Christ University Law Journal
2024, Vol. 13, No. 1, *59-85*
ISSN 2278-4322/https://doi.org/10.12728/culj.24.3

Exploring Possibilities for a Right against Destruction for Architects

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Abstract

The courts and legal frameworks across the globe have not been unanimous as to whether the right against destruction should be a moral right or not for artists in general and for architects in particular. Both common law and civil law countries have been non-committal and lack uniformity in their approach in this regard. The right against destruction has been distinguished from other rights on the premise that there is no loss/detriment caused to the artist by the destruction of the creation. Despite its beneficent presence in the Copyright Act, 1957 the recent denial of moral rights against destruction to architects in the buildings envisioned and realised by them by the Delhi High Court needs a sound diagnosis and correction as it could have a cascading effect. In this, it deviates from a former ruling of the same (Delhi high court) court without making a substantial reference to it. It raises the issue of whether the basis for anti-destructive sentiment can be placed on the plank of public interest in the preservation of artistic works rather than on personality rights upon which the right to integrity is anchored. An assessment of these contexts will be useful to identify the limits on the right to destroy property particularly intellectual property in architecture.

Keywords: Copyright Act 1957, Fair use provisions, Integrity, Moral Rights, The California Art Preservation Act 1979

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1. Introduction

1.1 The Case of Raj Rewal v. Union of India[1]

Raj Rewal, an architect of stature, saw the prospect of a work of architecture he created that had stood lining the horizon of the national capital being obliterated and razed to rubble. His remonstrance went unheeded, and the pavilions and the landscapes bit the dust by the state-manoeuvred bulldozers. Pragati Maidan was a national symbol for intercultural and Interglobal initiatives as designed by Raj Rewal and Mahendra Raj in the sixties to provide a podium and showcase to the world its intercultural prowess and commercial accomplishments (it had been a bustling hub of exhibitions and conferences). The broad spread of the venue included the Nehru pavilion, the Hall of Nations and several other landmarks dotting the Delhi landscape.[2] Ironically, pending the disposal of his appeal in the Delhi High Court, the Union government (ITPO-India Trade Promotion Organisation)) demolished the structures. In other words, the state that owned the structure did not venture forth to negotiate any formalities or legal niceties of due process despite the architect throwing the law book at it. The High Court did not find in him a pressing argument that could provide him relief either in the form of an injunction or in the nature of restitution and damages.

Raj Rewal based his arguments on the following grounds – the chief of which was that the architectural marvel was his creation, of which he was the author, along with Mahendra Raj, who had designed the structure. The architectural ingenuity had fetched the building the repute of being the first large-span concrete structure in the world. It was symbolic of the national prowess in structural engineering and architecture in the 25th year of national

[1] Raj Rewal v. Union of India, [CS(COMM) 3/2018, with IA Nos. 90 and 92 of 2018]

[2] Maanvi (2017) *Losing a heritage: A history of Pragati Maidan's 'hall of nations'*, The Quint. Available at: https://www.thequint.com/news/india/history-of-pragati-maidan-hall-of-nations (last visited: 21 April 2024).

independence. It also found itself as one among the 62 iconic buildings drawn up by the Indian National Trust for Art and Cultural Heritage (INTACH). The representation to include it under the list for heritage conservation was pending before the Heritage Conservation Committee. However, while the appeal was pending before the high court, ITPO, the owner of the building, went ahead and demolished the structure.

1.2 A Critical Assessment

Before one embarks on a critical path, it would be instructive to understand the main import of the judgement by Learned Justice Rajiv Sahai Endlaw of the High Court of Delhi. Justice Endlaw found an impossibility in the coexistence of the rights of the architect and the owner of the land. He found it difficult to reconcile and harmonise the two streams of legal rights. He observes (in para 19) 'as distinct from copyright, which is purely a statutory right and not even a natural or common law right, right to land/ property is not only a human and common law right but also a constitutional right and till the year 1978 was also a fundamental right'. The learned judge suggests that the statutory right, if any, cannot dent the constitutional right to property in the land/building owner. According to him, copyright unlike trademark is not a common law right or a natural right and is purely a creation of the statute. Thus, unless a law expressly provides for deprivation of the right to use the land or prevents the owner from certain acts over his land, as in the present case, for removal of the building, the owner cannot be excluded from using his land.[3] The judgement refers to a slew of judgements of the Supreme Court of India in this respect which display a cautious approach to applying expropriating legislations. According to him, such legislations must be strictly construed (the judge terms Section 57 of the Copyright Act, 1957 as an expropriatory legislation). He goes onto affirm that '*to negate a constitutional right (property in the present context) on the ground that there is an available statutory protection is to invert Constitutional theory*'.

[3] Raj Rewal v. Union of India, [CS(COMM) 3/2018, with IA Nos. 90 and 92 of 2018]

The learned judge likens the demand of Section 57 of the Copyright Act, 1957, to honour the moral right of the architect to an expropriatory legislation that has not been expressly conferred by the statute. According to him, there cannot be an implied deprivation of property and refers to the importance of Art. 300 A of the Constitution of India that stipulates that no person shall be deprived of his property save by authority of law.[4] Thus, on one hand the judgement categorises Section 57 as an expropriatory law but on the other hand, the judgement is not able to recognise/identify any law or any moral right against destruction whatsoever for the architect in Section 57 of the Copyright Act, 1957. In this regard, it does not consider a previous precedent of the Delhi High Court in the *Amarnath Sehgal* judgement.[5]

