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## RITESH SINHA V. STATE OF U.P. – THE PURPOSEIVE APPROACH

*FILLING THE GAPS IN LEGISLATION THROUGH JUDICIAL INTERPRETATION: A PERSPECTIVE*

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### Abstract

Judicial Interpretation shapes how the law is interpreted. It Puts the intention of the legislature at the forefronts. The lines between judicial interpretation, judicial activism and judicial overreach are extremely thin. Can the judiciary examine the gaps in the legislature, the answer is a resounding yes, can the judiciary interpret the law in such a way these gapping holes can be filed that is a question that needs some examination. It was thus considered pertinent by the author to discuss the Ritesh Singha v. State of U.P. to answer this question, in this case the supreme court had analysed whether voice samples can be used in criminal investigations when there was no provision in the Criminal Procedure Handbook that such practices can be permitted. It is interesting to study how the judiciary has interpreted the law in this case and thus the author has tried to explain judicial interpretation filing up blaring gaps in the legislature through the Ritesh Singha judgment. The author further adds details to this discussion by taking a step further in discussing how the purposive approach helps foster Judicial Interpretation in situations as mentioned in the Ritesh Singha judgment.

Key Words: *Purposive Approach, Judicial Interpretation, Criminal Procedure, voice samples, privacy.*

### I. Introduction

In *Ritesh Singha v State of U.P.*, a three-judge bench of the supreme court consisting of Rajan Gogoi CJI., Deepak Gupta and Sanjiv Khanna JJ. ordered that a Magistrate can order a person to give a sample of his voice for the purpose of investigation of a crime, even in the absence of express provision in the Criminal Procedure Handbook<sup>i</sup>. The present case discussed above is unique in two aspects First, it talks about collection of voice samples under the criminal procedure code. Voice Sampling is a developing method of voice identification that is prevalent much more in foreign jurisdictions than in Indian Forensic practice<sup>ii</sup>. The magistrate's power to collect voice samples when the legislature remains silent on that point is brought forth in the present case<sup>iii</sup>. Secondly, it talks about whether a practice of voice analysis or voice print identification could be self-incriminatory in nature. Lastly, this case beautifully sets a precedent in criminal jurisprudence wherein although there is a lack of legislation on the point, through judicial interpretation a magistrate was conceded the power to collect voice samples for the purposes of investigation of a crime<sup>iv</sup>. The Supreme court assumed jurisdiction via Article 142, this legislative void as to whether a magistrate can collect voice samples during criminal investigation was answered by courts dually, as voiceprint identification is a permissible practice and that the courts can act when there is a gap in a statutory provision<sup>v</sup>. The purposive approach which is used to interpret the statutes when the legislature is silent as to a point is observed in the present case and will be further explained by the author<sup>vi</sup>. The author will be discussing how ejusdem generis applies in

this context and provide an insight on the application of the doctrine of imminent necessity as observed in the present case with the courts calling upon the legislature to act promptly as regards the present issue.

*‘Procedure is the handmaid, not the mistress, of justice and cannot be permitted to thwart the factfinding course in litigation.’*

- Justice V.R. Krishna Iyer (1975).

The Supreme Court of India by using its extraordinary power enshrined under article 142 of the Indian Constitution, for the purpose of “doing complete justice”, has empowered a judicial magistrate to direct a person to give sample of his voice for identification of the speaker in a criminal investigation<sup>vii</sup>.

## II. Legal Issues:

In Ritesh Sinha case, the district police lodged an FIR against the appellant alleging for engaging in collection of money from different persons by promising employment in police department. For the purpose of matching the voice recorded in the mobile phone seized from the accused, investigating agency was permitted by the trial court for taking voice sample of the accused persons. The aggrieved accused approached the high court, but the appeal was dismissed. Consequently, an appeal was raised before the apex court.

