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LAW REVIEW

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NMIMS

LAW REVIEW

Volume II

July 2022

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FROM THE DEAN'S DESK

This publication serves as a milestone in our mission to institutionalise research and lays out the foundation for achieving our vision to openly and objectively promote quality legal discourse. I say with utmost pride that when review articles were solicited, we were surprised with the huge response from across the country. After due peer-review process, we selected some original research articles. I am sure this will generate appreciation and constructive dialogue from the readers. This year, the journal examines various contemporary debacles and facilitates a detailed legal analysis of the issues. Covering a wide range of current issues, the journal not only provides various perspectives on noteworthy subjects, but it also raises awareness and is a treat for readers.

Kirit P. Mehta School of Law has received worthy endorsements from the industry, academia, judiciary, bar, law firms, MNCs and regulatory bodies like SEBI. We welcome and thank our esteemed Board of Advisors and Peers who have timely guided this edition to become part of a discourse that generates and challenges existing paradigms of legal jurisprudence. I congratulate the Editor-in-Chief and each member of the Editorial Board for their time and contribution to the growth of NMIMS Law Review. I urge the readers to give wings to the thoughts presented by our contributors.

\- **Dr. Durgambini Patel**

MENTOR'S MESSAGE

It was a moment of pride for us when the Law Review was launched, in 2021, under the guidance of our Dean and Faculty In-Charge. That the Journal has received such an overwhelming response from authors, all budding professionals, is a sign that we are going in the right direction. I congratulate all the authors whose works have made it here, after a thorough and lengthy process of review. The experience of researching, writing, formatting, and eagerly waiting for a response from the Editorial Team must be worth the wait. The sense of elation is incomparable.

To those who missed out, I hope that you keep going with your writing endeavours. The experience of researching and writing on the numerous questions of law is in itself a rewarding and enriching experience, and a skillset of immense value in our industry. Unfortunately, the Editorial Team can choose only a handful of articles from the entries received. I am sure they had a hard time choosing which papers edged out the others by the slightest of margins.

To the Editorial Team, I congratulate you on successfully publishing the First Volume, the culmination of a year of planning, waiting, reviewing, editing, proofreading, and piecing together a manuscript that will contribute significantly to the literature of our noble industry. I hope each one of you found the experience enlightening, and will go on to play a role in developing the research culture in the field of law.

\- **Mr. Harshal Shah**

FOREWORD

The Editorial Board is pleased to publish the Second Volume of the NMIMS Law Review. Through this endeavor, the Editorial Board has sought to platform academic discourse from authors with great domain expertise delving into contemporary, relevant, and unanswered questions on the cutting edge of the law.

This year's volume opens on a strong note with Dhananjaya Sud tackling the intersection between insolvency and contempt laws. Examining the Insolvency and Bankruptcy Code, 2016 with specific reference to the Eleventh Schedule thereof inserted in 2020 and the Contempt of Courts Act, 1971. Sud analyses the form, mechanisms and jurisdiction held by the National Company Law Tribunals and the National Company Law Appellate Tribunal to effectuate, adjudicate and dispose of contempt proceedings.

Carrying forward with questions of jurisdiction, Astle examines the urgency to establish an adjudicatory body to facilitate free speech on the internet and promote internet governance. Consulting the functioning of Facebook's Oversight Board as a model to that effect, identifying its strengths and weaknesses. Astle draws a parallel to the infamous 2021 Information Technology Rules to drive home the urgency for good internet governance.

On the note of the omnipresent social impact of corporations, Shruti Khetan and Varsha Koshy deliver a thorough analysis of the Corporate Social Responsibility framework statutorily mandated under Section 135 of the 2013 Companies Act. Khetan and Koshy analyse the utilization of unspent CSR amount; CSR expenditure – including administrative overheads, holding of capital asset, surplus arising from CSR activities, and set-off of excess – and the role of the Board and CSR Committee.

In an effort to promote a more thorough exploration and discussion of copyright legal reforms, Jassimran Kaur, through her article, espouses the rights of literary authors under copyright law, including economic rights, moral rights and the waiver thereof vis-à-vis contracts with publishers.

To round out this Volume, Dr. Sarfaraz Ahmed Khan and Aditi Morali embark on an insightful analysis of the colonial traditions that govern the state of policing to this date and argues for an urgent need of implementing the pending police reforms. The authors argue that issues such as shortage of manpower, obsolete machinery,

inadequate training, and lack of basic amenities like safe and affordable housing, sanitation, access to clean drinking water et cetera hinder the performance and welfare of the police personnel. The authors conclude with emphasis on the need for transparent mechanisms to ensure accountability and incentives for a satisfied police force.

Board of Editors

July, 2022

CONTEMPT PROCEEDINGS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

- **Dhananjaya Sud***

I. BACKGROUND

In 2016, the policy of Insolvency and Bankruptcy was streamlined and incorporated in the form of the Insolvency and Bankruptcy Code, 2016[1] ("**Code**"). Under Part II of the Code, the Hon'ble National Company Law Tribunal ("**Hon'ble NCLT**) has been given broad authority with respect to the Resolution and Liquidation Proceedings of the Corporate Debtor.

In compliance with the Code, the Parliament had pioneered a new technique giving power to the Financial Creditors as well as other Creditors of a Company to seek Resolution of a Company by appointing an Independent Professional to take charge of the affairs of the Company from its Board of Directors wherein the said Company had defaulted in paying a Debt for an amount over Rs.1,00,000/- (Rupees One Lac Only) which has now been increased to Rs.1,00,00,000/- (Rupees One Crore Only) by way of an amendment to Section 4 of the Code by the Central Government vide Notification dated 24.03.2020.[2]

The insertion of the Eleventh Schedule to the Code brought amendments in the Companies Act, 2013,[3] however, major provisions of the Companies Act, 2013 were untouched akin to Section 425[4] relating to giving powers to the Hon'ble NCLT to hold a person or an entity liable for contempt.

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* Dhananjaya Sud, Advocate.

[1] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

[2] Ministry of Corporate Affairs, F. No. 30/9/2020-Insolvency (Issued on March 24, 2020), https://www.mca.gov.in/Ministry/pdf/Notification_28032020.pdf

[3] Companies Act, 2013, No. 18, Acts of Parliament, 2013, sch. XI (India).

[4] Companies Act, 2013, No. 18, Acts of Parliament, 2013, §425 (India).

The offence of contempt was established in the common law during the year 1926 when the powers was given to High Courts to punish its subordinate courts for contempt. However, in 1971, through the Contempt of Courts Act,[5] the offence of contempt was categorized into civil as well as criminal contempt.

II. INTRODUCTION

The term 'contempt of court' has been defined under Section 2 (a) the Contempt of Courts Act, 1971 as "*civil contempt or criminal contempt*".[6] Further the civil contempt and the criminal contempt are defined under Section 2 (b)[7] and (c)[8] of the Contempt of Courts Act, 1971.

The contempt can be issued by a court of law if any person or an entity willfully refuses to comply with the directions or any other process of the Court. In other words, the Court can issue contempt if any person or an entity fails to comply and breaches with the undertaking given to the Court.

Section 12 (4) of the Contempt of Courts Act, 1971, talks about the contempt by a company and the persons associated with the company wherein it provides that – "*Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person.*"[9]

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[5] Contempt of Courts Act, 1971, No. 70, Acts of Parliament, 1971 (India).

[6] Contempt of Courts Act, 1971, No. 70, Acts of Parliament, 1971, §2(a) (India).

[7] Contempt of Courts Act, 1971, No. 70, Acts of Parliament, 1971, §2(b) (India) (""civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court").

[8] Contempt of Courts Act, 1971, No. 70, Acts of Parliament, 1971, §2(c) (India) (""criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which— (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner").

[9] Contempt of Courts Act, 1971, No. 70, Acts of Parliament, 1971, §12(4) (India).

Also, Section 12 (5) of the Contempt of Courts Act, 1971, talks about the contempt against the directors for their involvement in such fraudulent act shall also be held liable for the punishment for contempt. The said Section reads as – "*Notwithstanding anything contained in sub-section (4), where the contempt of court referred to therein has been committed by a company and it is proved that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of such director, manager, secretary or other officer.*"[10]

III. CONTEMPT PROCEEDINGS UNDER THE CODE

The Hon'ble NCLT and the National Company Law Appellate Tribunal ("**Hon'ble NCLAT**") shall have the same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971.

The Hon'ble NCLT and the Hon'ble NCLAT have been construed with defined powers under the Code to take cognizance of the defaults committed by the companies in pursuant to the Corporate Insolvency Resolution Process ("**CIRP**") with an intention of defrauding its creditors or any act with fraudulent purpose.

Any person who is a Corporate Person or any person who, at the time of the contempt was committed or was in charge of and was responsible to, such person for the conduct of business of the Corporate Person can be held responsible and liable by the Hon'ble NCLT and the Hon'ble NCLAT for contempt of court in respect of any undertaking given to a court and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person.

[10] Contempt of Courts Act, 1971, No. 70, Acts of Parliament, 1971, §12(5) (India).

The Hon'ble NCLAT in the matter of *Manoj K. Daga vs. ISGEC Heavy Engineering Pvt. Ltd. & Ors.*[11] held that the Directors of the Company in respect of their acts were guilty of serious contempt and violating the mandate of law of the Code applied by the orders of the Tribunal and the Appellate Tribunal and breach of undertaking and trust given on oath before the Appellate Tribunal.

Also, the Hon'ble NCLAT in the matter of *Mahesh Kumar Panwar vs. M/s Mega Soft Infrastructure Pvt. Ltd. and Ors.*[12] emphasized upon the fact that Section 425 of the Companies Act, 2013 can be invoked and initiated during the insolvency proceedings. However, the Hon'ble NCLT recently in the matter of *K.K. Agarwal & Anr. vs. M/s Soni Infratech Pvt. Ltd. & Ors.*[13] has taken a view that Section 425 is not applicable to the proceedings under the Code.

IV. CONCLUSION

The role of the Hon'ble NCLT and the Hon'ble NCLAT in issuing contempt against any person or an entity or a company in a number of cases implies that the power to punish results in the compliance of the orders of the Court and better execution of the Resolution Process as well as the Liquidation Process under the Code.

Accordingly, in case, if the Hon'ble NCLT or the Hon'ble NCLAT finds, in a given set of facts, that the acts of the company or its officers on behalf of the company with an intention to defraud its creditors or are in breach of any directions passed by the Hon'ble Court, then such a company or its officers shall be liable for punishment of contempt.

Therefore, the Hon'ble NCLT or the Hon'ble NCLAT shall have the jurisdiction to initiate contempt proceedings against such a company or its officers acting on behalf of the company.

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[11] Manoj K. Daga v. ISGEC Heavy Engineering Pvt. Ltd., 2020 SCC OnLine NCLAT 869.

[12] Mahesh Kumar Panwar v. M/s Mega Soft Infrastructure Pvt. Ltd., 2019 SCC OnLine NCLAT 306.

[13] K.K. Agarwal v. M/s Soni Infratech Pvt. Ltd., Order dated Jan. 01, 2020 passed by the NCLAT in IB N0.448 (PB) of 2018.

ESTABLISHING AN ADJUDICATORY BODY FOR FACILITATING ONLINE FREE SPEECH AND PROMOTING INTERNET GOVERNANCE; IN CONTEXT OF FACEBOOK OVERSIGHT BOARD

- **Astle***

ABSTRACT

The advent of this decade brought changes to the human lifestyle and revolutionise the techno-legal aspect of mankind. The Social platform became an emblem of the person's character and a reflection of thoughts and ideology. The unprecedented novel coronavirus made huge human suffering and slumping of the economy but the techno industries kept growing.

Facebook, with over 2 billion users shared stories post 365 days a year. But cling to that crime, threats, country security and all such penal threats were other sides of social networking. It was this social media that transmitted the information of Colonel Gaddafi as a dictator and incited the rebellion resulting in the burning of Libya. Facebook with its norms and set of rules comes up with a "Community standard", In India, since the internet has no physical jurisdiction, the local authorities in absence of uniform laws started arresting people on online posts, if that appears to be a threat to internal security. Users were restricted to express their free speech under the reasonable ground of restriction (Article 19 (2-6)) Indian constitution. So the need for "Internet governance is ought to be paramount for facilitating online free speech and ensuring respect for others.

* Astle, Research Scholar at GITAM School of Law.

In November 2018, Mark Zuckerberg announced to establish an Oversight Board for articulating Internet governance[1]. In India, in December the 'Oversight panel took cognizance of a case where the prophet Mohammed was in his leather shining armour with sword depicting President Emmanuel macron as a devil. The committee removed the post stating it as a veiled threat to an Individual. The way forward is how this parallel adjudicating body ensures online free speech and whether this could be the next generation in techno-legal governance.

Keywords – Internet Governance, Adjudicating body, Techno legal governance, online free speech, Oversight board

I. INTRODUCTION TO INTERNET GOVERNANCE

The growing internet as source of information and indulging in our daily lifestyle resulted in governance of internet. The ICT (Information and communication technology) is now an important part for academics as well as for any businesses. The Internet governance in the early 20's was focused on domain name and IP address but its ambit has now been increased.

- Cyber security
- Digital Trade
- Online free expression
- Privacy and surveillance
- Internet identity
- Geo politics[2]

And what not! The dimension of the internet is broader than the world. The world encircles around the internet. The model of internet governance is important as well as mandatory because even our daily strategic facilities are reliant on a digital network

[1] The Oversight Board by Facebook is an adjudicatory mechanism for facilitating the adjudication of online hate speech and internet freedom of expression. 'Oversight Board' has members from all around the globe.

[2] *What is Internet Governance?*, INTERNET GOVERNANCE PROJECT, https://www.internetgovernance.org/what-is-internet-governance/ (last visited Mar. 11, 2021)

for proper functioning and maintained. Internet governance is a set of principle combined with policies standardized to coordinate with global cyberspace. The Internet has no hierarchal jurisdiction, for any court of law or any government regulating body, this is a major challenge and practically impossible to regulate. Governance is more a polycentric term and does have a model to govern it. Some of the major internet players namely Google, Yahoo, Facebook has a large chunk of share on the internet and do have straight social interaction among people, handling these issues are open to these networking sites adjudicatory mechanism, which results in huge conflict in even court of law. Since freedom of speech has to be read with freedom of speech on the Internet.

A. Defining Internet Governance

Internet Governance is a very broad and evolving concept, The United Nation summit made by working group on Internet Governance define Internet governance as

"Internet governance is the 'the development and application by governments, the private sector, and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet'.[3]

The 2003-2005 World Summit on the Information Society ("**WSIS**")[4] was organised by the United Nation ("**UN**"). Under Resolution 56/183 and it aimed to strive on the security and developing unitary global vision.

The definition was on the two handles, firstly on the technical aspects only, secondly on the issue of private sector-led players (e-commerce, private apps). The definition was accepted in the second phase of the meeting in Tunisia (2005). The definition provided the accountability of different stakeholders for the security of the internet. Various stakeholders such as the government, the owner of media platforms,

[3] *What is internet governance?*, DIGWATCH, https://dig.watch/what-is-internet-governance-digital-policy

[4] Established under G.A. Res. 56/183, World Summit on the Information Society (Dec. 21, 2001).

intergovernmental organisation, technical community and another civil society member in charge of the governance of the internet.[5]

B. United Nations and Internet Governance

UN organised a discussion with Internet Governance Forum ("**IGP**") over the issue of Geopolitics and content moderation. Different social media platforms may be digitally unique but socially and legally they are far behind. The new concept of online free speech has been developed over a few years. These platforms being digitally fit didn't dare to check the content socially viable. Nor even the authors of these platforms had clue in their head while making these digital platforms. So content moderation by the social media platform is still shaping and needs to be performed keeping the social-economical stigma of a country in mind. Lawyers, journalist and other sovereign activists shall constructively be amigos with the online platform for ensuring free speech.

C. US-centric online platforms.

Most of these online platforms developed in the USA and has a political array of US. Imposing the same criteria around the globe is not what an online platform shall be doing. The change in policies, regular amendment processes and also time to time checking of the terms and conditions concerning the countries socio-legal background needs to be done. We are witnessing how Facebook has come up with a new oversight board or different social media platforms that have come up with the local language and sovereign based terms and conditions. But it has also to be considered that it has taken over a decade to just arrive at the socio-legal touch of the country where these online corporations are working on. It shall be the social responsibility of the online platform to regularly frame the policies and constructively in compliance with the socio-legal counsel condition of other countries.

D. Online Free speech and expression and Indian Law

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[5] *Basic Information: About WSIS, World Summit on Information Society*, INTERNATIONAL TELECOMMUNICATION UNION, https://www.itu.int/net/wsis/basic/about.html

The Indian constitution on the issue of free online speech has a provision in Article 19[6], where the freedom of speech and expression is incorporated. In broader interpretation, online free speech with the advent of technology is incorporated in this provision only. But the provisions come with reasonable restriction mentioned in the same Article under Article 19 (2-6)[7]. In India, online free speech is not absolute right it is open as well as up to the court interpretation. Section 66 A of the Information Technology Act[8] has the provision of penalising up to 3 years of imprisonment on some injurious, grossly offensive and inconvenient post to defame or insult someone's character. This provision was struck down in the year 2015 for being violative of the provision of freedom of speech and expression (a fundamental right) in the case of *Shreya Singhal v. Union of India.*[9] The *Shreya Singhal* judgement of the year 2015 was defining ruling for online free speech and authorities to look into it.

E. J. Chelameswar and J. Nariman in the **Shreya Singhal** *ruling*

The issue was Section 66A of the IT act being violative of Article 19 (1) of the Constitution. The court focused on three aspects – Advocacy, discussion and incitement. The Court said that if there is only advocacy or discussion that doesn't amount to any crime but if there is incitement due to that advocacy that is unreasonable.

Secondly, the argument for Whether Section 66A protects individual from online defamation?[10] The court stated that the defamation is caused because of 'injury to reputation' and the objective of the section is to remove annoying and inconvenient things by state. Court also upshot certain arguments of not specified definition of inconvenient speech and on this argument court invalidate Section 66A of IT Act in its entirety as it violated the right to freedom of speech.[11]

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[6] INDIA CONST. art. 19, cl. (1)(a).
[7] INDIA CONST. art. 19, cl. (2) - (6).
[8] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000, §66A (India).
[9] Shreya Singhal v. Union of India, AIR 2015 SC 1523 (India).
[10] PEN. CODE, §499 (India). Defined under Section 499, IPC, it is also a civil wrong.
[11] *Shreya Singhal v. Union of India*, GLOBAL FREEDOM OF EXPRESSION, https://globalfreedomofexpression.columbia.edu/cases/shreya-singhal-v-union-of-india/

Universal Declaration of Human right under Article 19 and ICCPR[12] encompasses freedom of speech even on the online platform. The lockdown in Kashmir resulted in the internet ban. The Supreme Court assured the right to online world in a landmark judgement. The increase in the number of hate speech and penal threats over the online world and also the privacy issue led the government to draft the 2018 amendment of the Information technology Act.[13] Under these certain guidelines were introduced where:

-End to end encryption (what we see in our WhatsApp)

-Automated filters for encountering hate speech

These were introduced to reduce hate speech and ensure privacy but isn't this a failure to comply with the spirit of *Shreya Singhal* judgement. Though it's not for promoting free speech over the internet it's for ensuring freedom of security against hate speech over the internet. The internet has the power to reach the people within a blink and can change the dynamic so in order of complete interpretation by the government is violative of Article 14[14] (Right to equality) as well as this hate speech making the internet more toxic to surf.