The judgement explores the contours and content of the right under Section 57 of the Copyright Act, 1957 particularly with respect to architects.[6] The judgement interprets the Section 57 (1)(b) literally and restrictively and accordingly destruction cannot be read into the prohibitions enlisted in Section 57 with respect to the right to integrity of the artist. He reasons that mutilation and distortion of the work do not encompass destruction of the work because destruction of a work cannot lower the honour or reputation of the artist as the work itself is not in existence. The judge points out to the difference between work itself and the embodiment of the work. In his words, '*No imperfections can be found in what cannot be seen, heard or felt.*' In other words, derogatory treatment cannot be made in respect of a work that has been destroyed. According to the judge, *a work that is destroyed does not pose any challenges to the honour or reputation of the author.* Though Interestingly, the judge points out that the architect can object to modifications of the building made by the owner but cannot object to its destruction. To quote, "I like or dislike only a building /structure which I see. What I don't see, I

[4] INDIA CONST. art. 300A

[5] Amar Nath Sehgal vs Union of India (UoI) And Anr., 2005 (30) PTC 253 (Del)

[6] Copyright Act, 1957, § 57, No. 14, Acts of Parliament, 1957

don't judge. When a building is not seen, the question of forming any opinion of the architect does not arise".[7]

The judgement sidesteps the question as to whether the provisions of sec. 57 is to be applied indiscriminately to all creations of architecture or only to those possessing artistic character or design. Finding it irrelevant to the issue, the judgement abandons the quest in this regard.[8] However, this issue needs resolution from a utilitarian point and as a matter of public policy, in order to harmonise the rights of three segments – the architects, the building owners and the public interest in these iconic structures.

According to the judgement, the special right conferred on the architect cannot pose a restriction on the owner of the land/building to better utilize his land or building by removing the existing building or constructing new ones. Reason? - *artistic work or architectural works are not scarce and more can be produced on the contrary land is scarce as no more can be produced*. However, the judge reasons that the alterations to the building by the owner can be interfered with by the architect if it is made to look otherwise than as designed by the artist author. This is allowed because the altered work may be attributed to the architect and thereby bringing him disrepute.[9] The learned judge draws similarities between the right of the owner of an artistic work not to display the same with the right of the owner of a building to destroy the work even if it is an acclaimed architecture. Thus, the judgement bestows on the building owner the authority to destroy the structure whatever be the architectural credentials of the building/ structure (Surely the right not to display the work cannot be said to be at par with the right to destroy the work). The judge observes that the architect, in case of modifications to the work, can only have the right to enforce the claim against misattribution of the work. In other words, where a work has undergone modifications from the original plan of the architect, the

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[7] Raj Rewal v. Union of India (2019), [CS(COMM) 3/2018, with IA Nos. 90 and 92 of 2018], at Para 25

[8] Supra n.7, Para 26

[9] Raj Rewal v. Union of India (2019), [CS(COMM) 3/2018, with IA Nos. 90 and 92 of 2018], High Court of Delhi

architect can seek to cease the attribution of the building as his creation. However, he cannot stop the modifications from being carried out.[10]

The judgement further examines the limitations on the architect's rights from other legislations and rules to which he is subject to, for instance, the town planning rules. Even though there was no argument that architects have unfettered rights. He further empowers the owner of the building to modify and destroy the building if there are sufficient technical and economic reasons for the same. The judgement does not elaborate on what are the technical or economic reasons or whether the same has to be adduced by the owner before altering or destroying the building. The functionality of the building outweighs the interest of the architect to preserve the building. By saying so the judgement virtually negates any application of Section 57 to the architect to whom authorship has been bestowed by the Copyright Act and affirms the partial denial of the right to integrity that has been extended to him.

The judgement traverses through the Copyright Act, 1957 to find out how differently the Act has treated architects from other authors to come to an inference whether they have a moral right against destruction of their creation. Though this effort is indeed discernible, it is doubtful whether it has logically contributed to the final thesis of the judge - that the rights of the owner of the land overwhelms the moral rights of the architect or that both these rights are repugnant and cannot coexist with one another.

1.3 Advancing a Point through the Fair Use Provisions

The judgement makes attempts at differentiating architectural works from other artistic works recognised under the Copyright Act of 1957 to drive home a point.[11] However, the point never convincingly surfaces. For instance, the learned judge points out to the exemptions made to the use of architectural works under the fair use provisions in Section 52 of the Copyright Act, 1957. But the surmise from exploring that distinction is missing and the reference

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[10] *Id.* at Para 28

[11] Supra n.9, Para 23

to the Israel Copyright Act of 2007 in this respect leaves one wondering. The judgement was trying to highlight and justify the rights of the owner with respect to his property and that it could not be diminished, obstructed /interfered by the rights of the architect in the architecture of the building**.** In doing so, the judgement turns its attention to Section 52(x)[12] of the Copyright Act, 1957, in order to analyse the exceptions in the case of the use of architectural works. However, the analysis reflects a strained logic to derive an inference that destruction without authorisation from the architect is allowed within the Indian context. The judge points out the provision that allows for the reconstruction of the building in accordance with the original plan without further authorisation from the architect of the original plan. He, in essence, asks the question of how can reconstruction be allowed without the primary act of destruction being allowed as well? According to the judgement reading, Section 57(1)(b), as barring unauthorised destruction, could render the reconstruction enabling provision 'otiose'. It is puzzling how such an inference can be arrived at when both the provisions are in two different contexts with different implications. There is nothing contradictory about these provisions that renders one of it to be redundant. They can coexist. For the act of destruction, in the case of the architect's right subsisting in the plan, prior consent of the architect is essential. In the case of reconstruction based on the same plan, there is no need for a fresh authorisation from the architect of the original plan, and the latter cannot initiate infringement proceedings.

The judgement refers to Section 59 of the Copyright Act, 1957 as a determining point on the issue.[13] It points out that the remedies available for infringement for other works of art under the Copyright statute have not been extended to works of architecture[14]. For instance, the remedy of demolition has not been made available to

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[12]Copyright Act, 1957, § 52(x), No. 14, Acts of Parliament, 1957

[13] *Raj Rewal v. Union of India* (2019), [CS(COMM) 3/2018, with IA Nos. 90 and 92 of 2018]

[14] Copyright Act, 1957, S. 59, No. 14, Acts of Parliament, 1957: Restriction on remedies in the case of works of architecture

the architect in case of violation by the builder. Section 59 of the Act only truncates the options for remedy in case of infringement of the architects' plan, such as by restraining construction or demolition. This differential treatment of the architect cannot be considered as impliedly denying moral rights against destruction to the architect.

