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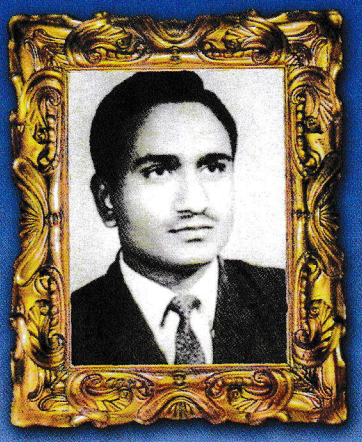
A TRUE VISIONARY

"You see things and you say **Why***? But I dream of things that never were and say* **Why** *not?"*

- George Bernard Shaw



Shri Jagannath Gupta
(1950 - 1980)

Also a true visionary...who dared to dream!
He lives no more but his dreams live on....and on!

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And more dreams to come!

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48/4, Knowledge Park-III, Greater Noida-
201308 (U.P.)
Phone:, 01203819700
Email: jimslawjournal.gn@jagannath.org Website- www.jimsgn.org

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I believe that this journal will be an opportunity to the researchers, academicians and students to express their views on the basis of their logical thinking on various legal issues which would contribute the development of legal research. The response for this journal was highly encouraging and the diverse articles received are of contemporary relevance which are insightful and thought provoking. The Editorial Board is grateful to all the authors who have contributed scholarly articles of contemporary relevance and look forward for more academic endeavors from prospective authors.
Being Executive editor, I request all the readers, contributors and legal luminaries to keep contributing in the same manner so that the *JIMS Journal of Law* is able to touch all social, economic and political aspects of the society and maintain high standards of reading.

DR.K.K.GEETHA

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DEMYSTIFYING 'PROPERTY' IN INTELLECTUAL PROPERTY: A CRITICAL ANALYSIS IN THE CONTEXT OF ACCESS TO KNOWLEDGE

Renjit Thomas* & Devi Jagani**

Abstract

The IPR regime is justified on moral, philosophical and jurisprudential grounds by John Locke, Hegel and the utilitarian philosophers. They justify using copyright to protect the original expression of ideas in a tangible form, now protected internationally due to the Berne Convention and TRIPS. Considering the present day society is a knowledge economy operating in the age of Wikipedia where information is a non -rivalrous social creation, the most crucial difficulty is whether the limitations created on access of knowledge in lieu incentivizing creation of knowledge by protection of proprietary interests is justified jurisprudentially? The paper refers to modern day critiques, which argue that the copyright regime has no logical, moral or natural law basis. The approach used in the paper is adopted from the works of Jeremy Waldron, who uses the Hohfeldian analysis of rights to highlight the importance of duties created on the constrained user as an ideal starting point to assess the validity of the justifications given to protect the rights of the creators, both of which need to be balanced for substantial justice. The paper attempts to analyze this issue jurisprudentially by problematizing the unquestioned basis of the present copyright regime and seeks to find an alternative.

Keywords:
access to knowledge, copyright, incentivizing creation, moral rights, right to education, social change, knowledge society

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*Assistant Professor of Law, National Law University Jodhpur. The authors can be contacted at renjithmthomas@gmail.com. **IIIrd Year Student, B.A. LL.B. (Hons.), Institute of Law, Nirma University.

Theoretical Underpinning of Intellectual Property

First they came for the Socialists,
and I did not speak out—
Because I was not a Socialist.
Then they came for the Trade Unionists,
and I did not speak out—
Because I was not a Trade Unionist.
Then they came for the Jews,
and I did not speak out—
Because I was not a Jew. Then they came for me –
and there was no one left to speak for me.
Martin Niemöller[1]

The Intellectual Property Rights (IPR) regime is justified on the theoretical understandings developed and supported by various philosophers and jurists, most prominently, John Locke,[2]

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1 Quote of Martin Niemöller taken from – Anonymous, *Martin Neimöller: —First They Came For The Socialists...*‖, HOLOCAUST ENCYCLOPEDIA, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007392 (last accessed on Feb. 6, 2016).

2 The most persuasive deontological justifications for intellectual property stem from Locke's labour theory of property. In all these theories, basic justifications arise from the conclusion that a man should own what he produces and brings into being. Why this should be the case depends on a closer analysis of the theories and we shall consider this question particularly in relation to the —no-harm theory and the —just-deserts theory. The essential Lockean logic in all his labour theories has two basic theses. The first is that everyone has a property right in the labour of his own body. This, according to Locke, is because people have property in their bodies and therefor that their labour is also their property. The second thesis is that when this labour is applied to objects of the common, this labour puts a distinction between the thing worked on and what is held in common. This allows the labourer to appropriate the objects. This general justification is then limited by Locke through two provisos. First, that property rights can only arise if there is enough and as good as left over for others after the appropriation and second, that the labourer should take no more than he can use. – William Dibble, *Justifying Intellectual Property,* 1994 UCL Jurisprudence Rev. 74, 75 (1994).

Hegel[3] and the utilitarians.[4] When we are applying these philosophical understandings, which are originally designed to support and justify the rights of private ownership over material/tangible property to the novice area of intellectual property, which is intangible, such application is becoming more problematic and it unravels the poverty of intellectual property

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3 The premise of the Hegelian approach, derived from the writings of Kant and Hegel, is that private property rights are crucial to the satisfaction of some fundamental human needs. Intellectual property rights may be justified on the ground that they create social and economic conditions conductive to creative intellectual activitiy, which in turn is important to human flourishing. Individual's will was considered as the most important value in the existence of an individual. According to Hegel, the will depends on the personality of an individual. Hegelian theory can also be called as personality theory. Intellectual property is the personification of the personality of an individual. The expression of an idea; a novel invention are all such personifications. The Hegelian theory thus supports the basic presumption of personality of an individual. The notion of moral rights in copyright, namely paternity right, integrity right, attribution right, etc., point to the personality of an individual and aptly supports the Hegelian philosophy. – ELIZABETH VERKEY, INTELLECTUAL PROPERTY 7 (1st ed. 2015). *See* Dane Joseph Weber, —A Critique of Intellectual Property Rights‖ (Thesis for Bachelor of Arts, Christendom College, 2002).

4 This theory claims that governments should assign strong, artificial intellectual property rights to creators, inventors, and discoverers and intensely enforce these rights against violators. This practice of assigning and enforcing strong intellectual property rights is believed to maximize the incentive to create, innovate and discover. It is assumed that by maximizing these incentives, we will maximize the quality and quantity of social goods generated. In turn, maximizing the quality and quantity of social goods is believed to be a necessary condition for satisfying the principle of utility. - Michael Morrissey, —An Alternative to Intellectual Property Theories of Locke and Utilitarian Economics‖ (Thesis for Masters of Arts, Louisiana State University and Agricultural and Mechanical College, 2012).

justifications.[5] In the modern era, knowledge is the most important tool of the intelligentsia and its dissemination is regulated and controlled by intellectual property laws based on the theories and doctrines originally evolved to support physical property. These legislations and their theoretical underpinnings should be carefully scrutinized and a simultaneous reconstruction of their theoretical and jurisprudential justifications is the need of the hour. The edifice on which intellectual property is different from tangible property is built on first that intellectual property is not self-contained to one person, secondly it is replenishable and thirdly it is inseparable. This distinction is commonly denoted by the use of the terms non-exclusivity', non-exclusion' and separability'.[6]The limitations created by the characteristics of tangible property wither away when the theories based on them are applied to intellectual property because at one point of time intellectual property can be accessed and put to use by a number of people, and its use by one does not restrict its avail ability for the enjoyment by the other.[7] For instance, my reading of the book Practical Ethics by Peter Singer does not deprive another of reading it by making a copy of the work, thereby implying that restrictions in use come only by ownership of the physical book however, the information contained therein is non-rivalrous and if reproduced can be simultaneously accessed to the same degree by all people. According to Penner, property rights are distinctive as they denote that what is mine might as well be that of someone else if a valid transfer of title is made,[8] however, with attributes attached to the person such as ideas, emotions, skills, personalities etc. as noted by Rajshree Chandra cannot be alienated among humans in the same way.[9] The element of non-exclusivity of intellectual property, and consequently its availability for free and simultaneous consumption by all has commonly led scholars to draw an analogy with the economic notion of public goods, based

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5 *See* Wenwei Guan, *The Poverty of Intellectual Property Philosophy,* 38 Hong Kong L.J. 359 (2008).

6 Rajshree Chandra, knowledge as property-issues in the moral grounding of intellectual property rights 13 (1st. ed. 2010).

7 Adam Moore and Ken Himma, *Intellectual Property,* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/intellectual-property/ (last accessed on Feb. 8, 2016).

8 *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 111 (1st ed. 1997).

9 Chandra, Supra Note 7, at 14.

on which they contend that by their nature public goods are prone to be underprovided and over-consumed.[10] However, as the law of scarcity is not applicable to intellectual property it being non-exhaustive, the question of propertization of knowledge is essentially not linked with any inherent feature of intellectual attributes but, because of a matter of political and socio-legal policy, which considers it to be efficient to render intellectual works in the realm of private property to encourage the creation of further knowledge.[11]

The justification offered by the Lockean labor oriented theory of property fails miserably in defending intellectual property primarily because the parallel of the virgin land' which is intact in its natural form and unaltered by human activity and on which by exercise of labor material property is appropriated is absent when it comes to the realm of the intellectual as knowledge is a socially generated product.[12] This simply means that by putting your labor (whose identification in the intellectual realm is itself highly problematic) to something that is already existing in the form of collective human creation cannot give you absolute rights for your incremental efforts to add to the common stock.[13] The personality theory propounded by Hegel focuses on the element of self-realization through the expression of free will to appropriate property, however, when this logic is applied to intellectual property it becomes counter productive by restricting freedom of the individual to partake in cultural and social activities as it gives the owner of the intellectual property the exclusive rights to determine use and application of the idea he owns.[14]

The theories providing justifications for the intellectual property rights regime have been constantly evolving over a period of time, and, most modern legislations are defended on

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10 Unlike the earthy commons, the commons of the mind is generally —non-rivall. Many uses of land are mutually exclusive. If I am using the field for grazing, it may interfere with your plan to use it for growing crops. By contrast, a gene sequence, an MP3 file, or an image may be used by multiple parties; my use does not interfere with yours. To simplify a complicated analysis, this means that the threat of overuse of fields and fisheries is generally not a problem with the informational or innovational commons.
In other words, we are more likely to see in the informational domain what property scholar Carol Rose has called a —comedy of the commonsl than a tragedy of the commons, because more use tends to produce social gains, rather than social losses. – Amy Kapczynski, *Access To Knowledge: A Conceptual Genealogy, IN* ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 33 (Gaëlle Krikorian and Amy Kapczynski eds. 2010).
11 Chandra, S*upra* Note, at 16.
12 SEBASTIAN HAUNSS, CONFLICTS IN THE KNOWLEDGE SOCIETY – THE CONTENTIOUS POLITICS OF INTELLECTUAL PROPERTY 34 (1st ed. 2013).
13 Guan, Supra Note 6, at 365-366.
14 Michael A Kanning, *A Philosophical Analysis of Intellectual Property: In Defense of Instrumentalism,* (Graduate Theses and Dissertations, University of South Florida, 2012), 11.

grounds of the utilitarian calculation which is inherently problematic because of its difficulty in empirical terms to ensure the identification and proper construction of all socially relevant variables, which are considered in arriving at the conclusion that the law leads to greater social benefits that significantly outweigh its costs.[15]The author through this article attempts to unearth some of these considerations, especially the elements of social and individual costs by focusing upon the constrained user of information, who Jeremy Waldron by the use of the Hohfieldian analysis correctly identifies as the one to whom justification is owed as these laws directly restrict the exercise his/her rights and on whom duties are imposed.[16]

The article begins by outlining the inherent flaws in applying the classical theories of property in justifying intellectual property (above) and then evaluates jurisprudentially, socially, ethically, economically and politically these existing justifications of the intellectual property rights regime with specific reference to copyright legislations in a developing country like India vis-à-vis the debate of access to knowledge. Thereafter, by drawing a specific analogy to the right to education as an aspect of right to life guaranteed as a fundamental right under the Indian Constitution and the relegation of the right to property as a statutory right after the 44th Constitutional Amendment,[17] the article critically analyzes the extent to which the copyright law in India is balancing the generation of knowledge (which is the social interest justification in utilitarian terms for enacting the legislation) with the grant of exclusive individual rights.
Specific oppositions to the existing copyright regime in terms of it acting as a restraint on the exercise by people of their fundamental right to education[18] and the inability of the weakly construed and vaguely interpreted fair dealing statutory exceptions to protect such right to education are analyzed by a thorough consideration of the Indian judicial approach, the human rights perspective and the socio-economic needs of the nation. Then an attempt is made to show how the logic behind the copyright law is flawed both in theory and practice by raising the issues of its obsession the romantic notion of the author in construing the concept of originality and the transfer of rights from the author to the commercial publishers both to the detriment of the common public and the creator himself/herself. Finally, a sociological analysis is

15*See,* Weber, Supra Note 4.
16 Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property,* 68 Chi.-Kent. L.R. 841, 842-844 (1992).
17 Constitution of India, amend. XLIV, § 6, 34.
18 Constitution of India, 1950, art. 21.

Presented of the possibilities of restructuring the present intellectual property rights regime to promote greater access to knowledge, with particular focus on the copyright law in India and the possibilities of the goal of access to knowledge being secured by alternatives. The author considers the concern expressed by *Martin Niemöller* through his words quoted at the opening of this article, as an apt indication for the need of all of us to assume a proactive role for the sake of humanity in building a system where knowledge is freely accessible by the deprived sections of society in order to ensure collective development.

Copyright Vis-a-Vis Access to Knowledge – A Logical Fallacy

From the above discussion, it is evident that jurisprudential justifications for intellectual property rights are wholly unfounded. It becomes more problematic when in the evaluation of the working of these laws to achieve their purpose of advancing the generation of knowledge we fail to take into consideration the immediate and far reaching effects of the exclusion of majority of the people from the use and application of the knowledge so created, in order to incentivize creator by securing them monetary benefit.

In the recent past we have seen the public raising their voice to share in the benefits of knowledge generated by the work of few individuals especially through the instances most prominently including protest against the USA-Thailand agreement where a demand was made for the grant of a compulsorily licensing of a drug to cure HIV/AIDS, the establishment and working of the Creative Commons, which furthers the open access to creative work by way of a special copyright licensing which values sharing and openness and finally the instance of the Federation of a Free Information Infrastructure (an N.G.O)who successfully campaigned against the software patenting in Europe.[19]Since the introduction of copyright laws around the world it has been a cardinal principle that the law seeks to reach a balance between incentivizing creators and facilitating access to knowledge by the public.[20] However, since the introduction of TRIPs in 1995 as a part of the WTO, which member countries are bound to adhere to or risk trade sanctions there has been an expansion in the level of intellectual property protection by prescription of high minimum mandatory standards by the

19 Haunss, *Supra Note* 13, at 1. 20*See,* Statute of Anne. 1710, 8 Anne, c. 20 (1710) (United Kingdom); United States Constitution, art. 1, cl. 8.

TRIPs.[21]In this context when the rights of people are being restricted further, it has given rise to the Access to Knowledge (A2K) movement, whose central claim is based on the concept of access. This demand for access to knowledge is relational in nature and proceeds from those who are excluded by the system of copy rights to allow them a participation in the use of the knowledge generated. These requisitions reflect an inherent sense of distributive justice.[22]

Here it is noteworthy to mention that knowledge, which can be manifested in many forms such as information, inventions, ideas etc., is not merely of intellectual interest but has an important aspect of practical utility attached to it. For instance, it may play a role in improving the health conditions of people or it may increase agricultural productivity or it may further help in the acquisition of new skills by a student who reads a book and so on. This element of practical utility of knowledge has two important ramifications. Firstly, it emphasizes and reflects that it is only through the application and dissemination of the knowledge generated as a result of an individual's intellectual activity that such knowledge will have a social impact,[23] i.e. it will increase social welfare by improving the standards and quality of human health, education, security etc. – it follows naturally then that public interest is in favor of wider access, and this is something that we should prioritize in facilitating through law, especially when such law is justified on utilitarian grounds. We must also remember that business models differ depending upon the nature of products, and they may encourage or discourage the access to knowledge as the holders of intellectual property, operating on a capitalist logic act to maximize economic gains for themselves, and are not concerned about societal benefit at large.[24] In such a context, as has been recognized time and again by the academicians, social activists and policymakers linked with the A2K movement; that laws and policies have not been designed to achieve an ideal/desired balance between the

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21*See,* Madhavi Sunder, *Foreward, IN* ACCESS TO KNOWLEDGE IN INDIA: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT (Ramesh Subramanian & Lea Shaver eds. 2011).

22 Kapczynski, *Supra* Note 11, at 37 n. 84.

23 We have focused so narrowly on the production half of the copyright equation that we have seemed to think that the Progress of Science is nothing more than a giant warehouse filled with works of authorship. When we do this, we miss, or forget, an essential step. In order for the creation and dissemination of a work of authorship wo mean anything at all, someone needs to read the book, view the art, hear the music, watch the film, listen to the CD, run the computer program,, and build and inhabit the architecture – Lea Shaver, *Copyright and Inequality,* 92 Wash. U. L. Rev. 117, 121 n. 15 (2014-2015).

24*See,* Lea Shaver, *Access to Knowledge in India,* 23 Nat'l L. Sch. India Rev. 87 (2011-2012).

competing individual and social concerns.[25] As noted above, after TRIPS, law has tilted to expand and favor the interests of the holder of intellectual property rights, and it is quintessential for the restoration of this balance that due importance be attached to the value of access to knowledge for all members of the society at large.

The second crucial consequence of the fact that knowledge is not valued merely at the level of the intellect, but, that it has attached with it crucial aspects of practical utility is that denial of access to knowledge is a direct impediment on the exercise and enjoyment of other human rights of a person such a right to life which includes as its inherent facets the right to health, the right to receive education, the right to achieve self-fulfillment etc.[26] It would thus help to have a more profound and lasting impact on the minds of the lawmakers and the public in general if the entire debate of access to knowledge was restructured and expressed in the terms of human rights to supplement the current trend of the movement being developed within the narrow framework of development and trade.[27]

Another interesting and crucial dimension to the claim for access to knowledge is developed by Lea Shaver in her research article titled _*Copyright and Inequality*' where the premise that all consumers are not equal is explored through the lens of class and culture, two factors which determine who gains and who loses out from the entire system of copyright protection. The author concludes that the copyright mechanism is unlikely to incentivize creation of works in _neglected languages' spoken mostly by the poor, thereby further disassociating them from the gains of knowledge so generated.[28] This approach of Shaver makes us realize that the access to knowledge movement is not simply about making knowledge free but it is also about ensuring that the people have the capacity (economically, socially, politically, culturally) to exploit the gains of the knowledge so made freely accessible.[29] Therefore, all the claims, demands and debates surrounding the concept of

25 *See* Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property,* 117 Yale L. J. 804 (2008).

26 Kapczynski, *Supra* Note 11, at 38.

27 *See* Lea Shaver, *The Right to Science and Culture,* 2010 WISC. L. REV. 121.

28 Shaver, *Supra* Note 24, at 117, 166-168.

29 Finally, can the freedom imagined by the A2K be produced by merely formal lack of (the wrong kind of) constraint, for example, by the lack of the constraints imposed by intellectual property law? Or does it require something more substantive, an affirmative ability, for example, to access works in the public domain, or the tools of the new —remix culture‖? Is the freedom of the public domain or the commons really worthy of the name if the majority of the world has no access to the means needed to participate in it—for example, education, computers, and affordable access to digital networks? At the close of 2007, only one-fifth of the world's population was using the Internet, and this use was highly skewed geographically: Only 4 percent of people in sub-Saharan Africa had such access. Although A2K thinkers invoke a robust conception of freedom that would require the ability in *fact* to access the goods of which they speak, in practice, they devote little attention to the profound inequalities in access to digital networks. Can A2K advocates really claim to have a vision of freedom in the digital age if they do not do more to theorize and demand affirmative access to the tools to create and exchange information and knowledge? – Kapczynski, *Supra* Note 11, at 41 n. 94,95.

access to knowledge should be framed and presented in a more holistic manner[30] to ensure that inequalities, which are inherent in the structure of society impede equal access to knowledge, even when knowledge is made freely available to all.

ACCESS TO KNOWLEDGE – RIGHTS BASED APPROACH: BALANCING THE UNBALANCED

Access to knowledge is an inseparable part of the right to education coming under the ambit of right to life guaranteed under Article 21 of the Indian Constitution.[31] The current copyright regime is controlling the dissemination and restricting the spread of information and knowledge, and is in effect acting as a counterproductive force in relation to the fundamental rights guaranteed under the Constitution.[32] If we are analyzing the exceptions provided in the Berne Convention, only photocopying of the limited part of the book but not the whole book in itself, is permissible and at the same time it is accepting the importance of education and access to knowledge thereby giving to the concerned state rights to design their domestic intellectual property law keeping in mind their specific socio-economic conditions.[33]

The teaching exception[34] and right to education when analyzed in the Indian context, becomes more crucial because access to knowledge and even the access to the classroom itself is problematic and the major chunk of the population is relying on distant education and

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30*See* Prashant Iyengar, *Public Libraries and Access to Knowledge (A2K): A History of Open Access (OA) and the Internet in India in the Nineteenth and Twentieth Centuries, IN* ACCESS TO KNOWLEDGE IN INDIA: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT (Ramesh Subramanian & Lea Shaver eds. 2011).