Though it is impossible to see and check every user so time to time framing policies for the collective masses and also desirable censorship can ensure the internet a better place for exercising free speech. The adjudication of the hate speech and handling fake news or any propaganda shall be of national importance and shall be done with civil societies, Techno spaces with the sovereign power. It shall be kept in view not to infringe the privacy and free speech right of any individual without any proper judgement.

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[12] International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171

[13] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (India).

[14] INDIA CONST. art. 14.

II. THE NARRATIVE: FACEBOOK OVERSIGHT BOARD

"Independent judgement ensuring respect for free expression" [15]

The official website of the newly Incorporated Facebook oversight board has this quote. The meaning is shrouded under the ambit of its formation and its work. With over 2 billion Facebook user, the company finally established its adjudicatory mechanism. The purpose is to promote free online speech. It comprises of independent members from different part of the world to facilitate the governance of free speech with a motive of independent judgement. Facebook has to abide by the decision made by the board. In year 2018, the concept of this board was established. In the year 2019, a draft charter was outlines followed by public proposal. In 2020, the board started operating.

The process of filing an appeal is:

i) First, an appeal is registered

ii) Secondly, Board decides which case shall be heard

iii) Finally, Board assigns a panel to review the decision.

The governance of the board is a completely transparent and free expression by the world largest social media platform is Paramount. But with that comes the responsibility of balancing the free speech and sentiment of people. To balance the same the company came up with this board. The board has a charter where articles are mentioned and the Board has to work in compliance with these articles. From India, the board has 'Sudhir Krishnaswamy'[16] and other in total 40 members with different background and area of interest. The vision of the formation of the board is to bring the world together to share diverse opinions and exchange ideas but keeping sentiments at apex stake. The motive of independent judgement, transparency are considerably been done by the board and due to its diversity, it is one such example of

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[15] *News and Articles*, OVERSIGHT BOARD, https://oversightboard.com/news/

[16] *Who is Sudhir Krishnaswamy from Facebook's oversight board?*, THE INDIAN EXPRESS (May 8, 2020), https://indianexpress.com/article/technology/tech-news-technology/sudhir-krishnaswamy-facebook-oversight-board-6398217/

an exquisite way of handling the appeal process. The board could have been with proper infrastructure increased to the content moderation and privacy policy. The charter with its articles only bestows the appellate power to the board but for proper functioning in the coming days, there shall be an initiative of structural reform and foundational evolution of the board. The board shall not be limited to the appellate jurisdiction but shall have the power to decide for facilitating the governance over the internet. This initiative shall be performed by each one of the social giants and it shall be under the ambit of corporate social responsibility to safeguard the Interest of the individual and enable them to exercise their fundamental right to free speech

A. First case by Facebook Oversight Board in India.

The facts were a user posted a man in leather with the sword in his right hand depicting a text overlay on the photo Indian Muslim. Also, with a hashtag of French president, Emmanuel Macron's as the devil and asking to boycott French product.[17] The board considering this as a veiled threat removed the post and also banned the ID that posted this.

Not this, the Facebook space of 'Violence and Incitement community standards' is grundnorm for the corporation and the board. The board is also incumbent to follow as per the community standard set up by the corporation. Though it's an independent body it cannot go beyond the jurisdiction of the code as well as shall abide by the community standard of the Facebook

B. ICANN and FBOB

Internet cooperation for assigned names and numbers ("**ICANN**") and Facebook oversight board ("**FBOB**") bear significant pertinence to the matter addressed. The promotion of good governance is the primary principle of both the board. The ICANN

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[17] Anumeha Chaturvedi, *Facebook's Oversight Board overturns firm's decision to remove a post in first Indian case*, THE ECONOMIC TIMES (Feb. 13, 2021), https://economictimes.indiatimes.com/tech/technology/facebooks-oversight-board-overturns-firms-decision-to-remove-a-post-in-first-indian-case/articleshow/80885063.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

protects the interest of the stakeholders on the Internet by security and bulwarking their data, IP address and other search engines. FBOB is appellate body by Facebook that entertain the plea of hate comments and act as an appellate body. It is diverse and its decision is binding on Facebook. The ICANN promotes the ease of using the Internet and creating space for using the internet in a good direction. The oversight board allows individual to file an appeal on the decision and to ensure Facebook is a platform for sharing constructive ideas and dialogues. In the New York times a heading on FBOB was printed where it was written "Supreme court of digital media" but later was called absurd by different head because the FBOB only takes up a single appeal and not control the whole internet.

C. Disinformation: Still a right?

With the freedom of online speech comes a lot of check and balance to ensure the word speech is a generic term. Speech is a statement made, most used in an affirmative sense as well as an imperative or action by any person. Exceeding it as a right has some boundaries, the boundaries that it shall not hurt the sentiments of people, it shall not be of malicious rather also not disinformation. Much such news related to disinformation resulting in mob violence, riots are often in news and to tackle these one need to ensure the limit of speech up to a certain extent.

Now, what is the information? Any such knowledge or materialistic facts of a certain thing is information. When the presented Information is false and is presented with an intention to its widespread for fulfilling the set agenda of self-belief, political belief, religious tension and communal violence or defamation is disinformation. This is not an accurate definition but is workable in the broader sense. Bennett and Livingston defined disinformation as the 'intentional spread of false news to achieve certain political goals.'[18]

[18] *Misinformation about Disinformation*, INTERNET GOVERNANCE PROJECT, https://www.internetgovernance.org/2021/02/25/misinformation-about-disinformation/

The most workable idea to counter disinformation is to protect the freedom of challenging it. If in the view of any individual having empirical evidence has information of any content to be false shall have the freedom to challenge it. This will ensure better content and will strive down any ill motive or propaganda behind the news. The idea of online media as ruthless and fake is completely absurd. We see many social cause fundraiser activities taking place.

Many ignite are provided to small scale businesses and it is also efficient in growing awareness among the people. Showcasing talent online is all such boon to the people and it is up to the people to govern it positively or negatively. Be it an institution places, the idea of a good actor and bad actors have always been there. Coping up with it shall be of importance.[19]

D. The US election and Riots aftermath

The impact of social media on the edges of politics is still the top concern worldwide. The US election and suspension of Donald trump account handle has been one of a few incidences that shook the security of the country. The riots in the USA were at the onset of the election result in America. Facebook oversight board on the suspension of Donald Trump's account were left with two questions – Firstly, whether the suspension of the account is for time immemorial or will be overturned and secondly, is there any space for political parties and politicians to go above the rule of internet governance set up by an independent body (Facebook)?

The question of whether private actors be moderating the act of a sovereign is acceptable?

In Russia, the internet regulatory ministry, Roskomnadzor, declared that it will impose a fine on big social media players who tries to spread the call for joining pro-Alexei Navalny.[20] In the same queue, 38 percentages of videos were deleted by TikTok and 50

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[19] *Id.*

[20] *Russia to Fine Social Media Giants For Keeping Up Pro-Navalny Videos*, THE MOSCOW TIMES (Jan. 27, 2021), https://www.themoscowtimes.com/2021/01/27/russia-to-fine-social-media-giants-for-keeping-up-pro-navalny-videos-a72756

per cent of videos were taken out by YouTube on the call for joining the rally. This led to the control of state actors over social networking[21]

III. THE INFORMATION TECHNOLOGY (GUIDELINE FOR INTERMEDIARIES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021

To regulate social media intermediaries, digital media intermediaries any third party media intermediaries, the Ministry of electronics and information technology has come up with a new draft of guideline called – The Information Technology (Guideline for Intermediaries and Digital Media Ethics Code) Rules, 2021. The ambit of this draft extends from digital media to OTT platforms.

The reason for this draft to be discussed under this heading is to find the bridge between the ethical codes -regulated by the government for digital media to online free speech. Media and journalism are one such impactful dimensions of anybody's life that come up with daily affairs and are the most reasonable example of free online speech. The effectiveness of the freedom index of any country is also influenced by the media. So, the new draft of the Information technology act is to be understood on the same footing as free speech and ethical code.

The draft has provision for due diligence and Grievance redressal

Significant social media intermediaries and social media intermediaries are now required to keep the date of any grievance for one hundred eighty days. The data collected by the intermediaries shall be registered on computer resource and shall be kept for the same period above mentioned.

A. Digital Media

It applies to the news and current affairs publisher. The grievance redressal mechanism has complied within three ways- either a grievance redressal officer appointed by publisher or by the association of the publishers or MeitY will coordinate and facilitate the departmental committee for providing grievance to the aggrieved

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[21] INTERNET GOVERNANCE PROJECT, *supra* note 2.

party.[22] This has been a milestone in the latest draft ensuring accountability for online free speech with reasonable restriction by appointing officers to have a check and balance over media free speech.

B. State encroachment on digital platform

The Indian government in February passes a bill called the Information technology (Guideline for intermediaries and digital media ethics code) Rule 2021.[23] The bill was passed without proper discussion in Parliament as well as this bill extends not only to media platforms but also to OTT and other mass media platforms. This will not only limited the media to show or express their part but will also give the state enormous power to sweep or cut down the content provided by the bodies based on etiquettes and rules Incorporated under the draft. The new digital intermediaries are to be regulated as per the rule issued by the government under this draft. The ethical code and even journalist behaviour have a model to be followed. The new draft is ultra vires to the parent act. This will create a barrier to the behaviour of media articles and their free speech. Before this draft, India has the Press Council Act, 1978[24] and the Cable Television Network (Regulation) Act, 1995[25] which has a provision of model code and ethical values for any content delivery. Then the need of this rule is completely hard to understand.[26]

The newspaper under this rule is not covered but it has a term called 'News and current affairs' by Rule 2 (1) (m),[27] thereof indirectly it gives control to the government

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[22] Neharika Vhatkar, *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021- A Brief Note*, BANANAIP, https://www.bananaip.com/ip-news-center/the-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021-a-brief-note/

[23] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (India).

[24] Press Council Act, 1978, No. 37, Acts of Parliament, 1978 (India).

[25] Cable Television Network (Regulation) Act, 1995, No. 7, Acts of Parliament, 1995 (India).

[26] *Why The Wire wants new IT rules to struck down*, THE WIRE (Mar. 9, 2021), https://thewire.in/media/why-the-wire-wants-the-new-it-rules-struck-down

[27] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 2(1)(m) (India).

over daily news items. The E-News, replica news, commercial activities are all under the ambit of this new rule.

It has overreach to that of the parent act and a censor on the working of media. In the case of *Ajay Kumar Banerjee v. Union of India*.[28] The honourable court stated that no unlimited power or rights shall be delegated to the subordinate and that legislation cannot go beyond the parent act. Any such rules or regulations later formed have to be in furtherance of the parent act.

Section 69A of the IT Act[29] has a provision of blocking intermediary when required but new IT rules impose terms like 'Half-truth, 'good and bad taste', decency. It has also a scope of censor, warning, apology and what not to curtail the freedom of expression. This is contrary to the judgement in *Shreya Singhal*.

Not only these, but these draconian provisions have also made online free speech to be a prisoner of the government Grievance redressal officer appointed- any person aggrieved by any content may file a complaint. An oversight committee has been formulated. It also acts as the second appellate forum "Emergency power"

Over everything, this is reserve power in the hands of ministry which is capable of passing blocking of any content and also provided with an opportunity to hear the argument

IV. CONCLUSION

The upshot of the above discussion is that the court of law in India needs to have a separate branch for online free speech and shall be regulated from time to time. Since it's impossible to check everyone following rule of law, there needs to be the collective formulation of policies and law from time to time by the government. International societies with that of Indian sovereign power need to establish a mechanism for checking any hatred content and staggering out the content which is a threat to

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[28] Ajay Kumar Banerjee v. Union of India, 1984 AIR 1130 (India).

[29] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000, §69A (India).

security and above all, the establishment of an adjudicatory body in physical infrastructure shall be of great importance. Like the Facebook oversight board, each big social media platform need to have an adjudicatory mechanism that shall function under the sovereign established an adjudicatory body to ensure free expression. The IT rules formulated by the government needs to be restructured by the government and that shall ensure the freedom of digital media to express their content freely unless it's not inciting the mob. The state shall not act as a watchdog since privacy is also of paramount importance, rather the state shall act in a harmonious way to ensure free online speech with reasonable restrictions. The international institutions as ICANN FBOB and government agencies shall act as three-dimensional filtration processes to ensure the internet being a friendly place for surfing and working and rather ensuring free speech with reasonable restrictions. Interstate agencies shall also act in constructive ways since the internet has no definite boundary and constructive sharing of information may result in complete privacy and also ensuring free online speech.

THE NEW CSR FRAMEWORK - A DEPARTURE FROM THE 'COMPLY OR EXPLAIN' REGIME

- **Varsha Koshy & Shruti Khetan**[*]

ABSTRACT

With the enactment of section 135 of the Companies Act, 2013 (the 'Act'), India became the first country to introduce a corporate social responsibility ('CSR') framework on certain class of companies. This framework premised on companies 'voluntarily' undertaking CSR activities and non-compliance by companies only necessitated an explanation from the companies (i.e., the 'comply or explain' principle). The recent notification by the Ministry of Corporate Affairs ('MCA') to the various amendments to the CSR regime has significantly curtailed the companies' autonomy in charting out and undertaking its corporate social responsibility and has steered away from the 'comply or explain' regime. This article seeks to examine the key changes brought about by the amendments and its impact on the 'comply or explain' regime.

Keywords: CSR, comply or explain, section 135, MCA, Companies Act

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I. INTRODUCTION

Recently, the MCA notified the amendments to section 135 of the Companies Act, 2013 *vide* Companies (Amendment) Act, 2019 and Companies (Amendment) Act, 2021. Additionally, the MCA notified the Companies (Corporate Social Responsibility) Amendment Rules, 2021 (*collectively the* 'Amendment'). The Amendment has brought about a complete shift from the pre-existing 'comply or explain' CSR regime under which, the companies failing to comply with the CSR spending requirements under the Act *only* needed to disclose reasons for such non-compliance in its board report.[1] This article focuses on the three major changes brought forth by the Amendment i.e., (i) the utilization of unspent CSR amount; (ii) modes of CSR expenditure; and (iii) the role of the board and CSR committee. Additionally, the article examines certain difficulties in relation to the current CSR regime which the Amendment has not addressed or for which no clarification has been issued.

II. UTILIZATION OF UNSPENT CSR AMOUNT

Section 135 (1) of the Act mandates that every company having a net worth of Rs 500 crores or more, or turnover of Rs 1000 crores or more or a net profit of Rs 5 crores or more during the immediately preceding financial year should constitute a CSR committee. Further, such a company is also required to spend at least 2% of its average net profits made during the three immediately preceding financial years on CSR activities.[2] The Amendment has clarified that in the event, the company has not completed three financial years since incorporation, the average net profit, during which the company has been in existence will be taken for computing its CSR obligation.

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[1] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §134(3) (India).
[2] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §135(5) (India).

A company which does not carry out its CSR obligations in accordance with the above provisions is required to transfer the unspent amount to a fund specified in Schedule VII of the Act within six months from the expiry of the respective financial year.[3] Currently, no special fund has been created for this purpose and the unspent amount can be transferred to any fund specified in Schedule VII of the Act.[4] These funds include the Clean Ganga Fund, Prime Minister's National Relief Fund, PM Cares Fund in addition to any other central government fund for socio-economic advancement and for the betterment of backward classes, minorities and women (*collectively* 'Central Government Fund').[5] This is in addition to the company's obligation to disclose reasons of non-spending of the requisite CSR amount in the director's report.[6] However, any unspent amount which pertains to an 'ongoing project'[7] undertaken by a company in pursuance of its CSR obligation should be transferred by the company within thirty days to a special account called the 'Unspent Corporate Social Responsibility Account' ('Unspent Account') opened by the company in any scheduled bank.[8] The company should spend the unspent amount in furtherance of its CSR policy within three years of transferring the amount to the Unspent Account failing which; the company should transfer it to a Central Government Fund.[9]

This requirement of mandatorily transferring the unspent amount raises multiple issues. *Firstly*, the CSR policy hinges on engaging businesses to aid social development and to herald innovation in the private sector.[10] Transferring the unspent CSR amount

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[3] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §135(6) (India).

[4] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 10 (India).

[5] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, sch. VII, cl (iv) & (viii) (India).

[6] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §135(5) (India).

[7]Ongoing project as per the Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 2(1)(i) (India) means : 'means a multi-year project undertaken by a Company in fulfilment of its CSR obligation having timelines not exceeding three years excluding the financial year in which it was commenced, and shall include such project that was initially not approved as a multi-year project but whose duration has been extended beyond one year by the board based on reasonable justification'.

[8] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §135(6) (India).

[9] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §135(6) (India).

[10] Ministry of Corporate Affairs, *Report of the High Level Committee on Corporate Social Responsibility 2018* 15 (August, 2019), https://www.mca.gov.in/Ministry/pdf/CSRHLC_13092019.pdf [hereinafter MCA HLC REPORT ON CSR].

to a Central Government Fund tantamounts to mere disbursement of money and defeats the very objective behind CSR spending. Moreover, contributions to the Central Government Fund as a mode of CSR has been recommended to be discontinued by the High Level Committees constituted for reviewing the CSR framework.[11] *Secondl*y, the primary rationale for enacting the CSR regime was to enable strategic CSR spending as opposed to mere charity or donations.[12] However, the three year limit on spending in relation to 'ongoing projects', could prompt a shift in CSR spending by companies from undertaking long term sustainable projects to smaller projects or making donations to the Central Government Fund and thereby, lead to a potential erosion in the quality CSR spending.

Thirdly, companies, especially smaller and recently incorporated ones, could have potential implementation issues in relation to CSR projects that could lead to non-spending or under- spending of the CSR amount. These issues include delay in identification of suitable project, lack of prior expertise, technical difficulties, inability to formulate an efficient CSR policy and undertaking projects in rural areas (which could have a long-term implementation period), among other factors.[13] Thus, mandatorily transferring the unspent CSR amount to the Central Government Fund where companies have not identified an 'ongoing project' or enforcing a hard-line cap of three years for completion of 'ongoing project' could adversely impact CSR planning, and allocation and spending by companies. Further, there is no provision in the Amendment to enable companies to seek an extension of time period in relation completion of 'ongoing projects' by providing detailed reasons. This approach is

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[11] *Id.* at 71; Ministry of Corporate Affairs, *Report of the High Level Committee (to suggest measures for improved monitoring of the implementation of Corporate Social Responsibility policies)* 15 (September, 2015), https://www.mca.gov.in/Ministry/pdf/HLC_report_05102015.pdf [hereinafter Improved Monitoring Report].