The court leans on a ruling of the Athens court of first instance in *Architecture Studio and Architectes Associes Pour Environment v. Organisation of Labour Housing (OEK) [2002] E.C.D.R. 36.*[15] Here the Athens court did not uphold the plea of the petitioners as the moral rights were already interpreted to have been surrendered in the tender document. The court has failed to notice the potency of the Section 57 in Indian copyright law – moral rights are non-waivable rights. Therefore, a contractual waiver of moral rights might not be in keeping with the sentiment underlying the statute in India. Further, both parties failed to produce the tender document, which might have been lost with the efflux of time.

1.4 The Need for Strong Reasons and Fair Procedure

The judgement takes recourse to foreign precedents and legislations to articulate the limitations on the moral rights of the architect vis a vis the owner of the building. It takes strength from the legislation from Australia and the United States in this regard. But it is important to note that in both these countries the legislations are clear in their literal structure. The Australian legislation has been brought into effect through an amendment - the Copyright Amendment (the Moral Rights Act 2000) where in change can be made in a work if the act is reasonable.[16]For an act to be reasonable, the following needs to be taken into consideration - 1. The nature of the work 2. The purpose for which the work is used 3. The manner in which the work is used 4. The context in which the work is used. Thus, it is important to note that there have to be cogent reasons for overwhelming the moral rights of the author of the architectural

[15] Supra n.13

[16] Copyright Amendment (Moral Rights) Act, 2000, § 195AS, https://www.legislation.gov.au/Details/C2004A00752, (last accessed: 21 April 2021)

work. Demolition and destruction are legitimate if the due process has been followed, that is, a proper notice has been issued to the affected artist to make inter alia a record of the work. Thus, both substantive reasons and procedural fairness are required by law to be observed before depriving the author of those rights[17]. The judgement further cites Section 120 of the Copyright Act of the USA which endows the authority on the owner of a building to alter or to demolish or destroy a building without the consent of the author of the architectural work if the building is no longer needed[18](amended in 1990).[19] Such clarity of intent is absent in the Indian Law and therefore the deprivation of the right cannot be read into the Act.

Although the learned judge notes the need for due process, he does not deem it essential to provide any relief to the architect under the present circumstances, who was neither provided a notice nor a hearing by the defendants before the demolition. The legal culture and practices in this regard in India seem to be arid now, and the court has not helped in this regard either. It is important to note that the Indian statute as it stands today is vividly clear, and the legislation does not exempt anyone, including the architect, from moral rights either in Section 57 nor in the exceptions to Section 52 of the Copyright Act, 1957.

1.5 The Illustrious Precedent Courteously Sidestepped – Amarnath Sehgal v. Union of India[20]

Though the precedent set down by the Delhi High Court in 2005[21] was a path breaking one, Justice Rajiv Sahai End law carefully sidesteps its influencing effect on the premise that the preceding judgement dealt with a mural installation and not architecture.

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[17] Kenna, Jonathan, *Moral rights in architecture, Architecture AU*, https://architectureau.com/articles/moral-rights/ (last visited: 21 April 2022).

[18] Copy Right Act of 1976, § 120

[19] Guillot -Vogt associates, Inc. v. Holly & Smith 848 F.Supp.682 & David Phillips v. Pembroke Real Estate 459 F.3d 128

[20] Amarnath Sehgal v. Union of India, 2005 (30) PTC 253 (Del)

[21] Supra n.20

However, it cannot be lost sight of that the ambit of the right to integrity and more specifically of the right against destruction had been arduously laid down in the precedent. The finding of the judge that destruction does not affect the honour and reputation of the author as the work is already destroyed had not been accepted by the court in the prior case. Leaning on insightful arguments of the learned counsel Praveen Anand, the court inferred the existence of the right against destruction and had heavily relied on the relationship between moral rights and the need for preservation of cultural artefacts. (It is noteworthy that this close relationship between role of moral rights in preservation of cultural property including architecture had been growing in the western jurisprudence since the late eighties). The court in *Amarnath Sehgal* quotes and relies on the international conventions to which the India is a signatory to emphasise on the point of national obligation to protect the cultural contributions of artists.[22] This in turn is achieved by protecting the moral rights of the artist specifically the right to integrity and the right against destruction. This strong relationship is not taken note of by the justice in the *Raj Rewal* decision. In *Amarnath Sehgal* judgement the court referring to international conventions read in protection of cultural heritage into the public policy responsibilities of the state. The right against destruction was recognized as being part of the right to integrity in Section 57 of the Copyright Act, 1957. Destruction was regarded as an extreme form of mutilation. To quote, 'since by reducing the volume of the authors creative corpus it affects his reputation prejudicially as being actionable under said section'.[23] The said work had to be a modern national treasure. In fact, in *Raj Rewal*, the judgement sticks to the notion of the narrower school that does not see a detriment to the reputation of the artist if the work is destroyed.

There are similarities in the arguments placed by the parties in both the cases. In both cases, the state argued that it is the owner of the property and in both the state does not deny that the petitioner

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[22] Amarnath Sehgal v. Union of India, 2005 (30) PTC 253 (Del), Para 38 to 50 of the judgement.

[23] Amarnath Sehgal v. HOI, 2005 (30) PTC 253 (Del), Para 55 and 56

was the original author of the work. The right of the state to use or not to use the work emanates from its status of ownership of the work. Interestingly, in *Amarnath Sehgals* case, the waiver had not been exercised by the author which further boosted the case of the artist. In *Raj Rewal* decision, the tender document and the papers therein could not be produced by the state. The presumption therefore should have been in favour of the architect as not having waived the rights. In both cases there is never any doubt about the stature of the artist or the glory of his creation. Though in the circumstances of *Raj Rewal*, it is noteworthy that before the process of attestation by heritage conservation committee the structure was reduced to nothing.[24] It speaks volumes about the need for a sound and uniform national policy towards protecting architectural and cultural treasures in India.

