COMPARATIVE CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW QUARTERLY

CONTENTS

THE *WEDNESBURY* PRINCIPLES: FORMULATION, EVOLUTION AND DEMISE?

BY

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I. INTRODUCTION: THE ROLE OF THE JUDICIARY IN THE USE AND ABUSE OF POWER

It is but a common adage that '*with great power comes great responsibility*'.[2] This applies as equally to the lowest criminal holding a gun to a hostage as it does to a powerful Government official capable of exercising a wide plethora of discretionary decision-making powers. While the criminal with a gun has a responsibility to not harm the innocent who is in his power, the Government servant has a responsibility to not misuse or abuse his discretionary powers in the normal course of his functioning – this is the ideal case. However, less than ideal outcomes in both scenarios are not uncommon. Focussing on the second scenario, when the executive fails, people turn to the Courts to correct this anomaly – to return the system to its normal functioning. When the Courts step in to correct such deviations in executive action, such interventions are termed 'judicial reviews'.

Judicial intervention in the form of review is recognised as a tool of the last resort[3] to be used as scarcely as it must be effectively and judiciously. While this may not adequately describe the situation prevailing in India today[4], where judicial reviews are the rule rather than the exception, it has been the dominant discourse in the United Kingdom (hereinafter 'UK'). Courts in the UK have often been reluctant to intervene in exercises of discretion and have distanced themselves from scenarios where there is potential to 'substitute their choice as to how the discretion ought to have been exercised for that of the administrative authority'.[5] Such substitution, they fear, would lead to a 'reallocation of power from the legislature and bureaucracy to the Court'.[6] In line with

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[2] Voltaire. Jean, Adrien. Beuchot, Quentin and Miger, Pierre, Auguste. "Œuvres de Voltaire, Volume 48". Lefèvre, 1832

[3] The Rt Hon Justice Kay, Stuart Sime, Derek French (eds.), Blackstone's Civil Practice 2013: The Commentary, Oxford University Press, 2012, p. 1265. *Also see* R v. Law Society, ex pare Kingsley [1996] COD 59.

[4] 'Centre calls for cap on intervention by judiciary', India Today Magazine, viewed on July 26, 2012, <http://indiatoday.intoday.in/story/presidential-reference-centre-g.-e.-vahanvati-supreme-court/1/210339.html> ("India Today").

[5] Paul Crag, Administrative Law, Sweet and Maxwell, 2008, p. 613.

[6] Ibid.

their non-interventionist stance, they have time and again emphasised on the need to leave the decision-making relating to 'political and social choice' to the legislature.[7] Despite such strong indicators, this however does not lead one to the conclusion, that the powers of judicial review of English Courts are non-existent. They are, at best, limited and exercised rarely.

Such a commitment to non-intervention is well exemplified in the emotionally-charged case of the *Cambridge Health Authority*[8] in which the applicant was a ten year old girl, B, critically in need of life saving medical treatment. The matter concerned the judicial review of a decision taken by doctors not to allocate funds for B's treatment given the low chances of her survival and the lack of funds at the disposal of the National Health Service. The total cost for the procedure was to be around £ 75,000 with chances of her survival estimated to be around 10 - 20 per cent. In rejecting the application for judicial review, Sir Thomas Bingham MR, speaking for the Court of Appeal, stated that the Court could not substitute its decisions for those of the doctors on the 'merits of the matter' and should confine itself to 'deciding the *lawfulness* of the decision under scrutiny'.[9]

Despite such examples of judicial non-intervention, there is a general recognition that it is necessary for Courts to exercise some measure of control over administrative decision making; specifically, their *lawfulness* and *rationality*. For example, in the case of *Rogers*[10], Courts ruled that the policy of the National Health Service to provide certain life-saving drugs to some patients over others based on their subjective satisfaction that there existed 'exceptional personal or clinical circumstances' was irrational and struck it down.

Thus, as noted by Craig, English courts have increasingly expressed their disinclination to judicially review the merits of administrative decisions. However, there is evidence to indicate that in certain circumstances – such as when issues of irrationality and reasonableness are on point –Courts have had to *implicitly* assume the mantle of merit-linked decision making. This is as true of the Court in *Rogers* as it is in applying legal standards such as the *Wednesbury* principles to situations where the court is required to look beyond questions of legislative competence and procedure and the test substantive aspects of the administrative decision. However, the balance is fine and consistency and clear patterns in approach are indiscernible.

[7]R v. Ministry of Agriculture, Fisheries and Food, Ex p. First City Trading, [1997] 1 C.M.L.R. 250, p. 278.

[8]R v. Cambridge Health Authority, Ex p. B, [1995] 2 All E.R. 129.

[9] India Today *supra* note 1; *emphasis added.*

[10]R (on the application of Rogers) v. Swindon NHS Primary Care Trust, [2006] 1 W.L.R. 2649.

This paper aims to analyse the evolution of approaches taken by English Courts in ruling upon cases of abuses of administrative discretion in the specific context of the famed *Wednesbury* principles [Chapter II], before taking at a comparative look at the corresponding standards resorted to by India Courts in Chapter III. Chapter IV considers the question of whether resort to the *Wednesbury* standards has been in the decline while Chapter V looks at the manner in which recent cases have treated the *Wednesbury* standards in adjudicating upon the exercise of discretion by government authorities.

II. NO SUNDAY CINEMA FOR CHILDREN: *WEDNESBURY* REVISITED

An eminent jurist David Foulkes observed that 'all powers, public and private, are liable to be misused'.[11] The recent spurt in the number of government scams coming to light would seem to indicate that the observation was, by no means, wholly inaccurate. It is only a question of what constitutes such misuse that remains to be seen. In cases of exercise of discretionary powers by administrative authorities, the question morphs into what must be the legal touchstone on which questions of such abuse are to be tested. A 'convenient'[12] place to begin is the case of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*,[13] of the English Court of Appeal.

Factual Background

An interesting background point to be noted was that many forms of entertainment or commercial activities was prohibited on Sundays in the early parts of 20th century England.[14] The *Wednesbury* case was in relation to the *Sunday Entertainments Act of 1932* which allowed local authorities – in this case the Corporation of Wednesbury – to grant licenses for entertainment establishments to function on Sundays. Grant of such licenses was subject 'to such conditions as the authority thinks fit to impose'.[15]

The present dispute arose out of the condition that no child below the age of fifteen was to be permitted to attend, either with or without a parent. The plaintiff-cinema challenged this condition contending that it was *ultra vires* the authority of the Corporation's license granting powers. The primary contention of the plaintiffs was that the restriction on the entry of children should have been restricted to the case of children unaccompanied by adults as opposed to a blanket restriction.

[11]David Foulkes, Administrative Law, Butterworths, 1990, p. 224 ("Foulkes").

[12]Ibid

[13]Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, [1948] 1 KB 223 ("Wednesbury").

[14]These laws were often referred to as 'Blue Laws' in the USA and Canada.

[15]§ 1(1) of the Sunday Entertainments Act, 1932 (United Kingdom).

They submitted that such a blanket condition was 'unreasonable' and consequently *ultra vires* the authority of the Corporation.

The speech of Lord Greene, MR: the *Wednesbury* Principles are born

Lord Greene's decision for the Court is widely regarded as the *locus classicus* on the role that Courts should play while dealing with challenges to administrative decisions.[16] Lord Greene in his judgment emphasised on two primary points: *first*, that the Sunday Entertainments Act, 1932 conferred upon local authorities 'unfettered' and unlimited power to decide upon what conditions may be imposed in the grant of a license. *Secondly*, he noted that the statute in itself did not provide for any appeals from its decisions. In such a circumstance, he reasoned that the Courts had only a limited power to interfere with such decisions as they could not substitute their own reasoning with that of the authority.

He opined that these decisions could only be interfered with if they could be shown to have *contravened the law* and in a 'strictly limited class of cases'. These manifest if the authority were to take into account extraneous considerations or make patent lapses in its decision-making. Subsequently, he goes on to analyse the exact connotations of 'unreasonableness' as and reasons that there was no scope for the argument that 'physical and moral health of the children' were extraneous considerations taken into account by the authority while granting the license. He substantiates by pointing out that, in the instant case, there was nothing to indicate that the authority had done something so unreasonable that *no reasonable authority would have done*. The authority concerned herein, in conferring certain conditions on the licenses granted, had acted in a manner that was consistent with the 'unfettered' powers conferred upon it by law of the Parliament. Thus, this exercise could not be held to be unreasonable.

He concludes his analysis of the jurisprudential import of 'unreasonableness' by citing cases where unreasonableness in decision-making had warranted judicial interference. The cases he alluded to in this regard were *R.* v. *Burnley Justices*[17] and *Ellis* v. *Dubowski*[18]. In both, the actions of the administrative bodies were held to be 'unreasonable' due to the unauthorised delegation of powers

[16] Barry Hough, 'Relevance and Reasons in planning Matters', *Journal of Planning and Environment Law*, 1998, pp. 625 – 634. *Also See* Lord Irvine, Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays, Hart Publishing, 2003, p. 139.

[17] R. v. Burnley Justices, 85 Law Journal Reports (K.B.) 1565.

[18] Ellis v. Dubowski, [1921] 3 K.B. 621.

– that were conferred by Parliament on these bodies – to third parties. Delegation while *ipso facto* not an unreasonable act was, in these cases, held to improper and contrary to statute.

Lord Greene further states, in what come to be known as the celebrated *Wednesbury* principles, that a Court may interfere with the discretionary authority of a local body if and only if: "*they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account.*" – the relevancy test; or if they despite having "*kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.*" – the unreasonableness test.[19]

An analysis of the decision in *Wednesbury*

The decision of the Court of Appeal in *Wednesbury* no doubt marked an important milestone in the development of law relating to the circumstances in which Courts could interfere with the exercise of discretion by administrative authorities. Moreover, the Court herein delineated and clarified the grounds on which such interference may be warranted. However, given the wording of the statute concerned herein[20], it is easy to imagine why the Court readily declined to interfere in the decision of the local authority. The Act was drafted in a manner so as to allow the local authority the widest possible discretion in determining what conditions were fit to be attached to the grant of an entertainment license. Therefore, unless the authority acted in a manner that was manifestly unjust, there would be no scope for Courts to intervene in the decision-making process.

Thus, given the levels of discretion exercisable by the local authorities, the Courts were right to decline to interfere with their decision. This was especially due to the definite socio-moral objectives behind the impugned actions. However, questions of whether Lord Greene's characterisation of unreasonableness as that which 'would require something *overwhelming*' has attracted considerable criticism for being worded in a too narrow and restrictive manner. To illustrate the threshold he had in contemplation, he cited the hypothetical instance of a red-haired teacher being fired from her job by virtue of her having red-hair.[21] Whether in practice, such overt and manifestly 'unreasonable' acts ever arise, remains to be seen.

[19] It is this latter test that is often referred to as the 'Wednesbury unreasonableness' principle.

[20]The Sunday Entertainments Act, 1932 (United Kingdom).

[21]Short v. Poole Corporation, [1926] Ch. 66, pp. 90 – 91.

Developments post-*Wednesbury*: the move away from mere 'unreasonableness'

Of the different grounds of challenge to discretion delineated in *Wednesbury*, the *Wednesbury* unreasonableness principle in particular has been the subject of numerous characterisations and interpretations subsequent to its initial formulation. The role of a non-appellate Court was further clarified by Lord Justice Griffiths in *R* v. *Greenwich London Borough Council, ex p Cedar Transport Group Ltd.*[22] It was noted herein that the Court had to take care to not "*too easily be lured…into substituting its own view of the way in which…council should have exercised its discretion for that of the council itself*".

