87, (Eastern Book Company, 1st Edition, 2019)
[41] Towel cases are those cases were children are fond of hanging their towels on their shoulder or head and sleep on pavements.

hearings. Children are harassed and instead of reuniting with their families, they drift even further away. The first interface of the problem is the police. How can we humanise the police? … ln the words of Reita Panickar of the group Butterfly in Delhi, the need for reforming the entire police system and not making a few policemen child-friendly. The police system treats children on par with adult criminals and the age-old Criminal Procedure Code is applied to them[42]." The common complaint among children is that police arrest them on suspicion to meet their quota[43]. "It is no exaggeration to state that the errant police officials resort to arbitrary arresting juveniles, especially the ones loitering in the streets, often as a part of deliberate strategy to meet the number of arrests, colloquially called *quota* usually set by the officer-in-charge of the concerned area, as required to exhibit their vigilance necessary for securing the job-promotions[44]." The police use their discretion to make arbitrary arrests of juvenile justice but seldom invoke section 12 to grant them the bail before producing them before JJB.

EXCEPTIONS TO RULE OF BAIL

The question of grant of bail or denial of bail to juvenile in conflict with law has reached to the courts for interpretation on many occasions. The courts have resorted to the liberal meaning in favour of children in conflict with the law. In catena of cases the court held that bail can be denied only on the three grounds mentioned in section 12 and gravity of offence or circumstances of offence can't be the ground of denial of bail[45]. The terminology used in the section for denial of bail is vague and subjective to the understanding of officials granting bail. The words like "known criminal, moral, physical and psychological dangers and defeat the ends of justice" deserve the explanation. The Indian Judiciary has given interpretation to the

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[42] Manu N. Kulkarni, Justice for 'Delinquents', *Economic and Political Weekly* , Jun. 25, 1994, Vol. 29, No. 26 (Jun. 25, 1994), p. 1575, available at https://www.jstor.org/stable/4401387 (last visited on 13.05.2022)

[43] Police Abuse and Killings of Street Children in India, Human Rights Watch Children's Rights Project, available at https://www.hrw.org/reports/1996/India4.htm (last visited on 28.08.2022)

[44] Juvenile Justice, UNICEF International Child Development Centre, Innocenti Digest, (Issue 3, January 1998), available at http://www.unicef-irc.org/publications/pdf/digest3e.pdf, quoted in Vishrut Kansal, Special Juvenile Police Unit, *National Law School of India Review*, 2015, Vol. 27, No. 1 (2015), available at https://www.jstor.org/stable/44283649 (last visited on 15.08.2022)

[45] *Manoj Singh v. State of Rajasthan,* 2004(2) RCC 995; *Lal Chand v. State of Rajasthan*, 2006(1) RCC 167; *Prakash v. State of Rajasthan*, 2006(2) RCR (Criminal) 530 and *Udaibhan Singh alias Bablu Singh v. State of Rajasthan* 2005(4) Crimes 649; *Vishvas v. State of Punja,* CRR No. 53 of 2021

grounds of denial of bail in a number of cases. In *Manoj alias Kali v The State (NCT of Delhi)*[46], the court observed that "a juvenile has to be released on bail mandatorily unless and until the exceptions carved out in the section itself are made out." In *Nand Kishore (in JC) v. State*[47] the Delhi High Court with respect to first exception held that "before it [exception in section 12 (emphasis supplied)] can be invoked to deny bail to a juvenile there must be a reasonable ground for believing that his release is likely to bring him into association with any known criminal The expression 'known criminal 'is not without significance. When the liberty of a juvenile is sought to be curtailed by employing the exception, the exception must be construed strictly. Therefore, before this exception is invoked, the prosecution must identify the 'known criminal ' and then the court must have reasonable grounds to believe that the Juvenile if released on bail, would associate with this 'known criminal'. It cannot be generally observed that the release of the Juvenile would bring him into association with criminals without identifying the criminals and without returning a prima facie finding with regard to the nexus between the Juvenile and such criminal..." However, the court in *Pappi @ Prem Singh v. State Of U.P.*[48] reached to a different conclusion and held that "there is possibility to this effect that after release on bail he *[(the revisionist, who was child (emphasis added)]* may come into contact with his brothers who have been convicted in this very case and with them he may threaten prosecution witnesses who are of more tender age than the accused revisionist and have got no protection of any adult guardian and in this way prosecution evidence may be tampered with and in such a circumstance interest of justice may be defeated." The term known criminal ordinarily means a person who habitually commits crime, or person with bad criminal antecedents or criminal history, gangster, hardened criminal, those who repeatedly commit a particular type of crime etc. As such, person may be a co-accused to the child in conflict with law, "who has been involved in a crime but has no criminal history or criminal antecedents to his credit cannot be termed as "Known criminal[49]." In *Vishvas v. State of Punjab*[50], the court in this made an important observation