Even though the right against destruction has been recognised in the same manner as the protection against alteration by the courts in India and abroad, the subject matter of architectural works has not been treated at par with other subject matter. The decisions of the courts in India in the last two decades, one about a mural and the other about a sculpture, testify to the liberal approach of the courts in construing moral rights in favour of the artists and cultural property. Thus, one can find a glimmer of hope in both *Amarnath Sehgal v. Union of India* (2005) and *Jatin Das v. Union of India* (2019)[25], in the recognition of a broad right to integrity inclusive of a right against destruction.[26]However, these precedents seem not to have rubbed off on the court with respect to the creator's right against destruction or on the need for a fair procedure prior to a decision taken to destroy. It is noteworthy that in *Jatin Das*, the court constituted a high-level committee to make recommendations after

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[24] Raj Rewal v. Union of India (2019), [CS(COMM) 3/2018, with IA Nos. 90 and 92 of 2018], Para 16

[25] Jatin Das v. Union of India, CS(COMM) 559/2018

[26] Kaveri Jain, Distortion or Destruction of Artistic Works: Scope of Moral Rights of Artists, *spicy IP*, 3rd January 2020, https://spicyip.com/2020//01/distortion-or-destruction-of-artistic-works-scope-of-artists-moral-rights.html, (last visited: 21 May 2021)

looking into the matter.[27] This committee included the Director of the National Gallery of Modern Art[28] and other senior officials from the cultural ministry.

The judgement does not make a distinction between buildings privately owned and circumstances in which the state is the owner. The accountability should have been pegged at a higher level when it comes to the liabilities and accountability of the latter in case of irreversible damage by an act such as destruction. The judgement also does not differentiate between general utility buildings and iconic buildings, which are architectural marvels of a recognised stature. In this, the court does not take note of the change in the content of Section 2 (b) of the Copyright Act,1957 effected in 1995.[29] The words 'architectural work of art' was replaced by the words 'work of architecture'. Thus, the protective ambit has been broadened; however, the requirement of artistic character in the building has been maintained.

An unqualified authority has been bestowed on the owner of the building by the judgement to modify or destroy it rather than a more subtle approach by weighing the circumstances of each case after a requisite consultative process. This does not augur well for sustaining an encouraging cultural environment for architects to bring forth challenging creations. The judgement does not vehemently assert the need for a transparent consultative process with the architect, particularly in the case of buildings owned by the state or organs of the state. There are lessons to be learnt from the judgement that should impel the legislature to make changes in the Copyright Act and heritage conservation practices in India. The trend the world over has been to either restrict the rights or articulate

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[27] 'Snapshot: The scope of copyright in India', https://www.lexology.com /library/detail.aspx?g=3c7dce4f-74d0-4461-a800-40daa2826b67, (21 January 2021)

[28] Jatin Das v. Union of India, CS(COMM) 559/2018

[29] Copyright Act, 1957, S. 2(b), No. 14, Acts of Parliament, 1957 ["work of architecture"] means any building or structure having an artistic character or design or any model for such building or structure;

the boundaries of moral rights through legislation rather than leave it to mere judicial speculation.

2. Right against Destruction in France

It would be instructive to gauge the ambit of the right to destroy or the right against destruction, by looking at the judicial opinion and statutes that have evolved over the years in other key jurisdictions. The French approach to moral rights lends a fundamentalist gleam to moral rights zeal. Therefore, the resonance of the right to integrity, of which the right against destruction is apparently a component, is sought to be vindicated in these jurisdictions. In a string of decisions, one can discern the exploration of this theme in the French courts and the positive vibe from the juristic offices there. Interestingly, the artists in France display a rare pedigree in their exercise of moral rights; they have a history of defining and affirming moral rights.[30] Architects have not been treated distinctly from the rest of the creators whose subject matter has been protected in France. French jurisprudence attributes to the author certain inalienable rights that transcend economic rights of exploitation.[31] These moral rights are not stapled to rights of commercial or economic exploitation but exist inherently in the creator and survives contractual dealings such as assignment or licensing.[32] There is no room created to treat architecture and architectural works distinctly. The author is vested with four primary rights in the moral rights armoury 1. The right of divulgation 2. Right of paternity 3. The right of integrity 4. the right

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[30] Sofie G. Syed, *The Right to Destroy Under Droit D'Auteur: A Theoretical Moral Right or a Tool of Art Speech?* 15 Chi. -Kent J. Intell. Prop. 504-537 (2016) https://scholarship.kentlaw.iit.edu/ckjip/vol15/iss2/8 (last visited: 20 March 2021)

[31] Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT Soc'y U.S.A. 1-58 (1980) Available at https://heinonline-org- (last visited: 8 July 2021)

[32] Article L. 121-1 to 9 of the Intellectual Property Code, Available at https://www.regimbeau.eu/docs/Intellectual-Property-Code-EN.pdf, (last visited: 2 July 2021)

of withdrawal.[33] The right against destruction stems from the right to integrity that forbids change to the artistic work that may bring disrepute and lower the esteem of the artist in the eyes of the public.

A few recent cases in France will be illustrative of the dilemma whether rights of the architect should supervene over the rights of ownership of the building that is the owner of the building in making changes to the building that includes destruction of the building. Most of the cases are against mutilation and is a remonstration against change by the owner that would disfigure the work created by the architect. The approach of the French courts has not been to totally negate the rights of the architect or the builder but to strike a reasonable balance between the two interests – a utilitarian and an idealistic moral rights approach. The reasons must be strictly proportional to the need. Therefore, in France there is a need to convince the court regarding the need for change/alteration /destruction failing which the remedies in damages or injunction must be provided to the architect author. Thus, it is not a veritable negation of the moral rights of the architect when it comes to exercise of ownership rights of the owner of the building but rather based on the fulfilment of reasonable premises for some drastic action.