[12] Committee on Public Undertakings (2015-16), *Corporate Social Responsibility in Select Public Sector Undertakings (CPSUs)* 19, (December, 2015), http://164.100.47.193/lsscommittee/Public%20Undertakings/16_Public_Undertakings_8.pdf

[13] MCA HLC REPORT ON CSR, *supra* note 10 at 30; Ministry of Corporate Affairs, *Standing Committee on Finance: Demands for Grants*, (March 2017), available at http://164.100.47.193/lsscommittee/Finance/16_Finance_44.pdf

particularly burdensome for smaller companies/ newly incorporated companies who have not been granted any statutory relaxations in the timeframe for utilization of its amounts and completion of projects.

Lastly, as per section 135 (7) of the Act (which is the only penal provision under the CSR regime), violation of provisions in relation to transfer of unspent amount[14] imposes a monetary penalty on the company and on every defaulting officer.[15] The Amendment has omitted imprisonment of 'officer in default' from its penal consequences and has restricted the penalty to a monetary fine.[16] However, the penal provision only applies for violation of sections 135(5) and section 135(6) of the Act. Thus, non-compliances such as non-constitution of a CSR committee, non-formulation of CSR plan by the CSR committee, and violation by a company's board to adequately monitor CSR activity etc., will not be covered within the ambit of this penalty provision. However, non-compliances in relation to other CSR provisions could invite the residuary penalty prescribed under section 450 of the Act.[17]

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[14] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §135(6) (India).

[15] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §135(7) (India). The provision states that : "If a company is in default in complying with the provisions of sub-section (5) or sub-section (6), the company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less".

[16] The Companies (Amendment) Act, 2019, No. 22, Acts of Parliament, 2019, §21 (India). This provision prescribed that every officer in default of the amended CSR provisions could be imprisoned up to a period of 3 years or be imposed a monetary penalty between Rs 50,000 to Rs 5,00,000 or be fined and imprisoned.

[17] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §450 (India). The provision states that " If a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made thereunder, or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided elsewhere in this Act, the company and every officer of the company who is in default or such other person shall be liable to a penalty of ten thousand rupees, and in case of continuing contravention, with a further penalty of one thousand rupees for each day after the first during which the contravention continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default or any other person".

Thus, to effectively to avoid penal consequences, a company only needs to spend the statutorily mandated amount and transfer unspent amounts to the Central Government Fund (as the case may be). Consequently, the manner of implementation of CSR spending and the quality of output[18] will assume lesser significance compared to spending the statutorily required amount. To that extent the 'comply or explain' regime is intact. Further, since the quantum of penalty is capped at Rs 1 crore, larger companies (in terms of net worth, net profit and turnover) could opt to pay a fine rather than undertaking long-drawn CSR compliances. Thus, enforcement of this penalty could result in a namesake disbursement of CSR funds and yet again trundle the rational of utilizing CSR as a tool of long-term benefit to the society. The imposition of this penalty is also cumbersome on smaller / newly incorporated companies facing CSR implementation issues. Smaller companies/ newly incorporated companies should be exempt from the penal consequences and the initial few years should be seen as a period of learning.

III. CSR EXPENDITURE

Rule 7 of the Companies (Corporate Social Responsibility Policy) Rules, 2014 ('CSR Rules') has prescribed limits and various modes of CSR expenditure. These include (i) administrative overheads; (ii) holding of capital assets; (iii) surplus arising from CSR activities; and (iv) set off of CSR spending. This section seeks to analyse in detail, only the first two modes of CSR expenditure as the application of the other two additions are straightforward in nature.

A. ADMINISTRATIVE OVERHEADS

The CSR Rules define 'administrative overheads' to include the company's expenses for the "*general management and administration*" of its CSR functions and specifically excludes the expenses incurred in relation to "*designing, implementation, monitoring and*

[18] Ministry of Corporate Affairs, *Standing Committee on Finance: Report on Companies Bill, 2011*, 59 (June 2012), http://164.100.47.193/lsscommittee/Finance/15_Finance_57.pdf

evaluation" of a CSR project or program.[19] The administrative overheads should not exceed 5% of the CSR expenditure for the respective financial year. Though defining and capping the expenses on 'administrative overheads' has streamlined CSR spending, the current definition has a few shortcomings. The current definition is vague and can be widely construed. For instance, expenses incurred for CSR capacity building of the company's own personnel or its implementing agencies was previously capped.[20] This limit was removed as a result of the Amendment. The High Level Committees on CSR which was constituted in 2015 and 2018[21] ('HLC 2015' and 'HLC 2018' respectively) have recommended that the expenses in relation to capacity building should not be treated as an 'administrative overhead'. However, due to the wide ambit of the definition, such expenses can arguably be characterized as an 'administrative overhead' thereby resulting in the imposition of significant financial limitations on companies undertaking capacity building.

Further, Rule 8(3)(a) of the CSR Rules mandates certain class of companies[22] to undertake impact assessment of their CSR projects. Expenses in relation to impact assessment cannot exceed 5% of the total CSR expenditure for the given financial year or Rs 50 lakhs, whichever is lesser.[23] Expenses for the same could be characterized as arising from 'general management' coupled with 'monitoring and evaluation' of a CSR project and can be treated as an 'administrative overhead'. In such a scenario it is unclear whether the prescribed 5% limit on undertaking impact assessment is

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[19] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 2(1)(b) (India).

[20] Before the Amendment, this limit was prescribed under the Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 4(6) (India).

[21] Improved Monitoring Report, *supra* note 11 at 15: MCA HLC REPORT ON CSR, *supra* note 10 at 71.

[22] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 8(3)(a) (India). This rule states that "Every company having average CSR obligation of ten crore rupees or more in pursuance of subsection (5) of section 135 of the Act, in the three immediately preceding financial years, shall undertake impact assessment, through an independent agency, of their CSR projects having outlays of one crore rupees or more, and which have been completed not less than one year before undertaking the impact study".

[23] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 8(3)(c) (India).

independent of the 5% limit prescribed for 'administrative overheads' and a clarification on the same is required.

B. ***HOLDING OF CAPITAL ASSET***

The HLC 2018 had made two observations in relation to creation of 'capital assets' through utilization of CSR funds: *First*, it noted that the creation of assets by the company in its own name through CSR funds would '*tantamount to non-spending of CSR monies*'. Rule 7(4) of the CSR Rules accounts for the first observation by permitting CSR expenditure to be used for the creation or acquisition of capital asset, provided that such capital asset can only be held by the entities specified in the CSR Rules ('Specified Entities'[24]) and cannot be held in the name of the company/ its beneficiaries.[25] This rule has a retrospective application and the capital assets acquired by the company prior to the Amendment should be transferred to the Specified Entities within 180 days from the commencement of the Amendment. (This period could be further extended by a period of 90 days after obtaining the company's board's approval).[26] *Second*, the HLC 2018 stressed the need for an enhanced regulatory oversight where CSR funds are utilized for acquiring capital assets. The revised format for 'Annual Report on CSR Activities' (applicable from financial year commencing after April 1, 2020) ('Disclosure Format'), mandates a detailed disclosure for acquisition of capital assets[27] whereas the pre-existing format did not prescribe any such disclosure requirements.

However, these provisions have certain limitations: (a) The Act or the CSR Rules do not shed any clarity on the ambit of what constitutes 'capital assets' (b) The HLC 2018 had taken on record, complaints received in relation to the misuse of the acquired/created capital assets in relation to CSR activities, which alleged that

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[24] The entities specified in Rule 7(4) of the Companies (Corporate Social Responsibility Policy) Rules, 2014 (India) are: (i) companies established under section 8 of the Act, or a Registered Public Trust or Registered Society, having charitable objects and CSR Registration Number; (ii) beneficiaries of the CSR project, in the form of self-help groups, collectives, entities; and (iii) public authority.

[25] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 7(4) (India).

[26] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 7(4) (India).

[27] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Annex. II (India).

inordinate costs were levied by the companies for using the acquired/created capital assets (such as schools and hospitals). While transfer of capital assets to Specified Entities ensures that the ownership of capital assets rests with the public, the amendment fails to address the possible commercialization of capital assets. Further, the Disclosure Format does not mandate a disclosure on whether any charge is levied on the beneficiaries of the acquired/created capital asset. Further, there is no provision in the Amendment prescribing a separate disclosure on the Specified Entities in relation to the capital assets held by them (c) Transfer of capital assets to Specified Entities fails to take into account the tax implication accrued by the Specified Entities once the capital assets are transferred in its name. (i.e., post the transfer the liability to pay taxes in relation to the capital assets will lie on the Specified Entities). Further, transfer of certain capital assets will involve payment of stamp duty by the company thereby casting an unreasonable financial burden on the companies.

C. SURPLUS ARISING FROM CSR ACTIVITIES

The CSR Rules mandates that any surplus arising from CSR activities should (i) be utilized for the same CSR project; or (ii) transferred to 'Unspent CSR Account' or; (iii) transferred to a Central Government Fund within 6 months from the expiry of the financial year.[28] As a result of this requirement a company is deprived of the autonomy to utilize the surplus amount for a new/upcoming CSR projects and in the eventuality where a company cannot utilize the surplus amount for the same CSR project and when the company does not have an 'Unspent CSR Account' for an 'ongoing project', it is forced to transfer the surplus to a Central Government Fund. The HLC 2018 had noted significant CSR contributions to Central Government funds specified in Schedule VII and had recommended that such contribution be discontinued as it conflicted with the ethos of CSR which hinges on utilizing corporates for maximizing the potential for social advancement.

[28] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 7(2) (India).

D. Set—off of excess CSR spending

The CSR Rules permit companies to set off excess CSR amount spent by it in the immediately succeeding financial years provided that the company's board passes a resolution to that effect and the set- off amount cannot include surplus amounts received by the company pursuant to its CSR activities.[29] This provision vests with the company greater autonomy in relation to the amount of CSR spending and will enables companies to invest in large- scale CSR projects.

IV. ROLE OF THE BOARD AND CSR COMMITTEE

One of the major shifts brought by the Amendment that has led to a departure from the 'comply or explain' principle is the enhanced role cast on the board of directors of the company for implementation of its CSR obligations. Prior to the Amendment, the board had to approve and enclose the CSR policy in the board report and ensure that the company undertakes the activities laid down in the CSR policy and that such activities were in relation to the areas or subjects specified in Schedule VII of the Act. However, in case of failure of the company to spend the required CSR amount, the only obligation on the board was to disclose the reasons for the same and no penalty was imposed on the board.[30] This was in line with the rationale under the pre-existing 'comply or explain' regime where, annual statutory disclosures were considered as a sufficient check for CSR compliance and the companies would only be penalized if they did not spend the stipulated amount *and* failed to report. [31]

The Amendment lays additional responsibilities on the board to: (i) transfer unspent CSR amount to the Central Government Fund (in cases where the company does not have an 'ongoing project')[32]; (ii) extend a single year CSR project to an 'ongoing

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[29] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 7(3) (India).

[30] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §135(5) (India).

[31] *Corporate Social Responsibility a leap of Faith for the Government: Sachin Pilot, Minister Corporate Affairs*, India CSR Network (December 20, 2012), https://indiacsr.in/corporate-social-responsibility-a-leap-of-faith-for-the-government-sachin-pilot-minister-corporate-affairs/ (last visited May 18, 2021).

[32] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §135(5) (India).

project' after providing reasonable justification[33]; (iii) monitor the implementation of an 'ongoing project' and to make adequate modifications for the implementation of the project within the prescribed time period[34]; and (iv) ensure that the CSR funds have been properly utilized as per the approved CSR policy (and annual action plan) and the Chief Financial Officer ('CFO') or the person responsible for the company's financial management has to certify the same.[35] Thus, the overall responsibility for CSR monitoring and implementation cast on the board has increased manifold and could place immense stress on the company's board. Prior to the Amendment, the CSR committee was entrusted with formulating and monitoring the CSR policy and a detailed action plan, and recommending the CSR expenditure. However, in light of the increased obligations cast on the board, the CSR committee's role has been reduced to mere policy making with the responsibility of carrying out the bulk of CSR implementation on the company's board.

V. ADDITIONAL TAKEAWAYS

A. CSR SPENDING IN LOCAL AREAS

A company undertaking CSR activities is mandated to give preference to the local areas around which it operates.[36] The 37th report of The Standing Committee of Finance has observed that local CSR expenditure was miniscule compared to CSR expenditure in other areas and recommended a strict enforcement of this provision.[37] A subsequent clarification issued by the MCA clarified that companies should comply with this provision.[38] However, the HLC 2018 noted that, owing to the increasing local CSR expenditure, CSR spending was concentrated in certain geographical areas and

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[33] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 2(1)(i) (India).
[34] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 4(6) (India).
[35] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 4(5) (India).
[36] The Companies Act, 2013, No.18, Acts of Parliament, 2013, §135(5) (India).
[37] Ministry of Corporate Affairs, *Standing Committee on Finance: Report on The Companies (Amendment) Bill, 2016* 45 (December 2016), http://164.100.47.193/lsscommittee/Finance/16_Finance_37.pdf
[38] Ministry of Corporate Affairs, General Circular No. 06/2018 (Issued on May 28, 2018), https://www.mca.gov.in/Ministry/pdf/GeneralCircular2805_29052018.pdf

was skewed towards industrialized states.[39] The HLC 2018 advocated that a conjoined reading of this section with the entries in Schedule VII makes it clear that CSR spending is not intended to be concentrated within certain geographical areas. The HLC 2018 also recommended that emphasizing local CSR expenditure should be directory and that, CSR spending should be undertaken by juxtaposing local CSR expenditure vis-à-vis other CSR spending. The MCA has not yet released any clarification on the mandatory nature of local CSR expenditure and in the current scenario, a company has to strictly provide preference to local areas and companies violating the same can be levied a monetary penalty under the Act.[40]

B. TAX EXEMPTIONS AND CSR EXPENDITURE

A contentious aspect in the CSR regime has been the lack of a uniform tax regime for activities undertaken by companies in pursuance of its CSR obligations. The Finance Act, 2014 amended section 37(1) of the Income Tax Act, 1961 ('ITA') and clarified that CSR expenditure carried out by companies cannot be treated as business expenditure.[41] This was because CSR expenditure was seen as an application of a company's income and deduction of such expenditure would effectively be the government subsidizing such expenses.[42] However, the restriction under section 37 of the ITA does not preclude companies from claiming deductions under various other provisions of the ITA (such as sections 30-36 of the ITA), for undertaking various activities prescribed in Schedule VII of the Act such as, rural development projects, scientific research etc.[43] For instance, donations towards the Prime Minister's National Relief Fund is fully eligible for tax deduction under section 80G of the ITA.[44] These

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39 MCA HLC REPORT ON CSR, *supra* note 10 at 71.

40 The Companies Act, 2013, No. 18, Acts of Parliament, 2013, §§135(5) & (7) (India).

41 The Finance Act, 2014, No. 2, Acts of Parliament, 2014, §13 (India).

42 Ministry of Finance, Circular No. 1/2015 (Issued on January 21, 2015), https://www.incometaxindia.gov.in/communications/circular/circular1_2015.pdf

43 *FAQ on CSR Cell*, MINISTRY OF CORPORATE AFFAIRS, https://www.mca.gov.in/MinistryV2/faq+on+csr+cell.html (last visited May 18, 2021).

44 Satish Y Deodhar, *India's Mandatory CSR, Process of Compliance and Channels of Spending* 9 (Indian Institute of Management Ahmedabad, Working Paper No. 2015-05-01, 2015), https://web.iima.ac.in/assets/snippets/workingpaperpdf/16048663442015-05-01.pdf

exemptions could incentivize companies to concentrate its CSR activities in areas or sectors that could enable them to claim tax deductions. To curb this, activities specified under Schedule VII of the Act should be vested with uniform tax benefits and CSR expenditure should be permitted to be deducted while computing a company's taxable income.

VI. CONCLUSION

The HLC 2015 and HLC 2018 have stressed on the effective utilization of CSR spending especially as allegations of misuse of CSR funds and inefficient utilization of CSR spending came to the fore. To that extent many changes brought about by the Amendment have tried to rectify such misuse and has tried to streamline the process of CSR spending. A few positive changes include — (i) mandating implementing agencies to mandatorily register with the Central Government[45] which will enhance accountability of the implementation agencies and could curb the re-routing of CSR funds back to the company; (ii) mandating that capital assets used for CSR purposes cannot be held in the company's name[46] reflects the CSR ethos that society should be the beneficiaries of CSR projects and the company is precluded from profiting from CSR projects; (iii) carrying out impact assessment for CSR projects for certain class of companies enables companies to gauge the efficacy of their CSR spending[47]; (iv) permitting companies undertaking CSR spending, in excess of the required amount to set off the excess amounts[48] within prescribed timelines provides greater flexibility to companies while choosing and allotting CSR projects; and (vi) permitting companies to employ international organizations in assisting with its CSR projects[49] could enable companies to employ international best practices while carrying out the activities.

[45] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 4(2)(a) (India).
[46] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 7(4) (India).
[47] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 8(3) (India).
[48] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 7(3) (India).
[49] The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 4(3) (India).

However, as discussed above, many of the provisions of the Amendment have several impediments associated with it. Though the CSR policy has been made more comprehensive, the role of CSR has taken a back seat with enhanced responsibility cast on the board of directors. The legislative intent while enacting the CSR regime was to preserve companies' autonomy while encouraging them to voluntarily contribute to CSR activities.[50] Currently, the mandatory spending requirement of the CSR amounts (or transferring of unspent CSR amount), the threat of monetary sanction for non-spending of CSR and the increased interference in the role of the board of directors of a company in relation to CSR implementation has stripped companies of its autonomy in relation to carrying out CSR activities and has resulted in a significant departure from the 'comply or explain' regime. The new regime has therefore imposed a stringent burden on the companies to reconfigure its existing CSR framework in line with the Amendment.

[50] *Corporate Social Responsibility a leap of Faith for the Government: Sachin Pilot, Minister Corporate Affairs*, INDIA CSR NETWORK (December 20, 2012), https://indiacsr.in/corporate-social-responsibility-a-leap-of-faith-for-the-government-sachin-pilot-minister-corporate-affairs/ (last visited May 18, 2021).

Rights Of Literary Authors Under Copyright Law

- **Jassimran Kaur**[*]

Abstract

There are principles on which the modern international system of Copyright and Authors' rights (with focus on Poets and Novelists) are based upon. Such principles are applied by different jurisdictions in a different manner as a result of which different jurisdictions accommodate the interests of Authors vis-à-vis other stakeholders differently. The two distinct kinds of protection available to the Poets and Novelists (hereinafter referred to as Authors') under the Copyright Law are Economic Rights and Moral Rights. This chapter discusses such rights from the point of view of the Literary Authors and throws light on the applicable law, term of protection granted to Authors in different countries. Further it discusses the question of waiver of moral rights with emphasis on Indian jurisdiction as the position on this aspect is unclear as on date. Thereafter taking into account the publishing industry, the standard contractual arrangements usually entered into between the Authors and the Publishers are being discussed along with some instances of contractual disputes which arose between the parties and how the same were decided by the Courts mainly in U.S. and India. To conclude, both the Authors and publishers have got different interests therefore reconciliation of their interests is very important. But it is often seen that the Authors' position is worsened off due to one reason or another. Hence some solutions by way of which the position of the Authors can be strengthened are cited.