31 Impliedly the court accepted in the case of *Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi & Ors.* (1981 AIR 746, 1981 SCR (2) 516) the right to education as an important aspect of Article 21 of the Indian Constitution. Later, in 1992 in *Miss Mohini Jain vs. State of Karnataka & Ors* (1992 AIR 1858, 1992 SCR (3) 658), the Apex Court explicitly declared it as a fundamental right. Again, in *Unni Krishnan, J.P. & Ors Etc. vs. State of Andhra Pradesh & Ors.* (1993 AIR 2178, 1993 SCR (1) 594), the Supreme Court reaffirmed (although in a restricted sense) education as a fundamental right under Article 21.

32*See* Lawrence Liang, *Exceptions and Limitations in Indian Copyright Law for Education: An Assessment,* Vol. 3 Issue 2 The Law and Development Review 197 (2010).

33 Anonymous, *Berne Convention for the Protection of Literary and Artistic Works,* WORLD INTELLECTUAL PROPERTY ORGANIZATION,http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693 (last accessed on Feb. 8, 2016).

34 The Berne Convention allows the use for teaching purpose of full copies of the copyrighted work in unrestricted numbers for reproduction, translation, adaptation, communication to public etc., but in India photocopying of a work for teaching purpose in its entirety under the concept of fair use doctrine is an area where the law is ambiguously silent.

other modes, and these loopholes in the fair use doctrine under the domestic copyright law is adversely affecting the access to knowledge, which is a concomitant right to the right to education.

As has been emphasized and elucidated with great vigor above, the fundamental and most essential principle as regards the analysis of the provisions of the copyright law is that it must not be analyzed only from the point of view of the holders of the right but also from the point of view of the people at large as has been aptly noted by the renowned IP scholar Shamnad Basheer, who points out that Section 52 of the Copyright Act, 1957 sufficiently provides support to this view.[35] Section 52, which is considered to be the statutory provision containing the law on the subject of fair dealing exempts certain acts, which done without the permission of the copyright holder would but for the provision be seen as an infringement of copyright.[36] In the particular context of the interface between the right to education and the doctrine of fair dealing, the provisions of the copyright law provide that any use of a copyrighted material for *—private or personal use, including research*[37], *—criticism or review, whether of that work or of any other work*[38]and *—the reproduction of any work by a teacher or a pupil in the course of instruction*[39] shall not be deemed to constitute an infringing act.

The actual scope of these provisions in particular is an unsettled field, as is highlighted in the recent controversy surrounding the popularly known Delhi University photocopying case, where Oxford University Press, Cambridge University Press and Taylor & Francis proceeded against the university and Rameshwari Photocopy Services, a small photocopy shop on campus of the said university for engaging in acts infringing their copyright through the reproduction of course material that contained exact extracts from the copyrighted works.[40]As the matter a remains sub judice before the Hon'ble Supreme Court of India, the issue has led to a wide spread public debate and has also attracted the views of prominent academicians, legal scholars and renowned

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35*See* Shamnad Basheer, *The Copyright (Amendment) Act, 2012: A Fair Balance?,* 5 NUJS L. Rev. (2012).
36 The Copyright Act, 1957, § 52(1).
37 The Copyright Act, 1957, § 52(1)(a)(i).
38 The Copyright Act, 1957, § 52(1)(a)(ii).
39 The Copyright Act, 1957, § 52(1)(i).
40*The Chancellors, Masters and Scholars of the University of Oxford & Ors v. Rameshwari Photocopying Services & Anr*, CS (OS) 2439/2012.

authors.[41] The authors, who favor Widespread dissemination of their work, consider the preparation of such course packs to fall within the purview of fair use and assert to disassociate themselves with the case of the petitioners.[42] In a developing country like India, where as noted above access to education is a challenge, affordability of educational material is a crucial factor in determining the access to knowledge by the general public, and considering the fundamental right to education various stakeholders have argued against the contentions raised by the publishers concerning the aspect of loss of potential market and commercial losses. Several alternatives to balance the interests of the opposing parties have been suggested (when interpreting the exact scope of the fair dealing provisions affecting the right to education) ranging from payment of royalty to the publishers through the channel of the Indian Reprographic Rights Organization[43] to considering the people unable to access education due to issues of affordability within the definition of people with disability under Section 52(1)(zb).[44] However, the author feels that the most effective manner to handle the situation would be through increasing the provision of Indian editions of these books[45] and through an interpretation of the fair dealing provisions by the courts taking into consideration not only the four factor test developed in USA but also the socio-economic needs of the nation and other relevant policy considerations[46] as has been pointed out by several scholars, and the latter approach is a factor that the Supreme Court should consider when deciding the matter especially in light of the fundamental right to education of all people.

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41 *See* S. Thambisetty, *Access to Knowledge or Publisher Profits? The Challenges of Fair Copying for Educational Purposes in India,* SOUTH ASIA @ LSE, http://blogs.lse.ac.uk/southasia/2012/09/19/access-to knowledge-or-publisher-profits/ (last accessed on Feb. 8, 2016 09:17); Nitisha Kashyap, *Battle rages on for DU's Right to Photocopy,* TIMES OF INDIA, http://timesofindia.indiatimes.com/life-style/people/Battle-rages-on-for-DUs-right-to-photocopy/articleshow/23414956.cms (last accessed on Feb 8, 2016 06:34); Amlan Mohanty, *Analysing the Delhi University v. Publishers Photocopying Case,* SPICY IP: DECODING INDIAN INTEELECTUAL PROPERTY LAW, http://spicyip.com/2012/09/analysing-delhi-university-v-publishers.html (last accessed on Feb. 8, 2016 17:23); Sai Vinod, *Publishers Support Fair Use. Really?,* SPICY IP: DECODING INDIAN INTEELECTUAL PROPERTY LAW, http://spicyip.com/2013/04/publishers-support-fair-use-really.html (last accessed on Feb. 8, 2016 19:36).

42 Amlan Mohanty, *Authors, Academics and Students Protest Publishers' Move in Delhi University Case,* SPICY IP: DECODING INDIAN INTEELECTUAL PROPERTY LAW, http://spicyip.com/2012/09/authors-academics-and-students-protest.html (last accessed on Feb. 8, 2016 05:08).

43 *See* Anand Narayan and Aditya Rajput, *Dilemma Over Photocopying of Copyrighted Material: In Light of Delhi University's On-going Litigation,* Vol. 1 Issue 1 RGNLU Stu. L. Rev. 85.

44 *See* Anuradha Herur and Samraat Basu, *The Copyright Act and its Effect on the Right To Education: A Critical Analysis,* Vol. 1 Issue 1 RGNLU Stu. L. Rev. 62.

45 For a holistic analysis of the possible alternatives and the correct approach in determining the scope of Section 52(1)(a) and (i) of the Copyright Act, 1957 in light of the liberal language used by the legislature, the socio-economic needs of India and the fundamental right to education – Shamnad Basheer, *Why Students Need The Right To Copy,* THE HINDU, http://www.thehindu.com/opinion/op-ed/why-students-need-the-right-to-copy/article4654452.ece (last accessed on Feb. 7, 2016 07:39).

46 *See* Ayush Sharma, *Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Fereda?,* 14 (6) JIPR 523 (2009).

This issue is not only restricted to the constitutional arena, but it has overlapping human rights dimensions also. Article 27 of the Universal Declaration of Human Rights[47] protects the access to knowledge and science under the international legal framework and thereby the spirit of this provision penetrates into the domestic arena and becomes a guiding principle for the member countries in framing their laws. The said Article tries to balance the conflicting interests of right to access on one side with the moral and material interests of the author on the other. While analyzing the current IPR regime in India, we realize that it is not in tune with what UDHR envisages because material interests discussed in Article 27 is entirely different from the current understanding in the Indian IPR regime because the rights, which are granted by the present intellectual property laws are subject to sale or transfer so, alienation becomes a mirage or in effect it is no longer inalienable.[48] Therefore, the current domestic intellectual property laws are miserably failing to protect the human rights perspective of the right to access to knowledge.

Whether material interest can be equated with exclusive economic rights over the work is a question to answer, which we must carefully consider not only the concept of property in intellectual property but also the restrictions on the right to property. After the 44th Constitutional Amendment of the Indian Constitution, we deleted the right to property[49] as a fundamental right and made it a statutory right making it permissible for the government by law to acquire land of people by providing due compensation for serving the purpose equitable distribution of wealth to further societal interest at large.[50] Hence, if we are to consider intellectual property as a type of property, it will be subject to the same restrictions in the sense that we must frame our laws in such a manner that exercise of certain proprietary rights in connection thereto may be restricted for the sake of promoting the common good.

47Article 27 – (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) 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 – Universal Declaration of Human Rights, 1948, art. 27.

48*See* Shaver, *Supra* Note 28.

49 Ch-3 of National Committee Review on Working of Constitution Final Report Vol .1, Ministry of Law and Justice, http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm (last accessed on Feb. 8, 2016).

50*See* Namita Wahi, *State, Private Property and the Supreme Court,* FRONTLINE, http://www.frontline.in/static/html/fl2919/stories/20121005291903600.htm (last accessed on Feb. 8, 2016 at 07:17); Gyanant Singh, *The Poor Need Right to Property,* INDIA TODAY, http://indiatoday.intoday.in/story/the-poor-need-right-to-property/1/139070.html (last accessed on Feb. 8, 2016).

Romantic Notion of an Author and Benefiting Publishers – A Flawed Logic

Most of the modern copyright legislations, including the Indian Copyright Act, 1957 are based on the premise that the exclusive economic rights[51] granted to the creator/author of an original literary, musical, dramatic and artistic work and those of cinematograph films and sound recordings act as an encouragement factor for the creators to produce knowledge (i.e. promote the growth of science and the useful arts[52]). Such encouragement is provided by giving them a type of incentive, which is nothing but a benefit to reward the time, labor, skill and capital expended by them in creating the work and giving this benefit is like rewarding their efforts, and so as Jeremy Waldron points out the logic extends in this manner to conclude that rewards are generally given for acts that are morally desirable and so, authors have a moral entitlement over these exclusive economic rights attached to the copyright. As Waldron crucially points out that something, which began being justified in terms of, a social policy for the benefit of all ends up being entrenched in an image of moral entitlement. However, he is quick to point out that rewards are presented to people who are morally deserving but it is a logical fallacy to assume that everyone who is rewarded is morally entitled to the same. To support his argument that rewarding people is a broader category of which morally deserving beings are a subset, he suggests that rewards can be a mode of behavioral manipulation to ensure self-motivated individuals act in synchrony with the common good.[53]

This analogical argument of Jeremy Waldron goes a long way in deconstructing the premise of copyright law which all of us take for granted, and it shows that there is no logical foundation whatsoever to the author morally deserving the fruits of his labor.[54]It is the common justificatory claim that the works of the author are awarded/incentivized by permitting them to enjoy economic benefits of their creation for a limited period of time as

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51 The Copyright Act, 1957, § 14.

52 The primary objective of copyright is not to reward the labor of the authors, but to promote the progress of science and useful arts. To this end, copyright assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by a work. – V.K. AHUJA, LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS 19 (2nd ed. 2013). *See Eastern Book Company* v. *D.B. Modak,* 2008 1 SCC 1.

53 Relate to the analogy of the senator who is given first class air fare as an incentive to keep in touch with the community he represents, which is his duty and which he surely doesn't morally deserve – Waldron, *Supra* Note 17, at 852.

54 Refer the Hayekian Argument given in Waldron, *Supra* Note 17, at 852 n. 44.

these works are original.[55] The notion of originality in copyright law is inherently weak and the standards for determining its existence are very low.[56] However, on a conceptual level, the notion of originality and authorship are contested areas where on one hand, the Romantic cult of individual artists assert for the work being a creation of the individual efforts of the creator whereas on the other hand, deconstructionist and post-modernist scholars discuss the concept of the death of the author as they claim that there exists no single individual who can take credit for the generation of a given work as an individual's personality is itself a cultural product' and that no work protected by copyright is created from the scratch, but, rather it is the result of putting the expressions, ideas, concepts etc. freely circulating in ones environment in a concrete, crystallized material form.[57]

Thus, we recognize that the notion of the author, who in copyright law we idealize as the creative genius who is the source of originality, is a construction of law which is highly problematic in itself. Scholars have often argued that the notion of the author is a creation of the copyright law to serve its purpose of converting intellectual works into private property, rather than the latter being in existence to serve the interests of the author – this is because the author is the essential starting point in whom ownership rights, which are freely divestible/alienable/ transferable should inhere.[58] In practice, most creators transfer their copyright interests further to publishers who operate on a capitalist logic, and therefore exploit these exclusive economic rights to serve their personal interests by maximizing profits, and these publishers are now the ones who make the decisions regarding dissemination, reproduction, communication, translation, adaptation etc. of the work, the author being ultimately distanced from the work he created and effectively being no more than the indispensable first step in the process of commodification of intellectual work, where ultimately publishers gain more than the authors[59] whom the law was designed to protect. These publishers (representative of the commercial holders of intellectual property rights)

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55 In *Macmillan vs. Cooper,* (AIR 1924 PC 75) it was held that a work may be original' if the author has applied his skill or labor, even though he has drawn on knowledge common to himself and others or has used already existing material. A mere copyist does not obtain copyright in his work. *See also* the case of *C. Cunniah and Co. by partners M. Anjaneyulu vs. Balraj and Co. by Partners S. Rajaratnam Chettiar,* (1960) 1 Mad LJ 53, where it was reiterated that the work must not be copied from another work, the manner of expression of the thought must be original. The expenditure of skill and labor in the manner of expression must be original point originating in thought.

56 COPYRIGHT LAW CONCEPTS AND CASES 93 (A.V. Narsimha Rao ed. 2005).

57 Waldron, *Supra Note* 17, at 878-880. Refer Boyle's argument on Haunss, *Supra Note* 13, at 35. 3

58*See* Waldron, *Supra* Note 17, at 879 and Rao, *Supra* Note 58, at 144 n. 35.

59 Rao, *Supra* Note 58, at 80-87.

ultimately use the power they wield to influence the process of law-making in a way so as to maintain the status quo or if possible, enhance their rights.[60] Thus, it flows from the comprehensive and diverse arguments advanced above that not only does the copyright law place unreasonable burdens on the common public as regards their claim to access to knowledge, but nor does it in practice secure the authors the benefit it proclaims to provide as a measure of incentivizing creation leaving us with a question as to what is the utility, if any, of the existing copyright regime? If there seems none, we must move on to next analyze the possibilities of restructuring the entire framework in which our intellectual property rights are created and the alternative structures, which may effectively secure the same social goal of generation of knowledge whereby simultaneously securing sufficient incentives for the individual creators.

Deconstructing and Restructuring the Whole Regime: Possibilities

Sebastian Haunss in his powerful book titled *Conflicts in the Knowledge Society The Contentious Politics of Intellectual Property'* begins analyzing the possibilities of restructuring the present intellectual property rights regime by making a pertinent observation that before the 1990s the debate of the adverse impacts of intellectual property rights was restricted to the immediate stakeholders as legal challenges through litigation had only those with direct economic interests and competitors as parties, however, in the mid and late 90s political mobilization of the masses happened in opposition of the existing IPRs regime as is seen by the references earlier made to the opposition of US-Thailand Agreement, the increase in the use of the Creative Commons license etc. Politicization as noted by Haunss is a social process entailing the involvement of more diverse actors (industrialists, academicians, farmers, individuals, NGOs, activists etc.) as contenders for the issues relating to intellectual property and the range of issues being addressed by them widening to cover novel areas such as access to knowledge, biopiracy, concept of limits of patentability etc. The term politicization also implies that these groups of collective actors are employing diverse ways of action to oppose the current regime ranging from lobbying to influence lawmaking to street demonstrations and boycotting of products[61]

60*See* Rao, *Supra Note* 58, at 92-117 and Haunss, *Supra Note* 13, at 44-45

61 Haunss, *Supra* Note 13, at 1-10.

This process of politicization gained force recently due to the large scale social change in the present societies which are transforming themselves from industrial societies to what is commonly known as knowledge societies, network societies, informational societies etc.[62]where the concept of power and other socio-economic structures are organized around the generation, validation, use and application of knowledge. Haunss further says that with every large scale structural change in society, several simultaneous and independent conflicts arise giving rise to a complex network model of conflict and social change, which is representative of the path of growth and development of society.[63] Here, the noted academician and theorist Stehr has importantly drawn attention that conflicts in the knowledge society are likely to arise around tensions created in the process involved with the governance of knowledge. Stehr argues that in modern knowledge societies, where power is based on knowledge, knowledge has to be guarded against general access by all people because power being a relational concept only when there is exists a considerable differential distribution of knowledge can it act as the basis of power. This need of prohibiting access is directly clashes with the nature of knowledge as a public good which is non-excludable and non-exhaustive and therefore, serious efforts need to be taken to establish the need for excludability, which in order to sound legitimate in done through the intellectual property rights regime in terms of an utilitarian justification to advance the public good, but, which in turn secures temporary exclusivity over the control and use of knowledge generated by individual effort to maintain the differential access on which power can be based. It is ultimately this power, which is used to influence law making in a manner to as to allow for an expansionary IPRs regime.[64]

When people wish to oppose such a power differential resting on the regulated access to knowledge, they ought to act together, and Haunss recognizes that to make this possible there needs to be the formation of a collective identity, whose creation depends firstly on the _political opportunity structures'[65], i.e. the institutional structures of governance in a country that determine how the lawmakers

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62 Refer theories of knowledge society and their relation to social conflict as explained in Haunss, *Supra* Note 13, at 59-78. *See also* DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING (Special Anniversary Edition, 1999); MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY (2nd ed. 2010); MANUEL CASTELLS, END OF MILLENNIUM (2nd ed. 2010); NICO STEHR, KNOWLEDGE AND ECONOMIC CONDUCT (1st ed. 2002).

63 Haunss, *Supra* Note 13, at 83-93

64 Haunss, *Supra* Note 13, at 77.

65 Haunss, *Supra* Note 13, at 7.

can be approached etc., and secondly on the 'discursive opportunity structures'[66] that refer to the possibilities of identifying and uniting with other people who share the same claim. When utilizing both these structures to frame a collective identity, on a conceptual level (which relates to the discursive level of conflicts), the leaders assuming responsibility for the collective action ought to simplify their claims by the use of any combination of the 3 types of frameworks – firstly the diagnostic, which identifies the exact issue in conflict; secondly, the prognostic, which carves out a solution to tackle the existing issue and finally the motivational, which gives reasons to the common man to act beyond mere recognition of the problem to bring about change.[67]

As elaborately discussed in the previous part of this article, the access to knowledge movement has to structure its participation in the conflict against the restrictive access to knowledge created by the existing IPR regime more holistically[68] to ensure that knowledge once made freely accessible, people have the equal capabilities to benefit out of the same. In this connection, there is one more crucial aspect that the access to knowledge movement participants and leaders need to conceptually clarify and that is they should not restrict their actions towards securing free access to information but rather free access to knowledge because fundamentally these two terminologies denote completely different things.[69]Information is the raw data generated as a result of intellectual activity but on the other hand knowledge refers to the capacity of an individual to process information to generate further information or to put information to practical use by way of application in a meaningful way[70] – hence, knowledge is more a capacity[71] rather than an object whereas

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66*Id.*

67 These three frameworks and their role in shaping collective action is developed in by Snow and Benford and they assert that these are the basis of successful mobilizations of the public to secure change - Haunss, *Supra* Note 13, at 9.

68 Refer to the elucidating discussion by Amy Kapczynski on the internal tensions within the access to knowledge movement, and her attempt to answer four crucial questions on this aspect namely What is the nature of the freedom that A2K demands? Is A2K committed more to the model of the public domain or of the commons, and can it be committed to both? Is information really different *enough* from material goods? And finally, can the A2K movement in fact make good on its attempt to create a politics not just of information, but also of knowledge? Or to put it in another way, what are the proper limits of the politics of A2K? - Kapczynski, *Supra* Note 11, at 25-34.

69 Kapczynski, *Supra* Note 11, at 45 n. 108.

70 Information is —raw data, scientific reports of the output of scientific discov- ery, news, and factual reports,‖ while knowledge is —the set of cultural practices and capacities necessary for processing the information into either new statements into the information exchange, or more important in our context, for practical use of the information in appropriate ways to produce more desirable actions or outcomes from action.‖Thus, information is objective and external, while knowledge is the capacity to use information to create new information or to use information to generate technical effects in the world (knowledge as —know-how‖) – Kapczynski, *Supra* Note 11, at 45 n. 109.