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[46] Crl. Rev. P. 178/2996 decided on 2.6.2006

[47] 2006 (4) RCR (Criminal) 754, available at https://delhicourts.nic.in/july06/NAND%20KISHORE%20VS.%20STATE.pdf (last visited on 26.08.2022)

[48] (2006) 55 ACC 939

[49] *Paplu v. State of U.P.,* (2005) 2 All LJ 92, quoted in Kumar Askand Pandey, *Juvenile Justice: A Commentary* 87, (Eastern Book Company, 1st Edition, 2019)

[50] CRR No. 53 of 2021, (available at https://highcourtchd.gov.in/jjmc/Judgements/CRR_53_2021_08_02_2021_FINAL_ORDER.pdf (last visited on 15.08.2022)

about denial of bail by the JJBs. The court observed "this Court came across numerous cases where orders declining bail to the juveniles are being passed by the J.J. Boards in a mechanical manner, being wholly influenced with the gravity of offence and the manner in which the alleged offence is committed by the Child in Conflict with law, and so has the approach been of the Appellate Courts. This case is also one of such kind." The single instance of joining with the known criminals cannot amount to denial of bail[51].

Likewise the court in different cases deliberated on the denial of bail on the ground of expose of child offender to psychological, moral and physical danger. In *Ashish Masih @ Ashu v. State of Punjab*[52], the High Court of Punjab and Haryana observed that "Section 12 of the Juvenile Justice Act, 2015 makes it quite clear that the grant of bail to the child in conflict with the law be the norm and the proviso be that denial of such bail only when the release of the child is likely to bring the child into association with known criminals or expose one to psychological, moral, or physical danger or defeat the ends of Justice". The court held that the reason for rejection of the bail should not be a mechanical representation of the legal provision and mere lip service of the Board. Also, in *Shashi Kumar Saini v. The State*[53], the court released the child delinquent with following observation that "there is no indication in the social investigation report that if the petitioner is released such release would be likely to bring him into association of known criminals or expose him to moral, physical or psychological danger or his release would defeat the ends of justice."

The most tedious task for both adjudicating bodies and the police is to understand when the release of a juvenile in conflict with law on bail will defeat the ends of the justice. This is again subjective to the discretion of authorities granting bail. No clear cut guidelines have been laid down in the statute. The courts have interpreted this with reference to the best interest of the child. The JJB had rejected the bail in *Master Abhishek (Minor) v. State (Delhi)*[54], on the grounds like "aggressive behaviour, tendencies to harm others and the fact that the person assaulted only with his fist and arms shows his brutal mental makeup." However, Delhi High Court took note of the objects set in the preamble to JJ Act and held that "what can be said to be the factors

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[51] *Prahlad Gaur v. State of U.P.* 2009 Cri LJ 153 (All), *Amit Yadav v. State of U.P.* (2016) 5 All LJ 169

[52] CRR-992-2020

[53] 120 (2005) DLT 313, 2005 (82) DRJ 255

[54] (2005) 119 DLT 556

to determine what will defeat the ends of Justice have to be located in the context of the purpose of the Act. The purpose of the Act is to meet the need for care and protection of children and to cater to their development needs. This can be done by adopting a child-friendly approach in the adjudication and disposing of matters in the best interest of children and for their ultimate rehabilitation." The Supreme Court has also directed that bail shall be granted to all juvenile delinquents "unless it is shown that there appear reasonable grounds for believing that the releases is likely to bring him under the influence of any criminal or expose him to moral danger or defeat the ends of justice[55]."