The decision of Sedley, J. in *R* v. *Parliamentary Commissioner for Administration, Ex p Balchin*,[23] in holding that a decision would be *Wednesbury* unreasonable if it 'disclosed an error of reasoning which robbed the decision of its logical integrity', first brought logicality within the scope of unreasonableness .[24] The decision in *Coighlan*,[25] further extended the unreasonableness doctrine to cover not only decisions that 'defied comprehension' but also those which were made with 'flawed logic(al)' considerations.[26]

Recent times have seen increased calls for 'loosening' the high thresholds laid down in *Wednesbury* by Lord Greene. In the case of *R* v. *Chief Constable of Sussex Ex p. International Trader's Ferry Ltd.*[27], Lord Cooke remarked that such an extreme formulation of unreasonableness was not necessary to ensure that the judiciary did not tread into the realm of the executive. He felt that a simpler test: that of '*whether the decision was one that a reasonable authority could have reached*' was the need of the day. He reiterated his stance in *Daly* where he expressed the opinion that the 'retrogressive' *Wednesbury* test that protected against a very extreme degree of unreasonableness was on its way out.[28] He was of the firm belief that the degree or depth of judicial review must vary concomitantly with the nature of the subject-matter being adjudicated upon.

Subject-matter specificity and *Wednesbury*

In a manner that would almost certainly please Lord Cooke, the *Wednesbury* approach to unreasonableness has indeed become tempered in accordance with the subject-matter being

[22]R v. Greenwich London Borough Council, Ex p. Cedar Transport Group Ltd., [1983] RA 173, DC.

[23]R v. Parliamentary Commissioner for Administration, Ex p. Balchin, [1997] C.O.D. 146.

[24]Ibid, at ¶ 19-004.

[25] R v. North and East Devon Health Authority, Ex p. Coughlan, [2001] Q.B. 213.

[26]Ibid, at ¶ 65.

[27]R v. Chief Constable of Sussex, Ex p. International Trader's Ferry Ltd., [1999] 2 A.C. 418, p. 452 ("Chief Constable of Sussex").

[28]R. v. Secretary of State, Ex p. Daly, [2001] 2 A.C. 532, p. 549.

addressed.[29] This has especially become the norm in cases concerning human rights after the passing of the Human Rights Act, 1998 (hereinafter 'HRA') in the UK.

For instance, Lord Bridge in *Brind*,[30] modified the test to the scenario of cases concerned with the rights of citizens. According to this formulation, Courts must enquire as to whether a reasonable Secretary of State could reasonably have made the primary decision being challenged. In the course of such an enquiry, the Court were to bear in mind that only a compelling public interest could warrant the invasion of a right. In *Smith*[31], Sir Bingham advocated an approach whereby Courts were to consider whether the decision impugned was beyond the range of responses open to a reasonable decision-maker. This analysis was to be carried out keeping in mind that greater the level of interference with human rights, the greater the Courts would require by means of justification'. While conflicting opinions exist over whether the tests employed in such contexts are merely variants of the *Wednesbury* principle or independent formulation, it is all but certain that, in some form or other – strengthened or diminished, Lord Greene's decision lives on.

***Wednesbury* "irrationality"?**

The principle of *Wednesbury* unreasonableness was further described to be included under the ambit of 'irrationality' in the decision of Lord Diplock in *Council for Civil Service Unions* v. *Minister for the Civil Service*[32]. In this case, a Royal Prerogative preventing employees of the Government Communications Headquarters (GCHQ) from forming trade unions in the interests of national security was impugned. The Council for Unions challenged the order by way of an application for judicial review in the High Court where Justice Glidewell ruled that the lack of consultations with employees before the decision was taken rendered it invalid. On appeal to the Court of Appeal, the Court, in a resurgence of the famous non-interventionist streak alluded to above, refused to interfere holding that national security considerations were to be made by the executive and not the judiciary.

On further appeal, the House of Lords overruled the Court of Appeal's decision to the extent that the Royal Prerogatives were subject to judicial review in a manner similar to other administrative

[29]Sir John Laws, Wednesbury, in C. Forsyth and I. Hare (eds.), The Golden Metwand and the Crooked Cord, Essays in Honour of Sir William Wade, Oxford University Press, 1998, pp. 185-202.

[30]R v. Secretary of State for the Home Department, Ex p. Brind, [1991] 1 AC 696.

[31]R v. Ministry of Defence, Ex p. Smith, [1996] Q.B. 517.

[32]Council for Civil Service Unions v. Minister for the Civil Service, [1985] AC 374.

decisions. Nonetheless, in line with the Court of Appeal's reasoning extracted above, the appeal failed as the decision concerned was premised on national security grounds.

Lord Diplock's judgment is particularly relevant to the present study. He held that administrative actions were reviewable on three grounds – illegality, irrationality and procedural irregularity.[33] In this classification, he explained irrationality to mean nothing but *Wednesbury* unreasonableness.[34] It was in such a manner that the transformation from unreasonableness to something clearer in scope as well as application – 'irrationality' was effected.

Proportionality

The most recent form in which the review of administrative decisions has come to manifest is the standard of 'proportionality'. It refers to the evaluation of whether a particular Government measure goes beyond what is required to achieve the particular policy objective.[35] While the characteristics of the test justify its treatment as an independent creature; Courts have often attempted to treat the test as an aspect, if not off-shoot, of the *Wednesbury* unreasonableness doctrine. Foulkes attributes such an approach to the fear of Courts that the proliferation of the proportionality test would result in Courts acting as arbiters in deciding which approach is to be taken to tackle a particular problem.[36] This test is dealt with in different measures, in subsequent parts of this note.

In the current scenario, a decision may be said to unreasonable on account of its disproportionate effect, illogicality or contrary to accepted moral standards.[37] Thus, while it is tempting to say that *Wednesbury* has evolved to be replaced by the proportionality approach – the truth is that it has merely absorbed it within its fold, so as to maintain its high threshold while at the same time extending its flexibility to diverse fact scenarios.

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[33]Katharine Thompson, Garner's Administrative Law, Butterworths, 1996, pp. 232-33.

[34] Lord Diplock stated: "*By 'irrationality' I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223).*

It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

[35]Foulkes *supra* note 8 at p. 245.

[36]Ibid.

[37] Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, at 410.

III. *WEDNESBURY* IN INDIA

According to the noted legal commentator M.P. Jain, the judiciary in India has also often resorted to using the unreasonableness test to check discretionary executive action.[38] He notes that Courts in the country have resorted to using a more positive test, that of testing whether the decision taken could have been taken by a reasonable authority as opposed to the more negatively worded *Wednesbury* test – which questions whether the act was *so unreasonable or absurd* that no reasonable man would have reached it. Indian Courts have in a number of cases as discussed in the course of the paper stated that an administrative decision is likely to be quashed if no reasonably body, based on the same material that it had available for its decision, would have reached such a conclusion.

Indian approaches to *Wednesbury*, unreasonableness and *Wednesbury* unreasonableness

In *Y. Mahaboob Sheriff and Sons* v. *Mysore State Transport Authority*,[39] the Supreme Court was concerned with the question of whether Courts could interfere in the discretion granted on transport authorities by Section 58 of the Motor Vehicles Act, 1939. Under the said provision, the authority had powers to renew transport licenses for a period "*not less than three years and not more than five years*".[40] In the instant case, the authority granted renewal for a period of one year. The petition challenged this order claiming that the authority had no power to exercise discretion beyond the confines of the statutory provisions. The Supreme Court in allowing the petition quashed the order and directed the authority to issue licenses in accordance with Section 58 of the Act. Kapur, J. cited *Wednesbury* and quashed the order on the ground that it was one that no reasonable authority would have made in light of the statutory restrictions. Furthermore, in delineating the powers of the judiciary, he held that although the Court could quash the renewal for being unreasonable, it could not grant mandamus for renewal. Kapur J. Reasoned that if the mandamus is granted in this matter then that would amount to the judiciary substituting its judgment in an area where the power was conferred on the transport authority.

In *M.A. Rasheed* v. *State of Kerala*,[41] the Court once again took into account the consideration of reasonableness of the decision to rule whether a notification prohibiting 'production of fibre from coconut husks by the use of machinery to secure equitable distribution of coconut husks to traditional sector' was valid. The Court in upholding the notification took into account various

[38]M.P. Jain, Principles of Administrative Law, Butterworths Wadhwa, Nagpur, 2011, p. 1267.

[39]Y. Mahaboob Sheriff and Sons v. Mysore State Transport Authority, AIR 1960 SC 321.

[40]Section 58(1)(a) of the Motor Vehicles Act, 1939 (India).

[41]M.A. Rasheed v. State of Kerala, 1975 SCR (2) 96.

considerations such as the fact that the decision had been taken after adequate due diligence and was thus, 'reasonable'.

However, it is interesting to note that in this decision, the Court also took the term 'sensible' to mean the same as 'reasonable'. In doing so, did the Court evolve a new standard altogether or was the difference merely literary in nature? It would seem as though the Court used the two words in a synonymous manner and not with the intention of evolving a new standard. This is substantiated by the lack of any meaningful explanation of the term 'sensibility'.

Another manifestation of a Wednesbury-esque reasonableness test may be found in *State of Bombay* v. *K.P. Krishnan* where the Supreme Court in deciding a dispute between a tyre company and its workers opined that the State was bound to act '*reasonably and fairly*' in applying its discretion to decide whether the dispute was to be referred to arbitration under s. 12(5) of the Industrial Disputes Act, 1947.[42] This fairness criterion has often found to be applied alongside that of reasonableness.

In the case of *Rohtas Industries* v. *S.D. Agarwal*[43]the Supreme Court of India was again compelled to discuss the nuances of the Wednesbury principle. In this case, the Court considered a decision of the Government to initiate an investigation into a company's affairs under Section 237(b) of the Companies Act, 1956. The provision provided for the Government's discretionary power to undertake investigations into a company if circumstances existed to suggest any corporate wrong-doing. The Court, while holding that the Government acted in excess of the powers under Section 237 by not applying its mind, held that: "*We do not think that any reasonable person much less any expert body like the Government on the material before it, could have jumped to the conclusion that there was any fraud involved in the sale of the shares in question.*" Herein, yet another manifestation in the form of a *positive* approach to the *Wednesbury* reasonableness principle is observed. However, an interesting point to be noted is that the Court felt that an 'expert' body like the Government had to conform to a higher standard of reasonableness than others. In other words, there has been a trend towards the Courts recognising that a body such as the Government is to act in a manner *more reasonable* than a private or non-governmental body.

[42]K.P. Krishnan v. State of Bombay, AIR 1960 SC 1223, ¶ 23.

[43]Rohtas Industries v. S.D. Agarwal, AIR 1969 SC 707.

A more recent reference to the principle arose in the case of *Jashbir Kaur*,[44] where the challenge was to the Chief of Army Staff's recommendation for a particular uniform for military nurses. The Court noting that a grievance redressal committee had been formed and that the grievances had been taken into account held that there was no scope for the Court to interfere. Explicitly referring to the Diplockian variant of *Wednesbury*, the Court held: "*A decision such as the one challenged before us can hardly be faulted unless on the ground of Wednesbury principle of rationality. In our view there is no such irrationality in the decision of the Army Act which requires us to interfere in exercise of our constitutional powers.*"[45]

Thus, it is clear that Wednesbury unreasonableness as a standard to test administrative decisions against is far from being alien to the Indian judiciary. Courts in India, as discernible from the limited sample set discussed above, have both explicitly and implicitly embraced the tenets of Lord Greene.

IV. THE DECLINE OF *WEDNESBURY*?

Despite the wide-spread use of the principle in cases such as those detailed above, Courts have come to recognise that, in certain circumstances, a more searching and pervasive form of judicial review was required. This recognition most explicitly came to light in *Bombay Dyeing*,[46] wherein, noting that there had been further developments in different jurisdictions, the Court agreed that "*in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than Wednesbury, but involves a full-blown merits judgment.*"[47] While this by itself did not necessarily signify a move away from the *Wednesbury* approach, after making the above remark, the Court rather laconically stated that the "*Law is never static; it changes with the change of time*". Given that this is one of the more recent decisions of the Court, .one may not be faulted for believing that a move away from the narrow confines and high threshold of Wednesbury is being contemplated.