Jean Nouvel, an acclaimed architect moved the court against the owner of Paris philharmonic, a concert hall commissioned by the French state and the city of Paris.[34] His grievance was that the owner had changed and thus defiled his architectural creation.[35] He did not

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[33] Jeffrey M. Dine, *Authors' Moral Rights in Non-European Nations: International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls*, 16 MICH. J. INT'L L. 545-582 (1995) at 550. Available at: https://repository.law.umich.edu/mjil/vol16/iss2/7, (last visited: 3 July 2021)

[34] Frédérique Fontaine and Pauline Celeyron, *France: French court rules on the moral rights of well-known architect Jean Nouvel*, Dec. 7, 2016, https://www.lexology.com/library/detail.aspx?g=7d5329e4-6329-439e-975b-93da493b298d (last visited: 1 July 2021)

[35] *France: Jean Nouvel sues the Philarmonie de Paris for breach of his moral rights*, July 30, 2015, https://www.dreyfus.fr/en/2015/07/30/france-jean-

want deviation and wanted the construction in line with his original plan. He claimed both the relief of damages as well as an injunction. The French courts, rooted in the mosaic of moral rights in France, has as expected entertained his petition. On similar lines in the year 2015, the mecca of French Tennis – the Rolland Garros came under the judicial scanner for objections raised by the heirs of the original architect of a garden (*Les Serres d'Auteuil*) on the plea that the extended works done to the garden would destroy the same. It is noteworthy that an injunction was granted despite the fact that the architect was no more alive and the plea was that of his heirs.

It is noteworthy that the French intellectual property code does not expressly forbid the destruction of a work of art by its owner. In fact, a few case laws regarding other subject matter point out that destruction may not form part of the right to integrity in France.[36] However, certain other courts have inferred otherwise that the transferee has no right to destroy.[37] The law is not settled in this regard. With respect to works of architecture, the French courts explore a compromise in this regard between the rights of the owner and rights of the author architect. A good reason has to be there taking into account the work, its state and its site. The court has to be convinced of the technical necessities.[38]

3. The Trend in the United Kingdom

In the early 1920's, a controversy erupted over the orders from King George V to destroy a portrait of his created by Charles Sim (royal

nouvel-sues-the-philarmonie-de-paris-for-breach-of-his-moral-rights/ (last visited: 1 July, 2021)

[36] Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists'Rights in France and the United States*, 28 BULL. COPYRIGHT Soc'y U.S.A. 1 (1980) https://heinonline-org- (last visited: 8 July 2021)

[37] *Id*. at pg. no. 33

[38] Nicolas Bouche, *Intellectual Property Law in France*, 4th edition, Wolters Kluwer, at para 182

academy) [39]. This was followed by the Sutherland incident in the fifties that is the Winston Churchill controversy – it is alleged that Churchill's wife destroyed the art work of his portrait and that Churchill himself had disliked it.[40] Charles Sutherland the painter of the portrait called it as an act of vandalism. While the episode did not have legal script wound around it – it was a hugely debated incident on the question of destruction of the work of art and the moral rights of the creator and the right of the public in the preservation of works art as part of the cultural heritage. The Copyright and Designs Act, 1988 in United Kingdom provides a bulwark against mutilation and alteration prejudicial to the reputation of the artist but does not spell out the legitimacy of destruction either by the owner or by the artist themselves.[41]

4. The Trend in the United States

The juridical experience through case laws is patchy with certain instances reaching up to the courts.[42] In the year 1949, the moral right to integrity was invoked by a fresco mural artist against a church that painted over his work as they found his work imparting to Jesus Christ a more physical than a spiritual character.[43] Though the New York court rejected the contentions of the artist based on

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[39] Henry Lydiate, *The right to destroy art work, 2001*, https://www.artquest.org.uk/artlaw-article/the-right-to-destroy-artwork-2/(last visited: 2-1--2021)

[40] Sutherland pointed out that the painting in 1978 would have cost upwards of $100000; Available at https://www.nytimes.com/1978/01/12/archives/churchills-wife-destroyed-portrait-they-both-disliked.html(last accessed, 2 January 2021)

[41] Fionna Timms & Iain Connor, *Moral rights in art: cases highlight risks*, https://www.pinsentmasons.com/out-law/analysis/moral-rights-in-art-cases-highlight-risks (12 July 2021)

[42] Sonya G. Bonneau, *Honor and Destruction: The Conflicted Object in Moral Rights Law*, St. Johns Law Review, 2013, P.48, https://scholarship.law.stjo hns.edu/lawreview/vol87/iss1/2/ (12 July 2021)

[43] Crimi v. Rutgers Presbyterian Church in N.Y., 194 Misc. 570, 571-72, 89 N.Y.S.2d 813, 815 (Sup. Ct. N.Y. Cnty. 1949).

the moral rights plank, it nevertheless based their judgement referring to jurisprudential possibilities in two well-known academic works. Though one denied the moral right against destruction in the artist, the other saw possibilities in the same. It brought out a distinction between deforming and destruction based on its consequent effects. While the former attributed a work to the author that was not the authors, the latter did not result in such a consequence.[44] The other reference was to an authoritative account of international copyright by Stephen Laddas, where in the right against destruction was found by the author in the need for preservation of cultural legacy.[45] Thus, apart from the natural rights (personality rights) argument the moral rights premise has found new support in the *terra firma* of cultural rights preservation. There have been several authoritative commentators who have identified the function of preservation of cultural legacy as a new support for the moral rights argument against destruction. While some found a possibility of perpetuality in the ambit of protection others saw a limit - ending with the death of the artist. However, one can discern a shift in the philosophical rationale from the personality rights school to the school of social utility to support the moral rights of the artist. The act of destruction is against the public interest as it 'removes something from the cultural heritage' nurtured and to be preserved by the society.[46] Other scholars on the subject of cultural preservation too extoll the utility of moral rights protection in preserving both the artists reputation as well as the cultural property

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[44] The referred work was by Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 557 (1940).