Keywords: Copyright, Authors, Publishers, Moral Rights, Contractual Disputes

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I. INTRODUCTION

***"A true poet writes from the language and experiences of their own heart, not those of others."* - Suzy Kassem.**

The role of Copyright is to protect the Author's original creation by giving him the exclusive right to authorise or prohibit certain uses of his works by others. It is believed that the Author has exclusive natural right of the property in the results of his labour; he should control the publication of his work; should object to any unauthorised alterations or other attack on the integrity of his work; should be remunerated when his work is exploited which stimulates the creativity and should be encouraged to publish his works in order to have widest dissemination of works amongst the public at large.[1] These are the principles on which the modern international system of Copyright and Authors rights are founded and are applied in all the jurisdictions across the world, with some jurisdictions focusing more on one principle over the other.[2] For example, The U.S. focuses more on economic aspect i.e. it seeks to provide incentives to the Authors for making their work available to public. This can be inferred from 'The United States Constitution' which grants Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[3] In one of the decisions rendered by the Supreme Court of U.S. on respecting the copyright monopoly granted by Congress, it was held that, 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.'[4] On the other hand, France, being a civil law country focuses more on the principles of natural

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[1] K. GARNETT ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT 29 (Sweet & Maxwell, 1999).
[2] *Id.*
[3] U.S. CONST. art. 1, §8, cl. 8.
[4] Fox Film Corp. v. Doyal., *286 U.S. 123* (*1932*).

justice i.e. copyright is deemed a natural right, part of natural law, a true extension of personality of the Author.[5] It aims to protect the two key interests held by the Author i.e. his pecuniary and exploitative interests on the one hand, and his intellectual and moral interests on the other.[6] This is in contrast to the approach of the USA which is mere economic.[7]

India being a common law country, has its Copyright law based on the English Model. So far as the protection of Authors' rights is concerned, there have been policy decisions of varying nature, mainly influenced by other common law jurisdictions and accommodate the interests of the Authors and other stake holders in the Copyright regime. This has made the Indian Copyright law open to several interpretations so far as the exercise of the modern rights are concerned, which may, sometimes, affect the rights of the Authors positively and sometimes to their detriment. When it comes to protecting the interests of Authors vis-à-vis the interests of Publishers, over the period of time, there has been change in policies underlying the objectives. For example, with respect to provisions relating to Moral rights and jurisdiction of the court allowing Authors to sue at the place of suing, the courts have consistently held that the Copyright Act has underlying objective of helping the Authors who are poor enough to travel to far flung places to enforce their right to sue and have their moral rights protected.[8] However, when it came to analysing the interests of the Broadcasters vis-à-vis the other stake holders, the Supreme Court of India adopted the balancing the approach by observing in one of the cases[9] that: The Indian Copyright Act seeks to maintain a balance between the interest of the owner of the copyright in protecting his works and the interest of the public to have access to the works. The extent to which the owner is entitled to protection in regard to his work for which he has obtained

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[5] Jean-Luc Piotraut, *An Authors' Rights-Based CopyrightLlaw: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 555 (2006).

[6] *Id*. at 551.

[7] *Id*. at 552.

[8] Manu Bhandari v. Kala Vikas Pictures Pvt. Ltd., AIR 1987 Delhi 13 (India) [hereinafter *Manu Bhandari*]; Exphar Sa v. Eupharma Laboratories Ltd. & Anr (2004) 3 SCC 688 (India).

[9] Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd., [2008] 37 PTC [353] SC (India).

copyright and the interest of the public is a matter which would depend upon the statutory provision.[10] In the late December 2020, the IPAB (Intellectual Property Appellate Board), which has now been abolished, in a case concerning the grant of statutory license and the Authors' rights to get the share of royalty when the broadcast of sound recording is made, upheld the rights of the Authors and observe that the provisions relating to amendment are beneficial piece of legislation aiming to ameliorate the conditions of the distressed and deprived Authors as a class of the persons who were involved as participants in creation of the sound recordings.[11]

II.RIGHTS

The Poets and Novelists (hereinafter referred as Authors') are granted two distinct kinds of protection under the Copyright Law i.e. Economic Rights and Moral Rights.

A. Economic Rights

One of the Economic rights granted to Authors is Right of reproduction. There are other economic rights as well such as right of distribution, right of communication, right to perform publicly, right to adaptation which are generally same whether it is a common law country or civil law country.[12] The purpose of economic rights is to enable the Authors to reap economic benefits by granting them exclusive rights over their work. It allows them to derive material benefits when their work is used by others. The duration of the protection of economic rights granted to Authors for literary works as per Berne Convention[13] is life of the Author and 50 years after his death[14] whereas in France and the USA, the copyright protection exists for the life of

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[10] *Id*.

[11] Intellectual Property Appellate Board, https://ipab.gov.in/ipab_orders/delhi/OP-(SEC-31D)-1-to-9-2020-CRNZ-and-OP-(SEC-31D)-1-2020-CR-WZ.pdf (last visited July.5, 2021).

[12] *See* The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 §2(h) (India).; 17 U.S.C. §102 (2006) (U.S.).; Copyright, Designs and Patent Act 1988, c.48, §16 (U.K).

[13] Berne Convention for The Protection of Literary and Artistic Works, Sept. 9. 1886, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

[14] *Id.* at art. 7(1).

the author and 70 years thereafter.[15] In India, the copyright subsists for literary works during the life of the Author and 60 years counted from the year following the death of the Author.[16]

B. Moral Rights

The moral rights recognized in the literature consists of the Author's right to claim authorship *(right of attribution*), the right to object to modifications of the work (*right of integrity*), the right to decide when and how the work in question will be published (*right of disclosure*), and the right to withdraw a work after publication (*right of withdrawal*).[17] The scope of these rights vis-à-vis literary Authors varies from civil law jurisdiction (which give more importance to moral rights) to common law jurisdiction depending upon the philosophy underpinning the formulation of statute. In France, the author simultaneously enjoys the right to respect for his name, his authorship and his work; the right to divulge his work and a right to reconsider or of withdrawal."[18] In the U.S., Visual Artists Rights Act of 1990 (VARA) makes a provision[19] for the rights of integrity and attribution only with respect to visual arts. Apart from this, The American Courts have protected moral rights on the basis of common law rights and through other statues such as trademarks, privacy, unfair competition and defamation.[20] India became signatory to Berne Convention[21] in the year 1958, therefore it had to provide for minimum protection[22] of moral rights, hence by virtue of Section

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[15] *See* CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.], art. L123-1 (Fr.).; 17 U.S.C. §302 (2006) (U.S.)

[16] The Copyright Act, 1957, No. 27, Acts of Parliament, 1957 §22 (India).

[17] Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 353 (2006).

[18] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.], art. L.121-6.,121-2,121-4 (Fr.).

[19] 17 U.S.C. §106A(a) (2006) (U.S.).

[20] Betsy Rosenblatt, *Moral Rights Basics*, HARVARD LAW SCHOOL (1998), https://cyber.harvard.edu/property/library/moralprimer.html.

[21] Berne Convention, *supra* note 13.

[22] Internationally one of source of the moral rights is the Berne Convention which provides for minimum standards of protection relating to the works and rights to of the authors. Article 6bis (1) of the Berne Convention also recognises only two moral rights i.e. Right of Attribution and Right of Integrity.

57 of the Copyright Act[23], it provides statutory protection to Right of Attribution and Right of Integrity. **Right to Attribution**[24] is the right to claim Authorship in a work or a right attributing a protected work to its creator. **Right to integrity**[25] is the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

It is believed that recognition of non-economic interests of Authors promotes the scientific, technological and cultural development in a society. It helps in the enrichment of cultural heritage and enables Authors to associate the work with themselves. The key reason many Authors create literary works is the expectation of reputational benefits such as recognition and attention.[26] The term of protection of moral rights varies from country to country. For example, in the U.S., these rights expire when the Author dies.[27] France provides indefinite protection to moral rights [28] while in Germany moral rights expire 70 years after the Author's death.[29] In India, there is no express provision providing duration of protection of moral rights but Section 22 of the Copyright Act, talks about the duration of the protection of copyright which is during the life of the Author and 60 years counted from the year following the death of the Author.[30] Therefore, it can be inferred that the duration of moral rights last till copyright protection. Further in some countries, after the death moral rights

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[23] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 §57 (India) ("Author's Special Rights says that Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right to claim authorship of the work; and (b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation .It also restricts the applicability of moral rights to adaptations of computer programmes.").
[24] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 §57 (India).
[25] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 §2(h) (India).
[26] Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 58 (2007)
[27]17 U.S.C. §106A(d) (2006) (U.S.).
[28] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.], art. L 121-1 (Fr.).
[29] Urheberrechtsgesetz [UrhG] [Copyright and Related Rights Act], Sep. 9, 1965, BGBL.I at 1273, §64 (Ger.).
[30] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 §22 (India)

may be transferred to heirs[31] while in others moral rights are only till the Author's lifetime.[32]

C. *Waiver of Moral Rights*

Some jurisdictions consider Moral Rights to be perpetual and of inalienable nature while in some countries, waiver of moral rights is allowed, this makes the '*Waiver of the moral rights*' one of the highly debated topics in various jurisdictions which aims to take away the statutory protections granted to Authors. These rights are inherently necessary to safeguard their works from external intrusions. In the U.S., the moral rights may be waived if the Author agrees to such waiver in a written agreement signed by the Author.[33] The French IP Code says that the moral rights shall be perpetual, inalienable and imprescriptible.[34] In the UK, moral rights may be waived by instrument in writing signed by the person.[35] It also provides for informal waiver under general contract or law of estoppel.[36] In India, the position is unclear as to whether moral rights can be waived or not. Therefore, it is very important to delve into the question and understand how the Legislature and Indian Judiciary has dealt with it.

The amendments which were introduced in the year 1994, limited the scope of protection of moral rights of Authors. The original provision on moral rights provided the protection to the authors even if the distortion, mutilation or other modification of work was not prejudicial to honour or reputation. However, after amendment in the year 1994, the distortion, mutilation, modification was qualified being prejudicial to honour and reputation. The Statement of Objects and Reasons[37] appended to the bill

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[31] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.], art. L 121-1 (Fr.).
[32] 17 U.S.C. §106A(d) (2006) (U.S.).
[33] 17 U.S.C. §106A(e) (2006) (U.S.).
[34] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.], art. L 121-1 (Fr.).
[35] The Copyright, Designs and Patent Act 1988, c.48, §87(2) (U.K).
[36] The Copyright, Designs and Patent Act 1988, c.48, §87(4) (U.K).
[37] Rajya Sabha Secretariat, *Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010* (2010), http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf

which introduced amendments in the copyright law in the year 2010 sought to give independent rights to Authors of literary and musical works; that the authors would have rights to receive royalties and the benefits enjoyed through the copyright societies; ensure that the authors of the works, in particular, author of the songs included in the cinematograph films or sound recordings, receive royalty for the commercial exploitation of such works; strengthen enforcement of rights by making provision of control of importing infringing copies by the Customs Department, disposal of infringing copies and presumption of authorship under civil remedies etc. These objectives seem to be in favour of the Authors. The amendments which took place in the year 2012 allowed the Right of Authorship to be claimed by legal representatives of the Author which further expanded the scope of the provision on moral rights.

The Courts in India, have adopted an extensive approach while granting protection to moral rights in India. As said in one of the leading cases[38] that *Section 57 may override the terms of [a] contract of assignment of copyright i.e., the contract of assignment of copyright has to be read subject to the provisions of Section 57, and the terms of [the] contract cannot negate the special rights and remedies granted by Section 57.*

In another case[39] decided by Delhi High Court, the question at issue was whether film directors can be considered Authors and waive their moral rights. The court held as follows: *'in response to a query whether a director can decide to not want his name to be associated with a film which he considers harmful to his reputation, the counsel for the Plaintiff submitted that such a waiver would be contrary to public policy since the public would have a right to know who the Director of a film was. However, the Court is not prepared to go as far as to deny the right of a director to waive his right to be credited as such if for any reason he does not want his name to be associated with the film. As long as the waiver is voluntary, it cannot be said to be opposed to public policy. The mandatory declaration of the name of the*

[38] *See* Manu Bhandari, *supra* note 8.

[39] Sartaj Singh Pannu v. Gurbani Media Pvt Ltd, 2015 (63) PTC 590 Del (India) [hereinafter Sartaj Singh Pannu].

Director in the application for a censor certificate is sufficient to satisfy the requirement of the right of the public to know who the Director is.' The implication of this case is that under limited circumstances, where the Author/ Director himself intends to disassociate himself with the work in the interest of his own honor and reputation, then the limited right of waiver is available.

The Supreme Court of India held in one of the non-copyright cases[40] that: *"A person may waive his right. Such waiver of right is permissible even in relation to a benefit conferred under the law. But it is trite that no right can be waived where public policy or public interest is involved. Jurisdiction on a tribunal/ court is a creature of statute. Jurisdiction on Arbitration can be conferred by agreement between the parties. But, the contract between the parties must be in obedience to law and not in derogation thereof. Contracting out is permissible provided it does not deal with a matter of public policy. An agreement under no circumstances can violate the Public Policy."*

From the above decisions, one could decipher the varying approach of Indian Judiciary. One could see that the view held by the Learned Court in *Sartaj Singh Pannu's* case that the moral rights can be waived if its voluntary and not against public policy is different from the view taken by the Learned Court in *Mannu Bhandari's* Case. It is the belief of the Author that the decision given by the Court in *Sartaj Singh Pannu* is not a good law as earlier India's approach be it of legislature of or Judiciary has always been Author's oriented like that of France, Italy, Germany etc. wherein the Authors are granted inalienable and perpetual moral rights. While in the latter case, the Court in India proceeded to allow waiver of the moral rights albeit in some contextual observations. The moral rights are certainly a matter of public policy; therefore, the question of waiver should not be singularly associated with the case specific facts.

[40] Centrotrade Minerals and Metal. Inc. v. Hindustan Copper Limited, (2006) 11 SCC 245 (India).

Further, considering the position of India, which has got 100 crores of population and a rich cultural heritage with 121 languages[41] (out of which 22 languages are already part of the Eighth Schedule to the Constitution of India), in such a situation, it is obvious that the number of Authors be it in national or regional languages will be large in number and also they may not be economically sound taking into account the income inequality which is prevalent in India. In such circumstances, decisions like *Sartaj Singh Pannu*[42] will make the life of a poor Author pitiable as the authors will be forced to waive their moral rights for financial considerations which may seem tempting to them in the short run. It is the belief of the Author that the efforts should be made by Indian Judiciary to interpret the law in such a manner which is Author oriented like done in the countries such as France wherein the courts follow the protectionist approach i.e. protect the Author's interests with respect to moral right.

III.CONTRACTS WITH PUBLISHERS

After an author is done with labour in creating the work, he would like to get it commercially exploited so that he can reap economic benefits for the hard work done. Some go for self-publishing while others have to approach publishing houses /publishers / literary agents for getting their work published. Often such entities, who are professionals with strong bargaining power, enter into licensing agreements/publishing agreements/or assignment of rights/waiver of rights with the Authors, having weaker bargaining power in a contractual relationship. The publishing company /other intermediate entities agree to publish the work of the Author in lieu of payment of royalty/fees/advance on such terms and conditions

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[41] *More than 19,500 mother tongues spoken in India: Census*, THE INDIAN EXPRESS (Jul. 1, 2018), https://indianexpress.com/article/india/more-than-19500-mother-tongues-spoken-in-india-census-5241056/ ("The 121 languages are presented in two parts — languages included in the Eighth Schedule of the Indian Constitution, comprising 22 languages and languages not included in the Eighth Schedule, comprising of 99 languages plus the category "total of other languages", which includes all other languages and mother tongues which returned less than 10,000 speakers each at the all-India level or were not identifiable on the basis of the linguistic information available.")

[42] *See* Sartaj Singh Pannu, *supra* note 39.

decided between the parties. Sometimes, the Authors fall into the prey of Literary agents who take huge sum of money from them to establish their contact with publishing houses and work on commission basis. So, one can understand the pain and obstacles that an Author has to undergo at the nascent stage. Often the budding Authors who need a platform to launch their book enter into publishing agreements' compromising with the legal consequences.

When it comes to transfer of rights, the Authors do the same via license, assignment or waiver so that there can be economic exploitation of their work.[43] These three forms of contract have peculiar characteristics such as wherein license is granted to the publishers; copyright in the work remains the Author but is merely granted the permission to perform certain acts which in the absence of authorisation would fall under the category of infringement.[44] Licenses can be express, implied, exclusive and non-exclusive as well.[45] In case of assignment, copyright belongs to the publisher and is free to exploit it in the manner he chooses. In case of waiver of rights, the Author relinquishes certain rights in favour of the publisher to his benefit or renounces to enforce his rights.[46] In many countries, transferees ask Authors to sign standard contracts to waive their right of integrity which is a moral right so that the work can be adapted.[47] Usually in a standard contractual arrangement, the Author licenses his economic right i.e. right of reproduction and right of distribution over his work to a Publishing house/entity. The publishers in lieu of the same publishes the work in printed or electronic form and put the same into market through retailers, e-book platforms, book sellers by entering into licensing agreements with them.[48] The Authors are represented by agents or collective management organisations, who collect remuneration on the behalf of Authors and also exercise exclusive rights on

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[43] SEVERINE DUSOLLIER, SCOPING STUDY ON COPYRIGHT AND RELATED RIGHTS AND THE PUBLIC DOMAIN 7 (WIPO, 2010).
[44] *See id.* at 14.
[45] *See id.*
[46] *Id.* at 7.
[47] *Id.* at 38.
[48] *Id.* at 18.

behalf of the Authors.[49] Unlike western world wherein Collective Managements Societies play active role in providing the Authors with the economic rewards and in enforcement of their rights, the situation in India is different. The primary copyright society in respect of literary work in India is IRRO (Indian Reprographic Rights Organisation) established in the year 2000 only.[50]

A. Contractual Disputes

The contractual disputes between the Authors and Publishers are of varied nature. The dispute may arise between the Authors and the Publishers as to the Authorship/ ownership claims; terms of the contract (when the terms are not mutually convenient). The contracts between the parties contains the terms over the extent of use, payment of royalty, geographical scope, duration of license, translation rights, future works, termination of contract etc. The publishing houses generally put the conditions which are in their favour and help them reap the profit which is their ultimate objective. Therefore it is necessary to consult a lawyer before entering into agreement of any type with the publishing house or any such entity and to have it in written form after understanding the terms and conditions and its legal consequences. In one of the cases[51] decided by the Court in India, it was held that the *object of the law being the protection of the author makes it a beneficial piece of legislation. It becomes the duty of the court especially in the cases involving the agreements between the author and publisher to be mindful and circumspect to infer the true intent of the parties so that the interest of the author may not be adversely affected and the correct interpretation to the agreements may be given.This is the reason for which the courts are time and again faced with the situations where the courts have*

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[49] *See id.* at 61.

