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Chief Justice
High Court of Delhi

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MESSAGE

"You can never be overdressed or overeducated."

-Oscar Wilde

The quote explains the importance of reading such a rich edition of legal journal. One can gain a lot without even realising it. Journals are an important source of knowledge and not just for law students but for advocates, judges and teaching fraternity as well.

Delhi Judicial Academy whilst publishing its Journal annually promotes exchange of new ideas, techniques and line of thinking developed by different distinguished people from the legal fraternity and even some times the students. This journal in my opinion is essential to carry to the readers the eminent researches made in the field of law and latest judgements delivered by the Superior Courts.

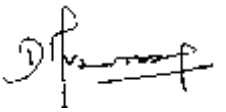
It gives me stupendous pleasure and gratification to place in the hands of the reader's this issue of journal published by the Delhi Judicial Academy under expert guidance and supervision of Prof. Dr. M.P. Singh.

The Journal encases in itself articles by various distinct legal personalities who by virtue of their vast experience and depth of knowledge in various fields have beautifully defined the essence and importance of their respective writings. Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court has explained the role of Apex Court in protection of child rights and also has laid down the correct approach the Magistrates must follow while dealing with cases involving child rights. The other article by Hon'ble Mr. Justice Fakkir Mohamed Ibrahim Kalifulla, Judge, Supreme Court has explained the emerging

trends in the field of taxation and how to go about them and also how the recent and other landmark Judgements affect litigation in the taxation field and also the effect of GDP. Other writers have also made excellent effort in their respective articles and notes respectively. Another article on mediation explains a student point of view towards the practice of court annexed mediation, by the article the writer proposes to understand and elaborate on the position of law relating to Section 89, Code of Civil Procedure at large and practice of mediation in India. The Delhi Judicial Academy by way of regular publication time and again paves an imperative and cardinal path on academics and has never failed to live up to the role of 'Academy' in its true and natural sense. Such publications are a boon for whosoever reads them and are always enlightening and educating. In my words such a journal is the building block of immense pool of knowledge and thus the society at large.

It has always been the endeavour of the DJA to adopt all possible methods for coming up with such a rich edition of annual journal.

I congratulate the editorial board and all those aforesaid and others whose names feature in this edition for the commendable effort and wish them all the luck and success in the future.



27.02.2013 (D. Murugesan)
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MESSAGE

"The mind is not a vessel to be filled, but a fire to be kindled."

-Plutarch

..... and the Delhi Judicial Academy aims to ignite the flame to passion within a Judicial Officer to learn and acquire skills to become an ideal Judicial Officer.

And as ***Swami Vivekananda*** said:

"Our duty is to encourage every one in his struggle to live up to his own highest idea, and strive at the same time to make the ideal as near as possible to the Truth".

Ever since the foundation of Delhi Judicial Academy its contribution in strengthening the Justice Delivery System/ Adujudicatory process by capacity building cannot be termed in string of words. DJA has been a fore-runner in continuous Judicial Education & Training Programmes. Its outstanding performance year after year has further raised the high expectations and faith in the Academy.

Activities of Delhi Judicial Academy are vast and expanding. While the Academy acts as a nursery for the newly inducted Judicial Officers through intensive Induction Training, it provides a platform to the serving Judicial Officers for continuously sharpening the core-judicial skills in application of law through intensive discussion, deliberation, dialogue, dissemination and exchange in order to effectively meet the emerging challenges and bring Consitutional Vision of Justice in the adjudicatory process.

In the year 2012, the Delhi Judicial Academy conducted 16 Refresher Courses for the serving Judicial Officers on various dimensions of law, 08 Courses for the Officers of Delhi Higher Judicial Service & 08 Courses for the officers of Delhi Judicial service. Besides Refresher Courses on *'Judging'* and *'Core-Judicial Skills'*, the Academy conducted 02 Orientation Courses on *'Towards Equality'*, which gave a unique exposure to the Judicial Officers to learn and equip themselves to deal with various kinds of prejudices, inequalities and biases in the society. An Orientation Course on *'Principles of Mediation, Importance of Role of Referral Judges and Case Management'* was conducted to enable the Judicial Officers to develop the skill for identification of suitable cases for Mediation. The Delhi Judicial Academy has been a pioneer in conceptualizing and organising a Colloquium and a Review Colloquium for the District Judges and Administrative Heads of other departments working in close coordination with the District Courts on the issues of Administration, Management and Governance related to District Courts. The Academy achieved yet another milestone in performance by successfully organising Judicial Colloquium on *'Human Trafficking'* in partnership with the Ministry of Home Affairs, Government of India. Orientation Course on *'Juvenile Justice'* was conducted for the entire cadre of Metropolitan Magistrates in 04 Batches. The Induction Training of a Branch of 36 newly recruited Officers of Delhi Judicial Services was successfully completed in February, 2012 besides an Orientation Programme for a Batch of 12 newly promoted Officers to Delhi Higher Judicial Service.

Recognizing the high standards achieved by the Academy, the High Court of Guwahati requested the Academy to develop, plan and conduct Judicial Education Programme for 5 Batches of Judicial Officers from the North Eastern States. A delegation from Bhutan had also visited the Academy to see its working.

In pursuit of excellence in the Judicial Education and Training Programmes, the Academy is constantly working to update its resources and experiments various methods of Judicial Education and Training, so that it leads to creation of a motivated task force.

Whether an institution contributes effectively and serves the purpose for which it exists, depends on the competence, dedication and hard work of the people who constitute it, and how they conduct themselves. I heartily appreciate, under the leadership of Prof. (Dr.) M.P. Singh, Chairperson, Delhi Judicial Academy the team work of the two wings of the Delhi Judicial Academy i.e. Academic and Administrative, for working in a mission mode exhibiting dynamic synergy to achieve the goals thereby taking the Academy to new heights and thus raising the bar of performance to greater heights. I take this opportunity to acknowledge and appreciate the performance of each one from this team. Ms. Santosh Snehi Mann, Director (Academics) has added thrust to the vision of the Academy through her futuristic and innovative approach. Mr. Gurdeep Singh, Director (Administration) has carried forward administrative initiatives for smooth functioning of the Academy. Ms. Aditi Choudhary, Addl. Director (Academics) has added to the strength of the Academy with her teaching experience. I would also like to acknowledge the contribution of Mr. Alok Aggarwal, the former Director (Administration) in dealing with administrative challenges.

I congratulate the Delhi Judicial Academy for bringing out its Yearly Journal for the year 2012.

I convey my best wishes and success to the Academy.

(Pradeep Nandrajog)

EDITORIAL

DJA Journal, the Journal of the Academy, has been, as it should be, an integral feature of the Academy from its inception. It has served as a vehicle of dissemination of information on the activities of the Academy, a forum for the judges and other law persons to express their views as well as a source of learning on issues covered in it. From time to time improvements and innovations have been made in the quality and contents of the Journal. In pursuance of that goal the Journal has remained dynamic and successively year after year its periodicity and character have changed.

In the background of such an evolutionary process of the Journal, for its 2012 edition the Academy decided that even if we fail to bring out more than one issue of the Journal its contents should be germane to the aims and objects of the Academy. As the sole aim and object of the Academy is imparting of education and training to the judges of the district courts or additionally to those who are involved in justicing such as special magistrates, or occasionally also NGOs engaged in promoting justice to different sections of the society, the Academy decided that the Journal should include materials that promote and assist judicial education and training necessary for the promotion of better adjudication and justice system.

Accordingly requests were sent to all the Hon'ble Judges of the Supreme Court, the High Court of Delhi and the District Courts in Delhi to contribute papers for the journal. Similar request was also made to the lawyers through their Bar Associations and also to some of the academics either through their institutions or personally. Unexpectedly not many papers were received. Even among the ones that were received several did not meet any of the above criteria. They were either too elementary to be of any educative value or repetitive of what has been said in a much better way more than once and is well known and well settled. Therefore, they could not be accommodated in the Journal. We hope the policy guidelines for the Journal are

appropriate and justified. However, they are open for improvement and any suggestions in this or any other regard are welcome.

I am of the view that any publication to be called journal must have a reasonable periodicity. It may not appear weekly like an eminent periodical such as EPW or any popular magazine, but it must appear more than once in a year – at least once in six months to begin with but setting a target of once in three months in due course. It should not be used as publicity material or medium but rather must concentrate on issues that would primarily ensure better administration of justice by our courts or promote overall justice through law or help or guide the Academy in optimising its performance. It is hoped that the Academy will continue to pursue that goal in the course of its onward march. The current issue is expected to be a beginning in that direction.

I hope whatever is published in this volume will be found useful by those whose interests the Academy is expected to serve. If it also serves a wider purpose so far so good. But in the interest of its growth I wish that those whose interests it is supposed to serve must take keen interest in improving its quality and periodicity through their contribution. I hope they will do so in future.

As the Academy is an organ of the High Court and works under its direction and guidance, on behalf of it I express my gratitude to its Patron in Chief, the Hon'ble Chief Justice of the Delhi High Court as well as to the Hon'ble Chairperson and Hon'ble Members of the Judicial Education and Practical Training Committee of the High Court. Special gratitude is expressed to the Hon'ble Chief Justice and the Hon'ble Chairprson for decorating the Journal with their messages of support and encouragement. Again, as I happen to write this note on behalf of all the faculty members, researchers and administrative staff of the Academy, I thank them all for ensuring the appearance of the Journal. The note is concluded with the fond hope of seeing a better and more frequent appearance of the Journal.

M.P. Singh

Child Rights - Understanding The Concept, Philosophy And Role of Courts in Protection of Child Rights*

*Justice Dipak Misra***

To most of us, the "rights of a child" as a concept and the philosophy behind the said concept may appear quite simple and an easy perception. It is because all of us have passed through childhood and come across children in a very familiar way in the close circle of the family, among relatives, friends and social acquaintances. That apart, one develops a feeling that if he or she gets acquainted with certain laws like the Juvenile Justice (Care & Protection of Children) Act, 2000, Child Rights Act, 2005, the law relating to pre-natal sex determination, child labour, and violence caused to a child in various spheres, etc., he has a thorough entry into the subject. Definitely acquainting oneself with the law is essential, but that apart, one has to understand how generations of thinkers, lawmakers, writers and philosophers have conceptualised the rights of a child, whether they are enacted by a statute or developed by natural process in a civilized society.

Almost two centuries back William Wordsworth the English poet laureate had stated, "Child is the father of man". Prior to him John Milton had remarked, "Child shows the man as morning shows the day". Emerson, a great American thinker, who has been responsible in imbibing a deep sense of optimism into the American psyche, had once stated that "when a child is born I see the growth of human race."

The Supreme Court of India in *M. C. Mehta* v. *State of Tamil Nadu*[1], while dealing with engagement of children in factories

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* Speech delivered on July 21, 2012 at the Delhi Judicial Academy.

** Judge, Supreme Court of India.

[1] AIR 1997 SC 699.

manufacturing hazardous substances, had commenced the judgment with a touching poem by Manie Gene Cole. It reads:

> "I am a child.
> All the world waits for my coming.
> All the earth watches with interest to see what I shall become.
> Civilization hangs in the balance,
> For what I am, the world of tomorrow will be.
> I am the child. You hold in your hand my destiny.
> You determine, largely, whether I shall succeed or fail,
> Give me, I pray you, these things that makes for happiness.
> Train me, I beg you, that I may be a blessing to the world".

Sitting in a time machine if we telescope the Indian tradition, it was believed that wellbeing of a child depended on *daya, dakshina, bhiksha, ahimsa, samya-bhawa, swadharma and tyaga*. The welfare of a child was also thought in different ways. Kautilya had stated:

> *"Lalayate Panchavarshani dasavarshani tadayate*
> *Praptesu sodasha varse,*
> *Putram Mitram Mibarachate"*

Yagnavalkya, one of the law givers, had laid down that when a child below sixteen commits an offence, he will be imposed one-fourth of the punishment meted to a major man. It is worthy to note that there were seven factors to be taken note of for imposing punishment and the principal factor was age.

With the passage of time the concept of welfare developed in child rights. The fifth decade of the last century witnessed the U. N. Declaration of Rights of the Child adopted by the U. N. General Assembly. This Declaration was also accepted by the Government of India. The rights perspective is primarily embodied in the United Nations Convention on the Rights of the Child, 1989. Founders of our Constitution in its framework made ample provisions for the protection, development and welfare of children. It had been stated in *Childline India Foundation* v. *Allan John Water*[2] in the following terms:

[1] (2011) 6 SCC 261.

"Children are the greatest gift to humanity. The sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent. There are special safeguards in the Constitution that apply specifically to children. The Constitution has envisaged a happy and healthy childhood for children, which is free from abuse and exploitation. Article 15(3) of the Constitution has provided the State with the power to make special provisions for women and children. Article 21A of the Constitution mandates that every child in India shall be entitled to free and compulsory education upto the age of 14 years. The word "life" in the context of Article 21 of the Constitution has been found to include "education" and accordingly this Court has implied that "right to education" is in fact a fundamental right.

Article 23 of the Constitution prohibits traffic in human beings, beggars and other similar forms of forced labour and exploitation. Although this Article does not specifically speak of children, yet it is applied to them and is more relevant in their context because children are the most vulnerable section of the society. It is a known fact that many children are exploited because of their poverty. They are deprived of education, made to do all sorts of work injurious to their health and personality. Article 24 expressly provides that no child below the age of 14 years shall be employed in work in any factory or mine or be engaged in any hazardous employment. This Court has issued elaborate guidelines on this issue.

The Directive Principles of State Policy embodied in the Constitution of India provides for the policy of protection of children with a self-imposing

direction towards securing the health and strength of workers, particularly, to see that the children of tender age are not abused, nor they are forced by economic necessity to enter into avocations unsuited to their strength.

Article 45 has provided that the State shall endeavour to provide early childhood care and education for all the children until they complete the age of fourteen years. This Directive Principle signifies that it is not only confined to primary education, but extends to free education whatever it may be upto the age of 14 years. Article 45 is supplementary to Article 24 on the ground that when the child is not to be employed before the age of 14 years, he is to be kept occupied in some educational institutions. It is suggested that Article 24 in turn supplements the clauses (e) and (f) of Article 39, thus ensuring distributive justice to children in the matter of education. Virtually, Article 45 recognizes the importance of dignity and personality of the child and directs the State to provide free and compulsory education for the children upto the age of 14 years."

With the efflux of time, range of laws came into existence that guarantees rights and entitlements of the children.

In 1959, the Declaration of the Rights of the Child was adopted by the General Assembly of the United Nations. Article 24 of the International Covenant on Civil and Political Rights, 1966 also provides for the rights of children. The importance of child rights has been appropriately recognized at the international forums and India is also a party to these International Charters having ratified the Declarations.

It is necessary to see the response of the Supreme Court towards children prior to enactment of the 2000 Act.

Juvenile and penology

In *Kakoo* v. *State of H.P.*[3] a boy of only 13 years of age had committed rape on a small child of two years. Reducing the sentence on humanitarian consideration, Justice Sarkaria observed that an inordinate long imprisonment term is sure to turn a juvenile delinquent into an obdurate criminal and emphasised that in case of child offenders, current penological trends command a more humanitarian approach.

Juvenile and jail

In *Hira Lal Malik* v. *State of Bihar*[4] Justice Krishna Iyer in relation to sentencing policy towards the juvenile delinquents observed that the family tie of the juvenile in jail must be kept alive and with this idea in view, he referred to the need for parole in such case.

Juvenile entitled to all safeguards

The Supreme Court in *Satto* v. *State of U.P.*[5], expressing its concern over the non enforcement of juvenile justice in U. P., observed that the Uttar Pradesh Children Act, appears to have been virtually given a go by in the courts below, a phenomenon which frequently happens because the practising lawyers and judicial officers have not yet given the deeper reflection that welfare oriented rehabilitative legislation of the mentally and morally retarded in the criminal justice field deserve. It also pronounced the right of child to all the procedural safeguards, which are available to an adult, in case he is to be detained.

Juvenile and free legal aid

In *Khatri* v. *State of Bihar*[6] Justice P. N. Bhagwati, on the right to free legal aid and the right to be defended by a legal practitioner had said that it is an obligation on the part of the Magistrates or the

[3] AIR 1976 SC 1991.
[4] AIR 1977 SC 2236.
[5] 1979 CrLJ 943.
[6] AIR 1981 SC 928.

Sessions Judge to inform if the accused is unable to engage the services of lawyers on account of poverty, he is entitled to obtain free legal services at the cost of the state. This imperative is also applicable to children as well. This order of the Supreme Court, in fact, speaks of the highly adorned concept of human right for the poor including the children so that they should not be deprived of justice.

Juvenile needs family life

In *Lakshmi Kant Pandey* v. *Union of India*[7] the Supreme Court observed that every child has the right to love and affection and of moral and mental security and this is possible if the child is brought up in the family and the inter-country adoptions should be permitted after exhausting the possibility of adoption within the county by Indian parents. The Court held that its primary object must be the welfare of the child and great care must be exercised in permitting the child to be given in adoption to the foreign parents.

In *Munna* v. *State of U.P.*[8], public interest litigation was filed against the sexual exploitation of the juvenile undertrials kept in Kanpur Jail by adult prisoners. The Supreme Court ordered that no child below 16 years of age be kept in jail, instead, he must be detained in a children's home or any other suitable place of safety as the law is very much concerned with ensuring that a juvenile does not come in contact with hardened criminals and his chances of reformation are not belied by contact with habitual offenders.

As is manifest the judge made law did not lag behind to see the child rights are protected. Justice Bhagwati in *Sheela Barse* v. *Union of India*[9]. has observed, "if a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality".

Again in *Sheela Barse* v. *Secy, Children's Aid Society*[10] emphasis

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[7] (1984) 2 SCC 244.
[8] AIR 1982 SC 806.
[9] AIR 1986 SC 1773.
[10] AIR 1987 SC 656.

was laid on the future of a child and the Court stated that today's children would be the leaders of tomorrow who would hold the country's banner high and maintain the prestige of the nation. If a child goes wrong for want of proper attention, training and guidance, it would indeed be a deficiency of the society and of the government of the day. A problem child is indeed a negative factor. Every society must, therefore, devote full attention to ensure that children are properly cared for and brought up in a proper atmosphere where they could receive adequate training, education and guidance in order that they may be able to have their rightful place in the society when they grow up.

In the case of *Gaurav Jain* v. *Union of India*[11], it was enunciated that children of the world are innocent, vulnerable and dependent. They are all curious, active and full of hope. Their life should be full of joy and peace, playing, learning and growing. Their future should be shaped in harmony and co-operation. Their childhood should mature, as they broaden their perspectives and gain new experience. Abandoning the children, excluding good foundation of life for them, is a crime against humanity. The children, cannot wait till tomorrow, they grow everyday, alongwith them grows their sense of awareness about the surroundings. Tomorrow is no answer, the goal of their present care, protection and rehabilitation is the need of the hour.

All these preliminaries have been spoken in various ways because there is a realisation that child is a creation of beauty and perfection and life fondly embraces a child as a symbol of pure conscience. Not for nothing it has been pronounced that where "child sleeps in peace there is my country."

I have referred to the aforesaid authorities only to show the function of the Apex Court with regard to the child rights and the welfare of the child. The concern led to growth of law and ultimately relevant legislation. Eventually a consolidated Act, namely, 2000 Act came into force.

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[11] AIR 1997 SC 3021.

Coming to the 2000 Act, it is to be borne in mind that the said enactment came into existence to consolidate and amend the laws relating to juvenile in conflict with law and children in need of care and protection by providing for proper care, protection and treatment by catering to their developed needs and by adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation. Emphasis has been laid on the needs of children to be met and their basic human rights fully protected. Child has been given a meaning in the Act. A "juvenile" and a "juvenile in conflict" with law have been defined. Every definition in Section 2 of the Act has to be carefully studied by every judicial officer who has to function under the Act and by anyone who has to deal with it at whatever level he is required to do so.

The legislative intendment of the said Act has been clearly stated in *Pratap Singh* v. *State of Jharkhand*[12] by the Constitution Bench wherein it has been expressed that the legislative intendment underlying Section 3 read with the Preamble, aims and objects of the Act is clearly discernible. A conjoint reading of the section, preamble, aims and objects of the Act leaves no manner of doubt that the Legislature intended to provide protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication thereof. The Supreme Court further expressed the view that the enactment is a piece of social legislation meant for protection of infants who commit criminal offences and therefore such provisions require to be liberally and meaningfully construed so as to advance the object of the Act.

Some of the important features of the 2000 Act were to provide a system in which a juvenile would be treated in such a manner as to give him/her an opportunity of reforming and rehabilitating himself/herself. The provisions of the Act were reform oriented and not punishment oriented. In fact, even the terminology used is such as to dispel any connection with the regular provisions of the Indian Penal Code. Accordingly, a child offender who had committed any

[12] 2005 CrLJ 3091.

offence punishable under any of the provisions of the Indian Penal Code is described under the Act as "a child in conflict with law." The procedure for apprehension of a child delinquent has been elaborately provided for in the Act with the provision for the formation of a special police force to deal with juveniles.

It is worth noting that the 2000 Act has many additional facets which were earlier not incorporated in the 1986 Act. The Juvenile Justice Board has been given immense power. The procedure requires immediacy and promptitude. The determination of age is an extremely significant factor because it brings a child below 18 years of age under the purview of the Act. The composition of the Juvenile Justice Board has immense signification. It has a Judicial Magistrate and two social workers one of whom at least shall be a woman. The Principal Magistrate of the Board has been conferred power to review pendency of cases before the Board. The said Principal Magistrate is required to have special knowledge or training in child psychology and child welfare. The State Government is under obligation to provide such training in child psychology. It is necessary because the Board has to perform a number of functions as provided under Rule 10 of Juvenile Justice (Care and Protection of Children) Rules, 2007. I am not going to enumerate the functions of the Board but need to focus on the duties cast and obligations imposed under the Act and the Rules. I would like to emphasize that the learned Magistrate is required to understand the situation in which a juvenile is coming in conflict with law, the legal nuance of the Act, a protected and careful attitude while dealing with the child produced before him or her and multiple factors, regard being had to the provisions contained in Sections 14 and 15 and Rules 15 and 17 of the Rules.

The basic fact that a Magistrate is required to understand is, how a child responds to emotions. I have made four compartments in this regard.

I. Comparatively a child is more emotionally responsive to a situation than an adult. It does not possess the strength and the ability to regulate, and adapt effectively to certain kinds of

treatment. The social context also plays a role.

II. A juvenile is hurt more than an adult and his emotional base gets a stir where there is a verbal or non-verbal assault by the parents, relatives, friends and teachers. It causes psychological injury.

III. A Magistrate in-charge of juvenile court has to have the skill in receiving the emotional message and even study the body language from that point of view.

IV. Cultivated empathy has to be part of the skill to nurture an insight, to be aware and understand the meaning and significance of the feelings, emotions and behaviour of a juvenile.

The empathy is visible in the recent decision in *Bachpan Bachao Andolan* v. *Union of India*[13] Be it noted, The National Commission for Protection of Child Rights (NCPCR) was set up in March 2007 under the Commission for Protection of Child Rights Act, 2005. The Commission's mandate is to ensure that all laws, policies, programmes and administrative mechanisms are in consonance with the Child Rights perspective as enshrined in the Constitution of India and the UN Convention on the Rights of the Child.

In conclusion, I would like to emphasise that the Magistrate presiding over the Board must have superlative concern with and innate sensitivity towards juveniles, so that the society at large can feel the fragrance of empathy.

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[13] (2011) 5 SCC 1.

Recent Trends In Taxation*

*Justice Fakkir Mohamed Ibrahim Kalifulla***

While speaking on the topic of Recent Trends in Taxation, I must say that I had the opportunity of sitting with a scholarly judge who was the then Chief Justice of the Madras High Court and later elevated to the Supreme Court, who is now holding a different assignment and is always in the lime light, who is none other than our Justice Markandey Katju. At that time when we were sitting together, he used to tell me that one day I should lead a Tax Bench in the Madras High Court and for that, I must equip myself with the basics of Tax Laws. I am referring to him only to mention that he has authored a book called "Interpretation of Taxing Statutes" published by Butterworths which is a concise book on the subject covering essential features as to how one should go about while interpreting taxing statutes.

To understand how a forum competent to interpret a taxing statute should interpret the law, can be gathered from what has been stated by Lord Cairns in *Partington* v. *Attorney General*[1]:

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind. On the other hand if the Court seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

Another English judge Justice Rowlatt in *Cape Brady Syndicate* v. *IRC*[2] observed:

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* Speech delivered at the Golden Jubilee Celebrations of the Revenue Bar Association , Chennai organized by the Shri V. Ramchandran Memorial Lecture Foundation on February 29,2012.

** Judge, Supreme Court of India.

[1] (1869) LR 4 HL 100.

[2] [(1921) 1 KB 64] *cited* in AIR 1968 SC 623.

"In a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used."

Our Supreme Court in *A.V. Fernandez* v. *The State of Kerala*[3] observed:

"If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the taxing statute no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

In a subsequent decision, the Supreme Court while affirming the said view also held that where two interpretations are possible, a view, which is favourable to the subject, should be preferred and held that :

"…. It is well settled that there is no equity about tax. If the provisions of a taxing statute are clear and unambiguous full effect must be given to them irrespective of any considerations of equity. Where however the provisions are couched in a language which is not free from ambiguity and admits of two interpretations, a view which is favourable to the subject should be adopted. The fact that such an interpretation is also in consonance with ordinary notions of equity and fairness would further fortify the court in adopting such a course."

Subsequently in *Commissioner of Wealth Tax* v. *Ellis Bridge Gymkhana.*[5], the Supreme Court held:

"The rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. No one can be taxed by implication. A charging section has to be construed strictly. If

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[3] AIR 1957 SC 657.
[4] AIR 1998 SC 120.

a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all."

By these statements of law, which are consistent right from the year 1869 till now, we are clear that equity has no role to play in the interpretation of taxing statutes. The provisions of taxing statutes are to be construed strictly as spelt out in the provisions and there is no question of purporsive interpretation. On the other hand, it is made clear that where two interpretations are possible, one which favours the assessee should be preferred.

It is also necessary to bear in mind that as far as constitutional validity of fiscal statutes is concerned, it is said that taxation has ceased to be regarded as an impertinent intrusion into the sacred rights of property. It is now increasingly regarded as a patent fiscal tool of State policy to strike the balance required between citizen's claim to enjoyment of his property on the one hand and the need for an equitable distribution of the burden of the community to sustain social services and purposes on the other.

The Hon`ble Supreme Court by setting out the above principle in the celebrated case of *Keshavji Ravji & Co.* v. *Commissioner of Income Tax*[5] held that in construing a taxing measure for determining its constitutional validity, the question of reasonableness cannot enter a judicial mind. The only consideration, which is germane, is whether the legislation challenged is permitted by the Constitution. Therefore, in order for the levy of tax to be valid, in the foremost, what is to be satisfied is the competency of the legislature in imposing it. Thereafter, to find out whether it is for a public purpose and finally whether it violates the Fundamental Rights guaranteed by Part III of the Constitution. In the process of interpretation, it is well settled that the taxing statute has to look at what is clearly said. There is no question of any intendment or equity about a tax. Nothing is to be read or implied. It is also well settled that if there are two possible constructions of the words of the statute, effect is to be given to the one

[5] AIR 1991 SC 1806.

that favours the citizen and not the one that imposes a burden on him. It is also well settled that words in a taxing statute should be construed in the same way in which they are understood in ordinary parlance in the area in which the law is in force.

If the revenue satisfies the court that the case falls strictly within the provision of the law, the subject can be taxed whereas if it is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to prove the intentions of the legislature and by considering what was the substance of the matter. No one can be taxed by implication. In a taxing statute, analogies play no part. The Court cannot imply anything, which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency. Considerations of equity, reason or justice have no place in a taxing statute, which must be construed only on the basis of the language used therein. Questions of hardship cannot justify the Court in departing from the plain provisions of the Act.

However, it will also be worthwhile to note the recent trend on this aspect as well. I will quote some decisions of the Supreme Court in the cases of *Commissioner of Customs (Imports), Mumbai* v. *Tullow India Operations Ltd.*[6] *ACC* v. *Commissioner of Customs*[7] and *Compack Pvt. Ltd.* v. *Commissioner of Central Excise, Vadodara*[8]. In these cases the Supreme Court has now recently seen to have carved out a situation to the extent that no interpretation should lead to absurd results. In the case of *Tullow India Operations Ltd.*[9] an importer was denied an exemption because he was not able to produce a certificate, which was necessary at the time of import. The certificate was, however, produced at a later stage. The assessee was denied the benefit incidental to the import made. The Supreme Court set aside the order of the Commissioner of Customs on the ground that it will lead to an absurd result, besides many other reasons. According to the Tribunal, the

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[6] (2005) 13 SCC 789.
[7] (2001) 4 SCC 593.
[8] 2005 (8) SCC 300.
[9] *Supra* note 6.

expression, '*at the time of importation*' literally meant at the time when the ship entered India. It was held that it will lead to an absurd situation since nobody could claim exemption at that time. The Tribunal extended the meaning of '*at the time of importation*' to '*at the time of clearance of goods*.' The said dictum was reiterated by the Supreme Court in the case of *ACC* v. *Commissioner of Customs*[10]. In that case the question was about valuation of a drawing and design. The Supreme Court observed that it would be absurd to value such articles or similar articles like paintings for the purpose of customs duty merely on the basis of the cost of the canvass or the cost of the oil paints. In another judgment, in *Commissioner of Central Excise* v. *Acer India Ltd.*[11] the Supreme Court observed in relation to the value of operating software that the principle of purposive construction should be adhered to when a literal meaning is absurd. In one of the latest judgments, in the case of *Compack Pvt. Ltd.* v. *Commissioner of Central Excise*[12], the Supreme Court observed in relation to availing of Modvat credit that if it was not written in a notification that the final product had to be made only or purely from certain inputs, the exemption cannot be denied because it has used other inputs as well. That sort of interpretation would create an absurd situation. It was also observed that notification had to be construed in terms of the language used, unless literal meaning led to an anomaly or absurdity and if there is no such absurdity in the literal interpretation, there is no need to go for the intention or the purpose of the notification. The conclusion is, therefore, that we have to first resort to literal interpretation of statute or expression. If that leads to an absurd result, we have to look for the intension or the purpose of the legislation so that the legislation itself does not become invalid.

In the recent decision of the Supreme Court in *Vodafone International Holdings BV* v. *Union of India.*[13] the principle has been reiterated to the following effect:

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[10] *Supra* note 7.
[11] (2004) 10 SCC 111.
[12] *Supra* note 8.
[13] (2012) 6 SCC 613.

"The question of providing "*look through*" in the statute or in the treaty is a matter of policy. It is to be expressly provided for in the statute or in the treaty. Similarly, *limitation of benefits* has to be expressly provided for in the treaty. Such clauses cannot be read into the section by interpretation. For the foregoing reasons, we hold that Section 9(1) (i) is not a "look through" provision."

As many as 12 doctrines have also been set out in the said judgment, namely, doctrine of *abus de droit* i.e. abuse of rights, doctrine of fiscal nullity, doctrine of limitation of benefits (LOB), doctrine of look at, doctrine of look through, doctrine of merger, doctrine of perspective investment, doctrine of preordained transactions, doctrine of separate entity, doctrine of substance to form, doctrine of true beneficial ownership or alter ego and doctrine of piercing the corporative veil.

Keeping this basic concept, on interpretation of taxing statutes in mind, while addressing on a fiscal statutes and its recent trends, I feel that we should also examine the development of the fiscal laws in this country and what is the scope of reforms, which is in contemplation for the years to come. If we trace the history of Income Tax in India, we can keep reminding ourselves of what Mark Twain has rightly said, "Only two things are certain in this life – death and taxes." In Kautilya's *Arthshastra* the complete details about how a King should collect and utilize tax was propounded. For the first time, income tax was introduced in the year 1860 when India was a colony of Great Britain. It is said that the Indian Income Tax Act, 1922 for the first time gave a specific nomenclature to various income tax authorities and laid the foundation for a proper system of tax administration. In independent India, till the year 1961, direct taxes were administered as per provisions of the Indian Income Tax Act, 1922, then came the Income Tax Act, 1961 which was the result of the recommendations by 'Income Tax Investigation Commission' headed by Sir Srinivasa Varadachariar in 1947 and also by 'Taxation Enquiry Commission' of 1953-54 constituted under Dr. John Matha and, thereafter, by famous economist Nicholas Kaldor and by the 'Direct Taxes Administration

Enquiry Committee' set up in June 1958 (Tyagi Committee). Post 1961, 'Committee for Rationalization and Simplification of Tax Structure' headed by Shri Bhoothalingham suggested measures for rationalization and simplification of personal income tax and corporation tax.

Another committee – 'Direct Taxes Enquiry Committee' was set up in 1971 under Shri Wanchoo. This Committee looked into the aspects of tax evasion and black money. This Committee identified factors like high tax rates, controls, licenses, and ineffective information system as major problems in India's direct tax system. It favoured more stringent measures like searches and seizures.

In 1972, a Committee headed by Shri K.N. Raj suggested a novel option to bring agricultural income under the income tax net, through integrated system of agricultural and non-agricultural income. It is said that this method of computation of tax on agricultural income is still being followed. The income tax rates in India were in its peak in 1973-74, the maximum marginal tax rates with surcharge was as high as 97.75 per cent.

The recommendations of Wanchoo Committee in 1971 brought down the marginal tax rates gradually to 50 per cent in 1985-86. It is also said that the foundation for the tax reforms came in 1991 when the economy was liberalized and the Indian companies were not able to compete with the multinationals by virtue of the tax reforms undertaken. It paved the way for increasing tax revenue to GDP (Gross Domestic Product) ratio not by increasing tax rates but by simplifying the tax structure by widening the tax base and by improving the tax administration.

It is always said that the Indian tax system is one of the most complex systems in the world. A Task Force was set up under the Chairmanship of Dr. Vijay Kelkar, the then Finance Secretary, to look into the aspects of streamlining the taxation system in India in the year 2002. The said Task Force identified four operational objectives relating to the direct tax code. Those were:

1) Institution of a simple and transparent system.
2) Reduction of transactions costs of tax revenue collection and compliance costs of taxpayers.
3) Alignment of incentives of taxpayers and the tax administration; and
4) Widening of the tax base.

Some of the measures suggested by the Task Force are:

(a) Use the mobile connectivity system to convey vital information by way of SMS to the tax payers.
(b) Educate through floppy diskettes through retail outlets
(c) by establishing taxpayers' clinic in different parts of the country to enable taxpayers to walk in for assistance.
(d) Better treatment of existing taxpayers to induce others to become taxpaying citizens.
(e) The department should provide easy access to taxpayers through Internet and e-mail and extend facilities such as tele-filing, tele-refunds etc., which have now come into existence.
(f) Income Tax Department should design special programmes for retired people, low-income taxpayers, who cannot afford expensive services of tax consultants.

The Task Force recommended that the requirement of quoting PAN may be expanded to cover very many financial transactions, which have now been brought into force. Thereby such requirement has to be fulfilled whenever sale or purchase of immovable property takes place, sale or purchase of motor vehicle, opening of bank account etc.

The introduction of Tax Information Net is another recent phenomenon, which has got three key sub-systems:

(a) Electronic Return Acceptance and Consolidation System
(b) Online Tax Accounting System
(c) Central PAN Ledger Generation System.

The TDS and TCS devices are another important measures for bringing those incomes to tax, which go unreported for tax purposes.