There are three legal questions to be addressed in the issue of taking voice samples against the consent of the subject. Firstly, whether compelling the subject to furnish voice sample during investigation amounts to infringement of the right against self-incrimination? Secondly, whether existing procedural laws in India have provisions enabling a magistrate for ordering to record voice sample? Thirdly, in absence of explicit legal provisions under procedural codes, whether a magistrate can be empowered for issuing such order? These issues are addressed here in addition to deliberation on other interconnected issues involved therein

## III. Purposive Rule of Interpretation:

The purposive interpretation rule is a modern technique to interpret statutes. It could also be stated that the purposive rule is a development from the mischief rule. It is more flexible than the literal or the golden rule which tends to concentrate upon the meaning of individual words or phrases<sup>viii</sup>. This aids the judge to add or ignore words in an act aiding them to give a decision that supports their view as to the reasoning behind an enactment. The purposive approach while following ejusdem generis and context of a particular act also gives importance to the background, subject-matter, scope, and purpose while interpreting a legislation. The author suggests that the purposive approach of interpretation is clearly visible in the present case. The Apex court has used its extraordinary powers under Article 142, to make a contingent arrangement so as to empower a magistrate in collecting voice samples till the Parliament enacts the law<sup>ix</sup>.

### Analysis

A voiceprint is a set of measurable characteristics of human voice which uniquely identifies an individual. Voiceprints are similar to fingerprints, in the sense that each person has a distinct voice with characteristic features which are dictated by vocal cavities and articulators. A voice print in particular refers to a voice sample recorded for the purposes of identification<sup>x</sup>. The Law Commission of India recognized the importance of voiceprints as early as 1980s, when a review of the Provisions of the Identification of the Prisoners Act, 1920 was being conducted courts on the Federal and State Level in United States of America had permitted voiceprint identification w.r.t ruling out suspects and acquittals. The Commission recognized voice samples as an important piece of identification and proposed the expansion of Section 5 (5) of the Act to be inclusive of voice samples<sup>xi</sup>.

Scientifically, the Spectrographic or the Voiceprint identification process is based on the comparative analysis of voice samples i.e. the phonetic elements to identify individuals. It has great potential as it aids in the identification of individuals through the sound spectrograms of their voice samples<sup>xii</sup>. Article 20 (3) of The Constitution of India deals with the right of an individual against self-incrimination, *‘nemo tenetur seipsum accusare’* i.e. *‘No person accused of any offence shall be compelled to be a witness against himself’*. The objective of article 20 (3) is to ensure the reliability of the statements made by an accused and that such statements are made voluntarily by the accused and not due to external factors such as coercion<sup>xiii</sup>. This is an important safeguard against compelled testimony, third degree methods and factors in protection of human rights. Further, it is observed in such cases the compulsion which is prohibited by the constitution should by itself have the character to incriminate the accused.

Spectroscopy is the science behind voiceprint or voice spectrogram which helps to corroborate the identity of a person. Voiceprint is a potent forensic tool used for long in Indian courts as corroborative evidence, but neither recognized as “opinion of experts” under section 45 of the Indian Evidence Act, 1872 nor is listed as, “Government scientific experts” in the procedure code under section 293(4). Furthermore, being digital evidence, voiceprint must fulfill several laid down conditions such as certification under section 65-B of the Indian Evidence Act, 1872 integrity of the sample, etc to gain admissibility in the court of law. A voice analyst as forensic expert must fulfil requirement of education and experience to validate his expert opinion in the courtroom. The accreditation of scientific procedure applied for voice analysis is yet other obligation on the prosecution to validate a voiceprint and expert opinion thereof.

#### IV. The Purposive Interpretation of Statutes

In *Ritesh Sinha v. State of U.P.*, there were two questions that were raised (a) Whether voice samples can be permitted in light of Article 20 (3) (b) Whether The magistrate had to power to order the investigation agency to obtain a voice sample of the accused. As regards the first question raised, the permissibility of voice samples was approved and that would not be a self-incriminatory evidence<sup>xiv</sup>. The answer to this question was already answered in the *Oghad*<sup>xv</sup> and *Selvi*<sup>xvi</sup> judgments, where oghad laid down the parameters i.e. purely forensic evidence such as fingerprints, handwriting was not considered to be self-incriminatory and thereby not violative of Article 20 (3) of the Constitution. Only oral or written testimonial based on personal knowledge and communicated through a positive act of volition was accorded protection from compulsion. Its stress on ‘act of volition’ also helped developed case law in *Selvi* on evidence collection methods based on narco-analysis, polygraph tests and BEAP tests<sup>xvii</sup>. (b) this leads to the second question which deals with more of interpretation of statutes and tests the limits of judicial interpretation. Can judicial interpretation stretch so much as to filling legislative gaps and if so, is that judicial law-making?