ANTICIPATORY BAIL AND NON OBSTANTE CLAUSE UNDER SECTION 12

The judicial controversy has emerged on the issue whether a juvenile is entitled to benefits of anticipatory bail under section 438 Cr.P.C. The different High Courts have expressed opposite views giving different reasons. This controversy has emerged because of the JJ Act, 2015 is silent on the grant of anticipatory bail. It only mentions bail to be granted after apprehension. The Chhattisgarh High Court[56] and Madras High Court[57] had taken the view that child cannot approach for grant of anticipatory bail under section 438 Cr.P.C as same is not applicable to them because of non obstante clause[58] in the JJ Act, 2015. The Madras High Court observed:

> "…there are lot of safeguards provided to the child in conflict with law in the event the child is apprehended by the police. In the light of these safeguards, and in the light of the legal position that the child in conflict with law cannot be arrested, the child in conflict with law need not apply for anticipatory bail. The legislature has consciously did not empower the police to arrest a child in conflict with law. Thus, it is manifestly clear that an application seeking anticipatory bail under Section 438 Cr.P.C. at the instance of a child in conflict with law is not at all maintainable. Similarly, a direction to the Juvenile Justice Board to release the child in conflict with law cannot be issued by the High Court in exercise of its inherent power saved under Section 482 Cr.P.C."

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[55] *Gopinath Ghosh v. State of West Bengal*, 1984 Supp SCC 228

[56] *Sudhir Sharma v. State of Chhattisgarh*, 2017 SCC OnLine Chh 1554

[57] *K. Vignesh v. State,* 2017 SCC OnLine Mad 28442

[58] Section 12 "…not withstanding anything contained in the Code of Criminal Procedure, 1973…"

However, the Kerala High Court[59] has allowed the child to avail benefits under Section 438 Cr.P.C because same is not inconsistent with the objectives of JJ Act, 2015 and held that JJ Act, 2015 does not, either directly or indirectly, rule out the applicability of section 438 Cr.P.C in case of children in conflict with the law. The Allahabad High Court in *Shahaab Ali (Miner) and Another v. State Of U.P.*[60] on 20 January, 2020, accorded an extraordinary explanation to the question in these words:

> "It must consequently be held that once first information is registered or information otherwise recorded by the SJPU or the CWPO with regard to a child in conflict with law, the provisions of Section 438 stand impliedly excluded. In such a situation it is the provisions made in Sections 10 and 12 of the 2015 Act which alone must be permitted to operate and recognised in law to be applicable."

The Bombay High Court in *Raman & another v. State of Maharashtra*[61], giving precedence to liberty over institutionalisation observed that "When a child in conflict with law is apprehended, his liberty is curtailed. Section 438 of the Cr.P.C. affords a valuable right to a person, who is likely to be arrested or in other words, whose liberty is likely to be curtailed. Section 438 of the Cr.P.C. does not make any distinction between different persons."
The Division of the Chhattisgarh High Court in *Sudhir Sharma v. State of Chhattisgarh*[62], gave a more pragmatic explanation to the availability of benefits to a child under section 438 Cr.P.C by holding that JJ Act, 2015 does not contain any provision which excludes general application of Cr.P.C. The Court said:

> "…We fail to see how the beneficial provision for grant of bail to CICL could be interpreted to the utter prejudice of a CICL to say that he would not be entitled to say that important statutory scheme of seeking anticipatory bail provided under Section 438 of the Code of Criminal Procedure, 1973 is not available to him. On rational construction of the non obstante clause in Section 12, it only seeks to put a ClCL in a better position as compared to any other person who is not a CICL by providing that ordinarily a

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[59] *Gopakumar v. State of Kerala*, (2012) 4 KLT 755*; X. v. State of Kerala*, BA No. 3320 0f 2018

[60] available at https://indiankanoon.org/doc/44292418/ (last visited on 28.08.2022)

[61] *Raman & another v. State of Maharashtra*, available at https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/ordjud-1-426029.pdf (last visited on 28.08.2022)

[62] 2017 SCC OnLine Chh 1554

> CICL has to be granted bail and it could be rejected upon existence of three specified grounds…"

The court answered the reference by upholding the right of bail to CICL before the High Court or the Sessions Court in the following words:

> "The application for grant of anticipatory bail under section 438 of the Code of Criminal Procedure, 1973 at the behest of CICL before the High Court or the Court of Sessions is maintainable under the law and the said remedy is not excluded by application of section 12 of the Act of 2015."