The TDS measure covered very many areas such as salary, interest on securities, dividends, winning from lotteries, horse race, payment of contractors, commissions, fees for professional services and payment of compensation on acquisition of land and so on and so forth.

The introduction of the concept of Annual Information Return known as AIR by way of insertion of Section 285 BA with Rule 114B for high value transaction was one another step taken to widen the scope of coverage of assessees and assessments.

The new procedure recommended by Task Force and implemented by the department are:

(a) One single challan for making payment of tax in the bank.
(b) Banks now issue a computerized receipt to the taxpayer instantaneously. The date of presentation of a cheque is treated as a date of payment.
(c) The requirement of enclosing a copy of the challan as evidence of tax payment has been done away with.
(d) The requirement to file TDS certificate along with the return of income has been dispensed with.

However, on the refund area, there is still lot of improvements to be made. May be it is due to the cumbersome process for issuing refunds.

The Task Force recommended the requirement of obtaining a task clearance certificate before leaving the country as an exception as against the practice of obliging everyone to comply with the procedure.

The personal income tax limits have been increased. Now, in 2009, a draft Bill of Direct Taxes Code Bill, 2010 was formulated. It will be worthwhile to quote what the then Finance Minister said on 6th July, 2009 in the Parliament while presenting the Union Budget of 2009-10. He said the tax reform is a process and not an event. He also referred to his promise to pursue structural changes in direct taxes by releasing the new Direct Tax Code within the next 45 days for public debate. In fulfillment of the said promise, the draft Direct Taxes Code

was released on 12th August, 2009. In the foreword to the said draft, he said that the thrust of the Code is to improve the efficiency and equity of our tax system by eliminating distortions in the tax structure, introducing moderate levels of taxation and expanding the tax base. He specifically mentioned that the attempt was to simplify the language to enable better comprehension and remove ambiguity to foster voluntary compliance. It was anticipated that eventually the new legislation will pave the way for a single unified taxpayer reporting system. He also invited members of the public to go through the draft and share their valuable suggestions. The expectation was to present the Bill in the winter session of 2009. The draft Bill was, however, conceptualized as the Direct Taxes Code, 2010, Bill No.110/2010 and presented in the Parliament in the year 2010 which is still pending.

I used to express to the members of the revenue bar and was amazed to see how they were able to assimilate the various provisions of the Income Tax Act, 1961 which has got as many as 298 sections with added sections such as 'A' to 'Z' or 'AA' to 'ZA' with so many explanations, provisos and fourteen schedules. Each schedule is a separate code by itself. Thereafter, each finance Act will have its own ramifications. I use to wonder how both Mr. Subramanium, representing the Department and Mr. Vijayaraghvan, representing the assessees, were able to correlate the various provisions with such exactitude while placing their submissions before us. It is no wonder that a fear complex will be created for one who looks at the provisions of Income Tax Act. But the Direct Taxes Code Bill, 2010 once passed in the Parliament, I am sure it will be a boon to every taxpayer as well as to those who are involved in this profession, dealing with tax laws.

A cursory glance of the Bill shows the provisions governing the scope of total income, computation of total income, determination of total income, the deductions permissible, maintenance of books of accounts, self tax assessments, general anti-avoidance rules, submissions of return of income, process of return and assessment, provisions for appeal to the High Court and to the Supreme Court, TDS procedure, refund provisions with specified interest rate, modes

of recovery, prosecution provisions, advance ruling and dispute resolution settlement commission.

Significantly, in the Direct Taxes Bill the definitions are set out almost at the end of the statute in clause 314 which contains not less than 208 definitions. Once the Direct Taxes Code becomes an Act then there will be a fusion of income tax and wealth tax together and consequent repeal of the Income Tax Act, 1961 and the Wealth Tax Act. The rates of income tax and the slab system have been specified in the First Schedule.

Having got a glimpse of the present attempt of the introduction of the Direct Taxes Code, I think as a student of law one can make an attempt as to how those, who are in this field look at the implication of the new legislation who have made a critical analysis of the above attempt.

While the introduction of DTC is in the anvil, there is widespread debate as to its implications on the one side and suggestions on the other side, which is a welcome step. Suggestions are manifold.

I came across a write-up on one particular aspect of generating more tax receipts by making an analysis based on data.

I wish to simply place it before this august audience the view point as I felt that the data furnished disclosed the ground reality and the said view point calls for a genuine consideration. At the end, by placing the said view point before the audience, having regard to the fact that the composition of this audience is of very high calibre, I feel that it can be left for your introspection on the subject so that the think tank can come out with more and more ideas on other fields as well which will enable the concerned authorities to deliberate upon those ideas and which will ultimately enable the law makers to come out with a comprehensive legislation on this subject.

The point of view projected was on the agricultural income in India today, which is not subject to tax.

Let me place before the audience a data in the forefront. It is stated that agriculture accounted for about 12.3% of GDP (Gross Domestic Product) in 2009-10. Its contribution to taxation is limited to the value added tax paid on some of the products and the agricultural income tax paid on few plantation crops like tea. A hypothetical question was posed as to how much additional revenue could have been mobilized in that sector, if agricultural income is to be treated on par with other incomes which is subject to income tax.

According to the information furnished, there is a potential revenue in the range of Rs.50,000 crores based on the data available in 2007-08, which is stated to be about 1.2% of GDP or about 9% of the GDP of agriculture.

It also suggests the consequential revenue for States to an extent of about 19%. It is common knowledge that exemptions generate incentives to under report taxable incomes. Such an approach is always sought to be justified by relying upon the principle avoidance is not evasion.

With that prelude, it was said that it is necessary to bring back the discussion to deal with taxation of agricultural income.

This was focused in the light of the fact that the Direct Tax Code having been proposed, the current legislation can be used to ensure that the base referred to within exemption of agricultural income is kept as narrow as possible instead of expanding it. The think tank, on this issue, in my view has a sound perspective.

It is common knowledge that as compared to the good olden days, agricultural operation is not small farmers struggle to meet the food security challenge of this country. There is increasing presence of commercial crops and commercial participants in this sector.

Therefore, the attempt is while examining the nature of agricultural operation, which was existing and the development that had taken place in that sector, the recent tax structure on agricultural income, the provisions in the proposed DTC covering this area what

could be the possible suggestions or options which can be opened up. To elaborate on this aspect, in the yester years agricultural operations in this country was concentrated more on production of foodgrains which were meant for self-consumption as well as for the market. It was said that the sector supported 65% of population for the livelihood.

In the past recent six decades, it is well known that there is a vast change in the crops cultivated, the improved method of cultivation, as well as, the involvement of various organisations in this sector.

The data reveals that the number of tractors per 100 sq. km. has increased from 50 in the late 1980s to about 200 by 2008 with a marginal increase in the total cropped area from 185 to 195 million hectares since 1990-91. However, it is stated that the share of foodgrains remained static around 122 to 125 million hectares.

Therefore, there must have been the increase in the area devoted to non-foodgrain crops such as fiber-yielding crops, like cotton, jute, oilseeds, spices and entire range of horticultural crops like fruits and vegetables and in the recent times, floricultural crops has also assumed greater significance.

The statistics revealed that the returns of cultivation of non-foodgrains are significantly higher than those from cultivation of traditional foodgrains.

The share of cereals stated to have declined over the years paving the way for production of fruits and vegetables. According to the information, the share of cereals stated to have declined to almost 30% from over 45% while the share of fruits and vegetables has increased from 15% in 1970s to 25% in the recent times. It included floriculture crops as well.

The ultimate outcome of these figures only shows that in terms of the value of output there is larger share of agricultural output responding to the market demand simultaneously resulting in diversification and high value generation in this sector.

Another important factor, which was projected, was the involvement of corporate sector in this field. It is a known factor that, having regard to the tax benefits available, there is inducement for the corporate sector to report agricultural income for their benefits. Though, it cannot be said that such involvement is in a wider range, the figures disclose that with over 50 companies reporting agricultural incomes of over Rs.100 crores which amounted to Rs.31,313 crores in 2009-10. They were not companies who were specialized in the agricultural products alone.

As a matter of fact, it was said that their agricultural products were only a small fraction of the total sales.

What all it showed was that there is noticeable presence of the corporate sector in agricultural sector.

The ultimate outcome is that the agricultural sector is no longer a farmers' paradise, it has now opened-up the scope for big wigs to thrust into this field in order to avail the maximum tax benefits, while simultaneously improving their financial base.

The nature of involvement, if noticed, disclose that it is either by way of propagation of contract forming or of own production. The intervention of the corporate sector into agriculture is either by providing technical inputs into cultivation and thereby improving the quality and quantity of the crop produced or by providing some form of support in the price factor or in the market set up.

This being the present scenario, when we examine the present system of taxation on agricultural income, there is a major exemption factor operating.

Entry No.82 of the Union List of the Seventh Schedule empowers the Parliament to make laws with respect to taxes on income other than agricultural income. Article 246(3) read with Entry 46 in List II, State List of the Seventh Schedule, empowers exclusively the State legislature to make laws relating to tax on agricultural income.

As per Section 10(1A) of the Income Tax Act, there is exclusion of agricultural income in the computation of total income. This was the position even in the Government of India Act, 1935 and the Income Tax Act, 1922.

The earliest case on this subject was the decision of the Supreme Court in the case of *Commissioner of Income Tax* v. *Benoy Kumar Sahas Roy*[14] wherein it was held that "the primary sense in which the term agriculture is understood is the cultivation of the field and in that sense relates to basic operations like tilling of the land, sowing of the seeds and planting and similar operations on the land. These basic operations require expenditure in terms of human labour and skill upon the land itself." The other allied activities noted were though not basic in nature but were performed after the produce sprouts from the land such as weeding, digging of the soil around the growth, preservation against insects and pests, tending, pruning, cutting, harvesting, etc., or rendering the produce fit to be taken to the market. It was said that those allied operations must necessarily to be held in conjunction with and in continuation of the basic operations. It was held that the nature of the produce raised is not only relevant factor and the products could be either vegetables or fruits necessary for human consumption and even pastures given for cattle and items like betel nut, coffee, tea, spices or tobacco for the growth of commercial crops.

All subsequent decisions have been rendered in the touchstone of the test as laid down in the said judgment. In the 1970 Amendment, agricultural income in the Income Tax Act provided for further expansion which said "any rent or revenue derived from land which is used for agricultural purposes to form part of agricultural income". The basic requirement was assessment to land revenue which was the condition precedent before the income could be categorized as agricultural income. The Allahabad High Court in the case of *Smt. Anand Bala Bhushan* v. *CIT*[15] held that where the land in question was

[14] 32 ITR 466 (SC).
[15] 217 ITR 144 (Allahabad).

not assessed to land revenue and it was situated within the jurisdiction of the municipality, it was held that the income derived from such land could not be treated as agricultural income and sale of lychee fruits and the income derived therefrom was not exempted from taxes.

There was Taxation Laws (Amendment) Act, 1970 by which the definition of agricultural income was amended so as to drop the condition that the land from which income is derived should be assessed to land revenue or any local rate.

Further concession was shown by including income attributable to farm buildings, which is required by farmers for residence, storage or grains and such other purposes also to be included as agricultural income. However, it was made clear that where the land was not subject to land revenue, the farmhouse should be situated outside urban areas to enjoy the benefit of the exemption. This again was in the Amendment Act of 1970.

There were certain other amendments in the years 1970, 1973, 1989 and 2000 dealing with agricultural income. By bringing out certain provisions by which restrictions came to be imposed in availing the tax benefits under the caption agricultural income in the area of capital gains and buildings owned by the cultivator.

While the statutory provision remained such, when we examine the taxation on agricultural income, the figures show in terms of revenue restriction from agricultural income tax as a percentage of Gross State Domestic Product (GSDP) none of the States were able to mobilize even 0.5% from this source. The maximum revenue mobilized was by State of Assam which was 0.3% in one of the five years in 2009-10. In the matter of rupees, it revealed that the revenue collections varied between Rs.8 crores for Karnataka and West Bengal and Rs.78 crores in the case of Assam for the year 2009-10.

When we examine the composition of agricultural operations which has undergone a massive change in India, there are nurseries and pot cultivation, tissue culture, seed generation and contract farming.

In the case of *Jugal Kishore Arora* v. *Deputy Commissioner of Income Tax*[16] the assessing officer found that the assessee was maintaining a nursery at his residence. He took the view that the nursery was run as a business quite independently of agriculture. He, therefore, held that it cannot be stated to be a primary agricultural operation in the sense of cultivation of the soil. He took note of the fact that the plants were grown in earthen pots which were placed on concrete structure in the terrace or in the house and most of the plants were kept in polythene bags and no use of land was found. He, therefore, held that no agricultural process was involved. The Tribunal held that the Assessing Officer should bring on record the whole nature of operations, namely, primary as well as secondary on the specific land area, and thereafter, apply the law laid down. The said view of the Tribunal was upheld by the High Court by holding that mere performing of the secondary operation will not make the assessee's activity an agricultural activity. The said view was upheld by the High Court.

However, through the Finance Act, 2008, an explanation was added to the definition of agricultural income to the effect that any income derived from saplings or seedlings grown in a nursery shall be deemed to be an agricultural income. By virtue of the said addition, irrespective of whether the basic operations have been carried out on land, such income was treated as agricultural income, qualifying for exemption under sub-section (1) of Section 10 of the Act.

In tissue culture, a taxpayer in the business of growing and exporting of ornamental plants claimed for income as exempted from tax. The Assessing Officer, who visited the premises, came to the conclusion that the taxpayer was carrying on tissue culture methodology and some of the activities were non-agricultural. Therefore, he bifurcated the income. The Tribunal held that the plant tissue culture is used to reproduce clones of a plant with the same traits by placing various tissues of the mother plant and containers and required medium, which is definitely not land or soil, and, therefore,

[16] 269 ITR 133.

such operation cannot be called as agricultural operation.

In the recent year, there are cases on seed companies which employ modern methods of generation and propagation of seeds. They again claimed exemption, which was turned down.

In one case of contract farming, the assessee declared income generated from the sale of hybrid seeds on land taken for contract farming as agricultural income. The land was owned by the farmer who agreed to cultivate the hybrid seeds specified by the assessee. He also undertook to observe all the conditions regarding cultivation. The company agreed to pay him compensation per quintal. The Karnataka High Court in the case of *Commissioner of Income Tax* v. *M/s. Nandhari Seeds Pvt. Ltd.*[17], however, held that such input or scientific method in giving advice to the farmer cannot be termed as either basic agricultural operation or subsequent operations ordinarily employed by the farmer or agriculturist.

Keeping the above scenario prevalent in regard to the treatment of agricultural income, when we see the changes proposed under DTC, it is suggested that, when a new beginning was being made in the DTC, there is a possibility to make intelligent use of the leeway given by the judiciary and bring in the provisions which would restrict the scope of agricultural income particularly in areas like hybrid seeds, where the market is immense and scope of profits large. With that perspective, it was analyzed and the implications of DTC provisions were analytically examined.

The provision reads "any profits and gains derived from cultivation of agricultural land". The people in the field feel that the language now employed is completely different and is capable of encompassing within its fold all incomes which might be derived from the cultivation of the land as compared to the scope of exemption limited to (a) the rent of agricultural land, (b) the income derived from such land by agriculture and (c) Income from farmhouses.

[17] ITA Nos. 513 & 514/Bang/2011, DOD 27.02.2012.

It should not be taken to mean that I am attempting to suggest that there should be a restricted meaning. The think tank only highlights in the light of the development in the field of agriculture, which has taken place over the past six decades after post independence, should there be or not a higher level of restrictions in the grant of exemption relating to agricultural income.

It is again said that it is possible to argue that any income from any farmhouse whether rural or urban, whether used for the purpose of renting out for marriage party or not, may be considered as agricultural income. In the DTC, there is proposal providing specific exemption from the income derived from saplings or seedlings grown in a nursery which was introduced in the Finance Act, 2008 and is carried over in the DTC.

I have only referred to one area of discussion where the scope of improving the revenue base, having regard to the data available, requires serious deliberations.

Earlier at the commencement of my speech I mentioned that the professionals in the field of taxation, both chartered accountants and Tax Law practitioners, have to play a significant role in the improvement of the economic structure of this country. I said so, having regard to their participation and involvement in the industrial and other sectors in so far as it related to money matters and, therefore, there is greater scope for the said segment of professionals to contribute their ideas effectively which would provide scope for significant improvement in the economic structure of the country. It is common knowledge that the taxpayers and in particular those whose contribution by way of tax payment is on the higher side have to necessarily seek the succor of the auditors and tax law practitioners. Having regard to the complex nature of tax laws, it is next to impossible for any taxpayer to work out his tax planning more effectively than with the assistance of chartered accountants and Tax Law practitioners. Since, they are in constant touch and have a thorough knowledge about the various provisions of the Direct Tax Laws/Fiscal Laws and its implications, vis-à-vis their clients, they will

be in a position to suggest the best possible means by which the income of the State could be augmented well without compromising on the interest of their clients.

All, I wish to point out and make an earnest request to the chartered accountants and Tax Law practitioners is that, by making best use of their vast experience in the field of Taxation *vis-à-vis* the available potential, make every effort, by exploring the ways and means in improving the tax structure in the country and consequent earnings of the State. At the same time, protect the best interest of the taxpayers in the matter of collection of such improved method of taxation and tax payment. Since, the existing institutions consist of members of the chartered accountants, where they can examine the pros and cons of the existing tax structure and the improvements, suggestions can be made in regard to the Direct Tax Code which is in the anvil, I am confident that, if an earnest effort is made there will be every scope for achieving best results in the field of taxation. Since, along with those institutions, comprised of the members of the chartered accountants and the members of the Bar, having their own associations wherever the need for appraisal of the legal principles are needed in the framing of the statute vis-à-vis the constitutional implications, a coordinated effort can be made by both the groups to achieve the above objective. In this context, the thinking of one person for widening the scope of tax revenue by eliminating the wasteful exercise or hidden hurdles in the field of Agricultural Income Tax needs to be focused by all those who are actively involved in the field of taxation and come out with their valuable suggestions.

It is for the persons, in the helm of affairs, to consider the scope of putting into use the vast track of unused State lands, which can be entrusted with the corporate sector in the form of investment by the States. Agreeing for development of such vast extent of lands by way of large scale farming which would provide scope for solving unemployment problem, increase in productivity in the farming sector of diverse products, consequential development of housing, medical facilities, improvement of education and consequential

decongestions concentrated in the urban areas. By way of incentive, to attract more and wider participation to consider whether partial exemption on payment of tax can be extended. Having regard to the extent and scope of improved farming operation, in that way the scope of generation of higher revenue earning can be achieved. I had the benefit of reading some materials on this aspect. This is only an attempt to know how the new legislation is going to have its effect. The salient features of DTC Bill, 2010 concerning Income Tax for individuals can be summed up as under:

- The provisions drafted enable a common man to understand the scope and purport of the provisions
- One single legislation covering the entire direct tax liability
- The substantive provisions prescribes the general principles and the details and the working out of the legislation in the Rules and Schedules
- Endeavour to reduce the scope of litigation by streamlining the provisions
- The core of the statute in the definitions, incentives, procedures and rates of tax have been couched in such a way for the better understanding of the legislation consistent with the general scheme of the Act. By withdrawing the regulatory function the substantial leeway has been created.
- Prescription of rate of taxes in the schedule would enable a stable structure in stead of the same becoming an annual feature.
- Tax saving investment base has been widened. Substantial benefits have been provided for senior citizens and very senior citizens. Exclusion of certain components under the head salary subject to certain limitations will have larger benefits. Pre requisite value of rent free accommodation not to be made on market value. Restoration of HRA exemption without requirement of computation. The revised proposal has made it clear that tax incentives on housing loans will continue and payment of interest on housing loan up to 1.5 lakh remains.
- Abolition of notional value of rent from house property and in

its place only actual rent to be taxed as another special feature. Rate of received arrears to be included in the year of receipt whether the person is owner of the property at the time of receipt of the property or not is another feature. Income under the head capital gains will be considered as income from ordinary source in respect of all tax payers including non-residents. Limit for tax audits for professional tax to be increased from 15 lakh to 25 lakh and for business from 60 lakh to 1 crore. Surcharge in education cess to be abolished.

Though, there are more areas to be covered on the recent trend in taxation, I feel that such discussion on this topic can be made in a day long conference or seminar where experts in this field can come out with better ideas.

I thank the Trustees of Late Shri V. Ramachandran Memorial Trust and the Revenue Bar of Madras for having given me this opportunity.

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Towards Understanding Judicial Education

*Upendra Baxi**

Introductory remarks

The publication of a journal is always an exciting event; the Delhi Judicial Academy's venture and in particular Chairperson Professor (Dr.) M.P Singh deserve warmest felicitations for marking some new beginnings of conversation between our justices and the communities of the judged.

Judicial education has been on the Indian policy agendum since long it was imagined by the 14th Indian Law Commission as early as 1958 and specifically programatized by 117th Law Commission Report in 1987[1]. In this sense, concern with 'judicial education' is not new; what is distinctive today is its full scale institutionalization with near-adequate resources. There was a time when only a few state judicial academies (often called 'staff colleges') were fully functional; today, we have a fully-fledged National Judicial Academy at Bhopal, and a wide array of State academies offering programmes of both pre-service and in-service judicial training. This itself suggests that judicial education is being at last being taken seriously in India—a happy portent for the future of democratic judicature in India.

To say this is not, of course to ignore some splendid efforts in this direction variously sited at the Sardar Ballabhbhai Patel National Police Academy, the Lal Bahadur Sastri National Academy of Administration, the Indian Institute of Public Administration, the National Institute of Criminology and Forensic Sciences, the National

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[1] I had the privilege to assist Justice D.A. Desai in the writing of this Report, especially as regards the curriculum and pedagogy of judicial education.

Labour Institute, the Bureau of Police Research and Development, and the National Institute of Social Defence. My own engagement with these varied programmes of judicial learning suggests a distinctive vantage point: these institutions put dialogically together district justices, prosecutors, senior police officials, voices from civil society, and academic experts. How far the current phase of judicial academies fashion such communities of co-learning remains a crucial question.

In what follows I offer a few general provocations concerning the current practices of judicial education. Fortunately, now at hand remains Dr. Geeta Oberoi's *Developing the Judicial Education Discourse*.[2] She indicates reasons why conceptualizing and delivering judicial education in India is no easy task. In what follows, I further reinforce her call for a call towards a better understanding of knowledge/power relationships entailed in the current wave of institutionalizing Indian Judicial Academies.

Education in the obvious

It is a well-known fact that the best and the brightest of Indian justices flourished in the absence of judicial education programmes; indeed, only a few were even exposed to high standards of legal education. This fact carries a simple message: they learnt the art and craft of justicing in the school of experience; even today there is no substitute for this.

However, judicial education is necessary because 'education', in all walks of life, at least implies two additional virtues: the virtue of critical introspection and of social reflection. The school of experience does not necessarily provide sites for the development of these two virtues. I may not elaborate here reasons why save saying two 'things': the Indian justices are far too overworked to avail opportunities for developing the arts of introspection and far too overridden by judicial hierarchies of power to afford social reflection, both on and off the Bench:

[2] Dr. Geeta Oberoi, *Developing the Judicial Education Discourse* (Thomson Reuters, New Delhi, 2013). I here develop further some of the themes indicated in my Foreword to this volume.

This must surely invite attention to a great *doha* from Kabir:

Kabira Dheeraj Ke Dhare
Haathi Man Bhar Khaaye
Tuk Tuk Bekar Me
Svan Ghare Ghar Jaaye

Roughly translated this means: As the elephant has patience, it eats till its mind is satisfied; in contrast the impatient dog runs here and there in the hope of food!

As a protagonist of the human rights of non-human animal persons, I do note read Kabir as elevating an 'elephant' over 'dog'! Rather, we learn about two styles of consciousness: patient and restless. We need to educate our justices to patient modes of self- introspection while also encouraging the impatience of social reflection. Both in the long run will beneficially change our practices of adjudication. Introspection will birth new ways of '*producing*' *justice*' in an intensely unequal society; social reflection will deliver responsive innovation in *administering 'justice'*

In this way, judicial education, worth the dignity of this name, assumes a decisive edge when it provides auspices for social reflection. By 'social' I here signify practices of forming *communities of co-learning*; by 'reflection' I mean processes that raise some basic question of individual and collective responsibility towards the worst-off, deeply bruised, and wounded Indian citizenry as contemplated by Part-IV--and now Part IV-A of the Indian Constitution. Allow me subject to what gets said further in this conversation, to remind ourselves of a remarkable observation of Justice Oliver Wendell Holmes, Jr., that what we all need is '*education in the obvious*'.

The law often speaks of the 'obvious'—for example, Section 56 of the Indian Evidence Act prescribes that 'no fact of which the court will take judicial notice need to be proved', and Section 148 (as well as section 152) of the same Act place an obligation on the presiding judicial officers to ensure that no improper examination of witnesses may occur.

Turning first to the doctrine of judicial notice (nearly 800 years-plus common law rule of evidence)[3], why it should be necessary for the Verma Commission as late as in 2013 to recommend, for example, some changes relating to testimony of the persons living with disability? We all know, or should know, that the Evidence Act constitutes no more than a charter of judicial discretion. When I began 'teaching' the Evidence Act in Delhi Law School, my first lecture began with a prefatory observation of an English Judge (to an early 20th century CE introduction to the great treatise on the subject by Munir) that the Act may be summarized as follows: *There is only one rule of evidence and it says that there are no rules of evidence*! To make a general point, education means seeing what is *before, in front of us and rendering it also more socially visible*

Even granting that the 'obvious' has been rendered variously technically into 'non-obvious', we may still profit from the landmark Australian High Court enunciation in *Holland* v. *Jones*:

> [W]herever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the court 'notices' it, either simpliciter if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt.[4]

Dixon J, in the *Communist Party Case* further enunciated the doctrine of judicial notice as follows:

> Where judicial notice is taken without inquiry, the fact noticed must be "open and notorious". Where judicial notice is taken after inquiry, the inquiry must be into the "common knowledge of educated men" as revealed in "accepted writings", "standard works" and "serious studies and inquiries.[5]

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[3] See, James Bradley Thayer, "Judicial Notice and the Law of Evidence" 3 *Harvard Law Review* 285 (1890).

[4] *Holland* v. *Jones,* (1917) 23 CLR 149, 153.

[5] *Australian Communist* Party v. *Commonwealth,* (1951) 83 CLR 1, 196. See further as to this, Paul Burgess, "The Application of the Doctrine of Judicial Notice to Online Sources", *Queensland Law Student Review* 3:1 (2010).

How often re-education in the obvious' occurs in India is a question best left for judicial education academies curricular/pedagogic practices.

Moving beyond the perplexities of taking judicial notice, it is obvious that a lack of control by the Bench over undignified and hostile acts of cross-examination is neither sanctioned by our laws or the Constitution. It is obvious that a right to speedy trial as an integral part of a new due process Article 21 regime entails that our justices, at all levels, have failed to provide a time-bound schedule of heinous crimes against women and the girl child (not to speak of enormous violence practised against sexual minorities. Colonial and antiquated practices such as two finger test in rape cases continue to be judicially endorsed. All too often 'lecherous' courtroom talk continues reflecting, perhaps in part, the societal tolerance of adjudicatory rape cultures.[6] Further, all this again *very* obviously remains at odds with the duties of our judges as citizens (under Article 51-A) to renounce practices derogatory of the dignity of women.

In the wake of the national response to the tragic incident of Delhi gangrape, the selfsame communities of justicing now rightly stresses the importance of expeditious trials consistent with due process and practice their sentencing discretion with maximal solicitude for the violated women and girl chid. The previously existing not-so-obvious now manifests itself as overwhelmingly 'obvious'. Put another way, the responsiveness of our judiciary has dramatically increased resulting in the displacement of the old judicial commonsense by a new judicial commonsense.

If so, the question is: How far the pedagogy of judicial education may help further the consolidation of this new commonsense combating the artificial reason of law that otherwise results in the sustenance of unconstitutional forms of patriarchal biases in our ways of justicing?

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[6] See as concerns all this, Pratiksha Baxi, *Law as a Public Secret: Rape Trials in Gujarat* (In Press, Delhi, Oxford University Press, 2013).

Beyond judicial 'training'?

'Training' --in the sense of provision of skills and competence-- is an indispensable ingredient of all 'education'. It would be a mistake to neglect this dimension in offering judicial' education'; yet, it would also be an egregious error to conflate *training* with *education*.

The tasks of training as directed at imparting varied endowments sets of basic competencies and skills range widely. I lack, sadly, the competence to speak to ways in which such 'training' may actually address an invisible dimension of the day to day management of court bureaucracies beyond saying that this surely calls for sensibility ('human touch') in human relationships between justices and their staff. Indian judicial academies may, incidentally, serve their constitutional purpose well by empirically informed how the *Vishakha* guidelines concerning sexual harassment (the inhumane and also unconstitutional 'touch') have been actually implemented across Indian judiciary and the Indian Bar.

The more visible dimension remains presented to everyday courtroom management. Unfortunately, docket management skills and competences always stand in the shadow of the rather asymmetrical Bench-Bar relationship. How may judicial training and education address progressive elimination of these constitutional justice-unfriendly asymmetries?

Popular demands for judicial accountability in the administration of criminal justice now register a high growth curve. How may judicial training proceed to endow our justices and courts with skills and competence to respond to such demands consistent with due regard for the dignity of the justicing profession? These sorts of questions invite many experiments in thought, perhaps, best pursued by Indian judicial academies given the stark fact that our representative institutions continue to suffer from lack of quality time to address these concerns.

One, among many pertinent questions, relates to new judicial education ways of preparing the State annual reports concerning

administration of justice. The current practice is that the district judiciary drafts these reports whetted, and often vetoed, by the High Courts, and at times further by the State and Union Law Ministries. This surely must now change in view of the fact that increasingly the voices of disgruntled and wounded citizenry now demand a more responsive social audit of judicial performance. At the very least, judicial education should now impart skills and competence for drafting these reports informing the public at least about the administration of criminal justice system including frank, full, and free statements regarding judicial arrears, conviction rates, bail and sentencing policy, and delay in the appointment of judges. Absent such an innovation, our conscientious judges will remain unfairly exposed to some strident even hawkish, manipulation of public opinion accentuated by celebrated TV anchors, not to speak of the practitioners of opportunistic competitive party political practices.

Conceiving judicial education primarily as training necessarily leads to training *of* the judges *by* incumbent judges. Senior or upper echelon justices, no doubt, have a role to play in transmitting their life-experiences in adjudication to fresh recruits and in programmes of in-service judicial education. Yet, unless these judges are further exposed to judicial education pedagogies, they may continue pontificating from high up above in ways deeply inimical to 'training' and indeed *fatal* to judicial education. The rarest of the rare exceptions here prove the rule!

Further, emphasis primarily on judicial training leads to a perplexing result: Indian judicial academies are *academies without academics!* To be sure senior law academics who adorn the Chair of judicial academies strive to make an excellent contribution. Even so, more is needed than the present practice of regarding academicians as guest artists in an orchestration conducted and compeered by justices.

That 'more' consists surely in elimination of the well-entrenched bias against law teachers and researchers in our adjudicatory cultures. It is true that law teachers may not have access to the everyday workings of court- craft or procedural aspects of

administration of justice. But it must also be recognized that the labours of generations of law teachers and researches have ensured a steady supply of qualified law graduates eligible to practice law, many of whom become judges; equally crucially, scholarly research and writing has contributed a good deal than is recognized in transforming the landscapes of democratic Indian justicing. Without an appropriate recognition of such contributions, judicial *education* may be unfortunately subjected to an early amniocentesis!

Moving on, judicial education worth the dignity of that name entails more than judicial training. Skills and competencies enabling judges to perform their tasks with greater efficiency is of course an important aspect of judicial education; yet '*efficiency*' is a virtue that ought to be related to the virtue of *justice.* Judging may be rendered efficient as perfecting arts of adjudication towards the means and ends of Holoucastian practices of politics. Several Indian wounded citizens constitute communities of hurt, harm and danger such as the Bhopal catastrophe violated, the violated of 1984 Sikh massacre and of Gujarat, 2002 and much beyond.

Far from making any crass political statement, this observation is intended to suggest that while efficiency in adjudication is *necessary*, it is not a *sufficient* condition for constitutional justicing. This sort of realization may never fully occur in a zodiac which unfortunately still suggests that the district judiciary's mission is to apply the law, reserving the task of constitutional interpretation to their upper-echelon Brethren. In an era that marks of the fall of the Berlin Wall, our district level justices can, and ought to do, much better by redefining their role and function in the administration of justice.

An ounce of judicial sensitivity

Let us recall the fact that in the wake of an Open Letter to the Chief Justice of India concerning the *Mathura Case*[7], Justice Krishna Iyer remarked from the High Bench that an 'ounce' of judicial

[7] See, Upendra Baxi, Vasudha Dhagamwar, Ragunath Kelkar, and Lotika Sarkar, " An Open Letter to the Chief Justice of India," (1979) 4 *SCC (Jour)* 17.

sensitivity and sensibility is worth 'tons' of 'law' reform. How may our ways of imparting judicial education ever fully result in the producing this precious 'ounce'?

Surely, belonging to a learned judicial profession implies a quotient of certified learning: the question here goes deeper: *how far*, *when*, how *much*, and from *whom* the upper echelon justices may *learn/unlearn* from the *non-judicial* others? This question is not as esoteric as it may appear at the first sight; indeed, there is sufficient evidence that most justices do imbibe such learning: how else may one grasp the rise and spread of social action litigation (SAL), still miscalled public interest litigation (PIL)?

Yet, vast disagreements also persist. In the Indian contexts, Justice Krishna Iyer was moved to contrast 'populist activists' justices from others merely designated as the 'shopkeepers of legal justice.'[8] I do not know whether, or indeed how, this distinction may be cogently fully brought to view by the current custodians of Indian judicial education in the Judicial Academy 'classrooms'.

Krishna Iyer of course addresses the agonies of the appellate judiciary; even so, this question goes to the heart of judicial education curricula and pedagogies. For one thing, many grassroots Indian adjudicators now need to understand the imageries of 'populists' and 'shopkeepers' ways of justicing and choices for their role-definition thus opened up. They may not have the power to decide great constitutional cases and controversies; yet in their everyday work of justicing must also be orientated to the Indian constitutional vision. May I recall to you the valiant role that the Indian district judiciary performed in the wake of the 1975-76 Emergency 'Rule' as compared with the Supreme Court of India in the infamous habeas corpus judgement.[9] And may I ask you to bear in mind the heroic figure of

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[8] See, for further analysis, Upendra Baxi, "The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer's Combat with the Production of Rightlessness in India" in C. Raj Kumar and K. Chockalingam, et.al.(eds.) *Human Rights, Justice & Constitutional Empowerment,* at pp 3-25 (Delhi, Oxford University Press: , 2007).

[9] See as to this, Mahendra Pal Singh, *V. N. Shukla's Constitution of India* 201-211 (The Eastern Book Company; 11th Edn, 2011).

Justice Deo, who strove against all odds to render justice to the Bhopal-violated?[10]

Neither term ---'populists' and 'shopkeepers'-- should be understood as pejorative or as mutually exclusive. Shopkeepers are needed for social relations (the daily acts of living); visionaries are needed to sustain constitutional social transformation. Shopkeepers become a social problem when they hoard essential commodities, price them excessively, or sell shoddy goods. When judges *hoard* justice (or deliver shoddy judgements) they also pose a huge social problem. There is nothing wrong in being a shopkeeper of *justice provided it is justice that you 'keep'*. Judicial incapacity to treat all citizens and persons as equal in dignity in the daily acts of administration of criminal justice provides a reiterated example of bad 'shop -keeping'.