The position is no less different in the UK where the utility of the *Wednesbury* principles in the post-HRA era has come into question on many occasions. Lord Shyn remarked in *Alconbury*,[48] that the principle was of no relevance in its independent sense and would at some stage have to be

[44]Jashbir Kaur v. Union of India, S.L.P. (C) Nos. 12904-12909, 14275 and 14487 of 2002 (Decided on November 13, 2003) (Supreme Court of India).

[45]Ibid, at ¶ 8.

[46]Bombay Dyeing & Mfg. Co. Ltd v. Bombay Environmental Action Group, Appeal No. (civil) 1519 of 2006 (Supreme Court of India).

[47]Ibid.

[48] R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions, [2003] 2 AC 295.

merged with more contemporary tests such as *proportionality* which had evolved much more recently.

Lord Irvine expressed similar sentiments while observing that there was a dichotomy between Courts having to use the narrow, restricted *Wednesbury* principle in domestic cases but having to inquire more deeply into administrative cases where rights-elements covered by ECHR-law were involved.[49]

If *Wednesbury* is losing, what is gaining?

If it is indeed the end of the *Wednesbury* era, as far as the Indian and English Courts are concerned, what are the contemporary doctrines that have come to take its place? The answer is expectedly different in different jurisdictional contexts.

In India, the primary challenge to unreasonableness of the Government's administrative actions has come to manifest in the form of writ petitions under Article 14 of the Indian Constitution. The 'Right to Equality' has been extended to serve as a tool not just to preserve equality before the law and equal protection\of the laws, but also to guard against arbitrary and unreasonable actions. The Article has come to afford a wider and more flexible scope of protection than that offered by the *Wednesbury* standards. There can be no better illustration of this than in the opinion of Justice P.N. Bhagwati in *Maneka Gandhi*, where he stated that *reasonableness* in exercise of discretion, being an "essential element of equality or non-arbitrariness" pervades through Article 14 with a "brooding omnipresence".[50] This clearly indicates that Article 14 not only took into account violations of equality and arbitrariness in decision making *but also* questions of reasonableness.

It is in such a manner that the concept of unreasonableness in the Indian context has been subsumed by the broader tenets of arbitrariness and equality under Article 14. In India, more than common law principles of unreasonableness, it is the constitutional tenets of equality under Article 14 that have been the primary weapon in checking discretionary Government actions. Principles earlier considered to be stand-alone or independent such as the *Wednesbury* tenets and proportionality have also been subsumed by the same.[51]

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[49]Lord Irvine, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights', Public Law, 1998, p. 234.

[50] Maneka Gandhi v. Union of India and Anr., AIR 1978 SC 597.

[51] For instance, see the decision of the Delhi High Court in Ex Constable Jai Kishan v. Union of India at ¶71. (Decided on 19 September, 2002) (citation unavailable).

In the UK, the transition has been mainly from *Wednesbury* to proportionality; primarily because both the doctrines cover a great deal of 'common ground'.[52] To take an example, a decision to impose death penalty for a young child stealing a loaf of bread could be quashed either on grounds of proportionality or unreasonableness. *Per* Lord Hoffman, "*it is often not possible to see the daylight between them*".[53] Moreover, the test for proportionality is a more 'exacting' measure requiring Courts to test not only the magnitudes of the actions but whether such actions were within the scope of the actions that could be reasonably taken by the Government.[54]

Not only have there been indications of the demise of *Wednesbury*, there have also been explicit recognitions of the principle's subsistence. In *R (Association of British Civilian Internees: Far East Region)*,[55] it was stated by the Court that: "*We have difficulty in seeing what justification there now is for retaining the Wednesbury test …. but we consider that it is not for this Court to perform burial rights*."

Surprisingly, Indian Courts seem to have heralded its demise more explicitly than English Courts. In *State of Madhya Pradesh and Others* v. *Hazarilal*,[56] the Court following various other decisions of the Supreme Court ruled rather strongly that "*the legal parameters of judicial review have undergone a change. Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality.*" Such a definitive conclusion is at best unsustainable as there are continuing instances of application of the principle by English Courts.[57]

However, these have mostly been in cases where there are no issues of human rights concerned. In cases where rights based issues are involved, the rules of proportionality have been employed so as to warrant a deeper and more searching enquiry. It is important to note that while there is no sheer differentiation in the legal regimes relating rights and non-rights based exercises of discretion, there has been a move towards proportionality in India too. However, there have been no particular trends to speak of in relation to the *Wednesbury* principle. In other words, one has not

[52]Wade and Forsyth, Administrative Law, Oxford University Press, 2009, p. 312.

[53]In a lecture quoted in Chief Constable of Sussex *supra* note 22 at p. 495.

[54]Ibid.

[55]R. (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence, [2003] 1 WLR 1813.

[56]State of Madhya Pradesh and Ors., v. Hazarilal, (2008) 3 SCC 273.

[57] The principles have been cited numerous times in the past few years. Two recent judgments which comprehensively considered the Wednesbury principles were: The Queen on the application of Michael Evans v. Secretary of State for Communities and Local Government, [2013] EWCA Civ 115 and R v. Secretary of State for the Home Department, 2011 SLT 970 at pp. 973/974.

risen, at the fall of another. The following section illustrates a few recent cases that employed the proportionality principle in India.

V. RECENT EXPOSITIONS ON *WEDNESBURY* IN INDIA

This section aims to cover the most recent case that has referred to the *Wednesbury* principle in India.

In *Avishek Goenka*,[58], the Supreme Court was concerned with a public interest litigation that attempted to bring judicial notice to the phenomena of pre-paid mobile connections being issued without proper verification of user credentials and information. The petitioner, a public-spirited citizen, was concerned with the lack of implementation of various TRAI and DoT guidelines in the same regard. While the Court in this case did not explicitly cite the *Wednesbury* principle, it approved its usage in an earlier case of *Delhi Science Forum*[59] as one of the grounds upon which the issue of instructions and directions in various regards may be challenged.

Further, in the *Goenka case*, the apex Court proceeded to also hold that it would not "*examine the merit or otherwise of such policy and regulatory matters which have been determined by expert bodies having possessing requisite technical knowhow and are statutory in nature. However, the Court would step in and direct the technical bodies to consider the matter in accordance with law, while ensuring that public interest is safeguarded and arbitrary decisions do not prevail.*" This is no less than an implicit approval of Lord Greene's speech in *Wednesbury* where he emphasised that the role of the Courts in cases of regulatory and policy matters (where scope for discretion existed) was to examine whether such decision were taken *contrary* to the law. Thus in *Avishek Goenka*, the Supreme Court not only approved the use of the *Wednesbury* principles but also implicitly applied them to the facts at hand (as evident from the extract above). In *Tejas Construction*,[60] the Supreme Court while evaluating the decision of the Municipal Council, Sendhwa to award a tender for the construction of an Integrated Water Supply system, noted that the *Wednesbury* principles were indeed to be tested against, did not seem to explicitly or implicitly apply them.

[58]Avishek Goenka v. Union of India, Writ Petition (Civil) NO. 285 OF 2010 (decided on April 27, 2012) (Supreme Court of India).

[59] Delhi Science Forum & Ors. v. Union of India AIR 1996 SC 1356.

[60]Tejas Construction v. Municipal Council Sendhwa, Civil Appeal No. 4195 of 2012 (decided on 4 May, 2012) (Supreme Court of India).

VI. CONCLUSION

In the preceding chapters, this brief note has attempted to analyse the speech of Lord Greene MR in the case of *Associated Films* v. *Wednesbury Corporation* which laid the foundations of administrative law with regard to the checks that may be applied by Courts in exercise of its discretionary power by administrators. It has sought to place in perspective some of the contemporary variants of the approach first crystallised in the famous decision – before asking the question of whether the original principles are indeed in terminal decline.

It is concluded that, despite numerous criticisms of the restrictive and unrealistically high thresholds set by the *Wednesbury* test, it is still found to be in wide use in both the UK and India. However, in both jurisdictions, the application of the test has been affected by other developments in the law. In the UK, this was the passing of the HRA while in India; the expansive interpretations given to Article 14 of the Constitution have had a similar effect. Often the citing of *Wednesbury* in judgment resembles a superficial adornment to show that the author has conducted a comprehensive analysis of the case-law in the field.

These developments have to be seen in context of the numerous calls to replace the *Wednesbury* principles with a more flexible and context-sensitive approach such as that of 'proportionality'. It is found that while the broader tests of proportionality may very well cover the tenets of the *Wednesbury* prescriptions, its proliferation depends on the level of judicial intervention generally found to be prevailing in that jurisdiction. In the case of India, where Courts have never been shy to 'interfere' with or often motivate the Government functioning, Courts have increased their reliance on the proportionality rules. This resort to proportionality has also been a result of the general trend to group all such challenges under the precepts of Article 14 which today is not just a safeguard to equality but a significant tool in protecting against arbitrariness and unreasonableness of Government decisions.

In contrast in the UK, the passing of the HRA in addition to a significant amount of disenchantment with the practical utility of the perceivably unattainable *Wednesburian* thresholds has heralded a similar move. However, the shift is, by no means, a foregone conclusion with the courts still frequently citing *Wednesbury*.[61]Thus, whatever the future holds for the *Wednesbury* principles, it is certain that while holding their own in the present, and they have already found their place in history.

[61] *See* note 56 *supra*.

JUDICIAL ACCOUNTABILITY AND CONTEMPT OF COURT: COMPARING INDIA WITH U.K., THE U.S.A AND SINGAPORE

BY

SPADIKA JAYARAJ[1]

I. INTRODUCTION

Judicial Accountability is often thought to deal only with the appointment of judges, their tenure, impeachment, etc. In light of the pending Judicial Accountability Bill, the issue of the independence of the Judiciary is raging a debate in India. This paper attempts to cover an important aspect of judicial accountability that is often forgotten in the on-going debates the question of protecting the judiciary from public criticism.

Contempt of Court powers are granted to judiciaries in order to prevent obstructions in the administration of justice. However, what we find is that these powers are often misused by the judiciary to protect the characters of individual judges, when ordinary defamation proceedings would suffice. Moreover, the principles of natural justice are compromised, when Judges sit in judgment over contempt over themselves.

The most worrisome effect of unbridled contempt powers in the hands of the judiciary is that hanging pall of contempt powers ends up having a 'chilling effect' on the freedom of speech, especially that of the media. This leads us to ask some important questions regarding the right of the public to freely criticise the judiciary. Is the judiciary so fragile that it needs to be shielded from public scrutiny? Or is public scrutiny required to increase judicial accountability? In this paper, the author has examined the way Contempt Powers have been used in India, at the cost of judicial accountability.

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II. THE POWER OF THE COURTS TO PUNISH FOR CONTEMPT

The Constitutional scheme of India is based upon the idea of Rule of Law. This implies that everyone, both in their individual and collective capacities, are under law's supremacy, and the judiciary is an institution that is given the power and responsibility by it. The rationale behind Contempt of Court is that Courts must have the power to secure obedience to their judgments, in order to serve this purpose of administering justice.[2]The purpose of punishing Contempt of Court is not to protect the dignity of the Court, but of the process of justice itself.[3]

Contempt of Court can refer to both civil and criminal contempt. Civil contempt refers to any "wilful disobedience of any judgment, decree, direction, writ or other process of the court".[4] It is punishable with imprisonment or fine. The rationale behind civil contempt is to compel compliance with court orders.[5]Criminal contempt is any behaviour with *scandalises* the court, *prejudices* the due course of a judicial proceeding or *interferes or tends to interfere* with the administration of justice.[6]Therefore, acts such as defiant disobedience of the Judge in Court, prejudicing on-going trials by publishing information regarding past convictions of the accused,[7] or even criticising a judge in the media shall constitute criminal contempt. Since this paper deals with Contempt of Court and judicial accountability, the term 'contempt of court' shall refer only to criminal contempt through the course of this paper.