#### V. Section 53 and 311-A of the Code of Criminal Procedure, 1973:

There is no specific provision in the Indian procedural laws to direct a person for giving his voice sample. However, by applying the doctrine of *eiusdem generis* the phrase “such other tests” appearing in the explanation (a) to section 53 Cr PC, the magistrate may pass an order to give voice sample to aid criminal investigation was argued by Desai J in the order of double bench. A voice sample by itself is fully innocuous. Desai J. opined that voice sample is like fingerprint impression, signature or specimen handwriting of an accused and hence cannot attract the expression “to be a witness.”<sup>xviii</sup> By giving voice sample an accused does not convey information based upon his personal knowledge which can incriminate him. Per contra, it was argued by Alam J. the dissenting judge that section 53, 53-A and 311-A of Cr PC were amended by the no. 25 of 2005<sup>xix</sup> but no provision was made to compel the subject to give sample of his voice. Alam J. holds that for compelling an accused to give a voice sample, the law must come from the legislature and not through court process since such compulsive orders of the court attract invasion of the right. Thus, the matter was referred to larger bench, which also observed that procedural law in India is silent on the issue. The dilemma expressed in the present scenario which caused the appeal is also one that existed as a dissent to the opinion of Denning’s J., in *Seaford Court Estates Ltd. Case*, which will be explained by the author later.

In *Marbury v. Madison*<sup>xx</sup>, C.J John Marshall stated that the judicial department has the duty to establish what the law states. Judgement and Judicial Pronouncements have the final say when it comes to the interpretation of statutes until the legislature brings forth a change, such as, amend the provision. The judges carry out the will of the legislature in saying what a law is, and success of any method of interpretation of statutes lays with how well the will of the legislature is translated into the judgment. In *Smith v. Hughes*<sup>xxi</sup>, the English Courts have clearly explained how the purposive approach to interpretation is applied by jurists. In the present case a similar correlation is applied as to the final judgment is a purposive interpretation as to the purpose of the legislation being fulfilled. In this present case, collection of voice samples can go a long way as regards the investigation that was conducted.

*Bangalore Water Supply & Sewerage Board*<sup>xxii</sup> case was a lone voice of dissent by the Apex Court against expansion of the frontiers of judicial interpretation to fill in gaps in the Statute enunciated by Lord Denning, L.J, in *Seaford Court Estates Ltd. v. Asher*<sup>xxiii</sup>, which did not find immediate favour of the learned Judge's contemporaries was however acknowledged to have carried within itself the vision and the perception of the future. Coincidentally, this view enunciated by Lord Justice Denning in *Seaford Court Estates Ltd.*, of ironing of the creases in the legislation has been approved by the Indian Supreme Court by M.H. Beg CJI. In *M. Pentiah*<sup>xxiv</sup> Case., Sarkar, J., approved of the reasoning, adopted by Lord Denning stating that in a case where “the definition of ‘industry’ is left in the state in which we find it, the situation perhaps calls for some judicial



heroics to cope with the difficulties raised.” Similarly, including voice samples collection within the magistrate’s purview could be considered to be the purpose of the legislature as already explained voiceprints are similar to fingerprints and help in identification of individuals.