Visionary judges (the 'populists in Krishna Iyer's sense) have obligation to develop jurisprudence that appeals equally to hapless citizens and co-judges. This is a difficult task if only because the exigencies of appellate judicial decision-making coalitions entail trade-offs between them. Even when judges sit singly, they cannot be consistently either 'populists' or 'shopkeepers'.

Even so, all judges of whatever 'type' owe virtues of fidelity to constitutional oath and in particular to their fundamental duties as citizens, under Part IV-A of the Indian Constitution. When our citizen-judges act in the oblivion of their fundamental duties, they put the legitimacy of judiciary entirely at stake. Such oblivion, truth to say, amounts to a symbolic bonfire of the very idea of constitutionalism. Regardless of hierarchies of adjudicative power, any judicial failure to respect Part IV-A fundamental duties at everyday level of justicing, remains unconscionable. And, in my considered view at least, if judicial education is to have future meaning at all it must endeavour maximally to present Part IV-A obligations *as if this is all there is to the idea of Indian constitutionalism.*

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[10] See, Upendra Baxi, "Writing About Impunity and Environment: the 'Silver Jubilee' of the Bhopal Catastrophe," *Journal of Human Rights and the Environment,* 1:1, pp. 23–44 (2010).

Judicial education as lifelong learning

The upper echelon of Indian judiciary recognizes the need for judicial 'training' for fresh recruits and district judiciary; it presides, quite often indifferently, over the destinies of the ever proliferating Indian judicial academies. Yet, very few judges of Indian High Courts and the Supreme Court have the humility (and here exceptions prove the rule) to submit themselves to continuing judicial education programs. A bare mention of this fact remains unfortunately necessary, if only because the manner in which judicial education may be imparted remains deeply affected by such hierarchy-based exceptions.

Hierarchies of adjudicative power constitutively inform judicial education as judicial training. A wider conception of judicial education leads us to ways in which *all our Justices may learn from each other*. Such learning may *never ever occur* when even judicial academies promote *vertical* rather than *horizontal l*earning experience. How may then judicial education initiatives proceed to respond to the largely unmet needs of education of the upper echelon Justices?

I raise this concern with a full sense of appreciation of the National Judicial Academy judicial education programmes for the Indian High Court judges. Yet, even my little exposure to NJA programmes indicates the ways in which High Court justices are *spoken to* even by the best and brightest of our Apex Justices (no differently than District justices remain spoken to by the High Court Brethren!) All forms of education remain meaningful, however, not an act of *speaking to* but a performance of *speaking with* others. How may the current practices of judicial education ameliorate this situation?

In the early eighties, I was fortunate in leading an experiment of co-learning for the Indian Supreme Court Justices. This consisted in inviting in an order of seniority their Lordships to meet, in a non-public event, with an eminent group of High Court justices, social science experts, and others to discuss carefully culled recent Supreme

Court judgments. The rules of the 'game' were simple: no time was to be invested in complimenting judicial performance, rather the time was to be devoted to a rigorous discussion of the decision; the individual Justice who authored the opinion for the Court was given 30 minutes at the end to respond. These discussions, which I remained privileged to chair with a firm and equal hand, remained possible because of an agreement with the then Chief Justice of India that each one of his Brethren consensually submitted to this process and the program was to terminate when any one 'down the line' declined to participate. This indeed happened with the ninth judge who refused to participate!

I recall all this here because all judicial and non-judicial participants acknowledged the worth of this enterprise and as a matter of objective record many participating Apex Justices changed their styles, and even habits, of decision-making. The message is simple: different ways of relating judicial education to our apex justices need to be further imagined; and one even hopes that our judicial academies may venture to develop cultures of adjudicative learning in which such conversations may meaningfully occur.

In any event, I at least suggest a wider horizon for judicial education. More than any cadre of justices, our upper echelon justices in their long afterlife (upon superannuation) continue to serve the Indian Nation variously—for example, as Chairpersons of human rights institutions, law commissions, Lokpal, regulatory agencies, tribunals also inclusive of the Green Bench, commissions of enquiry and much else besides.

Truth to say, their eminent prior adjudicatory experience does not necessarily equip them either with energy or vision to fully address their new tasks and mandates. Future judicial education developments at judicial education reach out to these adjudicatory beings in their afterlives?

A concluding word

Perhaps, the future of judicial education lies in replacing the term '*education*' with '*learning* together.' A fellowship of juristic learning is a requisite pre-condition for the reformation of the Indian legal system and for the renaissance of the spirit of Indian constitutionalism.

I have thus far addressed a few ways in which judicial learning can only be best fostered. I must now conclude by a summary mention of three difficulties that need to be overcome.

First, we all should continue to learn how best to innovate the ways of Indian Constitution is put to work, and how best to combat ways of putting it to sleep. Fostering all this entails both historical and empirical grasp of our legal institutions and how they work.[11] This at least means generous inclusion, at all decision-making levels of our judicial academies, of specialists in fields other than law.

Second, because it is a fact that that at the end of the day justices and courts remain repositories of sovereign state power and its prowess, fellowships of judicial, and juridical, learning may not always provide the most responsive ways of listening to the voices of the communities of wounded, hurt, harmed, India's worst-off citizens. Even when one may not pursue a utopic vision converting our adjudicators and lawyers as integral aspects of a new social movement, how may we refashion judicial education into learning is a concern best formulated as speaking to *citizen justices, citizen governmental lawyers, and citizen lawpersons.* To reiterate, Part IV-A now redefines the idea of citizenship and rearticulates the fundamental duties of all citizens as citizens of sovereign democratic *Republic*. In a constitutional democratic republic, citizens are beings (as Aristotle long while ago said) who know best the arts of how to be *ruled* and how to *rule*.

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[11] See, Upendra Baxi, *Towards a Sociology of Indian Law* (Delhi, ICSSR/Satvahan , 1985) and related writing available at http://upendrabaxi.net/documents.html (visited on 08. 02.2012).

Third, transformation of the enterprise of judicial education into collective social learning for us all signifies a never ending engagement with the plight of the most impoverished Indian citizens who are denied dignity and their '*right to have rights'* (to recall a gifted phrase from Hannah Ardent)[12]. I must here resist the temptation to bring to your notice most compelling genre of writing from Saddat Hassan Manto to Mahesweta Devi (among significant others).

Even so, my overall point of transformation of judicial education into judicial learning at least thus invites to feats of representation of human suffering and human rightlessness far beyond the adjudicative prose of some of our most gifted apex justices. For the moment, may I urge at least a fulsome attention to the following texts: P. Sainath, *Everyone Loves A Good Drought*,[13]; Harsh Mander, *The Ash in the Belly: India's Unfinished Battle Against Hunger*[14] and of course the Rohinton Mistry epic narrative *A Fine Balance*[15]?

In sum I suggest that experiments at judicial learning thus re-imagined may after all enhance at least some present day practices of Indian judicial education and much else already plentifully it's institutionally decreed futures?

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[12] See further, Upendra Baxi, *The Future of Human Rights* (Delhi, Oxford University Press, 2012 Perennial edition).

[13] P. Sainath, *Everyone Loves A Good Drought* (Penguin Books, Delhi, 1996).

[14] Harsh Mander, *The Ash in the Belly: India's Unfinished Battle Against Hunger* (Penguin Books, Delhi, 2012).

[15] Rohintoon Mistry, *A Fine Balance* (Vintage Books, New York , 2001).

Situating The Constitution in The District Courts*

*M.P. Singh***

Constitution as supreme law

Long gone are the days, rather centuries, when Lord Chief Justice Edward Coke's remarks in Dr. Bonham's Case[1] that "the common law controul acts of Parliament and adjudge them to be utterly void" when the acts are "against common right and reason" incurred the wrath of King James I and much later Chief Justice Marshall's unanimous opinion in *Marbury* v. *Madison*[2] "that a law repugnant to the Constitution is void; and that *courts*, as well as other departments, are bound by that instrument"[3] was questioned and debated in the United States. By the time our Constitution came into force on 26 January 1950 it was no more in controversy that the constitution of a country is the highest law of that country and it must be so observed. Much before the making of the Constitution the constitutional Acts of British Parliament starting with the Regulating Act, 1773 and ending with the Indian Independence Act, 1947 were taken by the courts as the highest law of the land and the courts starting with the Supreme Court at Calcutta established in 1774 followed by the High Courts from 1862[4] onwards and ending with the addition of the Federal Court in 1937 in India and the King in Council, later known as the Privy Council, as the final court of appeal in the United Kingdom, were exercising the power of invalidating laws of legislatures established under them if they were found inconsistent

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* The expression district courts is used for "Subordinate Courts" in Chapter VI of Part VI of the Constitution.

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1 8 Rep. 118a (CP 1610).

2 1 Cranch137 & 2 Led 60 (1803).

3 *Id.*, emphasis in the original.

4 The first three High Courts, replacing the Supreme Courts, at Calcutta, Bombay and Madras were established in 1962 under the Indian High Courts Act, 1861.

with the Acts of British Parliament which established them. Therefore, on the commencement of the Constitution the Supreme Court and the High Courts, without entertaining any argument or doubt that the Constitution was the highest law of the land, started examining the validity of Central and State laws vis a vis the Constitution and invalidated those which they found inconsistent with the Constitution.

Burden of the past

Preceding the Constitution the power of judicial review i.e., the power of examining whether a law was consistent with the constituting Act of British Parliament, was exercised only by the High Courts and the courts above them and not by the courts below. This could be because corresponding power of examining whether a delegated legislation was consistent with the parent Act of the British Parliament was exercised only by the King`s Bench in England and also because of the specific provisions in the Civil Procedure Code (CPC) and the Criminal Procedure Code (CrPC) which regulated the jurisdiction of those courts.[5] These provisions of the two Codes survived the adoption of the Constitution. Also the Constitution, following Section 225 of the Government of India Act, 1935 with some modifications, provides in Article 228 as follows:

> Transfer of certain cases to High Court: "If the High Court is satisfied that a case pending in a court subordinate to it involves *a substantial question of law as to the interpretation of this Constitution* the determination of which is necessary for the disposal of the case, it shall withdraw the case and may –
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> *(a)* either dispose of the case itself, or
>
> *(b)* determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and

[5] The two Codes came into being almost simultaneously with the establishment of the High Courts in India in 1861 though their predecessors in some form existed from the time of the establishment of the Supreme Court at Calcutta.

the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment."[6]

Article 228 is, however, quite specific and applies or can be invoked when all the conditions set out in it are satisfied. The conditions are: (i) that a suit or case must be actually pending in a court subordinate to the High Court; (ii) the High Court must be satisfied that the case involves a substantial question of law as to the interpretation of the Constitution and not merely a question in which no question of the interpretation of the Constitution is involved;[7] and (iii) the High Court must be satisfied that the determination of the constitutional question is necessary for the disposal of the case.[8] Obviously, therefore, Article 228 should not be presumed to state that the district courts cannot apply to a case before them even the clear provisions of the Constitution or the provisions which the superior courts i.e., the High Court of the State or the Supreme Court has clearly and conclusively interpreted. As a matter of policy, for the uniform application and understanding of the Constitution throughout the country, an appeal in the Supreme Court is also available against any decision of a High Court if the High Court certifies "that the case involves a substantial question of law as to the interpretation of this Constitution."[9] Article 228 also does not impose any obligation on the district courts to refer a case on its own motion or even on the application of either party to a case unless the foregoing conditions (ii) and (iii) are satisfied. Similarly the High Court shall not withdraw a case unless the determination of the substantial question of law as to the interpretation of the Constitution is "necessary for the disposal of the case".

As regards the two Codes, Section 9 of CPC confers jurisdiction on district courts "to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred." Only Section 113 requires a district court to refer a matter to the opinion of

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[6] Emphasis supplied.

[7] State of *West Bengal* v. *Samar Kumar Sarkar,* (2009) 15 SCC 444.

[8] See, Durga Das Basu, *Commentary on the Constitution of India,* vol 7, p 8459 (LexisNexis, 8th ed., 2010).

[9] Art. 132.

the High Court if it is "satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in any Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of the opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court." Further, Rule 1 of Order XXVIIA says that "In any suit in which it appears to the Court that any such question as is referred to in clause (1) of Article 132, read with Article 147 of the Constitution, is involved, the Court shall not proceed to determine that question until after notice has been given to the Attorney-General of India if the question of law concerns the Central Government and to the Advocate-General of the State if the question of law concerns State Government." Similarly, Rule 1A of that Order provides that "In any suit in which it appears to the Court that any question as to the validity of any statutory instrument, not being a question of the nature mentioned in Rule 1, is involved, the Court shall not proceed to determine the question except after giving notice – (a) to the Government pleader, if the question concerns the Government, or (b) to the authority which issued the statutory instrument, if the question concerns an authority other than Government." Further, Rules 2 and 2A provide for allowing the Central or State Government or the concerned authority as the case may be to become defendant in any such suit. Apart from these provisions Section 80 of the Code requires two months notice for filing a suit against Central or State Government which may also be partly dispensed with in certain situations. These references to the Constitution and statutory instruments for specific purposes, clearly imply and make obvious that subject to these conditions suits can be instituted in any court and those courts are competent to decide them subject to those restrictions. Accordingly, the law does not require the district courts to take the stand that they are not competent to apply, or ever to interpret, the Constitution in their determinations.

Similarly in criminal matters Section 395 of CrPC provides that "if a Court is satisfied that a case pending before it involves a

question as to the validity of any Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of the opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefore, and refer the same for the decision of the High Court." Like Section 114 of CPC Section 396 of CrPC also provides that after the question referred to the High Court has been decided the court shall proceed further in accordance with the opinion of the High Court.

Notably, the above provisions of the two Codes are silent about the power of the district courts on the question of exercise of executive power in violation of the Constitution. Therefore, if in the exercise of its executive powers the executive does something which is not covered by any law but is inconsistent with the Constitution such as, for example, the fundamental rights or any other constitutional right, the district courts are not debarred from determining the validity of the executive act vis a vis the Constitution so long as the issue does not involve a question covered by Article 228.

In a comparative perspective it is noteworthy that in matters of constitutional litigation the position of our district courts is different from the position of the courts in the United States. In the United States all courts from the lowest – the district court – to the highest – the Supreme Court – have the power of judicial review. It is also different from the position in the civil law countries such as Germany or France where only a special constitutional court independent of the hierarchy of other courts has the exclusive power of judicial review whose decisions on constitutional issues bind all other courts.[10] Unlike the United States we did not make a complete break from the United

[10] See, e.g., Art. 100 Basic Law of Germany which in some ways reads like Article 228 of our Constitution and the foregoing provisions of the two Codes. Cl. (1) of Article 100 of the Basic Law reads:
"If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where the Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law."

Kingdom. Therefore, much of our constitutional institutions has been impacted by the pre-Constitution models given to us by the British including the model of public law remedies of habeas corpus, mandamus, certiorari or prohibition etc against the public authorities. These remedies were available only in the High Court in the United Kingdom and also in the High Courts in India and not in the courts below them.[11] But this difference and background need not lead us to the conclusion that the pre-Constitution constitutional Acts of the British Parliament were and the Constitution after its commencement is no concern of the district courts. Besides the common law doctrine of precedent that binds every lower court by the decisions of the courts higher to it, Article 141 expressly states that "The law declared by the Supreme Court shall be binding on all courts within the territory of India." The law so declared definitely includes constitutional law which is also the supreme law with which all other laws of the country must comply. Therefore, in the application of all substantive and procedural laws in the district courts the constitutional law declared by the Supreme Court must be followed. Any nonobservance of the law so declared by the Supreme Court shall amount to defiance of the Constitution which no court or authority in the country is competent to do.

Surprisingly, while the form of oath of the judges of the Supreme Court and the High Courts besides requiring them to "bear true faith and allegiance to the Constitution of India", which the oath of every office holder under the Constitution requires,[12] also requires them to uphold "the Constitution and the laws", the form of oath of the judges of the district courts does not have the latter words, nor does it have the words "without fear or favour, affection or ill will" which apart from the oath of judges of the Supreme Court and the High

[11] Art. 228 had the corresponding S. 225 in the Government of India Act, 1935 and the two Codes continued as before with consequential adjustments. For a critical appraisal of the Constitution following imperial model see, M. Mukherjee, *India in the Shadows of Empire,* particularly p. 181 ff. (OUP, 2009, Indian Papaerback, 2012). For the British position in this regard see, HWR Wade & Forsyth, *Administrative Law,* 500ff (OUP, 10th ed., 2009).

[12] See the forms of oath in Sch. III of the Constitution.

Courts the oath of some other office bearers also has.[13] This difference in the form of oath creates a doubt whether our judicial system assigns that exalted status to the district judiciary which the Supreme Court attributed to it in *All India Judges Assocn.* v. *Union of India*.[14] But irrespective of the form of their oath the Constitution binds the judges of the district courts as much as it binds the judges of the Supreme Court and the High Courts. No judge or public officer in the country can claim immunity from the binding effect of the Constitution. The judges of the district courts are required to act in accordance with the Constitution no less than the judges of the Supreme Court and the High Courts. Irrespective of their oath, the judges as citizens of the country owe a Fundamental Duty "to abide by the Constitution."[15] Any of their acts in the performance of their duties which is not consistent with the Constitution will be in violation of their obligations under the Constitution. These obligations cannot appropriately be discharged without knowing and understanding the Constitution. The Constitution as law is not merely its bare provisions but also includes at least its interpretation as settled by the higher courts through their judicial pronouncements and as evolved through laws and practices consistent with it. This is of course a difficult and demanding task, but in the light of their position and responsibilities under the Constitution and the laws the judges have no escape from it.

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[13] The form of oath of the member of Delhi judiciary obtained from the Delhi High Court Registry reads:
"I _____ do swear that I will be faithful and bear true allegiance to India and to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, and that I will carry out the duties of my office loyally, honestly and with impartiality. So help me God."
On my suggestion the High Court of Delhi has modified the form of oath administered to the new entrants of Delhi Higher Judicial Service and Delhi Judicial Service to bring it in conformity with the oath taken by the judges of the Supreme Court and the High Courts (Vide letter no. DJA/Chairperson/556/2011/1669 dated 13.2.2013 of the Chairperson, Delhi Judicial Academy and vide letter no. 2736/DHC/GAZ/oath/2013 dated 14.5.2013 from Registrar General, High Court of Delhi

[14] AIR 1993 SC 2493. At pages 2501- 2502 the Supreme Court in that case observed:
"The judicial service is not service in the sense of 'employment'. The judges are not employees. As members of the judiciary they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. … The parity is between the political executive, the legislators and the Judges and not between the Judges and the administrative executive."
While the oath of the political executive and legislators is provided in the Constitution and requires the former to act in accordance with the Constitution, the oath of the judges of the district courts is neither provided in the Constitution, nor does it require them, as given in the foregoing note, to act in accordance with the Constitution and the laws of the country. Their oath is perhaps the same as of the "secretarial staff or the administrative executive" differentiated from the judges in the above case.

[15] Art. 51-A (*a*).

Therefore, even if for the sake of argument it is accepted that a constitutional issue cannot be agitated in the district courts they are bound to decide a matter in accordance with the Constitution irrespective of whether either of the parties asks for it or not.

Constitution in district courts

The foregoing arguments could be substantiated by some real and some hypothetical examples. An obvious, though unexpected, example could be of a criminal trial in which either out of ignorance or otherwise the prosecution is relying upon a law made after the commission of the act in question and the defence either raises an objection against its application on the ground of violation of Article 20 (1) or out of ignorance or otherwise fails to raise that objection, the judge is not expected to proceed with such a trial because she is expected to go by the Constitution or the law of the land. Apparently such a question cannot be referred to the High Court either under Section 395 of Cr.PC or under Article 228 of the Constitution because no question of either the validity of a law or substantial question with respect to the interpretation of the Constitution is involved. Similarly, cases may be brought before the courts for acts which if read in association with fundamental rights like the freedom of speech or expression or free movement throughout the territory of India under Article 19 (1) (*a*) or (*d*) of the Constitution do not constitute any crime.[16] In all such cases the courts are expected to ensure if an alleged act constitutes any crime before remanding a person to police or judicial custody. Also in all such and even other cases presumption must be in favour of the liberties of the individual which need to be interpreted liberally and not in favour of the criminal law which must be interpreted strictly and narrowly.

Similarly, several principles of criminal procedure and trials have emerged from the Constitution either in association with CrPC or independently which the trial courts are expected to respect and observe. In pursuance of those provisions the Supreme Court has laid

[16] For examples situations like the ones in Chapter VIII of CrPC or as in *Ram Lakhan* v. *State,* 137 (2007) DLT 173 Justice Ahmad alluded to Art. 19 (1) (a).

down binding propositions of law which bind the courts along with the police or jail authorities or independent of them. For example, in *Sunil Batra* v. *Delhi Administration*[17] and several other cases directions have been given to jail authorities on the treatment of prisoners.[18] Similarly in *D.K. Basu* v. *State of WB*[19] and several other cases directions have been given in respect of arrested persons and persons in police custody.[20] Special directions have also been given to prison and police authorities in cases of women and children and their protection against sexual abuse and exploitation as well as for early trial.[21] Handcuffing of under-trials without adequate reasons in writing is also unconstitutional.[22] Although in *P. Ramchandra Rao* v. *State of Karnataka*[23] the Supreme Court has retreated from setting an outer limit for trials,[24] its stand on speedy trials as a fundamental right under Article 21 recognised in a series of *Hussainara Khatoon Cases*[25] and several other cases remains unaffected. Similarly cruel and unusual punishments cannot be given.[26] Right to legal aid in criminal proceedings is absolute and a trial and conviction in which the accused is not represented by a lawyer is unconstitutional and liable to be set aside.[27] Also the right to fair trial in criminal cases ensuring discovery of truth and prevention of miscarriage of justice is recognised under the Constitution.[28] Similarly Article 22 (2) is violated if remand orders

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[17] (1978) 4 SCC 494.

[18] See, eg, *Harbans Singh* v. *State of UP,* AIR 1991 SC 531; *Kewal Pati* v. *State of UP,* (1995) 3 SCC 600; *Murti Devi* v. *State of Delhi,* (1998) 9 SCC 604.

[19] (1997) 1 SCC 416.

[20] See, eg, *DK Basu* v. *State of WB,* (1997) 6 SCC 642: *PUCL* v. *Union of India,* (1997) 3 SCC 433.

[21] See, eg, *Munna* v. *UP,* (1982) 1 SCC 545, *Sheela Barse* v. *Maharashtra,* (1983) 2 SCC 96; *Sheela Barse* v. *Union of India,* (1986) 3 SCC 596.

[22] *Prem Shanker* v. *Delhi Administration,* (1980) 3 SCC 526; also *Aeltemesh Rein* v. *Union of India,* (1988) 4 SCC 54; *Sunil Gupta* v. *MP,* (1990) 3 SCC 119; *MP Dwivedi, In re,* (1996) 4 SCC 152.

[23] (2002) 4 SCC 578.

[24] See, *Common Cause* v. *Union of India,* (1996) 4 SCC 33 & 6 SCC 775: *Rajiv Gupta* v. *HP,* (2000) 10 SCC 68.

[25] *Hussainara Khatoon* v. *Home Secretary Behar,* (1980) 1 SCC 81, 91, 93, 98 & 108 followed by a large number of other cases such as *Mahadev* v. *Bihar,* (1985) 2 SCC 102; *RD Upadhyaya* v. *UP,* (1996) 3 SCC.

[26] *Parmanand Katara* v. *Union of India,* (1995) 3 SCC 248. In *Attorney General of India* v. *Lachma Devi,* AIR 1986 SC 467 at 468 the Court observed that "the execution of death sentence by public hanging would be a barbaric practice clearly violative of Art. 21 of the Constitution" and "if any Jail Manual were to provide public hanging, we would declare it to be violative of Article 21 of the Constitution."

[27] *Khatri (III)* v. *State of Bihar,* (1981) 1 SCC 635 & *Suk Das* v. *Union Territory of Arunachal Prades,* (1986) 2 SCC 401; *Mohd. Ajmal Amir Kasab* v. *Maharshtra,* (2012) 9 SCC 1; *Rajoo* v. *MP* (2012) 8 SCC 553.

[28] *Zahira Habibullah Shaikh (5)* v. *Gujarat,* (2006) 3 SCC 374 at 396; *Mohd. Hussain* v. *State (Govt. of NCT of Delhi),* (2012) 9 SCC 408; *Rattiram* v. *MP,* (2012) 4 SCC 516.

are given by a judge without the production of the accused within 24 hours of arrest.[29] The right against self-incrimination in Article 20 (3) gives an accused person the right to be informed that he has a right to call a lawyer before answering any of the questions put to him by the police.[30] Also oral or written statement conveying personal knowledge, likely to lead to incrimination by itself or furnishing a link in chain of evidence comes within the prohibition of Article 20(3). Accordingly narcoanalysis, polygraph and brain electrical activation profile tests are not permissible under Article 20 (3) and any evidence collected through them cannot be produced in the courts.[31]

The district courts are equally engaged in civil litigation as in the criminal. The Constitution directly or indirectly influences the outcome of such litigation also just as it does of criminal. Unexpectedly in a matrimonial matter Delhi High Court had once remarked:

> "Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Art. 21 nor Art. 14 have any place. In a sensitive sphere which is at once most intimate and delicate the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond."[32]

True, the personal laws have been left untouched by the Constitution, but once legislated they become law made by the state and are fully subject to the discipline of the fundamental rights by virtue of Article 13 (2) and other provisions of the Constitution by virtue of the supremacy of the Constitution in the hierarchy of laws. In the foregoing case also the High Court and on appeal the Supreme Court tested the impugned law with reference to Articles 14 and 21

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[29] *Bhim Singh* v. *J & K,* (1985) 4 SCC 677.
[30] *Nandini Satpathi* v. *P.L. Dani,* (1978) 2 SCC 424.
[31] *Selvi* v. *Karnataka,* (2010) 7 SCC 263. Comp. *Mohd. Ajmal Amir Kasb* v. *Maharashtra,* (2012) 9 SCC 1.
[32] *Harvinder Kaur* v. *Harmander Singh,* AIR 1984 Del. 66 at 75.

and upheld it.[33] In several other matrimonial or other family law matters also the Supreme Court has applied the constitutional requirements. It has also held that pernicious activities such as gambling,[34] sale of liquor[35] and exploitative money lending[36] or for that matter human trafficking[37] cannot claim the status of business or trade under Article 19 (1) (*g*) of the Constitution. The outcome of all such and many other matters needs to be determined with reference to the Constitution and its goals. Even in procedural matters such as execution of decrees the courts cannot order arrest and detention of the judgment debtor under Section 51 read with Order 21 and Rule 37 of CPC if he has no means to pay the decretal amount and did not evade payment by any dishonest or mala fide intentions because it may violate the fundamental rights under Articles 14 and 21.[38]

There may be many more cases under the criminal, civil, procedural and other laws in which the district courts decide and which the Constitution may or shall influence the outcome. In any case the district courts are expected and required to do justice according to law. The Constitution being the law and for that matter the highest law the district courts must do justice according to it.

PIL/SAL, horizontal fundamental rights and fundamental duties

Besides the foregoing remedies that could be sought in the district courts for the enforcement of the Constitution, judicial remedies through public interest or social interest litigation (PIL/SAL) could also be sought in these courts. It may be recalled that the origin of PIL/SAL, which has become a popular and effective instrument of law enforcement, lies in a Section 133 Cr.PC order of a magistrate upheld both by the High Court as well as the Supreme Court in

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[33] *Saroj Rani* v. *Sudarshan Kumar,* (1984) 4 SCC 90. For the contrary view see, *T. Sareetha* v. *T. Venkata Subbaiah,* AIR 1983 AP 356.

[34] *State of Bombay* v. *RMDC,* AIR 1957 SC 699.

[35] *PN Kaushal* v. *Union of India,* AIR 1978 SC 1457 and several other cases including *State of AP* v. *McDowell* & Co, AIR 1996 SC 1627.

[36] *Fatehchand* v. *State of Maharashtra,* AIR 1977 SC 1825.

[37] See, Art. 23.

[38] *Jolly George Varghese* v. *Bank of Cochin,* AIR 1980 SC 470.

Ratlam Municipality v. *Vardhichand*.[39] Appreciating the magistrate's order Justice Krishna Iyer said: "Judicial discretion when facts for its exercise are present, has a mandatory import."[40] Referring to IPC and CrPC as codes of ancient vintage, he pointed out that "the new social justice orientation imparted to them by the Constitution of India, makes it a remedial weapon of versatile use."[41] In the exercise of such a power as in Section 133 CrPC, he said "the judiciary must be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by Art. 38 of the Constitution."[42] Drawing the attention to the constitutional value of one man one value he concluded:

> The nature of the judicial process is not purely adjudicatory nor is it functionally that of an umpire only. Affirmative action to make the remedy effective is of the essence of the right which otherwise becomes sterile.[43]

Like Section 133 CrPC of colonial origin, in the post-Constitution era Parliament and State legislatures have made many laws in pursuance of the constitutional goals of justice, liberty, equality, fraternity and human dignity for the welfare of the people in general and the weaker or helpless sections of them such as children, workers, women, poor, homeless, Scheduled Castes and Scheduled tribes etc in particular. These laws also provide for remedies in case of violation or non-execution of these laws. But it is a matter of common knowledge that most of the intended beneficiaries of these laws are incapable of either knowing about them or seeking remedy against their non-observance. Many of these laws are addressed to non-state bodies or individuals. Therefore, even those provisions of CPC or Cr.PC which inhibit action against state authorities also do not

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[39] AIR 1980 SC 1622.

[40] *Id.*, para 13.

[41] *Id.*, para 14.

[42] *Ibid.* Art. 38 requires the State "to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life" and "to minimise the inequalities in income, and to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

[43] *Id.* Para 16.

obstruct or discourage resort to district courts if a socially sensitive or public spirited person or body invokes their jurisdiction. Therefore, they can entertain PIL/SAL and grant appropriate remedy such as declaration, injunction or compensation.

Similarly remedy against the violation of fundamental rights could also be sought in the district courts. Even the procedural inhibitions of instituting proceedings against the state authorities in the district courts should not always come in the way of such proceedings because many of the fundamental rights have horizontal application, i.e they are available not only against the state authorities but also against private persons or bodies. While some of them such as the ones falling under Articles 15 (2), 17, 23, 24, 25, 26, 29 (1) and 30 (1) expressly or impliedly confer fundamental rights against private persons others have been extended against private persons through judicial interpretation either by expanding the right to cover private persons or bodies or by expanding the concept of state to non-state bodies such as registered societies and companies.[44] Moreover, a new jurisprudence is emerging all over the world in support of horizontal application of fundamental or human rights.[45] Not too long after its establishment the German Constitutional Court in the *Lueth* decision of 1958 held that the bill of rights in the German Constitution was "a fundamental and objective system of values" which "must apply as a constitutional axiom throughout the whole legal system" including private law matters.[46] In the light of such developments and understanding in law the district courts should not only enforce the fundamental rights in a case of specific demand for the enforcement of a fundamental right but they must also do so when deciding a case in private law matters between two individuals.

Moreover, as noted above, the Constitution also lays down certain fundamental duties binding upon citizens amongst whom the judges are also covered. Not only they must observe these duties in

[44] For a detailed discussion on it see, M.P. Singh, Protection of Human Rights against State and Non-State Action, in D. Oliver & J. Fedtke (eds), *Human Rights and the Private Sphere A Comparative Study,* 181 (Routledge-Cavandish, 2007).

[45] See the book cited in the preceding fn.

[46] BVerfGE 7, at 198 ff of 15 January 1958.

person but they must also enforce them against other citizens when approached through appropriate proceedings. For example, when so approached they must enforce the renunciation of practices derogatory to the dignity of women or the duty of parent or guardian of a child between six and fourteen to provide opportunities for education to the child.

With this background of a few specifics of the location of the Constitution in the district courts we could move to a larger picture of constitutional justice which has always been in the foundation of all human endeavours.

Constitutional vision of justice

A phrase coined by the National Judicial Academy, constitutional vision of justice goes beyond the application of specific provisions of the Constitution to specific cases before the courts. It is about that grand image of the society which our constitution makers had developed during the course of their struggle for independence from the colonial rule and towards which they wanted India to be taken through the constitutional means. That image of the society they tried to capture and project in as many words as it could be possible in our founding principles in the form of the Constitution. For that purpose they did not mind deviation from the then existing models of constitutional designs and gave it the shape they considered most appropriate for the realisation of their vision of India. A constitution is commonly about the framework of the government, its powers and functions and is, therefore, addressed only to the government and its different branches or organs. It may in addition provide the relationship of the government with the citizens in the form of a bill of rights. The Constitution of India goes beyond that and is at places addressed also to private individuals and their groups. It confers on them rights and imposes duties not only against the government or the state but also inter-se. The members of the government too are addressed not only in their public capacity but also at places as citizens. As one of the three branches of the state into which the totality of the governance of a country is bifurcated, the judiciary

has been assigned important place and role in the Constitution for the realisation of that vision of India which its makers had formulated. In the words of Granville Austin:

> "The members of the Constituent Assembly brought to the framing of the Judicial provisions of the Constitution an idealism equalled only by that shown towards the Fundamental Rights."[47]

As citizens, judges also share the responsibilities of a citizen. The quality and quantity of responsibility of the judiciary may be different from that of the legislature and the executive, but it is no less important because as Granville Austin further observes, in the estimation of the constitution makers

> "The judiciary was to be an arm of the social revolution, upholding the equality that Indians had longed for during colonial days, but had not gained – not simply because the regime was colonial, and per force repressive, but largely because the British had feared that social change would endanger their rule."[48]

The district judiciary may not be performing the task of the interpretation of the Constitution, which the judges of the Supreme Court and the High Courts do, but, as noted above, they are as much under an obligation to follow and apply the Constitution in the performance of their task as the judges of the Supreme Court and the High Courts. As the role of the district courts is much more pervasive and closer to the site of social injustice pervading in our society than the role of the Supreme Court and the High Courts, the realisation of the constitutional goal of social revolution depends more on the former than on the latter.

Justice has been, if not the only, at least one of the foremost goals of human endeavour from the earliest times. It may have been

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[47] G. Austin, *The Indian Constitution Cornerstone of a Nation,* 164 (OUP, 1966). In continuation the author writes: "Indeed the judiciary was seen as an extension of the Rights, for it was the courts that would give the Rights force."

[48] *Ibid.*

pursued with greater scientific vigour and intensity in some societies than the others, but all societies all over the world in some form or the other have strived for it. India, which in the possible company only of China is the most ancient surviving society on earth, has through the ages developed its own conceptions of justice which were conceived and formulated by those who lead our struggle for freedom from the British rule. Many, if not most, of them became members of the Constituent Assembly and played the leading role in the conceptualisation and formation of our Constitution. Nehru, of course, was one of the foremost among them who, amongst other things, expressed his expectations from the Constitution in the following words:

> "The first task of this Assembly is to free India through a new constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity."[49]

Austin perceived two revolutions in India since the end of WW I, the national and the social. "With independence," he says "the national revolution will be completed, but the social revolution must go."[50] According to Austin, therefore, the Constitution as it finally emerged from the Assembly aims at bringing a social revolution in the country. In his words:

> "The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement."[51]

Speaking of the idea of India as it was conceived by the main architect of its Constitution, Ananya Vajpeyi says:

> "This new India – whose key text, the Constitution of 1950, Ambedkar shepherded into its inaugural form – had to be

[49] Constituent Assembly Debates, vol. 3, p. 316 quoted in G. Austin, cited above, p. 26.
[50] G. Austin, cited above, p. 26.
[51] *Id.* At 50.