Contempt of Court finds a place in the Indian Constitution under Article 19(2), Article 129 and Article 215. According to Article 19(2) of the Constitution, 'Contempt of Court' is one of the grounds on which the State can legislate to place reasonable restrictions on freedom of speech.[8]The primary legislation dealing with contempt is the Contempt of Courts Act, 1971. On a reading of the Act, it appears as though the Act places more importance on the exceptions to contempt rather than what constitutes contempt itself. The Act says that fair and accurate reporting of any judicial

[2]C.J. Miller, Contempt of Court, Oxford University Press, Oxford, (6th edition, 2006), p.112

[3]Attorney General v. Times Newspapers, [1973] 3 W.L.R. 298

[4]§ 2(b), Contempt of Court Act, 1971.

[5]D.D. Basu, *Commentary on the Constitution of India – Volume 5*, Lexis Nexis Butterworths Wadhwa (2009) 2012, p. 5618.

[6]§2(c), Contempt of Court Act, 1971.

[7]Attorney General v. Hinch, (1987) 164 CLR

[8]Article 19(2) of the Constitution of India says, "*Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence*".

proceedings shall not constitute contempt.[9] The Act also precludes fair criticism of judicial acts from being held as contumacious.[10] 'Innocent Publications', that is, potential information that would prejudice the trial, though the person publishing it did not know or have the reason to believe that proceedings were pending, are also not punished under this Act.[11] After the *Contempt of Courts (Amendment) Act, 2006*, 'truth' has been added as a defence.[12]If the Contempt power of the Indian Courts is read purely in light of the Contempt of Courts Act, there appears to be no grave conflict between judicial accountability and contempt of court, as the Act restricts contempt powers to only genuine cases of abuse of the judiciary or obstruction of justice. However, the grave catch is that the applicability of this Act is deceptively restricted.

Article 129 of the Constitution of India says that the Supreme Court shall be a 'court of record'. Article 215 grants a similar status to the High Courts. While the term 'Court of Record' has not been defined in the Constitution itself, it is well recognised in the judicial world[13] to mean a court whose acts and judicial proceedings are enrolled for "perpetual memorial and testimony", and the court also has the power of summarily punishing contempt of itself.[14]This means that the constitutionally-granted power to punish for contempt of itself cannot be subject to any legislation.

The implication of this is that the contempt power of the Supreme Court under Article 129 and the High Courts under Article 215 cannot be *denuded, restricted or limited*[15] by the Contempt of Courts Act, 1971. In *Supreme Court Bar Association*[16]case, it was held that the Parliament may still prescribe the procedural aspects for Contempt of Court to be applicable to the High Courts and the Supreme Court. This would imply that §12(1) of the Contempt of Courts Act, which prescribes a maximum punishment as a fine of Rs. 5000 and/or imprisonment for a term of 6 months shall be applicable. However, in *Zabira Habibullah Sheikh*,[17] it was held that the punishment for Contempt under the Act shall be applicable to the High Courts, but shall only act as a *guide* for the Supreme Court. There was also no accompanying rationale given in this judgment, which is worrisome because it

[9]§4, Contempt of Court Act, 1971.

[10]§5, Contempt of Court Act, 1971.

[11]§3, Contempt of Court Act, 1971.

[12]§ 13, Contempt of Court Act, 1971.

[13]D.D. Basu, *supra* note 4 at 5615.

[14]Delhi Judicial Service Association v. State of Gujarat, AIR 1991 SC 2176; Supreme Court Bar Association v. Union of India, AIR 1998 SC 1895.

[15]In Re: Ajay Kumar Pandey, AIR 1997 SC 260.

[16]Supreme Court Bar Association v. Union of India, AIR 1998 SC 1895.

[17]ZahiraHabibullah Sheikh v. State of Gujarat, (2004) 4 SCC 158.

grants great powers to the Supreme Court which may have not been envisaged by the drafters of the Constitution.

This is in addition to Article 19(2) of the Constitution, which guarantees that the State may curb freedom of speech and expression on the grounds of Contempt of Court. Both these powers, when taken together, lead to a scenario where the High Courts and the Supreme Court enjoy great amount of power regarding Contempt, one of the consequences of which is that judicial accountability is put at peril. The most direct link between failure of judicial accountability and contempt of court is demonstrated in the offence of contempt by 'scandalising the court'.

III. SCANDALISING THE COURT& THE FAILURE OF JUDICIAL ACCOUNTABILITY IN INDIA

The offence of Scandalising the Court in India must be understood in light of the *Veeraswamy*[18]case. In this case, a complaint was made under the Prevention of Corruption Act, 1947 against a former Chief Justice of a High Court, alleging that the Judge had assets disproportionate to his income. The Supreme Court, in a landmark judgment, held that no criminal case can be registered against a judge of the High Court or the Supreme Court, without the consultation of the Chief Justice of India. Therefore, Judges are virtually immune from the deterrent effect of the threat of criminal proceedings. This makes it extremely important for the media to have the right to criticise the judiciary.

'*Scandalising the cour*t' means any hostile criticism of a judge in his capacity as a judge.[19] This includes scandalising judges of the judicial system as a whole, challenging a judge's personal honesty or discrediting a judge in public.[20] The substance of this offence is that the attack must be "*on the judge or judiciary as a whole with or reference to particular cases, causing unwarranted and defamatory aspersions upon the character and ability of the judge.*"[21]

In order to determine whether a statement scandalises the Court, the Supreme Court has held that the relevant factors for consideration would be the surrounding circumstances and the degree of

[18]K. Veeraswamy v. Union of India and Ors., 1991 SCC (3) 655.

[19]Goodhart Arthur, 'Newspapers and Contempt of Court in English Law'*,Harvard Law Review*, Vol. 48, No. 6 (Apr., 1935),p. 885, 898.

[20]R. De, *Contempt of Courts: Law and Practice,* Eastern Law House, Kolkata, 2012, p.233.

[21]Brahma Prakash Sharma v. State of UP*,* AIR 1954 SC 10 (Hereinafter, "Brahma").

publicity given to the statement.[22] The test is whether it is likely to *have an injurious effect on the minds of the public*.[23]It is evident that all these tests are absolutely subjective in nature, giving the judge great discretion in deciding what is 'scandalous' to the Court. Not surprisingly, the usage of these tests to determine what scandalises the court has led to some absurd results.

This is exemplified in the case of *In Re Arundhati Roy*.[24]The respondent, a famous writer, was involved in the *Narmada Bachao Andolan*, a movement to protest against the construction of the Sardar Sarovar Dam. A writ petition regarding the adverse environmental and economic consequences of this project was pending before the Supreme Court. During its pendency, the Court passed some other orders, which the protestors felt would worsen the situation. They staged a protest in front of the Supreme Court, following which contempt proceedings were initiated They were each asked to first show-cause with an affidavit as to why action must not be taken. One of them, Ms.Arundhati Roy, mentioned the following statement in her strongly-worded affidavit: "*By entertaining a petition based on an FIR that even a local police station does not see fit to act upon, the Supreme Court is doing its own reputation and credibility considerable harm."*

The Court then sent her another show-cause notice regarding initiation of contempt proceedings with respect to her affidavit. In her reply-affidavit, she stood her ground and offered several criticisms of the Court regarding its recent decisions. She also criticised the Court's hesitation to take up the issue of corruption in the then-ruling party. The *Tehelka Scandal* had just broken out; with the sting operation revealing a serious case of political corruption, yet the Delhi High Court had refused to entertain a petition to conduct an enquiry, threatening to impose costs on the petitioners for their frivolity.[25]

In conclusion, she said, "*It indicates a disquieting inclination on the part of the court to silence criticism and muzzle dissent, to harass and intimidate those who disagree with it."*She was punished for contempt, as the Supreme Court considered her statements as '*a destructive attack on the reputation and the credibility of the institution and it undermines the public confidence in the judiciary as a whole and by no stretch of imagination, can be held to be a fair criticism of the Court's proceeding*." Justice Sethi also added,

> *"She wanted to become a champion to the cause of the writers by asserting that persons like her can allege anything they desire and accuse any person or*

[22]Brahma, AIR 1954 SC 10.

[23]BathinaRamakrishanav. State of Madras, AIR 1952 SC 149.

[24]In Re ArundhatiRoy, AIR 2002 SC 1375 (Hereinafter, "Arundhati Roy").

[25]"*Tehelka Expose*" , The Tribune , April 15, 2001.

> *institution without any circumspection, limitation or restraint. Such an attitude shows her persistent and consistent attempt to malign the institution of the judiciary found to be most important pillar in the Indian democratic set up."*

As mentioned previously, it was held in *Brahma*[26]that 'degree of publicity' should be a factor while determining whether a statement should be punished as contumacious. In the instant case, Ms. Roy's statements were made in an affidavit to the Court. Her statements were not even in circulation among the public. It is difficult to see how these words would then have been likely to lower the reputation of the judiciary among the people. This makes it even more difficult to support the Supreme Court's decision to punish her for contempt.

The Counsel argued that her statements would fall within the defence of 'fair comment'. The defence of 'fair comment' to the offence of scandalising the court comes from two important common law decisions, namely *R v. Grey*[27]and *Ambard*v. *Attorney General of Trinidad and Tobago.*[28]They have held that judges are open to criticism; and if reasonable arguments are offered in disagreement with the Court's decisions, it would not be held as contempt.[29]As long as the person is not acting in malice or attempting to impair the administration of justice,[30] the criticism shall fall under the defence of fair comment. It has been affirmed by the Indian Supreme Court that *fair and reasonable comment* would not be held as Contempt, in the case of *P.N. Duda*v. *P. Shiv Shanker.*[31]

The Supreme Court did not consider Ms. Roy's statements to be fair comment, although she had clearly substantiated her claims with reasons and examples. Here, they differentiated the instant case from *Shiv Shanker*. In *Shiv Shanker*, P.N. Duda, the then Minister of Law, gave a speech in front of the Bar Council of Hyderabad. His speech imputed that the Supreme Court was biased towards the elite classes, as reflected in their judgments relating to land reforms. He even said, "*Antisocial elements i.e. FERA violators, bride burners and a whole horde of reactionaries have found their heaven in the Supreme Court."* On a plain reading, the words of Mr.Duda appear to be even more inflammatory and *likely to lower the authority of the court* than the words of Ms. Roy. However, in this

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[26]*Brahma*, AIR 1954 SC 10.

[27]R v. Gray, [1900] 2 QB 36 (Hereinafter, "Gray").

[28]Ambard v. Attorney General of Trinidad and Tobago, [1936] AC 322 .

[29]Gray, 1900 2 Q.B. 36

[30]Ambard v. Attorney General of Trinidad and Tobago,[1936] AC 322 (Privy Council); Raymond v. Honey, [1983] AC 1.

[31]P.N. Dudav. v. P. Shiv Shanker, 1988 (3) SCR 547 (Hereinafter, "Shiv Shanker").

case, he was not punished for contempt. The Court factored in the audience for the speech mainly consisting of lawyers and jurists, and concluded that there was no *imminent danger of interference with the administration of justice.*[32]

In *Arundhati Roy*,[33] the Court held that the ratio of *Shiv Shanker*[34]will not apply because Mr.Duda was a Minister of Law, while Ms. Roy was just a writer who did not possess any "special knowledge" of the law or the working of the judiciary. This reasoning leads to the absurd conclusion that the right to criticise the Court is granted only to those educationally qualified to do so. A right to expression that is qualified by educational requirements is a flagrant violation of Article 14 and Article 19(1)(a). If the more reasonable test, of *imminent danger* was employed as it was in *Shiv Shanker*,[35] the Court in *Arundhati Roy*[36]would have found that the imminent danger was even lower, as the audience for her words were the Judges themselves.

In *Harish* v. *Bal Thackeray*,[37] the High Court punished political Bal Thackeray for contempt of court. He had announced in a political rally that a judge had demanded a large sum of money from him. However, this decision was overturned by the Supreme Court; and no grounds were given apart from the fact that he had apologised, even though the High Court had made a clear case of contempt and had not asked for an apology. These cases, thus, clearly prove how easy it is for Contempt of Court proceedings to be motivated by biases.