[50] *See How IRRO works?*, INDIAN REPROGRAPHIC RIGHTS ORGANISATION, https://www.irro.org.in/about-us/how-irro-works/ (last visited Aug.10, 2021); Its role is to issue licenses on behalf of copyright holders for reproduction of copyrighted materials in the form of photocopying, scanning etc, printing, Digital copying on CDs and DVDs, Electronic storage in databases; collect royalties and distribute the same to the right holders

[51] Pee Pee Publishers and Distributors (P) Ltd. v. Dr. Neena Khanna, MANU/DE/3916/2010 (India) [hereinafter *Pee Pee Publishers*].

to indulge into scrutiny of clauses of the agreements between the author and publishers and interpret the agreements accordingly.

There are various terms of the contract which are debated in the Courts over the world and different interpretations to the contractual clauses are normally given by the parties to the dispute. Some of the usual kinds of the contractual disputes arising between the Authors and Publishers are outlined below:

1) Rejection of unsatisfactory manuscript: The dispute arises when the publishers reject the manuscript by claiming that it is unsatisfactory and recoup the advances paid to the Authors.[52] In one of the leading cases,[53] the publisher sued the Author for violation of one of the contractual terms and sought to recover advances paid to the Author for a manuscript which the publisher found unsatisfactory in style, form and content, hence not fit for publication. To this, the U.S. Court held that the publisher breached its implied obligation to provide the Author with editorial commentary and the opportunity to revise accordingly and hence the Author is released from any obligation to return the advance. However this duty to edit set forth as an absolute obligation in the Dell Publishing case was diminished by the Curtis[54] decision.[55] In another case[56] , the question arose was whether a publisher retains the right to reject an author's manuscript written pursuant to a standard industry agreement, even though the manuscript is of the quality contemplated by both parties, to which the court held that if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration."

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[52] M. Simensky, *Redefining the Right and Obligations of Publishers and Authors*, 5 LOY. L.A. ENT. L. REV. 111, 113, (1985).
[53] Dell Publishing Co., Inc. v. Whedon, 577 F. Supp. 1459 (S.D.N.Y. *1984*).
[54] Doubleday & Co. v. Curtis, 763 F.2d 495, 496 (2d Cir. 1985).
[55] Martin P. Levin, *The Contemporary Guide to Negotiating the Author-Publisher Contract,* 59 N.Y.L. SCH. L. REV. 447, 471 (2009).
[56] Chodos v. West Publishing Co., 292 F.3d 992 (9th Cir. 2002).

2) Failure to Publish the manuscript: The dispute arises when the Publisher after delivery of satisfactory manuscript by the Author, refuses to publish it without any justification.[57] The Court, while remedying had asked the Authors to keep the advance, awarded damages to the authors.[58]

3) Technology Issues: The dispute arises between the Author and the Publisher over the distribution of work of the copyright owners online. Generally the Author plead infringement of his economic rights and right to integrity (which is one of the moral rights) when his work is transformed from original medium to different mode wherein he may feel that his work is distorted. While the publishers feel that the same constitutes legitimate use. In one of the cases[59] decided by the Court in U.S., the dispute was that the publisher had put the already published articles of the freelance writers, on electronic databases available to the public without compensating them, to which the question arose whether the e-versions of articles constituted "revisions"[60] of the original newspaper or magazine under the U.S. Copyright Act. To this, the Court held that the electronic databases are not "revisions" of the original collective works. It was held that *articles are viewed as parts of a new compendium—namely, the entirety of works in the Database. In that compendium, each edition of each periodical represents only a miniscule fraction of the ever-expanding Database. The Database no more constitutes a "revision" of each constituent edition than a 400-page novel quoting a sonnet in passing would represent a "revision" of that poem. "Revision" denotes a new "version," and a version is, in this setting, a "distinct form of something regarded by its creator or others as one work."[61] In short, unlike microforms, the Databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any "revision" thereof.*[62] The Publishers (both print and electronic) have infringed Authors' rights.

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[57] Levin, *supra* note 55, at 456.
[58] *Id.*
[59] New York Times Co. v. Tasini, *533 U.S. 483* (2001) [hereinafter *Tasini*].
[60] 17 U.S.C. §201(c) (2006) (U.S.).
[61] See *Tasini, supra* note, at 500.
[62] *Id.* at 502.

4) ***Reduced Royalties:*** In most of the countries, the amount due to the Author by way of remuneration is decided in a contract.[63] The countries which have Author oriented policies, have legislation to determine the type of remuneration to be used to pay to the Authors such as whether it will be proportional, lump sum or equitable. The contractual dispute arises when the publisher who is selling published work at a greater discount than the normal one, may reduce the agreed royalty amount on the basis of net receipts.[64] In one of the cases[65] decided by U.S Court, the Authors brought an action against the publisher, as it reduced the royalties on sales made by the publisher above the normal discounts.[66] Ultimately the suit was settled between the parties.[67] In France, remuneration which is not equal to zero has to be there in a publishing contract.[68] The Copyright law in Germany recognised adequate remuneration as a key objective of copyright.[69]

5) ***Presence of negative covenants in the agreement, which against the contract law, hence void****:* Apart from the applicability of the provisions of Copyright law, the general principles of contract law such as doctrines of good faith; fairness, equity etc are applicable on all the contracts. The presence of negative covenants in the agreements i.e. agreements in restraint of trade are void. To quote a decision[70] of the Court in India, wherein a condition was put that during the continuance of this Agreement, the Author shall not without the consent in writing of the Publisher prepare or edit for any other publisher any work that is an expansion abridgement or revision of the work or of any part of it or publish or cause to be published any work on the same subject at or about the price the sale of which may reasonably be regarded as conflicting or likely to conflict with the sale of the work, it was held that *the negative*

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[63] *See* DUSOLLIER *supra*, note 43.
[64] Levin, *supra* note 55, at 459.
[65] Levering v. Addison-Wesley Publishing Co., 12 Media L. Rptr. 1807, 1809–10 (N.D. Cal. 1986).
[66] Levin, *supra* note 55, at 457.
[67] *Id.*
[68] *See* DUSOLLIER *supra*, note 43.
[69] Urheberrechtsgesetz [UrhG] [Copyright and Related Rights Act], Sep. 9, 1965, BGBL.I at 1273, §11 (Ger.).
[70] The Chancellor Masters v. Orient Longman Private Limited, 2003 (26) PTC 186 (India).

stipulation contained in Agreement, being in restraint of trade, is void under Section 27 of the Contract Act.

6) Violation of Right of Attribution i.e. one of the moral rights of the Authors: The dispute arises over the right of attribution between the Authors and the Publishers. The court in U.S. held that the Authors enjoy the right of attribution, which prohibits the false use of their name during their lifetime.[71] The attribution right is available to authors who seek to restrain the publication of works for which they never authorized publication and to authors who wish to protect their reputation.[72]

7) Violation of Right to Integrity, i.e. one of the moral rights of the Authors: The contractual dispute arises between the parties when the publishers copyedit the Authors' work in order to conform the same with the Publishers' style manual.[73] No doubt they are not allowed to make substantial changes without Author's consent.[74] But when the changes are made without Author's consent, it amount to violation of one of the moral rights of the Authors. In one of the cases[75], the defendant published the article in content and form substantially different from plaintiff's completed article it was held that *contract must be construed according to the custom and use prevailing in a particular trade, evidence should be taken as to the connotation of the words "edit" and "change" in the context of the publishing industry as it may be possible that the agreement merely permits reasonable modification of the original article but does not allow substantial departure therefrom.*

8) Violation of Non Competing clause: In a standard contractual arrangement, often the authors are curtailed by the Publishers not to work on the same subject or work on any other subject which may hamper the sales of the current work.[76] The

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[71] Clemens v. Belford, Clark & Co., 14 F. 728 (C.C.N.D.Ill.1883).
[72] *See* Piotraut *supra note 5,* at 610.
[73] MARK FISCHER, E. GABRIEL PERLE & JOHN TAYLOR WILLIAMS, PERLE, WILLIAMS & FISCHER ON PUBLISHING LAW 2-27 (Wolters Kluwer Law & Business, United States, 2013).
[74] *Id.*
[75] Edison v. Viva International, Ltd., 70 A.D.2d 379 (N.Y. App. Div. 1979).
[76] Levin, *supra* note 55, at 475.

dispute arises because there is no such restriction on the part of the Publisher.[77] It was held in one of the cases[78] by U.S. Court that such a *contract does not close off the right of a publisher to issue books on the same subject, to negotiate with and pay authors to write such books and to promote them fully according to the publisher's economic interests, even though those later publications adversely affect the contracting author's sales.* In another case[79] decided by Delhi High Court, the Plaintiff was the author of story titled 'Lakshman Kills A Tiger' and owner of copyright. Defendants entered into contract for printing and publication and Defendants claimed the story was written under their employment and ownership of copyright belongs to them. While evidence showed that the copyright belonged to the Plaintiff. Defendants got the books published in another language from other publisher. It was held that since the Original manuscript was with the plaintiff hence defendants have no right to get book published from elsewhere which would amount to infringement of copyright.

9) Nature of agreement/contract: The conflict arises between the parties as to whether the nature of contract entered into between the Author and the Publishing house/entity is a license or assignment, on which the Authority[80] on the subject has observed, that "in each case it is a matter of construction of the instrument in question whether the parties intended that there should be transferred a proprietary interest in the copyright or merely that there should be given permission to exploit the work, coupled perhaps with contractual restraints on the grantor as to his own exploitation. The distinction is often a fine one. The position is made complicated by the fact that the rights of the copyright owner are defined in terms of the exclusive right to do various acts restricted by the copyright. A grant of "exclusive" or sole and exclusive right is therefore ambiguous being equally consistent with an assignment or a license. Where such an expression is used, as it often is, the other terms of the agreement must

[77] *Id.*

[78] Van Valkenburgh v. Hayden Pub. Co., 30 N.Y.2d 34 (N.Y. 1972).

[79] P.N. Krishna Murthy v. Cooperative for American Relief Everywhere, AIR 2001 Del 258 (India).

[80] GARNETT ET AL., *supra* note 1.

be considered to determine whether the grant was intended to operate as assignment or license."

10) Right of retraction, one of the moral rights (not recognised in India): The dispute as to retraction right arose between the Author and Publisher in a case wherein the court refused to recognize the retraction right. In one of the cases[81], the defendant withdrew the rights granted to the publisher to refrain him from publishing, co-publishing, translating and adapting the contents of the book of the defendant either partially or wholly in any form, to which the Hon'ble Court held that the right of retraction is concerned it operates in Civil Law Jurisdictions such as in France[82] and since Indian Law is based on common law system, it finds no mention therein and further once the Act does not recognise such right, the same cannot be read into in the legislative scheme. It was held that the retraction right is the right of the author to withdraw his work from publication because of the changed opinion.

IV.CONCLUSION

To conclude, there has always been conflict between interests of the Authors and the publishers. The publishers have economic interests and intend to exploit the copyrighted work fully to reap economic benefits whereas the Authors apart from economic interests want to protect their moral rights as well. The protection of moral rights varies from Civil Law Countries to Common Law Countries. There are theories relating to Moral Rights protection in various jurisdictions but what is suitable to one jurisdiction cannot be applied in another jurisdiction; Moreover, civil law jurisdiction focuses more on moral rights protection than common law jurisdiction. Therefore, efforts should be made to harmonise copyright laws with respect to moral rights internationally as different countries have conceptualised the law differently. Law in India should also be reformed on the lines of the international harmonisation. In case

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[81] *See* Pee Pee Publishers, *supra* note 51.

[82] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.], art. L.121.4 (Fr.).

of subordination, efforts should be made at all levels to encourage the Authors to get their rights enforced. Courts should play a key role in enforcing the Authors' rights in such circumstances. The role of Collective management organisations especially in countries like India should be strengthened and should be brought on a par with Western Countries. Wherever possible, efforts should be made to maintain the proper balance between the commercial interests of Authors and that of publishers/publishing houses. In case of conflicts between the parties, the use of Alternative Dispute resolutions system should be encouraged to avoid the wastage of time, efforts and money.

A COMPELLING CASE FOR WHY POLICE REFORMS MATTER

- Dr. Sarfaraz Ahmed Khan & Aditi Morale*

ABSTRACT

Being the first line of defence in the country, the local police forces serve as the face of the state, a state machinery with maximum visibility in the eyes of public. From investigating crimes to enforcing law and order, the police officers form the backbone of our criminal justice system. However, the existing policing system is rife with maladies. Unbridled political interference, rampant police excesses, lack of accountability, inaction, corruption, and criminal complicity have tainted the face of the Indian Police. The paper identifies the colonial traditions that govern the state of policing to this date and argues for an urgent need of implementing the pending police reforms.

Issues such as shortage of manpower, obsolete machinery, inadequate training, and lack of basic amenities like safe and affordable housing, sanitation, access to clean drinking water et cetera hinder the performance and welfare of the police personnel. This makes comprehensive police reforms more important than ever. Despite a long history of attempts at police reforms, the compliance by the political leadership seems to be dissatisfactory on all counts. This paper, therefore, sets out to make a compelling case as to why the police reforms matter and what should be done to ensure ameliorations that go beyond the Supreme Court directives in the landmark Prakash Singh judgement. The need for transparent mechanisms to ensure accountability and incentives for a satisfied police force is also addressed through this paper.

Keywords: Police reforms, political interference, colonial traditions, accountability, incentives

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I. INTRODUCTION

India, the world's largest democracy gained its status as the "Republic of India" post-independence, rightfully presenting itself as the sovereign deriving its power from the will of the newly liberated populace. Most institutions that we see today find their origins in the democratic aspirations of these vanguards of modern India.

The systems of policing, on the other hand, remind one of the colonial traditions of securing law and order. A democratic society, much like ourselves demands democratic ways of policing. To actualize this vision, the political leadership at the Centre along with the local governments will have to pick up the gauntlet and bring about the much-awaited police reforms.

This paper explores the history of police reforms in India while setting the tone for an urgent need to expedite these impending reforms. Further, while arguing for transparent and public-partnered systems of accountability to tackle with the police excesses, the paper also identifies that a welfare-oriented approach is crucial to achieve comprehensive police reforms.

The following subsection shall deal with the timeline for police reforms that begins from the pre-Independence India and spans over more than 150 years.

A. The Colonial Past

One of the earliest recorded attempts at police reforms [1], the Madras Torture Commission of 1855, was a mere façade in the name of a reform. The Commission offered a racially insensitive explanation for the horrors that ensued under the pretext of revenue collection. It disingenuously achieved that effect by demonizing the native cadre of servants and further exploiting the stereotype that "oriental is barbaric".[2] The reform was unsuccessful in addressing the issue of widespread brutality and use of

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[1] Akun Sabharwal et al., *Internal and External Impediments to Police Reforms in India,* SARDAR VALLABHBHAI PATEL NATIONAL POLICE ACADEMY (2015), https://www.svpnpa.gov.in/images/npa/pdfs/CompletedResearchProject/6_internalandextimpedence topolice.pdf (last visited: May 28, 2021)

[2] Anuj Bhuwania, *"Very wicked children": "Indian torture" and the Madras Torture Commission Report of 1855*,10 SUR - INTERNATIONAL JOURNAL ON HUMAN RIGHTS 7, 9 (2009), https://sur.conectas.org/en/very-wicked-children/.

disproportionate force by the Company officials but the British regime somehow managed to use the reform to pose as a progressive or a liberal government[3].

The Police Act, 1861 followed the Madras Torture Commission Report and was introduced in the backdrop of the Sepoy Mutiny of 1857. Agitated by the mutiny, the British formulated this Act to crush dissent or any movement demanding self-governance with an apparent intention of controlling the masses by use of brute force.[4]

"In sharp contrast to their Bobby, a celebrated symbol of citizen cooperation, the Indian police constable was deliberately made a symbol of the British Raj", observes a former IPS Officer[5] while talking about the remnants of the colonial police administration and thoughtless adoption of the 1861 legislation by the sovereign state of India.

Ironically, the Police Acts enacted by most states of independent India are based on this very Act and continue to govern the police officials to this day despite their colonial roots and the underlying intention to suppress democratic remonstrations.

This is exactly why the discourse related to police reforms in India necessarily begins with the substitution of the State legislations based on the Police Act, 1861 with the Model Police Act in all States/UTs, a major reform that the executive has failed to implement in both its letter and spirit to this date.

B. Post-independence reforms:

This paper primarily focuses on the post-independence reforms aimed at reviving the state of policing in India. The following subsections discuss the committees formed to look into the matters of police reforms as well as the contribution through judicial activism.

1. The National Police Commission

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[3] *Id.*

[4] DAVID ARNOLD, POLICE POWER AND COLONIAL RULE: MADRAS, 1859-1947 (Oxford University Press 1986).

[5] Arvind Verma, *National Police Commission in India: An Analysis of the Policy Failures*, 71(3), THE POLICE JOURNAL 226, 227 (1998).

The National Police Commission was formed in the year 1977 by the Janata Government to look into the police reforms especially in the backdrop of abuse of power and involvement of the police[6] in suppression of democratic processes in the country during the state of Emergency imposed from 1975 to 1977.

The National Police Commission (NPC) produced eight reports between 1979 and 1981. It sought to make arrangements for impartial inquiry into the complaints against police in ways that must be acceptable to the civil society in general and suggested an independent authority in the form of state level Police Complaint Boards for grievance redressal.[7]

The Commission also recommended judicial intervention[8] in cases of custodial rape, death or grievous hurt caused in police custody and death of two or more persons resulting from police firing while dispersing unlawful assemblies. This recommendation manifested later in the amended section 176(1A) of the Code of Criminal Procedure, 1973, an important provision, the implementation of which is unfortunately still not commonplace[9].

To minimize the threat of illicit transfers or suspensions, the Commission recommended institution of a State Security Commission (SSC)[10] in each state so as to put a check on the unwarranted superintendence exercised by the State governments on their respective police forces. It also prescribed a fix statutory tenure of service for the Chief of police[11] and laid down guidelines for the recruitment process.

Other major recommendations by the NPC include institution of a state level special investigation cell[12] to monitor the cases of atrocities against the marginalized

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[6] *Id.*
[7] NATIONAL POLICE COMMISSION, *First Report*, (1979).
[8]*Id.*
[9]Sukanya Shantha, *Most States Have Flouted Mandatory Judicial Inquiry into Custodial Deaths for 15 Years*, THE WIRE, (Jul. 07, 2020) https://thewire.in/rights/custodial-death-judicial-inquiry-crpc
[10]NATIONAL POLICE COMMISSION, *Second Report* (1979).
[11]*Id.*
[12]NATIONAL POLICE COMMISSION, *Third Report* (1980).

communities, enactment of a new Police Act,[13] a Central Police Committee,[14] separation of investigation and law and order,[15]an All India Police Institute[16] along with certain proposed amendments in the Code of Criminal Procedure (CrPC) including withdrawal of protection from prosecution[17] granted under sections 132 and 197 of the said Act.