71 Kapczynski, *Supra* Note 11, at 46 n. 113.

information is the externalized object on which this capacity is exercised.[72] Also the arguments put forward by the A2K theorists may need modification in the light of the fact that the ideal of perfect and zero-cost transmission of information (which exhibits the characteristics of non-exclusion and non-exhaustion but isn't scare like other public goods) cannot be ipso facto applied to knowledge, as transfer of competence/capabilities is not possible as these are attributes attached to the physical being of a person.[73]

The Way Forward: Analyzing the Possible Alternatives

Eliminating the distinction between the information-rich and information-poor is ...critical to eliminating economic and other inequalities between North and South, and to improving the life of all humanity.‖– Nelson Mandela[74]

In the light of the above discussion regarding the possibilities of effectuating a change in the current intellectual property rights regime, where change is to pushed through by utilizing the political and discursive opportunity structures, we need to first realize that any alternative that we seek to propose has to be analyzed from within the framework of possibilities of change. Also, it is a must that for such an alternative to be adopted by the lawmakers must be able to efficaciously prioritize the social good of generation and access to knowledge over the wealth maximizing behavior of copyright holders, and in doing so it should first take into consideration the multifarious motivational factors responsible for the generation of knowledge rather than being confined to the neo-classical economist theory of monetary benefits as the primary incentivizing factor, and secondly, it should put due emphasis on evaluating the claims of promoting access to knowledge for ultimately all laws are designed to benefit the society at large.[75]

In this context, given the strong hold of the economically influential owners of intellectual property rights on the process of law making, it is practically impossible to start advocating for radical transformation such as scrapping off the whole IPRs regime and as suggested by a few scholars replacing it with mechanisms such as state funded university systems, charity by private individuals or

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72 Kapczynski, *Supra* Note 11, at 46 n. 114.
73 Kapczynski, *Supra* Note 11, at 47.
74 Quote of nelson mandela taken from article – Douglas R Rogers, *Increasing Access To Knowledge Through Fair Use – Analyzing the Google Litigation to Unleash Developing Countries,* 10 Tul. J. Tech. & Intell. Prop. 1 (2007).
75*See* Michael B. McNally, ―Intellectual Property and its Alternatives: Incentives, Innovation and Ideology‖ (Ph.D. Thesis, University of Western Ontario, 2012).

by subsidizing the working of cultural organizations to incentivize generation of knowledge.[76] However, in the view of the author, these alternatives leave discretionary choice on the resourceful individuals or the state to spend money on the generation of knowledge, a choice that may be for many reasons such as lack of funds, aversion to the area of research etc. not favor the creation of knowledge be relied upon to entirely replace the existing regime. A research shows that to a large extent in India the results of publicly funded research remain inaccessible to the public at large,[77] so in practice the idea of state funded research may not serve its utopian goal of wide social dissemination. Another researcher has suggested that developed and developing countries be judged on different parameters as far as compliance to IPRs laws are concerned as their needs to promote societal access to knowledge differ and therefore, universities should look for apt funding for their libraries and they should also adopt a copyright management policy to advance principles of fair use and discourage plagiarism.[78] However, this seems to the author an approach, which may have certain beneficial effects at the micro level, but is to a great degree inadequate to meet the societal needs of securing equal access to knowledge for fostering collective growth.

After the extensive consideration by the author the theoretical and practical failings of the present regime of intellectual property rights, and particularly the framework of copyright laws, it is sine qua non that a collective voice of people should be raised against the further expansion of protection granted under the IPRs regime both nationally and internationally. For a developing country like India, in light of the specific concerns raised in this article, the author agrees with the suggestion put forward by Mira Ranjan in her research article titled *_Moral Rights in Developing Countries: The Example of India'*, where she articulates that it is particularly a dangerous trend that the mandatory provisions of TRIPs do not include the concept of moral rights and this high level of flexibility with respect to moral rights, which are essential in contributing towards the advancement of culture and creativity in developing nations, leaves it open for countries to lesson or abandon the protection of these special rights of the author which are crucial in maintaining a balance between the generation and use of knowledge. She suggests that in India, moral rights[79] protection be sufficiently strengthened in relation to artistic

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76 Haunss, *Supra* Note 13, at 26.
77 *See* S. Gutam et. al, *Open Access: Making Science Research Available,* Vol. 45 No. 47 Eco. & Pol. Weekly 19 (2010).
78 Dr. Sabuj Kumar Chaudhuri, *Fair Use vs. Copyright Non-Compliance Among the Academic Community in Universities of Developing Nations,* Vol. 2 Issue 1 International Journal of Digital Library Services 135 (2012).
79 The Copyright Act, 1957, § 57.

and literary works to secure the promotion of cultural and traditional activities, however, if the need be special exemptions can be made in favor of special industries such as the Information Technology industry.[80]

Considering the issues created with specific reference to the connection between the right to education and the fair use doctrine under copyright law in India, the author suggests that it is an urgent need of the hour to clarify and strengthen the nature, scope, meaning and extent of the fair use doctrine in India in such a manner so as to accommodate for its special socio-economic conditions and to further constitutional objective of securing socio-economic and political justice by facilitating an equal access to knowledge for all members of the community, and this active role may be played by the judiciary where they pronounce a judgment equivalent to that of *Folsom v. Marsh.*[81] The author finds the view of Lea Shaver in her article *'Access to Knowledge in India'* as an ideal first step that India should take to mitigate the strictness of the prevailing intellectual property rights regime by employing the language of human rights and through the medium of constitutional litigation to further the exercise of these socio-economic rights which are negatively affected by the intellectual property laws.[82] The author says that a reduction in the scope of transferability and alienation of the economic rights of authors to publishers along with an enhanced capacity of the authors to decide terms of the transfer in a manner synchronous with the access to knowledge should be an ideal step to be taken by the Indian legislature. To conclude, the author feels it to be of axiomatic importance to initiate this debate about access to knowledge in the era of intellectual property laws to expose the drawbacks of the existing system before the public eye.

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80 *See,* Mira Ranjan, *Moral Rights in Developing Countries: The Example of India,* 8(5) JIPR 357 (2003); Arunabha Banerjee and Aniket D. Agarwal, *Morality of Copyright – A Critique in view of the '3 Idiots' Controversy,* 16 JIPR 394 (2011).

81 9 F Cas 342.

82 Shaver, *Supra* Note 25.

Cross-Media Ownership and Indian Competition Law – Are we there yet?

Ritwika Sharma*

Abstract

The media, also called the 'fourth estate', is an important agent for shaping public opinion and ensuring seamless flow of diverse views in a democracy. In recent times, print as well as electronic media has been facing issues which arise due to cross-media ownership and vertical integration of various forms of media by some of the more influential corporate entities. Against this background, this article will attempt to examine issues in cross-media ownership and assess whether India's competition law regime is equipped to address these concerns. The article will commence with a discussion of the Competition Act, 2002, and how it is grounded in an economic basis to ensure a free market. The essay will then throw light on the fact that a special competition regime for specific industries is a concept which is not unheard of. Thereafter, the article will look into orders of the Competition Commission of India on the media industry and critique the application of the principles of the Act to the peculiar issues of the media. The article parts with the thought that since the Act is meant to address largely economics-driven issues, perhaps time is ripe for a specific competition regime for the media industry.

Keywords

Cross-media Ownership – competition – media plurality – democracy

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* The writer is a lawyer working at the Vidhi Centre for Legal Policy, a think-tank based in New Delhi.

Introduction

Today, the Indian media and entertainment industry consists of over 70,000 newspapers, 500 television channels, 1000 feature films annually, and innumerable digital publications. It is expected to grow at a rapid rate of 15% in the next few years.[1] Together, the industry has a pivotal effect on India"s democratic character and its cultural landscape. The heady growth of the industry has been accompanied by concerns about the degree to which it is independent, plural and responsible. In this context, it is worthwhile to study the issue of cross-media ownership in India, and how it interacts with the competition law regime.

Cross-media ownership implies ownership across various segments of media.[2] An instance of vertical integration would be Bennett Coleman and Company Ltd. which owns a newspaper chain, as well as television („TV") networks, thereby implying consolidation across various types of media (print as well as electronic). In the summer of 2014, Reliance Industries Ltd. announced that it was taking over Network18 Media and Investments Ltd., which owns several news and entertainment TV channels, along with numerous websites.[3] This takeover raised substantial questions on what would happen to content neutrality, and diversity of opinions, besides also concerning market competition.

This article will examine India"s competition law, which is largely subsumed in the Competition Act, 2002, and how it has been applied to the media industry in India. The core argument is that the competition law in India is premised on solely economic concerns, and might be currently inadequate to address issues of plurality and diversity of opinions, which are essential to a thriving democracy. The article will limit itself to a discussion of the current landscape of competition law vis-à-vis the media industry, and will part with the thought that some changes to the competition law regime will be imperative to ensure that cross-media ownership concerns are adequately addressed.

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1 Soutik Biswas, "Why are India"s media under fire?" *BBC News*, Jan. 12, 2012; Pricewaterhouse Coopers, „India Entertainment and Media Outlook 2014", India, *available at*: http://www.pwc.in/india-entertainment-media-outlook/index.jhtml (Last Accessed Dec. 16, 2016).

2 Administrative Staff College of India, Study on Cross Media Ownership in India Draft Report (2009) 43.

3 Megha Bahree, "Reliance Takes Over Network18: Is This The Death Of Media Independence?" *Forbes*, May 30, 2014, *available at*: http://www.forbes.com/sites/meghabahree/2014/05/30/reliance-takes-over-network18-is-this-the-death-of-media-independence/#1c32b7684543 (Last Accessed Dec. 4, 2016).

Goals of Competition Law

The primary goals of competition law, everywhere around the world, flow from a theoretical analysis of the market. In a theoretical market, suppliers have the freedom to compete against themselves and the consumers have knowledge of the suppliers, the relative prices and quality, and decide to buy or not depending upon their preferences and purchasing power.[4] However, such optimum market conditions do not exist and it is not possible to create a market that is free from interference. Essentially, competition law is to be applied in such a way so as to protect small firms against more powerful rivals, and ensure that the smaller ones are also given a fair chance to succeed.[5] To respond to a situation which strives to eliminate competition altogether from markets, states enact competition statutes. Most competition laws attempt to address myriad issues, which is why any legislative definition of an anti-competitive practice or conduct is general and inclusive.[6]

Generally, in a developing economy, competition law and policy is understood as serving two distinct goals –promoting competition in the market while at the same time fostering democracy.[7] What clearly stands out as a goal of competition policy is eliminating or mitigating governmental, natural or artificial barriers to entry, which is based on the proposition that *entry is the essence of competition*.[8] Such a view is founded on the premise that an entry-based competition policy can provide the foundation for a democratic market economy wherein competitive pressures hone production efficiency and stimulate product and process innovation fundamental to international competitiveness and economic growth.[9] Competition law is largely used to protect the competition process in the markets by installing a legal framework to regulate the practices of undertakings, and to provide a good environment for business entities.[10] By facilitating competition, competition law aims to achieve efficient allocation of resources and enhance consumer welfare by lowering product price.[11]

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4 T. Ramappa, *Competition Law in India* 2 (Oxford University Press India, Delhi, 3rd edn., 2013).

5 Richard Whish and David Bailey, *Competition Law* 21 (Oxford University Press, United Kingdom, 7th edn., 2012).

6 *Supra* Note 4 at 2.

7 Ross C. Singleton, "Competition Policy for Developing Countries: A Long-run, Entry-based Approach" XV *Contemporary Economic Policy* 4 (April 1997).

8 *Ibid.*

9 *Ibid.*

10 Rita Yi Man Li and Yi Lut Li, "The Role of Competition Law: An Asian Perspective" 9 *Asian Social Science* (2013), available at: http://dx.doi.org/10.5539/ass.v9n7p47 (Last accessed Dec. 4, 2016).

11 *Ibid.*

Competition policy in India formerly revolved around the now-repealed Monopolies and Restrictive Trade Practices Act, 1969 („MRTP Act"). The MRTP Act was a testimony of the social and economic philosophy enshrined in the Directive Principles of State Policy.[12] However, evolving trade practices and changing market conditions necessitated the enactment of a new legislation, which could address the problems that the new market conditions brought with themselves. The pressing need to shift focus from curbing monopolies to promoting competition was also one of the reasons which prompted enactment of a new competition law.[13] Consequently, the Competition Act, 2002 („Competition Act") was enacted to prevent practices having an adverse effect on competition, to protect the interests of consumers, and to ensure the freedom of trade.[14] While the MRTP Act was meant to contain the concentration of economic power, the Competition Act relates to the preservation and protection of competition. The Competition Act is one of the ways in which India responded to globalisation, by opening up its economy, removing control and resorting to liberalisation.[15] While attempting to be an improvement upon the MRTP Act, the Competition Act now contains four essential components:

- Anti-competitive agreements;
- Abuse of dominance;
- Combinations regulations;
- Competition advocacy.

Competition law in India also abides by the view that entry is the essence of competition. The Statement of Objects and Reasons of the Competition Act observe that in order to ensure that the Indian market should be geared to face competition from within the country and outside, this Act seeks to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effects on competition in markets within India.[16] In fact, the Indian competition law unusually lays down in the statute itself several economic criteria that the Competition Commission of India "shall have due regard to" in arriving at a decision about the anti-competitive nature of a firm"s actions.[17] Section 19(3)[18] of the Act enlists the factors

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12 S.M. Dugar, *Guide to Competition Law* 4 (Lexis Nexis Butterworths Wadhwa, Nagpur, Vol. 1, 5th edn., 2010).
13 *Supra* Note 13 at 572.
14 The Competition Act, 2002, Statement of Objects and Reasons.
15 The Competition Bill, 2001, Statement of Objects and Reasons.
16 The Competition Act, 2002, Statement of Objects and Purpose.
17 Aditya Bhattacharjea, "India"s New Competition Law: A Comparative Assessment" 4 *Journal of Competition Law and Economics* 618 (2008).
18 The Competition Act, s. 19.

that the Competition Commission is expected to take into consideration while determining whether an agreement has an appreciable adverse effect on competition. The first three sub-clauses of Section 19(3) mandate that the Commission shall have due regard to the following factors:

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market.

Evidently, freedom of entry into a particular market plays a significant role in determining whether a particular agreement has an appreciable adverse effect on competition. The Raghavan Committee Report[19] captures the essence of the competition law regime in India. The Report observes that existing competition laws prohibit abuse of dominant position in two forms - firstly, actions taken by an incumbent firm to exploit its position of dominance (by charging higher prices, restricting quantities, etc.), and secondly, actions by an incumbent in a dominant position to protect its position of dominance by making it difficult for potential entrants and competitors to enter the market.[20]

The Supreme Court has acknowledged that the overall intention of the competition policy in India has been to limit the role of market power that might result from substantial concentration in a particular industry.[21] In *Competition Commission of India v. Steel Authority of India Ltd.*,[22] the Court observed that the primary purpose of competition law is to remedy some of those situations where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other.[23] The model of perfect competition would be the "economic model" that usually comes to an economist"s mind when thinking about the competitive markets.[24] While some objectives of competition law may differ across jurisdictions, promoting efficiency remains common to all. Theoretically, competition law commonly seeks to achieve allocative efficiency, which ensures the effective allocation of resources; productive efficiency, which ensures that costs of production are kept at a

19 The Committee was constituted under the Chairmanship of Mr. S.V.S. Raghavan.
20 S.V.S. Raghavan Committee, Report of High-Level Committee on Competition Law and Policy (2007), *available at*: http://www.competitioncommission.gov.in/Act/Re port_of High_Level Committee (Last Accessed Dec. 4, 2016).
21 *Competition Commission of India v. Steel Authority of India Ltd.*, (2010) 10 SCC 744. 22 (2010) 10 SCC 744.
23 *Ibid.*
24 *Ibid.*

minimum; and dynamic efficiency, which promotes innovative practices.[25] These factors have, by and large, been accepted all over the world and in India, as the guiding principles for effective implementation of competition law.[26]

The Competition Commission of India terms the Act an "economic law" the purpose of which is to promote and protect competitive forces in the market because free and fair competition is in the interest of consumers.[27] The Commission has acknowledged that while the term "competition" is not defined under this Act, in economics it is a term that encompasses the notion of "individuals and firms striving for a greater share of a market to sell or buy goods and services and earn higher profits as a consequence."[28] Essentially, this would mean that competition strives to achieve a situation where each firm has an equal opportunity to enter a market and barriers to entry are curbed, to a large extent.

That the competition law in India takes a highly economic view of dominance of an enterprise is evident from the manner in which "abuse of dominance" is to be determined under the Act. Abuse of dominant position is established, for the purposes of the Competition Act, if the dominant firm imposes unfair conditions or price, predatory pricing, limiting production/market, creating barriers to entry and applying dissimilar conditions to similar transactions.[29] Moreover, to prove that the acquisition of an enterprise by another enterprise amounts to a combination, the Act lays down strictly economical standards based on the respective turnovers of either of the enterprises. Evidently, the form and structure of the Competition Act is founded on purely economic considerations coupled with free entry being the essence of this structure.

Competition Law and Industry/Sector-specific Issues

Given the generic nature of the Competition Act, it is but natural that the Act is expected to protect and promote competition across all industries, notwithstanding the diverse nature of goods or services that such industries might be providing. This is not meant to disregard instances where the Competition Commission has been faced with appeals to carve a special competition regime for specific industries/markets. For instance, in the case of *Sh. Dhanraj Pillay and*

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25 Aditya Bhattacharjea, "Of Omissions and Commissions: India"s Competition Laws" 45 *Economic and Political Weekly* 47 (2010).
26 (2010) 10 SCC 744.
27*Arun Kumar Tyagi v. The Software Engineering Institute, The High Court of Uttarakhand and HCL Technologies*, 2011 Comp LR 539 (CCI).
28 2011 Comp LR 539 (CCI).
29 The Competition Act, s. 4.

Ors. v. M/s. Hockey India,[30] the applicability of competition laws to the sports sector was questioned due to the pyramidal structure of sports" organisations in India and whether certain specificities of sports make it different from other commercial enterprises. While the need for a special competition regime for the sports industry was not fructified, the question for a separate competition regime for some sectors certainly merits attention.

The media industry, as a separate sector in itself, invites the attention of the stakeholders for enactment of a specific competition regime for itself. A lot many alleged cross media ownership entities might escape the provisions of the Competition Act because they are tested against the standards laid down by competition law, which are largely economic in nature. The cross media holdings do not, *per se*, violate any provisions of the Competition Act. However, broader considerations of plurality and diversity of views in the media are not considered during such an assessment. In India and elsewhere, the shifting nature of the markets and the relatively unusual nature of business in the media markets, have thrown up new conceptual problems intrinsic to competition law and policy, adequate responses to such problems may or may not have been devised till now.[31]

More than anything else, the jurisprudential approach of the Competition Commission while dealing with issues in media markets has prompted such a discussion. In the Commission"s defence, competition law has been designed to protect competition in markets, and not peculiar issues that arise in specific markets. For media markets, issues of plurality in ownership and diversity of content are burgeoning issues, which competition law may not be equipped to address. The next part will analyse certain orders of the Commission in regard to the media markets and the approach that the Commission has been adopting to determine what undermines competition law principles in the media markets.

Approach of the Competition Commission of India in its Orders concerning the media industry

From an economic standpoint, competition law tends to enhance the distribution of media products as carriers of information and, thereby, competition law contributes to democracy by distributing politically relevant information, ideas and opinions more effectively.[32] Economic

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30 2013 Comp LR 0543 (CCI).

31Andrew Scott, "Media Markets: A Crucible for Assessing the Intrinsic and Extrinsic Challenges for Competition Law and Policy" 9 *The Competition Law Review* 4 (2013).

32 Josef Drexl, "Competition Law in Media Markets and its Contribution to Democracy – A Global Perspective" Max Planck Institute for Innovation and Competition Research Paper No. 14-16 (2014), *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2511146 (Last Visited Dec. 4, 2016).

markets tend to be more narrowly defined than the relevant market in view of protecting media plurality.[33] However, a concern which merits urgent consideration is whether the media being a "politically relevant" industry requires a more concrete set of rules and practice for addressing the competition law question. The criterion that the Commission has adopted while giving orders concerning the media industry has been that of the „relevant market". The Act defines relevant market under Section 2(r) as:

"*the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.*"

The Act proceeds to define the "relevant geographic market" and the "relevant product market" in Sections 2(s) and 2(t), respectively. Whether a firm enjoys dominant position is to be determined with reference to a relevant market, both the relevant product market and the relevant geographic market.[34] While a relevant geographic market would comprise that part of the territory where the conditions of competition for supply of goods or provision of services are distinctly homogenous, a relevant product market comprises all products and services considered interchangeable or substitutes by the consumer by reason of characteristics of the products or services, their prices and intended use.

Identification of the relevant market formed an important part of the discussion in *JAK Communications Pvt. Ltd. v. Sun Direct Pvt. Ltd.*[35] Here, the informant alleged that the opposite party was providing huge subsidies to the consumers in respect of direct-to-home (DTH) services in an attempt to capture the market. The opposite party had allegedly subsidised the prices of set-top boxes (STBs) as well as monthly subscription charges for paid channels, acts which amount to "predatory pricing" and "abuse of dominant position".[36] The informant was a multi-system operator (MSO) and engaged in the business of distributing TV signals and hence, the opposite party was one of its competitors. Interestingly, the Director-General[37] identified the whole of India as the relevant market in the instant case, on the ground that DTH services and cable TV services cannot be regarded as interchangeable by reason of characteristics of the product, pricing and intended use.[38] On the contrary, the

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33 *Ibid.*
34 *Supra* Note 4 at 165.
35 2011 Comp LR 519 (CCI).
36 2011 Comp LR 519 (CCI).
37 Competition Act, 2002, s. 2(g) defines "Director General" as the Director General appointed under s. 16(1) and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section.
38 2011 Comp LR 519 (CCI).

Commission identified the relevant market on the basis of language while keeping in mind the peculiar features of the South Indian TV market, where the opposite party largely operated. The Commission held:

"*In South India, it is not that other DTH service providers are having no presence. There is no entry barrier which prevents other operators from gainfully entering and operating in the market.*"

The Commission held that the opposite party was not in a position of dominance and other players in the relevant market were giving sufficient competition to it. The presence of a number of other DTH service providers in the South Indian TV market was what assisted the Commission in formulating the view that the conduct of the opposite party was not anti-competitive.