> imagined on the basis of a kind of selfhood that would appeal as much to Hindus as to minorities, to upper castes as to Sudras and Untouchables, and to those in the mainstream as to those on the margins."[52]

The incorporation of this imagination of inclusiveness in the Constitution has been one of its three sustaining factors, identified for sustaining the constitutions around the world, in the midst of all odds and adversities which we have faced ever since its adoption.[53] Tracing similar imaginations of a few other leaders who directly or indirectly influenced the contents and spirit of the Constitution Vajpeyi concludes:

> "Free India, India that had won its swaraj, the India hard fought and brightly envisioned by extra-ordinary figures like Gandhi and Ambedkar, Tagore and Nehru, was the dream of realizing both the norm of righteousness and the form of a republic."[54]

Several similar and overlapping visions of the Constitution emerge from the readings of many others.[55] Professor Mohan Gopal, the former Director of the National Judicial Academy, has been the one who passionately presents one such vision of constitutional justice for the judges that in brief takes them from the background of British rule and its associated evils to *swaraj*, democracy, rule of law, inclusiveness, *antoydaya* (upliftment of the last) culminating in *sarvodaya* (upliftment of all).[56] His predecessor, Professor Menon, has

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[52] A. Vajpeyi, *Righteous Republic The political Foundations of Modern India,* 209 (Harvard Uni. Press, 2012).

[53] See, Z. Elkins, T. Ginsberg , J. Melton, *The Endurance of National Constitutions,* 151 ff (Cambridge Uni. Press, 2009)

[54] Cited above, fn 52 at 250.

[55] See, eg, U Baxi who in his convocation address at National University of Juridical Sciences in 2012 spoke to the new graduates as follows:
"And my constitutional aching and ageing heart allows me only to say this much to you today – in whatever you may do by way of future enterprises and experiments, please try to avoid the aspiration to preside over the liquidation of the constitutional idea of India." 5 *NUJS Law Review,* 165, 169.
Also see, R.C. Heredia, Taking Sides (Peguin Books, 2012) particularly p. 121 ff.; and P Mishra, From the Ruins of Empire (Allen Lane, 2012) who with reference specifically to Tagore presents a vision of future India.

[56] I approached Professor Mohan Gopal a little bit too late for a written version of his picture for this issue of the journal for which he could not find a slot at such a brief notice in his busy schedule as Director of Rajiv Gandhi Institute for Contemporary Studies, New Delhi.

also spoken of it in one of his recent writings on adjudication in trial courts.[57] In the light of all these overlapping visions of the Constitution I try to draw one from its provisions that in my understanding is relevant for the district courts. We have noted above that even if the district courts may not interpret the Constitution they are expected to follow it. What they are expected to follow is not always in terms of do's or don'ts. But as the judiciary is expected to be an important ally in the realisation of the social revolution and a just society as constitutional goals, corresponding to their jurisdiction and the amount of judicial work the district courts are expected and must play a larger role in the realisation of that goal than could be expected from the High Courts and the Supreme Court.

To begin with the key to what the Constitution expects to achieve is in the Preamble of the Constitution which was the first item introduced in the Constituent Assembly in the form of Objective Resolution and the last to be adopted by it. Although all the expressions in the Preamble are heavily loaded, they are unambiguous in their expression. The Preamble traces the origin of the Constitution in the people of India and not in any other human or divine authority. The people of India are the ones who have resolved to constitute India into a

> "SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC" and to secure to its citizens
>
> JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and opportunity; and to promote among them

[57] N.R. Madhava Menon, D. Annoussamy & D.K. Sampath, *Adjudication in Trial Courts,* 9 (Lexis-Nexis, 2012). In one of the chapters of the section of the book done by him, he observes:
"The challenge before judicial educators is to ensure that judges are enabled to appreciate the significance of the change brought about by a democratic constitution to judicial reasoning in individual cases coming before them. Judging, analytically speaking, involves formulation of the judge's own theory of justice in the context of the facts of the case and this is reflected in framing of issues, appreciation of evidence, judicial reasoning etc. What is sought to be achieved by judicial education therefore is the cultivation of judicial reasoning around the given constitutional values and principles and the social expectations from the laws."

FRATERNITY assuring the dignity of the individual and the unity and integrity of the nation."

Special attention may be paid to the sequence of different values in the Preamble which places "JUSTICE" above all others including freedom and equality and which is repeated and reinforced in the Directive principles of State Policy.

Mithi Mukherji, who draws attention to this fact, has elaborated justice as equity.[58] In dispensing justice to the parties before them the district courts must ensure that their decisions do not in any way derogate from any of these constitutional goals.

Concretising and making these goals operational the Constitution defines citizenship and makes it uniform for all.[59] It confers suitably crafted fundamental rights on all citizens and with a few exceptions also on non-citizens.[60] They include the right to equality and non-discrimination on grounds of race, religion, caste, sex or place of birth in all matters including state employment. Most importantly it abolishes age old evil of "Untouchability" and forbids its practice in any form. The state is prohibited from conferring any title on any one and citizens are prohibited from accepting any title from any foreign state. Subject to reasonable restrictions on specified grounds all citizens can exercise freedom of speech and expression, assembly, associations and unions, movement, residence and settlement, and of profession, occupation, trade or business. No new offences can be created or punishments enhanced retrospectively. Double jeopardy and self-incrimination are prohibited. No person can be deprived of his life or liberty without due procedure and persons accused of any offence are entitled to certain safeguards. All citizens between the age of six to fourteen have the right to education. Traffic in human beings, forced labour and employment of children under fourteen in hazardous industries is prohibited. Freedom of

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[58] For details, see, M. Mukherjee, *India in the Shadows of Empire,* 185 ff & 199 ff (OUP, 2010, Paperback, 2012). Also see, Art. 38 (1).

[59] Part II.

[60] Part III.

religion is guaranteed to all persons and religious denominations. While all state funded or aided educational institutions are open to all citizens, religious and linguistic minorities have the right to establish and administer educational institutions of their choice. For ensuring compliance with these rights the right to approach the Supreme Court is also guaranteed.

Notable features of these rights are that some of them expressly and others impliedly are available not only against the state or public authorities but also against the private persons or bodies;[61] some of them make special provisions for women and children[62] while others make similar provisions for weaker sections of the society designated as socially and educationally backward classes or backward classes and Scheduled Castes and Scheduled Tribes[63] while still others make similar provisions for minorities and certain sections of the society.[64]

Moving further, the Constitution issues certain directives to the state which though not enforceable in the courts are still "fundamental in the governance of the country" and the state, which the Supreme Court has on occasions read to include courts,[65] is duty bound to apply them in the making of the laws. They include promotion of the welfare of the people "by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all institutions of the national life"; minimisation of inequalities among individuals as well as groups; equal means of livelihood and equal pay for equal work for women and men; ownership and control of material resources for the common good; avoidance of concentration of wealth and means of production to the common detriment; protection of workers and children and aged against abuse as well as special care for children; equal justice and free legal aid to all; right to work, education and public assistance in

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[61] E.g., Arts. 15 (2), 16 (5), 17, 18, 19, 21, 23, 24, 25, 26, 28, 29, 30. For details, see, M.P. Singh, cited above footnote no. 44.

[62] E.g., Arts. 15 (3), 21-A & 24.

[63] E.g., Arts. 15 (4) & (5), 16 (4), (4-A) & (4-B), 19 (5),

[64] E.g., Arts. 25 Explanation I, 29 (1) & 30.

[65] See, e.g., Mathew J. in *Kesavananda Bharati* v. *State of Kerala,* AIR 1973 SC 1461 & *State of Kerala* v. *N.M. Thomas,* AIR SC 490, 515 and *Unni Krishnan* v. *State of AP,* (1993) 1 SCC 645.

cases of unemployment, old age, sickness, disablement and other cases of undeserved want; humane conditions of work and maternity relief; minimum wages for workers and their participation in management; promotion of cooperative societies; uniform civil code; early childhood care and provision for education for children up to the age of six; promotion of educational and economic interests of Scheduled Castes and Scheduled Tribes and other weaker sections; raising of levels of nutrition and standards of living and improvement of public health; organisation of agriculture and animal husbandry; and protection of environment, forests and wild life.

Not only the Constitution confers rights on the citizens, it also imposes certain duties on them which include abiding by the Constitution and respecting its ideals and institutions; cherishing and following the ideals that inspired national struggle for freedom; upholding and protecting the sovereignty, unity and integrity of India; defending of the country and rendering national service when called upon to do so; promoting harmony and the spirit of common brotherhood amongst all persons and renouncing of practices derogatory to the dignity of women; valuing and preserving the rich heritage of our composite culture; protecting environment and having compassion for living creatures; developing scientific temper, humanism and the spirit of inquiry and reform; safeguarding of public property and abjuring of violence; striving towards excellence in all spheres of activity; and providing opportunities for education to child or ward between the age of six and fourteen.

Notable features of the rights, directives and the duties are that they express special concern for women, children and weaker sections of the society, prominently among them socially and educationally backward classes, Scheduled Castes and Scheduled Tribes and, for some specific purposes, also the minorities. These concerns are presumed to inform all our laws and legal institutions either expressly or impliedly. Wherever such concern is expressly shown in any law and it comes before a district court for adjudication obviously the court must give effect to it. But even if it is not expressly shown the court

must imply such concern in that law and must give effect to it. Wherever the law expressly ignores such concern and the court is convinced that such a law is inconsistent with the above constitutional concerns it must refer the matter to the High Court under the relevant provision of CPC or CrPC as the case may be and wait for its decision. If a court ignores these concerns or does not pay due consideration to them, it shall be deemed to be acting against the Constitution and eroding the foundations on which the country stands. Undoubtedly a substantial, if not large, number of cases in the district courts must be concerned with persons for whom the Constitution expresses special concern. They are expected to give effect to that concern.

These concerns are further supported by the provisions of the Constitution in Parts IX and IX-A relating respectively to Panchayats and municipalities in which special provisions have been made for the representation of women, Scheduled Castes and Scheduled Tribes[66] and also in Part XVI where similar provisions for the representation of the Scheduled Castes, the Scheduled Tribes and a minority community have been made for Parliament and State Legislatures.[67] Additional provisions have been made in this part for the representation of Scheduled Castes and Scheduled Tribes in State services and also for a minority for such representation in some services and for special grants for education.[68] The Constitution also provides for special commissions to look after the interests of the Scheduled Castes, Scheduled Tribes and backward classes.[69] Special provisions for the Scheduled Castes, Scheduled Tribes backward classes, especially for the Scheduled Tribes, are scattered all over the Constitution including its Schedules.[70] A few safeguards are also provided for the linguistic minorities.[71]

All these provisions of the Constitution express special concern for those sections of the society who either because of the historical

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[66] Arts. 243-D & 243-T.
[67] Arts. 330 – 333,
[68] Arts. 335 & 336.
[69] Arts. 338, 338-A & 340.
[70] Art. 164 (1) Proviso, Part X, Arts. 339, 371-A, 371-B, 371-G, 371-H, & 5th & 6th Schedules.
[71] Arts. 350-A & 350-B.

reasons or because of their numerical strength cannot have enough say in the ordinary democratic process unless and until they are made capable of having their say. The Constitution either clearly intends to make them equal citizens and participants in the life of the nation as in the case of the Scheduled Castes, the Scheduled Tribes, backward classes, minorities and women or expresses special concern for others such as children, weaker sections and workers either because they are the future of the country or because the society owes an obligation to support them for any number of reasons. This noble but also gigantic task cannot be realised merely by the incorporation of the provisions in the Constitution or even by making the laws in support of them. Its fulfillment requires efforts from all directions. Definitely the district courts as dispensers of justice can play a distinct and vital role in the realisation of the constitutional vision of justice. If they either remain indifferent to that vision or ignore it under the impression that the Constitution is not their concern then not only we disappoint our forefathers who made sacrifices for our freedom and those who, amongst them, gave us a remarkable Constitution but also belie forever the hope of that heaven of freedom "Where the mind is without fear and the head is held high;" "Where tireless striving stretches its arms towards perfection;" and "Where the clear stream of reason has not lost its way Into the dreary desert sand of dead habit", to which Tagore so intensely longed for India to awake.[72]

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[72] For full text see, Rabindranath Tagore, *Gitanjali,* 75 (UBSPD, 2003, 10th reprint 2006).

Principle of Two Views: Application in other than Criminal Cases

*S. K. Sarvaria**

Introduction

In my earlier article[1] on the principle of 'two views', I have dealt with its applicability and use in criminal justice system in appeals and at different stages of trial. The said principle is not confined to criminal law. In cases, other than criminal cases, such as disputes between workman and management; civil matters, both at original and appellate stages; and revenue matters, while appreciating evidence or law in the given facts and circumstances of the case, two views often emerge. The purpose of the present article is to show to the readers from legal fraternity how this judge-made principle is working under different situations in non-criminal cases.

Hon'ble Justice A.K. Sikri of the High Court of Delhi has also remarked on the situations where there can be two possible results out of the same set of facts, though in a slightly different context, in his Article "Gender Justice" as follows:

> "……what is emphasized is that there can be different outcomes of the same dispute before different Judges. This may arise at two levels, viz., (a) appreciation of the facts and evidence, which can be perceived differently by two different Judges; and (b) interpretation of a particular provision of law, if such a provision is susceptible to more than one interpretation. In the

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[1] S.K. Sarvaria, "Principle of 'Two Views': Application in Criminal Law", (2011) 7 (II) DJA 132.

process, discretion which is exercised by a Judge in resolving the disputes may be exercised differently. These questions do not arise in the "easy cases" in which there is one answer to the legal problem and the Judge has no choice but to choose it. Problem arises in deciding "hard cases" in which legal problem has more than one legal answer."[2]

The present article tries to deal mainly with the *"hard"* cases of the second kind of situation contemplated in the above quote i.e. when a provision is susceptible to more than one interpretation. It can, therefore, be perceived that the existence of two equally possible views on a question of law in a particular case is an indicator of the existence of ambiguity, which can be resolved through the application of appropriate rule of interpretation.

To my knowledge, there is no authoritative pronouncement of higher courts as to the meaning or definition of the principle of 'two views'. So I venture to explain essential requisite of applicability of this principle in civil cases. I feel that there should be parity as to possibility of the two opposing views for the applicability of this principle. We have seen in my earlier article[3] with regard to this principle as applicable to criminal law that parity of views in favour of State/prosecution and the accused is possible even in cases where the former proves its case beyond reasonable doubt and the latter on preponderance of probabilities. The difference in civil cases is that the proof of a fact from both parties is required to the level of preponderance of probabilities only. Therefore, in civil cases, if one view is established in favour of one of the parties on preponderance of probabilities, the other view should also be of the same weight or at about the same level. The difficulty, however, would arise where one view is of the value of conclusive proof and the other view is of a bit lower value of credible proof or of still lower level of preponderance of probabilities. In that case, the view which emerges on the basis of

[2] (2011) 7 (I) DJA 18 p.no. 20.

[3] *Supra* note 1.

conclusive proof cannot be equated to the view of the level of credible proof or preponderance of probabilities. If, for instance, during the subsistence of marriage a child is born after 240 days of marriage and the spouses have access to each other, it is conclusive proof of the parentage of the child. If the evidence of non-access is established by the disputing spouse at the level of preponderance of probabilities, then it cannot unsettle the view which is inbuilt in such a situation by virtue of Section 112 of Evidence Act, 1872. Therefore, to have benefit of the principle of 'two views' in civil cases, the view in favour of a party, if based on conclusive proof, credible proof or preponderance of probabilities, should be pitted against an equally possible view in favour of the other party to the *lis*.

Application of the principle

In this part, an attempt is made to show how the higher courts have dealt with different cases when there is a possibility of emergence of two views. I intend to deal with the topic under the following synopsis:

1. Interpretation preserving the constitutionality of statutes
2. Retrospective or prospective application of statutes
3. Welfare legislations
4. Fiscal statutes
5. Election matters
6. Writ jurisdiction
7. Matters challenging administrative decisions of government
8. Construction of trust deed
9. Civil appeal
10. Second civil appeal
11. Special leave petition
12. Review petition

1. Interpretation preserving the constitutionality of statutes

The Apex Court has observed in *Tejkumar Balakrishna Ruia* v. *A. K. Menon*[4] that it is for the Parliament to enact a law that meets all

[4] AIR 1997 SC 442.

contingencies and the courts must interpret the law as it reads. While a purposive interpretation is permissible where two interpretations are possible, the purposive interpretation must be such as preserves the constitutionality of the provision. In this case, the Supreme Court was considering the true import of Section 3(3) of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992. Similarly, in *Mark Netto* v. *Government of Kerala,*[5] while determining the constitutionality of Rule 12 (iii) of Chapter VI of the Kerala Education Rules, 1959 vis-à-vis Article 30(1) of the Constitution, it was observed that before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope.

2. Retrospective or prospective application of statutes

Any new law that is made should ordinarily affect future transactions, not past ones. Hence, unless there be something in the language, context, or object of an Act showing a contrary intention, the duty and practice of courts of justice is to presume that the legislature enacts prospectively and not retrospectively.[6] It is a familiar rule that no statute shall be construed to be of retrospective operation unless the terms of the statute expressly state that it is retrospective or such a construction arises by necessary implication. The rule is based on the presumption that the legislature does not intend what is unjust or that transactions which have already vested title to property should be reopened or thrown into doubt.[7]

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[5] AIR 1979 SC 83; c.f. *Government of Andhra Pradesh* v. *P. Laxmi Devi,* AIR 2008 SC 1640.

[6] *Tika Sao* v. *Harilal* (1940), AIR 1940 Pat 385 para 5; *Maloji Narsing Rao* v. *Shankar Saran,* AIR 1958 All 775; *State of Kerala* v. *Philomina,* AIR 1976 SC 2363.

[7] *Kusum Kumari Devi* v. *Custodian, Evacuee Properly,* AIR 1954 Pat 288.

According to the Supreme Court, all laws which affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective effect is intended. Hence, the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision in question in accordance with its tenor. If the language is not clear then the court has to decide whether in the light of the surrounding circumstance retrospective effect should be given to it or not.[8] Even in cases where the two views are possible with regard to the retrospective or prospective application of the Act the law is if an enactment is expressed in language, which is fairly capable of either interpretation, it ought to be construed as prospective only.[9]

3. Welfare legislations

The principle of two views has also been made applicable to welfare legislations for employees in private sector to the advantage of the employees. In the disputes between workmen and management, the Supreme Court has applied this principle in the clash between unequals, i.e., poor worker and influential management with financial clouts, to the benefit of workmen. The Apex Court has observed that while interpreting and applying the Industrial Law in the perspective of Part IV of the Constitution, the benefit of reasonable doubt on law and facts, if there be such a doubt, must go to the weaker section, labour.[10] Similarly, while explaining the term 'victimisation', it has been held that the word 'victimisation' can be interpreted in two different ways and the interpretation which is in favour of the labour

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[8] *Punjab Tin Supply Co.* v. *Central Government,* AIR 1984 SC 87 para 16.

[9] *Daulat Singh* v. *State,* AIR 1950 MB 112-13; *Henry Hunter* v. *Basanti Devi,* (1938) ILR 13 Luck 317, AIR 1937 Oudh 241-42; *Ganpati* v. *Maruti,* AIR 1962 Bom 75-76; *Gorden* v. *Lucas* [1878] 3 AC 582, p 601; *Kempiah* v. *Girigamma,* AIR 1966 Mys 189; *Govind Das* v. *Income-tax Officer* (1976) 1 SCC 906.

[10] *KCP Employees' Association, Madras* v. *Management of KCP Ltd.,* AIR 1978 SC 474 para 6.

should be accepted as they are the poorer section of the people compared to the management.[11] In *S.M. Nilajkar* v. *Telecom Distt. Manager, Karnataka*,[12] it was held that the labour laws being beneficial pieces of legislation are to be interpreted in favour of beneficiaries. Accordingly, in case of doubt or where it is possible to take two views of a provision, the benefit must go to the labour.

In *All India Reporter Karmachari Sangh* v. *All India Reporter Ltd.*,[13] it was held that the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 is a beneficial legislation which is enacted for the purpose of improving the conditions of service of the employees of the newspaper establishments and hence even if it is possible to have two opinions on the construction of the provisions of the Act, the one which advances the object of the Act and is in favour of the employees for whose benefit the Act is passed has to be accepted. Similarly, in *Transport Corporation of India* v. *Employees State Insurance Corporation*,[14] the Supreme Court observed that the Employees' State Insurance Act, 1948 is a beneficial piece of legislation intended to provide benefits to employees in case of sickness, maternity, employment injury and for certain other matters in relation thereto. It is enacted with a view to ensuring social welfare and for providing safe insurance cover to employees who were likely to suffer from various physical illnesses during the course of their employment. Such a beneficial piece of legislation has to be construed in its correct perspective so as to fructify the legislative intention underlying its enactment. It was, therefore, held that when two views are possible on its applicability to a given set of employees, that view, which furthers the legislative intention, should be preferred to the one which would frustrate it.

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[11] *Workmen* v. *M/s Williamson Magor & Co. Ltd. and Anr.* (1982) SCC (L&S) 42 para 8.
[12] (2003) 4 SCC 27.
[13] AIR 1988 SC 1325.
[14] AIR 2000 SC 238.

4. Fiscal statutes

The principle of two views acts in two ways insofar as its application to fiscal statutes is concerned. The first application leads to interpretation in favour of the assessee and the other application leads to non-interference by the appellate forum with the order in appeal. These two outcomes have been separately dealt as under:

(a) Existence of two views leading to interpretation in favour of the assessee

General rule of interpretation in Tax Acts is that they must be construed strictly.[15] This rule of interpretation makes way to allow the courts to give benefit to the assessee. The Apex Court has observed in *Collector of Customs, Madras* v. *Lotus Inks*[16] that if two views are possible the one in favour of the assessee would guide the decision of the court.[17] The said observations came while determining whether a particular commodity (Alkali Blue Flushing in the said case) would fall under Item 14-I (1) or Item 14-D of the Central Excise Tariff. It was held that in the absence of any evidence to the effect that the said commodity was used in dyeing, the view taken by the Customs, Excise and Gold Control Appellate Tribunal (CEGAT) in favour of the assessee should not be interfered with. In *Commissioner of Income Tax Punjab* v. *Kulu Vallety Transport Co. (P) Ltd,*[18] the Supreme Court has, while interpreting Section 22(3) of the Income Tax Act, 1922 observed that if two views are possible, the view which is favourable to the assessee must be accepted while construing the provisions of a

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[15] *Commissioner of Sales Tax, U.P.* v. *Modi Sugar Mills Ltd.* [1961] 2 SCR 189; *NH Lokohmi Bai* v. *Commissioner of Wealth-tax,* (1994) 2 SCC 534.

[16] (1997) 10 SCC 291.

[17] *Sun Export Corporation, Bombay* v. *Collector of Customs, Bombay,* AIR 1997 SC 2658 wherein the Supreme Court made similar observations while considering whether 'animal feed supplements' would fall under the purview of an Exemption Notification and whether the Appellant therein was entitled to refund of the duty paid under the Central Excise Tariff Act, 1975. The Court observed that even assuming that there are two views possible, it is well settled, that one favourable to the assessee in matters of taxation has to be preferred. However, see *Novopan India Ltd.* v. *Collector of Central Excise and Customs, Hyderabad,* 1994 AIR SCW 3976 wherein it has been held that a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision and in case of doubt or ambiguity, benefit of it must go to the State; see also *State Level Committee* v. *M/s. Morgardshammar India* Ltd., AIR1996 SC 524.

[18] AIR 1970 SC 1734.

taxing statute. The assessee is, therefore, entitled to the benefit of doubt[19] and that opinion which is in its favour should be given effect.

(b) Existence of two views leading to non-interference with the order in appeal

While dealing with an appeal from CEGAT, the Supreme Court has, in *Collector of Customs, Bombay* v. *Swastic Woollen (P) Ltd*,[20] observed that merely because another view might be possible by a competent Court of law is no ground for interference under Section 130-E of the Customs Act, 1962 though in relation to the rate of duty of customs or to the value of goods for purposes of assessment, the amplitude of appeal is unlimited. It was further held that if the Tribunal has acted bona fide with the natural justice by a speaking order, even if superior court feels that another view is possible, that is no ground for substitution of that view in exercise of power under clause (b) of Section 30-E of the Customs Act, 1962. In cases pertaining to customs duty, it has been held by the Apex Court that even if two views were possible the view taken by the High Court being a plausible one would not call for intervention.[21]

5. Election matters

The cumbersome and expensive re-election process should be avoided by giving the benefit to the elected candidate whenever two views emerge in the facts and circumstances of the case. The Apex Court has expressed its view in *Ram Singh* v. *Col. Ram Singh*[22] that in an election petition to declare election of an elected candidate null and void, if two views are reasonably possible: one in favour of the elected candidate and the other against him, the courts should not interfere with the expensive electoral process and instead of setting at naught the election of the winning candidate, should uphold his election giving him the benefit of doubt. This is more so where allegations of

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[19] *Poulose and Mathen* v. *Collector of Central Excise,* AIR 1997 SC 965.
[20] AIR 1988 SC 2176.
[21] *Union of India* v. *Gangadhar Narsingdas Aggarwal,* (1997) 10 SCC 305 para 4.
[22] AIR 1986 SC 3.

fraud or undue influence are made. Therefore, the election should not be declared void in such cases.

6. Writ jurisdiction

The principle of two views is equally applicable in writ jurisdiction exercised by the Supreme Court and the High Courts of different States. In *Surya Dev Rai* v. *Ram Chander Rai,*[23] the Supreme Court has ruled that to be amenable to correction in certiorari jurisdiction, the error committed by the court or authority on whose judgment the High Court was exercising jurisdiction, should be an error which is self-evident. An error which needs to be established by lengthy and complicated arguments or by indulging into a long-drawn process of reasoning cannot possibly be an error available for correction by writ of certiorari. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent calling for interference by the writ court.

In *MSM Discovery Private Limited* v. *Viacom 18 Media Private Limited*,[24] the Delhi High Court has observed that its power under Articles 226 and 227 of the Constitution to judicially review the order of a tribunal is limited. The power is even more limited in regard to interlocutory orders. Unless it is shown that the impugned orders are perverse or suffer from some material irregularity or are in violation of the principles of natural justice, interference would generally not be called for. In this case, the Single Bench of Hon'ble Justice S. Muralidhar refrained from interfering with an interlocutory order of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). It was held that merely because another view is possible, the High Court would not interfere with the order of the TDSAT.

When the trial judge comes to one conclusion and the Appellate bench comes to another conclusion, it is an indication of the position that two views were possible in the said case. In such

[23] (2003) 6 SCC 675; see also *Ranjeet Singh* v. *Ravi Parkash,* AIR 2004 SC 3892.
[24] MANU/DE/1935/2010 (decision dated 11th August 2010).

circumstances, the Supreme Court has observed that the High Court should not interfere, by going into questions which depended upon appreciation of evidence. It was, therefore, held that the High Court would transgress its limits of jurisdiction under Article 227 of the Constitution in preferring one view to another of factual appreciation of evidence.[25]

Therefore, as can be seen, the principle of two views in writ jurisdiction is applied mainly in the first category of "hard cases" as already referred to in the earlier part of this article,[26] i.e. those cases where appreciation of the facts and evidence can be perceived differently by two different Judges. In such cases, the writ court prefers to not interfere with the decision under challenge.

7. Matters challenging administrative decisions of government

In the matters relating to administrative decisions of the government, propriety demands judicial restraint where two or more views are possible upon looking at the same material. In a matter relating to amalgamation of two gram panchayats under the Punjab Gram Panchayat Act, 1952, the Supreme Court has in *Karnail Singh* v. *Darshan Singh*[27] held that when there is some material before the authority or the Government and the same was considered, though two views could be possible to be taken on the same material, it must be left to the Government to take a decision and unless it is vitiated by *mala fides*, the court cannot substitute its view for that of the Government.

In *Indian Railway Construction Co.* v. *Ajay Kumar*,[28] a matter where the administrative decision to dismiss an employee without holding a disciplinary enquiry was in question; the Apex Court observed that the satisfaction as to whether the facts exist to justify dispensing with the enquiry has to be of the disciplinary authority. Where two views are possible as to whether holding of an enquiry

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[25] *Chandravarkar Sita Ratna Rao* v. *Ashalata S. Guram,* AIR 1987 SC 117 para 21.
[26] *Supra* note 2.
[27] (1995) Supp (1) SCC 760.
[28] AIR 2003 SC 1843.

would have been proper or not, it would not be within the domain of the court to substitute its view for that of the disciplinary authority as if the Court is sitting as an appellate authority over the disciplinary authority. Similarly, in *Union of India* v. *Tulsi Ram Patel*[29] and *Union of India* v. *Harjeet Singh Sandhu,*[30] it has been observed that the satisfaction of the authority is not immune from judicial review on well settled parameters of judicial review of administrative decisions. However, if on the satisfaction reached by the authority two views are possible, the court will decline to interfere.

8. Construction of trust deed

If a trust deed is capable of two constructions: one, that it created only a partial dedication and not an absolute debutter, the properties being charged for seva puja or other religious purposes to the extent specified therein and two, that it created an absolute debutter in favour of the deity, the former construction was expressly adopted by the court while passing the consent decree. Since the consent decree was based upon one view which was also not beyond the orbit of reasonable possibility, the said decree could not be challenged in a subsequent suit on the ground of fraud and collusion.[31]

9. Civil appeal

Similar to writ jurisdiction, in civil appeals also the appellate court prefers not to interfere with the finding of the trial court when two views are possible. The principle of 'two views' has been used by the Supreme Court in different kinds of civil appeals. In the new scheme of things under the Customs Act, 1962, the tribunals have been entrusted with the authority and the jurisdiction to decide the questions involving determination of the rate of duty of excise or the value of goods for the purposes of assessment. An appeal has been provided to the Supreme Court to oversee that the subordinate tribunals act within the law. Merely because another view could be

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[29] (1985)3 SCC 398.
[30] (2001) 5 SCC 593.
[31] *Jadu Gopal Chakravarty* v. *Pannalal Bhowmick,* AIR 1978 SC 1329.

possible by a competent court is no ground for interference under Section 130-E of the Customs Act, though in relation to the rate of duty of customs or the value of goods for the purposes of assessment the amplitude of appeal is unlimited.[32] Even if two views were possible the view taken by the High Court, if a plausible one, would not call for intervention by the Supreme Court.[33]

In an appeal against an arbitral award under the old Arbitration Act, 1940 the court did not sit in appeal and did not re-assess the evidence. Even if the court felt that had it been left to it, it would have assessed the evidence differently that could not be a valid ground for setting aside the award.[34] In *Hind Builders* v. *Union of India,*[35] the Apex Court has pointed out that where on an interpretation of any contract or document, two views are possible and the Arbitrator accepts one view while the other view is more appealing, it would not be open to the Court to interfere with the award. In *M. Subba Reddy* v. *A.P. State Road Transport Corporation*,[36] it was observed that when two interpretations are possible the one which promotes justice and equity should be preferred. Although hardship cannot be a ground for striking down a law but when two views are possible, it is permissible in law that the court shall interpret the statutory provision in such a manner that possible hardship is avoided.

10. Second civil appeal

Where the Appellate Court is the final court on facts, has accepted the interpretation which is quite plausible and acceptable, in second appeal that judgment should not be interfered with where the interpretation of the lower appellate court is one of the two possible interpretations. In *Shanmughamand and Ors.* v. *Saraswathi and Ors.*,[37] where the bequest of property was made by will to children and the expression for child did not indicate the sex of the child, the

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[32] *Collector of Customs, Bombay* v. *Swastic Woollen* (P) Ltd, AIR 1988 SC 2176 para 9.
[33] *Union of India* v. *Gangadhar Narsingdas Aggarwal* (1997) 10 SCC 305 para 4.
[34] *Jagdish Chander Bhatia* v. *Lachhman Das Bhatia* (1993) 1 SCC 548 para 4.
[35] (1990) 3 SCC 338.
[36] AIR 2004 SC 3517.
[37] AIR 1997 Mad 226.

interpretation of expression of child by the appellate court was found by the Madras High Court to be quite plausible and acceptable and not liable to be interfered with in the second appeal.

The existence of a substantial question of law is the *sine qua non* for the exercise of the jurisdiction under the provisions of Section 100, Code of Civil Procedure, 1908.[38] It has been held by the Punjab and Haryana High Court[39] that merely because the High Court in second appeal could reach a different conclusion, would not give rise to a substantial question of law. The High Court of Himachal Pradesh[40] has also held that merely because of appreciation of evidence another view is also possible, would not empower the High Court to assume the jurisdiction by terming the question as substantial question of law.

11. Special leave petition

The general rule of practice is that the Apex Court does not disturb the findings of the final court of fact where two views are possible.[41] In a Special Leave Petition against the decision of High Court in a writ petition under Article 226 of the Constitution of India, the settled rule of practice of the Supreme Court is not to interfere with the exercise of discretionary powers of High Courts under Article 226 of the Constitution. Therefore, merely because two views are possible upon the facts of a case does not form a sufficient ground for interference.[42] In a case dealing with grant of stage carriage permit under the Motor Vehicles Act, 1939 where two views could be taken and an order of remand was passed by the Madras High Court and the matter remanded to the Appellate Tribunal without determining the rights of the parties, the Supreme Court did not find any justification to interfere under Article 136 of the Constitution merely because an alternative action could also be taken.[43]

[38] *Monicka Poosali* v. *Anjalai Ammal,* AIR 2005 SC 1777.

[39] *Gurmail Singh* v. *Rajinder Singh,* AIR 2003 P&H 336.

[40] *Chitru Devi* v. *Ram Dei,* AIR 2002 HP 59.

[41] Commissioner for Hindu Religious and Charitable Endowments, Mysore v. Ratnavarma Heggade, AIR 1977 SC 1848; see also State of U.P. v. Jashoda Nandan Gupta, AIR 1974 SC 753 dealing with an appeal against an order of acquittal wherein it was held that interference with an order of acquittal is not justified when there is a reasonable possibility of two views, one indicating acquittal and the other conviction.

[42] *Beant Singh* v. *Union of India,* AIR1977 SC 388.

[43] *Ajantha Transports (P) Ltd., Coimbatore* v. *M/s. T.V.K. Transports Pulampatti,* AIR 1975 SC 123.

12. Review petition

In *Lily Thomas* v. *Union of India*,[44] the Apex Court has held that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Thus, re-assessing evidence and pointing out defects in the order of the Court is not proper.[45]

Conclusion

In my earlier article[46] we have already seen that in a criminal trial the principle of two views is working in favour of the accused. From the above discussion, it is clear that this important principle is working in favour of David against Goliath. In criminal cases, this principle supports the accused against the might of the state/prosecution. Likewise, this principle leans in favour of poor workmen against influential and financially strong management, in favour of the subject for whose welfare the welfare legislation is enacted like working journalists, employees covered under State Insurance Act, etc. A woman being a weaker (or weakened) sex is considered to be at a disadvantage in several respects in our society, more so, when the majority of women in our Indian society are not working and so, financially dependent upon their husbands and parents. I have not yet come across an edict from higher courts where the principle of two views is made applicable to matrimonial disputes also. However, going by the interpretation of the rule in labour as well as criminal cases, the same principle should apply in the legal disputes between women and their husbands as regards maintenance, income of husband etc. to give benefit to the 'weakened' sex. Similarly, it appears that the principle of two views can be made applicable in other cases in favour of the weak and against the strong. For example, in legal

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[44] AIR 2000 SC 1650.