The reason why there is an increase in the practice of purposive interpretation of statutes is that it contributes rather than detracts from the law. But would the present case be an instance of purposivism? The author argues in the positive, the order of the apex court conceding power to the magistrate is a contingent measure until the legislation makes an amendment or a change. The present instance could not be stretched to law-making as the courts have not introduced anything new, but have argued whether voice samples should be included under the ambit of Section 53 of the Criminal Code<sup>xxv</sup>. A clear purposive interpretation of the law is observed, as procedural laws are the legal tools to translate legislative intent in administration of substantive justice and in the present case there is a deficiency in the procedural law. Krishna Iyer J., on deficiency in procedural laws had observed, ‘The mortality of justice in the hands of law troubles a Judge’s conscience and points an angry interrogation at the law reformer. The procedural law so dominates in certain systems as to overpower substantive rights and substantive justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable.’ In order to render complete justice in the present case a necessity for a temporary patchwork of filling up to make the Statute effective and workable and to sub-serve societal interests through a process of judicial interpretation became inevitable.<sup>xxvi</sup>

The role of judiciary for correcting the defects in law was succinctly narrated by Lord Denning, ‘When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written words so as to give ‘force and life’ to the intention of legislature. A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.’<sup>xxvii</sup> However, Lord Simonds described ‘filling in the gaps’ approach as “a naked usurpation of the legislative function under the thin disguise of interpretation”<sup>xxviii</sup>. The difference of opinion between Lord Simonds and Dennings is also observed in the dissent between Alam J., and Desai J. in the present case. This is also the difference between acceptance of the purposive approach of interpretation and the dangers of usurping the power of the legislature to make laws. Hence, there is an intrinsic need to maintain a subtle balance and self-restraint by the judiciary during statutory interpretation for the purpose of expansion of legislative intent. The Indian Constitution under article 142 has empowered the apex judiciary to make such order as is necessary for doing complete justice, and such order has force alike any law made by the Parliament.

## VI. Future Concerns of Privacy Arising out of Present Judgment:

In the present case, the issue under dispute was out of a telephonic conversation and the author will outline privacy concerns arising in the future due to the supreme court order in Ritesh Sinha. A telephonic interception, without informed consent of the subject, tantamount to an infringement of the right to informational privacy, which has now been recognized as a fundamental right under article 21. The apex court hold that “the right to hold a telephone conversation in the privacy of one’s home or office without interference can certainly be claimed as “right to privacy”. Conversation on the telephone are often of an intimate and confidential character.” In *KM Malkani v. State of Maharashtra*, the apex court emphasized upon protection of right of innocent person against wrongful telephonic surveillance by observing, “Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephone conversation of an innocent citizen will be protected by Courts against wrongful or high-handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Court will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods.”<sup>xxix</sup> The Supreme Court, while adjudicating on two public interest litigations of Puttaswamy Justice, has protected an individual from illicit intervention in informational privacy<sup>xxx</sup>. The judicial intent in these judgments evidently protects the rights of innocent citizen and at the same time provides scope to punish the guilty person.

## VII. Conclusion:

The Supreme Court has conceded to judicial magistrate the power to order a person to give sample of his voice for the purpose of investigation of crime “until explicit provisions are engrafted in the Code of Procedure by Parliament”. It appears that the apex court has empowered the magistrate by introducing a contingent arrangement for addressing legal necessity without mentioning specific provision of law. The author has explained the workings of purposive interpretation of law in the present case while also providing arguments supporting such an approach in judiciary filling out yawning gaps in a statute but also strongly attesting to the need for a subtle balance and self-restraint to be expressed by the judiciary while expanding the legislative intent.

<sup>i</sup> *Ritesh Sinha v. State of Uttar Pradesh*, 2019 SCC OnLine 956.

<sup>ii</sup> Code of Criminal Procedure (Amendment) Act, 2005 (Act No. 25 of 2005) with effect from 23.06.2006.

<sup>iii</sup> Section 311A of the Code of Criminal Procedure, 1973 confers power on Magistrate only to direct accused to give specimen signature or handwriting (and not to furnish voice sample).

<sup>iv</sup> As per Hon'ble Ms. Justice Desai, "By giving voice sample, the accused does not convey information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous."

<sup>v</sup> Kamine. S., *The Voiceprint Technique: Its Structure and Reliability*, 6 San Diego L. Rev. 213 (1969).

<sup>vi</sup> Oliphant, Benjamin J. "TAKING PURPOSES SERIOUSLY: THE PURPOSIVE SCOPE AND TEXTUAL BOUNDS OF INTERPRETATION UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS." *The University of Toronto Law Journal*, vol. 65, no. 3, 2015, pp. 239–283., [www.jstor.org/stable/24855483](http://www.jstor.org/stable/24855483). Accessed 12 Dec. 2020.