Another consequence of allowing Judges unbridled powers to charge with scandalising the Court is that the judges may misuse contempt proceedings to punish personal attacks on their character.[38]This was demonstrated in the controversial *Mysore Sex Scandal* incident, where their Lordships punished the newspapers that exposed their misdemeanours with contempt charges, when ordinary libel proceedings would have sufficed.[39]

What must be noted is that when the judiciary exercises its contempt powers on the media, it appears to view the public to be startlingly naive. This is exhibited from both the *Mysore Sex Scandal*

[32]Shiv Shanker, at p.577.

[33]Arundhati Roy, AIR 2002 SC 1375

[34]Shiv Shanker,1988 (3) SCR 547

[35]Shiv Shanker, 1988 (3) SCR 547

[36]Arundhati Roy, AIR 2002 SC 1375

[37]Harish S/O MahadeoPimpalkhute and Anr.v. Bal Thackeray and Ors, (1997) 99 BomLR 455.

[38]Donde R, 'Uses and Abuses of Contempt', *The Economic and Political Weekly*Vol - XLII No. 39, P 3919, 3922.

[39]*Id.*

incident and the *Wah India*[40]case. A magazine had collated the ratings of some senior counsels of the Delhi High Court regarding the judiciary. The ratings were based on parameters such as integrity, understanding of law, courtroom behaviour, etc. The editor of the magazine was held in contempt for scandalising the judiciary, as the article was said to impute corruption to the judiciary. The survey merely revealed the opinions of senior counsels, in order to highlight some problems in the working of the judiciary. By holding this publication as contumacious, the Judges seem to believe that the public would begin to question the authority of the judiciary on the basis of just one piece of investigative journalism. The Court also gave an order to stop the publication of the said magazine, and ordered the police to seize all copies available in shops and magazine stands. The Bench went further and restrained the press from talking about this incident itself.

When the editor, Mr.Trehan, rendered an unconditional apology, the contempt charge against him was withdrawn. However, it is sad to note that the entire incident, instead of upholding the authority of the judiciary, ended up undermining it by over-reacting and placing undue restraints on the media. The legitimacy of such a move is highly questionable.[41]

A heartening decision in recent times has been the decision of the Delhi High Court *Secretary General, Supreme Court of India* v. *Subhash Chandra Agarwal*.[42] The High Court has held that Judges of the Supreme Court come under the purview of the Right to Information Act. The need to ensure accountability in the judiciary was recognised. This, in the opinion of the author, is a decision that is far-reaching, as it does not protect the judiciary with ivory towers in the name of protecting justice. After all, "be ye ever so high, the law is above you".

No doubt that with the *Subhash Chandra Agarwal*[43]decision, the public can now seek information about the judges to keep a check on corruption. However, with the contempt powers that the High Court and Supreme Court wield, the power granted by the RTI Act to citizens is of little practical value against the judiciary. This is because the judiciary has demonstrated that contempt charges can be pressed against anybody questioning the motives of a judge, regardless of the truth of the claims. Therefore, the media is helpless in its capacity as a watchdogand the 'fourth pillar' of democracy. The punishment that Courts grant for contempt of court is usually lenient[44], so

[40]Shri Surya PrakashKhatri and Ors.v. MadhuTrehan and Ors., 2001 Cri L.J. 3476

[41]Datta Mandkak A, "Contempt of Court: Finding the Limit", *The NUJS Law Review*, Vol 2(1) 2009, P. 55,57

[42]Secretary General, Supreme Court of India v. Subhash Chandra Agarwal AIR 2010 Del 159 (Hereinafter, "Subhash Chandra Agarwal*").*

[43]Subhash Chandra Agarwal, AIR 2010 Del 159.

[44] As in the In re Arundhati Roy case where she was given a punishment of one day in prison plus a fine of Rs. 2000

fearless agents in the media can perhaps still keep a check on the judiciary. However, when the law on scandalising the Court is vague and subjective, dissent and criticism are inevitably stifled. The author believes that lessons can be learned by analysing the legal position on Scandalising the Court in some foreign jurisdictions, mainly in the United Kingdom where this offence originated and the United States of America where this offence does not exist and also in Australia and Singapore.

IV. A COMPARISON WITH FOREIGN JURISDICTIONS

United Kingdom

While the offence of scandalising the Court from common law, there have been no convictions for this offence in England since 1931.[45]The origin of contempt by scandalising the court can be traced back to as early as the year 1765. In *King* v. *Almon*,[46]the judiciary proceeded against the Almon in a summary trial, for libel against a judge. The ordinary proceedings for libel involved a Jury. This was challenged before the Court. Justice Wilmot ruled in favour of having a summary trial, declaring that libel against a judge in his judicial capacity deserves a special punishment. Following this, scandalising the court became a form of Contempt of Court.

Around a hundred years later, Lord Morris was on the Bench to decide the case *McLeod* v. *St.Aubin.*[47] It was regarding a newspaper article in circulation in the then colony of Trinidad and Tobago. A newspaper called The Federalist ran an article which said that the island of St. Vincent suffered from "maladministration of justice". It went on to say that one of the Judges, Justice St. Aubyn,was "reducing the status of the judiciary to that of a clown".[48] The article also said that the Judge "hob-nobs with two or three of the barristers,winks significantly at them in court, and in the trial of cases he has cast to the winds the ordinary principles of justice and fair play which require a judge to keep even the scales of justice between parties".[49]

While deciding this case, Lord Morris made a wonderfully far-sighted statement that committals for contempt by scandalising has become obsolete, and that courts must leave to the public opinion-attacks or comments that are derogatory or scandalous to the judiciary. In the instant case,

[45]U.K. Law Commission Consultation Paper No. 207: *Contempt of Court- Scandalising the Court*, 2 (Hereinafter, "Consultation Paper").

[46]243 K.B. 1765.

[47][1899] A.C. 549 (Hereinafter, "Aubyn").

[48]Aubyn, [1899] A.C. 549 at 552.

[49]Aubyn, [1899] A.C. 549 at 556.

the Contempt charge was moved against a distributor of the newspaper. The Court found that he was not guilty for contempt, as it could not be expected of him to be familiar with all the contents of the newspapers he was distributing. However, it did remark that contempt by scandalising was still relevant to small colonies consisting of "coloured populations", as it was absolutely necessary to preserve the dignity and respect for the Court in such jurisdictions.[50] This shows that the Privy Council, back in 1899, considered the English Judiciary to be mature enough to handle criticism from the media. It considered punishing contempt by scandalising as justified only in its colonies. This was perhaps a part of the "white man's burden", or was simply better for administration of justice in a context where the population considered the administration as alien and oppressive.

However, within a year, his words about the offence of contempt by scandalising being obsolete proved false in the decision *Queen* v. *Gray.*[51]Mr.Gray was charged with contempt of court for publishing an article which said that Justice Darling must "master the duties of his own profession before undertaking the regulation of others". In this case, Mr.Gray was punished for contempt. The Court conceded that the Judiciary is still open to criticism by the media, but it qualified the statement by adding that "reasonable argument or expostulation" must be offered in order to not treat a statement as contempt.

The last-known conviction[52] for this brand of contempt in England was the case *R* v. *Colsey*.[53] Here, the editor of *Truth* magazine was charged with Contempt of Court for publishing an article which had the following sentence- "*Lord Justice Sleaser, who can hardly be said to be unbiased about legislation of this type maintained that it really was a very nice provisional order or as good a one as can be expected in this vale of tears"*. Lord Justice Sleaser had been Attorney General in a former Labour Party-led Government that had supported the legislation mentioned.[54] This case was widely criticized for stretching the doctrine of contempt by scandalising too far. However, there were no convictions in England after this.

In 1968, in the decision *R* v. *Commissioner of Metropolis, Ex parte Blackburn*,[55] it was held by the Queen's Bench Division that any criticism of the judiciary, regardless of how strongly-worded it is, would not be contumacious as long as it was done in good faith. It was reasoned that this must

[50]Aubyn, [1899] A.C. 549 at 561.

[51]Gray, 1900 2 Q.B. 36 (Queen's Bench Division).

[52]*Consultation Paper, supra* note 43.

[53]R v. Colsey, The Times, 9 May 1931*as cited in* Consultation Paper, *supra* note 43.

[54]A. Goodhart, Newspapers and Contempt of Court in English Law, 48(6) *Harvard Law Review*, 885, 904 (1935).

[55]R v. Commissioner of Metropolis; Ex Parte Blackburn [1968] 2 Q.B. 150 (Hereinafter, "Blackburn").

be the Judiciary's position, as it is the *inalienable right* of the public to comment and criticise on matters of public importance, such as the judiciary's functioning.[56]

The 2012 Law Commission Consultation Paper on Scandalising the Court gives insights into contemporary debates about Contempt by Scandalising in the United Kingdom. It looked at the merits of retaining the offence, modifying it or abolishing it altogether. While looking at the arguments for retaining the offence, an argument considered was that retaining it would send the message that attacks against the judiciary must be discouraged.[57] The option of modifying the offence to make it more certain and applicable only to situations where there was a substantial risk of interference with the administration of justice, where the statement is untrue, and at the same time providing for defence of fair comment.[58]

However, the authors of the paper were of the opinion that the offence should be abolished altogether. They reasoned that shielding the judiciary from media criticism would only undermine its authority. They also said that judges have other remedies available, such as pressing defamation charges. This will have the additional consequence of shifting the burden of financing the proceedings from the state to the judges' own resources. The main thrust of the paper's argument was that the offence must be abolished simply because it is obsolete and has fallen into disuse.[59]

United States of America

The United States of America has long considered the offence of contempt by scandalising to be too extreme. Every criticism of the judiciary to some degree undermines the authority of the Court. However, the right to freely comment and criticise the actions of public institutions is considered to be of primary importance to the public, and essential to the American idea of democracy.[60]This is perhaps due to the strong First Amendment Rights in the American Constitution. While considering abolishing the offence, the UK Consultation paper relied on a landmark decision of the U.S. Supreme Court, *Bridges* v. *California*,[61] where it was famously said by Lord Black:

> "*The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although*

[56]Blackburn, [1968] 2 Q.B. 150 at 155.

[57]*Consultation Paper*, *supra* note 43 at 21.

[58]*Consultation Paper, supra* note 43 at 30.

[59]*Consultation Paper, supra* note 43 at 28-30.

[60]S. Gill, Contempt of Court by Publications, 24(1) *California Law Review*, 114 (1935).

[61]Bridges v. California, 314 US 252 (1941) (Hereinafter, "Bridges").

> *not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."*

Post *Bridges*,[62] this offence has been considered unconstitutional in the United States.[63] Justice Frankfurter suggested that the offence is nothing but *English foolishness* and that weak characters must not be judges.[64]

Singapore

Contempt by scandalising is very much still an offence in Singapore and the standards to punish speech for such contempt is quite low.[65]The judiciary of Singapore employs the "inherent tendency" test to decide whether a publication is contumacious for scandalising the court. This test stipulates that the words must convey to an average reasonable reader allegations of bias, lack of impartiality, impropriety, etc.[66] Such a low standard is justified by the judiciary by going into the special characteristics unique to Singapore. It was held that the small size of the country, and the practice of judges deciding on questions of both law and fact necessitates that publications are dealt with more strongly in Singapore than in other common law jurisdictions.[67]

This stand of the Singapore judiciary has been heavily criticised by academics. Singapore is a developed country with a high literacy rate. Moreover, in the age of digital communication, the geographical size of a community is hardly of consequence. It is therefore not justified that the Singapore judiciary attempt to use the same line of reasoning that was used in St. Aubyn, as that case is more than a century old, and was decided in the context of colonisers having an interest in a strong judiciary in their colonies. It is not surprising that in reality, this soft stand taken by the judiciary is often used as a tool to stifle dissent against the ruling party in Singapore.[68]

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[62]Bridges, 314 US 252 (1941).