In *Consumer Online Foundation v. Tata Sky Limited and Ors.*,[39] it is pertinent to mention that the information was filed by the Consumer Online Foundation against Tata Sky Limited, Dish TV Limited, Reliance Big TV Limited and Sun Direct TV Pvt. Ltd. (all of whom are DTH service providers). The informant alleged that the said DTH service providers were restraining competition in the market by preventing interoperability between hardware and DTH signals provided by different manufacturers and DTH service providers. DTH service providers, allegedly, were not providing services to consumers, unless they also purchase the hardware from them, which includes the dish antennae and STB.[40] The information claimed that ideally, if a consumer has a STB, he/she should be able to access the services of different DTH service providers, without being required to buy a different STB for availing the services of different service providers. Different manufacturers should be able to provide hardware directly to the subscribers irrespective of the service provider of the content.[41] Essentially, by preventing interoperability, DTH service providers are creating a barrier to entry for the enterprises which manufacture only STBs. Moreover, it was alleged that the respondents were providing STBs to their consumer base for free which amounted to abuse of dominant position through "predatory pricing". While the issue in this case hinged largely on technological limitations inherent in DTH services which could not have made interoperability possible, the Commission made a pertinent observation when it said:

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39 MANU/CO/0081/2011.
40 *Ibid.*
41 *Id.*

"The TV subscription market is very dynamic and competitive where not only are DTH operators vigorously competing with each other but also with the entrenched cable TV providers. Therefore, allegation of dominance cannot be established. In the absence of dominance, the question of any abuse, including predatory pricing, does not arise."[42]

It is important to consider the order of the Competition Commission passed in the challenge to the *Reliance-Network18-Eenadu combination*[43] *(Combination Registration No. C-2012/03/47)*. Since both the groups are engaged in the business of TV channels, the combination has the effect of consolidating numerous news channels in English, and several other regional channels under a single ownership. Additionally, numerous websites, web-portals and other web-managed content offered by the Nework18 Group was also brought within the umbrella of this combination. The said combination was challenged for causing an appreciable adverse effect on competition by foreclosing scope for innovation and competition, both in terms of technology and content.[44]

The Competition Commission, however, chose to rely on a strictly construed definition of relevant markets and concluded that the said combination was not anti-competitive. While commenting on the issue of competition in the TV channel market, the Commission noted:

"the business of supply of television channels in India is featured by the presence of significant number of broadcasters operating across various genres targeting national and regional audience/viewership. The television channels operated by the RIL Group primarily target regional audience/ viewership, whereas the television channels operated by Network 18 Group are targeted towards the national audience/viewership."

Further, the Commission also drew a distinction between the relevant markets on the basis of genre and language. The Commission observed:

"The television channels operated by Network18 Group and RIL Group could be further distinguished from each other on the basis of genre and language. Both groups operate regional Marathi television channels, however, IBN Lokmat operated by Network18 Group is a Marathi news channel whereas

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42 MANU/CO/0081/2011, para 19.1.
43 *Competition Commission of India v. Zero Coupon Optionally Convertible Debentures*, MANU/CO/0058/2012.
44 MANU/CO/0058/2012, para 27.

ETV-Marathi operated by the RIL Group is a Marathi general entertainment television channel. IBN7 of Network 18 Group and ETV-UP, ETV-MP, ETV-Bihar and ETV-Rajasthan of RIL Group operate in Hindi news space which is characterised by the presence of other known channels like AajTak, India TV, NDTV India, Star News and Zee News……Moreover, the combined share of IBN7, ETV-UP, ETV-MP, ETV-Bihar and ETV-Rajasthan in the total viewership base for Hindi news channels is also not significant."

While discussing the issue of web portals, the Commission observed:

"Network 18 Group operates various web-portals that could be accessed through various internet access services through wire line or wireless network including those using 2G, 3G and 4G technologies. In view of the fact that there are other content providers, either existing or potential, who in time will be able to provide content through other Internet Service Providers (ISPs), including players offering 4G services, and may even use new and more competitive models, the potential competition concerns, if any, that may arise from the vertical arrangement get mitigated."[45]

While from a competition law perspective, the Commission"s decision would find abundant support, issues of media plurality have either not figured in the Commission"s consideration, or seem to have been relegated to a backseat. Numerically put, this combination would have control over 13 news channels, 22 entertainment channels and 18 websites, in 11 languages.[46] *Prima facie*, this comes across as consolidation of news media in the country in the hands of a concentrated few.

This approach involving assessment of the relevant market is also evident in the Commission"s order in *Walt Disney Company (Southeast Asia) Pte. Ltd. v. UTV Software Communications Ltd.*,[47] approving the Walt Disney-UTV combination. The said combination relates to the media and entertainment industry, comprising films, television, radio, print, music, advertising, interactive media including animation, gaming, etc.[48] The Commission seemed to have accepted the contention of the parties when they said that while the Disney Group is primarily engaged in the business of producing and releasing motion pictures in the

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45 MANU/CO/0058/2012, para 27.
46 Anuradha Raman, "Big ED in the Chair" *The Outlook*, Jul. 14, 2014, *available at*: http://www.outlookindia.com/article/Big-ED-In-The-Chair/291311 (Last Accessed Dec. 4, 2016).
47 2012 Comp LR 258 (CCI).
48 *Ibid.*

English language, the UTV Group is primarily in the business of producing and releasing Hindi language motion pictures.[49] The parties also contended that the *market is also characterised by relative ease of entry and exit for the players*. The Commission accepted these contentions forwarded by the parties on the ground that the said combination between the two entities was not likely to lead to *co-ordinated or exclusionary behaviour* and availability of ample choice and variety of products to the consumers would be ensured.[50]

In *Shri Yogesh Ganeshlaji Somani v. Zee Turner Ltd. and Star Den Media Services Pvt. Ltd.*,[51] a joint venture (JV) between both the opposite parties was challenged by the informant as being anti-competitive. The JV between Zee Turner Ltd. and Star Den Media Services Pvt. Ltd. was meant to combine the distribution of their respective channel bouquets following which the JV would jointly aggregate and distribute channels licensed to either of the parties and collect the subscription revenue of the combined entity.[52] The informant claimed that the JV formed by both the parties would eventually own 63 TV channels across different languages and genres. The informant also alleged that the JV would be a much stronger intermediary in the market which would have the potential to stifle competition in the market because after subscribing to channels out of the 63 offered by the JV, the MSOs, local cable operators (LCOs), DTH operators (DTHOs) and Internet Protocol television operators (IPTVOs) would not have enough financial capacity to subscribe to channels of other broadcasters.[53]

However, despite the number of channels that would have fallen under the umbrella of the impugned JV, the Commission refused to term its position as dominant in the relevant market. The Commission held that,

"*on the basis of available data, it is noted that as an aggregator the JV formed by the Opposite Parties has the largest number of channels in its kitty but when compared to the total number of channels available in the country its market share is approximately 10 per cent only.*"[54]

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49 2012 Comp LR 258 (CCI)
50 *Ibid.*
51 2013 Comp LR 492 (CCI).
52 *Ibid.*
53 *Id.*
54 *Id.*

The problem with delineating relevant markets on the basis of "language"

Even though the Competition Commission has been using language as a parameter to define a relevant market, media plurality is far from protected by means of this approach. India is a multilingual nation with most people having proficiency in more than one language. Consequently, consumer preferences and consumption patterns would transcend more than one market, particularly insofar as language is concerned.

Moreover, the Commission seems to have easily accepted arguments in favour of combinations which are based primarily on the large number of channels/websites/other such media that would exist, even pursuant to a combination the validity of which maybe suspect. For instance, in the *Walt Disney-UTV* combination, the Commission accepts the contention "*that the presence of a number of significant players offering a large number of channels, including for each of the genres, competing for viewership and prime-time slots, existence of regulatory oversight and overall growth in the last few years in the number of channels and options available to the viewers, make this business highly competitive, innovative and dynamic.*"[55] Hence, entry has been the touchstone of ensuring competition; plurality in media ownership or diversity in the content being offered have not.

The Commission appears to have been categorical in its assertion that the edifice of competition law rests upon the dynamics of competition in "one particular market", and that the benefits or harm to competition have to be assessed with respect to that market.[56] However, it needs to be borne in mind that market definition focuses on demand substitution factors which would comprise within it possible consumer preferences.[57] Media plurality has been considered to include consumption patterns and hence, the manner in which the Commission has been defining relevant markets in the media industry are sufficient to only serve the purposes of competition law.

It would be unfair to say that the Commission has not made attempts to take non-economic factors into consideration while giving orders with respect to entities in the media market. In *HT Media Ltd. v. Super Cassette Industries Ltd.*[58] the Commission observed that "evaluation of strength" has to be ascertained not merely on the basis of market share of an enterprise but on the basis of a

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55 2012 Comp LR 258 (CCI), para 19.
56 As is evident from the orders in *HT Media* and *Walt Disney*.
57 *Supra* Note 13 at 859.
58 2014 Comp LR 129 (CCI).

"host of factors such as size and importance of competitors, economic power of enterprise, entry barriers, etc. This wide spectrum of factors indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position."

Arguably, a "holistic and pragmatic approach" in the media market can possibly bring within its ambit the plurality of media ownership and diversity in the views being presented to the audience. The Commission had the opportunity of addressing these questions in the case of the *Reliance-Network18 combination*, which had the consequence of combining several TV channels and internet news websites under the single ownership of the Reliance group. The combination brings within a single umbrella a large number of news channels which essentially serve politically relevant content to the audience. The Commission could have adopted what is coming to be called the "evolutionary approach" to competition, which would have the effect of enhancing democracy.[59] Theoretically, this approach stresses that a higher number of market participants that compete for innovation will be more likely to provide full and equal access of creators and their works instead of limiting access to the market to only an efficient number of works. Under the economics-driven competition law approach, this might seem like a far-fetched proposition. But in the absence of a separate and distinct competition regime for the media markets, this can be something that can be argued for.

In this context, what is worthy of mention is a decision of the Competition Commission which had the effect of protecting diversity of views being presented to the audience while confining itself within the limits of the present Competition Act. In *Kansan News Pvt. Ltd. v. Fast Way Transmission Pvt. Ltd.*,[60] the Commission was called upon to act against a group of cable TV operators in the State of Punjab that were obstructing the transmission of news on a regional TV news channel called Kansan News. The matter took a political turn when the informant alleged that it was being harassed by the cable TV operators, who enjoyed control over almost 95% of the cable distribution network system in the State of Punjab and the Union territory of Chandigarh, for having criticised the then ruling party in Punjab.[61]

The Commission used strict competition law principles to analyse the market dominance of the cable TV operators and the position of Kansan News against it. In this context, the

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59 *Supra* Note 32.
60 MANU/CO/0063/2012.
61 *Ibid.*

Commission considered cable TV service a distinct product in relation to other platforms for TV transmission (for instance, DTH service). The Commission identified Punjab and Chandigarh as the relevant geographic market, and found that the group of cable operators had to be considered a dominant player with substantial market share.[62] Interestingly, the Commission noted that the actions of the cable TV operators had reduced the reach of Kansan News to "*only 56,000 households on the cable TV in the State of Punjab, where about 45,00,000 households are connected to the cable network. Thus, the informant has been effectively wiped out from the entire relevant market.*"[63] Evidently, the Commission adopted the economic approach that the Competition Act is known for.

Scholarly writing has, however, chosen to adopt a more democratic way of looking at this decision by observing that in this particular case,"*the Commission used competition law to ensure access of a particular group of consumers to important political information,*"[64] which was being foreclosed by the group of cable TV operators. In other words, the Commission helped promote both "competition culture" as well as "democratic culture".[65]

In fact, the Supreme Court has recognised that the primary purpose of competition law and policy is to control the proliferation of monopolies as these have the effect of causing *economic efficiency losses to society* and product quality, and *diversity* may also be affected.[66]

Conclusion

A combination in the nature of *Reliance-Network18* might not fall foul of the Competition Act even though it might severely impact the diversity of views prevalent in the media market. A combination of such nature may (or may not) hurt the media market, or other incumbent firms economically. However, the lack of plurality in media ownership would be evident in the content that would be made available on the consortium of channels that would fall under the umbrella of this combination.

The primary goal of competition law in a developing economy is eliminating or mitigating governmental, natural or artificial barriers to entry. However, only removal of barriers to entry may or may not serve the goals of media plurality. The goal of plurality in media

62 MANU/CO/0063/2012.
63 *Ibid.*
64 *Supra* Note 32.
65 *Ibid.*
66 *Competition Commission of India v. Steel Authority of India Ltd.*, (2010) 10 SCC 744.

markets is to ensure the existence of a range of media voices, to ensure diversity of viewpoints and prevent any one media owner to have too much influence over public opinion. Given the peculiar nature and implications of media plurality, a special framework, separate from competition law, may be required for ensuring diversity of viewpoints in the media markets. To ensure robust competition as well as the ends of democracy, cross-media ownership concerns deserve urgent attention from competition law. Time is ripe to reassess this concern, and bring about necessary changes to the competition law regime to adequately serve the needs of the thriving democracy that is India.

CIVILIAN AND COMMERCIAL USAGE OF DRONES: PROMISES AND LEGALITIES

Mohammad Umar *

Abstract

Drones are conventionally understood as military tools of stealth and destruction. However, with technological innovation in recent past, the concept has acquired several civilian and commercial dimensions such as - keeping a watch over a large public gathering or delivering items bought online at the door step of the customers. Like any technological invention, there are legal issues related to drones also; especially, with regards to privacy and human security. Individual state aviation departments have made some leads alongside the developments in ICAO but operationalization of drones as a common practice is yet to be achieved. The article is an attempt to throw light on these aspects with special focus on USA and India.

Keywords- civilian and commercial dimensions, privacy, human security, ICAO

Prefatory

In the beginning, drones[1] were almost exclusively the province of militaries. At first little more than remote-controlled planes used in the World War I era, military drones advanced steadily over the decades, eventually becoming sophisticated tools that could surveil battlefield enemies from the sky. Today, the terms —drone‖ and —unmanned aircraft system‖ denote a vehicle that navigates through the air from point A to point B and is either remotely controlled or flies autonomously. While they vary in size and shape, such vehicles all feature a communications link, intelligent software, sensors or cameras, a power source, and a method of mobility (usually propellers).

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* Assistant Professor, Galgotias University, Greater Noida, U.P.

1. In this paper the term drone shall be used interchangeably with its substitutes like UAV (Unmanned Aerial Vehicle) and RPAS (Remotely Piloted Aircraft Systems).

Inevitably, drone technology spilled out from the military and into other parts of the public sector. In the United States over the last decade, federal researchers turned to drones for monitoring weather and land, the Department of Homeland Security started relying on them to keep an eye on borders, and police adopted them for search-and-rescue missions. Then came everyday consumers, who took to parks on the weekend with their often homemade creations. Outside government, drones were mostly flown for fun, not profit.

Until recently, that is. In the last several years, a new group of actors has come to embrace drones: private companies. Inspired by the technological progress made in the military and in the massive hobby market, these newcomers have realized that in everything from farming to bridge inspection, drones offer a dramatic improvement over business as usual. Companies like Amazon and Google have invested a significant amount of money in planning their drone services to their consumers.

So there remains a huge scope of integration of drones in domestic space. However, this is not as simple as attractive it is. There are range of legal issues and evolution of legalities regarding drones taking place all over the world. The article shall try to give an overview of the international position and would look specifically into the drone law of United States and finally it shall analyse the position in India as well.

Potential Usage and Market of Drones

As more and more actors have invested in drone research and development, the vehicles themselves have become cheaper, simpler, and safer. Perhaps even more exciting are the changes in software, which has advanced at lightning speed, getting smarter and more reliable by the day: now, for example, users can fly drones without any guidance and set up so-called geo-fences to fix boundaries at certain altitudes or around certain areas. The economics are now attractive

enough that many industries are looking to drones to perform work traditionally done by humans—or never before done at all[2].

Many applications involve inspection; it's far cheaper and safer to send a drone with a camera into a remote or dangerous place than to send a human. Oil and gas companies are using drones to monitor pipelines, oil rigs, and gas flares. Utility companies can use them to check electrical wires and towers. Engineers are beginning to use them to inspect bridges and buildings for damage and to survey land. In agriculture, meanwhile, drones offer a bird's-eye view of farms, without the cost of aircraft or satellites. Farmers are starting to rely on drones to diagnose the health of their crops, assess damage after a storm or flood, herd livestock, and eradicate pests. In Australia and Japan, drones are fertilizing crops[3]. Drones could soon deliver light packages, too. Already, Amazon and Google have spent millions of dollars developing drone delivery programs, although much work remains to be done to make the services practical. Some entrepreneurs have tried out drones to deliver beer at concerts and champagne to hotel balconies. In Singapore, which has more service jobs than available workers, one restaurant chain is planning to replace waiters with drones. In remote parts of the world with little transportation infrastructure, drones could be used for humanitarian purposes, delivering medicine and other essentials. They could also play a role in protecting endangered species by tracking illegal poachers.[4]The list is virtually non-exhaustive and it can go on to the extent of human imagination.

The potential size of the commercial drone market is hard to pin down, in part because in the United States, the shaky regulatory environment is leading many companies to keep their plans private. Still, forecasts are upbeat. In 2014, the firm Lux Research estimated that by 2025, the

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2 See generally Des Butler, The Dawn of the Age of the Drones: An Australian Privacy law Perspective, UNSW Law Journal, Vol 37(2), p.437; See also Roland E Weibel and R John Hansman, _Safety Considerations for Operation of Unmanned Aerial Vehicles in the National Airspace System' (Report No ICAT 2005-1, International Centre for Air Transportation, Massachusetts Institute of Technology, March 2005) 19.

3Gretchen West,Drone On, Foreign Affairs, 2015, Vol. 94, Issue 3

4 *Ibid.*

global market for commercial drones will reach $1.7 billion, with drones used for agriculture generating $350 million in annual revenue and those used in the oil and gas industry generating $247 million. The drone industry is poised for greatness.[5]

Legal Issues involved

a. Privacy

These machines now mean that for individuals like the posited homeowner's adolescent neighbour, barriers such as high fences no longer constitute insuperable obstacles to their voyeuristic endeavours. Moreover, ease of access to the internet and video sharing websites provides a ready means of sharing any recordings made with such cameras with a wide audience. Persons in the homeowner's position might understandably seek some form of redress for such egregious invasions of their privacy. Other than some form of self-help[6] what alternative measures may be available? The application, called Snoopy, runs on drones and looks for a smartphone signal while it is searching for a Wi-Fi network. The software is designed to trick a victim's mobile device into thinking it's connecting to a trusted access point to access data from the handset once attached. Snoopy could be used by attackers to steal a victim's data, including user credentials, credit card numbers and location data. The researchers at Sensepoint successfully demonstrated the ability of the Snoopy application to steal Amazon, PayPal, and

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5 *Ibid.*

6 Such as may be encouraged by bounties for shooting down drones, as at least one American town has been reported as considering: Keith Coffman, _Don't Like Drones? Folks in Deer Trail, Colorado Mull Paying Citizens to Shoot Them Down', The Sydney Morning Herald ,18 July 2013, Available at- http://www.smh.com.au/technology/technology-news/dont-like-drones-folks-in-deer-trail-colorado-mull-paying-citizens-to-shoot-them-down-20130718-2q5rd.html#ixzz2ZMSXOsCH <Accessed on 5th April, 2016>

Yahoo credentials from random citizens while the drone was flying over their heads in the streets of London.[7]

b. Safety

There are concerns from safety angles to. Flying drones poses a threat to manned civilian aircrafts and there are possibilities that an aerial collision can happen in case the flight of drone goes ill regulated. Further, battery failure in air or any other technical fault can land the drone on some individual which can cause injury and grievous hurt. The issue of fixing the liability is extremely pertinent in these cases.

c. Snooping

Recently, a radioactive drone landed on the terrace of Japan's president's abode. Although after investigation no significant threat was sensed but a possibility arose for the thoughtful that drones can be use as agents of snooping and stealing government's secret information by flying over sensitive zones, keeping a track of official's guests etc.

International Legal Position

The International Civil Aviation Organization (ICAO) was created in 1944 upon the signing of the Convention on International Civil Aviation (commonly referred to as the Chicago Convention), as a UN specialised agency.[8] It publishes Standards and Recommended Practices (SARPs) which are intended to assist States in developing national aviation regulations. Each ICAO member country has a national aviation agency, or agencies, to oversee the different aspects of civil aviation, such as pilot licensing or air traffic management services. Under Article 8 of the Chicago Convention, all RPAS regardless of size are prohibited from flying over another

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7http://securityaffairs.co/wordpress/23374/hacking/snoopy-drone-data-stealer.html (Last Accessed on 5th April, 2016)

8ICAO has 191 Member States which work collectively to harmonise and standardise the use of airspace for safety, efficiency and regularity of air transport.

state's territory without its permission.[9] However, this article has less to do with civil and commercial application of drones and is more concerned about sovereignty breach issues due to unmanned aerial vehicles respectively.

Given the lack of availability of guidelines, ICAO set up an Unmanned Aircraft Systems Study Group (UASSG) in 2007, which brought together experts from its Member States, stakeholder groups and industry, to discuss the impact of RPAS on aviation regulation. In November 2014, in response to the rapid developments in RPAS technology, the UASSG was elevated to the status of a Panel, and it aims to publish Standards and Recommended Practices (SARPs) on unmanned aircraft by 2018.[10] These SARPs will include guidance on airworthiness, operations and pilot licensing.