[45] *Santosh Kumar* v. *Nageshwar Prasad,* AIR 2001 All 187.

[46] *Supra* note 1.

disputes between a minor, a physically challenged person, a senior citizen and an individual on the one hand and a major, a physically fit (or strong) person, a non-senior major citizen and an organisation on the other hand, as the case may be, benefit can be given to the former category of persons by applying the principle of two views and reading it with the rule of beneficial interpretation where any ambiguity exists or emerges.

The principle also works in favour of an elected candidate in an election. In fiscal statutes, the principle of two views works in favour of the assessee. As to the interpretation and applicability of statutes, the tilt of the principle is in favour of their constitutionality and prospective applicability. When the two views emerge and the administrative authority has accepted one view, the principle prevents the courts from relying upon the other view. In the writ petitions, appeals, second appeals and special leave petitions, the concerned court should not interfere if two views are equally possible and the subordinate court or tribunal has acted upon one of the said two possible views. Similarly, a possibility of two views is not a ground for review in civil cases.

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Compendium of Punishments

*Girish Kathpalia**

In the backdrop of the recent upheaval in India, demanding severest and publicly meted out punishment for the accused of the infamous gangrape and homicide case in Delhi, and a debate over insufficiency of the kinds of punishments in our legal system, limited scope of this piece is to enumerate the major punishments, recognized across the globe.

As on date, major punishments recognized in many parts of the world, including India[1] are death, imprisonment, rigorous or simple, for specified span or for life, forfeiture of property and fine.

Before the Indian Penal Code came into existence, the Mohammedan criminal law was applied to both Hindus and Muslims, recognizing the following types of punishments, namely *qisas* (victim or his relatives inflicted similar pain/punishment to the offender); *diya* (offender could be exempted by paying money to the victim or heir of victim); *hadd* (fixed punishment to various crimes, with no judicial discretion); *tazeer* (punishment at the discretion of the judge); and *siyasat* (punishment by the king in public interest).

Prior to that, the ancient criminal law dealt with the aspect of punishment by way of quite well deliberated upon *dandaneeti* (penology).[2] The *Brihaspatismriti* laid down that depending upon the nature of crime, country, time, strength, deed and wealth, the king should impose appropriate punishment. Mainly four kinds of punishments were prescribed namely *vagdanda* (admonition), *dhigdanda* (censure), *dhanadanda* (fine) and *vadhadanda* (corporal

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1 Section 53 of Indian Penal Code, 1860.

2 Dalvir Bhandari, *The Constitution and Criminal Justice Administration* available at http://dalbirbharti.com/CRIME%20AND%20JUSTICE%20for%20PDF.pdf accessed on 15.01.2013.

punishment including capital punishment), with further classifications and sub-classifications of each kind. As laid down in *Brihaspatismriti*: "*vag dhig dhanam vadhaschaiva, purusham vaibhavam dosham janatva tam parikalpayet*", which means that the punishment of four kinds namely admonition, censure, fine and corporal punishment should be meted out after considering the offender, his financial condition and the nature of the crime committed.

Different societies, through different ages have coined a wide spectrum of punishments. Till a few decades ago, punishments such as torture and sadistic forms of inflicting pain as well as the barbaric modes of executing death sentence coupled with all sorts of cruelties in the prisons were some of the distinguishing features of the penal philosophy. What follows is a brief glimpse into the varied conspectus of punishments and modes of execution of capital punishment.

Corporal punishment

The term 'corporal punishment' has, since the 19th century usually meant caning, flogging or whipping rather than other types of physical penalty. Before the rise of humanitarianism in the penal philosophy, mutilation, branding and flogging also were well recognized modes of punishment across the world.

Whipping

In India, corporal punishment by way of whipping was first added and regulated by the Whipping Act, 1864 and replaced by the Whipping Act, 1909, but was abolished in 1955.[3]

In England flogging, also stood abolished quite some time ago. However, the issue whether or not to reintroduce whipping as a recognized form of punishment is very much a living one. In the year 1960, the Advisory Council on the Treatment of Offenders[4] was asked

[3] Great Britain Parliament, Advisory Council on the Treatment of Offenders, Report on Corporal punishment (1: 17) (H.M. Stationery Off., 1960).

[4] *Ibid.*

to consider the desirability of such a course and till date debate on efficacy of this form of punishment is extant.

To prove the efficacy of whipping, it is frequently argued that flogging by parents or school teachers in childhood have a constructive effect, though the child psychologists strongly dispute this claim and so much so that now a days any form of corporal punishment is very strictly banned even in schools.[5] However, such an argument ignores two fundamental aspects of whipping as a correctional measure. Firstly, the whipping administered by a parent or even a teacher is in the context of the emotional relationship between the child and the punishing authority, which is lacking in case of convict and the State agencies.[6] Secondly, the whipping done by a parent or school teacher inflicts pain generally within a very short time after the aberrant act is committed by the child and such promptness in the punishment is bound to intensify the effect of the reprimand, which proximity between the crime and the punishment is practically impossible to achieve.

Various efficacy studies do not lend any support to the view that whipping has any deterrent effect. In a research carried out by the British Home Office, the criminal records of 440 persons sentenced for robbery with violence during 1921-1930 were compared with 142 sentenced to corporal punishment and it was found that out of flogged convicts, 55% were subsequently convicted of serious crimes compared to 43.9% of those not flogged.[7] Although, the punishment of whipping does not have much effect on hardened criminals but it does cause some deterrence to those who commit crimes of comparatively lesser gravity.

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[5] Tom Johnson, "The Fallacies of Pro-Spanking Science: A Point-by-Point Rebuttal to the Apologetics of Two Pediatricians", 1997 available at http://www.nospank.net/johnson2.htm accessed on 20.01.2013.

[6] Murray A. "Straus Children Should Never, Ever, Be Spanked No Matter What the Circumstances Straus", (2005).in D. R. Loseke, R. J.Gelles & M. M. Cavanaugh (Eds.), *Current Controversies about Family Violence* (2nd ed., pp. 137.157) Thousand Oak, CA: Sage. available at http://www.law.qub.ac.uk/schools/SchoolofLaw/Research/ResearchProjects/ChildhoodTransitionandSocialJusticeInitiative/FileStore/Filetouplo ad,179667,en.pdf accessed on 15.02.2013.

[7] Rajendra R Shukla, 2007, *Human Rights of Under Trial Prisoners in Gujarat State,* (PhD thesis), Saurashtra University available at http://etheses.saurashtrauniversity.edu/749/1/shukla_rr_thesis_law.pdf accessed on 20.01.2013.

Some countries, including a number of former British territories such as Botswana, Malaysia, Singapore and Tanzania have retained corporal punishment. In Malaysia and Singapore, for certain specified offences, males are routinely sentenced to caning in addition to a prison term. The Singaporean practice of caning became much discussed around the world in 1994 when an American teenager Michael P. Fay was caned for vandalism. A number of countries with an Islamic legal system, such as Saudi Arabia, Iran, Sudan and northern Nigeria, employ judicial whipping for a range of offences. As of 2009, some regions of Pakistan are experiencing a breakdown of law and government, leading to a reintroduction of corporal punishment by *ad hoc* Islamic courts.

Chandrasekharan Kunnath observes:[8]

> "Those in favour of Judicial Corporal Punishment argue that corporal punishment is a quick and effective method and less cruel than long-term imprisonment; adherents to this viewpoint think that corporal punishment should be re-considered in countries that have banned it as an alternative to imprisonment; some even want corporal punishment to replace fines for such minor offences as graffiti. The purported advantages of this approach include easier reintegration in society (generally, physical wounds heal quickly, while prison may adversely affect relationships and job prospects), greater deterrence rates, less recidivism, and fewer costs to society. Proponents of corporal punishment also invoke arguments of authority such as those found in a literal reading of the Bible or Quran, or simply 'traditional means to defend traditional values'."

Branding

In criminal law, branding with a hot iron was a mode of punishment. The subjects were marked like goods or animals,

[8] Chandrasekharan Kunnath, "Corporal Punishment: Pros & Cons" available at http://chandrasekharank.hubpages.com/hub/Corporate-Punishment-Pros-Cons accessed on 21.01.2013.

sometimes concurrently with their reduction of status. Brand marks were also used as a punishment for convicted criminals, combining physical punishment (as burns are very painful) with public humiliation (greatest if marked on a normally visible part of the body) and with the imposition of an indelible criminal record.

Robbers and runaway slaves were marked by the Romans with the letter F (fur) and the toilers in the mines and convicts condemned to figure in gladiatorial shows were branded on the forehead for identification. During the rule of the Roman emperor Constantine I (306-337) the face was not permitted to be so disfigured, so the branding used to be done on the hand, arm or calf. In the 16th century, German Anabaptists were branded with a cross on their foreheads for refusing to recant their faith and join the Roman Catholic Church. In the North-American Puritan settlements of the 17th century, men and women sentenced for having committed acts of adultery were branded with letter 'A' on their chest.

The branding mark in later times was also often chosen as a code for the crime, e.g. in Canadian military prisons D was branded for “desertion” and BC for “bad character”, so that most branded men could be shipped off to a penal colony.

Branding tended to be abolished like other judicial mutilations with notable exceptions, such as amputation under Sharia law, sooner and more widely than flogging, caning and similar corporal punishments, which normally aimed only to inflict pain and at worst caused stripe scars, though the most severe lashings in terms of dosage and instrument could even turn out to be fatal.

Mutilation

In times when even judicial physical punishment was still commonly allowed to inflict not only intense pain and public humiliation during the process of administration but also to inflict long time permanent physical damage, or even deliberately intended to mark the criminal for life by docking or branding, one of the common anatomical target areas not normally under permanent cover

of clothing, so particularly merciless in the long term, were the ears.

In England, for example, various pamphleteers attacking the religious views of the Anglican episcopacy under William Laud, the Archbishop of Canterbury, had their ears cut off for those writings. In Scotland one of the Covenanters, James Gavin of Douglas, Lanark shire, had his ears cut off for refusing to renounce his religious faith. In Japan, Gonsalo Garcia and his companions were similarly treated.

Notably in various jurisdictions of colonial British North America even relatively minor crimes, such as hog stealing, were punishable by having one's ears nailed to the pillory and slit loose, or even cropped, a counterfeiter would be branded on top.

Tongue being cut also was a form of mutilation as this led to bleeding to death in most cases with choking in the lungs.

In Sharia law, mutilation is, in certain cases, used as a punishment for crimes. For example, thieves may be punished by having the right hand amputated.

Another example from a non-western culture is that of Nebahne Yohannes, an unsuccessful claimant to the Ethiopian imperial throne who had his ears and nose cut off, yet was then freed. This form of mutilation against unsuccessful claimants to thrones had been in use in middle-eastern regions for thousands of years. To qualify as a king, formerly, one had to exemplify perfection. Obvious physical deformities such as missing noses, ears, or lips, were thereby sufficient disqualifications. The victim in these cases was typically freed alive to act as an example to others, and as no longer a threat.

However, later this form of punishment was also discarded being barbaric and degrading, besides its having a tendency to infuse cruelty among people.

Stoning

Medieval period witnessed another cruel form of corporal punishment, whereby criminals were stoned to death. Stoning or

lapidating was a form of punishment whereby a group of persons would throw stones at the convict until he died. No individual among the attacking group could be identified as the one who killed the convict, yet everyone involved plainly bore some degree of moral culpability. Slower than other forms of execution, stoning is a form of execution by extreme torture.

Banishment

This is one of the most ancient punishments. The object of banishment is to eliminate the criminal from the society by sending him to some far away place and sometimes even rebels, revolutionaries and reformers were also taken care of by this process. In India, banishment termed as *kala paani* meant transportation of dangerous criminals, especially freedom fighters to the deserted Andaman and Nicobar islands. The Indian Penal Code framers, while proposing this punishment, took note of the extraordinary fear among Indians of the sea, particularly those living far away from it and felt that such a punishment would cause much more terror in the Indian minds than what was actually warranted by the actual punishment. Further, banishment had an additional dimension for Hindus because going beyond the seas involved the forfeiture of one's caste, which in itself had very far reaching social consequences for the Indian freedom fighters.

The Indian practice of sentencing by transportation to Andaman islands came to end in the early forties during the occupation of the islands by Japan. Finally, by an amending Act of 1955, the *kala paani* punishment was abolished altogether and transportation for life or a shorter duration was replaced by imprisonment for life or shorter period.

In England also, transportation as a punishment was abolished. Banishment was imposed in USSR by removal of the convicted person from the place of his residence, with obligatory settlement in a certain locality, usually Siberia, where living conditions are extremely bad due to the freezing cold. In 1932, Soviet Union

instituted the policy of *propiska* to control the internal movements of its population, as per which, people without an "acceptable occupation" were exiled from major cities and were instructed not to live within 100 km of the designated cities. This practice of banishment was later extended to include criminals, homeless, prostitutes and political dissidents. Even after the collapse of Soviet Union, and the resultant end of banishments, the former exiles have struggled to reintegrate into a society that they forcibly left long ago.

Recently, the question of introduction of this form of punishment was considered by the Law Commission of India, which concluded that this suggestion did not find favour from any quarter. For, practically speaking, it almost necessarily involves the establishment of a penal settlement in each state, somewhat similar to the settlement in the Andaman Islands and running of such settlements and keeping effective control over the convicts banished thereto will give rise to tricky problems of administration. If the control were to be strict, the settlement would degenerate into concentration camps. As an alternative to long-term imprisonment, banishment does not appear to have any appreciable advantage.

Pillory

Yet another form of barbaric punishment, pillory was in practice till 19th century. The convict sentenced with pillory was made to stand in a public place with his head and hands locked in an iron frame, so that he could not move, then he was whipped or branded or stoned in public. Such a restraining of physical movement at the time of infliction aggrandized the pain of whipping etc. and was believed to have a strong deterrent effect. At times, the hardened criminals were nailed to the wall and shot or stoned to death.

Castration

Castration as a mode of punishment in cases of sexual assault has been a matter of debate world over for long. Castration, also referred to as gelding, neutering and orchiectomy, is an act which brings about loss of testicular functions in males and ovarian functions

in females.

Some States in the US, like California, Florida, Georgia and Montana etc. have used castration as a form of punishment. In India, till date castration is not recognized as a lawful punishment, but of late on account of a significant rise in the sexual assaults on women, there is a strong lobby for bringing castration on the statute book as a punishment approved by law. In *Rajendra Prasad etc.* v. *State of Uttar Pradesh*[9], Mr.Justice V.R.Krishna Iyer observed: "An anti-aphrodisiac treatment or a willing castration is a better recipe for this hyper-sexed human than outright death".

Most recently, on 3rd January, 2012, a South Korean court sentenced a 31 years old pedophile to 15 years in jail and ordered the country's first ever chemical castration in accordance with the law passed in the year 2011 authorising castration as a recognized form of punishment.[10] This verdict has come when India is hotly debating to bring this form of punishment on the statute book to deal with sexual offences.

Castration can be surgical or chemical. Surgical castration involves removal of reproductive organs surgically, while chemical castration involves administration of drugs in order to block or reduce libido. In chemical castration, regular dosages of anti androgens are injected, which block the androgen receptors of leydig cells in testes and prevent the testosterone from taking effect and consequently reducing libido. Unlike surgical castration, chemical castration can be both temporary as well as permanent.

Fines

Fines as an additional or alternative form of punishment have been increasingly favoured by the legislative as well as judicial authorities. As solitary punishment, fines are most appropriate relating to traffic and other minor offences. Fines are commonly

[9] AIR 1979 SC 916.

[10] South Korean Court Orders First Chemical Castration available at www.thehindu.com>News>International 03.01, 2013 accessed on 04.01.2013.

imposed in relation to crimes against property like embezzlement, fraud, theft and gambling etc. as punishment in addition to imprisonment. Fine is the most common punishment in every part of the world and it is a punishment with immense and obvious advantage. Punishments like imprisonment, transportation, banishment, solitude, compelled labour etc. are not equally agreeable to all men. But as regards fine the case is different.

According to Bentham, the punishment of fine has the advantage of being capable of regulation according to the means of the offender, implies no disgrace and is remissible in case of unjust convictions as discovered subsequently. On the other hand, Bentham also points out the disadvantages of imposition of fine that the family and dependents of the offender are made to suffer for no fault of theirs.[11]

In imposing a fine it is always necessary to have regard to the pecuniary circumstances of the offender as well as to the character and magnitude of the offence. Fine may be imposed in four different ways as provided in the Indian Penal Code. For some offences, fine is the solitary punishment and the limit of maximum fine has been laid down; for certain offences fine is an alternative punishment but the imposable fine amount is limited; for some offences it is imperative to impose fine in addition to some other form of punishment; and for some offences it is obligatory to impose fine but no particular pecuniary limit is laid down.

As regards the question of quantum of fines, no general provision exists in England to regulate it but both the Magna Carta and the Bill of Rights contain provisions prohibiting excessive and unreasonable fines. Legally speaking, the position is that the fine pronounced in a judgment becomes a debt in favour of the State or Crown in England. An interesting question arose in a case[12] in England as to whether such a debt was personal to the offender so that

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[11] Jeremy Bentham, *Principles of Penal law* (ebooks@ Adelaide) available at http://ebooks.adelaide.edu.au/benthem/jeremy/principles_of_penel_lawcomplete.htmlaccessedon14.02.2013.

[12] *H.M. Treasury* v. *Harris,* (1957) 2 All E R 455.

it was extinguished by his death or it was capable of being recovered from his estate after his death. It was held that the debt was not extinguished by the death and was accordingly recoverable from his estate in the suit filed by the Crown.

In India, the framers of the Penal Code observed that in offences, which are the result of greed, the amount of fines ought to be so excessive so as to reduce the offender to poverty. There must be some power vested under the law to realize the fine imposed upon the offender. In many cases the courts award imprisonment in default of fine. This power to courts has been given under Section 64 of the Indian Penal Code.

Forfeiture and confiscation of property

Forfeiture of property, which was the subject-matter of the offence, is another possible mode of punishment under the Indian Penal Code for certain offences. But forfeiture of that portion of the criminal's property, which is not the subject matter of the crime, is not possible according to the present law in India. Such a punishment was possible under the original Penal Code but the provisions were repealed in 1921.

The Law Commission of India invited opinions on the basis of a questionnaire relating to the suggested introduction of certain forms of punishment in the Code, one of the items in the questionnaire being confiscation of the entire property of the criminal. The opinions received by the Commission were mostly against the introduction of confiscation of entire property of criminal as a punishment in the Code. The Commission also was of the view that "this harsh punishment, which will fall not only on the criminal but on his dependent family, is not to be commended".[13]

However, in my view, such a punishment is certainly called for in cases of smugglers and blackmarketeers where prima facie the source of income or property acquired by the offender is found to be illegal and so far as hardships to the family of the criminal is concerned,

[13] M.B.Chande, *The Police in India* (Atlantic Publishers and Distributors, New Delhi, 1997) p. 37 para 2.

the same is caused in varying degrees by all forms of punishment. Further, in a welfare State the criminal's family, if hit hard, can also be provided financial relief by the government agencies and the family's possible suffering need not be used as an argument for withholding a punishment from an offender who deserves it otherwise.

Imprisonment

Ages ago Kautilaya's *Arthshastra* spoke of jails and imprisonment, but otherwise in comparison to other forms of punishment, maximum preferable use of imprisonment is of relatively recent origin and got prominence as a result of the deliberate reduction in the use of capital punishment and transportation in most of the countries during the last century or so.

Imprisonment in its pure form as a kind of punitive reaction to crime primarily has as its object deprivation of the offender's liberty which in itself is the most serious harm that can be caused to a human being, next only to deprivation of life by death sentence. This kind of punishment has always been a subject matter of deep study and research. Philosophy underlying imprisonment has undergone tremendous change over past few decades across the world, including introduction of correctional schemes. With all its extensive modulations, imprisonment as a punishment continues to remain the most common mode to reflect punitive approach and its fundamental character remains the same.

The traditional concept of prisons was different from the one in which it has been understood since the middle of the last century. Traditionally it was considered that imprisonment should be used for the custody of offenders only until such time as they could be appropriately dealt with, and this view prevailed in Europe from the time of the Roman Emperor Justinian for the next thousand years or so. In medieval England prisons were places where suspects were detained until the royal Judges came round on circuit with a commission of 'gaol delivery' aimed at emptying the jails and inquired

into the alleged crimes.[14] Presently, in India, imprisonment is used for dual purposes – as a punishment post conviction and also as detention during pendency of trial prior to conviction.

Briefly stated, imprisonment as a punishment is fraught with far reaching social and psychological consequences for the convict. The most serious problem associated with imprisonment is what has been termed as 'prisonisation'. The prison, which has its own archetypal environment, with its own culture and values, significantly impacts the earlier culture and values to which the prisoner was exposed before entering the jail, and this impact results in acculturation of the offender, leading to a severe personality dent. What was earlier the personal identity of the criminal, is the first casualty in the process of imprisonment and his name is replaced by a number. His clothes, food and working and leisure hours are just the same as those of other members of the group i.e. the fellow prisoners. In other words, the prisoner becomes a unit to be processed by the prison employees and is perceived as a job, rather than a person. All this results in some sort of social debasement of the convict in his own eyes.

Equally damaging effect of imprisonment is on family relationships of the convicted or undertrial prisoner. So much so that many legal systems recognize imprisonment as a ground for divorce available to the spouse of the convict. The only possible contact of a prisoner with the family members is through periodic visits permitted to them under the jail rules and such contacts also are after long periods of time and that too, for a short duration under the claustrophobic atmosphere. Instead of moving the criminal away from criminal tendencies, imprisonment sometimes results in something just the opposite. Deviant sexual behavior and hardening of criminal impulses are some major impacts on the criminal in prison.[15]

Finally, the most serious damage caused to the prisoner is

[14] Fox Linoel W, *The English Prison and Brostal Systems* (Routledge and Kegal Paul Lt.1952) available at http://archive.org/stream/englishprisonand031978mbp/englishprisonand031978mbp_djvu.txt accessed on 14.01.2013.

[15] Handbook on Criminal with Special needs (United Nations Publication, New York, 2009).

stigmatization arising out of a prison term. Once out of jail upon completing the punishment term, the prisoner has to go back to the same society to which he belonged prior to being sent to jail, but that society never accepts back the prisoner with the same dignity as he earlier enjoyed. Prisoners often feel, quite justifiably, that the real punishment begins after they leave the prison.

Externment from a locality

Externment is another form of punishment, in which the convict is sent out of the area of his abode for a particular period, so as to deprive the convict of the company of his friends and associates etc. The rationale of this punishment is that dissociation of the offender from his surroundings may reduce his capacity to commit crimes of a particular nature. Major drawback of this kind of punishment is the possibility of its adverse repercussions on the offender, his otherwise innocent family and the likely exploitation of externment for political reasons.

The Indian Penal Code (Amendment) Bill, 1972, suggested three new forms of punishment: externment, compensation to victims, and public censure. The bill was sent to a select committee of the Parliament and in 1978, the committee rejected the proposal for externment as a form of punishment, having regard to its constitutional ramifications. The subsequent Indian Penal Code (Amendment) Bill of 1978 proposed four forms of punishment: community service, compensation to victims, public censure, and disqualification from holding offices in certain types of cases, for example, white-collar crimes. But the 1978 Bill never saw the light of day.[16] Presently, many of the local laws enacted to strengthen the hands of local police in many Indian States bear the punishment of externment on their statute book, like the Delhi Police Act, the Bombay Police Act, the Madhya Pradesh Security Act and the Kerala Police Act etc. But it is desired that externment be also included as a

[16] Uma Devi Bellary, Arrest, Detention, and Criminal Justice System: A Study in the Context of the Constitution of India available at http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198075998.001.0001/acprof-9780198075998 accessed on 07.02.1013.

recognized punishment in the Indian Penal Code, applicable across the country so as to ensure uniformity and consistency in law and ensure procedural safeguards.

Corrective labour

Technically speaking, this form of punishment cannot be termed as a category of punitive reaction to crime *stricto senso* since the emphasis here is on the reformation and rehabilitation of the criminal. Corrective labour calls for the offender to work at his own residence or some work place except the prison. It was a common mode of punishment in USSR, as Lenin's teachings provided a basis for such approach.

The essence of the corrective labour punishment should be working on reduced wages at a public work centre and it is primarily suitable for persons belonging to the labouring classes. Deductions from the wages of the person sentenced to corrective labour should be made at a rate laid down by the judgment of the court and credited to the State.

Article 50 of Chapter 9 in Section III of Part I of The Criminal Code of the Russian Federation[17] contemplates corrective labour as a recognized penalty for a term of two months to two years, during which the convict serves the sentence at his workplace and an amount between 5% to 20% of his wages is deducted for the benefit of the State and if the convict is found to be maliciously shirking away, the court may replace the remaining term with penalty in the form of restricted liberty, arrest or deprived liberty at specific rate commensurate to the deductable wages.

Compensation

Traditionally, criminal law was not concerned with the problem of compensating the victim of a crime. The victim was expected to seek remedy in the law of torts through a civil action. But

[17] Federal Law on the Enforcement of the Criminal Code of the Russian Federation (No. 64-FZ of June 13, 1996) available at http://www.wtocenter.org.tw/SmartKMS/fileviewer?id=129834 accessed on 06.02.2013.

subsequently, payment of compensation by the convict to the victim came to be recognized as a part of the punishment awarded to him.

Compensation to a victim may be made in three different ways, namely the State may be held responsible for the payment of compensation; or the convict can be sentenced to pay a fine by way of punishment for the offence and, out of that fine, compensation can be awarded to the victim; or the court may in addition to punishing the convict according to law, further direct him to pay compensation to the victim of the crime, or otherwise make amends by repairing the damage done by the offence. In this connection Section 357 of the Criminal Procedure Code, 1973 is quite a comprehensive provision which is not fully utilized by the courts.

Capital punishment

Capital punishment is one of the most widely debated subjects of human concern for criminologists and penologists across the globe. The endless debate between those who advocate retention of this punishment and those who advocate for its abolition remains inconclusive for past decades.[18] To abolish or not to abolish capital punishment is the quandary which has been faced in many countries and is being faced even now. Due to space constraints for this write up and also in tune with the overall tenor, the said debate is not being touched. Keeping in mind the flow of this piece, it is considered apposite to study various modes of execution of capital punishment, hereinafter.

Despite threadbare and deeply deliberated upon retention-abolition debates qua capital sentence in India, mode of infliction of death punishment has hardly caught the requisite interest of jurists or of human rights activists, which certainly is a cause of concern. As such, it is considered necessary here to enter into this hitherto unexplored arena of penology. Various modes and methods of inflicting death sentence upon the convict have been practiced in different societies over different stages, varying with social mores.

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[18] *Bachan Singh* v. *State of Punjab* (1982) 3 SCC 24.

Several methods of execution of death sentences were adopted in middle ages, which involved torture, like gradual strangulation, burning by tying against a pillar/stake, dragging by a running horse, crushing under elephant's feet, breaking on the wheel, throwing from a precipice, stoning to death, and boiling in oil etc. With the emergence of various principles relating to fair procedure in the constitutions of several democratic countries and with the augmentation of the human rights movement, such severe death punishments involving torture began to be abhorred and faded out in the 18th century. The number of offences punishable with death also came to be reduced in all the leading countries. Punishments involving torture came to be substituted with the idea that punishment by way of death sentence should be swift and humane.[19]

At this stage, it would be apposite to look into some such modes of execution.

Burning at the stake

'Burning' the devil dates back to the Christian era. Burning at the stake was a popular form of death sentence and means of torture, which was used mostly for heretics, witches, and suspicious women. It was in the year 643AD, that an edict issued by Pope declared it illegal to burn witches. However, the increased persecution of witches throughout the centuries resulted in millions of women being burned at the stake. The first major witch-hunt is reported to have occurred in Switzerland in the year 1427 AD.[20] Throughout the 16th and 17th centuries, witch trials became common throughout Germany, Austria, Switzerland, England, Scotland, and Spain during the inquisition. Soon after, which trials began to decline in parts of Europe and in England and the death penalty for witches was abolished. The last legal execution by burning at the stake reportedly took place at end of the Spanish Inquisition in 1834.

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[19] Law Commission of India, Consultation Paper on Mode Of Execution of Death Sentence and Incidental Matters available at http://lawcommissionofindia.nic.in/cpds1.pdf accessed on 08.02.2013.

[20] *Ibid.*

Burning was applied in a calculated manner, depending upon the gravity of punishing intent. If the fire was large (for instance, when a large number of prisoners were executed at the same time), death often came from carbon monoxide poisoning before flames actually caused harm to the body. However, if the fire was small, the convict would burn for some time until death from heatstroke, shock, loss of blood and/or simply the thermal decomposition of vital body parts took place.

Catherine wheel

The Catherine wheel, also known as the breaking wheel or simply the wheel, was a torture device used for capital punishment in the middle ages and early modern times for public execution by bludgeoning to death. It was used during the middle ages and was still in use in the 19th century.[21] The wheel as a method of torture and execution could be used in a number of ways. A person could be attached to the outer rim of the wheel and then rolled over sharp spikes, or down a hill, to his death. Another way was that the wheel could be laid on its side, like a turntable, with the person tied to it, the wheel would turn, and people would take turns beating the victim with iron bars, breaking his bones and eventually causing his death. This method was used throughout Europe, especially during the middle ages.[22]

Headman's axe

This form of execution was quite popular in Germany and England during the 16th and 17th centuries, where decapitation was thought to be the most humane form of capital punishment. An executioner, usually hooded, would chop off the prisoner's head with an axe or sword. The last beheading took place in the year 1747 in United Kingdom. The act of beheading with axe was considered barbaric as the axe man would often miss the clean killing stroke.

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[21] Breaking wheel, Academic Dictionaries and Encyclopedias available at http://en.academic.ru/dic.nsf/enwiki/99764 accessed on 15.02.2013.

[22] *Supra* note 19.

Many axe beheadings required two or even three strokes. The invention of the guillotine was accepted as a humane method of execution.[23]

Decapitation - guillotine

In France in the year 1789, Dr. Joseph Guillotine proposed that all criminals be executed by the same method and that torture should be kept to a minimum. Decapitation was thought to be the least painful and most humane method of execution at that time. Guillotine suggested that a decapitation machine be built.[24] Subsequently, the decapitation machine came to be named after him. The machine was first tested on sheep and calves, and then on human corpses. Finally, after many improvements and trials, the blade was perfected, and the first execution by Guillotine machine took place in the year 1792.[25] It was widely used during the French Revolution, where many of the executions were held publicly outside the prison of Versailles. King Charles I was also executed in the same way in England. The last public execution by Guillotine was held in France, in June 1939. The device has not officially been used since.[26]

Though the Guillotine is less painful, it is not acceptable today as it is primitive and involves the mutilation of the convict. After France was admitted to the European Union, death sentences itself has since been abolished in France.

Garrote

Garrote was a weapon, most often referring to a hand held ligature of chain, rope, scarf, wire or fishing line used to strangulate a person. In Garrote, a popular method of torture and similar to hanging, a mechanical device such as a rack or a gag would be tightened around the convict's neck, causing slow strangulation, stretching, and obstruction of blood vessels. A device could also be

[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*

placed in a convict's mouth and kept in place by tying and locking a chain around his or her neck. The Indian version of the garrote, though not used as a recognized form of execution of death sentence, frequently incorporates a knot at the center intended to aid in crushing the larynx while applying pressure to the victim's back, usually by means of a foot or knee.

Garrote was the principal device used for capital punishment in Spain for hundreds of years. Originally, it was a form of execution where the convict was killed by hitting him with a club (*garrote* in Spanish).[27] This later developed into a strangulation device, where the condemned was tied to a wooden stake, with a loop of rope placed around his neck; a wooden stick was placed in the loop, and by rotating the stick, the rope was tightened until the condemned person was strangled to death.[28] Over a passage of time, the execution method was modified in the form of a wooden chair to which the condemned was bound, while the executioner tightened a metal band around his neck with a crank or a wheel until asphyxiation of the condemned person was accomplished.

Firing squad

There was no fixed procedure when it came to execution by firing squad. Usually the convict was tied to the pole, with hands tied and was blindfolded and a cloth patch was put on his heart, or was tied to a chair.[29] In most cases, a team of five executioners was used to aim at the convict's heart. In some countries, during the process few of the rifles are loaded with blank bullets and the shooters are not told about it so that the true killer remains unknown. Several countries like the Russia, eastern European countries, China and Thailand used this method.

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[27] Matthew C. Mirow, "The Legality Principle and the Constitution of Cádiz" in Markus Dirk Dubber, Georges Martyn and Heikki Pihlajamäki, (eds.) From The Judge's Arbitrium to The Legality Principle: Legislation as A Source of Law in Criminal Trials (Florida International University Legal Studies, 2013) 189-205.

[28] *Ibid.*

[29] *Supra* note 19.

In some states in United States like Utah and Oklahoma, choice is given to the convict whether he should be shot to death by a firing squad or put to death by the lethal injection.

It is significant to note that the leaders of the third Irish of Germany, who were given death punishment by hanging at the Nuremberg trials, asked for execution of death punishment by firing squad as the former was degrading and they wanted a military death. This reflects that death by hanging is not considered by the army men as a dignified method of execution.[30]

Gas chamber

In an execution using lethal gas, the prisoner is restrained and seated in an airtight chamber. When given the signal the executioner opens a valve, allowing hydrochloric acid to flow into a pan.[31] Upon another signal, either potassium cyanide or sodium cyanide crystals are dropped mechanically into the acid, producing hydrocyanic gas. The hydrocyanic gas destroys the body's ability to process blood hemoglobin, and unconsciousness can occur within a few seconds if the prisoner takes a deep breath. However, if he or she holds their breath death can take much longer, and the prisoner usually goes into wild convulsions. Death usually occurs within 6 to 18 minutes. After the pronouncement of death the chamber is evacuated through carbon and neutralizing filters. Crews wearing gas masks decontaminate the body with bleach solution, and it is out gassed before being released. If this process was not done, the undertaker or anyone handling the body would be killed.

Nevada was the first state to sanction the use of the gas chamber, and the first execution by lethal gas took place in February, 1924. Since then it has been a means of carrying out the death sentence 31 times. Five States in the USA, namely Arizona, California, Maryland, Missouri, and Wyoming authorize the use of the gas chamber as an alternative to lethal injection. In most cases the prisoner

[30] *Ibid.*
[31] *Ibid.*

is allowed to choose the method of execution, depending on his or her date of sentencing. Eleven people have been executed by lethal gas in the United States since 1976.

This method, however, is expensive and cumbersome. It is also a reminder of hundreds of thousands of Jews who were killed in gas chambers by the Nazi Germany. Prisoners considered too weak to be good workers were sent to the gas chamber. To prevent panic, the Nazis told them that they would be taking a shower. Instead, the disguised showerheads gassed the prisoners to death using Zyklon-B pellets. Zyklon B, a poisonous gas made from hydrogen cyanide crystals, was originally manufactured as a strong disinfectant and for pest control.

Electrocution

In a typical execution using the electric chair, a prisoner is strapped to a specially built chair, with his head and body shaved to provide better contact with the moistened copper electrodes that the executioner attaches.[32] Before execution, the convict is fitted with an adult diaper to contain any feces that may be released during their electrocution. The guards must ensure tightening of the straps well so that the convulsions caused by electrocution do not dislodge the equipment. Electrodes are placed on their head and legs and a mask is placed over their face. After a final statement, the switch is flipped and the convict is executed.