[63]Pennekamp v. Florida (1946) 328 US 331;Garrison v. Louisiana (1964) 379 US 64; Craig v. Harney (1947) 331 US 367.

[64]Pennekamp v. Florida (1946) 328 US 331.

[65]Lee J, 'Freedom of Speech and Contempt by Scandalising in Singapore', Research Collection School of Law (Singapore Management University, 2009) viewed on December 29, 2012, < http://ink.library .smu.edu.sg/sol_research/10 >.

[66]Attorney General v. Hertzberg Daniel and Ors., [2008] SGHC 218 (Hereinafter, "Hertzberg").

[67]Hertzberg, [2008] SGHC 218; Attorney General v. Chee Soon Juan, [2006] 2 SLR 250

[68]Lee, *supra* note 63

What must be learned from these jurisdictions is that the offence of contempt by scandalising is fast losing its relevance, as people realize the scope of misuse that can occur by allowing this offence to exist. The United States, which places great value on free speech, has taken the express stand that judicial accountability can only be ensured by allowing press scrutiny of the judiciary. In the United Kingdom, the offence exists in principle, but it its more or less defunct in terms of convictions. Australia and Singapore still retain its offence. However, in Australia, efforts are being made to do away with it, while the judiciary has misused this power in Singapore.

V. CONCLUSION

The Supreme Court and the High Courts are 'Courts of record' by virtue of Articles 129 and 215 of the Constitution of India. This means that they have *inherent powers* to punish for contempt. Therefore, the provisions of the Contempt of Court Act cannot restrict the power of these Courts to punish for contempt, as this power is derived from the Constitution itself.

'Scandalising the Court' is a form of contempt that has its origins in the United Kingdom. While this offence has fallen into disuse in the UK, the Indian judiciary actively uses this offence to punish criticism of the judiciary. The Supreme Court in *Brahma* held that the test for scandalising must consider whether the speech if likely to have an injurious effect on the minds of the public. However, the Courts have disregarded this in cases such as *Arundhathi Roy*, where an affidavit addressed to the Court was held to be contumacious. Further, the Judiciary has often used their contempt powers to punish attacks on their personal character, though that is clearly outside the scope of this offence.

The consequence of this offence, apart from impinging on the Fundamental Right of Freedom of Speech, is the shrouding of the judiciary in secrecy. Veeraswamy held that criminal proceedings cannot be brought against judges. If the media is also not allowed to speculate on improprieties in the judiciary, it becomes nearly impossible for any malpractices to be brought to light. By convicting newspaper editors, activists and journalists for contempt when they express their opinions or publish their investigations, the judiciary is not only underestimating the discretionary powers of the public, but is also *losing* its accountability. The Judiciary is also a public institution- it is as important, if not more, for the public to not only trust, but examine and criticise it without the threat of prosecution.

The United Kingdom has not had any convictions for this offence for nearly a century. The offence is said to clearly violate the First Amendment Right of freedom of speech in the United

States. We have seen that Singapore still retains this offence. However, efforts are being made in Australia to remove 'Scandalising ' as an offence. Singapore justifies the use of its offence by citing its 'small geographical size' and other parameters, which the author finds irrelevant for the consideration of allowing the public to keep a check on the judiciary. The author therefore submits that Singapore must not be followed as an example, as apart from its justifications resting on flimsy grounds; the offence has been misused to stifle political defence. India has had an independent judiciary for more than half a century. The author is of the sincere opinion that it is time for India to follow the United States and the United Kingdom and accord more importance to freedom of speech and judicial accountability, as any mature democracy must.

ADMINISTRATIVE AGENCY AND STATUTORY INTERPRETATION: A COMPARATIVE ANALYSIS

BY

ROOPASHI KHATRI[1]

I. INTRODUCTION

Can an administrative body interpret statutes? In modern times, given the complexity of society, governance requires several statutes that are specialized on various specific issues. Often the interpretation of these statutes, especially on relatively trivial issues, cannot be handled by the judiciary alone. In such cases, administrative agencies authorized under these statutes are required to interpret various ambiguous terms in order to ensure the enforcement of the statute.

Since statutory interpretation is '*unavoidably an act of creating meaning*', [2]there has understandably been a heated debate on who has the ultimate authority to determine the meaning of a statute. Thus, underlying the debate on statutory interpretation by an administrative agency is the issue of delegation of power and authority to an agency to administer a statute and at a more fundamental level, the debate highlights the issues of the legitimacy of the administrative state as well as the theory of separation of powers.[3]

In this paper, the author argues that agency-interpretation of statutes is based on the theoretical understanding of the powers of the judiciary and the executive in a democratic polity. The paper presents a comparative analysis of the techniques of administrative interpretation, as well as the subsequent judicial review in the United States and India. Through this analysis, the author presents a conceptual clarity of agency statutory interpretation in a larger context of the jurisprudence of statutory interpretation and political theory.

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[2]Diver C, 'Statutory Interpretation in the Administrative State', *University of Pennsylvania Law Review*, Vol. 133, pp. 549-599.

[3]*See* Bulman-Pozen J., 'Federalism as a Safegaurd of the Seperation of Powers', *Columbia Law Review,* Vol. 112, 2012.

II. THEORY OF AGENCY STATUTORY INTERPRETATION

Entrusting judicial functions of any kind to administrative bodies, which are considered a universally '*suspect class*',[4] is an uncomfortable position for many. No doubt, the act of statutory interpretation by an administrative body is necessitated by the need for expedient action, as well as for the practical application of technical provisions of a statute at a ground-level,[5] however, the question of an agency interpreting statutes appears to be an obfuscation of judicial powers with administrative ones, thereby leading to the genuine threat of an administrative body wielding excessive power, and a violation of the separation of powers.

Spicer and Terry identify two concerns with respect to statutory interpretation by administrative bodies –first, the character of the agency's statute(s) and the extent to which it confers discretionary authority to the administrative body; second, the manner of the actual exercise of this discretionary authority.[6]The pertinent question is –how does one balance powers in a democratic setup where administrative agencies must perform the judicial task of interpreting statutes? One answer to this problem is the theory of judicial deference –in case of an agency statute that is ambiguous, with an unascertainable legislative history and intent, the interpretation offered by the agency is given primacy. This argument assumes that agency officials are, on account of their expertise and knowledge, more capable than judges in interpreting statutes concerning the specific field they specialize in.[7]Judicial deference to the interpretation of an administrative agency has unsettled several theorists, besides creating a fear of possible exercise of unbridled power conferred upon the administrative agency. One line of argument states that the very assumption that administrative officials possess such knowledge, as is envisaged by the theory of judicial deference, is a flawed perception of realities, given the practical situation where the hired administrative staff may not be well-equipped to interpret statutes in an intricate and reasoned manner. Peter Strauss describes scepticism of a different nature – that while considering bureaucratic officials and members of the executive, politics is suspected by both the public and the judiciary.[8]John Hart Ely describes how

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[4]D.M Wagner, '*Gonzales v. Oregon*: The Assisted Suicide of *Chevron* Deference', *Michigan State Law Review*, Vol. 435, 2007, pp. 435-450.

[5]. FarinaC, 'Statutory Interpretation and the Balance of Power in the Administrative State', *Columbia Law Review,* Vol. 89, No 3, (April 1989), pp. 452-528.

[6]Spicer M. and. TerryL, 'Administrative Interpretation of Statutes: A Constitutional View on the "New World Order" of Public Administration', *Public Administration Review*, Vol. 56, 1996, pp. 38-47.

[7]*supra* Farina.

[8]StraussP.L, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch', *Columbia Law Review,* Vol. 84, (April 1984), pp. 573 – 669.

administrative interpretation encourages legislators to avoid making difficult policy decisions and instead provides generalizations, leaving the intricacies to ground-level officials.[9]Most attacks at judicial deference appear to be a manifestations of the distrust towards a system that appears to threaten the traditional, strict division of powers.

At this juncture, it is important to note that the problem of defining the extent to which agencies are allowed to interpret statutes reflects another theoretical concern at a different level. A popular theoretical assumption is that judicial interpretation is the best (and perhaps the only) manner in which statutes can be interpreted, and that the rules of statutory interpretation followed by the judiciary is the only precise means of accurately determining the meaning of a statute. The latter view is myopic in the sense that it ignores a growing field of legisprudence[10] and administrative law[11], where several authors have argued that judicial interpretation must give primacy to the processes of the making and execution of law (instead of a singular focus on the canons of interpretation). The former view, however, requires a deeper analysis. The assumption that judiciary is the primary (or only) institution competent to interpret statutes is based on an extremely rigid view of the theory of separation of powers. Indeed, a significant problem with the Montesquieuan separation of powers is that complete separation of powers is neither possible nor desirable.[12] In particular, overlaps of judicial and administrative functions are inevitable in cases of administrative bodies that are empowered to administer a statute, since the expertise and knowledge of the administrative officials is vital in understanding the intricacies of a statute dedicated to a particular administrative field. As Gaus noted early in 1936, in a state which the power of the government is intertwined with industry, commerce, finance and similar concerns, the traditional restraints on the discretion of an administrator are inadequate.[13] The solution to this problem lies in Donald Kettl's postulation of *'blended accountability'*, which holds that the danger of tyranny or injustice lies when administrative bodies have unchecked power, and not '*blended power*'.[14] This solution is widely accepted today as a constitutional requirement in democracies, even by

[9]*supra* Ely.

[10]. Eskridge Wand. FrickeyP, 'Statutory Interpretation as Practical Reasoning', *Standard University Law Review*, Vol. 42, 1990, pp. 321-384.

[11]W.D Kmiec, 'Judicial Deference to Executive Agencies and the Decline of the Non-delegation Doctrine', Vol. 2, 1988, pp. 269-299.

[12]*supra*Strauss.

[13]. Gaus, J. WhiteD and DimockM.E,*The Frontiers of Public Administration*, Russell & Russell, Chicago,1967, p. 26.

[14]. KettlD, 'Administrative Accountability and the Rule of Law', *Political Science and Politics*, Vol. 42, 2008, pp. 11 – 17.

scholars who propound a rigid view of the doctrine of separation of powers.[15] Administrative interpretation also best serves the widely accepted method of interpretation – namely, the public values approach - [16] in that an administrative body can best amalgamate technical provisions with public values since it directly interacts with the public.

It is apparent from this theoretical analysis that there are two reasonable views of the deference argument – one which distrusts any power of interpretation given to agencies, and another which calls for the acceptance of this interpretation as long as it is within reasonable confines and is constantly checked.[17] The conflict between the two sides cannot be easily ~~resolves~~ resolved– administrative agencies (that directly communicate with the public) often combine multiple tools of action in order to execute policies in public interest,[18] thus necessitating a different nature of interpretation for the relevant statutes; on the other hand, interpretation by a non-judicial body goes against the grain of established canons of interpretation that have been revered in the legal tradition.[19] As Selznick explains, the question is this- if the administration and the judiciary hold distinctively different practices, traditions and rules, how can one reconcile with different meanings accorded to the same statute?[20]

III. ANALYZING CHEVRON

Chevron U.S.A v. *Natural Resources Defence Council*[21] is arguably the most cited case in modern public law.[22] The case brought to light a heated debate within jurisprudence regarding the extent of powers of the administrative institutions.

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[15]*supra* Spicer and Terry.

[16]*supra* Eskridge and Frickey.

[17]. MurphyR, 'Judicial Deference, Agency Commitment and the Force of Law', *Ohio State Law Journal*, Vol. 66, 2005, pp. 1013-1018.

[18]SalamonM., *The Tools of Government: A Public Management Handbook for the Era of Third-Party Government*, Oxford University Press, New York, 2002, p. 490.

[19]*supra* Kmiec.

[20]. SelznickP, *Leadership in Administration: A Sociological Interpretation*, University of California Press, Berkeley, 1984, p. 332.

[21]Chevron U.S.A v. Natural Resources Defence Council, 467 U.S. 837 (1984).