As an interim measure, ICAO has recently completed drafting the Manual on Remotely Piloted Aircraft Systems (RPAS) (Doc 10019).[11] This document provides readers with analyses of how the existing regulatory framework developed for manned aviation applies to unmanned aircraft and provides insight into the changes that will be coming. It serves as an educational tool for States and stakeholders, it supports the development of SARPs and guidance material by ICAO and it gives a basis for other standards-making organizations to harmonize their activities.[12]

Therefore, as far as international guidelines on drones are concerned, they are still in a very nascent stage. We have to wait till final guidelines are up. Till then matter is best left to state practices. We shall be focusing on the position in United States and then finally on the status of drone flight in India.

Drones in United States

9The Civil Aviation Authority, CAP 722: Unmanned Aircraft Systems Operations in UK Airspace: Guidance (10 August 2012) Section 1, Chapter 2, p 1: https://www.caa.co.uk/docs/33/CAP722.pdf

10 An ICAO Panel can generate Standards and Recommendations while this is not possible under an ICAO Study Group.

11Available at- http://www.dronezine.it/wp-content/uploads/2015/03/10019_cons_en-Secured-1.pdf

12 *Ibid.*

a. *The Pirker case.*

Position of drones in USA can be gauged from the time of Pirker's case decision by Administrative Law Judge where for the first time in United States use of drones for peaceful purposes came before the court.

In United States, for decades, the definitions of "aircraft" did not include "model aircraft," the majority of which are now of the "drone" type. The Federal Aviation Administration (FAA) neither considered nor treated them as "aircraft." However, that all changed when, for the first time in history, the FAA issued a Proposed Order of Assessment against a foreign national named Raphael Pirker. Pirker is a well-known, highly skilled and experienced drone pilot. In 2011, at the request of the University of Virginia, Pirker flew a drone over the campus to obtain video footage and was compensated for the flight. That flight resulted in the FAA issuing an Proposed Order of Assessment of a civil penalty of $10,000.00. In its Order of Assessment, the FAA listed all of its alleged facts concerning the flight, including an allegation that Pirker was compensated for it. However, the FAA did not rely upon that compensation at all for its proposed civil penalty. It couldn't. There existed no FAR that prohibited commercial operation (and there still exists no such FAR). Instead it based its Proposed Order of Assessment solely upon an allegation that Pirker flew recklessly, in violation of FAR 91.13. The Proposed Order of Assessment, in relevant part reads:

"By reason of the foregoing, you violated the following section(s) of the Federal Aviation Regulations:

a. Section 91.13(a) which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

Pirker's attorneyfiled and won a Motion to Dismiss.[13] In March 2014, Administrative Law Judge Patrick Geraghty, in a well-reasoned, logical and scathing decision,[14] granted Schulman's Motion to Dismiss and the FAA lost. The Administrative Law Judge ("ALJ") held that drones

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13<http://www.kramerlevin.com/files/upload/FAA-v-Pirker.pdf> (Accessed on 25th March, 2016)

14<http://www.ntsb.gov/legal/alj/Documents/Pirker-CP-217.pdf > (Accessed on 25th March, 2016)

(which he referred to as "model aircraft.") are *not* aircraft under the federal definitions, and therefore the FAA had no jurisdiction over Pirker's flight. Not surprisingly, the FAA appealed the decision immediately to the full NTSB Board.

In November 2014, the NTSB issued its appealdecision,[15] reversing the ALJ's granting of Pirker's Motion to Dismiss. It held that drones *are* aircraft as the word is defined under federal law and therefore subject to the recklessness regulation. It remanded the matter to the ALJ to decide whether Pirker's flight was, in fact, conducted recklessly.

The NTSB's decision was very narrow in one respect: it held that because drones are aircraft, FAR 91.13, the only FAR at issue in the matter, applies to drones. It did not address "commercial use" since that was not addressed by the Judge, and it did not hold that any other FAR applies to drones.

The Board's decision was very *broad* in another respect: it did not qualify which size drones are aircraft. So both a 1-ounce child's "toy" drone and a 55-pound industrial-sized drone are aircraft, and both are equally subject to FAR 91.13. In fact, given the extremely broad federal definition of aircraft, even paper airplanes are now subject to FAR 91.13.

As for Raphael Pirker, there was no decision on remand to the ALJ. Judge Geraghty first demanded that the FAA explain its authority to bring the recklessness action against a foreign national in the first place, since according to the FAA itself, it's not supposed to. The FAA'sOrder2150.3B[16] (Chapter 6, paragraph 34(a)) makes that clear. It reads:

34. Violations of FAA Regulations by Foreign Persons.

General. Legal counsel for the region with geographic response bility for the investigation processes a case against a foreign person who violates the Federal Aviation Regulations. Legal counsel takes legal enforcement action against an airman who *commits a violation while exercising the privileges of his or her FAA*

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15 Available at http://www.ntsb.gov/legal/alj/Documents/5730.pdf (Accessed on 25th March, 2016)

16 Available at http://www.faa.gov/documentLibrary/media/Order/2150.3B_W-Chg_8.pdf (Accessed on 25th March, 2016)

airman certificate, a foreign individual who commits a passenger violation, or a foreign air carrier operating under 14 C.F.R. part 129. All other violations committed by foreign persons, except Canadian persons, are referred to the appropriate foreign aviation authority through the Department of State. Violations committed by Canadian persons, for whom legal enforcement action is not taken, are referred directly to Transport Canada. (*emphasis supplied.*)

Pirker's actions did not fall under any of the emphasized language above. He is *not* an FAA certified airman. He did *not* commit a passenger violation and he is *not* a foreign air carrier. This means that the entire Pirker matter, if handled as the FAA's Order itself says it should be handled, it *should* have been handled by the "appropriate foreign aviation authority" through the Department of State, *not* by the FAA, a fact that had been argued by Schulman.

In the end, Pirker settled[17] the case that never should have been brought against him by the FAA, for $1,100.00, with no admission of wrongdoing on his part. The FAA got an NTSB decision that drones are "aircraft" as that term is defined under the federal statutory and regulatory definitions, and subject to a single FAR— 91.13 (recklessness). Unless and until definitions of aircraft change, or a new definition for drones is created, drones will remain aircraft.

b. *The New FAA Rules*

Because of the mounting pressure on clarifying its stands on private usage of drones FAA on 15th February, 2015 proposed a framework of regulations[18] that would allow routine use of certain small unmanned aircraft systems (UAS) in today's aviation system, while maintaining flexibility to accommodate future technological innovations.

17http://www.scribd.com/doc/253446698/Pirker-Faa-Settlement#scribd <Accessed on 25th March, 2016>

18Summary of the regulations available at - http://www.faa.gov/regulations_policies/rulemaking/media/021515_sUAS_Summary.pdf <Accessed on 25th March, 2016>

The proposal offers safety rules for small UAS (under 55 pounds) conducting non-recreational operations. The rule would limit flights to daylight and visual-line-of-sight operations. It also addresses height restrictions, operator certification, optional use of a visual observer, aircraft registration and marking, and operational limits. [19]

The proposed rule also includes extensive discussion of the possibility of an additional, more flexible framework for —micro‖ UAS under 4.4 pounds. The FAA is asking the public to comment on this possible classification to determine whether it should include this option as part of a final rule. The FAA is also asking for comment about how the agency can further leverage the UAS test site program and an upcoming UAS Center of Excellence to further spur innovation at —innovation zones. [20]

The proposed rules would also require an operator to maintain visual line of sight of a small UAS. The rule would allow, but not require, an operator to work with a visual observer who would maintain constant visual contact with the aircraft. The operator would still need to be able to see the UAS with unaided vision (except for glasses). The FAA is asking for comments on whether the rules should permit operations beyond line of sight, and if so, what the appropriate limits should be.[21]

Further, an operator would have to be at least 17 years old, pass an aeronautical knowledge test and obtain an FAA UAS operator certificate. To maintain certification, the operator would have to pass the FAA knowledge tests every 24 months. A small UAS operator would not need any further private pilot certifications (i.e., a private pilot license or medical rating).[22]

The new rule also proposes operating limitations designed to minimize risks to other aircraft and people and property on the ground: A small UAS operator must always see and avoid manned

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19*Ibid.*
20Press Release – DOT and FAA Propose New Rules for Small Unmanned Aircraft Systems, 15th February 2015, Available at- http://www.faa.gov/news/press_releases/news_story.cfm?newsId=18295 <Accessed on 25th March, 2016>
21 *Supra* Note 18.
22 *Ibid.*

aircraft. If there is a risk of collision, the UAS operator must be the first to manoeuvre away. Other obligations include-

- The operator must discontinue the flight when continuing would pose a hazard to other aircraft, people or property.

- A small UAS operator must assess weather conditions, airspace restrictions and the location of people to lessen risks if he or she loses control of the UAS.

- A small UAS may not fly over people, except those directly involved with the flight.

- Flights should be limited to 500 feet altitude and no faster than 100 mph.

- Operators must stay out of airport flight paths and restricted airspace areas, and obey any FAA Temporary Flight Restrictions (TFRs).

Existing prohibition against operating in a careless or reckless manner is maintained. An operator is barred from allowing any object to be dropped from the UAS. Operators would be responsible for ensuring an aircraft is safe before flying, but the FAA is not proposing that small UAS comply with current agency airworthiness standards or aircraft certification. For example, an operator would have to perform a preflight inspection that includes checking the communications link between the control station and the UAS. Small UAS with FAA-certificated components also could be subject to agency airworthiness directives.[23]

Although these rules are open for comments, but the criticisms are already rolling in. Those who are raising the questions on the viability of the proposed rules say that when it comes to flying electronic devices weighing up to 55 pounds, safety is an essential requirement. But are the delays justified? Moreover, the proposed rules are vague and incomplete, where they could easily be straightforward and even obvious. Special rules for micro-drones should have come first, not just hinted at last. And an unnecessarily restrictive requirement that all drone operation require continual —line of sight‖ visibility and daylight-only operation means that some of the

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23 *Ibid.*

most high-potential applications, including local delivery services and night-time agricultural monitoring, are still banned.[24]

Position in India

Indian position on peaceful usage of drone has varied from absolutely nothing to complete ban and then rethinking on the ban by mulling regulatory guidelines on the lines of FAA. In October 2014, the Indian government banned drones. The Director General of Civil Aviation (DGCA) issued a stern public notice[25] in the first week of October citing —security threats‖ as the reason why no one could fly drones in Indian airspace till further notice. It stated that-

> "UAS has potential for large number of civil applications. However, its use besides being a safety issue, also poses security threat. The Airspace over cities in India has high density of manned aircraft traffic. Due to lack of regulation, operating procedures/standards and uncertainty of the technology, UAS poses threat for air collisions and accidents. The civil operation of UAS will require approval from the Air Navigation Service provider, defence, Ministry of Home Affairs, and other concerned security agencies, besides the DGCA."[26]

On the positive note however, the notice also said -

> "DGCA is in the process of formulating the regulations (and globally harmonize those) for certification & operation for use of UAS in the Indian Civil Airspace. Till such regulations are issued, no non government agency, organization, or an

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24 Larry Downes, Whats Wrong with the FAA's New Drone Rules, Harvard Business Review, March 2, 2015 Available at https://hbr.org/2015/03/whats-wrong-with-the-faas-new-drone-rules. However, this does not mean that regulations have not been appreciated. The Consumer Electronics Association (CEA) of United States issued the following statement on behalf of CEA President and CEO Gary Shapiro praising the initiation of the process- —...decision by the FAA is an important milestone as the agency develops rules to allow unmanned aircraft to operate safely in U.S. airspace. We support the FAA's action and related guidance that provides a model for other private businesses seeking approval to operate drones in populated areas under controlled environments.‖ Available at- http://www.ce.org/News/News-Releases/Press-Releases/2014/Let-Them-Fly-CEA-Applauds-FAA%E2%80%99s-Ruling-on-Drones.aspx?feed=Policy-Press-Releases (Accessed on 25th March, 2016)

25 Available at http://dgca.nic.in/public_notice/PN_UAS.pdf (Accessed on 15th April, 2016)

26 *Ibid.*

individual will launch a UAS in Indian Civil Airspace for any purpose whatsoever."[27]

Accordingto the recently released draft guidelines,[28] unmanned aircraft operations at or above 200 feet AGL (above ground level) in uncontrolled airspace will require permit from DGCA. Also, operation of civil drones in controlled airspace is restricted. We will have to wait for the final roll out after the process of inviting comments and suggestions get over. Drafters went through operational regulations that exist in New Zealand, Australia, UK and of the FAA (Federal Aviation Administration) and then it shall be fine tuning the rules as per Indian needs.[29]

Whatever the final guidelines may be, their inspiration should lie in the nuggets provided by Professor R Swaminathan who in one of the most exhaustive papers available on the subject, published by Observer Research Foundation titled —Drones in India[30] points out that the need is to first quickly reorient the processes and procedures of airspace, especially the rules of certification and the monitoring processes of the ATC, to allow for UAVs to start co-existing with civilian and commercial aircrafts. It is only when a certain level of limited and controlled co-existence is brought about that the larger policy issues ofa complete integration of UAVs with the existing systems can be unraveled. The second is to evolve a unique identification code for UAVs so that very single drone, whether small or big, is completely accounted for. When all is said and done, drones falling in the wrong hands are a genuine risk for national security and need to be closely monitored.[31] The third is to create a stringent set of manufacturing standards and quality-control processes for drones and UAVs. They have to pass through the same—or at least similar—production processes, certification requirements and airworthiness procedures that

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27 *Ibid.*

28 http://www.dgca.nic.in/misc/draft%20circular/AT_Circular%20-%20Civil_UAS(Draft%20April%202016).pdf <Accessed on 15thMay, 2016>

29http://www.dnaindia.com/money/report-operational-rules-draft-for-uas-likely-to-be-in-place-this-week-2062274 <Accessed on 15th April, 2016>

30Available at-http://www.orfonline .org/cms/export/orfonline/modules/occasionalpaper/attachments/Occasional_Paper_58_142321 <Accessed on 15th April, 2016>2748249.pdf

31 *Ibid.*

manned aircrafts and commercial aerial vehicles are subjected to before they are allowed to take to air.[32]With these suggestions in the offing we can expect the DGCA to come up with fair guidelines well suited to Indian conditions.

Conclusion Drones are a Pandora's Box. Main legal issues associated with them are those of privacy and safety and each country has its own way of dealing with these. Few selected countries like Spain, Australia, New Zealand, Germany and France have provisional norms regulating the peaceful uses of drones but most of the countries including the advanced countries like United States are yet not settled on it. A lot will depend on the upcoming ICAO guidelines on drones and its civilian and commercial application as that will pave way for other countries to adopt them as a model who are yet unsure as to how to deal with this whole issue. As far as India is concerned, it is appreciable that we are making strides towards catching up with this technology having enormous potential for civilian and commercial applications. Hopefully, the DGCA will have a robust set of final guidelines soon.

32 *Ibid.*

Applicability of Theory of Causation in Criminal Law

Utkarsh Yadav*

Abstract

A major challenge towards imposing criminal liability is to establish a link between the conduct and the result. At times there is no difficulty in connecting the actus reus with the resultant harm but many a time the connection is blurred. The theory of Criminal Causation together with its rules and exceptions lays down a rationale approach to connect actus reus with the result and consequently guides the courts in attributing liability.

Introduction

Causation is the "causal relationship between conduct and result". Theory of Causation is applied to establish a link between the conduct and the resulting harm. It is only applicable where a result has been achieved and therefore is immaterial with regard to inchoate offences and also to conduct crimes.[1] Therefore, the theory of causation is relevant only to the extent of result crimes[2].

Causation is an enquiry to trace the conduct of a person to impose criminal liability. It was very simple when strict liability was applied in criminal law. However, with the introduction of foreseeability of offences, theory of causation became very complex. It provided that an actor is liable only for the foreseeable, and not the unforeseeable, consequences of his or her act. However a distinction between proximate and remote cause have always produced great difficulty.

* Assistant Professor, School of Law, Galgotias University, Greater Noida, U.P.

1Conduct crimes are those in which the *actus reus* is concerned with prohibited behaviour regardless of consequences (example: blackmail).

2 Result crimes are those in which the *actus reus* is defined in terms of prohibited *consequences,* irrespective of how they are brought about (example: there is no requirement that death is caused by unlawful means, just a requirement that death is caused)

Theory of causation is borrowed from the law of torts. It would not be wrong to assume that causation raises complex problems in torts then in criminal law. This is self evident if criminal liability is limited to voluntary conduct, whereas liability for torts includes not only such conduct but also damage sustained by such conduct. Further, in torts damage or injury may extend to extraordinary lengths and is often very uncertain, but criminal harms are definitely defined and limited. Thus in criminal law causation is more definite and can be well established, in contrast it is uncertain in tort law.

Theory of causation identifies the conditions under which guilt can be attributed to the accused. A man is said to have caused the *actus reus* of a crime, if, that actus would not have occurred without his participation in what was done. Therefore, some causal relationship has to be established between his conduct and the prohibited result.

The Theory of causation has three aspects[3]:-
1) The search for the causal connection between the conduct and the
2) Assessing whether the established causal connection sufficiently strong to justify causal responsibility.
3) Comparisons with other factors which are better claim for causal responsibility.

The initial step in a causation analysis is to ask whether there is any connection between a person"s conduct and the result alleged to constitute an offence. If the answer is in affirmative then the next step is to ask whether the connection is so strong to justify attributing causal responsibility to that person. And finally competing claims of multiple events needs to be analyzed to ascertain which of them are better claims for causal responsibility.

Theory of causation is an enquiry to trace the conduct of a person to impose criminal liability. Establishing causation is a two stage inquiry. The first stage involves establishing „factual" causation and the second stage involves establishing „legal" causation. The usual method of establishing factual causation is the *„but for"* test. It inquires „but for the defendant"s act, would the harm have occurred?" If the result would not have occurred 'but for' what the defendant did, then the prosecution has established causation in fact. In *R. vs. Pagett*[4] a man held his girlfriend

3Eric Colvin. "Causation in Criminal Law" *Bond Law Review* 253(1989) .
4 (1983) 76 Cr App R 279.
(proscribed result.

in front of him as a shield and fired at the police, who returned fire. Although she was killed by police bullets, the act of the accused was held to be the factual cause of her death as 'but for' his actions she would not have died. In *R. vs. White*[5], the defendant wanted to kill his mother, he poisoned her drink but she died of natural causes before the poison took effect. The court held that the Factual causation is established by asking whether the victim would have died „but for" the defendant"s conduct. If the answer is „yes", the defendant did not cause death. The defendant"s mother would have died anyway thus he is not the factual cause of death. Thus, the *„but for"* test is a preliminary stage that eliminates all unconnected acts/events leaving a range of potential legal causes. The relative simplicity of the "but for" test lies behind the basis that causal connection is a matter of fact rather than of law. Nevertheless, the law sometimes recognises causal connections without the "but for" test being satisfied and it ignores some connections which would be established under that test. Therefore, it is important to recognise certain exceptions to the *„but for"* test.

Multiple sufficient causation

Multiple sufficient causation is such an exceptional situation where a person can be held to have caused a death which would have occurred even without her contribution. It occurs where two actors each do things which would cause the result, so that the contribution of neither of them was necessary for the outcome, and the effects of their contributions cannot be separated. The problem is that either both must cause the result, or neither do. Suppose that A and B both inflict fatal wounds on V. If one wound can be isolated as the operative cause of death, then whoever inflicted that wound would have solely caused the death. The act of the other was neutralised. It may be, however, that the effects of the two wounds cannot be isolated. The accepted view here is that both actors can be held to have caused the death and can be convicted of a homicide offence. Usually in such situations, the two actors will be working in concert as joint-principals. They could, however, be independent actors. A spectacular example is the American case *of People vs. Lewis*[6]. The appellant from a manslaughter conviction had shot the deceased in the abdomen. The deceased, knowing that the wound was fatal, had then self-inflicted another fatal

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5 [1910] 2 KB 124
6 57 Pac 470 (1899) (Cal SC).

wound by cutting his throat with a knife. The argument on the appeal was that this was a case of suicide not homicide. The court played with the idea that the relationship between the two wounds might sustain the causal chain, even if the knife wound could be isolated as the operative cause of death. It concluded, however, that it was unnecessary to decide this, since the two wounds worked together in producing death. Hence, even if the second wound had been inflicted by a third party, the appellant would still have caused the death along with the third party. **'Year-and-a-day' rule** In addition to these instances where the "but for" test is by-passed, there are several instances where the test would be satisfied but the law nevertheless chooses to ignore the connection. An obvious example arises under the "year-and-a-day" rule, which is recognised at common law and under most codes. A death is not caused by conduct if it occurs more than a year and a day after the conduct. The origins of this rule are obscure and some recent reform proposals have recommended its abolition. **Doctrine of innocent agency**

The doctrine of innocent agency is another exception to the "but for" connections. An innocent agent is a person who is unwittingly used by someone else to achieve an unlawful end. An example would be the postman who delivers a bomb which has been sent through the mail. If the bomb explodes and kills the recipient, the death would not have occurred but for the delivery by the postman (and the actions of a string of other "innocent agents"). In ordinary language, however, an innocent agent is not said to cause a result. In *R. vs. Lowe*[7] an engineer who deserted his post at a colliery, leaving an ignorant boy in charge of the engine, who declared himself incompetent to manage it, was held guilty of manslaughter of a collier who was killed because the boy failed to stop the engine properly.