Usually three or more executioners push buttons, but only one is connected to the actual electrical source so the real executioner is not known. The jolt varies in power from State to State, and is also determined by the convict's body weight. The first jolt is followed by several more in a lower voltage. In Georgia, executioners apply 2,000 volts for four seconds, 1,000 volts for the next seven seconds and then 208 volts for two minutes.

Once the condemned person is attached to the chair, various cycles (differing in voltage and duration) of alternating current are

[32] *Ibid.*

passed through the convict's body in order to cause fatal damage to the internal organs (including the brain). The first jolt of electric current is designed to cause immediate unconsciousness and brain death; the second one is designed to cause fatal damage to the vital organs. Death is frequently caused by electrical over-stimulation of the heart. Electrocution produces visibly destructive effects on the body, as the internal organs are burned.

Today the electric chair is modernized and is used in many States of USA, while some of the US States authorize both lethal injection and electrocution, allowing some inmates to choose the method.

Lethal injection

Death by lethal injection involves the continuous intravenous injection of a lethal quantity of three different drugs. The prisoner is secured on a stretcher trolley with lined ankle and wrist restraints, a cardiac monitor and a stethoscope are attached to the prisoner covered with a sheet, where after saline intravenous line is opened in each arm. Thereafter saline intravenous lines are turned off and Sodium Thiopental is injected, causing the prisoner to fall into a deep sleep. Then second chemical agent, Pancuronium Bromide, a muscle relaxant is injected, which stops breathing of the prisoner by paralyses of the diaphragm and lungs. Finally, Potassium Chloride is injected, which stops the heart function.[33]

Ever since the year 1976, many prisoners have been executed by lethal injection in the United States and this is now the most common method of execution there. Of the 749 executions in America upto the year 2000, 586 have been carried out by lethal injection, including those of seven women. China also reported 8 executions by injection during the year 2000.[34]

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[33] Law Commission of India, 187th Report on Mode of Execution of Death Sentence and Incidental Matters (October, 2003) available at www.lawcommissionofindia.com accessed on 18.02.2013.

[34] *Supra* note 19.

Lethal injection was first considered as a means of execution in 1888 when New York's J. Mount Bleyer MD proposed it in an article in the Medico-Legal Journal suggesting that the intravenous injection of six grains of morphine should be used for execution of death sentence.[35] The idea initially did not get approved and New York introduced the electric chair instead Idea of lethal injection was again put forward in 1977 by Dr. Stanley Deutsch, who at that time chaired the Anaesthesiology Department of Oklahoma University Medical School. In response to a call by an Oklahoma State senator Bill Dawson for a cheaper alternative to repairing the State's derelict electric chair, Deutsch described a way to administer drugs through an intravenous drip so as to cause death rapidly and without pain. Deutsch wrote to the Senator Bill Dawson: "Having been anaesthetised on several occasions with ultra short acting barbiturates and having administered these drugs for approximately 20 years, I can assure you that this is a rapid, pleasant way of producing unconsciousness". And Oklahoma thus became the first State in USA to legislate for execution by lethal injection in the year 1977.

Texas introduced similar legislation later in the same year to replace its electric chair and carried out the first execution by the use of lethal injection on December 7, 1982, when Charles Brooks was put to death for murder. The procedure began at 12:07 PM and Brooks was certified dead at 12:16 PM. There was no apparent problem and Brooks seemed to die quite easily; at first he raised his head, clenched his fist and seemed to yawn or gasp before passing into unconsciousness.[36]

As many as 36 States in USA now use lethal injection either as their sole method or as an option to one of the traditional methods.

Hanging

Hanging has been a very common method adopted for

[35] J. Mount Bleyer, "Best Method of Executing Criminals", 5 *Medico-Legal J.* 425 (1887).

[36] Referaty. S.K., "Capital Punishment" available at http://referaty.atlas.sk/cudzie-jazyky/anglictina/16431/?print=1 accessed on 05.01.2013.

execution among the various methods available. The prisoner could simply be hanged with a noose, which could lead to death by fracturing his neck. However, if torture also was intended, there could be methods other than hanging with a noose. In medieval times, if torture was intended, a person would be fatigued before being hanged. For extremely serious crimes such as high treason, hanging alone was not considered enough. Therefore, a prisoner would be carved into pieces while still alive before being hanged.[37]

Hanging is one of the oldest methods of execution and even today it is used in some countries like India as a recognized form of execution. The number of people executed in India since independence in the year 1947 is a matter of dispute. Official government statistics claim that only 52 people had been executed since independence, but the Peoples Union for Civil Liberties[38] shows that 1,422 executions took place in 16 Indian states from 1953 to 1963, and has suggested that the total number of executions since independence may be as high as 3,000 to 4,300. No official statistics of those sentenced to death have been released. However, since the year 1995 hanging as a mode of execution has been used only three times, namely on Auto Shankar in 1995, Dhananjoy Chatterjee in 2004, and Ajmal Kasab in 2012 and Mohd. Afzal in February 2013.

The medical conditions leading to death by hanging can be any one or more of the following: closure of carotid arteries causing cerebral ischemia; closure of the jugular veins; induction of carotid sinus reflex death, which reduces heartbeat when the pressure in the carotid arteries is high, causing cardiac arrest; breaking of the neck (cervical fracture) causing traumatic spinal cord injury or even decapitation; closure of the airway; or death erection.

Over a period of time, hanging has become highly scientific and the least painful form of execution. Prior to execution the prisoner must be weighed. The 'drop' must be based on the prisoner's weight,

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[37] *Supra* note 19.

[38] Law Commission of India, Appendix 34 of the 35th Report on Capital Punishment, 1967.

to deliver 1260 foot-pounds of force to the neck.[39] The prisoner's weight in pounds is divided into 1260 to arrive at the drop in feet. The noose is then placed around the convict's neck, behind his or her left ear, which will cause the neck to snap. The trap door on which the convict stands then opens, and the convict drops.[40] If properly done, death is caused by dislocation of the third and fourth cervical vertebrae, or by asphyxiation. This lengthy measuring process is to assure almost instant death and a minimum of bruising. If careful measuring and planning is not done, strangulation, obstructed blood flow, or beheading often result. The death by hanging however according to most of the medico-jurisprudential writers is a result of asphyxia or strangulation and fracture of the neck is an exception.

In the case of *Attorney General of India* v. *Lachma Devi*,[41] the Rajasthan High Court initially directed execution of death sentence by way of public hanging at the Stadium Ground or Ramlila Ground of Jaipur after giving wide publicity by media as regards time and place of public execution, but later modified the order directing that the execution of the death sentence should be carried out in terms of the procedure provided in the rules mentioned above in the Jail Manual only, unless by that time any amendment is made in the Rules. The Supreme Court of India in appeal held:

> "It is clear from this order dated 11th December, 1985 that it is only because the Jail Rules do not provide for execution of death sentence by public hanging that the Bench appears to have been constrained to revoke the order directing execution of the death sentence by public hanging and that is why the Bench seems to have said that the death sentence should not be carried out by public hanging unless by the time the death sentence comes to be executed any amendment is made in the Rules by the State Government providing public hanging. We would like to make it clear that the

[39] *Supra* note 19.
[40] *Ibid.*
[41] AIR 1986 SC 467.

> execution of death sentence by public hanging would be a barbaric practice clearly violative of Art. 21 of the Constitution and we are glad to note that the Jail Manual of no State in the country makes provision for execution of death sentence by public hanging which, we have no doubt, is a revolting spectacle harking back to earlier centuries. The direction for execution of the death sentence by public hanging is, to our mind, unconstitutional and we may make it clear that if any Jail Manual were to provide public hanging, we would declare it to be violative of Art. 21 of the Constitution…..[42]"

Constitutionality of execution by hanging was challenged in the Supreme Court of India in the case of *Deena* v. *Union of India*[43], observing that the Constitution Bench in *Kehar Singh* v. *Union of India*[44] did not examine as to whether hanging can be declared unconstitutional and *ultra vires* Article 21 of the Constitution, the Supreme Court analysed this form of punishment. After analyzing plethora of material on different forms of executing death sentence, the Supreme Court observed;

> "Neither electrocution nor lethal gas, nor shooting, nor even the lethal injection has any distinct or demonstrable advantage over the system of hanging. Therefore, it is impossible to record the conclusion with any degree of certainty that the method of hanging should be replaced by any of these methods….[45]
>
> But, for due compliance with the mandate of Article 21, it is not enough to find that none of the other methods of execution has a real advantage over the method of hanging, what we must determine is,

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[42] *Id.* para 1.
[43] AIR 1983 SC 1155.
[44] (1989) 1 SJ 126.
[45] *Supra* note 41 para 3(f).

whether hanging as a method of executing the death sentence, considered in isolation, that is to say, without comparison with the other methods, offends against the canons of Article 21....[46]

There is a responsible body of scientific and legal opinion which holds the view that hanging by rope is not a cruel mode of executing the death sentence. That system is in operation in large parts of the civilized world. That was the only method of executing the death sentence which was known to the Constituent Assembly and yet it did not express any disapproval of that method.[47]

The system is consistent with the obligation of the State to ensure that the process of execution is conducted with decency and decorum without involving degradation or brutality of any kind....[48]

Humaneness is the hallmark of civilised laws. Therefore, torture, brutality, barbarity, humiliation and degradation of any kind is impermissible in the execution of any sentence. The process of hanging does not involve any of these, directly, indirectly or incidentally....[49]

Accordingly, we hold the method prescribed by Section 354(5) of the Code of Criminal Procedure for executing the death sentence does not violate the provision contained in Article 21 of the Constitution.[50]"

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[46] *Id.* para 57.
[47] *Id.* para 58.
[48] *Id.* para 1.
[49] *Id.* para 59.
[50] *Ibid.*

Conclusion

The purpose behind summation of various kinds of punishments and modes of execution of capital punishment is to ignite a debate qua the need to expand the kinds of punishments as well as the need to examine other modes of execution of death sentence also. Of course, one is certainly not advocating for regression to antiquated barbaric forms of punishments, but it certainly is high time we considered the diversification of punishments commensurate to the diversification of crime in the society.

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Jurisdictional Dilemma in Cases Under Section 138 Negotiable Instruments Act

*Rajesh Malik**

Introduction

The territorial jurisdiction of a criminal court to try an offence is essentially based upon the principle that all crimes are local. The rule of territorial jurisdiction is also based upon the principle of convenience. A place of crime leaves behind eyewitnesses and other material evidence, and the local police and the local court of the area are in the best position to investigate, prosecute, and try the case. The general principle that crime is local has got statutory sanction. Chapter XIII of the Code of Criminal Procedure (Cr.PC) contains exhaustive statutory provisions to deal with the issue of territorial jurisdiction. It is apposite to note here that the statuary law governs the issue of territorial jurisdiction of criminal courts.

Territorial jurisdiction under Section 138 Negotiable Instruments Act (NI Act)

As noted above, the jurisdiction of a court would ordinarily be governed by statutory provisions. However, in cases under Section 138 NI Act, judicial decisions have played a significant role in 'conferring' territorial jurisdiction. Infact dilemma of territorial jurisdiction exists due to the plethora of conflicting judgments on this issue.

The governing law, Section 177 of Cr.PC, provides that every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. Section 178 further provides that where the local area of the commission of offence is uncertain; or the offence is committed partly in one local area and partly in another; or is a continuing offence; or several acts

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constituting the offence are done in different local areas, the offence can be tried at any one of the aforesaid areas.

In the light of the two section of Cr.PC question arises as to where the offence is committed under Section 138 NI Act. Ordinarily an offence is committed when its ingredients are fulfilled. For example, the offence of theft is committed when the property is taken out from the possession of the person. Section 138 NI Act, speaks of "cause of action" Sections 177and 178 of Cr.PC, however, do not talk about cause of action. NI Act also does not define "cause of action". According to *Corpus Juris Secundum*:

> "Cause of action is a term of varying and doubtful meaning, and because of its many different and delicate shades of meaning according to the circumstances in which it is used, the Courts have found it difficult to give any general definition of the term, and perhaps no definition could be framed which would be entirely free from criticism, although it has been said that there is no legal expression the meaning of which is more clearly apparent."

In *Cooks* v. *Gill*[1] "cause of action" was defined as follows:

> "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

Thus in the context of Section 138 NI Act, the fact, which gives rise to the cause of action, is the default on the part of the drawer to make the payment within the stipulated time period. What the complainant has to aver in the complaint under Section 138 NI Act is that the accused has failed to make payment after the expiry of 15 days from the date of receipt of notice. The language of Section 142(b) NI Act also buttresses this view and accordingly, the cause of action to file the complaint arises on the failure of the drawer to make the payment.

[1] Law Rep. 8 CP 107.

The several acts prior to the default of the drawer to make the payment after receipt of notice are actually the contractual transactions and these acts, in no way, give arise to any criminal liability. They are merely pieces of evidence as per the above definition in *Cooks* v. *Gill* [2]. If these facts are considered to be giving rise to the criminal liability, then it would certainly be an offence of cheating. By no stretch of imagination, these contractual transactions prior to the default in making the payment can be termed as the facts essentially covered under the expression "cause of action." Let this be illustrated with the following example:

Suppose, 'A' gave a loan of Rs. 10 lacs to 'X', who issued a post dated cheque to repay the loan. However when 'X' took the loan, he had no intention to repay the loan and issued the cheque just to cheat "A". Here, drawing of the cheque, the meeting of 'A' and 'X', the place of making of payment, the place of giving of cheque and the place where the payment was to be made, are the ingredients of the offence of cheating and can be investigated and tried at any of such places as the offence is deemed to have been committed when 'X' took the amount of Rs. 10 Lacs with the dishonest intention and played deception upon 'A'. In contrast thereto, the offence under Section 138 is not deemed to have been committed on drawing of the cheque. If taken so, the offence is covered under Section 420 IPC rather than under Section 138 NI Act.

Clearly, the scheme of Section 138 is to give sanctity to cheque transactions and the cause of action arises when the drawer fails to make payment towards the dishonoured cheque and thereby breaches the sanctity of the cheque, which the legislation intends to prevent. Therefore, the cause of action does not arise merely on the dishonouring of cheque, but it would arise on the failure of the accused to pay the cheque amount within a period of 15 days from the date of receipt of the demand notice. Here, it is desirable to look at the bare provision of Section 142 NI Act which inter-alia provides as under:

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[2] *Ibid.*

Section 142(b) - Such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138.

Now the stage has been set to discuss the judgements that are, in fact governing the issue of territorial jurisdiction. These judgements fulfill the statutory gap and have been relied upon not only by the individual parties but also by the financial institutions.

In *K. Baskaran* v. *Sankaran Vaidhyan Balan*[3] it was held that:

> "An offence under section 138 of N.I act can be completed only with the con-catenation of a number of acts. Following are the acts which are components of the said offence: 1) drawing of cheque 2) presentation of cheque 3) returning of cheque unpaid by the drawee bank 4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, 5) failure of the drawer to make payment within 15 days of the receipt of the notice."[4]

The court further noted:

> "It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at 5 different localities. But concatenation of all the above five is a *sine qua non* for the completion of the offence under section 138 of NI Act."[5]

The court added:

> "It is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under section 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any

[3] AIR 1999 SC 3762.
[4] *Id.* para 15
[5] *Supra* note 3 para 16.

> one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence under section 138 of the Act."[6]

As a result of the interpretation of territorial jurisdiction given by this judgment, places such as Delhi, Bombay, Kolkata, Bangalore and other big cities were flooded with Section 138 complaints as the corporate houses have their offices in these cities. What they required to do was just to send the notice from their offices.

The financial institutions and individual complainants relied upon the judgment without understanding that the judgment was passed in peculiar facts of that case. Ironically, there was no attempt to distinguish the facts with other cases where the accused belonged to far off places. The fact that it is causing hardship to the litigating parties has so far been completely overlooked. The decision governed the principle of jurisdiction from 1999 to December 2008.

On 12.12.2008, *Harman Electronic* v. *National Panasonic India Limited*[7] changed the situation. It laid down that the cause of action does not arise at the place of sending of notice, but rather arises at the place where notice is received.

It held:

"Clause (b) and (c) of the proviso to section 138 must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would"[8]

It added:

> "….it is one thing to say that a presumption is raised that notice is served but is another thing to say that service of notice may not be held to be of any significance or may be held to be wholly unnecessary"[9]

[6] *Supra* note 3 para 17.
[7] AIR 2009 SC 1168.
[8] *Id*. para 14.
[9] *Supra* note 7 para 20.

Thus, the judgment in *Harman Electronic*[10] gives a new meaning to the term "cause of action" in section 138 NI Act.

Cause of action under Section 138 NI Act in view of *Harman Electronic Ltd.*

A combined reading of Sections 138(c) and 142(b) NI Act shows that the cause of action to file the complaint arises on the failure of the accused to make the payment. Therefore, the place of making of payment is of paramount importance under Section 138 NI Act. Thus, the place of making of payment is of utmost importance as cause of action arises on the failure of the accused to make the payment.

The place of payment and presentation of cheque

A few decisions of the High Courts throw some light on this issue. In *S.Prithviraj* Kukkillayya v. *Mathew Koshy*[11] the Kerala High Court held that:

> "The act of issuing a cheque cannot be considered as starting point of the commission of offence. It was further held that dishonour of cheque by itself does not give rise to cause of action because payment can be made on receipt of notice of demand contemplated in clause (b) of section 138 and in event there is no offence, nor any attempt to commit the offence, nor even a preparation to commit the offence. It was held that failure to pay the amount within 15 days of receipt of notice alone is the cause of action and nothing else."

Again in *P.K Muraleedharan* v. *Pare*[12] the same Court held that:

> "The venue of enquiry or trial has primarily to be determined by the averments of the complaint. *The place where creditor resides or the place where the debtor resides cannot be said to be the place of payment unless there is any indication to that effect either*

[10] *Supra* note 7.
[11] 1991CrLJ1771.
[12] 1992 CrLJ 1965.

expressly or impliedly. The cause of action as contemplated in Section 142 of the Act arises at the place where the drawer of the cheque fails to make payment of the money. That can be the place where the bank to which cheque was issued is located".[13]

Further, the Delhi High Court in *Mountain Mist Agro India (Pvt) Ltd.* v. *Mr. S. Subramaniyam*[14] has dealt with the effect of the presentation of the cheque in the following words :

> "Section 64 (1) of the Negotiable Instruments Act, 1881, insofar as it relates to cheques, stipulates that the cheques must be presented for payment to the drawee by or on behalf of the holder and that in default of such presentation, the other parties thereto are not liable thereon to such holder. This provision specifically indicates that unless there is proper presentment of the cheque, the drawer cannot be held liable in respect of the same. *Proper presentment of the cheque requires that the same must be presented for payment to the drawee. In this case the drawee is the Oriental Bank of Commerce at Oatacamund.* Therefore, in the facts of the present case, the presentment for payment of the amount represented by the cheque had to be made to the drawee, i.e. the Oriental Bank of Commerce at Oatacamund. The deposit of the cheque by the plaintiffs at their bankers (ICICI Bank, New Delhi) for collection is of no consequence. What is of importance is only the fact of presentment for payment and that has to be to the drawee which is the Oriental Bank of Commerce at Oatacamund."[15]

Again the High Court in the matter of *Arinits Sales Pvt. Ltd*. v. *Rockwell Plastic Pvt. Ltd.*[16] held that *no cause of action arises at a place where the cheque is presented to the payee banker.*

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[13] *Id.* para 23.
[14] 2007 X AD (Delhi) 14.
[15] Emphasis added.
[16] 149 (2008) DLT 123 (DB).

Though, these two judgments were given on the civil side, they expressly dealt with Section 64 (1) NI Act which requires the presentation of the cheque before the drawee bank and this section applies to both civil and criminal proceedings.

It is important to note here that in *ICICI Bank Ltd.* v. *Subhas Chand Bansal*,[17] the court held that the *registered office and presentation of cheque in Delhi do not confer jurisdiction to the Delhi courts.*

Further, the court in *Dhananjay Johri* v. *Naveen Sehgal*[18] held:

> "Deposit of cheque in the banker of the complainant i.e. collecting bank cannot be treated as presentation of cheque for encashment as presentation could be complete only when cheque in question is presented to drawee bank. Collecting bank acts only as agent of the complainant and thus the place where such collecting bank is situated does not confer jurisdiction to try the offence of dishonour of such cheque if no other cause of action arose there."

Thus, the aforesaid judgments strengthen the reasoning that no cause of action arises merely on presentation of the cheque to the payee bank. The cause of action arises on presentation of cheque at a place where the drawee bank is situated. In essence, it would not be wrong to say that drawing of a cheque at a particular branch gives rise to an express contract that the payment is to be made at the place where the drawee bank is situated.

Besides these judgments a few recent judgments add some new dimensions to the issue of territorial jurisdiction.

Conflicting judgments on the issue of territorial jurisdiction

In *Patiala Casting P. Ltd.* v. *Bhushan Steel Ltd.*[19], the High Court of Delhi held that where the registered office of the complainant is at

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[17] 160 (2009) DLT 379.
[18] I (2011) DLT (Crl.) 321.
[19] 172 (2010) DLT 6.

Delhi, cheque for encashment is deposited by the complainant at Delhi, notice of demand served from Delhi and the amount of cheque is not paid despite notice, the court of the Metropolitan Magistrate at Delhi would have jurisdiction to entertain complaint under section 138 NI Act.

In *Religare Finvest Limited* v. *State*[20], the High Court *held that a substantial part of the cause of action for filing complaint by petitioner prima facie appears to have arisen within the jurisdiction of the court in Delhi on the basis of presentation of the cheque in Delhi and registered office of the complainant being in Delhi*

Apparently, the ratio of these two judgments goes against the judgments in *Arinits Sales Pvt. Ltd.*[21], *Mountain Mist Agro India (Pvt) Ltd*[22] *and Dhananjay Johri*[23] which held that no part of the cause of action arises on presentation of cheque with the payee bank.

Here, it is apposite to mention some more judgments to understand the dilemma faced when deciding the territorial jurisdiction under Section 138 N.I Act.

In the matter of *K.O. Issac* v. *State*[24], it was held that *when the loan agreement was executed in Delhi* and cheque was issued and delivered by the accused in Delhi in the office of the complainant, then Delhi court has jurisdiction to try the offence.

The ratio of this judgment adds a new dimension, as it confers jurisdiction on the criminal courts on the basis of execution of agreement whereas Section 138 NI Act talks about the cause of action on the failure of the drawer to make the payment after receipt of demand notice.

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[20] 2010(173) DLT 185.
[21] *Supra* note 16.
[22] *Supra* note 14.
[23] *Supra* note 18.
[24] (2010) DLT (Crl.) 246

Further, in *Rajat Pharmachem Ltd.* v. *State Trading Corporation of India*[25], it was held that, simply the existence of the head office of the complainant in Delhi and receipt of business proposal from the accused in that office alone was not sufficient to give Delhi Courts jurisdiction to try the offence.

In *Hema Chaturvedi* v. *M/s Sunnit Enterprises*[26], the Court held that *sending notice from Delhi, depositing cheque in bank for collection in Delhi and the complainant having registered office in Delhi are not sufficient to confer jurisdiction.* However, a contrary view was taken in *Devendra Gupta* v. *Shree Rathi Steels Ltd.*[27] that the fact that the *cheque was handed* over at Delhi and order for supply was placed at Delhi, these two factors were found sufficient to confer jurisdiction upon Delhi courts to try the offence of dishonour of cheque. Further, the loan agreement being executed at Delhi and loan amount being disbursed from Delhi were found sufficient to confer jurisdiction on Delhi courts in *G.E.Capital Transportation Financial Services Ltd.* v. *Rajendra Parihar*.[28]

Further, in *M/s. Indian Renewable Energy Development Agency Ltd*. v. *M/s. Sri Sai Bio Fuels*[29] where the loan agreement was executed in Delhi, payment was to be returned in the head office of the complainant in Delhi, as per the agreement in case of dispute civil courts in Delhi were to have jurisdiction, so when the cheque was presented to the banker of the complainant in Delhi who returned it unpaid, and legal notice was sent from Delhi, the High Court held that the order of Magistrate in returning the complaint due to lack of jurisdiction was not correct and Delhi courts have jurisdiction to try the offence as substantial part of the cause of action had arisen in Delhi.

Now it would be relevant to note the factors, which according

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[25] 2009 (3) JCC 221
[26] 2011 (1) JCC
[27] MANU/DE/0530/2011.
[28] MANU/DE/1370/2011.
[29] 2010 X AD (Delhi) 616.

to these several and conflicting judgments confer jurisdiction upon the criminal courts under Section 138 NI Act cases. They are:

a) Handing over of the cheque
b) Issuance of supply order
c) Execution of loan agreement
d) Disbursement of loan amount
e) Return of payment
f) Substantial cause of action.

Here, the dilemma is that the factors referred to above go contrary to the statutory guidelines under Section 138 NI Act in as much as cause of action in Section 138 NI Act cases arises on the failure of the drawer to make the payment and it goes against the term "cause of action" if we introduce factors which are foreign to this term. Moreover there is no judicial consensus on these factors as is reflected in the conflicting judgments referred to above.

So, the conflicting judgments give rise to jurisdictional dilemma over the issue of territorial jurisdiction in Section 138 NI Act cases. Some judgments say that presentation of cheque and registered office have no significance in the issue of territorial jurisdiction while others say that registered office and presentation of cheque give arise to the substantial cause of action.

This is causing difficulty for the trial courts and invariably causing harassment to the drawer of the cheque who has to attend the court having jurisdiction over the payee bank or the registered office of the complainant. Further, it wastes judicial time getting the service of summons effected upon the accused residing in far off places.

I conclude with the hope that the law on this point would be settled soon to the advantage of the parties as well as for saving the valuable time of the courts.

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Court Annexed Mediation – Scenario Post Afcons Judgment

*Annirudh Sharma**

Introduction

"Mills of God, grind exceedingly slow, but grind exceedingly fine", said a great Greek thinker about the divine retribution and human life. This remark applies aptly to the justice delivery system of India where justice is meted out, however some what slow. This has caused a huge back log and arrears of 42 lakh cases pending in 21 High Courts and 2.7 crore in the subordinate judiciary.[1] For a solution to such a complex problem, India has looked at the solutions adopted by other judicial systems of the world. About a decade ago, the United States of America also faced a similar problem, but of a comparatively smaller magnitude than India. A delay of 5 years in pending cases caused a great concern there. However, in the past decade US courts have achieved a significant result. In the state of California the maximum pendency of a case is 2 years now. For achieving such results, many measures were taken, of which resorting to various forms of ADR (Alternative Dispute Resolution) including mediation and case management were the most significant. As an ADR technique, mediation has also become very popular in commercial disputes in Europe. The European Commission published a Green Paper on developing commercial mediation within the European Union in October, 1999. The Green Paper was the result of research and extensive work done by research groups in the Centre for Effective Dispute Resolution set up by some of the European countries like

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[1] Statistics as on December 31, 2010, available at http://barandbench.com/brief/2/1518/pending-litigations-2010-32225535-pending-cases-30-vacancies-in-high-courts-government-increases-judicial-infrastructure-budget-by-four-times accessed on 31.12.2012.

Italy, Belgium and Netherlands. United Nations Commission on International Trade Law (UNCITRAL) has also produced a Draft Model Law for mediation and conciliation. It has come to be universally accepted that court systems have to be supplemented with systems of ADR like mediation for effective dispensation of justice.

What is mediation?

The Black's Law Dictionary defines mediation as "A method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." The term 'mediation' has not been defined by any legislation in India but as generally understood, mediation is a negotiation process in which a neutral third party assists the disputing parties in resolving their disputes. It is a voluntary and non-coercive process in which an impartial and neutral mediator assists the parties to reach a decision. The term mediation and conciliation are often used synonymously and interchangeably but there exists a thin line of difference between the two. The difference lies in the fact that conciliation is an unstructured, pro active and interventionist process while mediation is a structured process in which parties have control over the decision and can explore a range of options. Unlike arbitration, where the third party actually makes the decision about how the dispute should be resolved, mediators only assist the parties in their efforts to formulate a solution of their own. Judicial settlement refers to settlement of a civil case with the help of a judge who may or may not be assigned to adjudicate upon the dispute. In lok adalat and judicial settlement the judge has no adjudicatory or judicial function. Thus, mediators bring the parties together, help them describe the problem in terms of negotiable interests and needs rather than non-negotiable positions, and develop a set of ideas for how the interests and needs of both sides can be met simultaneously. The mediator will then help the parties assess the relative merits of the different options and draft an agreement that works best to satisfy everyone's interests. It is up to the parties, however, to decide whether to accept the final agreement or not.

In *Bawa Masala Company* v. *Bawa Masala Company Pvt. Ltd.*[2] the Delhi High Court highlighted the importance of yet another ADR, namely 'early neutral evaluation'. In this process it was laid down that a senior counsel or panel with experience was to be appointed as evaluator. A written brief with summary of facts and legal arguments was to be provided by the lawyers to the evaluator in the initial session. The decision maker of each party accompanied by a lawyer would make presentation. The evaluator would retire to prepare the central dispute in the case, and its likely outcome on each aspect besides cost to each party. The evaluator shares his conclusion with parties either at a joint or single session. In this process the principles of mediation would be applicable.

By resorting to mediation, disputes and cases are resolved fully or partly without going through the full trials, thus avoiding delays and resolving the disputes much sooner than the court room trials. Some of the advantages of mediation are that the process is prompt, economical, convenient, there is preservation of harmonious relationship between the parties because of win-win position, and the process is informal though structured and confidential.

Court annexed mediation

The term 'court annexed mediation' means that the mediation services are provided by the court as part and parcel of the same judicial system. Court annexed mediation aims at supplementing the court system, but it can in no way be regarded as a substitute for judicial proceedings. The legislative intent for court annexed mediation is clearly reflected in Section 89, which reads:

> Section 89 - Settlement of disputes outside the Court – (1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the

[2] AIR 2007 Delhi 284.

terms of a possible settlement and refer the same for –

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat ; or

(d) mediation.

(2) Where a dispute has been referred –

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act ;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act ;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

The initiation of the mediation movement can be attributed to the Mediation and Conciliation Project Committee (MCPC). Hon'ble Justice R.C Lahoti, the then Chief Justice of India constituted the MCPC on 9th May, 2005, under the chairmanship of Hon'ble Mr. Justice Santosh Hegde to effectively implement Section 89 CPC. This Committee was formed to oversee directly the implementation of ADR at the national level. The MCPC has organized a number of training programs for judges and lawyers enabling establishment of

court annexed mediation centers throughout India. Since the year 2005, several High Courts and District Courts have started setting up court annexed mediation centres where judges and lawyers of the subordinate judiciary were trained as mediators. This has led to the wave of mediation throughout India. High Courts across India have made rules on mediation and conciliation under Order 10 and clause (d) of sub section (2) of Section 89 CPC. These rules prescribe the procedure of appointment of mediators, qualifications to be a mediator, disqualifications from being a mediator, duty of the mediators etc.

The advantage of court annexed mediation is that the judges, lawyers and litigants become participants in the mediation which makes the disputing parties feel that the decision is taken by them independently. When a judge refers a case to the court annexed mediation centre, keeping overall supervision on the process, no one would feel that the system has parted with the case. The Judge would feel that he has referred the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants feel that they are given an opportunity to play a participatory role in the resolution of disputes. Most important of all we cannot forget that the people of our country have unflinching faith in the court system. Mediation for them as ADR is an alien concept which cannot be accepted easily. When the court refers the matter for mediation this gives a larger public acceptance to the process. The court which has gained the public confidence in it retains its control and provides an additional service. The court is the parental institution for resolution of disputes and if ADR models are directed under court's supervision, at least in those cases which are referred by the courts, the effort of dispensing justice can become more coordinated. Thus ADR services under the control, guidance and supervision of the court have more authenticity and smooth acceptance. It ensures the feeling that mediation is complimentary and not competitive with the court system. If reference to mediation is made by the judge to the court annexed mediation services, the

mediation process becomes more expeditious and harmonized. It also facilitates the movement of the case between the court and the mediator faster and purposeful. It also facilitates reference of some issues to mediation leaving others for trial in appropriate cases. Court annexed mediation gives a feeling that the court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation is a willing reference. Court annexed mediation thus provides an additional tool by the same system providing continuity to the process, and above all, the court remains a central institution for the system. A popular feeling that court works hand-in-hand with mediation facility produces satisfactory and faster settlements.

In the system of court annexed mediation the services of both judges and lawyers are used as mediators. Since effective mediation requires parties to have utmost faith in the mediator to protect confidentiality and neutrality of the process, it is felt that judges make good mediator. However, at the same time it is cautioned that judges may see mediation as potentially undermining their authority to make judgments and normative pronouncements or may feel they will lose the professional satisfaction of issuing judgments if cases settle and also may be evaluated on the number of "legal" dispositions they reach, excluding settlements.

In court annexed mediation, advocates play a different and important role though they always represent their client's interests rather than argue adversely as they would do in court. They assist clients by helping them propose and consider settlement options in the light of their client's long term best interest. Court annexed mediation may be seen as a new professional opportunity for lawyers as it has opened doors to many litigants who were previously intimidated by the legal system. If the use of the legal system is costly (in terms of money, time, or uncertainty), many legally cognizable disputes are not brought to court. Legal injuries are internalized or "lumped," and many lawyers are not consulted for their advice. When either those costs decrease or superior conflict resolution services are

provided, a significant subset of those potential litigants will consult a lawyer, if not file a claim. Just as better roads bring more cars to the city, better conflict resolution processes create greater need for legal services, even when it does not necessitate work in court. Furthermore, legal mediations provide another venue in which legal services can be valuable to litigants, thus creating new opportunities for law practice and for lawyers to serve as neutrals. Also the time value of money dramatically discounts the actual value of claims filed in the courts. From an economic perspective, legal fees are a function of the difference they make in extracting social or economic value from the legal process. If delays in the system discount this value, the fees that lawyers can charge will be significantly less. This would mean that a more economically efficient system translates into higher legal fees for lawyers. There is neither any theory nor any evidence that the growth of mediation has any negative impact on the fees for legal services. Indeed, some lawyers, including a handful in India, have left their litigation practices to conduct mediations full-time. Further in mediation, lawyers have no difficulty in adapting their modes of representation, and may find a wider range of skills upon which to draw to provide valuable service to their clients outside formal court settings.

Implications of the Afcons judgment

Till the judgment of the Supreme Court in *Afcons Infrastucture Ltd.* v. *Cherian Varkey Construction Company Pvt. Ltd.*[3] there was confusion about the process of court annexed mediation as it existed in Section 89 CPC. It was not clear whether it was a voluntary process i.e. the court could refer the parties to mediation only if they agreed to the same. Also there was no clarity about the process being binding, which gave the parties an opportunity to retract from mediation settlements before the referral courts. It is in *Afcons Infrastucture Ltd.*[4] that the Supreme Court cleared confusion about the process of court annexed mediation. Although the question before the Supreme Court was whether the court can refer parties to arbitration without their consent

[3] (2010) 8 SCC 24.
[4] *Ibid.*

under Section 89 CPC (which it answered in the negative), it took pains to bring clarity to the concept and process of court annexed mediation and other forms of ADR. It discussed the scheme of Section 89 CPC, the various kinds of ADR under it, their features and distinctions and recasted the definition of mediation and lok adalat under Section 89 to clear ambiguity. The court laid down that the consent of the parties was required for arbitration and conciliation but not for lok adalat, mediation and judicial settlement thus clarifying that the consent of the parties is not necessary before the court refers the case for mediation.