In order to set this controversy at rest the Centre has approached the Supreme Court of India with a plea to decide if child can apply for anticipatory bail[63]. "The government has urged the Supreme Court to give authoritative decision on whether a child or juvenile accused of a crime can apply for anticipatory bail. It said the question of law has been a dilemma with courts giving opposing judgements over the years." This question must be settled with reference to the object of the JJ Act, 2015 and the principle that institutionalisation shall be the measure of last resort. A conjoint reading of international principles that "all decisions shall be taken in the best interest of the child" and "institutionalisation shall be a measure of last resort" with the objectives and principles of JJ Act, 2015 and other constitutional norms will take us to the conclusion that child shall be allowed to available the benefit of anticipatory bail. The anticipatory bail can be denied to the child only on the three grounds of denial of bail for his welfare under section 12 of JJ Act, 2015.

CONCLUSION

The urgent need for establishing the SJPU in each district can not be ruled out. The benevolent objectives of the JJ Act, 2015 and JJ Model Rules, 2016 can not be realised unless and until the police officials dealting with the juvenile delinquents have developed professionalism through orientation programmes. The liberty of every child is of paramount importance for his/her successful transition from his childhood to adulthood. We must take note of the fact that juvenile justice system, in contrast to adult criminal justice system, "de-emphasis the child's moral and legal responsibility for the

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[63] Centre urges SC to decide if children can apply for anticipatory bail, The Hindu, April 02, 2022, available at https://www.thehindu.com/news/national/centre-urges-sc-to-decide-if-children-can-apply-for-anticipatory-bail/article65285154.ece (last visited on 28.08.2022)

unlawful behaviour[64] which every stakeholder, including police, under juvenile justice system must understand. Justice Altamas kabir has aptly observed [65].

> The very scheme of the aforesaid Act is rehabilitative in nature and not adversarial which the Courts are generally used to. The implementation of the said law, therefore, requires a complete change in the mind-set of those who are vested with the authority of enforcing the same, without which it will be impossible to achieve the objectivity of the Juvenile Justice Act, 2000 [*now JJ Act, 2015 (emphasis supplied)*.

Earlier the Supreme Court of India has also observed that "the greatest recompense which the State can get for expenditure on children is the building up of a powerful human resource ready to take its place in the forward march of the nation[66]." The powerful resources can be created only by orientation programmes focused on various areas as mentioned under NALSA guidelines and on brain and behavioural sciences of the child. Besides created professionalism among stakeholders the law must be made deafted in an umbiguous vocabulary to enable the child to secure liberty either before apprehension through anticipatory bail or bail before the appropriate bodies. The law enforcement agencies and adjudicating bodies under the juvenile justice system shall take whole gamut of legal norms and judicial decision in consideration while apprehending or granting/denying anticipatory bail/bail to children in conflict with law.

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[64] B.B. Pande, 'Bad' Juveniles and the 'Worst' Juvenile Justice Law? The Second Challenge to Juvenile Justice Law in "*Darga Ram" v. "State Of Rajasthan", Journal of the Indian Law Institute*, January-March 2015, Vol. 57, No. 1 (January-March 2015), available at https://www.jstor.org/stable/44782489 (last visited on 05.05.2022)

[65] *Hari Ram v. State of Rajasthan* (2009) 13 SCC 211

[66] *Sheela Barse & Ors v. Union Of India & Ors* on 13 August, 1986, available at https://indiankanoon.org/doc/525548/ (last visted on 29.07.2022)

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I, Prof. Dr. Suresh V. Nadagoudar hereby declare that the particulars given above are true to the best of my knowledge and belief.

Prof. Dr. Suresh V. Nadagoudar

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