The "coincidence" or "ordinary hazard" principle can be viewed as yet another mechanism by which certain conduct is held not to be causally connected with the result, even though the result

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7 (1850) 3 C & K 123 (TAC).

would not have occurred without it. The function of the principle is to exclude connections which are mere coincidence. The coincidence principle can be viewed as an aspect of the more general principle that *de minimis non curat lex*

Causation in law

Notwithstanding that causation in fact has been established it is also necessary to establish causation in law. Causation in law can be established by showing that the defendant's act was an 'operative[8] and substantial[9]' cause of the consequence and that there was no intervening event. It uses notions of culpability, responsibility and forseeability to select the most appropriate factual cause as the basis for liability, even if this is not the most immediate cause. In *R. vs. Pagett*[10], the defendant was held to be the legal cause of death despite causing no physical injury himself as he set in motion the chain of events that led to death and it was foreseeable that the police would return fire. It was held that the defendant"s act need not be the sole cause, or even the main cause, of death provided it is a cause in that it „contributed significantly to that result". The defendant did not fire the shot that killed the victim but he was liable for her death as his was the most blameworthy act in the events leading to her death.

A causal connection between conduct and a result is not by itself sufficient to make that conduct the legally recognized cause of the result. The conduct causes the result only where the connection is sufficiently strong to justify the attribution of causal responsibility. The assessment of the strength of a connection involves weighing it against any other factors which contribute to the result. There are two tests which are generally used to establish causal responsibility:-
i) Substantial cause test;

(ii) Reasonable forseeability test.

8 An operative cause does not have to be the „sole or main" cause of the specified consequence.
9 Means more than something very trivial, i.e., more than something that the law considers *de minimis*.
10 *Supra* note 2

Substantial cause test

The „substantial cause" test is a *retrospective* test. It involves looking backwards from a result in order to determine whether, in the light of all that happened, a particular causal factor has played a substantial role in bringing about the result.

The best-known example of the 'substantial cause' test is the English case of *R. vs Smith*[11]. A stabbing was there held to cause death, even though the victim had twice been dropped on the way to the hospital and the medical treatment which he eventually received for his wound was inappropriate and 'might well have affected his chances of recovery. The test applied by the court was whether the original wound was 'still an operating cause and a substantial cause'. In *R. vs Evans & Gardiner*[12], the death was more remote from the wound. A stab wound had there necessitated the removal of a portion of the bowel. The victim had apparently recovered. He collapsed and died, however, eleven months afterwards. As in *Smith*[13],

there was an issue of medical negligence, but again the original assailant was found to have caused the death. The trial judge directed the jury in accordance with the test of 'an operating cause and a substantial cause'
from *Smith*[14].

The fullest statement of the 'substantial cause' test is that found in *R.vs. Hallett*[15]. The Court observed "*The question to be asked is whether an act or a series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event*".

Reasonable foreseeability test
In contrast the „reasonable foreseeability" test is a *prospective* test. It involves adopting the position of the person who was alleged to have caused the result and then looking forward from
11 (1959) 2 All ER (courts Martial AC)
12 (1976) VR 523
13 *Supra* note 9
14 *ibid*
15 (1969) SASR 141 (Full Court

the conduct towards the result. The question is asked whether or not the conduct made the result a reasonably foreseeable consequence, in the sense that it was within the normal range ofexpected out comes. The concern is with the forseeability of the consequence which is an ingredient of the offence and not with the forseeability of the manner of its occurrence. The intermediate steps which led to the consequence therefore need not have been foreseeable.

The most widely used authority for the test of reasonable foreseeability is the English case of *R. vs. Roberts*[16]. A girl had been assaulted in a moving car and had injured herself when she jumped out. In upholding a conviction of assault occasioning actual bodily harm, the Court of Appeal laid down this test of causation:

Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as a consequence of what he was saying or doing? As it was put in the old cases, it has got to be shown to be his act, and if of course the victim does something so 'daft', in the words of the appellant in this case, or so unexpected, not that this particular assailant did not actually foresee it but that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of the assault, it is really occasioned by a voluntary act on the part of the victim which could not reasonably be foreseen and which breaks the chain of causation between the assault and the harm or injury.[17]

This statement captures the essence of the reasonable foreseeability' test as a device which can sometimes exclude the causation of surprising outcomes, no matter how substantial the contribution ay appear to have been in retrospect. As so often happens in causation cases, however, the authority of *Roberts*[18] is weakened by the failure to address alternative tests. There was no mention of the substantial cause' test in the judgment and no reference to the decision in *Smith*[19].

In *R. vs. Knutsen,*[20] a more direct link was made to general issues about causation. In that case a man had assaulted a woman and left her lying unconscious on a highway. She was then run over

16 (1971) 56 Cr App R 95
17 *Id.* per Stephenson L J at 102
18 *Supra* note 13
19 *Supra* note 9
20 (1963) Qd R 157 (CCA).

by a passing motorist. The original assailant was convicted of doing grievous bodily harm, not with reference to the injuries suffered in the assault but instead with reference to the injuries suffered from having been run over. The judges took the view that the assailant would have caused the victim"s injuries if they were a reasonably foreseeable consequence of his actions. The court, however, split over the application of this test to the facts of this case.

Novus Actus Interveniens

The concept of „*Novus Actus Interveniens*" is a Latin concept that basically mean „a new act intervening" and is thus considered to a defense from causal responsibility. This is because it basically revolves around the idea that the act of a third party will serve to intervene between the original act (or omission) and the damage that is produced as a result, unless that original act or omission is still considered to be the main contributing factor to the damage that results because the act of the third party had no impact upon the events as they unfolded. Under this doctrine, the attribution of causal responsibility to a later actor is held to relieve the earlier actor of causal responsibility. The causal chain from the earlier actor is broken by the intervention of a new act. This does not mean that the earlier actor obtains complete immunity from criminal liability.
There could be liability for an attempt, for a lesser harm or for dangerous Conduct.

As Cheshire demonstrates, not all events that occur after the defendant"s act will break the chain of causation. Circumstances will only break the chain of causation if they are:

(i) an overwhelming cause of death; and
(ii) an unforeseeable occurrence.

Intervening acts fall into three categories:

(i) The Victim"s Contribution
(ii) Third Party"s Inadvertent Contribution
(iii) Naturally occurring events.

The Victim's Contribution

The general rule of causation is that the defendant is liable for the foreseeable consequences of his actions. Therefore, the victim may break the chain of causation if his reaction to the defendant"s initial act is extreme and unforeseeable. The decision in *R vs. Dear*[21] effectively serves as a prime example of such case where a man, believing the victim had sexually interfered with his daughter, attacked the victim with a knife. The defendant then argued the chain of causation had been broken because the victim later committed suicide so it became necessary to determine whether the injuries inflicted by the defendant were a significant cause of or contribution to the victim"s death. It was held that, as to whether the resumption or continuation of that bleeding was delibera tely caused by the victim, the defendant"s conduct remained the most significant cause of death.

In *R vs. Roberts*[22], the defendant tried to assault the victim whilst she was a passenger in his car. She jumped from the moving vehicle and sustained serious injuries in the fall. The defendant denied causing these injuries but his conviction was upheld as it was foreseeable that the victim would attempt to escape and could be injured in doing so. The chain of causation will be broken only if the victim"s actions were „so daft" as to be unforeseeable. *Roberts*[23] case makes it clear that only extreme acts of the victim will break the chain of causation and relieve the defendant of liability. This must be considered in conjunction with the „thin- skull" rule[24]

. Thin-skull rule provides that a defendant is liable for the full extent of the victim"s injuries even if, due to some abnormality or pre-existing condition, the victim suffers greater harm as a result of the defendant"s actions than the „ordinary" victim would suffer. The thin-skull rule is an exception to the rule that the defendant is only liable for the foreseeable consequences of his actions. The leading case is *R. vs. Blaue*[25]. The defendant stabbed the victim, puncturing her lung. She refused a blood transfusion as it was contrary to her religious beliefs. The defendant was convicted of manslaughter even though the victim had refused treatment that would have saved her life. It was held that the *thin-skull* rule was not limited to physical conditions but included an individual"s psychological make-up and beliefs.

21 (1996) CLR 595
22 (1971) 56 Cr App R 95
23 ibid
24 The *'thin skull'* rule says that the defendant must take his victim as he finds him. Therefore, even if injury or death
is not reasonably foreseeable the law still considers the defendant liable if the victim suffered from some physical or
mental condition that made him or her vulnerable.
25 [1975] 1 WLR 1411

Third Party's Inadvertent Contribution

Third parties may intervene between the defendant"s act and the victim"s death in a number of ways. There may be a subsequent attack on the victim, or an unsuccessful attempt to assist the victim that worsens his condition or causes fresh injuries. In *R. vs. Smith*[26] the defendant stabbed his victim twice in a barrack room brawl. Another soldier carried him to the medical centre but dropped him twice. The medical captain was very busy and failed to recognise the extent of the injuries. If the soldier had received proper treatment, he would have had a good chance of a complete recovery. Smith was convicted of manslaughter because the wound was the "operating and substantial cause of death".

In *R. vs. Cheshire*[27], the victim was shot in the leg and stomach. In hospital, he suffered pneumonia and respiratory problems in intensive care so he had a tracheotomy. After two months, he died. There was some medical negligence because the tracheotomy had caused a thickening of tissue ultimately causing suffocation. In upholding the conviction for murder, Beldam LJ. laid down the following test:

Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the accused unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.

In *R. vs. Malcherek*[28], the victim was placed on a life support machine and, after determining that she was brain dead, the doctors turned off the machine. The defendant appealed the conviction of murder arguing that the doctors had broken the chain of causation by deliberately switching off the life support machine. It was held that the original wounds were the operating and substantial cause of death, and that a life support machine does no more than hold the effect of the injuries in suspension and when the machine is switched off, the original wounds continue to cause the

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26 (1959) 2 QB 35
27 (1991) 3 AER 670
28 (1981) 73 Cr. App. R. 173

death no matter how long the victim survives after the machine's disconnection. In *R. vs. Pagett*[29], to resist lawful arrest, the defendant held a girl in front of him as a shield and shot at armed policemen. The police instinctively fired back and killed the girl. The Court of Appeal held that the defendant's act caused the death and that the reasonable actions of a third party acting in self-defense could not be regarded as a *novus actus interveniens* because self-defense is a foreseeable consequence of his action and had not broken the chain of causation.

Naturally occurring events

Principles of foresee ability determine whether a naturally-occurring event will amount to an intervening act which breaks the chain of causation. Glanville Williams argues: *„At common law there is an important difference in respect of criminal causation between a human act and an event: the intervening act of a responsible person has an effect on imputable*
causation that an "act of God" has not."
According to a leading American writer, Perkins, if D knocks down P and leaves him unconscious on the floor of a building which collapses in a sudden earthquake and kills him, D is not guilty of homicide even if it is certain that P would not have been in the building if D had not knocked him down. But if D had struck P on the sea shore and left him unconscious in the path of the incoming tide, D would be responsible for P"s death by drowning.
In *R. vs. Hallett*[30] the defendant had attacked the victim on a beach rendering him unconscious. The defendant claimed that he had not drowned the victim, but left him unconscious in what he thought was a position of apparent safety with his ankles in a few inches of water. The forensic evidence suggested that the immediate cause of death was drowning in shallow water whilst unconscious. The defendant was convicted of murder. The question arose on appeal whether the jury could find that the defendant caused the death of the victim by leaving him on the beach with an incoming tide. The Supreme Court held that it was the defendant's original blow (rendering the victim unconscious) which originated the events which led to drowning. It could not be said that the actions of the sea on the deceased broke the chain of causation. The court approved old cases where it had been held that the ordinary operation of natural causes did not

29 (1983) 76 Cr. App. R. 279
30 [1969] SASR 141

prevent the death from being caused by the defendant. However, they did recognise, that in some cases the extraordinary operation of natural forces may be regarded as breaking the chain of causation. The Supreme Court in *Hallett*[31] approved that the test is whether, at the time of death, the original conduct is still an operating cause and a substantial cause.

31 ibid

RIGHT TO PRIVACY AND HUMAN RIGHTS JURISPRUDENCE

* Dr. Ramesh Kumar

Abstract

The quest for privacy is natural need of a man so as to establish individual boundaries and to restrict the entry of others in that area. Privacy is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about themselves is communicated to others. Privacy is a fundamental human right. It underpins human dignity and other values such as freedom of association and freedom of speech. The concept of human rights is as old as the ancient doctrine of natural rights founded on natural law. It must be recognized that human rights are not merely ideals or aspirations, nor are they some rights granted to us by the existence of particular set of laws. They are claims made by virtue of the fact that we are human beings with an inalienable right to human dignity.

Keywords : Dignity, Manifestation, Individualistic, autonomy, gregariousness, intelligible, aspirations

Privacy is a part of vocabulary of every society. It is a human value enshrined in human behavior. It preserves human autonomy under the umbrella of human dignity. The quest for privacy is natural need of a man so as to establish individual boundaries and to restrict the entry of others in that area. Privacy is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about themselves is communicated to others. Privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve. Privacy and gregariousness are both human instincts and relate to all the higher forms

* Dr. Ramesh Kumar, Associate Professor , JEMTEC School of Law, affiliated to GGSIP University, Delhi

of animal life[1]. An animal knows instinctively when to hunt with the pack and when to retire to a solitary lair to lick its wounds. One of the basicfeatures of animal life is the struggle to achieve a balance between privacyand participation. So it is with human beings. Gregariousness may be themore usual desire and privacy the less usual but when the feeling for privacycomes it can be very compelling. The desire for privacy is natural one andthe inclination to pursue it follows automatically. This has always been thecase, the more so in modern times when life has become increasingly morecomplicated, demanding and pressing, leading to a greater demand forwithdrawal and protection from the complications, demands and pressures.

Now it is recognized that the individual not only has a desire, but an absolute need for a shield of privacy behind which only he can retreat, and this need should be translated into a right, regulated though it may be by the law or custom of the time. Privacy is not an abstract concept. It has meaning only in relation to a national culture, a particular political system and a specificperiod of time. It has become an issue in modern democratic societies whichare characterized by large scale sophisticated bureaucratic structures and advanced technology in communications and information systems. Rather than solving problems, technology often simply converts them into new and different forms. The development of modem communications technology forces us once again to redraw the balance between individual privacy and society's need for information. The struggle between individual privacy and society's need for information is apparent in the clash between data privacy and law enforcement's need to gather evidence in criminal investigations.

Although no law inherently requires us to sacrifice privacy to developing technology, we certainly have less control over personal information than we once had. Either law and social convention have not advanced with technology or our societal commitment to privacy has diminished in the face of modern criminal enterprise, or both. Technological development has been

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1 S, Sivakumar, Right to Privacy, *The Academy Law Review*, Vol. 18 1&2 (1994) pp. 191-230 at
p.220.

permitted to evolve without regard for its impact on our democratic political-system. The demand that individual privacy be respected is becoming more common and more insistent in this age. This probably reflects a rapidly increasing need for privacy arising from converging ecological, cultural, technical and social changes. The population explosion together with modern urbanization, have made it much more difficult for the individual to get away physically and psychologically from the crowd of strangers around him. The growing allegiance to political individualism and moral autonomy have caused the individual to resent and resist legal regulation and social interference more intensely. As organizations have grown larger in size and more bureaucratic in structure, their tendency to invade the life of the individual has grown apace. Privacy is a fundamental human right. It underpins human dignity and other values such as freedom of association and freedom of speech[2]. It is recognized around the world in diverse regions and cultures. The right to privacy first found its way into national constitutions, legislations and domestic jurisprudence of different jurisdictions. Its recognition as a human right is only a post Second World War development.

Although it is presently solidly embedded in international human rights law, different and varied formulations of privacy provisions in human rights treaties tend to create confusion about the nature and scope of this right. Against this background an attempt will be made here to discuss and examine the nature and scope of the human right to privacy. In pursuit of this objective this topic first discusses and examines the concept of human rights.

The discussion then proceeds to provide an analysis of the privacy provisions of the international and regional human rights instruments and shows that this right imposes negative as well as positive obligations on states and furthermore these positive obligations are in respect of both „vertical relations" and „horizontal relations". The concept of human rights is as old as the ancient doctrine of natural rights founded on natural law[3]. It must be recognized that human rights are not merely ideals or aspirations, nor are

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2 S.D. Warren and L.D. Brandies, The Right of Privacy, 4 *Harvard Law Review* 193 (1890) at p.191

3 P.M. Bakshi, Privacy : A House of many Mansions, *SCC(J)* (1986) Vol. I pp. 14-17 at.p.14.

they some rights granted to us by the existence of particular set of laws. They are claims made by virtue of the fact that we are human beings with an inalienable right to human dignity. Human rights are derived directly or indirectly from the very nature of man. Thus, the only condition necessary for enjoying natural basic rights is to be a human being. The concept of human rights is very much the product of history and of human civilization and as such is subject to evolution and change. The concept has assumed importance globally during the past few decades and it has international significance in the contemporary international law and relations as a result of international human right movement of the past six decades. Although the internationalization of human rights issues is of recent origin which dates back to the UN President"s speech to the Congress in 1941 and the adoption of the U.N. Charter of San Francisco in 1945. Under the preamble to the Charter, the member states "reaffirmed faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small." Article 1 of the Charter enjoined the United Nations with the responsibility of promotion and encouragement of respect for human rights and fundamental freedoms for all without any distinction. In the early years of the UN there was considerable dispute about the nature and scope of obligation and the meaning of Human Rights and Fundamental freedoms. Because human rights were not clearly defined or specified in the UN Charter[4]. The modern privacy benchmark at an international level can be found in the 1948 Universal Declaration of Human Rights, which specifically protects territorial and communications privacy. British jurists, notably Sir Hersch Lauterpatch, played an important role in the drafting and adoption of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948 . Among the broad and ambiguous statements of principle in the Declaration, Article 12 provides: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. ... Everyone has the right to the protection of the law against such interference.

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4 Krotoszynski, Ronald J. Jr, "Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law, *Duke Law Journal*, Vol. 1990, No. 6. (Dec., 1990), pp. 1398-1454 at p.1416

Despite the Declaration's unanimous adoption, and despite subsequent resolutions calling upon States to 'fully and faithfully observe' its provision, its status as a norm of international law has long been doubted[5]. The Universal Declaration was not generally conceived as law but as "a common standard of achievement". But today most of the provisions of the Declaration have become binding rules of international law by way of customs or general principles of law recognized by civilized states or as authoritative interpretation of the provisions of the UN. Subsequently, numerous international human rights treaties specifically recognized privacy as a right. The provisions of the Universal Declaration of Human Rights were elaborated upon in the two Human Rights Covenants viz International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. Together with the Universal Declaration these covenants constitute the International Bill of Human Rights. The other important human rights treaties are the Convention on the Elimination of All Forms of Racial Discrimination 1965, the Convention on the Elimination of All Forms of Discrimination against Women 1979, the Torture Convention 1984 and the Convention on the Rights of the Child 1989 and The UN convention on Migrant Workers. On the Regional level, various treaties provide for a more effective system of human rights protection than the global counterparts. Convention for the protection of Human Rights and Fundamental Freedoms, American Convention on Human Rights, American Declaration of the Rights and Duties of Man set out the right to privacy in terms similar to the Universal Declaration of Human Rights[6].

RIGHT TO PRIVACY UNDER INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS: AN ANALYSIS

The right to privacy is one of the most important civil rights which is sine quo non for an individual to enjoy his or her individual autonomy. „Civil

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5 Dr. U.C. Chandra: *Human Rights*, 1st (ed) Allahabad, Allahabad Law Agency Publications , 1999 at p. 15

6 David Feldman: *Civil Liberties and Human Rights in England and Wales*, 2nd (ed.) Oxford, Oxford University Press, 2002, p. 299-324 at.p. 299

rights" in broader sense means those rights which are the outgrowth of civilization, which arises from the needs of civil as distinguished from barbaric communities. Civil rights are those rights which are related to the protection of right to life and personal liberty. Civil rights are the protections and privileges of personal liberty given to all citizens by law. Examples of civil rights and liberties include the right to get redress if injured by another, the right to privacy, the right of peaceful protest, the right to a fair investigation and trial if suspected of a crime, and more generally-based constitutional rights such as the right to vote, the right to personal liberty, the right to life, the right to freedom of movement, the right to business and profession, the right to freedom of speech and expression. As civilizations emerged and formalized through written constitutions, some of the more important civil rights were granted to citizens[7]. When those grants were later found inadequate, civil rights movements emerged as the vehicle for claiming more equal protection of law and equality before law for all citizens and advocating new laws to restrict the effect of discriminations. Some civil rights are granted in written constitution and some are implied by customs and courts decisions. They are essential for human beings, so that, they may live dignified lives. Emerging from the liberal individualistic political philosophy and the economic and social principle of laissez faire, the concept of civil rights visualizes human rights in a negative term (freedom from) not in a positive term (right to). In search of human dignity, it is in the favour of state"s abstention, rather than state"s intervention. No one shall be subjected to arbitrary interference with the privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks[8]. The Right to privacy protects one"s identity, integrity and intimacy identity includes one"s name, gender, appearance, feelings, honour and reputation and so on[9]. The

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7 David.A Ambrose, Development of Right to Privacy as a Constitutional Right in India, *The Academy Law Review*, 1997, Vol. 21:1&2 pp.195-207 at p.195

8 Article 12 of UDHR

9 Article 17 of the International Covenant on Civil and Political Rights (ICCPR, 1966).

European Court and Commission of Human Rights have repeatedly stated that privacy consists of the right to establish and develop emotional and sexual relationships with other human beings, as necessary for the development and fulfillment of one"s personality. This view has also been reaffirmed by the Human Rights Committee. Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others[10]. Everyone has the right to have his honour respected and his dignity recognized. No one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence or of unlawful attacks on his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks[11]. Everyone has the right to respect for private life in relation to information about his or her health. Everyone is entitled to know any information collected about his or her health. However, the wishes of the individuals not to be so informed shall be observed. In exceptional cases, restrictions may be placed by law on the exercise of the rights contained in paragraph 2 in the interest of the patient.[12] The right to privacy has become a fundamental human right, solidly embedded in International Human Rights law as well as in national Constitutions, legislations and jurisprudence of different countries.Intrusions on privacy are baneful because they interfere with an individual in his disposition of what belongs to him. The "social space" around an individual, the recollection of his past, his conversation, his body and its image, all belong to him. He does not acquire them through

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10 Article 8 of The European Convention on Human Rights and Fundamental Freedoms 1950

11 Article 11 of The American Convention on Human Rights 1969

12 Article 10 of The European Convention on Human Rights and Biomedicine 1997

purchase or inheritance. He possesses them and is entitled to possess them by virtue of the charisma which is inherent in his existence as an individual soul-as we say nowadays, in his individuality-and which is inherent in his membership in the civil community. They belong to him by virtue of his humanity and civility. A society that claims to be both humane and civil is committed to their respect. When its practice departs from that respect, it also departs to that degree from humanity and civility.