2. Ribeiro Committee

In 1996, two former senior police officers filed a PIL before the Supreme Court seeking implementation of the recommendations made by National Police Commission. In response, the Hon'ble Court directed the government to set up a committee to review the NPC's recommendations, known as the Ribeiro Committee. Under the leadership of a former chief of police, J.F. Ribeiro, the Committee sat over 1998 and 1999 and produced two reports[18].

The Ribeiro Committee is said to have rejected the powerful recommendations by the National Police Commission on the grounds of "practicability"[19] implying that the political elite of the nation would not submit to the recommended institutions. While the Committee chose to call the State Security Commission, the "Police Performance and Accountability Commission", it did not strive to ensure its autonomy and utility and in fact, suggested that it be a *"non-statutory, advisory and recommendatory"*[20] body unlike the robust mechanism suggested by the NPC.

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[13]NATIONAL POLICE COMMISSION, *Eighth Report* (1981).
[14]NATIONAL POLICE COMMISSION, *Seventh Report* (1981).
[15]NATIONAL POLICE COMMISSION, *Sixth Report* (1981).
[16]*Supra* note 13.
[17]*Supra* note 12.
[18] COMMONWEALTH HUMAN RIGHTS INITIATIVE, POLICE REFORM DEBATES IN INDIA 3 (2011). https://humanrightsinitiative.org/publications/police/PRDebatesInIndia.pdf.
[19]*Report of the Ribeiro Committee on Police Reforms: A Critical Analysis*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, https://humanrightsinitiative.org/programs/aj/police/india/initiatives/analysis_ribeiro.pdf (last visited: Aug. 21, 2020).
[20] COMMONWEALTH HUMAN RIGHTS INITIATIVE, POLICE REFORM DEBATES IN INDIA – SELECTED RECOMMENDATIONS 21 (2007) https://www.humanrightsinitiative.org/publications/police/police_reform_debates_in_india.pdf.

The Committee also sought for implementation of other reforms spelt out by the NPC such as separation of investigation and law and order, fixed tenure and fair selection procedure for Director General of Police (DGP), establishment of Police Establishment Board and District Police Complaints Authority (albeit non-statutory and recommendatory[21]).

3 Other Committees

Apart from the National Police Commission and the Ribeiro Committee, many other committees have extensively contributed to the cause of reforming the face of Indian police. Attempts at reforms from as early as 1949 when the Kerala Police Reorganisation Committee paved way for other Police Commissions in different States of India[22] show that discussions on police reforms are not novel. The Working Group on Police by the Administrative Reforms Commission in 1966 followed by the Gore Committee on Police Training in 1971 that made important but often neglected recommendations regarding inclusion of sensitization, communication skills and development of service-oriented attitudes in police training programmes,[23] *inter alia*, indicate the presence of an ongoing series of attempts at police reforms albeit with less success.

Several High-Powered Committees such as the Padmanabhaiah Committee constituted in 2000, the (Malimath) Committee on Reforms of Criminal Justice System (2001-03), the Second Administrative Reforms Commission (2005-08) and the 2005 Soli Sorabjee Committee (also known as the Police Act Drafting Committee) which gave us the Model Police Act for India in 2006 have been created for the purpose of reforming the status of policing in India.

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[21] *See supra* note 19 at 23.

[22] *The Padmanabhaiah Committee on Police Reforms: A Critical Analysis of Some Important Recommendations,* COMMONWEALTH HUMAN RIGHTS INITIATIVE, https://humanrightsinitiative.org/programs/aj/police/india/initiatives/analysis_padmanabhaiah.pdf (last visited: August 29, 2021).

[23] *Id.*

4. ***Judicial contribution:***

Even the judiciary has significantly contributed in formulation of police laws and has time and again issued court orders to ensure compliance towards the suggested reforms. The landmark judgement of *Prakash Singh versus Union of India* was one such attempt by the judiciary at formulating comprehensive and uniform police reforms.

The PIL filed by retired IPS officer Prakash Singh and others was decided on by the Supreme Court in 2006, a decade after it was initially brought before the Court. This case marks the watershed moment in the history of police reforms in India.

The Apex Court, after having closely studied the recommendations from several reports by various Committees, issued definitive directions to be complied with by the State Governments, Union Territories and the central Government to ensure proper implementation of the pending reforms.

The Court allowed the states to choose from the following three models for constitution of the State Security Commission: The NHRC Model, the Ribeiro Committee model and the Sorabjee Committee Model. A balanced composition of members with the inclusion of Home Minister or the Chief Minister as the Chairman representing the incumbent government, the Leader of Opposition for diversity in opinions, a sitting/retired judge representing the impartial Judiciary, Director General of Police (DGP) as Ex-officio Secretary and 3-5 independent members to represent the civil society was ensured.

It is evident that the Supreme Court envisaged the State Security Commission as a force to reckon with, a powerful watchdog body entrusted with the responsibilities of drafting broad policy guidelines, evaluating the performance of the police and insulating the police force from the unfettered political control by regular scrutiny through annual reports to be tabled before the legislature. It emphasized on making its recommendations binding, so that the governments do not circumvent the suggestions of the SSCs.

Even for the selection of DGP, the State Governments are to only choose from the three seniormost officials empaneled by the Union Public Service Commission for

promotion on the basis of experience and caliber. Arbitrary termination of the DGP or any officer on field duty such as the Inspector General of Police or the Superintendent of Police goes against the said directives.

The Supreme Court in this landmark judgement issued highly specific directives with respect to the recommended institutions, the nature of their work, powers, composition etc. along with directions for selection procedure of the DGP among other reforms, leaving little to no scope for non-compliance. The Court even cited the *Vineet Narain case*[24] and placed on record that strict compliance of the issued directives was to be observed until they are replaced by suitable legislations in respective states.

Despite such constant efforts by retired officials, civil society organizations, several Government-formed Committees and Commissions coupled with the historic 2006 Judgment,[25] the delayed and improper implementation of police reforms in the nation is very disheartening.

II. Reluctance to comply

A. Dismal state of compliance

September 22, 2020, marked 14 years since the Supreme Court issued the aforementioned seven directives in the *Prakash Singh case.* However, none of the states have been found "fully compliant" of all the directives towards implementation of police reforms[26].

So far, 17 states have amended their police acts[27] through legislations or executive orders to show compliance. However, these legislations/orders are rife with anomalies

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[24]Vineet Narain v. Union of India, (1998) 1 SCC 226 (India).

[25]*See supra* note 24

[26]*Government Compliance With Supreme Court Directives on Police Reforms: An Assessment*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, 1 (Sept., 2020) https://www.humanrightsinitiative.org/publication/government-compliance-with-supreme-court-directives-on-police-reforms-an-assessment-2020

[27] *Status of Compliance with the Supreme Court's Directives on Police Reform in the Prakash Singh and Ors. vs. Union of India and Ors. Part I: States with Police Acts/Amendments*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, 1-42 (Sept., 2020) https://www.humanrightsinitiative.org/publication/compliance-chart-supreme-court-directives-on-police-reform-part-1-states-with-police-actsamendments

and provisions that seek to undermine the functional autonomy of their respective police forces due to which most of the defaulting states are marked "non-compliant".

Similarly, 26 out of 28 states have constituted an SSC, either through Police Acts or government orders[28]. However, deviations such as advisory nature of the body, non-inclusion of Leader of opposition, lack of clarity in procedure of selection of independent members of the SSC, absence of the provision for submitting annual performance reports or for tabling the said reports to the legislature, lack of diversity on the board, et cetera have reduced the said attempts at reform to no more than mere lip service. Same goes for the compliance with other directives in the *Prakash Singh* Judgement [29].

According to a study by the CHRI,[30] none of the Union Territories are compliant with the seven directives which indicates that the Central Government is equally responsible for the poor state of compliance. The Centre could have kick-started police reforms in UTs, thus creating a moral responsibility on states to comply. One of the seven directives in *Prakash Singh case* also includes the constitution of a National Security Commission responsible for appointment of Chiefs for the Central Police Organizations (CPOs) and a task of general evaluation and scrutiny.

However, apart from a brief response[31] by the Ministry of Home Affairs, stating that a committee called the "Committee on National Security and Central Police Personnel Welfare (CNS & CPPW)" is being formed in pursuance of compliance with the said directive, no other information exists in the public domain.

This atmosphere of complete indifference towards police reforms poses a serious question as to whether the delay in proper implementation of reforms an outcome of a sheer lack of political will is just or if it is a conscious act of non-compliance.

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[28]*Supra* note 27 at 7.

[29]*Id.*

[30]*Id.*

[31]Statement of H.G Ahir, RAJYA SABHA DEBATES, 1 (Jan. 3, 2018) https://www.mha.gov.in/MHA1/Par2017/pdfs/par2018-pdfs/rs-03012018/1843.pdf (last visited: Aug. 1, 2021)

B. Contempt of Court Orders

Even after the fine judicial pronouncement in the *Prakash Singh* case, the Indian Constitutional Courts have time and again sought to ensure compliance with the aforementioned seven directives. Two years after the landmark judgment in May 2008, a three-membered monitoring committee was set up by the Supreme Court to inquire into the status of implementation of the court's directives.[32] Based on the report submitted by this committee, the Court even sent notices to non-compliant states demanding clarifications for non-implementation.

Yet again, in March 2013, the Supreme Court took *suo moto* cognizance of two incidents of police brutality and disproportionate use of force by police and has since issued many notices to errant states on different occasions[33]. Despite several warnings of *suo moto* contempt proceedings by the judiciary[34] and constant censure[35] of non-compliance by errant states, the state of compliance by the concerned governments remains dissatisfactory.

Due to the indifference towards implementation of police reforms, an atmosphere of despair and inertia has unfortunately clawed its way into the courtroom,[36] evident

[32] COMMONWEALTH HUMAN RIGHTS INITIATIVE, STATE SECURITY COMMISSIONS: A STUDY OF POLICE OVERSIGHT IN INDIA, 10 (Dec., 2019) https://www.humanrightsinitiative.org/download/1590655230State%20Security%20Commission%202020.pdf

[33] *Id.*

[34] Mohamed Imranullah S., *HC warns govt. of suo motu contempt proceedings*, THE HINDU, (Jul. 13, 2020), https://www.thehindu.com/news/national/tamil-nadu/hc-warns-govt-of-suo-motu-contempt-proceedings/article32072317.ece

[35] *State panel: Contempt case adjourned*, TELANGANA TODAY, (Feb. 4, 2020), https://telanganatoday.com/state-panel-contempt-case-adjourned; *Supreme Court to hear contempt plea against Karnataka Chief,* BANGALORE MIRROR, (Apr. 24, 2018) https://bangaloremirror.indiatimes.com/bangalore/others/supreme-court-to-hear-contempt-plea-against-karnataka-chief-minister-siddaramaiah/articleshow/63886416.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[36] Gaurav Vivek Bhatnagar, *Police Reforms Order: SC Lax in Clamping Down on Non-Compliant States,* THE WIRE, (May 10, 2018), https://thewire.in/law/police-reforms-order-sc-lax-in-clamping-down-on-non-compliant-states

from the time when a bench led by Justice J. S. Khehar complained, "Police reforms are going on and on. Nobody listens to our orders".[37]

III. Executive Interference

Police is a state subject.[38] The political control over police also finds its legitimacy through the Police Act of 1861[39] and subsequent acts modelled on this legislation. Hence, such superintendence is warranted by the law itself. However, this arrangement has historically manifested itself in a culture of unchecked executive interference in the working of police. From running errands for politicians[40] to deploying police to suppress democratic processes under the pretext of law and order crisis,[41] the police force has consistently been used as a personal cohort for the politicians and their connections.

To address and rectify this anomaly, numerous committees along with the judiciary through its 2006 judgement have demanded formation of SSCs to insulate the police force from abuse by its political leadership. However, this directive has not been sufficiently implemented in many states and UTs.

Politicians wield significant power over the police forces. Illegitimate transfers, bribery, desired postings in return for favours and similar pliant behaviour makes the officials susceptible to punishment. The state governments have the option of exercising excessive control over its police force through express actions and even enacting legislative provisions or passing executive orders that institutionalize and facilitate illegitimate political interference.

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[37]*SC refuses urgent hearing on plea for police reforms,* PRESS TRUST OF INDIA, (Mar. 1, 2017), http://www.ptinews.com/news/8456205_SC-refuses-urgent-hearing-on-plea-for-police-reforms-

[38] INDIA CONST. sched. 7, list II, entry 2.

[39] The Police Act, 1861, §3, Act No. 5 of 1861 (India), http://indiacode.nic.in

[40]Beatrice Jauregui, *If the Constable Could Speak: Notes on a Continuing Failure to Secure the Masses and Reform the Police in India,* CENTER FOR THE ADVANCED STUDY OF INDIA, (Dec. 7, 2009) https://casi.sas.upenn.edu/iit/Jauregui

[41]PTI, *Heavy police deployment in various parts of Delhi amid protests calls against Citizenship Act*, THE NEW INDIAN EXPRESS, (Dec. 27, 2019), https://www.newindianexpress.com/cities/delhi/2019/dec/27/heavy-police-deployment-in-various-parts-of-delhi-amid-protests-calls-against-citizenship-act-2081588.html

For example, some states have used sweeping provisions to get away with dilution of the directives such as the Tamil Nadu Police Act that allows the DGP to be removed from service *"on other administrative grounds"*.[42] Similarly, the Police Act[43] allows the State Government to transfer any police personnel found "*guilty of dereliction of duty*" before completion of two years of their tenure. In the same section,[44] the Chief Minister can transfer an IPS officer and the Home Minister is empowered to transfer officers of and above the rank of Sub-inspector in "exceptional cases". Introduction of such ambiguity in law makes it susceptible to misuse as is evident from numerous examples.[45]

An average of 18% of Senior Superintendents of Police (SSPs) and Deputy Inspector Generals of Police (DIGs) at an all-India level have been transferred in less than two years from 2007 to 2016, according to a report by the Centre for the Study Developing Societies (CSDS).[46] Countless corroborations by police personnel across the ranks[47] indicate a positive correlation between such arbitrary transfers and political interference.

It is also pertinent to note, that executive interference effectively serves as a hindrance in on-ground implementation of the reforms despite ostensible legal protection indicating compliance to that effect.

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[42] The Tamil Nadu Police (Reforms) Act, 2013, §3(3)(e), No. 22, Acts of Tamil Nadu Legislative Assembly, 2013(India), http://indiacode.nic.in

[43] The Maharashtra Police (Amendment and Continuance) Act, 2014, §22N(1), No. 24, Acts of Maharashtra Legislative Assembly, 2014(India), https://www.maharashtra.gov.in/Site/Upload/Acts%20Rules/English/adhiniyam%2024%20pol%203_11072014.pdf (last visited: August 1, 2021).

[44] *Id.*, at §22N(2).

[45] Mohamed Thavur, *Three days on, Maharashtra govt revokes transfer order of 10 DCPs*, THE INDIAN EXPRESS, (Jul. 6, 2020), https://indianexpress.com/article/cities/mumbai/three-days-on-maharashtra-govt-revokes-transfer-order-of-10-dcps-6491740/

[46] COMMON CAUSE AND LOKNITI - CENTRE FOR THE STUDY DEVELOPING SOCIETIES (CSDS), STATUS OF POLICING IN INDIA REPORT 2019: POLICE ADEQUACY AND WORKING CONDITIONS, (2019) https://www.commoncause.in/uploadimage/page/Status_of_Policing_in_India_Report_2019_by_Common_Cause_and_CSDS.pdf

[47] Rishikesh Bahadur Desai, *Political interference is the biggest issue, say police personnel*, THE HINDU, (Jun. 04, 2016), https://www.thehindu.com/news/national/karnataka/Political-interference-is-the-biggest-issue-say-police-personnel/article14383531.ece

For instance, the state of Maharashtra constituted[48] and empowered[49] the Police Establishment Board (PEB) in 2013 to handle the matters related to transfer of police officials, in accordance with the Prakash Singh directives. However, an RTI query revealed that the then Chief Minister of Maharashtra transferred 47 IPS officers between January 1, 2016 and August 31, 2017 without there being such recommendations from the PEB.[50] It was in fact found that the PEB revised its own recommendations in almost nine cases. Even the number of executives among the members in many SSCs across India indicate political dominance and hinder execution of police reforms.

Such toothless bodies largely defeat the purpose of suggested reforms. Hence, mere formation of these supervisory bodies is not enough but ensuring maximum transparency and functional autonomy for these institutions is just as important.

IV. "Politicization" of the Police

The famous Aristotelian quote that "*man is a political animal*" is generally accepted as a truism.[51] The people that constitute public institutions or state machineries are no exceptions to this general rule either. However, it is also important to moderate the extent of political motivation driving public servants for complete antipathy to politics is as pointless as political partisanship is detrimental.

[48] Home Department, Government of Maharashtra, Government Resolution No.: NPC 1008/2/CR-6/Pol-3 (Issued on Jul. 15, 2013), https://www.maharashtra.gov.in/site/Upload/Government%20Resolutions/Marathi/201307151136271729.pdf (last visited: July 5, 2021)

[49] Home Department, Government of Maharashtra, Government Notification No.: MIS-513/C.R.217/ POL-5B, (Issued on Jul. 15, 2013), https://www.maharashtra.gov.in/Site/Upload/Government%20Resolutions/English/201307151134557029.pdf (last visited: July 5, 2021)

[50] Mohamed Thaver and Srinath Rao, *Despite police board, government retains grip on transfers*, THE INDIAN EXPRESS, (Dec. 12, 2017), https://indianexpress.com/article/india/despite-police-board-government-retains-grip-on-transfers-4978618/

[51] R. G. Mulgan *Aristotle's Doctrine That Man Is a Political Animal* 102(3) HERMES, 438–445 (1974), www.jstor.org/stable/4475868

Here, a clear distinction has to be made between "apolitical" and "neutral" individuals. While the former lacks a sense of general politics or is unfazed by its impact on the society, the latter knowingly prefers to dissociate their political affiliations from their work in a manner that such a divorce ensures a judicious performance of their duties.

The goal of police reforms, henceforth, should not just be limited to insulation of the force from the executive branch but should also include adequate training, sensitization programmes and improved curriculum for aspiring candidates aimed at fostering a neutral law enforcement agency.

This chapter studies the colonial past responsible for a structure that enables politicization of the police force and delves into some of its impacts such as poor relations with minorities, corruption and a criminal nexus between the police, criminals, and politicians.

A. Colonial roots and aversion to dissent

1. A force foundationally politicized

The modern police organization established in London after the adoption of the Metropolitan Police Act in 1829 was based on the Robert Peele's principles of policing such as democratic governance, community policing, separation of powers, eradication of crimes through prevention rather than punishment and persuasion to demand compliance instead of use of physical force or restraint.[52]

However, the same liberal principles were not extended to the police forces formed elsewhere in commonwealth countries. The model behind the Royal Irish Constabulary that helped the British crush the *Fenian resistance* and maintain imperial hegemony, was incorporated in other British colonies including the Indian subcontinent.[53]

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[52]*Sir Robert Peel's Nine Principles of Policing*, THE NEW YORK TIMES, (Apr. 15, 2014), https://www.nytimes.com/2014/04/16/nyregion/sir-robert-peels-nine-principles-of-policing.html

[53] Dilip K. Das and Arvind Verma, *The armed police in the British colonial tradition: The Indian perspective,* 21(2) POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES & MANAGEMENT 354-366 (MCB University Press,1998).