[22]CriddleE., '*Chevron's* Consensus',*Boston University Law Review*, Vol.. 88, 2008, pp. 1271-1278.

Thomas Merill describes what existed prior to Chevron as a '*multiple factors regime*'[23] of deference. For several courts, the simple solution to this conundrum was to emphasize that the ultimate purpose of statutory interpretation is to discover the intent of the legislature.[24] This was in conformity with the belief that administrative agencies are creatures of the legislature,[25] and are therefore bound to discharge regulatory duties, as envisaged by the legislature and apparent in the statute. The underlying assumption was that the legislative intent is apparent from the statute – meaning that several courts that propounded this argument also believed in a plain meaning approach of statutory interpretation.[26] It goes without saying that the plain meaning rule was riddled with difficulties.[27]

A more popular strategy of handling agency interpretations during the pre-*Chevron* period was outlined in *Skidmore* v. *Swift and Co.*[28], which established that the deference of agency interpretation depended upon the thoroughness of the judgment, the validity of the reasoning employed and consistency with earlier pronouncements, among other unspecified factors. This scheme allowed a heightened scrutiny of administrative actions by adding more considerations to the vague *Skidmore* standard. For instance, courts refused deference to an agency's decision in areas which were not necessarily technical and were within the enterprise of the court.[29]*General Electric* v. *Gilbert*[30] established that the judiciary owed no deference to an agency as per the Skidmore standard when its decision flatly contradicted its own earlier position. The *Skidmore* standard, however, did not provide a consistent standard for judicial review. A case contrary to *Gilbert* was *NAACP* v. *FCC*,[31] where the court established that as long as the agency established that it was aware of the fact that its decision is in contradiction with its earlier position and provided reasoned justifications for the change; and as long as the new policy was permissible within law, the judiciary owed deference to the agency decision.

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[23]. MerrillT. W, 'Judicial Deference to Executive Precedent'*, Yale Law Journal*, Vol. 101, No. 5 (Mar., 1992), pp. 972–75.

[24]Fresh Coat, Inc. v. K-2, Inc., 318 S.W.3d 893, 901.

[25]Tex. Nat. Res. Conserv. Comm'n v. Lakeshore Util. Co., 164 S.W.3d 368, 377.

[26]First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 631.

[27]*supra* Eskridge and Frickey.

[28]Skidmore v. Swift and Co., 3 23 U.S. 134 (1944).

[29] Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325, 1330 (11th Cir. 1983).

[30] General Electric v. Gilbert, 429 U.S. 125 (1976)

[31] NAACP v. FCC, 682 F. 2d 993, 998 (1982)

It must be noted that the non- delegation doctrine was never popular within the judiciary.[32] In fact, this delegation of power has been viewed by U.S courts as not only unavoidable (in order to avoid legislative oversight), but also necessary for effectively achieving legislative purpose.[33] There was no doubt, however, that the federal courts were assumed to be the principal authorities on the matter of statutory interpretation.[34]

The facts in the case of *Chevron* were as follows – Before 1981, the Environmental Protection Agency (hereinafter, 'the EPA') defined *'stationary source'* (of air pollution) under the Clean Air Act as any pollutant-emitting device in a plant. A plant having ten such devices was required to apply for a permit in order to modify any existing device or add a new one. This '*pipe-by-pipe definition'* was favoured during the Carter Administration. In 1981 (during the Reagan Administration), the EPA decided to alter this definition in such a manner that, so far as the total emission from a plant was the same, the plant owner could add any new device/modify an existing one. This implied that the term *'source'* now referred to a plant instead of any particular device. The latter definition catered to the pro-business agenda of the Reagan Administration as it was less demanding on industries. The National Resources Defence Council was understandably displeased, as the former definition provided a stricter standard and thus catered to environmental interests. The question before the Chevron Court was whether this definition frustrated the purpose of the Clean Air Act. Justice Stevens famously propounded a two-step test in order to analyze the agency's interpretation of the statute:

- If the Congress has unambiguously stated its intent in the statute, it was the duty of the agency to give effect to the same.
- If however, the court determines that no precise answer is found in the statute, then it cannot impose its own interpretation – rather the question for the court will be whether the agency's answer is based on a permissible construction of the statute or not.

Justice Stevens contended that if the Congress had explicitly left a gap in the statute, it implied a delegation of authority to the agency, thus, agency interpretations were to be given controlling weight unless they were arbitrary or clearly contrary to the intent of the statute.

[32]*supra* Kmiec.

[33]R.R. *Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992).

[34]. Pierce, JrR. L.,Reconciling Chevron and Stare Decisis',*Georgetown Law Journal*, Vol. 85, 1997, pp. 2225

The significance of this decision is that courts found it more difficult to overturn policy choices in the form of interpretations by statutory agencies.[35] The immediate advantage of this decision was that it was in conformity with the demands of the changing social, political and economic circumstances (post the New Deal) for more autonomous, specialized and expedient administrative agencies. Besides, the *Chevron* decision answered the immediate concern of the decision of the EPA that was unarguably motivated by a change of political heads. There are mixed views, however, on whether this was a desirable decision or not in the long run. Many commentators, for instance, believe that the doctrine shifted the power of saying *'what the law is'* from the judicial department to administrative agencies – in effect, classifying Chevron as '*a counter-Marbury'*.[36]

It is true that *Chevron* provided a simple, formal rule for reviewing courts to adhere to. However, the rule propounded by the *Court in Chevron* was on statutory silence rather than ambiguity– which was essentially a legislative function rather than an interpretative function.[37] Moreover, *Chevron* did not answer accurately as to which methods or modes the statutory interpretation was to be conducted in –for instance, the textualist or plain meaning approach, as well as the intentionalist approach of interpretation are possible within the realm of the Chevron doctrine; however, these approaches are left to the choice of the agency, which causes a major problem of ill-informed interpretation.

Consequently, courts began to settle the ambiguity of the *Chevron* doctrine by adding their own explanations. In *Rust* v. *Sullivan*,[38] the court relied on *Chevron* – however, it noted that the primary reason for agency deference in that case was because it had provided a reasonable analysis despite the sharp break from its earlier positions – effectively reverting back to the *Skidmore* strategy.

To resolve the ambiguous nature of *Chevron*, the judiciary later added to the *Chevron* doctrine '*Step Zero'*– to determine whether the *Chevron* standard applies or not. The major case that brought about this change was *United States* v. *Mead Corporation*,[39] where the court held that if the agency had stated its interpretation authoritatively (for instance, with the intent of according a precedential value to its decision within the agency), the court may grant the interpretation controlling weight

[35]StarrK., 'Judicial Review in the Post Chevron Era', *Yale Journal on Regulation*, Vol. 3, 1986, pp. 283-309.

[36]. SunsteinC. R, 'Law and Administration after Chevron', *Columbia Law Review*, Vol. 90, 1990, pp. 2071-2075.

[37]*supra* Pierce.

[38]Rust v. Sullivan, 500 U.S. 173 (1991).

[39]United States v. Mead Corp., 533 U.S. 218 (2001).

so far as the interpretation is reasonable. *Mead,* along with subsequent cases, in effect overturns *Chevron's* presumption that the interpretation of ambiguities could be delegated to agencies.

The post-*Chevron* period, hence, has been a continuous and unsettled debate over the issue of agency interpretation and judicial deference. It must be noted that the most significant contribution of *Chevron* is the increased awareness of clash between the judiciary and bureaucracy over issues of decision-making authority. It also highlights the necessity of balancing rule-making powers among unelected representatives. This awareness is, in part, the reason why the courts fluctuate in standards of agency deference on an issue that has no fixed consensus. The positive outcome, however, is that a form of conscious dialogue actively takes place in reviewing the powers of both the administrative agency and the judiciary.

IV. THE INDIAN SCENARIO: A LACK OF THEORY?

The understanding of statutory interpretation by administrative agencies in India is unique in the sense that there seems to be very little debate on the role of statutory interpretation. A major part of the debate is dedicated to the understanding of administrative action and natural justice. To that effect, a plethora of judgments (the most significant ones being landmark judgments such as A.*K Kraipak* v. *Union of India*[40] and *Bina Pani* v. *State of Orissa*)[41] have already established that even administrative proceedings are to follow the rules of natural justice. The mere articulation of rules of natural justice by most of these cases itself requires a determination or interpretation on part of the administrative agencies as to the proper course of action along procedurally fair lines, which would be sufficient to ensure that the administrative decisions are just and fair.

However, in reality, the correct application of these rules, more often than not, is a question that is frequently determined by courts of justice which are asked to review administrative actions.[42] In that sense, the fact that several judgments assert that the administrative body has to act *'judicially'* merely refers to the application of the principles of natural justice or passing a reasoned order in its executive capacities. The question of the ambiguity of a statute is also focussed on the determination of the powers granted. Several decisions (including *A.K Kraipak* v.*Union of India, In Re Delhi Laws Case* and *Sandhi Mamad Kala* v. *State of Gujarat*)[43] have held that in case there is an

[40]A. K Kraipak v. Union of India,AIR 1970 SC 150.

[41]Bina Pani v. State of Orissa, AIR 1967 SC 1269.

[42]In Re Delhi Laws Case, AIR 1951 SC 332.

[43]Sandhi Mamad Kala v. State of Gujarat, (1973) 14 GLR 384.

ambiguity regarding a statute or regarding the nature of power that the administrative agency can exercise, the court must analyze, among other things,the nature of powers delegated to the body as well as the consequences of the exercise of such power. It is therefore apparent that the question is not dedicated to statutory interpretation by administrative bodies, as much as it is focussed on the extent to which any power can be delegated to such an institution in the first place.

The best indication given by the judiciary in case of administrative deference is in the area of interpretation of taxing statutes. Cases such as *Shenbaga Nadar* v. *State of Madras,*[44] *G. Ramaswamy* v. *State of Andhra Pradesh*[45] and *Jagdamba Industries* v. *The State of Madhya Pradesh*,[46] concede that administrative authorities are capable of rendering a reasoned interpretation of taxing statutes – this interpretation, however, is to be considered an admissible and significant aid for interpretation by the court, rather than a finality of interpretation itself.

Another pertinent question that arises relates to the situations in the case of administrative tribunals with quasi-judicial powers, The Supreme Court case of *T. Sudhakar Prasad* v. *Government of Andhra Pradesh*[47] expounded that the decisions of administrative tribunals are appealable to the Supreme Court under Article 136 of the Constitution of India, the reason being that as a body with judicial character, it is only logical to incorporate it within the scheme of the courts of justice. This was a position that arose out of *L. Chandra Kumar* v. *Union of India*,[48] a case where the exclusion of jurisdiction of the High Courts and Supreme Court (under Article 323A/323B of the Constitution of India) was unconstitutional simply due to the scepticism of entrusting an administrative tribunal with the finality of a decision. The former case was a compromise to the position of the latter. While not denying the importance of administrative tribunals, it was hesitant to do away with the power of review of the higher courts of justice.

Minerva Mills v. *Union of India*[49] and *K.K Dutta* v. *Union of India*[50] similarly contended that the exclusion of the jurisdiction of the High Court is not necessarily *ultra vires*, since the Supreme Court still retained powers of judicial review. This appears to be a reasoned and rational position. However, both cases agree that the rationale behind this is not the concept of judicial deference

[44]Shenbaga Nadar v. State of Madras, [1973] 31 STC 81.

[45]G. Ramaswamy v. State of Andhra Pradesh, [1973] 32 STC 309.

[46]Jagdamba Industries v. The State of Madhya Pradesh, [1988] 69 STC 1.

[47]T. Sudhakar Prasad v. Government of Andhra Pradesh, Civil Appeal No. 5089-90 of 1998.

[48]L. Chandra Kumar v. Union of India, AIR 1997 SC 1125.

[49]Minerva Mills v. Union of India, AIR 1980 SC 1789.