UN Convention on Rights of Persons with Disabilities-An Overview

*Dr. Rumi Ahmed

Abstract:

The UNCRPD is the first human rights Convention which makes a significant paradigm shift towards the social model of disability and at the same time recognize disability as human rights issues. The international treaty was adopted unanimously by the UN General Assembly in 2006. India is also one of the signatory to the Convention. The Convention sets out the legal obligations on States to promote and protect the rights of persons with disabilities. It has brought all the existing human rights of persons with disabilities under one roof. The main focus areas of social-human rights model are capability and inclusion by lifting the environmental and attitudinal barriers that prevent persons with disabilities from full inclusion and equal participation in all aspects of community life. UNCRPD elaborates for the first time in a legally binding international human rights convention the concept of reasonable accommodation, explicitly linking it to the realization of all human rights – civil, political, economic, social, cultural – and embedding it within the non-discrimination mandate. The main purpose of this paper is to understand the universal mandate of nature of rights of persons with disabilities and obligations of state to have an inclusive society.

Key words: Human right, Disability, Obligation, Accessibility, Inclusion

Introduction

The UN Convention on the Rights of Persons with Disabilities (hereinafter UNCRPD) was adopted unanimously by the UN General Assembly in its resolution 61/106 of 13 December 2006. The Convention was opened for signature on 30th March 2007; and a record eighty-one states and the European Union signed the CRPD and forty-four states signed the Optional Protocol at its opening ceremony on 30th March 2007 itself.[1]The Convention entered into force on May 2008 following the requisite deposit of the twentieth instrument of ratification. The UNCRPD is the most rapidly negotiated treaty of its type in the history of international law[2] and was drafted[3] with unprecedented speed and the ratification has also taken place more quickly than anyone could have predicted, showing a high level of commitment from both governments and the civil society organizations.[4]As on 7th May 2016,

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* Assistant Professor,JEMTEC School of Law(Affiliated to GGSIP University), Greater Noida.

1 [Rosemary Kayess and Phillip French, "Out of Darkness into Light?: Introducing the Convention on the Rights of Persons with Disabilities", 8(1) *Human Rights Law Review* 2 (2008)

2 Katherine Guernsey, Marco Nicoli and Alberto Ninio, *Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the World Bank*, 2 (The World Bank, S P Discussion Paper No. 0712, June 2007), available at: http://siteresources.world bank.org/ SOCIALPROTECTION/Resources/SP-Discussionpapers/ Disability-DP/0712.pdf (visited on March 21, 2011)

3 [Id., p. 1]

4 Hassan M. Yousif and Diana Shaw (eds.), *UN Convention on the Rights of Persons with Disabilities: A Call for Action on Poverty, Discrimination and Lack of Access*, Report of a Joint Conference organized by Leonard Cheshire Disability and United Nations Economic Commission for Africa, held at UN Conference Center, Addis Ababa, Ethiopia, 20 –22 May 2008, p. 1, available at: http://www.lcdsouthasia.org/callforaction/LCDUNECAConference ReportFinal.pdf (visited on August 27, 2012)

163 countries (including regional integration organizations) have ratified the Convention, 88 have ratified its Optional Protocol; and 160 and 92 countries (including regional integration organizations) have signed the Convention and the Optional Protocol respectively.[5]

The UNCRPD is the first human rights Convention adopted in the twenty-first century. The Convention sets out the legal obligations on States to promote and protect the rights of persons with disabilities. It does not create new rights; but gives some clear guidelines and rules and regulation for effective implementation and monitoring of the already existing human rights of the disabled people.[6] It has brought all the existing human rights of persons with disabilities under the one roof. Although persons with disabilities have always been entitled to the same rights as everyone else, it is the first time that their rights are set out comprehensively in a legally binding international instrument.[7]

The Convention makes a significant paradigm shift considering the fact that it recognized the social model of disability[8] and at the same time recognize disability as human rights issues. In fact, the Convention enshrines the social and human rights model of disability.[9] The Convention shifts away from a medical-social welfare model of disability that fixates on *inability* and sorting of impairment as a way to "parallel track" difference and socially justify exceptions to universally-held human rights; and embraces instead a social-human rights model that focuses on *capability* and *inclusion*: on lifting the environmental and attitudinal barriers that prevent persons with disabilities from full inclusion and equal participation in all aspects of community life.[10]

Another significant paradigm shifts ushered into by the Disability Convention is that it represents an historic break from a state-centric model of treaty negotiation, in which instruments are negotiated behind closed doors, away from the very people they are intended to benefit. It moves instead toward a participatory approach that takes the views and lived experience of the affected, i.e. the participation of the disabled people and organizations of/for disabled people. Rather than resigning persons with disabilities to institutionalized living arrangements, segregated education, sheltered employment and qualified income support, it refocuses the lens of domestic social policy on the societal barriers that prevent persons with disabilities from full and effective participation and inclusion in all aspects of

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5 https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/latestdevelopments. html

6 In fact, the adoption of the Convention became imminent considering the fact that the United Nations treaty bodies and civil society had not used existing human rights instruments and monitoring mechanisms to their full potential to protect and promote the rights of persons with disabilities.

7 Office of the High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors – Professional Training Series No. 17*, 7 (United Nations: New York and Geneva, 2010), available at: http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf (visited on March 21, 2011)

8 The social model of disability distinguishes between impairment and disability. According to it, impairment is a malfunction of the body, mind, etc, whereas a disability is a restriction in activities of a person with an impairment resulting from society"s failures to socially include persons with disabilities.

9 Office of the High Commissioner for Human Rights, *supra note* 7, p. 13

10 Tara J. Melish, "*The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*", March 2007, p. 1-2, available at: http://ssrn.com/abstract= 997141 (visited on November 17, 2010)

community life, including employment, education, housing, health, political participation, access to justice, cultural expression, entertainment and leisure.[11]

UNCRPD elaborates for the first time in a legally binding international human rights convention the concept of reasonable accommodation, explicitly linking it to the realization of allhuman rights – civil, political, economic, social, cultural – and embedding it within the non-discrimination mandate.[12] It is the first universal human rights treaty to impose explicitly an obligation on the state to "take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise."[13] In addition, State parties are to "Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities." It urges private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities."

Although pre-existing human rights conventions offer considerable potential to promote and protect the rights of persons with disabilities, this potential was not being tapped. Persons with disabilities continued being denied their human rights and were kept on the margins of society in all parts of the world. The Convention sets out the legal obligations on States to promote and protect the rights of persons with disabilities. The Convention does not create new rights; but it represents a major legal and policy advance. It represents a strong affirmation at the international level of the rights of persons with disabilities, and underlines the change in thinking that has taken place from charity-based models to a rights-based framework grounded in a social model of disability.

The entry into force of the Convention on the Rights of Persons with Disabilities and its Optional Protocol marked the beginning of a new era in the efforts "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity".In order to ensure an environment conducive to the fulfillment of the rights of persons with disabilities, the Convention also includes Articles on awareness-raising, accessibility, situations of risk and humanitarian emergencies, access to justice, personal mobility, habilitation and rehabilitation, as well as statistics and data collection.[14] The Convention emphasizes the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable human development.

Overview of the UN Convention

The Convention on the Rights of Persons with Disabilities marks the end of a long struggle by persons with disabilities and their representative organizations to have disability fully

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11 Id., p. 8-9

12[Janet E. Lord and Rebecca Brown, "*The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities*", 2010, p.
6, available at: http://papers.ssrn.com/ sol3/papers.cfm?abstract id=1618903 (visited on August 21, 2012)]

13FrédéricMégret, "*The Disabilities Convention: Towards a Holistic Concept of Rights*", p. 13, available at:
http://ssrn.com/abstract=1267726 (visited on September 23, 2011)

14 Office of the High Commissioner for Human Rights, *supra note* 7, p. 24

recognized as a human rights issue. It is a wide ranging human rights treaty covering the full spectrum of civil, cultural, economic, political and social rights. As mentioned earlier, the Convention does not establish new rights for persons with disabilities; instead, it elaborates on what existing human rights mean for persons with disabilities and clarifies the obligations of States parties to protect and promote these rights.[15] In order to ensure an environment conducive to the fulfilment of the rights of persons with disabilities, the Convention also includes articles on awareness-raising, accessibility, situations of risk and humanitarian emergencies, access to justice, personal mobility, habilitation and rehabilitation, as well as statistics and data collection.[16]

The rapid drafting of the Convention was in fact necessitates by the fact of growing number of disabled people all over the world, particularly in the case of developing countries.[17] The Convention emphasizes the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable human development. The purpose of the Convention (Article 1) is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. The Convention marks a „paradigm shift" in attitudes and approaches to persons with disabilities. Persons with disabilities are not viewed as "objects" of charity, medical treatment and social protection; rather as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society. The Convention gives universal recognition to the dignity of persons with disabilities.

The Convention does not explicitly define disability under Article 2 on Definitions; however, Article 1, on Purpose, states that "Persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". The non-definition of disability was in fact intended to understand disability in a broader perspective. For the Convention, disability is an evolving concept. The Preamble (e) says "Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others". Article 3 of the Convention identifies a set of overarching and foundational principles. These guide the interpretation and implementation of the entire Convention, cutting across all issues. They are the starting point for understanding and interpreting the rights of persons with disabilities, providing benchmarks against which each right is measured.

The principles on which the Convention is based are:
1. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons with disabilities
2. Non-discrimination
3. Full and effective participation and inclusion in society
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
5. Equality of opportunity
6. Accessibility
7. Equality between men and women

15Office of the High Commissioner for Human Rights, *supra note* 7, p. 24
16Id.
17 An estimated 10 percent of the population of the world were reported to have some form of disabilities when the serious thinking was going on for a global treaty on disability.

8. Respect for the evolving capacities of children with disabilities and respect for the right ofchildren with disabilities to preserve their identities

The Disability Convention consists of a Preamble and 50 Articles, including four initial Articles on purpose, definitions, general principles, and general obligations; twenty-six Articles on substantive rights provisions covering the full range of civil, cultural, economic, political and social rights from disability perspective; ten Articles on national and international monitoring and supervision; and ten final provisions. Articles 4 and 5 of the UNCRPD contain the overarching general obligations requiring the adoption of legislative measures: According to Article 4 (1), States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake: (a) To adopt all appropriate *legislative*, administrative and other measures for the implementation of the rights recognized in the present Convention; (b) To take all appropriate measures, *including legislation*, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

Article 4 also requires State Parties: to engage in the research and development of accessible goods, services and technology for persons with disabilities and to encourage others to undertake such research; to provide accessible information about assistive technology to persons with disabilities; to promote professional and staff training on the Convention rights for those working with persons with disabilities; to consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes concerning the rights under UNCRPD. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law (Art. 5(1)).

In addition, States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities *equal and effective legal protection against discrimination* on all grounds (Art. 5(2)). Article 2(d) requires a State party "[t]o refrain from engaging in any act or practice that is inconsistent with the [...] Convention and to ensure that public authorities and institutions act in conformity" it and "[t]o take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise. Article 2(3) requires a State party to "closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations...[i]n the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities".

Articles 10 to 23 and Article 29 of UNCRPD set forth civil and political rights, including right to life; right to be protected in situations of risk; right to equal recognition before the law and access to justice; right to liberty of the person, including liberty of movement and nationality and freedom from torture or degrading punishments; right to integrity of the person and the right to be free of exploitation, violence and abuse; right to live independently and to be part of the community and to have personal mobility; right to freedom of expression and to access to information; right to privacy the right to marry and to found a family; and the right to participate in political and public life. Article 12 guarantee that persons with disabilities have the rights to recognition as persons before the law (Article 12(1)) and to enjoy legal capacity on an equal basis with others (Article 12(2)), and the requirement that

any measures relating to the exercise of legal capacity are subject to review by a competent, independent and impartial authority or judicial body (Article 12(4)).

Article 15(2) requires States parties to take "all effective legislative" and other measures to ensure persons with disabilities are not subject to torture or other forms of cruel, inhuman or degrading treatment. Article 16(1) requires States parties to take "all appropriate legislative" easures to protect persons with disabilities from exploitation, violence and abuse, while Article 16(4) requires the States parties to put in place "effective legislation and policies, including women- and child-focused legislation" to ensure the proper identification, investigation and prosecution of exploitation, violence and abuse against persons with disabilities.
Article 22(1) stipulates that persons with disabilities „have the right to protection of the law against... interferences or attacks" on their "privacy, family, home, or correspondence or other types of communication or... unlawful attacks on [their] honour or reputation." Articles
24 to 28 and article 30 of the UNCRPD set forth the following economic and social rights: right to education; right to the same health care as others, and also to habilitation and to rehabilitation; right to work on an equal basis with others; right to an adequate standard of living; and the right to recreation and to participate in cultural and sporting life.
Article 27(1) requires States parties to safeguard and promote the right to work "by taking appropriate steps, including through legislation" to prohibit discrimination on the basis of disability in relation to employment and to protect the rights of persons with disabilities to just and favourable conditions of work "including protection from harassment and the redress
of grievances" (Article 27(2). The Convention places special attention to Women with disabilities and Children with disabilities (Arts. 6, 7, 16) considering greater discrimination and vulnerability being faced by these groups of disabled people. Besides, the Convention gives emphasis on Awareness raising to educate the public about the rights and dignity of persons with disabilities, as well as their achievements and skills (Art. 8) and help them combat stereotypes, prejudice and activities that might cause harm to people with disabilities. It makes possible for people with disabilities to live independently and to participate in their communities.
Article 9 deals with accessability which is a crucial matter for persons with disabilities. It requires states parties to take measures to enable persons with disabilities to access the physical environment, to have access to buildings and to transport. It also means that people should have access to guides, readers, or sign language interpreters while in public places. The Convention recognizes reproductive rights and is the first universal human rights treaty that mentions sexual and reproductive health (Article 23). Articles 31-40 set forth the monitoring and implementation mechanisms for the UNCRPD. Article 31 of the CRPD deals with the collection of statistics and data, while Article 32
exhorts states parties to engage in international cooperation through aid programs to assist persons with disabilities. Articles 33, 34, 35 and 36 make provisions for national monitoring, the CRPD Committee and periodic reporting by states parties. Article 46 permits reservations by state parties.[18] However, it does not permit reservations incompatible with the object and purpose of the present Convention.

18 When ratifying conventions, states parties may make reservations and/or interpretive declarations. A reservation is a statement by the ratifying country that it will not regard itself as bound by an article, a paragraph or a sentence of the convention. It is also possible for ratifying states to make interpretive declarations. Such declarations simply state the way the country will interpret an article or a paragraph of a convention. In other words, the ratifying country agrees to be bound by the relevant provision, but signals how it will interpret that provision. The manner in which reservations and interpretive declarations are made by states parties varies and it is often difficult to discern the exact difference between a reservation and an interpretive declaration.

In brief, the Convention moves beyond the question of access to the physical environment, to broader issues of equality and elimination of legal and social barriers to participation, social opportunities, health, education, employment and personal development. In order to ensure an environment conducive to the fulfillment of the rights of persons with disabilities, the Convention includes Articles on awareness-raising, accessibility, situations of risk and humanitarian emergencies, access to justice, personal mobility, habilitation and rehabilitation, as well as statistics and data collection.CRPD sets forth other thematic Articles of general application to be horizontally integrated across the CRPD. Among these essential building blocks of any national-level law and policy framework are specific Articles on the rights of women with disabilities and children with disabilities.

Article 8 targets the underlying attitudes causing disability-based discrimination by requiring States Parties to raise public awareness, and provides a list of illustrative measures. Article 9 seeks to dismantle barriers erected because of discriminatory attitudes by promoting physical, technological, information, communication, economic, and social accessibility in the public and private sectors. The inclusion of a general principles article is an innovation that will guide both the interpretation of the entire text of the treaty by its treaty-monitoring body and the development of national law and policy. Given that effective national level law reform likely will not (and should not) manifest in a template approach, the general principles assume special significance. General principles should also serve as a filter through which discrete pieces of existing law should be run to assess conformity with the object and purpose of the CRPD.

The Convention is the first universal human rights treaty to impose explicitly an obligation on the state to "take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise" (Article 4). Article 19 imposes a general obligation on Parties to enable persons with disabilities to live independently and to participate fully in all aspects of life. It requires Parties to ensure that persons with disabilities are able to live in the community with accommodation options equal to others, and that these options support the inclusion and participation of persons with disabilities in community life.

The Convention also contains a number of innovations, including (i) Right of accessibility (Article 9), which covers a wide-ranging right to ensure equal access "to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas"; (ii) Specific provision to ensure "the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters" (Article 11); (iii) Right of living independently and to be included in the community (Article 19); (iv) Right to personal mobility (Article 20); (v) Freedom of expression (Article 21), which recognizes right of persons with disabilities to communicate "through all forms of communication of their choice"; whereby "communication" has broadly been defined in article 2 to include: "languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and

augmentative and alternative modes, means and formats of communication, including accessible information and communication technology."

The Convention makes it an obligation on the part of the State to provide information to persons with disabilities in accessible formats, to accept and facilitate the use of sign languages etc. in official interactions, and to urge private entities to provide information and services in accessible and usable formats. It urges States parties to take appropriate measures to recognize and promote the use of sign languages. Some other important innovations of the Convention include a specific and detailed provision on international cooperation (Article 32); a specific provision on national implementation and monitoring (Article 33); and participation of civil society, in particular persons with disabilities and their representative organizations in monitoring the implementation of the Convention.

The Convention on the Rights of Persons with Disabilities is the first treaty that contains specific requirements for its national implementation and monitoring (Article 33). As part of its effective implementation at the national level and for placing responsibility with governments, the Convention requires States to designate one or more focal points with responsibility for the implementation of the Convention within government and to consider the establishment of a coordination mechanism. The Convention requires that civil societies working for the persons with disabilities and persons with disabilities and their representative organizations will be involved in the implementation and monitoring process (Article 33(3)). It requests States to "give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels" (Article 33(1)).

Coordinating committees usually include representatives from various ministries and organizations of persons with disabilities, and also other civil society organizations, the private sector and trade unions. Their mandate often focuses on policy development, promotion of dialogue in the disability field, awareness-raising and similar functions. Often these committees have a staffed secretariat, which is housed in the relevant ministry of government.

The Convention on the Rights of Persons with Disabilities and its Optional Protocol are serviced by a joint Secretariat, consisting of staff of both the United Nations Department of Economic and Social Affairs (DESA), based in New York, and the Office of the High Commissioner for Human Rights (OHCHR) in Geneva.DESA services the Conference of States Parties to the Convention that convenes in New York and OHCHR services the Committee on the Rights of Persons with Disabilities that meets in Geneva.In New York, the Secretariat for the Convention on the Rights of Persons with Disabilities is housed in DESA"sDivision for Social Policy and Development.

The objectives of the Secretariat at DESA are: (i) to support the full and effective participation of persons with disabilities in social life and development; (ii) to advance the rights and protect the dignity of persons with disabilities and; (iii) to promote equal access to employment, education, information, goods and services. The Secretariat prepares publications and acts as a clearinghouse for information on disability issues; promotes national, regional and international programmes and activities; provides support to governments and civil society; and gives substantial support to technical co-operation projects and activities.

The Convention on the Rights of Persons with Disabilities provides for monitoring of the implementation of the Convention both at the international and national level. Article 34 of the Convention provides for monitoring at the international level. States and regional integration organizations which are parties to the Convention commit to periodically reporting on measures taken to give effect to their obligations under the Convention and on the progress made in this regard. Article 35(1) says that each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee on the Rights of Persons with Disabilities so requests (Article 35(2)). Subsequent reports need not repeat information provided in the first report.