Studies on colonial policing system in India uncover countless accounts of state-sponsored police brutality such as regular public floggings and humiliations,[54] suppression of dissent through incarceration of activists,[55] criminalization of natives[56] and subsequent profiling by the police along with close to no avenues for redressal against police excesses.[57]

This was made possible due to the inherent structure of a force that had a militaristic proclivity for violence and was institutionally designed to be subservient to its rulers. [58] This is the same system that was later on inherited by Indian administrators without much reform. For example, the Indian Police Act of 1861 is still *effectively* in force in most Indian states even after Independence.

It is commonly argued that the communal violence and political unrest following partition and the years after form part of the reason why the subsequent governments did not want to reform the existing policing system[59] that is best known for its disproportionate use of force and maintenance of law and order crises at the cost of infringement of rights of civilians.

Best described in a paper about an apparent "crisis of governability" in India, [60] the increasing dissatisfaction with successive governments and widespread public agitation coupled with communal rifts make maintenance of law and order look like the first priority of the police rather than ensuring active protection of human rights of the citizens.

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[54] *Id.*
[55] Robyn Wilson, *Inside Cellular Jail: the horrors and torture inflicted by the Raj on India's political activists*, INDEPENDENT, (Aug. 11, 2017), https://www.independent.co.uk/news/long_reads/cellular-jail-india-integral-country-fight-freedom-independence-british-colony-andaman-and-nicobar-islands-port-blair-sushil-dasguputa-a7883691.html
[56] Criminal Tribes Act, 1871, No. 27 of 1871[Repealed] https://ccnmtl.columbia.edu/projects/mmt/ambedkar/web/readings/Simhadri.pdf (last visited: July 21, 2021).
[57] *Supra* note 54.
[58] *Supra* note 40.
[59] *Supra* note 54.
[60]Atul Kohli, *Democracy and Discontent: India's Growing Crisis of Governability*, CAMBRIDGE UNIVERSITY PRESS, (1990), https://www.princeton.edu/~kohli/docs/democracy (last visited: May 12, 2021).

Therefore, apologists for the violence perpetrated by internal security forces get the opportunity to paint such untoward incidents as "necessary state action" under the pretext of threats to national security. This leads to further politicization of the police force that is manipulated and used for crushing dissent and serving ruling powers instead of acting as a people-friendly force.

2. Silencing dissent or maintaining law and order?

State-sponsored repression of remonstrances and aversion to any form of dissent go against the very ethos of a democracy. The Indian Courts have time and again held this right to dissent in a peaceful manner as one of the most basic democratic functions, a right traced back to the fundamental freedom that is guaranteed under Articles 19(1)(a), 19(1)(b) and 19(1)(c) of the Constitution.[61] The Supreme Court has categorically ruled that a dissenter cannot be implicated or held guilty of unlawful for peaceful dissent.[62]

Commenting on the role played by the police in suppression of freedom of speech and expression, the Court has said, "*They [the police] cannot arrogate to themselves the authority to be willing allies in the suppression of dissent and obstruction of speech and expression*."[63] Even in the case of an unruly crowd, the Supreme Court says, the police officials should use force only when absolutely necessary and the police personnel should receive appropriate crowd control related training to deal with violence and challenge to their authority.[64]

Despite such clear guidelines/laws in place which prescribe minimum use of force,[65] politicization of the police force manifests itself in more ways than one. An obvious rise in targeted crackdown on dissenters in the recent times, selective arrests

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[61] Anita Thakur v. State of J&K, (2016) 15 SCC 525 (India).
[62] Rajat Gangwar v. State of U.P., (2020) 139 ALR 571 (India).
[63] Indibily Creative Pvt. Ltd. v. Govt. of West Bengal, 2019 SCC OnLine SC 564 (India).
[64] *Supra* note 62
[65] Code Crim. Proc. § 130. *See also*, Ministry of Home Affairs, Code of Conduct for the Police in India, Letter No. VI-24021/97/84-GPA.1 (Issued on Jul. 4, 1985 & Jul. 7, 1985) https://police.py.gov.in/MHA%20-%20Model%20Code%20of%20Conduct%20-%20Indian%20Police.pdf (last visited: June 8, 2021) [hereinafter *Code of Conduct*].

and usage of the police machinery to silence dissent[66] is one such effect. Where the police machinery is supposed to be a non-partisan law enforcement agency, instances of police departments making clearly political statements[67] is not only indicative of the rising polarization in general but is also typical of a force heavily controlled and misused by the political leadership.

This issue calls for three reforms- the first being resorting to the "democratic model of policing" followed by special training for riot management with higher focus on protection of human rights and lastly separation of law and order wing from the investigative wing.

As the renowned pioneer in police research, David H. Bayley puts it, democratic policing can be summarized as "accountability to law; safeguarding of human rights, especially those required by democratic political processes; external accountability; and giving priority to the safety needs of individuals rather than government".[68] This model of policing emphasizes on minimum use of force, efficient prevention of crime and maintenance of law and order without comprising life or property of any individual, all of this contributing towards a force that respects democratic principles and obeys the rule of law. To work towards this model of democratic policing, the

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[66] Betwa Sharma, *Anti-CAA Protesters Exposed In UP Police Hoardings Terrified About Their Safety*, HUFFINGTON POST, (Mar. 6, 2020), https://www.huffingtonpost.in/entry/anti-caa-protesters-up-police-hoarding_in_5e61fc7ac5b647a5bd2fb50c; Kai Schultz and Suhasini Raj, *'Activists in Shackles': Indians Denounce Arrests as Crackdown on Dissent*, THE NEW YORK TIMES, (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/world/asia/india-activists-arrests.html; Hannah Ellis-Petersen and Shaikh Azizur Rahman, *'I'll destroy your family': India's activists tell of false arrest and torture in custody*, THE GUARDIAN, (Feb. 1, 2020), https://www.theguardian.com/world/2020/feb/01/uttar-pradesh-india-activists-false-arrest-torture-custody-citizenship-amendment-act

[67]*CAA protest: Police 'parroting' govt.'s political position in charge sheet, says DU professor*, THE HINDU, (Sept.13, 2020), https://www.thehindu.com/news/cities/Delhi/caa-protest-police-parroting-govts-political-position-in-chargesheet-says-du-professor/article32592405.ece; Raghav Ohri, *Anti-CAA protests work of 'Enemy Foreign Nations', says Delhi Police*, THE ECONOMIC TIMES, (Jun. 25, 2020) https://economictimes.indiatimes.com/news/politics-and-nation/anti-caa-protests-work-of-enemy-foreign-nations-says-delhi-police/articleshow/76632853.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[68] David H. Bayley, *Police Reform as Foreign Policy*, 38(2) AUSTRALIAN AND NEW ZEALAND JOURNAL OF CRIMINOLOGY 206-215 (2005)

police personnel have to be trained and sensitized to deal with cases of riots and/or protests.

And lastly, one of the seven directives of the *Prakash Singh judgement,* which is separation of law and order wings from investigative wings, needs to be implemented. The implementation of this directive will reduce the work load of police personnel and induce transparency in investigation of sensitive cases such as riots. For example, recently the Delhi police was accused of biased investigation and of protection of police officers complicit in violence.[69] In cases like this, separation of law and order wing from the investigation wing would make sure that the erring police personnel, if found complicit in instigating riots, shielding perpetrators, or found aiding violence and destruction of property, will not be investigated by immediate peers or control investigation directly linked to them.

This shall ensure a system of internal accountability which if coupled with robust Police Complaints Authorities as external accountability mechanisms could give effect to fair investigation and appropriate forums for grievance redressal against police excesses.

B. Police and marginalized communities

According to the Code of Conduct devised for Police in India, the police personnel should continuously strive to rise above personal prejudices and transcend religious, linguistic, or sectional barriers and should respect the rights of women and disadvantaged sections of society.[70] The role of police personnel as envisioned in the Model Police Act, 2006 is similar.[71] However, this ideal expectation is far from the reality.

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[69] Soibam Rocky Singh, *Independent inquiry sought into police brutality on Jamia students*, THE HINDU, (Aug. 4, 2020), https://www.thehindu.com/news/cities/Delhi/independent-inquiry-sought-into-police-brutality-on-jamia-students/article32271993.ece

[70] *Code of Conduct*, *Supra* note 66, at Principle 13.

[71] A draft Police Act by the Committee set up by Ministry of Home Affairs, The Model police Act, 2006, §58(d) (Submitted on Oct. 30, 2006) https://www.mha.gov.in/sites/default/files/ModelAct06_30_Oct_0.pdf (last visited: June 2, 2021)

The nation witnessed the harsh reality of police excesses during the targeted violence of the 1984 anti-Sikh riots, the Hashimpura massacre of 1987, communal riots in the aftermath of Babri Masjid demolition, the 2002 Gujarat carnage, the 2013 Muzaffarnagar riots or even the anti-CAA demonstrations, most of which could actualize due to the deep-seated prejudices of police officers.

"At best they [the police] were passive observers, and at worse they acted in concert with murderous mobs and participated directly in the burning and looting of Muslim shops and homes and the killing and mutilation of Muslims", observed a survivor while talking to the Human Rights Watch[72] that closely documented the bloodcurdling events of the 2002 Gujarat Riots.

Even in the recent times, instances of police brutality and complicity[73] during the widespread unrest over newly passed Citizenship Amendment Act have yet again testified to the fact that the police forces in the nation are not immune to communal hatred and are rather prone to abuse the minorities.

Such communal attitudes exhibited by public servants then in turn reflect in poor perception of police in India. Where the officers themselves believe Muslim localities to be a den of criminals or terrorist activity,[74] members of this community find themselves shrouded in a constant state of suspicion and paranoia further damaging the relations with the police.

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[72] *"WE HAVE NO ORDERS TO SAVE YOU" State Participation and Complicity in Communal Violence in Gujarat*,14 No.3 (C) HUMAN RIGHTS WATCH: INDIA 5 (2002) https://www.hrw.org/reports/2002/india/gujarat.pdf

[73] Kai Schultz and Sameer Yasir, *As India Violence Gets Worse, Police Are Accused of Abusing Muslims*, THE NEW YORK TIMES, (Jan. 2, 2020), https://www.nytimes.com/2020/01/02/world/asia/india-protests-police-muslims.html; Jayshree Bajoria, *India's Police Found Complicit in Anti-Muslim Mob Violence: Independent Report Highlights Police Inaction in February's Delhi Attacks*, HUMAN RIGHTS WATCH, (Jul. 17, 2020), https://www.hrw.org/news/2020/07/17/indias-police-found-complicit-anti-muslim-mob-violence; Soutik Biswas, *Delhi riots: How Muslims' homes were targeted and burnt*, BBC NEWS, (Mar. 4, 2020) https://www.bbc.com/news/world-asia-india-51719204; Reuters Staff, *Indian minorities panel faults police role in Delhi riots targeting Muslims*, REUTERS, (Jul. 17, 2020) https://www.reuters.com/article/us-india-citizenship-report-idUSKCN24I1JA

[74] COMMONWEALTH HUMAN RIGHTS INITIATIVE, MUSLIM VOICES: PERCEPTIONS OF POLICING IN INDIA, 9 (2018), https://www.humanrightsinitiative.org/download/1548414445Muslim%20Voices%20Perceptions%20of%20Policing%20Jan%202019.pdf

Since the force is made up of individuals from all ranks of the society, it mirrors the social ills such as the all-pervasive caste-based segregation and the resultant discrimination as well. Instances of violence and wanton discrimination by the police personnel against the caste minorities,[75] practices reinforcing the ideas of "purity and pollution" within the force,[76] a harmful trend of wrongfully implicating the victims' kin[77] and many such discriminatory practices have all further aggravated and aided the systemic discrimination against minorities in India.

Falling representation of SCs, STs and OBCs and lack of any clear legal provisions for ensuring representation for Muslims despite the disproportionately high levels of incarceration,[78] add to the existing problem of a general sense of mistrust and estrangement from police.

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[75]*Maharashtra: IPS officer 'brags' of filing false cases against Dalits, Muslims in video*, THE INDIAN EXPRESS, (Dec. 4, 2018), https://indianexpress.com/article/india/mumbai-ips-officer-brags-of-filing-false-cases-against-dalits-muslims-in-video-5477136/; *Gujarat: Probe ordered into 'police brutality' on Dalits during lockdown*, THE INDIAN EXPRESS, (Mar. 30, 2020), https://indianexpress.com/article/india/gujarat-police-brutality-on-dalits-during-lockdown-6339140/; Deep Mukherjee, *Barmer Dalit custodial death: 'I could hear my brother screaming … when we went in, he was lying there, dead'*, THE INDIAN EXPRESS, (Feb. 29, 2020), https://indianexpress.com/article/cities/jaipur/rajasthan-barmer-dalit-custodial-death-jitendra-khatik-6291846/; *Anger over video of Indian police attacking Dalit couple*, BBC NEWS, (Jul. 16, 2020), https://www.bbc.com/news/world-asia-india-53434716; Kavitha Muralidharan, *For the Kuravars of Tamil Nadu, Custodial Violence is a Way of Life. And Death*, THE WIRE, (Jul. 01, 2020), https://thewire.in/caste/for-the-kuravars-of-tamil-nadu-custodial-violence-is-a-way-of-life-and-death; Mini P Thomas, *Jailed, raped, tortured*, THE WEEK, (Jul. 03, 2016), https://www.theweek.in/theweek/cover/tribal-woman-naxalism.html; Sushmita, *Police Brutality against UP Adivasis: NHRC assures action after CJP intervention*, CITIZENS FOR JUSTICE AND PEACE, (Jun. 04, 2020), https://cjp.org.in/police-brutality-against-up-adivasis-nhrc-assures-action-after-cjp-intervention/; Anand Teltumbde, *Khairlanji and Its Aftermath: Exploding Some Myths,* 42(12), ECONOMIC AND POLITICAL WEEKLY, 1019-1025 (2007)

[76] S.K. Darapuri, *The Police in India Is Both Casteist and Communal*, THE WIRE, (Sept. 9, 2020) https://thewire.in/caste/police-casteist-communal

[77] Pavan Dahat, *Hathras: Lawyers, Activists Explain How Blame Is Shifted To Victim's Family In Caste Crimes*, THE HUFFINGTON POST, (Oct. 9, 2020) https://www.huffingtonpost.in/entry/hathras-lawyers-activists-explain-how-blame-is-shifted-to-victim-s-family-in-caste-crimes_in_5f7f3d4cc5b6da9ba1ee0995; Urmila Pullat, *The political capture of the police in India*, MINT, (Apr. 19, 2018) https://www.livemint.com/Opinion/GHQrTiUfvD9RnYLLUPsKyI/The-political-capture-of-the-police-in-India.html

[78] *NCRB data shows Muslims, Dalits, Tribal population in prisons disproportionate to their numbers outside*, FIRSTPOST, (Sept. 02, 2020), https://www.firstpost.com/india/ncrb-data-shows-muslims-dalits-tribal-population-in-prisons-disproportionate-to-their-numbers-outside-8775161.html

Even the gender-based representation in police forces is inadequate. For a force that is notorious for being gender insensitive, the percentage of women officers, although increasing over time, still constitutes just 7.28% of the police (as of 2016), with 90% of the women serving as constables and less than 1% in supervisory positions.[79] Refusal to believe survivors, delayed action or outright refusal to file FIR in cases of gendered violence, custodial rapes and sexual harassment meted out to female inmates highlight the need for stronger representation in the police for women along with gender-sensitivity training for the recruits.

Better representation and access to requisite resources for people of different sexual orientations and gender identities along with carefully planned and effectively implemented sensitization programmes cannot be excluded from the purview of comprehensive police reforms at any costs.

As opposed to traditional police training, that mainly focuses on technicalities, a human rights-based curriculum that sensitizes the police officials in various systems of discrimination including matters of caste, religion, sexism, marginality, et cetera, needs to be introduced for officers at all ranks.[80]

1. *The Criminal Nexus*

One of the obvious effects of politicization of police is the subsequent criminalization of the local police forces. In a study, the Association of Democratic Reforms (ADR) analyzed 539 Members of Parliament and found as many as 233 of them, i.e., a 43% with criminal charges filed against them.[81] The police officers who have to deal with these politicians are most evidently affected by this criminal ecosystem.

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[79] Uttam Sengupta, *Increase number of women and Dalits in the police to make women safer*, NATIONAL HERALD, (Oct. 3, 2020), https://www.nationalheraldindia.com/opinion/increase-number-of-women-and-dalits-in-the-police-to-make-women-safer

[80] *Supra* note 47.

[81] *43% newly-elected Lok Sabha MPs have criminal record: ADR*, THE HINDU, (May 26, 2019) https://www.thehindu.com/elections/lok-sabha-2019/43-newly-elected-lok-sabha-mps-have-criminal-record-adr/article27253649.ece

Extortion, tampering with evidence, manipulating investigation, moderating the language of an FIR, framing of charges, putting up challans, presenting bogus witnesses, collecting bribes, et cetera are the known avenues of money making for policemen.[82] Many of the times, political pressures are involved in such crimes, including electoral crimes even. At the higher levels, this same collusion leads to a network of criminals, drug syndicates, gun runners and such involved in organized crimes and even "multinational crimes" at times.[83]

And unlike other executive wings of the government, the police have maximum visibility in the society and thus their petty corruptions are largely sensationalized and exposed in comparison to systemic corruptions carried out by other branches of the state.[84] This further tarnish the public image of the police forces where the erring personnel become the symbol of the entire organization.[85]

As Heston and Kumar contend that the inherent lack of incentives coupled with a deeply entrenched *culture* encourages corruption at all scales,[86] Verma argues that the solution can only arrive in the form of a cultural transformation within the police organization.[87]

In an interesting approach taken by Hubert Williams,[88] he accounts for the shootings or killings by a police officer along with similar human rights violations as "corruption" as against the traditional definition of corruption limiting itself to abuse

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[82]K S Subramanian, *Are the Indian Police a Law Unto Themselves? A Rights-Based Assessment*, 3 SOCIAL WATCH INDIA PERSPECTIVE SERIES (2011), https://www.socialwatch.org/sites/default/files/swindia/Perspective-3_SWIndia_Indian-Police.pdf

[83] *Id.*

[84] K V Thomas, *Corruption in Indian Police*, THE SARDAR VALLABHBHAI PATEL NATIONAL POLICE ACADEMY JOURNAL, 4 (2004) https://www.svpnpa.gov.in/images/npa/acjournals/2004janjun.pdf

[85] *Id.*

[86]Alan Heston and Vijay Kumar, *Institutional Flaws and Corruption Incentives in India*, 44(9), JOURNAL OF DEVELOPMENT STUDIES, 1243–1261, (2008)

[87] Arvind Verma, *Cultural roots of police corruption in India*, 22(3) POLICING: AN INTERNATIONAL JOURNAL OF
POLICE STRATEGIES & MANAGEMENT, 264-279(MCB University Press, 1999)

[88] Hubert Williams, *Core Factors of Police Corruption Across the World*, 2(1) FORUM ON CRIME AND SOCIETY, 86 (2002) https://www.unodc.org/documents/treaties/publications/core_factors.pdf

of power for monetary gains. For him, such abuse of authority subsists by the virtue of a police subculture that defies the official standards of accountability.