[45] Public interest in culture and the development of the arts.

[46] Arthur L. Stevenson, Jr., Moral Right and the Common Law: A Proposal, 6 COPYRIGHT L. SYMP. (ASCAP) 89, 92 (1955) (in addition to protecting personality, the moral right "seeks to preserve the cultural heritage of the nation."); Mary A. Lee, Comment, Moral Rights Doctrine: Protection of the Artist's Interest in His Creation After Sale, 2 ALA. L. REV. 267, 272 (1950)

of the country.[47] The artists moral right can be used as a tool to protect cultural objects in the society.[48]

Thus, there is an intersection of interests in which both the need to protect the moral rights of the artist as well as protection and preservation of the object -the art piece become the focus. The double pronged utility is an appealing one as it seeks to preserve the cultural heritage as well. The individual and the public interest of collective utility interests converge. A strong backing and recognition of this stream of thought is apparent particularly in American jurisprudence through both academic as well as the statutory initiatives across several states in United States culminating in the final passage of Visual Artists Rights Act (VARA) of 1990 by the Federal state in 1990. This was however preceded by its accession to the Berne convention in 1989 removing its earlier reservation to Art.6 bis of the Berne convention. A scan through VARA reveals an intent to remove the ambiguity with respect to the prevalence of a right against destruction in common-law by making it explicit albeit with conditions. The right provided by the statute limits itself to a category of visual artists alone. The definition of visual artist is a narrow one.

The deliberations by the legislators and the academic fraternity with respect to the bill suggests that the rationale of protection extended not only to the personal right of the artist but to preservation of cultural heritage as well. Though the enforcement lay in the hands of the artist alone, the recognition of the right against destruction is a heartening safeguard to preserve the legacy. Section 106A(a)(3)(B) provides the right "to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right 'reflects the anti-destructive intent in the enactment. In *Carter v. Helmsley-Spear, Inc*., 71 F.3d 77, 81 (2d Cir. 1995) - one of the earliest cases to come under

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[47] John Henry Merryman, The Public Interest in Cultural Property, 77 CALIF. L. REV. 339, 355 (1989)

[48] Joseph L. Sax, Playing Darts with a Rembrandt (1999) (discussing Saito's "joke" announcement that he would have the work cremated with him).

VARA, the court clearly elaborated on the right against destruction expressed in the enactment and underscored the societal benefits from the same. Even though the act only protects the visual artists and works of stature from destruction nevertheless it imparts a legitimacy to protecting art resources from ruination and destruction. In that regard the Act goes beyond the minimal requirements of the Berne Convention and imparts a new poise to the exercise of moral rights.

In recent times, a verdict from the US Courts upheld the plea of graffiti artists whose work was removed from the walls of a building that was demolished by the developer. The court awarded compensation to the artists. Though the case arose under the ambit of VARA, it signifies a different approach to the recognition of public arts' eligibility for moral rights protection as such art was recognised as a work of 'recognised stature.[49] Temporary nature of the art was not considered as a disqualification to be recognised as a work of recognised stature. Though the case did not deal with architect's rights nevertheless it is relevant to the categorisation made between ordinary art and a work of recognised stature. A differentiation that can be applied to ordinary buildings and a work of architecture.

4.1 Right against Destruction and the Authors' Personality Rights in the United States

Isn't the act of destruction the ultimate act of disrespect, embarrassment and shaming of the artist? There have been commentators who have observed positively on these lines particularly from the academic commentators in the United States.[50] However, contradictions in debate have surfaced in circumstances

[49] Fionna Timms & Iain Connor, *Moral rights in art: cases highlight risks*, https://www.pinsentmasons.com/out-law/analysis/moral-rights-in-art-cases-highlight-risks, (last visited: 12 July 2021)

[50] Sonya G. Bonneau, *Honor and Destruction: The Conflicted Object in Moral Rights Law,* St. Johns Law Review, 2013, P.48, https://scholarship.law.stjohns.edu/lawreview/vol87/iss1/2/ (last visited: 12 July 2021)

where the artist was advancing the cause of the Right to Destroy his own work.[51]

In the few statutes that provide for the right to integrity and more specifically with respect to right against destruction, it is important to notice the approach of the judiciary and the recourses available in principles of common law. Its noteworthy that the judiciary has been reluctant to endorse moral rights as extensively provided in the French system. The stress has been to protect the owner's rights subject to the contractual terms between the parties. Thus, the American jurisprudence tows the line of the copyright system rather than follow the civil law proclivity towards author rights. The hands tied approach is being slowly influenced by statutory initiatives that provide for right to integrity albeit for limited subject matter and for specific authors. The changeover is also the reflection of the status of the art market in the United States which has changed from being an importer to an exporter of art – this is buttressed by the late accession of the country to the Berne Convention. There is thus an enhancement in upholding the moral rights jurisprudence and legitimacy to moral rights protection.

Though the courts have voiced contrary opinions on the question of the prevalence of moral rights particularly of the right to integrity in the work of art nevertheless the lawmakers have sought to bridge the shortfall by attempting to beget it through legislation. At least for a few works of art, the legislative resolve has dented the anti-European poise of the courts when it comes to the moral rights.