<sup>vii</sup> *Vatal Nagaraj v. Dayanand Sagar* (1975) 4 SCC 127 at para 12: AIR 1975 SC 349: 1975 SCR (2) 384.

<sup>viii</sup> "PREEMPTION AS PURPOSIVISM'S LAST REFUGE." *Harvard Law Review*, vol. 126, no. 4, 2013, pp. 1056–1077. JSTOR, [www.jstor.org/stable/23414791](http://www.jstor.org/stable/23414791). Accessed 12 Dec. 2020.

<sup>ix</sup> Article 142, Constitution of India.

<sup>x</sup> Tiersma, Peter, and Lawrence M. Solan. "The Linguist on the Witness Stand: Forensic Linguistics in American Courts." *Language*, vol. 78, no. 2, 2002, pp. 221–239. JSTOR, [www.jstor.org/stable/3086556](http://www.jstor.org/stable/3086556). Accessed 12 Dec. 2020.

<sup>xi</sup> Law Commission of India, "87th Report on Identification of Prisoners Act, 1920" (Aug, 1980).

<sup>xii</sup> *Supra* n. 11.

<sup>xiii</sup> Article 20 (3)., Commentaries from U.C. Srivastava J.

<sup>xiv</sup> Dalal, A.S., and Arunava Mukherjee. "CONSTITUTIONAL AND EVIDENTIARY VALIDITY OF NEW SCIENTIFIC TESTS." *Journal of the Indian Law Institute*, vol. 49, no. 4, 2007, pp. 529–542. JSTOR, [www.jstor.org/stable/43952091](http://www.jstor.org/stable/43952091). Accessed 12 Dec. 2020.

<sup>xv</sup> *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808.

<sup>xvi</sup> *Selvi and Others v. State of Karnataka*, (2010) 7 SCC 263.

<sup>xvii</sup> Goel, Ashish. "Indian Supreme Court in Smt. Selvi v State of Karnataka: Is a Confusing Judiciary Worse than a Confusing Legislation?" *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, vol. 44, no. 4, 2011, pp. 602–615. JSTOR, [www.jstor.org/stable/43239623](http://www.jstor.org/stable/43239623). Accessed 12 Dec. 2020.

<sup>xviii</sup> *Supra.*, 2.

<sup>xix</sup> The Criminal Law Amendment was introduced in reference to the observations of the apex court in the State of Uttar Pradesh v. Ram Bau Misra (1980) 2 SCC 343.

<sup>xx</sup> *Marbury v. Madison.*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>xxi</sup> *Smith v. Hughes*, [1960] 1 W.L.R.. 830.

<sup>xxii</sup> *Bangalore Water Supply & Sewerage Board v. A Rajappa and others.*, (1978) 2 SCC 213.

<sup>xxiii</sup> *Seaford Court Estates Ltd. v. Asher*<sup>xxiii</sup>, (1949) 2 All. E.R. 155.

<sup>xxiv</sup> *M. Pentiah v. Muddala Veeramallappa*, IR 1961 SC 1107, 1115.

<sup>xxv</sup> Tosi, Voice Identification for Lawyers (1974) (unpublished report in Michigan State University Library). Also see: John F. Decker, Joel Handler, "Voiceprint Identification Evidence – Out of the Fyre Pan and Into admissibility" 26.314 *The American University Law Journal* 320 (1977).

<sup>xxvi</sup> *Sushil Kumar Sen v. State of Bihar* (1975) 1 SCC 774: 1975 AIR 1185.

<sup>xxvii</sup> *Seaford Court Estates Ltd. v. Asher*, [1949] 2 All. E. R. 15.

<sup>xxviii</sup> *Magor and St Mellons Rural District Council v Newport Corporation*, [1951] 2 All ER 839.

<sup>xxix</sup> *KM Malkani v. State of Maharashtra*, (1973) 1 SCC 471.

<sup>xxx</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) 10 SCC 1.