According to him, the aspects of training, recruitment methods, incentives such as pay and promotion, systems of accountability within departments supported by the courts and the cultural traditions that obstruct the development of professional police standards are all responsible for this rampant corruption in police departments. And if the menace of corruption and crime plaguing the police forces has to be effectively dealt with, then the culture of criminal complicity backed by a lack of accountability has to be addressed at all costs.

V. The Need For Accountability

A. Why do we need accountability in policing?

Nearly 5 deaths occurred in custody every day for 10 years measuring up to March 2020,[89] some of them died within 24 hours of arrest.[90] Despite a COVID-19 induced lockdown (partial and otherwise) for two years, 236 cases of torture and 100 deaths in police custody have been reported in 2020-21, as informed by the Home Ministry in the written reply to a question put before Loksabha in August of 2021.[91]

Despite several judicial pronouncements[92] that have highlighted the need to curb the menace of custodial violence and issued guidelines to ensure protection of human rights while performing duties as a police official, the culture of violence and torture

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[89] Shreehari Paliath, *5 Deaths In Police/Judicial Custody Every Day Over 10 Years, But Few Convictions* INDIASPEND, (Aug. 6, 2020), https://www.indiaspend.com/5-deaths-in-police-judicial-custody-every-day-over-10-years-but-few-convictions/

[90] Raja Bagga, *60% custodial deaths within 24 hrs of arrest; most in Maharashtra, Gujarat*, BUSINESS STANDARD, (Oct. 6, 2020), https://www.business-standard.com/article/current-affairs/60-custodial-deaths-within-24-hrs-of-arrest-most-in-maharashtra-gujarat-120102600115_1.html#:~:text=Every%20death%20in%20police%20custody,NHRC%20guidelines%20on%20custodial%20death

[91] Bharti Jain, *348 died and 1,189 tortured in police custody in 2018-19, 2020-2021: home ministry*, THE TIMES OF INDIA, (Aug.3, 2021), https://timesofindia.indiatimes.com/india/348-died-and-1189-tortured-in-police-custody-in-2018-19-2020-21-home-ministry/articleshow/85005287.cms

[92] Joginder Kumar v. State of Uttar Pradesh, (1994) 4 SCC 260 (India); Yashwant & Others v. State of Maharashtra, (2018) 4MLJ (Crl)10 (SC) (India); D.K. Basu v. State of West Bengal¸1997 (1) SCC 416 (India); Munshi Singh Gautam v State of Madhya Pradesh, Appeal (Crl.) 919 of 1999 (India).

is nowhere near an end. Torture is so endemic to our system that even the law presumes such abuse of power by the police; for example, confessions made to a police officer not admissible as evidence.[93]

Enforced disappearances, illegal detentions, extrajudicial killings, custodial violence and instances of other human rights violations at the hands of officials, are all sad realities of policing in India. "Encounters" or extra-judicial executions, arbitrary arrests, malicious prosecutions, et cetera are normalized.

The abuse of power and disproportionate use of force is present even in the methods of crowd control adopted by the police. This is evident from the police brutalities during the protests over the newly enacted Citizenship law as well as from the dehumanizing state response seen during the handling of migration and other crises during the lockdown enforced due to a global pandemic in the last year.[94]

In the face of rampant police excesses across the country, the need to instill a sense of responsibility in the police officers and ensuring accountability so the perpetrators are punished is highly felt.

B. Who should the police be accountable to and how?

A report by the CPLR talks about three modes enforcing accountability in policing: Judiciary-based scrutiny, Police Complaints Authority, and the National Human Rights Commission.[95] While the judiciary and the Human Rights Commissions have been scrutinizing the cases of police excesses and ruling to protect the fundamental rights of citizens, the police excesses are still not being sufficiently dealt with.

While conceptualizing accountability Schedler opines, that accountability implies subjecting unrestricted forms of power to sanctions in cases of abuse, mandating transparent ways of manifesting power and lastly compelling the authority to justify

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[93] The Indian Evidence Act, 1872, §25, §26, No.1 of 1872, India Code (1993) http://indiacode.nic.in

[94] COMMONWEALTH HUMAN RIGHTS INITIATIVE "RESPECTING HUMAN RIGHTS WHILE ENFORCING THE LOCKDOWN: GUIDELINES FOR POLICE" 2 (2020), https://humanrightsinitiative.org/download/CHRI%20Guidelines%20to%20the%20Police_Lockdown_31%20Mar2020.pdf

[95] Sudhir Krishnaswamy, *Legal Accountability of the Police in India*, CENTRE FOR LAW & POLICY RESEARCH, (Jun. 4, 2014), https://clpr.org.in/publications/legal-accountability-of-the-police-in-india/

its acts publicly.[96] Accountability has to involve a system of internal and external checks and balances to ensure there is no abuse of power and to re-build public confidence and legitimacy. That is why, the Second Administrative Reforms Report on "Public Order" advocates for "strong and verifiable systems of accountability".[97] It quotes the Patten Commission[98] to remark that accountability is wider concept and police are not just accountable to the law but also to the society at large and that all government functionaries have citizen centered accountability.

The Police Complaints Authority (PCA), if formed as per the Supreme Court directives without any discrepancies related to membership or with respect to the binding nature of recommendations, is an effective way of bringing about citizen-partnered accountability mechanisms. The PCAs will not just provide an effective grievance redressal mechanism at different levels of governance but will also help analyze the trends of police abuse.

At the state-level, the PCAs inquire into allegations of "serious misconduct" including death, grievous hurt and rape in custody. The district level complaints authority is even authorized to inquire into allegations of extortion, land grabbing and serious abuse of power.[99] This is one of the many reasons why implementation of the directives in Prakash Singh judgement are so crucial for an overall development of our criminal justice system.

1. *Other modes and mechanisms to ensure accountability*

Through many cases,[100] the courts have tried to ensure that the protection under sections 197 and 132 of the CrPC are not extended to cases of abuse of power or criminal misconduct. However, lower conviction rates of police officers despite

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[96] ANDREAS SCHEDLER, *Conceptualizing Accountability* in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 14 (Andreas Schedler et al eds., 1999), https://works.bepress.com/andreas_schedler/22/

[97] SECOND ADMINISTRATIVE REFORMS COMMISSION, PUBLIC ORDER, 62 (2007) https://darpg.gov.in/sites/default/files/public_order5.pdf (last visited: Aug. 20, 2021)

[98] *Id* at 63.

[99] *Supra* note 24.

[100] Rajib Ranjan v. R. Vijaykumar, (2015) 1 SCC 513 (India); Subramanian Swamy v. Manmohan Singh, (2012) 3 SCC 64 (India).

widespread police excesses demonstrate a need for stronger legal framework to deal with cases of torture and police excesses of different forms. The same can be achieved by :-

(a) making new laws to hold guilty officers accountable and instill deterrence: For example, ratification of the UN Convention against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT) and further legislating on the matter could substantially make a difference. Even introduction of the Indian Evidence (Amendment) Bill, 2016 that proposes section 114 B that presumes death or injury is caused by the custodian considering the circumstances of death. This could enforce higher standards of accountability and professionalism. Even provisions (such as section 32 of Kerala Police Act[101]) that outrightly spell the liability of police officers to justify their acts contribute positively in terms of language of the law and culture of accountability.

(b) by ensuring the existing legal protections are sufficiently used and enforced.

Even modernization, as usually contended,[102] can be the key to bring in more transparency and accountability in the way of policing. Digitization of records, videography of the crime scene and putting up cameras in interrogation rooms as per the Supreme Court's orders,[103] can prove to be one of the many ways in which technological innovations can ensure accountability.

VI. Working Towards A Contented Force

While the ubiquitous police excesses are closely documented, erring officers and associated governments publicly censured and rightly so, the attempts at police

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[101] The Kerala Police Act, 2011, §32, No. 8, Acts of Kerala Legislative Assembly, 2011 (India), http://indiacode.nic.in

[102] K.T.S. Tulsi, *Police Modernisation is the Key: Technology Can Bring Transparency*, 36(4), COMMON CAUSE, 7-8, (2017) https://www.commoncause.in/pdf/jounral-24-1-18.pdf

[103] Paramvir Singh Saini v. Baljit Singh & Ors., SLP (Crl.) 3543/2020 (India); Shafhi Mohammad v. State of Himachal Pradesh, (2018) 5 SCC 311(India).

reforms cannot achieve the desired effect if it were to dehumanize the very policemen that form a major part of the structure that needs to be remodeled.

Both the approaches to police reforms – accountability oriented and welfare oriented –are not mutually exclusive and rather complement each other. Thus the need to monitor ways of policing would gradually lessen with incentivization and welfare schemes.

A. *Infrastructural inadequacy and lack of incentives*

It is common knowledge that the Indian police personnel are already underpaid, understaffed, overworked and lack basic amenities.[104] Appallingly low salaries in the lower ranks of police officers, excessive workload, long hours of duty, fewer avenues of promotion, lack of access to hygienic, safe and affordable housing,[105] inadequate technological support, equipment and weaponry coupled with absence of a conducive work environment are all major factors that leave police officers dissatisfied and thus unmotivated for work.[106]

Despite the Modernisation of Police Forces (MPF) scheme, underutilisation of funds poses an issue.[107] From 2013 to 2017, only 48% of the total modernisation budget of Rs 28,703 crore was utilised.[108] In the year 2020-2021, Rs. 784.53 crore has been sanctioned for modernization of state police (Rs. 155.26 crore less than what was spent

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[104] Atman Mehta, *Overworked, understaffed, underpaid! Do our police deserve this?* SIFY, (Oct. 23, 2019), https://www.sify.com/news/overworked-understaffed-underpaid-do-our-police-deserve-this-news-analysis-tkxn76jhcjjbi.html; *Police are overworked and underpaid*, TIMES OF INDIA, (Feb. 11, 2008), http://timesofindia.indiatimes.com/articleshow/2772174.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[105] Shreya Raman, *In Mumbai, much of the police force lives in tiny crumbling apartments*, SCROLL, (Oct. 8, 2019), https://scroll.in/article/939727/in-mumbai-much-of-the-police-force-lives-in-tiny-crumbling-apartments

[106] *Supra* note 41.

[107] Vinayak Krishnan, *Modernisation of Police Forces*, PRS LEGISLATIVE RESEARCH, (Oct. 3, 2017), https://www.prsindia.org/theprsblog/modernisation-police-forces

[108] Atman Mehta, *Why India's police forces lack weapons and communications equipment*, SCROLL, (Aug. 26, 2019), https://scroll.in/article/935008/why-indias-police-forces-lack-weapons-and-communications-equipment

in 2019-2020) with the capital expenditure on police training and forensic science being just Rs 21.69 crore and Rs. 15.41 crore respectively.[109]

Under such circumstances, it is no wonder that many police stations do not have wireless devices, telephones and some even lack access to vehicles.[110] Functional infrastructure, adequate telecommunications networking along with other modern technological setup to facilitate real-time sharing of intelligence are non-negotiable for the security forces that are entrusted with multifarious responsibilities.

As discussed earlier, training is an essential factor to ensure a skilled and sensitive police force. However, according to a report.[111] merely 6.5 % of the total police force has received training from 2012 to 2016, with only 1.26 % of the total annual police expenditure spent on police training during these five years. In fact, even among the officers that receive training, senior police officers are the ones that mostly receive such in-service training than the constables.[112]

B. *Forgotten foot soldiers: extending the police reforms to the Indian constabulary*

86% of the state police comprises of constabulary.[113] Most of those who die on duty are constables too.[114] However, their contribution to policing often goes unrecognized. Cases of harassment by senior police officers meted out to those in the subordinate ranks are common news.[115] K.S. Subramanian even goes on to describe the Indian

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[109] Praveen Swami, *The Budget has taken another brick out of the walls protecting Indians from anarchy*, CNBC TV 18, (Feb. 04, 2020), https://www.cnbctv18.com/views/the-budget-has-taken-another-brick-out-of-the-walls-protecting-indians-from-anarchy-5202791.html

[110] *Supra* note 47.

[111] *Id*.

[112] *Id*.

[113] Anviti Chaturvedi, *Police Reforms in India*, PRS LEGISLATIVE RESEARCH, (2017) https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/Police%20Reforms%20in%20India.pdf

[114] NAVAZ KOTWAL MAJA DARUWALA, COMMONWEALTH HUMAN RIGHTS INITIATIVE, *101 Things You Wanted To Know About The Police But Were Reluctant To Ask*, (2018) https://www.humanrightsinitiative.org/publication/101-things-you-wanted-to-know-about-the-police-but-were-too-afraid-to-ask-english-2018

[115] COMMON CAUSE AND LOKNITI - CENTRE FOR THE STUDY DEVELOPING SOCIETIES (SUB), STATUS OF POLICING IN INDIA REPORT 2018: A STUDY OF PERFORMANCE AND PERCEPTIONS (2018) https://www.commoncause.in/pdf/SPIR-2018-c-v.pdf

constabulary as *a neocolonial minority*,[116] a vast mass of citizens that are made to suffer like they are inferior human beings, deprived of respect, basic amenities and hounded by senior officials and politicians alike.

Even the language of the law enforces this rigid hierarchy and power dynamics that are meant to keep the constabulary subservient which is evident from Section 7 of the Police Act of 1861 that still uses the terminology "inferior officers" for police officers of subordinate ranks.

To add insult to injury, the constables are typically promoted only once during their service, and normally retire as head constables which then weakens their incentive to perform better.[117] Thus, the authors argue that keeping the constabulary at the center of reforms is the only way to go forward.

C. Ensuring mental well-being of police officers: need of the hour

As opposed to the United Nations standard that is 222 police per lakh persons, India's sanctioned strength is 181 police personnel per lakh persons.[118] But the actual police strength in India is at 137 police personnel per lakh persons.[119] According to a 2019 report,[120] the police in India currently works at 77 % or just 3/4th of its required capacity which clearly indicates how understaffed our police forces are.

In addition to that, the police personnel do not even have fixed hours of duty. A police officer is considered to be "always on duty".[121] Due to such long hours of work, lack of sleep and rest coupled with the dangerous nature of work, the emotional confrontations and the political pressures, police officers are very likely to be suffering from depression, anxiety, and other mental health issues.

A clinical psychologist, Dr. Mitra, who has worked with patients from the police forces talks about how such long hours of duty, stress and fatigue affect the families

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116 *Supra* note 83.
117 *Supra* note 116.
118 *Id.*
119 *The Big Picture: SMART Policing*, RAJYASABHA TV (Oct. 5, 2019) https://www.youtube.com/watch?v=DeSCO9h7DeM (last visited: July 26, 2021)
120 *Supra* note 47.
121 Supra note 40.

of the police personnel isolating the officers from their families.[122] He even recalls a story about his patient, "Every morning, as soon as he got up, he had to count rapes, murders, robberies and other heinous crimes in his jurisdiction".[123]

The taxing nature of work exposes the distressed police personnel to various mental health problems and is likely to make them prone to suicide. According to the data presented by Union Minister of State for Home Affairs in February, 2019, over 930 police personnel, including the police personnel in civil and armed forces, have committed suicide from 2014 to 2018.[124] This disturbing reality of policing goes on to show just how important it is to normalize counselling and therapy and to make mental health care accessible to all ranks of police personnel.

The state has to realize that if the police forces are under constant stress, experience fatigue and excessive work pressures all the time, they are not very likely to be productive or empathetic even while on duty.

Hence, fixing long hours of work and rationalizing it into three shifts,[125] separating law and order wings to reduce workload, giving sufficient holidays, creating conducive work environments and dealing with shortage of personnel have to be prioritized if better performance is to be expected from the local police forces.

Adoption of the Model Police Act, that along with other progressive suggestions calls for fixed worked hours not more than eight hours a day,[126] has to be achieved to ensure all-round development of our policing system.

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[122] Chayyanika Nigam, *How stress is driving Delhi cops to suicide*, INDIA TODAY (Dec. 15, 2019), https://www.indiatoday.in/mail-today/story/how-stress-is-driving-delhi-cops-to-suicide-1628366-2019-12-15

[123] *Id.*

[124] PTI, *Over 930 police personnel committed suicide in last 5 years: Govt*, INDIA TODAY (Feb. 13, 2019), https://www.indiatoday.in/india/story/over-930-police-personnel-committed-suicide-in-last-5-years-govt-1455395-2019-02-13.

[125] Sugandha Indulkar, Interview with Meera Chadha Borwankar, *Politician-police-criminal nexus flourishes because politicians decide on posting of officers at police stations*, TIMES OF INDIA (Jul.17, 2020, 7:54 AM) https://timesofindia.indiatimes.com/blogs/the-interviews-blog/politician-police-criminal-nexus-flourishes-because-politicians-decide-on-posting-of-officers-at-police-stations/ (last visited: July 20, 2021).

[126] *Supra* note 72 at §18.

VII. Conclusion

The unholy nexus between miscreants, police personnel and the ruling executive and the resultant ecosystem of criminal complicity compelled the formation of various committees in Independent India with an aim to restructure the role of the police as an impartial law enforcement agency and as an institution expected to protect the citizenry against multitudinous security threats. The landmark case of *Prakash Singh v. Union of India* passed crucial directives with the same intent back in 2006. However, the governments across the nation have been highly reluctant in properly implementing these police reforms. The state governments need to realize that implementation of the orders of the courts needs to be carried out *nolens volens* without altering the essence or the core of the judgment so pronounced. In addition to that, the police reforms need to go beyond the Supreme Court directives.

In a democratic society, a police force founded on colonial traditions of policing will only skew the dynamics between the state and its subjects and perpetuate long-standing issues. In order to actualize the idea of a desirable police force, comprehensive reforms have to be undertaken. These include the adoption of principles of democratic policing, insulation of the forces from polarization and politicization, ensuring robust accountability mechanisms along with effective measures to secure emotional, social and financial well-being of the police officers that form the backbone of our criminal justice system. Transforming the institutional culture that encourages corrupt behaviour by failing to provide resources, adequate training and conducive work environment as well as the system that supports criminality more than it does honest policing have to be transformed.

It is evident that the image of the policing system as an ecosystem rife with corruption, inefficiency, violence and sycophancy has taken the place of a desired image for the Indian police and it is highly imperative that the public perception be bettered in order for people to trust the institution and be able to cooperate with it. The writers of this paper realize that to achieve this effect, the police personnel will have to be held accountable through mechanisms that demand utmost transparency.

For the police personnel to be motivated and receptive to the needs of the citizens, incentivization and modernization of the forces need to be undertaken.

In conclusion, the authors of this chapter believe that only lawful policing is the right kind of policing and to have that, the system must enable police forces that serve the interests of the people, focus on human rights-based and judicious policing and abide by the rule of law. A satisfied and motivated police force that has enough incentive to work for the society, is empathetic towards the struggles of the common citizenry and genuinely believes in democratic ways of policing must be the focus of any and all police reforms.