The above judgment interprets Section 89(1) CPC in a new light. A bare reading of the provision makes it seem that as if before the case is referred for mediation the court is required to formulate terms of settlement. However, in this case it was held that the requirement of the judge formulating terms under Section 89(1) is an anamoly, since if every judge was required to formulate terms of settlement, nothing would be left to be done by the ADR forum as then the judge may himself proceed to record the settlement as a judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours. Thus it was laid down that before referring to ADR, it is not necessary for the court to formulate terms of settlement but it is sufficient if the court briefly refers to the nature of the dispute.

Section 89 (2) (d) provides that "for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed." This provision made the process of court annexed mediation appear akin to judicial settlement there by creating confusion about the process of mediation. To clear doubts created by bad legislative drafting of Section 89 CPC, the Supreme Court held that Clause (c) and (d) of Section 89(2) shall have to be interchanged to correct the draftsman's error. After this judgement these two clauses are required to be read as:

(c) for mediation the Court shall refer the same to a suitable institution or person and such institution or person shall be

deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for judicial settlement the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

As a guide to referral courts the Supreme Court enlisted cases which were "fit" and "not fit" for mediation. Cases fit for mediation include cases arising out of trade, commerce, contracts, disputes relating to specific performance of contracts, landlord tenant disputes etc. Those enlisted as "not fit" include representative suits under Order 1 Rule 8 CPC, election matters, grant of probate, cases involving serious cases of fraud, fabrication of documents, forgery, cases involving protection of courts like against minors and prosecution of criminal offences. If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

The judgment lays down the duties of a referral judge and the procedure to be adopted before referring a matter under Section 89 CPC. Before framing of issues the court is required to fix a preliminary hearing for appearance of parties. The court is required to consider whether the case is fit or unfit for ADR. If found unfit for ADR, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial. Where the case is found fit for ADR, the court is required to explain the five choices of ADR to the parties to

enable them to exercise their option. There is a need to first ascertain if the parties are willing for arbitration. They should be informed that if sent for arbitration the case would go outside the ambit of the court and costs would have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration. If they do not agree on arbitration the court should ascertain if they are agreeable for reference to conciliation. If not, then keeping in view the option and preference of the parties they can be referred for any of the other three forms of ADR. If the reference to ADR process fails the court shall proceed with the hearing of the suit. However, if there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping in view the principles of Order 23 Rule 3 CPC. Where the settlement is *ex facie* illegal or unenforceable, the court should draw the attention of the parties to it, to avoid further litigations and disputes about executability.

The referral court is required to bear in mind certain consequential aspects, while giving effect to Section 89 CPC. Where reference is to arbitration or conciliation it has to be recorded in the order sheet that the reference is by mutual consent. In case of reference to any other ADR process like court annexed mediation, it has to be recorded that having regard to the nature of the dispute the case is being referred. There is no need of an elaborate order. In case the judge trying the case assists the parties and if the settlement negotiations fail, he should not deal with the adjudication. Where the matter is referred to an ADR process the court should keep track of the matter by fixing a hearing date for the ADR report, to avoid delay in the trial. Also normally the referral court should not send the original record of the case but make available copies of relevant papers. However, in case of court annexed mediation it may make the original file available wherever necessary.

Mediating mediation - Conclusion

Inspite of all the efforts of the legislature and the judiciary some very serious questions arise about the practicality of court annexed

mediation. Some of these questions like the following need urgent attention and answers-

i. How should the courts establish quality controls (including ethics and discipline) over the emerging practice of mediation?

ii. How should the courts build both internal and external capacity without incurring unaffordable costs?

Our legal system is still evolving as a justice delivery system. The concept of lok adalat which was started 20 years back, with huge criticism has now synchronized with the judicial system. Likewise, mediation being a new concept is also undergoing its time of test and experiment. The judgment in *Afcons* has helped in clearly defining the mechanism of court annexed mediation, clearing confusions caused by ill drafting of Section 89 CPC. It has defined the duty of the referral judge for easy implementation of the provision. By recasting Section 89 it has also given teeth to the process of mediation by making the mediation settlement executable like an award of the Lok Adalat. The judgment of *Afcons* if implemented in its true spirit would change the nature of civil litigation in our country. The slow speed of case disposal in the judicial system makes court annexed mediation a necessity, not an option

> "The courts of this country should not be places where resolution of disputes begin. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."
>
> -Justice Sandra Day O'Connor[5]

Keeping in mind the above quoted words, the advantages of court annexed mediation especially post recasting of Section 89 CPC in the *Afcons* case, can never be overlooked, no matter what criticism it may face.

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[5] Justice Sandra Day O'Connor is an American jurist who was the first female member of the Supreme Court of the United States of America.

SAKET STUDY CIRCLE
STUDY NOTES-1
Session-I

SUBJECT : **ISSUES RELATING TO SECTION 156(3) Cr.PC**

Speaker : Sh. R. K. Gauba, District Judge (South).

Rapporteurs : Sh. Vikrant Vaid, Metropolitan Magistrate (NI Act) and
Ms. Manika, Metropolitan Magistrate.

Vetted by : Sh. Dinesh Kumar Sharma, Special Judge (PC Act)

The information of an offence is taken notice of by the police by registering what is generally known as First Information Report (FIR). In case of a cognizable offence, it is registered under Section 154 Cr.PC. It is pertinent to see that the word ''first'' is not used in Cr.PC. Yet, it is popularly so called because it is the starting point of police intervention. An FIR assumes significance in criminal trials because the promptitude with which it is lodged (or not lodged), at times, becomes the touch stone to test the credibility of the person giving the first information. A person who has a grievance that the police officer is not registering the FIR under Section 154 Cr.PC, can approach the Superintendent of Police, with a written application, under Section 154(3) Cr.PC. In case the Superintendent of Police also does not order registration of FIR, the aggrieved person can approach the Magistrate concerned for necessary action. This can be sought by filing a criminal complaint before the Magistrate with a prayer under Section 156 (3) Cr.PC. The Complaint may be in writing or even oral (in which case it must be reduced into writing after examining the complainant). The Magistrate is duty-bound to peruse and examine the complaint made, to see if it discloses commission of an offence requiring action on his

part. If it does so disclose, it is the discretion of the Magistrate to choose one of the two courses available to him at this stage. He may proceed to inquire into the complaint himself (which would be under Sections 200-202 Cr.PC) or he may ask the police to investigate into the matter (which would be under Section 156 Cr.PC in case of cognizable offences or under Section 155 Cr.PC in case of non-cognizable offences). Having regard to the utility of this provision *vis-à-vis* the rights of a citizen to put in motion the criminal law, it is very essential to know the powers conferred on the Magistrate under Section 156 (3) Cr.PC.

Section 156(3) Cr.PC is very briefly worded. The width and scope of powers of the Magistrate are not expressly mentioned in this section. Questions often arise as to under what conditions there is an implied power in the Magistrate under Section 156(3) Cr.PC to order registration of a criminal offence and / or to direct the officer in charge of the concerned police station to hold a proper investigation and take all such necessary steps as may be necessary for ensuring a proper investigation including monitoring of the same.

The interaction with the judicial officers during the session brought forward following important points:

Key learning points under Section 156(3) Cr.PC

1. A complaint must satisfy the test of Section 2 (d) Cr.PC.

2. No form is prescribed for filing a complaint. The Magistrate has to go by the contents and not the form of the complaint.

3. On receipt of a complaint (i.e. after satisfaction is reached that the petition made discloses commission of an offence), the Magistrate may (i) take cognizance of the offence under Section 190(1)(a) Cr.PC and inquire into the matter under Section 200 Cr.PC and, if necessary, postpone the issue of process and hold further inquiry or get investigation carried out under Section 202 Cr.PC; or (ii) direct investigation by police. As in any other matter involving discretion, the

Magistrate is expected to exercise the discretion in opting for one or the other course judiciously.

4. When a Magistrate receives a complaint, he is not bound to immediately take cognizance even if the facts (as alleged in the complaint) disclose the commission of an offence. This is clear from the use of the words 'may take cognizance' which (in the context in which they occur) cannot be equated with 'must take cognizance'. The word 'may' gives discretion to the Magistrate in the matter.

If on a reading of the complaint, the Magistrate finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) Cr.PC will be conducive to justice and save the valuable time of the Magistrate from being utilized in inquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as a preferred alternative to immediately taking cognizance of the offence and himself holding the inquiry.

This raises the incidental question as to what is meant by 'taking cognizance of an offence' by the Magistrate within the contemplation of Section 190 Cr.PC. This expression has not been defined in the Code. But, from the scheme of the Code, the content and marginal heading of Section 190 Cr.PC and the caption of Chapter XIV under which Sections 190 to 199 Cr.PC occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190(1) Cr.PC. Whether the magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for

the purposes of proceeding under Section 200 Cr.PC and the succeeding Sections in Chapter XV of the Cr.PC he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, instead of proceeding under Chapter XV, he, has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3) Cr.PC, he cannot be said to have taken cognizance of any offence. However, in case the Magistrate has chosen one course, he cannot go back and adopt another course i.e. if the Magistrate has taken cognizance, he cannot revert back and order investigation under Section 156(3) Cr.PC thereafter, nor can he choose to take cognizance once the investigation has been directed, until and unless, the police files a final report and the complainant chooses to pursue his complaint.

5. An oral application under Section 156(3) Cr.PC can also be entertained.

6. Any judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) Cr.PC. If he does so, he is not to examine the complainant on oath because he is not taking cognizance of any offence thereon. For the purpose of enabling the police to start investigation, it is open to the Magistrate to direct the police to register an FIR. The registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 Cr.PC. Even if a Magistrate does not say, in so many words, while directing investigating under Section 156(3) that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because the police officer can take further steps contemplated in the Chapter XII of Cr.PC only thereafter.

7. When a petition in the nature of a complaint is moved, the Magistrate is not to act like a post office. He has to examine whether or not from reading of the application/complaint under Section 200 Cr.PC *prima facie* commission of offence is disclosed. If he finds that no commission of offence is disclosed, he can reject the application/complaint. If he finds that *prima facie* commission of cognizable offence is disclosed, he may direct for registration and investigation of such complaint. If the Magistrate finds that though *prima facie* commission of offence is disclosed but it does not require investigation as no recovery or discovery is necessary in the matter, then he may proceed with it as a complaint case for inquiring before himself under Sections 200-202 Cr.PC.

8. The power to order police investigation under Section 156(3) Cr.PC is different from the power to direct investigation conferred by Section 202(1) Cr.PC. Section 156(3) Cr.PC occurs in Chapter XII, under the caption: 'Information to the Police and their powers to investigation'. Section 202 Cr.PC, on the other hand, falls in Chapter XV which bears the heading 'Of complaints to Magistrate'. The two operate in distinct spheres at different stages.

The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage, when the Magistrate is in *seisin* of the case. That is to say, in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) Cr.PC can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a) Cr.PC. But, once he takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3) Cr.PC.

It needs to be noted further that an order made under sub-section (3) of Section 156 Cr.PC, is essentially in the nature of a peremptory reminder or intimation to the police to

exercise their duty of investigation under Section 156(1) Cr.PC. Such an investigation embraces the entire continuous process under Chapter XII of Cr.PC which begins with the collection of evidence (after registering FIR) and ends with a report or charge sheet under Section 173 Cr.PC. On the other hand, Section 202 Cr.PC comes in at a stage when some evidence has been collected by the Magistrate in the proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 Cr.PC to direct, within the limits circumscribed by that section, an investigation 'for the purpose of deciding whether or not there is sufficient ground for proceeding.' Thus the object of an investigation under Section 202 Cr.PC is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

9. When a Complaint is made to a Magistrate *inter alia* stating that a complaint was first lodged with police but there was no action taken thereupon by that agency, there is a practice of calling for Status-Report or Action-Taken Report (ATR). The direction calling for Status Report or ATR is not an order to the police to start the investigation or hold a preliminary inquiry. It is actually to satisfy that there is no investigation already underway with the police, keeping in mind the restrictions contained in Section 210 Cr.PC. An order calling for status taken report/action taken report under Section 156(3) Cr.PC is not to be construed as an order directing investigation to the police.

10. If an inquiry is made by the officer in charge of the police station in the wake of the direction for filing status report and the statements are thereby recorded, such statements would be without authority as no FIR has been registered.

11. If an order passed by Magistrate under Section 156(3) Cr.PC

for registration of FIR is not complied with by the SHO, the Magistrate must ensure that the order is complied with and the case is registered and investigated. In case of non-compliance, the Magistrate can initiate action against the station officer. He may cause a copy of the order sent to Superintendent of Police/Senior Superintendent of Police to initiate a disciplinary inquiry against the SHO concerned and enforce compliance. In such case, it may also amount to non-compliance of the judicial order, and therefore invite penal action as well as reference for contempt of court.

12. No one can insist that an offence be investigated by a particular agency.

13. When a complaint petition is transmitted by the Magistrate to the police station under Section 156(3) Cr.PC, the police cannot refuse to conduct investigation on the ground of territorial jurisdiction.

14. Prior sanction under Section 197 Cr.PC is not required at the stage of hearing and disposal of the application under Section 156(3) Cr.PC. This is because sanction is a pre-requisite for cognizance and not for investigation.

15. Ideally, the remedy to get a FIR lodged with the police under Section 154(1) Cr.PC before approaching the Magistrate under Section 156(3) Cr.PC should be first exhausted. Yet, it is legal for a person to approach the Court directly without first approaching the police.

16. The rejection of application under Section 156(3) Cr.PC should be by a speaking order since it determines the possibility of such recourse and because the order is amenable to judicial review by the superior courts.

17. Once the Magistrate directs the police to investigate a cognizable offence under Section 156(3) Cr.PC and the police start investigation, the Magistrate cannot recall his order and

discharge the accused without awaiting report under Section 173 Cr.PC.

18. The law permits investigation to be entrusted to the police or even to "any person" (possibly only at the stage of Section 202 Cr.PC) [Section 2 (h) read with Section 202 (1) Cr.PC].

19. Section 156(3) Cr.PC empowers a Magistrate to direct the police to register a case and initiate investigations but this power has to be exercised judiciously on proper grounds and not in a mechanical manner. In those cases where the allegations are not very serious and the complainant himself is in possession of evidence to prove his allegations, there should be no need to pass orders under Section 156(3) Cr.PC. The discretion ought to be exercised after proper application of mind and police investigation should be ordered only in those cases where the Magistrate is of the view that the nature of the allegations is such that the complainant himself may not be in a position to collect and produce evidence before the Court and interests of justice demand that the police should step in to assist the complainant in mustering material in support. The police assistance can be taken by a Magistrate even under Section 202(1) Cr.PC after taking cognizance and proceeding with the complaint under Chapter XV of the Code.

20. While directing registration of FIR under Section 156(3) Cr.PC, the order must mention the specific offences *prima facie* involved. Ordinarily, there should be no direction with respect to investigation against any specific person.

21. It may not be proper to issue directions under Section 156(3) Cr.PC for registration of cross FIR.

Relevant case law on 156(3) Cr.PC

(i) *Gopal Dass Sindhi* v. *State of Assam* (AIR 1961 SC 986) and *Tula Ram* v. *Kishore Singh* (1978 Cri.L.J. 8 (SC)).

ã Upon filing of a private complaint, the Magistrate is not

bound to take cognizance and the Magistrate may well justify in sending the application under Section 156(3) Cr.PC to the police for investigation. "Taking cognizance," means application of mind for the purpose of proceeding under the various sections of Chapter XV Cr.PC.

(ii) *D. Lakshaminarayana* v. *Narayana* (1976 Cri.L.J. 1361 (SC)).

- In a complaint disclosing an offence exclusively triable by Magistrate court, the Magistrate is not debarred from sending the same to the police for investigation under Section 156(3) Cr.PC at pre-cognizable stage. However, once the Magistrate takes cognizance and embarks upon the procedure embodied in Chapter XV of Cr.PC, the Magistrate is not competent to switch back to the pre-cognizable stage and avail of Section 156(3) Cr.PC.

- The investigation / inquiry under Section156 (3) Cr.PC and Section 202(1) Cr.PC have different connotation. The investigation directed under Section156 (3) Cr.PC embraces the entire continuous process which begins with the collection of evidence and ends with a report or charge-sheet, whereas Section 202 Cr.PC comes in at a stage when the Magistrate after having taken cognizance has conducted some proceedings under Chapter XV of the Code, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. The inquiry / investigation under Section 202 Cr.PC is "for the purpose of deciding whether or not there is sufficient ground for proceeding", to assist the Magistrate in completing proceeding already instituted upon a complaint before him and not to initiate a fresh case on police report.

(iii) *A.R. Antulay* v. *R.S. Nayak and Anr.* [(1988) SCR Supl. (1) 1].

- "Locus Standi" is a concept foreign to criminal jurisprudence, and anyone can set and put criminal law into motion, except where the offence indicates to the contrary.
- The court may hold the enquiry as envisaged by Section 202 Cr.PC or direct investigation as therein contemplated. The matter is left to the judicial discretion of the court and this discretion cannot be circumscribed by making it mandatory upon the court to hold an inquiry or direct investigation.

(iv) *Madhu Bala* v. *Suresh Kumar* (AIR 1997 SC 3104).

- Upon a Magistrate directing investigation on a "complaint", the police has to register a cognizable case on that complaint, treating the same as the FIR and comply with the requirements of the Police Rules. Even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) Cr.PC, which empowers the police to investigate into a cognizable case and the rules framed under the Police Act, 1861, the police is duty bound to formally register the case and then investigate into the same.
- Upon completion of investigation and filing of charge-sheet under Section 173(2) Cr.PC, the Magistrate shall take cognizance under Section 190(1)(b) Cr.PC and not under Section 190(1)(a) Cr.PC, as the investigation of a cognizable case by the police culminates into the chargesheet.

(v) *Suresh Chand Jain* v. *State of M.P.* (AIR 2001 SC 571).

- The Magistrate may consider an application under Section 156(3) Cr.PC without taking cognizance and direct the police to register and investigate the case, or

he may take cognizance and proceed under Chapter XV Cr.PC. However this discretion of the Magistrate obviously cannot be unguided or arbitrary.

- The Magistrate before taking cognizance of the offence can order investigation under Section 156(3) Cr.PC and if he does so, he is not to examine the complainant on oath because he was not taking cognizance of the offence therein.

(vi) *Gulab Chand Upadhyaya* v. *State of UP and Ors.* [(2002) Cri.L.J. 2907 (SC)] and *M/s Skipper Beverages (P) Ltd.* v. *Sate* (2001 IV AD Delhi 625).

- If the private complaint does not indicate that any evidence is required to be collected and preserved, and the accused with their names and addresses as well as the witnesses, are known to the complainant then in such a case, no investigation by the police is required. The court may proceed to take cognizance and decline order under Section 156(3) Cr.P.C.

- The Magistrate may exercises the option to direct the registration of the case and its investigation by the police, where some "investigation" is required, which is of a nature that is not possible for the private complainant and which can only be done by the police upon whom statute has conferred powers essential for investigation.

(vii) *M.C. Abraham* v. *State of Maharashtra* [(2003) 2 SCC 649].

- The police is not bound to effect the arrest during the course of investigation. The power to arrest is required to be exercised cautiously. The police can file the final report or charge-sheet and the Magistrate cannot direct the investigating agency to submit a report i.e. in accord with his views. However, in the event of filing of the

closure report, the Magistrate is free to disagree with the closure report and to take cognizance. However, the Magistrate cannot direct the investigating agency to submit a chargesheet.

(viii) *Union of India* v. *Prakash P. Hinduja and Anr.* (AIR 2003 SC 2612).

- The court has a right to disagree with the final report or closure report filed by the police and may choose to take cognizance but would not interfere with the investigation or during the course of investigation.

(ix) *State of Karnataka* v. *Pastor P. Raju* (AIR 2006 SC 2825).

- Offence relating to previous sanction of appropriate authority is necessary only for taking "cognizance" by court – Bar of sanction will not apply against registration of criminal case or investigation by police agency.
- Passing of order of remand does not amount to taking "cognizance".

(x) *Mohd. Yousuf* v. *Smt. Afaq Jahan and Anr.* (JT 2006(1) SC 10).

- The Magistrate before taking cognizance of the offence can order investigation under Section 156(3) Cr.PC. The Magistrate can direct to register the FIR to enable the police to start investigation. Even if the Magistrate does not say in so many words while directing investigation under Section 156(3) Cr.PC, an FIR should be registered.

(xi) *Dilawar Singh* v. *State of Delhi* (JT 2007 (10) SC 585).

- Even if an FIR has been registered and the police has made the investigation, or is in the process of investigation, if the aggrieved person feels that investigation is not being carried out properly, such

person can approach the Magistrate under Section156 (3) Cr.PC and if the Magistrate is satisfied, he can order a proper investigation and take other suitable steps and pass such order as he thinks necessary for ensuring the proper investigation.

(xii) *Sakiri Vasu* v. *State of U.P. and Ors.* [(2008) 2 SCC 409] and *CBI and Anr.* v. *Rajesh Gandhi and Anr.* (1997 Cri.L.J. 63 (SC)).

- No one can insist that an offence be investigated by a particular agency. An aggrieved person can only claim that the offence he alleges be investigated properly, but he has no right to claim that it be investigated by any particular agency of his choice. An aggrieved person can approach the court for action, in case, police refuses to register FIR or after registration of FIR proper investigation is not held, upon such complaint being filed, the Magistrate can exercise his discretion under Section 156(3) Cr.PC and can direct the FIR to be registered and proper investigation to be made. The Magistrate can also monitor the investigation to ensure a proper investigation.
- Section 156(3) Cr.PC includes all such incidental powers as are necessary for ensuring a proper investigation.

(xiii) *Rasik Lal Dalpatram Thakkar* v. *State of Gujarat and Ors.* (AIR 2010 SC 715).

- The power under Section 156(3) Cr.PC may also be exercised by a Magistrate under Section 159 Cr.PC where the police has declined to investigate, under Section157 (1), proviso (b) Cr.PC.
- When an investigation is undertaken by the police at the instance of the Magistrate under sub-section (3) of

Section 156 Cr.P.C., the police officer is bound except in specific and specially exceptional cases, to conduct such investigation even if he was of the view that he did not have jurisdiction to investigate the matter. So, without holding the investigation, he cannot forward the report to the Magistrate with the observation that since the entire cause of action for the alleged offence had purportedly arisen beyond his territorial jurisdiction, the investigation should be transferred to the concerned police station.

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Saket Study Circle
Study Notes-2
Session-II

SUBJECT : **BAIL – LEGAL AND PRACTICAL ASPECTS FOR PERSPECTIVE OF MAGISTERIAL COURT**

Speaker : Sh. Yogesh Khanna, Addl. Sessions Judge (Spl. Fast Track Court)

Rapporteurs : Sh. Rakesh Pandit, Full Time Secretary, DLSA and Ms. Vijeta Singh, Metropolitan Magistrate.

Vetted by : Sh. Dinesh Kumar Sharma, Special Judge (PC Act) & Dr. Neera Bharihoke, Addl. District Judge

Introduction

There is no definition of bail in the Criminal Procedure Code (Cr.PC), although the terms 'bailable offence' and 'non-bailable offence' have been defined in Section 2(a) Cr.PC. Bail has been defined in the Law Lexicon as security for the appearance of the accused person, on giving which he is released pending trial or investigation. Bail, in law, means procurement of release from prison of a person awaiting trial or an appeal, by furnishing of bail bond to ensure his submission at the required time to legal authority. Failure of the person released on bail to surrender himself at the appointed time results in forfeiture of the security. The release on bail is crucial to the accused because if the same is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt, he would be subjected to the psychological and physical deprivation of jail life. Detention during the period of

trial has always been discouraged by superior courts. The effect of granting bail is not to set the accused free, but to release him from custody and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. According to the Cr.PC, the terms "bailable offence" and "non-bailable offence" have been defined in Section 2(a) of the Cr.PC. It can be generally stated that all serious offences, i.e. offences punishable with imprisonment for three years or more have been considered as non-bailable offences. Sections 436 to 450 Cr.PC set out the provisions for the grant of bail and bonds in criminal cases. The amount of security that is to be paid by the accused to secure his release has not been mentioned in the Cr.PC. Thus, it is the discretion of the court to put a monetary cap on the bond. If a person accused of a bailable offence is arrested or detained without warrant, he has a right to be released on bail. But if the offence is non-bailable that does not mean that the person accused of such offence shall not be released on bail, in such case bail is not a matter of right, but only a privilege to be granted at the discretion of the court. The law in regard to grant or refusal of bail is very well settled.

Bailable offences

Section 436 Cr.PC provides for release on bail in cases of bailable offences. In case of a bailable offence, bail is a matter of right. If such officer or Court thinks it fit, such person maybe released on a personal bond without sureties. In case of bailable offences, one has to file the bail bonds and no application is required.

Section 436 Cr.PC makes it mandatory to release a person who is indigent (not being able to furnish bail within a week of arrest is a sufficient ground to presume that he is indigent), on his executing a bond without sureties for his appearance. But such an order cannot be passed in non-bailable offence.

Non-Bailable offences

Section 437 Cr.PC provides for release on bail in cases of non-bailable offences. In such cases, bail is not a matter of right. Court has

sufficient discretion to deny or to grant bail. Cases often arise under Section 437 Cr.PC, where though the court regards the case as fit for the grant of bail, it regards imposition of certain conditions as necessary in the circumstances as provided under sub-section (3) of Section 437 Cr.PC. It is pertinent to mention that if, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he has been in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs. It will be noticed that under Section 437 (3) Cr.PC, the power to impose conditions has been given to the court and not to any police officer.

Section 437 Cr.PC dealing with non-bailable offences lays down that a person accused of such an offence *may* be released on bail but he shall not be so enlarged if:

- The offence is punishable with death or imprisonment for life. The offence is a cognizable offence and the accused has been previously convicted of an offence punishable with death, imprisonment for life or imprisonment of 7 years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for 3 years or more but not less than 7 years (But court may grant bail in this case in just and proper circumstances)
- However, the above-mentioned stringency has been relaxed in the case of the accused being a woman, a child below 16 years, sick or infirm. Also, the mere requirement of the accused for identification by witnesses during investigation is not sufficient to justify the refusal of grant of bail to the accused.

Section 436A Cr.PC is another very important provision which was introduced in order to solve the problems of undertrials'

who were languishing in jails. According to Section 436-A Cr.PC, a person who has undergone detention for a period extending upto half of the maximum period of imprisonment imposed for a particular offence, shall be released on her/his personal bond with or without sureties. The procedure provided is that the court has to hear the Public Prosecutor and give its decision with reasons in writing. The court may release the applicant, or if not satisfied may order for the continued detention of the applicant. However, no prisoner can be detained for a period longer than the maximum period of imprisonment provided that the section is not applicable to offenders who have been sentenced to death. There is no mention of any applications to be filed under the section. The first part of the section states that any prisoner who has served more than half the term of his/her imprisonment 'shall' be released. However, the proviso puts a restriction on the mandatory provision by giving discretionary powers to the courts.

Section 167(2) Cr.PC confers right to be released on bail, in case the investigating agency fails to complete investigation and file the charge-sheet within the time limit of either 60 or 90 days as the case may be. In case the investigation is not completed within the definite period, a most valuable right accrues to the accused. The accused is, in that eventuality, entitled to be released on bail.

Cancellation of bail

According to Section 437(5) Cr.PC any court which has released a person on bail under (1) or sub sec (2) of Section 437 Cr.PC may if considers it necessary so to do, direct that such person be arrested and committed to custody. The power to cancel bail has been given to the court and not to a police officer. Secondly, the court which granted the bail can alone cancel it. However, the bail granted by a police officer cannot be cancelled by the court of a magistrate. For cancellation of bail in such a situation, the powers of the High Court or Court of Session under Section 439 Cr.PC will have to be invoked. The judicial discretion for cancellation of bail is permitted only if , by reason of supervening circumstances it would be no longer conducive

to a fair trial to allow the accused to retain his freedom during the trial. However, bail granted illegally or improperly by a wrong arbitrary exercise of judicial discretion can be cancelled even if there is absence of supervening circumstances. If there is no material to prove that the accused abused his freedom, court may not cancel the bail. In the following circumstances the bail granted to the accused may be cancelled.

a Where the person on bail, during the period of the bail, commits the very same offence for which he is being tried or has been convicted, and thereby proves his utter unfitness to be on bail;

b If he hampers the investigation as will be the case if he, when on bail; forcibly prevents the search of place under his control for the *corpus delicti* or other incriminating things;

c If he tampers with the evidence, as by intimidating the prosecution witness, interfering with scene of the offence in order to remove traces or proofs of crime, etc.

d If he runs away to a foreign country, or goes underground, or beyond the control of his sureties; and

e If he commits acts of violence, in revenge, against the police and the prosecution witnesses and those who have booked him or are trying to book him.

Guiding factors for granting or refusing bail

Seriousness of the charge is one of the relevant considerations while considering bail applications but that is not the only test or the factor. The other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction. The gravity of the offence involved is likely to induce the accused to avoid the course of justice and heinousness of the crime must weigh with courts when considering the question of bail. Guiding factors are not guilt of the accused, but the charge, the nature of the evidence by which it is supported, and the punishment to which the party would

be liable if convicted.

Besides, gravity of the offence and the nature of evidence, the court is also required to see propensity to flee from justice and the possibility of obstructing the court of justice, if accused is released on bail. The court must take into account the likelihood of the applicant tampering with the prosecution witness or otherwise polluting the process of justice.

Primarily, while deciding a bail application the court should not get into the merits of the case. What is required to be proved before the court is just a prima facie case showing the involvement of the accused as at this stage the court has to strike a balance between the right to personal liberty of the accused and the requirements of fair trial and personal safety.

The interaction with the officers in the session brought forward following important points.

1. Every accused person is presumed to be innocent until proved guilty.

2. Bail or release on personal recognizance is available as a right in bailable offences and only to women and children in non-bailable offences punishable with death or life imprisonment. In case of bailable offence, one has to file only the bail-bonds and no application is required.

3. It is pertinent to mention here that if a person is released on bail by the police in a bailable offence, the court is required to pass a fresh bail order and direct the accused to furnish bail-bond.

4. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course.

5. Though at the stage of granting bail, a detailed examination of the evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being

granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind.

6. It is necessary for the court granting or declining bail, to consider among other circumstances, the following factors also before granting bail:-

   (a) Prima facie satisfaction of the court in support of the charge.

   (b) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

   (c) Reasonable apprehension of the accused tampering with the witnesses or threat to the complainant.

   (d) Possibility of the accused fleeing from justice, if enlarged from custody.

7. Section 50(2) Cr. PC makes it obligatory for a police officer arresting a person without a warrant to inform him of his right to be released on bail, if the offence is bailable.

8. Under Section 436 (1) Cr.PC, the officer-in-charge of a police station or any court does not have any discretion whatsoever to deny bail in cases involving bailable offence. The word "appears" in this sub- clause is wide enough to include voluntary appearance of the person accused of an offence even where no summons or warrant has been issued against him. There is nothing in Section 436 Cr.PC to exclude voluntary appearance or to suggest that the appearance of the accused must be in the obedience of a process issued by the court. The surrender and the physical presence of the accused with the submission to the jurisdiction and order of the court is judicial custody, and the accused may be granted bail and release from such custody.

9. The right to be released on bail under Section 436(1) Cr.PC cannot be nullified indirectly by fixing too high amount of bond or bail-bond to be furnished by the person seeking enlargement on bail.

10. Section 440(1) Cr.PC provides the amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive. While determining the question as to whether accused should be released on personal bond or should be asked to furnish the bail-bond or what should be the amount of the bail-bond, the court may take into account the following factors concerning the accused:

    i) The length of his residence in the community,

    ii) His employment status, history and his financial condition,

    iii) His family ties and relationships,

    iv) His reputation, character and monetary condition,

    v) His previous criminal record including any record or prior release on recognizance or on bail,

    vi) The identity of responsible members of the community who would vouch for his reliability.

    vii) The nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non appearance,

11. Section 440(2) Cr.PC empowers the High Court or the Court of Sessions may direct that the amount of bail required by a police officer or Magistrate be reduced.

12. Sub-section (2) of Section 436 Cr.PC makes a provision to the effect that a person who absconds or has breached the

condition of his bail bond when released on bail in a bailable case on a previous occasion, shall not as of right be entitled to bail when brought before the court on any subsequent date even though the offence may be bailable.

13. In case a person is accused of a non-bailable offence, it is a matter of discretion of the court to grant or refuse bail and an application has to be made in court for grant of bail.

14. It is not only a matter of practice but also one of condition to enquire into the antecedents of a man who is applying for bail to find out whether he has a bad record – particularly a record which suggests that he is likely to commit serious offences while on bail.

15. The provisions of Cr.PC confer discretionary jurisdiction on criminal courts to grant bail to accused pending trial or in appeal against convictions. Since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interests of the society at large.

Some landmark judgments

(i) *Kalyan Chandra Sarkar* v. *Rajesh Ranjan* [(2005) 2 SCC 42 (SC)].

- An accused of non- bailable offences is entitled to bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie against him and/or if the court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such accused on bail, where fact situation requires it to do so.

(ii) *Prahlad Singh Bhati* v.*NCT, Delhi* [(2001) 4 SCC 280 (SC)] *and Gajanand Aggarwal* v.*State of Orissa (*2007, Cri.L.J. 2752).

- The jurisdiction to grant bail has to be exercised on the

basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of the evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations.

(iii) *State of U.P.* v. *Amarmani Tripathi* [(2005) 8 SCC 21 (SC)] *and State of Rajasthan* v. *Balchand* [(1977) 4 SCC 308].

ã The matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused.

The object of detention of an accused person is primarily to secure her/his appearance at the time of trial and is available to receive sentence, in case found

guilty. The object of bail is neither punitive nor preventive.

(iv) *State of Kerala* v. *Raneef* [(2011) 1 SCC 784].

- An important factor, which should be taken into consideration while deciding bail applications by the court is the delay in concluding the trial. This is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail.

(v) *Gurcharan Singh* v. *State (Delhi Admn.)* [(1978) 1 SCC 118].

- In non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437 Cr.PC if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the court which may defeat proper investigation and a fair trial, the court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) Cr.PC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

- Section 439(1) Cr.PC, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1)

Cr.PC there is no ban imposed under Section 439(1) Cr.PC against granting of bail by the High Court or the court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) Cr.PC.

ã The overriding considerations in granting bail which are common both in the case of Section 437(1) Cr.PC and Section 439(1) Cr.P.C. are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.

(vi) *Moti Ram* v. *State of M.P.* [(1978) 4 SCC 47 (Supreme Court of India)].

ã The consequences of pre-trial detention are grave. Defendants presumed innocent arc subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented

from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.

(vii) *Sanjay Chandra* v. *CBI* [(Crl. App. No. 2178 of 2011) SLP No. Crl. 5650 of 2011 decided on 23 November, 2011, Supreme Court of India].

ã Punishment begins after conviction. Every man is deemed to be innocent until duly tried and duly found guilty. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test. It would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

(viii) *Maneka Gandhi* v. *Union of India* [(1978) 2 SCR 621].

ã The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the

nature of the charge. The inquiry into the solvency of the accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond.

(ix) *Rajeev Chaudhary* v. *State (N.C.T.) of Delhi* (2001 CRI. L. J. 2941).