4.2 Legislative Endeavour

The artists personality rights, though a mixed bag in the hands of the United States judiciary, is today embellished in some of the state legislations in the United States of America. Though not as extensive as the French notion of personality rights, the state legislation with certain qualifications provides for moral rights and particularly for the right against destruction. The California Art Preservation Act, 1979 is a pointer in this regard. The Act provides for an inclusive list

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[51] Mass. Museum of Contemporary Art Found., Inc. v. Christoph Buchel, 593 F.3d 38, 65-66 (1st Cir. 2010).

of works of art that is extended protection, so all works of art do not qualify for protection. It is interesting to note that the rationale to the Act is significantly for the protection of the integrity of the cultural artistic creations and the personality rights of the author. Thus, the Act dispels the ambiguity with respect to the existence of the concept of moral rights in art law and dealings in the realm of art. The protection is confined to fine art and secures work from anyone who intentionally defaces, mutilates, alters, or destroys the work. Thus, the right against destruction finds a secure place under the law. The art produced for commercial purposes is exempted from the protection and so are all literary, dramatic, musical and cinematic art forms. Significantly, the Act covers only those works of fine art recognized by "[other] artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art to be of 'good quality'. It is noteworthy that all art forms do not become automatically eligible for protection upon creation. Thus, it needs to be certified by the (aforementioned) professional people knowledgeable in the realm of art. The act also proposes for a registry of fine art to be administered by a state art council to identify the eligible works of art. The art attached to buildings also comes within the purview of protection though the eligibility of architecture does not find explicit mention. The right is not inalienable but can be waived by the artist. Therefore, the idea of a perpetual right is not reflected as the moral right subsists only for the statutory period.

The New York Artists' Authorship Rights Act, 1984, also forays into the moral right pasture, however, it is narrower when compared to the Californian laws' width. The works are not categorised according to its quality certified by others as in California but its protection depends on the reputation of the artist.[52] The artist has to prove his reputational standing in society to point out the deleterious adverse nature of the defendants' action. A complete destruction of the work is actionable in California but not in the New

[52] Burton M. Leiser and Kathleen Spiessbach, *Artists' Rights: The Free Mark et and State Protection of Personal Interests,* 9 Pace L. Rev. 1 (1989), https://digitalcommons.pace.edu/plr/vol9/iss1/1 (last visited: 21 June 2021)

York state. Damage to the artists reputation must be caused – either it needs to be caused or it must be reasonably likely to be caused. There is high likelihood that there could be contractual waiver by the artist or that the right could die with the artist. The aforementioned assessment of the trends in the two American states shows the increasing accommodation of moral rights or rather the recognition of a right against destruction as a moral right. It emanates not merely from the concept of personality rights but also in the public interest in preserving works of art.

4.3 Architects Treated Differently in United States

With the passage of the Architectural Works Copyright Protection Act in 1990, architectural works came to have statutory copyright protection in the United States.[53]Architectural buildings came to be protected and it brought the laws in United States at par with the requirements of the Berne Convention. However, two limitations are discernible on the exercise of the moral rights of the author or the copyright owners' rights over the architectural work. However, these exceptions are statutorily clear. It prevents the copyright owner or the architect from obstructing the building owner from altering or destroying the building under any circumstances. Thus, the provision categorically denies the prevalence of any moral rights in the architect with respect to the building. In the absence of contrary stipulations in the contract, the architect is not empowered with any moral rights protection.[54] Thus, while one can notice a surge in the moral rights consciousness in United States with respect to other works protected under copyright law, architectural works have been denied this privileged treatment. There is absolutely no need for the building owner to show any reasonable circumstances in order to alter or demolish a building of which the architect is an author. Commentators have however been speculating whether the simultaneously passed Visual Artists Rights Act (VARA), 1990 that

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[53] Andrew S. Pollock, *The Architectural Works Copyright Protection Act: Anal ysis of Probable Ramifications and Arising Issues*, 70 Neb. L. Rev. (1991), htt ps://digitalcommons.unl.edu/nlr/vol70/iss4/5 (last visited: 21 June 2021)

[54] Supra n.54, pg no. 887-888.

protects the moral rights of visual arts would cover architectural works as well. While the majority believe it does not, there are some heartening speculations as well. They point out that architectural works have neither been included nor excluded from the definitional ambit of visual art. Perhaps, they point out, some buildings might qualify as visual art to be amenable to moral rights protection under VARA[55](but they have to pass a separability test). Section 604 of the Act extends protection to buildings from destruction by its owners if works of visual art is attached to the building. Thus, Pollock points out that 'an architect of an embellished building' *might* beget moral rights protection under the VARA.[56] Therefore, all buildings need not be treated uniformly rather buildings that are artistically endowed(embellished) have possibilities of being protected and treated differently. A sweeping generalisation in denying moral rights of integrity to all buildings is unfair and discriminatory to the architects. A distinction needs to be drawn between a building and an architectural work that should be accorded a stature different from any functional utility structures.

5. Public Right Vs. Owner's Right

This question was considered in an instructive article in 2005.[57] The author sought to identify the conditions in which right to destroy could be enforced or denied to the owner. Referring to *Playing Darts with a Rembrandt* by Joseph Sax, the author notes down preservation of cultural legacy as one of the reasons for the limited right to destroy. It is significant to note that from an absolutist right to property to a qualified right to destroy – the nature of powers of the owner over property has changed over a period of time in human

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[55] Supra n.54, pg no. 890

[56] Andrew S. Pollock, *The Architectural Works Copyright Protection Act: Analysis of Probable Ramifications and Arising Issues*, 70 Neb. L. Rev. (1991), https://digitalcommons.unl.edu/nlr/vol70/iss4/5 (last visited: 21 June 2021)

[57] Lior Strahilevitz, "The Right to Destroy," 114 *Yale Law Journal* 781 (2005) available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11029&context=journal_articles (last visited on 22nd June 2021)

history. The *jus abutendi*[58] that was recognised by Roman law was endorsed by the common law system as well.[59]John Locke in his classic work 'second Treatise of the government' questioned the prevalence of the right to destroy by relying on the notion of divine justice by stating that 'nothing was made by god for man to spoil or destroy'[60]. Tony Honore points out that the right to destroy is not unrestricted and is limited by requiring things to be conserved in public interest.[61] An art owner collector is a steward and has a legal obligation to preserve it with a responsibility to make or accessible to scholars' art lovers and members of the general public.[62] In other words, the notion of valuable cultural resource is brought to the fore, depriving future generations of a potential cultural resource can be considered as denial of *intergenerational justice.*[63]