States are invited to consider preparing the reports through an open and transparent process, giving due consideration to close consultation with persons with disabilities and their representative organizations. These reports so submitted are examined by an international committee of independent experts, namely the Committee on the Rights of Persons with Disabilities.[19] This Committee has the mandate to consider the reports of parties to the Convention and make suggestions and recommendations to the parties for strengthening implementation of the Convention. The Committee may issue authoritative statements, known as general comments, to clarify specific provisions in the Convention or specific issues arising in the implementation of the Convention.[20]

Further, the Optional Protocol to the Convention establishes two additional procedures – an individual communications procedure and an inquiry procedure. According to the individual communications procedure, a State party to the protocol recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction claiming a violation by that State of any of the provisions in the Convention. The Committee assess whether the communication is admissible, including whether the petitioner has exhausted domestic remedies prior to considering the merits of the communication. The Committee, after examination of the admissibility and merits of the communication, may transmit its suggestions and recommendations to the State party and the petitioner. The Committee may present its views after considering the complaint in the light of the comments from the State concerned. The Optional Protocol also provides the Committee with an opportunity to undertake inquiries in States parties if it receives reliable information indicating grave or systematic violations of the Convention.[21]

The Committee on the Rights of Persons with Disabilities has to report every two years to the General Assembly and to the Economic and Social Council on its activities. In those reports, the Committee may make suggestions and general recommendations based on reports and information from States parties. To foment effective implementation of the CRPD, including international cooperation, the Committee is authorized to consult with "other relevant bodies

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19 Article 36(1) of the CRPD gives power to the Committee to examine the reports from states parties and empowers it to make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned.
20 Office of the High Commissioner for Human Rights, *supra note* 7, p. 31
21Id.

instituted by international human rights treaties." (38(b)) The Committee is also encouraged to cooperate with United Nations specialized agencies and other organs (Art. 38). These in turn are "entitled to be represented" during CRPD implementation (38(a)), which would include not only the reporting process but also Conferences of States Parties; moreover, they may be invited by the Committee to share technical assistance and to submit reports. Such bodies are a potentially important resource for the Committee to tap into in order to effectively fulfill its mandate.

As mentioned above, at the national level, Article 33 of the Convention requires States parties to put in place a structure tasked with implementing and monitoring the Convention. The implementation and monitoring functions are conceptually separated and the responsibility is assigned to distinct entities. Article 33 (1) emphasizes domestic implementation, placing responsibility with governmentsto designate one or more focal points with responsibility for the implementation of the Convention within government and to consider the establishment of a coordination mechanism.Article 33 (2) requires States parties to have or put in place a framework to protect, promote and monitor the implementation of the Convention. This necessarily entails the establishment of afunctional and independent national institution whose basic principle is to promote and protecthuman rights (generally referred to as Paris Principles[22]).

The Convention specifies that when designating or establishing the independent mechanism/s to be included in the framework, States shall take into account the Paris Principles. Article 33 does not prescribe a unique organizational form for the national monitoring framework and States parties are free to determine the appropriate structure according to their political and organizational context. Options can range from the attribution of the monitoring function to a single entity, i.e. one independent mechanism; a framework consisting of more than one independent mechanism; or a framework consisting of various entities, amongst which one or more independent mechanisms are included.

Entities that have been considered as possible components of the monitoring framework include legislative committees, national human rights institutions, organizations of persons with disabilities, parliamentary ombudsmen, national disability councils, government agencies delivering disability-related services, government agencies for disability policy coordination, and others. While allowing States to consider their legal and administrative specificities in the establishment of such frameworks, Article 33(2) harnesses government accountability by requiring the presence of independent entities in the framework. The Paris Principles provide important guidance to identify the characteristics the monitoring framework should overall possess.

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22. The Paris Principles are standards of independence and accountability set out by United Nations for National Human Rights Institutions and enforced through accreditation by the International Coordinating Committee of National Human Rights Institutions. These Principles relates to the Status of National Institutions for the Promotion and Protection of Human Rights. The Paris Principles adopted by UN General Assembly resolution 48/134 give national human rights institutions (NHRIs) an explicit mandate to promote, protect and monitor human rights. The Principles indicate that NHRIs may have a role that is a combination of promotion (which includes education, awareness-raising, encouraging further and better implementation of the convention), *protection* (assisting with cases, taking cases, engaging in strategic litigation) and *monitoring* (reflecting periodically on domestic implementation and commenting on or proposing legislation) that best fits local circumstances. [Gianni Magazzeni, "*The Notion of Independence in Article 33 and the Paris Principles on National Human Rights Institutions", National Implementation and Monitoring Structures: The Content and Rationale of Article 33*, Monday 26 October 2009, available at: *www2.ohchr.org/english/issues/disability/docs/sisi.doc (visited on August 27, 2012)*]

Article 33(2) requires that the framework shall include at least one independent mechanism that functions on the basis of the Paris Principles. The Paris Principles identify the following four main characteristics which should apply to the independent mechanisms under Article 33 of the Convention and should be considered to apply to the overall framework[23]:

- Competence and responsibilities: national human rights institution, and, in the context of Article 33, the independent mechanism established under the Convention, shall be given as broad a mandate as possible which shall be clearly set forth in a constitutional or legislative text. Responsibilities shall include: reporting to the Government on human rights matters; harmonization of national legislation, regulations and practices with international human rights standards; encouraging ratification of international human rights instruments; contributing to report of State to United Nations treaty bodies and committees; cooperating with international, regional and other national human rights institutions; assisting in human rights education; and publicizing and promoting human rights;
- Composition, independence and pluralism: independence is guaranteed through the means of: composition, which should ensure the pluralist representation of social forces in the country; sufficient funding and infrastructure, not to be subject to financial control by government; and appointment by official act, establishing the mandate;
- Methods of operation: the Principles require that a national human rights institution, and the independent framework in Article 33, shall freely consider any questions falling within its/their competence from whatever source it/they see/s fit. There is also a reference to maintaining consultation with the other bodies responsible for human rights issues and with nongovernmental organizations;
- The fourth characteristic concerns the status of institutions with quasi-judicial competences, which are authorized to hear and consider complaints and petitions. In the exercise of these functions, institutions can conciliate or issue binding decisions, hear any complaints or petitions or transmit them, inform the party of remedies available and promote access to them.

To conclude, the Convention on the Rights of Persons with Disabilities is the first human rights convention that includes an explicit role for national human rights institutions in promoting, protecting and monitoring implementation of a treaty at national level. However, only a few States have taken formal steps to designate their national human rights institutions as the independent mechanism of the framework. Designation of a national human rights institution as the independent mechanism requires internal structural changes, and additional financial and human resources. To quote Marianne Schulze, "It is frequently a challenge to secure adequate independence for national institutions. It is not just a matter of stating in legislation that the mechanism is "independent," i.e. securing independence *de jure*. The body has to have *de facto* independence. Its position within public structures has to be maintained separately, preferably by being responsible only to the Parliament. Equally, the funding of the independent mechanism has to be set up in such a way that there is no interference with the amount and its payment from third parties. Clearly, the aim is that the responsibilities of the independent mechanism be an integral part of the national human rights institution. It is not advisable to create a separate institution, as this would only perpetuate the notion of a different standard for persons with disabilities."[24]

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23. Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, "*Thematic Study by the Office of the United Nations High Commissioner for Human Rights on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities*", 2009, available at: http://www.ohchr.org/EN/Issues/Disability/Pages/ThematicStudies.aspx (visited on October 27, 2012)

24. Marianne Schulze, *A Handbook on the Human Rights of Persons with Disabilities: Understanding the UN Convention on the Rights of Persons with Disabilities*, 177 (Handicap International, July 2010)

The UN Convention on Disability represents a paradigm shift in attitudes that moves from a perception of persons with disabilities as objects of charity, medical treatment and social protection to subjects of rights, able to claim those rights as active members of society. According to FrédéricMégret, "the Disabilities Convention is about more than simply the status of persons with disabilities. It also speaks, more generally, to the larger project of which it is a part, human rights."[25]The Convention affirms that persons with disabilities hold civil, cultural, economic, political and social rights, are entitled to full protection against discrimination and by establishing monitoring mechanisms at the national and international levels to ensure that persons with disabilities are able to enforce those rights. The Convention has many other advantages.

Before the starting of the debate on and actual adoption of the Disability Convention, disability was only an invisible element of international human rights law.[26]The Disability Convention however cannot be claimed to have addressed all the problems of the persons with disabilities. Some disability rights issues still remain untouched or undeveloped in international human rights law.[27] Nevertheless, the Disability Convention provides accepted global legal standards on disability rights; clarifies the content of human rights principles and their application to the situation of persons with disabilities; provides an authoritative and global reference point for domestic laws and policies; provides effective mechanisms for monitoring, including supervision by a body of experts and reporting on implementation by governments and NGOs; provides a standard of assessment and achievement; and establishes a framework for international cooperation.

Although the Convention was not intended to introduce any new human rights, it contains a number of innovations – such as right of accessibility (Article 9), which inter-alia include a wide-ranging right to ensure equal access "to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas"; specific provision to ensure "the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters" (Article 11); right of living independently and to be included in the community (Article 19); right to personal mobility (Article 20), recognition of right of persons with disabilities to communicate "through all forms of communication of their choice"; "communication" is broadly defined in Article 2 to include: "languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology". According to Paul Harpur[28], "CRPD does not merely restateexisting human rights. The CRPD re-states existing rights and then creates incidental rights to ensure that existing rights are realized. Through this process existing rights are provided greater clarity, which provides disability advocates and scholars with a powerful tool to hold states accountable."[29]

25FrédéricMégret, *supra note* 13, p. 16
26 Rosemary Kayess and Phillip French, *supra note* 1, p. 12
27Id., p. 34
28 Paul Harpur, "Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities", 27(1) *Disability & Society* 2 (2012)
29 Despite what might be characterised as the „official fiction" that the CRPD does not set down any new human rights, it would seem clear that it has, in fact, modified, transformed and added to traditional human rights concepts in key respects. The CRPD does contain entirely new or amplified formulations of human rights,

Despite its innovative approach and the provisions for effective implementation and monitoring mechanisms, the Disability Convention is not the final step in the development of disability rights law as it still lacks an effective enforcement mechanism.[30] The Convention is only a signpost for nations and regional organizations to look up to and use as an impetus to develop their own stronger and enforceable disability discrimination laws.[31]For the effective implementation of the Convention, it might be advisable to adopt a two-pronged approach and appoint focal points at the level of each or most governmental departments/ministries as well as designate one overall focal point within government responsible for the implementation of the Convention. Designated focal points could be created at the local, regional and national/ federal level. Government agencies responsible for the implementation of the Convention need to be provided with effective institutional arrangements and adequate resources for effective functioning of the focal point system and coordination structure.

Although monitoring and reporting mechanisms are critical and a core part of the implementation measures of the CRPD, the Convention clearly envisages a broader human rights practice that extends beyond monitoring and reporting on violations or top-down lawreform efforts.[32]Legal reforms alone may not be enough to bring about social change. An empowered population that is willing to take action and advocate is necessary to guarantee the human rights and fundamental freedoms of persons with disabilities and influence social change.[33] UNCRPD does, however, provide persons with disabilities an impetus for social change and opportunities to develop increased empowerment.[34] It offers a transformative vision for fostering change at the domestic level.

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including a number of collective or social group rights [Rosemary Kayess and Phillip French, *supra note* 1, p.32]

30 Charles F. Szymanski, "The Globalization of Disability Rights Law – From the Americans with Disabilities Act to the UN Convention on the Rights of Persons with Disabilities", 2(1) *Baltic Journal of Law & Politics* 31 (2009), available at: www.degruyter.com/dg/viewarticle... /contentUri?t:ac...2009... (visited on September 18, 2012); Despite the CRPD"s extensive exposition of disability rights, some crucial areas, including bioethics and compulsory treatment, are barely grazed by the CRPD text. The CRPD is therefore a crucial buttress and facilitator of a disability rights agenda, but it is not a proxy for that agenda. Some disability rights issues still remain untouched or undeveloped in international human rights law. [Rosemary Kayess and Phillip French,*supra note* 1, p. 34]

31Id.

32Janet E. Lord and Michael Ashley Stein, "The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities", William & Mary Law School Research Paper No. 09-37, 83 *Washington Law Review* 456-7 (2008), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551945 (visited on March 21, 2011)

33 Valerie L. Karr, "A Life of Quality: Informing the UN Convention on the Rights of Persons With
Disabilities", 22(2) *Journal of Disability Policy Studies* 67 (2011)

34Id.

Subramanian Swamy v. *Union of India* – A Comment

Sridip S. Nambiar*

Introduction

"*This batch of writ petitions preferred under Article 32 of the Constitution of India exposits cavil in its quintessential conceptuality and percipient discord between venerated and exalted right of freedom of speech and expression of an individual, exploring manifold and multilayered, limitless, unbounded and unfettered spectrums, and the controls, restrictions and constrictions, under the assumed power of "reasonableness" ingrained in the statutory provisions relating to criminal law to reviver and uphold one's reputation.*"

This is the opening paragraph of the Supreme Court of India"s judgment in *Subramanian Swami* v. *Union of India*.The unnecessary use of „obscurely colourful language" in the judgment has been highlighted and ridiculed elsewhere.[1]Undoubtedly, such use of language has implications on discussions regarding access to justice. Laws and judgments should ensure that language used is accessible to the intended beneficiaries. The plain language movement has this as its precise objective.[2] However, this note intends to comment only on the rationale of the decision.

The writ petition (group of writ petitions and transfer petitions filed in 2014) challenged the constitutionality of section 499 of Indian Penal Code which defines the offence of criminal defamation.The case was heard by DipakMisra and Prafulla Pant, JJ and judgment was given by the former on behalf of both the judges.The Supreme Court upheld the validity of the section by holding that it is a reasonable restriction on a person"s right to freedom of speech and expression.

Any person who makes or publishes any content with the intent to harm the reputation of a person can be punished with a maximum of two years imprisonment under section 500. It is a bailable, non-cognizable and compundable offence.Prosecution can only be initiated on the

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* Asst. Professor,SreeNarayana Law College, Ernakulam.

1PratapBhanu Mehta, "Supreme Court"s Judgment on Criminal Defamation is the latest illustration of a syndrome", May 18, 2006.

2See http://www.nortonrosefulbright.com/knowledge/publications/123374/access-to-justice-in-plain-language

complaint of an aggrieved person. There are ten situations mentioned in section 499 that can be raised as defences in a criminal prosecution for defamation. Publishing truth for public good, fair comments on artistic performances, narration of court proceedings etc. are some of the exceptions. The principle employed is that the good faith of the accused person must be established to escape from liability.

An affected person has the option of simultaneously or otherwise filing a civil suit for damages. However, in a country like India where tort system is still under -developed, this option is rarely explored. Additionally, there is social stigma that is attached to criminal proceedings. This has led to a rise in the number of defamation prosecutions. Incidentally, the same judge who wrote the judgment in the instant case criticized the Tamil Nadu government for filing unnecessary defamation cases in the context of rumours relating to the health condition of the Chief Minister.[3] It is reported that the Misra, J orally remarked that "..this is not the sign of a healthy democracy. A public figure...has to face criticism" three months after he had upheld the validity of the section.

The judgment

Most of the petitioners had been charged with the offence in various cases across the country. Among them are Rahul Gandhi and Greenpeace activist PriyaPillai.[4]Various human rights advocates hoped that Supreme Court of India would take a progressive stance on this issue. The case was heard by DipakMisra and Prafulla Pant, JJ and judgment was given by the former. At the outset, it could be asked how a question of such constitutional importance was considered worthy of a single judge alone.

The main arguments raised by the petitioners are:

- By being an unreasonable curb on freedom of speech and expression, criminal defamation is violative of Article 19(2). It cannot be considered as a reasonable restriction because reasonableness is linked with proportionality. Since it is not the least restrictive measure that can be employed, it cannot be considered as proportional.

3 See http://www.thehindu.com/news/national/SC-raps-Tamil-Nadu-govt.-for-choking-dissent/article14588842.ec

4For a brief background on PriyaPillai"s case, see http://www.caravanmagazine.in/perspectives/blocked-outcorporations-defamation

- Defamation affects private interests of private individuals. Criminalisation ought to be linked with public interest.
- Simply telling the truth might not lead to acquittal in the case of criminal prosecution. It must be for „public good", which is a vague term. Vagueness of the term attracts Article 14.
- Criminal defamation, by virtue of being a pre-constitutional law must be subjected to stricter scrutiny. It would otherwise be relegated to a mere colonial provision applied to an advanced, progressive democracy.
- It does not incorporate the seriousness test. The provisions do not require potentiality of provoking breach of peace and subsequent damage.

The main arguments for the respondents are

- It is within legislative power to decide what to include within article 19 (2) as a reasonable restriction. The legislature has provided for defamation in clear terms and does not specify either civil or criminal defamation. At the time of framing of the constitution, the only existing provision for defamation was section 499. The framer"s intent cannot be doubted here.
- Its purpose is to protect the reputation as a shared value of the collective and hence, it cannot be called as exclusively pertaining to the private sphere.
- Right to reputation is part of article 21 and cannot be overridden by article 19(2).
- Civil remedy for defamation is not always adequate. Loss to reputation cannot always be compensated in monetary terms.
- International human rights law supports right to reputation.
- Harm to reputation is assessed with reference to public. Hence, public interest is involved. It is necessary in the interests of social stability.
-Mere possibility of abuse cannot make a provision unconstitutional.

Some unnecessary material in the judgment needs to be pointed out. The court mentioned nine definitions for the word „defamation" from various sources (none from a criminal defamation statute in any jurisdiction) without any specific reason. It then wrapped that part by observing that "Section 499 defines fame and covers quite a range of things but the

reference to the term „fame" is to ostracize the saying that "fame is a food that dead men eat." Then the judgment cites random quotes from *Bhagavad Gita,* Quran and the Bible relating to reputation, leaving out Guru Granth Sahib and other several religious texts. The court then referred to „thoughts of creative writers and thinkers" and quoted Shakespeare, Socrates and Aristotle. Kalidasa, Tagore and other Indian writers missed that list. Not a single source so cited was used by the court in its ultimate analysis. Supreme court has been constitutionally recognized as a court of record. The framers would not have envisaged that a lot of irrelevant material would be forced to go on record.

After referring to random authorities in U.S, U.K, Canada, South Africa and European Court of Human Rights, mostly without any utility, the court set out it"s perspective:

- Reputation is a value highly regarded in Supreme Court judgments.
- Framers of the constitution did not intend to restrict the meaning of defamation
- In the same way as the legislations relating to child labour, SC/ST atrocities deals with fundamental rights of citzens vis-à-vis other citizens, criminal defamation can be justified.

Comment

Based on the arguments raised, the Supreme Court held that a person"s right to reputation cannot be overridden by another person"s right to freedom of speech and expression. This is an argument that is partially conceded by the petitioners. The focus is on one of the remedies available to a person whose reputation has allegedly been affected.

a) The proposition that the word defamation in article 19(2) exclusively relates to criminal defamation may be incorrect. Thus, the analysis should have compared the nature of civil and criminal defamation. Progressive interpretation should have been done considering the fact that IPC is a pre -independence, colonial legislation. Many of the provisions like defamation or sedition had been inserted with the sole intention of quelling nationalist sentiments. Thus, defamation should have been analysed as a stand-alone section and not as part of article 19(2) alone. This argument was raised by the petitioners but it has not been addressed by the court.

b) To be fair to the court, the above mentioned point is not strictly within the authority of the court. Defamation has been enacted as a reasonable restriction. It is within the legislative sphere to decide what should be considered as a restriction. This is because legislation is presumably based on policy and courts have no role in the making of policy. The court has attempted to answer the question by checking whether defamation satisfies the test of proportionality. The court held that is proportional because "it determines a limit which is not impermissible within the criterion of reasonable restriction.[5]" However, it is submitted that this is not the correct formulation of the test of proportionality. Merely because an action is permissible does not mean it is proportional. It has been repeatedly asserted by the Supreme Court that a proportional action is one which imposes least restrictive measures to regulate freedom.[6] In the instant case, there can be no action which is more excessive in nature regarding defamation. All aspects, civil and criminal are included as reasonable restrictions.

c) The balancing of fundamental rights should be made on a rational ba sis. In the judgment, not a single line of reasoning has been provided that directly deals with the balance. Merely observing that right to reputation is sacrosanct and protected under international instruments is not sufficient to hold that it overrides an equally important right to freedom of expression.

We live in an age of over-criminalisation. These punitive impulses, as PratapBhanu Mehta observes, are a result of deep and pervasive institutional failure. The Supreme Court is the last resort of sorts for progressively interpreting laws for enhancing social engineering. The decision helps us to realize that we need to review our institutional structure and inject more clarity on foundational principles into the system.

5Paragraph 186.

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

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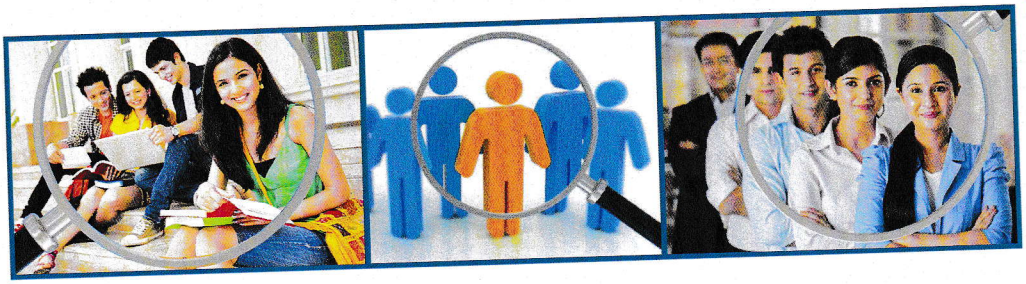

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