[50]K.K Dutta v. Union of India, [1980] 3 SCR 811.

to an administrative decision, but the idea that an administrative tribunal is merely an additional forum (rather than a specialized quasi-judicial body), designed to lessen the burden of cases on the ordinary courts of justice. In effect, judicial review of administrative tribunals ensures that courts have the power to overrule any decision of the tribunal. The decision of an administrative tribunal, therefore, becomes equivalent to the decision of a lower court, and is subject to the judicial determination of the higher court.

The implication of this is that all acts of interpretation, including those which could possibly be delegated to an administrative agency, are more often than not entrusted to the Indian judiciary alone. The negative consequences of such a set-up is the overburdening of the judiciary, not only in terms of the increased task of interpreting every statute, but also due to the increased number of cases where the courts will have to necessarily review the decision of an administrative body. The increased powers and burden on the judiciary also means that little deference is given to the decision of a specialized administrative institution –thereby, disrespecting the rule of separation of powers and causing an unnecessary imbalance of powers and duties of the judiciary. This is not the exclusive problem of administrative bodies alone – for instance, in the case of arbitration (an exercise with the sole purpose of settling matters outside the judiciary), almost all questions, ranging from trivial inquiries of facts to pertinent questions of law, ironically takes the parties to an arbitration proceeding to the court on a frequent basis. The overall impact of this inherent mistrust towards the statutory interpretation of an administrative agency is a serious imbalance of powers concentrating towards the judiciary in a democratic political setup.

V. CONCLUSION

The study of agency statutory interpretation is intertwined with the political and constitutional philosophy espoused by a State. The debate in the United States among jurists has developed an active dialogue on issues of statutory interpretation and separation of powers. Although, there appears to be no fixed standard for administrative agency, the theoretical consensus is that an administrative interpretation holds considerable weight, given the practical inputs which such an interpretation has, on account of being directly concerned by stakeholders.

In case of India, however, one cannot help but notice the lack of any deference to an administrative agency. The question of interpretation of a statute by an administrative body does not seem to arise, since the judiciary inherently believes that the task of adjudicating in all aspects is a judicial function alone. This is a major factor behind the high incidence of cases regarding administrative institutions before the court. Reviewing every administrative decision inevitably makes the

judiciary itself overburdened and ineffective. In other words, the doctrine of separation of powers seems to find little respect in the Indian political setup.

From the point of view of statutory interpretation, both systems are flawed while the judicial deference in the United States allows for a situation where the canons of interpretation can be easily misunderstood by the administrative agencies, the administrative deference in India ensures that absolutely no practical suggestions can be contributed by an agency through statutory interpretation. At the same time, both systems have positive points, in that while the former allows for flexibility, the latter has a definitive control over any administrative misuse of powers. The case of administrative agency and statutory interpretation, therefore, has no settled position, but, as stated, is dependent entirely upon the constant interaction of legal and political theories within a State.

THE EXTRAORDINARY INSTITUTION OF *OMBUDSMAN:* A STRATEGY FOR DEALING WITH ADMINISTRATIVE FAULTS

BY

SANDEEP SURESH[1]

I. INTRODUCTION

A democratic system of governance is always preferred to any other system because of the reverence it attaches to cardinal principles such as 'rule of law' and 'fairness in administrative actions' and due to its equally disapproving approach to arbitrariness & unreasonable exercise of power. In such a system, good governance is vital. However, it can only be assured if there are elements of accountability and transparency present in the actions and policies of the government. In a bureaucratic set up of the governments, every department may be given complaints regarding various actions or inactions by administrative agencies. There will necessarily be politically delicate matters among these complaints. In light of this issue, the significance of an impartial grievance resolving system is definitely crucial to achieve remedies against arbitrary administrative actions of the government and its agencies. This is where the office of an *ombudsman* claims limelight. The institution came up for the first time in Sweden in the 19th century as a mechanism to deal with the abuse of power by government officials. Thereafter, this alternate system of grievance redressing grew all over the world, especially after the effects of globalization started to spread internationally transgressing all the boundaries. With globalization, the scale of operations of every government grew very fast, gradually resulting in increased powers with the government agencies. The ombudsman is a control mechanism that helps in restricting administrative excess and ensures fair play in the exercise of administrative powers.[2]

II. THE EXTRAORDINARINESS OF OMBUDSMAN: A COMPREHENSIVE ANALYSIS

An ombudsman is usually appointed by the government under a specific statute. However, as stressed earlier, it has to be attached with significant independence which otherwise will render the institution futile. Basically, the ombudsman on the basis of a complaint or on a *suo moto* basis represents the interests of the people who are aggrieved that their rights have been violated by any

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[2] A.T.M. Obaidullah, *Democracy and Good Governance: Role of Ombudsman*, Bangaldesh Institute of Parliamentary Studies, Dhaka, 1st ed., 2001

administrative action. Therefore, as it is concerned with the nature of the exercise of power by administrative authorities, it can be clearly said that as a model, the ombudsman is a part of administrative law. Its ultimate end is to protect and uphold natural justice and the rule of law in the state/nation.

Coming to the necessity of having such an institution may be provoked by various situations that may occur in an administrative set up. *Firstly*, it is universal that administrative actions affect the lives of citizens. In a huge country like India with overabundance of people, administrative authorities, and laws and regulations coupled with complex facts and figures, it is highly probable that public officials may take decisions based on inappropriate and correct documents. It is either the result of their unawareness or sheer non-commitment. However, to a certain extent, the administration has to be discounted for the complexity of systems like that in India.

Secondly, delay in decision-making is one of the most common factors in every government. . It is generally agreed that in a complex administrative organization which is hierarchically classified, delay is unavoidable. But it cannot be conceded that if the officials put in more effort and commitment, there would not be any improvement in the situation. *Thirdly,* it is accepted that the legislature is not composed of individuals with godly vision who can provide measures in legislation for all the circumstances that may arise in the future. Also, unlike the judges of courts of law, administrative officers do not have any case laws or precedents for making a decision. Therefore, there is a great amount of discretion that is present in the administrative decision-making process. In such situations, it is again highly probable that the administrative officers may be influenced by their policy notions and faulty hypothesis, thereby, leading to incorrect decisions.

Finally, many public officials are statutorily given enforcement powers in order to compel the individuals to obey their directions. For example, the power to seize an individual's goods by a Customs Officer in India is one such power of *coercive* nature that it can be very well misused. History has shown that such powers have always been abused everywhere in the world. These measures need to be controlled to be kept within the limits so that constitutionally guaranteed rights of citizens are not exploited by the government easily.

These circumstances definitely make an institution like the ombudsman the *need of the hour.* It cannot be claimed that the ombudsman can drastically bring back everything into normalcy. In today's complicated web of government-citizen relationship, there cannot be an overhaul of any system. Only improvisations within the system can be practically implemented, provided there is cooperation from all the wings of the society. Fundamentally, the ombudsman serves three related purposes:

1. Redressing individual grievances
2. Improving the quality of administration
3. Helping the legislature to supervise the bureaucracy.[3]

For the public, the institution of ombudsman is a big relief as the services of looking into the complaint and taking necessary remedial measures is performed cost free. Apart from that, the complainant is not affected by the fear of departmental biases that may have occurred if complaint resolution was in the hands of the administrative authorities itself. Even if a person's grievance would not be fully resolved, the related actions may result in an enhancement in the quality of government actions. This will necessarily result in recreating in the people, the lost confidence in governments as a protector of citizen rights.

III. INDEPENDENCE OF OMBUDSMAN AND ITS RELEVANCE

As mentioned earlier, the crux on which the significance of this institution lies is its independent nature. The ombudsman is ought to be apolitical so as to impartially act as a middleman between the government and the citizens. It is also a matter of fact that according to the primary idea of an ombudsman, this office is not accorded any executive authority.[4] Prima facie, even though this deficiency may be thought as reducing the utility of this office, it is not completely true. The lack of executive bonding and its independence gives the ombudsman a very wide ambit to function. This apparent absence of coercive power allows greater operational flexibility and informality.[5] A related advantage that comes with this feature of the ombudsman is that it assists in increasing public access to address complaints with the ombudsman. A public friendly institution of such a nature can really be utilised to deal with various administrative faults, especially corruption.

IV. OMBUDSMAN AS A STRATEGY FOR DEALING WITH CORRUPTION

It is a hardened fact of human life that greed and self -preservation are the basic features of every person's character.. It only varies in its intensity. Apart from that, today's materialistic world has reduced into a small island in the sense that people do not think beyond their own personal interests. These societal and psychological concepts have indirectly led to corruption and

[3] *Article on Ombudsman*, Encyclopedia Britannica, Vol.16, 15th ed.,1986, pp. 960-61

[4] Gary Pienaar, *The Role Of The Ombudsman In Fighting Corruption*, The 9th International Anti-Corruption Conference, Durban, South Africa, 1999

[5] Ibid

maladministration within the governments at all levels. Political corruption has serious ramifications. The confidence of citizens in their leaders gets deeply affected due to deep- rooted corruption.[6] No bureaucracy is free from corruption and maladministration.[7] In such a system, it is the common man who is at the receiving end and is rendered helpless.

Corruption takes many forms. In the eyes of the common man, corruption is receiving bribes in return of some favour by government officials. This interpretation of corruption reflects only the criminal aspect of this evil. In a broader sense, corruption would include maladministration by officials without integrity and degradation in the standards of service delivery by the State. Therefore, the nature of the functions of the ombudsman will necessarily attract investigation of cases which contain elements of corruption. Considering the sensitivity of corruption in today's world, the set of tools that is necessary to combat this *global scourge*[8] effectively must be dynamic.

It is worthy to consider the other side of the discussion as well. Against the role of ombudsman in looking into corruption issues, it may be argued that as most of the corruption cases involve criminal proceedings that necessitate police investigation, the ombudsman is not the competent authority to handle such matters. It is not denied that the ombudsman shall not interfere with the normal proceedings under various anti-corruption statutes and general criminal laws of the country. Definitely, it would not be in the interests of democracy and its principles to allow the ombudsman a huge ambit that allows him to encroach into the jurisdiction of other government and constitutional authorities. However, in this context, we are discussing about the broader sense of corruption. As mentioned, morality and ethics with respect to administration are also covered under the ambit of corruption. In that light, what is suggested is that the ombudsman may inspect issues that fall into such imprecise area of ethical standards of administration and recommend steps to correct those defective actions or policies.

It is important to remember that corruption undermines democracy because it disregards the will of people for securing the interests of just a few individuals. Unfortunately, corruption also perpetuates discrimination as it results in unfair advantage and undeserved benefit.[9]

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[6] Preeti Dileep Pohekar, *A Study Of Ombudsman System In India*, Gyan Publishing House, New Delhi, 2010

[7] Ibid

[8] Gary Pienaar*, supra* note 3

[9] Ibid

V. CONCLUSION

To conclude, it is clear that the ombudsman is not a lawmaker or a draconian authority, which strikes down every action of the administrative agencies. Positively, the ombudsman is a citizen-friendly institution to ensure that government and its agencies work according to law, justice and equity. An ombudsman may not be necessary for the influential or powerful, but is extremely relevant as an alternate, or a final, recourse for those individual citizens who do not have powerful friends to intervene on their behalf, or who do not have sufficient funds or time to contest an administrative decision and who do not have sufficient knowledge about the administrative system to cope with it.[10]

All said and done about the role of ombudsman to fight corruption and correct other malpractices within the administrative authorities, it is worthy to note what Judge Learned Hand of the United States of America said in his book *'The Spirit of Liberty'*:

"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes, believe me. They are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court, can even do much to help it."

At the end of the day, it all depends on the mindset of individuals. Institutions like that of ombudsman can only be rendered useful if right set of people are willingly ready to put in their best efforts to correct the imperfections in our system.

[10] *See* Robin K. Matsunaga, *The Ombudsman,* National Conference Of State Legislatures, Louisiana, United States of America, 1999, viewed on April 3, 2013, <http://www.usombudsman.org/en/references/more_references/the_ombudsman.cfm>