Both arguments pro - destructive and anti-destructive need to be balanced and cannot overwhelm one another in an unqualified manner. Therefore, both schools of thought raise substantial concerns. While the learned author bats for individual autonomy, he fails to address the concern whether the same yardstick can be applied to state owned property. The need for extraordinary consensus or consultation required in case of state-owned property has not been addressed in the work. He agrees that both schools of thought raise substantial concerns.[64] He also points out that artist have a right to destroy their own works if they have not been published or publicly displayed[65]. It follows by means of inference that if it has been publicly displayed or published then a different set of restrictive norms should follow the intent of destruction. The

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[58] The right to abuse or destroy property by the owner

[59] Blackstonian commentaries

[60] Lior Strahilevitz, *The Right to Destroy*, 114 *Yale Law Journal* 781 (2005), pp.788-789

[61] *Id.* at p. 790

[62] Supra n.61, at p. 791

[63] Supra n.61 [Lior Strahilevitz]

[64] Lior Strahilevitz, *The Right to Destroy*, 114 *Yale Law Journal* 781 (2005), p. 853.

[65] *Id.* at p. 835.

article takes note of the developments in the United States after the initiation of VARA which protects artists who have created works of recognised stature.

6. A Nuanced approach from Supreme Court of Netherlands

A pronouncement from the courts in Netherlands signifies a more qualified approach. A finality to the ambiguity was brought about by the decision of the supreme court.[66] It is a more qualified approach to the issue rather than a categorial position extinguishing the vestige of any rights in the architect. The law clearly provides for moral rights to inhere in the architect but it is a conditional one. The courts must essentially go by the context of facts in each case and come to a surmise as to whether the change envisaged would lead to lowering of reputation to the architect's esteem. If it deleteriously affects the reputation of the artists stature then the changes cannot be carried out. The law clearly mirrors the sentiment of the Berne convention with respect to moral rights and emphasises on the need for appreciating the architects reasonable demand.[67] If the claim of the architect is not reasonable then the court will not accede to his request for intervention. In the instant case the architect was aggrieved about proposed changes to the building that he had designed. The court went by the functions test as well to find out whether the envisaged change would bring about a functional alteration in the building. The lower court was not impressed by the arguments in this regard and ruled that the architects demand was unreasonable and the impairment to the building would not cause any detriment to his reputation or name or dignity. The supreme court confirmed the lower courts findings and upheld the verdict. The fact that there was a functional change in the building through the proposed changes seemed to have impressed the Supreme Court

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[66] Roderick Chalmers Hoynck van Papendrecht, *Not all alterations of architectural works result in infringement of moral rights*, https://www.internationallawoffice.com/Newsletters/Litigation/Netherlands/AKD-The-Netherlands/Not-all-alterations-of-architectural-works-result-in-infringeme- nts-of-moral-rights#Intro (last visited: 24 March 2021)

[67] Berne Convention, 1886, Art. 6 bis (1)

and influenced the decision that the architects demand was unreasonable. However, it is noteworthy that the architect of the building is recognised, under the administrative procedure, as an important stakeholder in the process of change being planned for the building.

7. International Perspectives against Destruction

The sentiment for a right against destruction can also take heart from the international initiatives in this regard post the second world war. Two instruments are particularly significant in this regard, the 1954 Hague Convention on the Protection of Cultural Property and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Be it cultural property or individual art, the need to preserve cultural heritage is clearly symbolised in the pronouncements of international and national bodies and architectural works come within their purview. It is noteworthy that the Convention concerning the Protection of the World Cultural and Natural Heritage,1972 (UN Convention that India is a party to) defines world cultural heritage to include architectural works that are of outstanding universal value from the point of view of history, art or science.[68]

8. Conclusion

The question that the authorities and the courts need to ask is whether the recognition and application of moral rights serves a more utilitarian public purpose. Besides the aim of protecting the moral-integrity rights steeped in personality rights of the artist or the creator, the protection of cultural heritage is a desirable objective that ought to be realised.[69] The preservation of cultural heritage is one of the cherished ideals of a nation state that shapes its future. It is

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[68] World Heritage Convention, Art. 1 and Art. 4, https://whc.unesco.org /en/conventiontext/(last visited, 13th July 2021)

[69] Sarah Ann Smith, *New York Artists' Authorship Rights Act Increased Protection and Enhanced Status for Visual Artists*, 70 Cornell L. Rev. 158 (1984) Available at https://scholarship.law.cornell.edu/clr/vol70/iss1/7 (last visited 7 July 2021)

important to note that in doing so there is no imbalance between public and private interest by granting a qualified right against destruction to the architect. The judgement in *Raj Rewal* does not take these factors into account while taking away categorically the moral right against destruction. An attempt ought to be at harmonisation of interests, taking into consideration Art. 6 bis of the Berne Convention rather than an outright rejection of the right against destruction for architects in totality. Right to property is a constitutional right but it is not an absolute right and the state is not fettered in denying or restricting the right in reasonable circumstances. The emphasis to protect the cultural property is also part of the constitutional mandate. Art 49 of the constitution of India, that is the Directive Principles of State Policy, mandates on the state policy makers the need to protect every monument or place or object of artistic or historic interest, declared by or under law made by parliament to be of national importance from spoilation, disfigurement, destruction, removal, disposal or export as the case may be.[70] Further, the prescription of fundamental duties in Part IV A of the constitution of India says that it shall be the duty of every citizen of India to value and preserve the rich heritage of our composite culture.[71] Surely, architectural marvels, whether of the past or the present, ought to fall into these unavoidable exceptions rather than perish at the hands of market forces.

[70] Constitution of India, (1950), Art. 49

[71] INDIA CONST. Art. 51 A, cl.(f)