- The expression "offence punishable with imprisonment for a term of not less than 10 years" in cl. (i) of proviso (a) to Section167(2) Cr.PC is an offence for which imprisonment is for a clear period of 10 years or more. Under Section 386 IPC punishment prescribed can extend to ten years i.e it could be less than 10 years. Hence, accused cannot be released on bail on grounds of non-submission of chargesheet within period of 60 days. Accused can be detained up to period of ninety days.

(x) *State of Maharashtra* v. *Mrs. Bharati Chandmal Varma alias Ayesha Khan* (AIR 2002 SC 285).

- Accused moved for bail under Section 167(2) Cr.PC on the ground that charge-sheet not laid within 90 days. Accused was arrested for offence under IPC and was produced before Magistrate who remanded her to custody on 2-4-01. During investigation police discovered that crime under Maharashtra Control of Organised Crime Act (MCOC Act), 1999 had also been committed. The court held that 90 days envisaged in Section 167(2) should be reckoned not from the date when investigation legally commenced under MCOC Act i.e. on 21-4-01 after obtaining sanction of authority under MCOC Act but from date of initial remand to custody i.e. 2-4-01. If charge sheet not laid within 90 days from 2-4-01, accused shall be entitled to be released on bail.

(xi) *State of W.B.* v. *Dinesh Dalmia* (AIR 2007 SC 1801).

ã The whole purpose of Section 167 Cr.PC is that the accused should not be detained for more than 24 hours and subject to more than15 days' police remand. But the custody of police for investigation purpose cannot be treated as judicial custody/detention in another case. The police custody means the police custody in a particular case for investigation and not judicial custody in another case. Thus, where two F.I.Rs. were lodged against accused at Calcutta and Chennai and the accused who was arrested and was in C.B.I. custody in the case pending before the court at Chennai, on receiving information that he was also required in a case at Calcutta voluntarily surrendered before the Magistrate at Chennai in a case relating to F.I.R. in Calcutta, such notional surrender cannot be treated as police custody so as to count 90 days from that notional surrender as regards the case pending at Calcutta. A notorious criminal may have number of cases pending in various police stations in the city or outside city, a notional surrender in a pending case for another FIR outside city or of another police-station in the same city, if the notional surrender is counted then the police will not get the opportunity to get custodial investigation. The period of detention before a Magistrate can be treated as a device to avoid physical custody of the police and claim the benefit of proviso to sub-section (1) and can be released on bail. This kind of device cannot be permitted under Section 167 of the Cr.PC. The condition is that the accused must be in the custody of the police and so called deemed surrender in another criminal case cannot be taken as starting point for counting 15 days' police remand or 90 days or 60 days as the case may be. Therefore, this kind of surrender by the accused cannot be deemed to be in the

police custody in the case pending in Calcutta.

ã Statutory bail: Right to be released on bail is available only, till investigation remains pending. This right is lost once charge-sheet is filed and does not get revived only because further investigation is pending. The power of a Court to direct remand of an accused either in terms of Section 167(2) or Section 309(2) Cr.PC will depend on the stage of the trial. Whereas Section 167(2) Cr.PC would be attracted in a case where cognizance has not been taken, Section 309(2) Cr.PC would be attracted only after cognizance has been taken. Even in the same case depending upon the nature of charge-sheet filed by the investigating officer in terms of Section 173 Cr.PC, cognizance may be taken as against the person against whom an offence is said to have been made out and against whom no such offence has been made out even when investigation is pending. So long a charge- sheet is not filed within the meaning of Section 173(2) Cr.PC investigation remains pending. It, however, does not preclude an investigation officer to carry on further investigation despite filing of a police report, in terms of Section 173(8) Cr.PC. The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under Section 173(2) Cr.PC and further investigation contemplated under Section 173(8) Cr.PC. Whereas only when a charge-sheet is not filed and investigation is kept pending, benefit of Section 167(2) Cr.PC would be available to an offender. Once, however, a charge-sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of Section 173(8).

(xii) *Ram Govind Upadhaya* v. *Sudarshan Singh* (AIR 2002 SC 1475).

ã The Supreme Court enumerated the following considerations :

a Nature of the accusations, severity of the punishment, if the accusation entails a conviction and the nature of the evidence in support of the accusation ;

b Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant ;

While it is not accepted to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought to be a prima facie satisfaction of the court;

c Frivolity in prosecution.

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Study Circle
Study Notes-3
Session-III

SUBJECT : ORDER 10 CODE OF CIVIL PROCEDURE, 1908

Speaker : Ms. R. Kiran Nath, Registrar (Vigilance)

Rapporteurs : Sh. Manoj Jain, Special Judge
Dr. Neera Bharihoke, Addl. District Judge

Vetted by : Sh. Dinesh Kumar Sharma, Special Judge (PC Act)

Order 10 Code of Civil Procedure, 1908 aims at narrowing down controversy between the parties by seeking clarity about pleadings, removing any ambiguity therein, and ascertaining the exact points of dispute.

Proper use of this provision can result in saving of precious time of the Court and a judge can proceed with the trial with full and effective control.

Expression "first hearing"

Order 10 Rule (1) provides that at the "*first hearing*" of the suit the court shall ascertain from each party or his pleader, whether he admits or denies such allegation of fact as are made in the pleadings of the opposite party. The expression "f*irst hearing*" has come up for discussion in many cases. It has been consistently held that "*first hearing*" can never be earlier than the date fixed for preliminary examination of the parties and settlement of issues. Therefore, it necessarily occurs at the stage immediately after completion of pleadings. Order 10 CPC provides that the court on the first hearing

of the suit shall ascertain from each party about their pleadings. It does not place in any manner any bar on the powers of the court to seek clarification from any party at any date earlier than one fixed for framing issues so as to advance the interest of justice.

Scope of statement recorded under Order 10

The true scope of statement to be recorded under Order 10 is to find out the root points of dispute between the parties. This provision empowers the court to use its judicial power to understand the case and position of the parties in the event of pleadings being vague and non-specific. Order 10 Rule (2) empowers the Court to examine the party or companion to elucidate any matter in controversy in the suit or to obtain answer to any material question relating to the suit either at the first hearing or subsequent hearing. The object of examination under Order 10 Rule (2) is to identify the matters in controversy and not to prove or disprove the matters in controversy. This is a very useful tool, which empowers the Court to focus its attention at the matters on which the parties are at variance. The only rule of caution is that the court should not examine the party with a view of taking evidence and the purpose should only be to ascertain the real matter in controversy in the suit.

Amendment in Order 10 pursuant to the amendment of Section 89 CPC

Order 10 Rule 1(A) was incorporated by way of Amendment Act of 1999 consequential to the insertion of sub section (1) of Section 89 CPC. It mandates the court that after recording the admission and denial it is obligatory upon the court to refer the dispute for settlement by way of one of the various mode of alternative dispute remedy i.e., arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation. The provision gives an option to the party to choose any one of the ADR modes. Order 10 Rule 1(A), 1(B) and 1(C) are inter related provisions. As per Rule 1(B) the parties are required to appear before such ADR forum opted by them and Rule 1(C) provides for the Presiding Officer of the ADR forum to refer the

matter again to the court in case it feels that in the interest of justice, it should not proceed with the matter. This provision is in tune with the broad legislative intent of the settlement of disputes by alternative dispute redressal system with an object to declog and decongest the justice delivery system and to make the justice delivery system more effective, speedy and meaningful.

Distinction between Order 10 Rule (1) and Order 10 Rule (2)

There is a distinction between order 10 Rule (1) and Rule (2). Rule (1) relates only to ascertainment by statement between parties or their pleaders, whether allegations in the pleadings are admitted or denied. However, under Order 10 Rule (2), the court may examine any party or his companion, who is able to answer any material question relating to the suit. Order 10 Rule (2) also makes it obligatory upon the court for examining the parties for elucidating matters in controversy. Under Order 10 Rule (1) the statement of the pleader can also be recorded. However, order 10 Rule (2) is silent about recording the statement of counsel.

Consequences of refusal or inability

Order 10 Rule (4) provides consequences of refusal or inability of pleader to answer. In Rule (4) sub rule (1) the court may postpone the hearing of the suit to a day nor later than 07 days from the date of first hearing in case the pleader of a party representing such party or any person as referred to in Order 10 Rule (2), refuses or is unable to answer any material question relating to the suit. Perusal of sub Rule (2) of Order 10 Rule (4) indicates that even when a party fails to appear in person, the court is not bound to pronounce any judgment against the party. Instead, the court has been vested with the discretion to make such order in relation to the suit as it thinks fit. An order dismissing a suit under this rule operates as a decree and bars a fresh suit on the same cause of action.

Whether such statement has to be recorded on oath?

It is pertinent to mention here that Order 10 is silent about the

be converted into a process of selective cross-examination by the court, before the party has an opportunity to put forth his case at the trial.

12. The power of the court to summon a party for recording a statement is an attempt to identify the real issue in controversy and to elucidate matters required to be elucidated.

13. The scope of Order 10 Rule (2) is limited to identifying the matters in controversy and not to adjudicate upon the matters in controversy.

14. Order 10 Rule 2 sub rule 1(A) puts an obligation upon the court to examine the party at the first hearing for the purpose of elucidating the matters in controversy to narrow down the issues between the parties.

15. The statement recorded under Order 10 Rule (2) are intended for clarification of their pleadings and the value of such statement, cannot be set at naught by any subsequent tutored statement.

16. The statement made by a party under this rule is binding only on him and cannot be used against the opposite party for the simple reason that other party did not have the opportunity to cross examine the person making the statement.

17. The power to identify the matter in controversy by examination of parties at the pre-trial stage under Order 10 Rule (2) is completely different from the power exercised by the court under Section 165 of the Evidence Act to put any question it pleases in any form to a witness or party in order to discover or to obtain proper proof of relevant facts or the power under Order 18 Rule 14 of the Code to recall and examine any witness.

18. By no stretch of reasoning, a party giving an answer to a question put under Order 10 Rule (2) of the Code when not under oath and not being examined as a witness, can attract

Section 195 IPC and consequently, cannot attract Section 195 (1)(b) and Section 340 Cr.PC. A party giving answer in an

(v) *Krishan Lal and Ors.* v. *Alok Kapoor* [RFA No. 426/1999, (Hon'ble Delhi High Court) judgment delivered on 8/11/2011].

- The provision of order 10 CPC is not meant to be a substitute for detailed evidence in the case.

(vi) *Pritpal Singh Kohli* v. *Surjit Kaur,* [AIR 2001 Delhi 363].

- The court should be cautious that order 10 Rule 2 shall be put to use only when the court finds it necessary to obtain from any party information on any material question relating to the suit. The examination under this provision should not be resorted to with an object to supersede the ordinary procedures as laid down in Order 18. The statement recorded under Order 10 Rule 2 should be read as a whole.

(vii) *Vikas Agarwal* v. *Anubha* [(2002) 4 SCC 468].

"We would like to observe that Order 10 CPC in an enabling provision providing that the court at the first hearing of the suit shall ascertain from each party about their pleadings. It does not in any manner place any bar on the powers of the court to seek clarification from any party in an appropriate case, at any date earlier than one fixed for framing of issues so as to advance the interest of justice. It would not be in violation of Order 10 CPC or in conflict thereof. Considering the facts and circumstances of the case we agree with the submission made on behalf of the respondent and find that the appeal lacks merit so as to call for any interference by us under Article 136 of the Constitution. In the result, the appeal is dismissed with costs."

(viii) *Rajiv Srivastava* v. *Sanjiv Tuli* [AIR 2005 Delhi 319].

- The admissions made by a party under Order 10 Rule 2 of the Code is conclusive against him, and the court can proceed to pass judgment on the basis of such

admission.

(ix) *Gautam Adani* v. *Container Corporation of India* [150 (2008)

(C) No. 760 of 2007) (Supreme Court)].

ã Section 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said Rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore, the only practical way of reading Section 89 and Order 10 Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to Section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

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SAKET STUDY CIRCLE
STUDY NOTES-4
Session-IV

SUBJECT : **SECTION 89 CODE OF CIVIL PROCEDURE, 1908.**

Speaker : Sh. Narottam Kaushal, Addl. Sessions Judge (Electricity)

Rapporteurs : Sh. Vinay Kumar Khanna, Addl. Sessions Judge and Sh. Balwant Rai Bansal, Judge Small Cause Court – cum – Addl. Sr. Civil Judge – cum – Guardian Judge

Vetted by : Sh. Dinesh Kumar Sharma, Special Judge (Nodal Officer) and Dr. Neera Bharihoke, Addl. District Judge

Introduction

Pursuant to the amendment carried out in 1999, Section 89 CPC has been reincorporated, which *inter alia* provides about the settlement of disputes outside the court, popularly known as "Alternative Dispute Redressal System". The law provides that where it appears to the court that there exist elements of a settlement, which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for

i) Arbitration;
ii) Conciliation;
iii) Judicial settlement including settlement through Lok Adalat; or
iv) Mediation.

The court is required to refer the proceedings to any of the modes of ADR Forum only if there appears to be an element of settlement. The bare perusal of this provision also indicates that the reference should be with the consent of the parties.

Section 89 CPC sub-section (2) speaks about the stage of referring the dispute for settlement, which is, after the issues have been framed, by way of any modes of ADR as prescribed in Section 89 CPC. It is only when the parties fail to get their dispute settled through any of the ADR methods that the suit could proceed further. The constitutionality of Section 89 CPC has been upheld by the Apex Court.

However, the wording of Section 89 CPC has faced severe criticism and it has been felt that the legislature created a chaos by bad legislation. Apex Court has gone to the extent of saying that Section 89CPC in the present form is a nightmare for the judges.

Section 89 CPC casts a duty upon the judges to refer the dispute to Alternative Dispute Redressal System as referred in Section 89 CPC as it would de-congest the over burdened judicial system. If disputes are settled amicably and satisfactorily, it may bring peace and harmony in the society as compared to the settlement of the dispute through litigation. Such settlements are normally everlasting.

For fulfilling the objective of the legislature for settlement of dispute through Alternative Dispute Redressal System, not only Section 89 CPC was reincorporated, Order 10 Rule 1 CPC was also amended. Order 10 Rule 1(A), Rule 1(B) and Rule 1(C) were inserted by the amendments in Section 89 CPC.

Order 10 Rule 1(A) read with Order 10 Rule 1(B) and Rule 1(C) CPC empowers the court to explore the possibility of alternative method of dispute redressal as provided in Section 89 CPC. These provisions are also meant for the court to seek the option of the parties for alternative mode of settlement outside the court.

The stage of reference as provided in Order 10 Rule 1A may be

after recording the admissions and denials under Order 10 Rule 2. Order 10 Rule 1-(B) provides that where a suit is referred under Rule 1A, the parties shall appear before such forum or authority for settlement of the suit as referred by the court. Order 10 Rule 1(C) lays down the consequences of the failure of efforts of alternative method of dispute resolution.

The intention of the legislature behind Section 89 CPC and Order 10 Rule 1(A), Rule 1(B) & Rule 1(C) indicates that where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, they, at the instance of the Court, shall be made to apply their mind so as to opt for one or the other ADR methods as prescribed under Section 89 CPC such as Arbitration, Conciliation, Mediation, Judicial Settlement and Lok Adalat.

It is pertinent to mention here that the Arbitration and Conciliation are governed by the Arbitration and Conciliation Act, 1996 and the settlements through Lok Adalat are governed by Legal Service Authority Act, 1987. However, there is no separate legislation for Mediation as of now and the settlements reached through Mediation are required to be referred to the court for appropriate orders under Order 23 CPC. Similarly, the Judicial settlements are governed by the provisions under Order 23 CPC.

The reading of the Section 89 CPC would be incomplete without taking into account Section 16 of the Court Fees Act. Section 16 of Court Fees Act also provides that if the matter has been referred to any of modes referred above under Section 89 CPC, the court fee will be refunded. Section 16 Court Fee Act also indicates the efforts of the Legislature to settle the dispute through any of the modes as prescribed under Section 89 CPC to de-congest the over burdened courts.

It may be emphasized that Alternative Dispute Redressal System are not there to replace the existing judicial system. It is only to give an add-on support to the present judicial system, which has not been able to cope with the magnitude of litigation. There are certain

categories of cases which can be settled only through litigation and cannot be referred under Section 89 CPC and there are category of

modes of ADR cater to civil suits and therefore, criminal cases, compoundable or non-compoundable, cannot be referred to the Mediation. However, as per prevailing practice, courts are referring the matters under Section 138 Negotiable Instrumental Act or under Section 406/498-A IPC and bail application in such matters to the Mediation Centre for settlement.

Key Learning Points:

1. There is a thin line of difference between Conciliation and Mediation. The Conciliator assists the parties to reach their own settlement and may make suggestions. However, Mediator is required to avoid giving suggestions and encourages the parties for self-determination. The process of conciliation has been prescribed in Chapter-3 of Arbitration and Conciliation Act 1996, whereas, there is no statute to regulate the process of Mediation.

2. Conciliation involves a third party trying to bring together the disputant parties to help re-concile their differences, whereas Mediation process allows a third party to evolve terms on which the dispute might be resolved.

3. In Conciliation, the settlement results in arbitral award under Section 30 CPC having force of decree. However, no such law exists for Mediation.

4. The stage of referring the parties under Section 89 CPC is after the pleadings are complete, and before the framing of issues. However, the court can refer the matter under Section 89 CPC even after framing issues. Before referring the case to ADR, the court must ensure the presence of parties and assess relevant facts of the case.

5. In matrimonial matters, the ideal stage for mediation will be immediately after service of respondent and before the respondent files objections/written statements.

6. The court should avoid referring a case to ADR, if defendant or one of the defendants is ex-parte. The court should also not

Court need not necessarily be decided by the court itself. Keeping in mind the laws delays and the limited number of Judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date."

(ii) *K. Venkulu* v. *State of AP* (AIR 2004 Andhra Pradesh 85).

The court cannot be obligated to arbitrate the matter between the parties on the strength of agreement entered into between the parties. Section 89 of the CPC only enables the court for reference, if there is possibility of settlement either by way of arbitration or conciliation.

(iii) *Salem Advocate Bar Association, Tamil Nadu* v. *Union of India (*AIR 2005 SC 3353).

The intention of the legislature behind enacting Section 89 CPC is that where it appears to the court that there exists element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the ADR methods mentioned in the section.

Section 89 of the CPC uses both the word 'shall' and 'may' whereas Order 10, Rule 1A of CPC uses the word 'shall', but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in Section 89 of CPC only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of Section 89 of the CPC.

(iv) *Jaibir and Ors.* v. *State and Anr.* (142 (2007) DLT).

The legislature has amended Section 89 of the CPC in the year

2002. There is an all round attempt by the Legislature and Judiciary, as well as the Executive, to promote the settlement of

SAKET STUDY CIRCLE
STUDY NOTES-5
Session-V

SUBJECT: **SECTION 294 OF CODE OF CRIMINAL PROCEDURE, 1973.**

Speaker of the day: Ms. Monika Saroha, Metropolitan Magistrate (Mahila Court) &

Ms. Tyagita Singh, Metropolitan Magistrate (Mahila Court)

Vetted by: Sh. Dinesh Kumar Sharma, Special Judge (PC Act)

Introduction

Section 294 was added in the Criminal Procedure Code (Cr.PC) in 1973 with the object of dispensation of formal proof of documentary evidence in criminal trial with the ultimate aim of speedy trial by cutting short the procedural formalities without compromising the principles of fair trial and right of fair hearing of the accused and without compromising or reducing the probative value of documentary evidence. The trial courts can make good use of Section 294 Cr.PC for admission and denial of documents filed by prosecution or accused, at any stage of the trial, in the interest of justice. It is said justice delayed is justice denied; hence it is in the interest of all the parties to the proceeding as well as court that such beneficial provisions should be used as a matter of regular practice to shorten the length of trial and to enhance the pace of justice. Section 294 Cr.PC reads as follows:

"294. No formal proof of certain documents:-

(i) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(ii) The list of documents shall be in such form as may be prescribed by the State Government.

(iii) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed :

Provided that the Court may, in its discretion, require such signature to be proved."

Objective of legislature

Prior to the enactment of the Code, an accused was supposed to be a silent spectator at the trial and could not be asked to admit or deny the documents on which the prosecution relied and it was for the prosecution to prove them by examining witnesses even when the accused was not interested in challenging the facts sought to be proved through them and this resulted in inconvenience and avoidable delay. By enacting Section 294 Cr.PC, the legislature has empowered the court to call upon the prosecution or the accused to admit or deny the genuineness of the documents filed by the opposite side and to read them in evidence only if the opposite side admits the genuineness thereof.

The object of Section 294 Cr.PC is to accelerate the pace of trial by avoiding the time being wasted in examining the signatory to the document filed by either of the parties to prove his signatures and correctness of its documents, if its genuineness is not disputed. This section is intended to dispense with the formal proof of certain

documents. It is obviously intended to slim the proceedings by dispensing with elaborate and sometimes long drawn procedure of examining the concerned person when the genuineness of documents is not in dispute. Sub-section (3) providing for such dispensation is the main provision, sub-sections (1) and (2) being merely procedural. Such dispensing of proof is restricted only to such documents of which genuineness is not disputed when called upon to do so under sub-section (1) of Section 294 Cr.PC.

Related laws

Section 294 Cr.PC finds mention in Chapter XXIII, which contains Sections 272 to 299 and this chapter deals with the evidence in inquiries and trials.

According to Section 3 of the Indian Evidence Act, 1872 (the Evidence Act),

> *"Evidence" means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; and all documents produced for the inspection of the court; and the above said statements are called 'oral evidence' whereas the abovesaid documents are called 'documentary evidence.'*

No document produced for the inspection of the court can be admitted in evidence unless its genuineness is proved in accordance with law and no document, which has not been admitted in evidence, can be read by the court for the purpose of deciding the issue before it.

Sections 67 to 71 of the Evidence Act prescribe the mode of proof of the documents and Sections 292 to 294 of the Code permit the admission of certain documents into evidence without following the said mode.

This is also in consonance with the provisions of Section 58 of the Evidence Act which provides as under:

> *"Section 58: Facts admitted need not be proved: - No fact need be*

proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

The proviso to Section 58 of the Evidence Act specifically gives discretion to the Court to require the facts admitted to be proved otherwise than by such admission. The proviso corresponds to the proviso to Section 294 of Cr.PC. In view of this, it is quite clear that the Court at no stage can act blindly or mechanically. Section 294 Cr.PC if examined in its correct perspective would show that such document whose genuineness is not disputed may be led in evidence in enquiry, trial or other proceedings under the provisions of Cr.PC without proof of signature of the person by whom it purports to be signed.

Proviso to Section 294 Cr.PC as well as Section 58 of the Evidence Act however gives power to the Court to require a fact to be proved otherwise even though admitted. There might be feigned and collusive case or an admission might be fictitious or colourless. So the Court cannot be compelled to accept an admission and it may require any fact to be proved by evidence in the ordinary way as laid down in the proviso to Section 58 of the Evidence Act.

Procedure:

1. The party seeking to avail the benefit of Section 294 Cr.PC should file a list containing the particulars of every such document and shall call upon the other side to admit or deny the genuineness of each such document.

2. Admissions ought, in general, to be in writing.

3. Signed either by the parties or their advocates.

4. Admission should be clear and distinct and a party intending to rely upon such admissions should be careful not to leave any fact to be merely inferred from them, for if he does, he will not, on appeal be allowed to adduce evidence as to such fact.

When once the genuineness of the document is thus not disputed, no question of proof arises as Section 58 of the Evidence Act as well as Section 294(3) of the Cr.PC dispense with it.

Stage at which it is to be used

As a general practice, it is appropriate that the accused is called upon to admit or deny the documents filed by the prosecution as soon as the charge/notice is framed, as it will not cause any prejudice to the accused if he wants to put forward his arguments for discharge at the stage of charge. Moreover, it will save a lot of time of the court and court staff, if summons need not be issued to formal witnesses and their names are struck off from the list of witnesses there and then. Thirdly, it will save huge money of the state exchequer which has to be paid to formal witnesses like doctors, motor vehicle inspectors etc.

Key learning points.

1. The aim of Section 294 Cr.PC is speedy trial by cutting short the procedural formalities without compromising the principle of fair trial and right of fair hearing of the accused.

2. The trial courts can make good use of Section 294 for admission and denial of documents filed by prosecution or accused, at any stage of trial.

3. Section 294 Cr.PC is a beneficial provision and it should be used as a matter of regular practice to shorten the length of trial and to enhance the pace of justice.

4. Section 294 Cr.PC empowers the Court to call upon the prosecution or the accused to admit or deny the genuineness of the documents filed by the opposite side and to read them in evidence.

5. The object of Section 294 Cr.PC is to accelerate the pace of trial by avoiding the time being wasted in examining the signatory to the document filed by either of the parties to prove his signatures and correctness of its documents, if its genuineness is not disputed.

6. Proviso to Section 294 Cr.PC as well as 58 of the Evidence Act however gives power to the court to require a fact to be proved otherwise even though admitted. There might be a feigned and collusive case or an admission might be fictitious or colourless.

7. The admission/denial can take place even at pre-charge stage.

8. It is more appropriate that the accused is called upon to admit or deny the documents filed by the prosecution as soon as the charge/notice is framed, as it will not cause any prejudice to accused if he wants to put forward his arguments for discharge at the stage of charge.

9. Sub-section (3) of Section 294 Cr.PC covers postmortem report, daily diary entry, FIR, MLC etc. and every other document of which genuineness is not disputed. Once the requirements of Section 294 are fulfilled, there could be no difficulty in treating such document as substantive evidence in the case.

10. The documents being primary or secondary or substantive or corroborative, is not relevant for attracting Section 294 Cr.PC. Not disputing its genuineness is the only solitary test for dispensing with the formal proof of a document.

11. No document with all its probative value can be received in evidence unless its genuineness is first established by the mode of proof prescribed under the Evidence Act.

Some landmark judgments

(i) *Guman Singh* v. *State of Rajasthan* (1976 R.L.W. 507)*; L.K. Sharma* v.*State of Rajasthan (*1987(2) R.L.R. 558); *M.C.*

Agarwal v. *State of Rajasthan, (Rajasthan)* [1995(3) R.C.R. (Criminal) 222].

In this section the Legislature has not put any limitation as to at what stage, the provisions of Section 294 Cr.PC are to be followed. In Para 3 of Section 294 Cr.PC it has been clearly mentioned that the documents may be read in evidence in any enquiry, trial, other proceedings, under this Code. When the Legislature has provided in this section that once the document is admitted, it can be used in any proceedings besides the enquiry and trial, it is clear that when the document so admitted is to be used at the stage of enquiry or trial, then formalities of Section 294 Cr.PC have to be observed before initiation of any enquiry or trial. If the documents are admitted before framing of the charge, they become the evidence not only for the purpose of trial but with regard to the framing of the charge also.

(ii) *Saddiq and Ors.* v. *State* (1981 Cri.L.J.379)

If the signature and the correctness of the contents of a document filed by the prosecution or the accused under sub-section (1) of Section 294 Cr.PC, whose genuineness is not disputed by the opposite party are still required to be proved by examining the signatory of the document, the very object of enacting Section 294 Cr.PC will be defeated.

(iii) *Shaikh Farid Hussinsab* v. *The State of Maharashtra (1983 Cri LJ 487)*

A document becomes both relevant and authentic evidence of its contents without the proof of its authenticity by the author or anybody else by force of Section 294 on its conditions being complied with.

(iv) *K. Pratap Reddy* v. *State of A.P.* (1985 Cri LJ 1446).

Sections 293 and 294 Cr.PC are obviously intended to slim the proceedings by dispensing with elaborate and sometimes long

drawn procedure of examining the concerned person when the genuineness of document is not in dispute. The refrain from such procedure is not invariable and the court is empowered to examine, depending upon the circumstances and expediency. In the instant case, the report of the Deputy Controller of Explosives is taken as evidence as the Court did not consider it necessary to examine the expert in view of express consent of accused for reception of the report. Similarly postmortem report is admitted as evidence as no exception is taken for reception of the same. Section 294 Cr.PC empowers the court to admit the document as evidence in the situation embodied in Section 294 Cr.PC namely, when no objection is taken as to the admission of the document by either side and when it is not possible to examine the person connected with the document. Both these requirements have been satisfied as there was no objection for the admission of the document and further the doctor who conducted the postmortem was laid up in the hospital. The trial court is justified in admitting the report of the Deputy Controller of Explosives and postmortem report as evidence without insisting upon the evidence of expert or doctor.

(v) *Shabbir Mohammad* v. *State of Rajasthan* (Rajasthan) (FB) (1996 Cr.L.J. 2015).

If the genuineness of any document produced by the prosecution or the accused is admitted by the opposite party, when called upon to do so under sub-section (1) of Section 294 of the Code, in view of sub-section (3) of Section 294 of the Code, it can be read by the court as a substantive piece of evidence for deciding the issue pending before it with its probative value being the same as it would have had it had been proved by the party concerned on its genuineness having disputed by the opposite party when called upon to do so under sub-section (1) of Section 294 of the Code.

(vi) *Boraiah @ Shekar* v. *State* [2003(2) R.C.R.(Criminal) 160].

Section 294 Cr.PC dispenses with proof of every document when it becomes formal on its genuineness not being disputed. Sub-section (3) of Section 294 of Cr.PC covers postmortem reports and every other document of which genuineness is not disputed. Once the requirements of Section 294 are fulfilled, there could be no difficulty in treating such document as substantive evidence in the case. In fact after indication of no dispute as to the genuineness of a document, proof of document is reduced to a sheer empty formality. Even the PM report is also a document as any other document. Primary evidence of such a document is the report itself. There is nothing in Section 294 to justify exclusion of the PM report from the purview of documents covered thereby. The mode of proof of it also is liable to be waived as of any other document.

It does not only amount to the admission of the document being signed by the person by whom it purports to be signed but also implies the admission of the correctness of its contents. Such a document may be read in evidence under sub-section (3) of Section 294. Neither the signature nor the correctness of its contents need be proved by the prosecution or the accused by examining its signatory as it is admitted to be true or correct. The phrase 'read in evidence' means read as substantive evidence, which is the evidence adduced to prove a fact in issue as opposed to the evidence used to discredit a witness or to corroborate his testimony.

(vii) *Akhtar* v. *State of Uttranchal* [SC 2009(2) AICLR745].

If the accused had admitted the injury reports and postmortem reports under Section 294 Cr.PC. He cannot later contend that the said documents cannot be read into substantial evidence due to non-examination of doctors, and the said documents shall be read as valid and substantive evidence under Section 294 Cr.PC.

Format for applying Section 294 Cr.PC

Statement of accused.....s/o..... under Section 294 Cr.PC read with Section 313/281 Cr.PC.

w/o

I admit the genuineness of documents mentioned below and I have no objection if the author/signatories of these documents are exempted from formal examination and the said documents are read in evidence as per provisions of Section 294 Cr.PC:-

1) F.I.R.

2) M.L.C. No..... Of injured sh.....

3) postmortem report no. …. of deceased sh.....

4) motor vehicle inspection report of vehicle no.....

5) superdarinama in name of.....for vehicle no.....

6) dead body identification statement of sh.....

7) etc....

RO&AC MM/Saket, ND

Order

The documents, the genuineness of which has been voluntarily admitted by _____ vide his/her above statements, have been admitted in evidence and shall be hereafter referred as under:-

1)	F.I.R.	Ex. P-A
2)	M.L.C. No..... of injured sh.....	Ex. P-B
3)	postmortem report no. …. of deceased sh.....	Ex. P-C
4)	motor vehicle inspection report of vehicle no.....	Ex. P-D
5)	superdarinama in name of.....for vehicle no.....	Ex. P-E
6)	dead body identification statement of sh.....	Ex. P-F
7)	etc....	

Date MM/Saket, ND

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SAKET STUDY CIRCLE
STUDY NOTES-6
Session-V to VIII

SUBJECT : **INQUEST -AN INQUIRY INTO CAUSE OF DEATH-MAGISTERIAL AND FORENSIC PERSPECTIVE**

(Section 176 (1-A) of Code of Criminal Procedure, 1973)

In Chair : Sh. R.K. Gauba, District Judge (South).

Speakers of the day : (for first three sessions)
Sh. Vinay Kumar Khanna, Additional Sessions Judge
Sh. Sudhanshu Kaushik, Metropolitan Magistrate

Guest Speaker: (for fourth session)
Prof. Sudhir Gupta, Department of Forensic Science, AIIMS, New Delhi.

Rapporteurs : Sh. Sandeep Garg, Metropolitan Magistrate
Ms. Priya Mahendra, Metropolitan Magistrate (Mahila Court)
Ms. Shreya Arora, Civil Judge.

Vetted by : Sh. Dinesh Kumar Sharma, Special Judge (PC Act)

Introduction

The term '*Inquest*' derives its meaning from the term "*quasistus"* which means 'to seek'. In broad, inquest is an inquiry into the probable cause of custodial death, to find out whether a person died a natural death or a homicidal death or accidental death or due to

suicide. The Criminal Procedure Code (Cr.PC) envisages three types of inquest: Inquest by Police (Section 174); Inquest by an Executive Magistrate [Section 176(1)]; and, Inquest by a Judicial Magistrate [Section 174(1-A)].The provision of an inquest by a Judicial Magistrate was introduced by Amendment Act of 2005 which was notified w.e.f. 23.06.2006. It provides for an inquiry by a Judicial Magistrate, in whose local jurisdiction the offence has been committed, into the cause of death, disappearance of person, or rape in custody.

The ambit of Section 176(1-A) Cr.PC is to conduct an inquiry into custodial death, disappearance from custody or rape in custody. It includes the death of a mentally ill person undergoing treatment under the provisions of the Mental Health Act and a person who has been remanded to police custody by a court even if for a limited purpose of conducting a polygraph test, voice test, narco analysis, a person in judicial custody etc.

Inquest by a Judicial Magistrate aims to ensure that no person who is deprived of his liberty, being in custody, dies as a result of neglect or on account of act of commission or omission of the person(s) having his custody. Article 21 of the Constitution guarantees that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Even the convicts, under-trial prisoners, detenues or other such persons in custody cannot be denied this fundamental right. The legislative intent in entrusting to a Judicial Magistrate the responsibility of conducting inquest is to obviate the possibility of "cover up" wherein the police and executive agencies might be responsible for causing or triggering death. It is to lend greater impartiality and credibility to the inquiry into the cause of custodial death. In cases of custodial death and violence, the chances of availability of any independent direct evidence is generally scarce. The fate of such cases would depend entirely on the observations recorded and the findings given by a Magistrate in the inquest report. If inquest is not done thoroughly, there is every possibility that an important piece of evidence may be

lost and offender not brought to book. This would result in travesty of justice and, thus, serious violation of human rights in custody would go on with impunity.

Object of inquest

The object of inquest proceedings is to ascertain whether a person has died under unnatural circumstances or unnatural death and if so, what was the probable cause of his death. The scope of the inquest proceedings is confined only to this extent. It is settled by virtue of various judicial pronouncements that the details as to how the deceased was assaulted or who assaulted him are beyond the scope of inquest proceedings. A magistrate should bear in mind that the purpose of carrying out the inquest is not to ascertain as to who were the persons responsible for the death. It is confined to the limited aspects of ascertaining the cause of the death and the circumstances leading to the custodial death. Inquest proceedings under Section 176(1-A) Cr.PC is not a substitute for investigation or inquiry by police. This is in addition to the inquiry or investigation held by the police, particularly where the facts constitute an offence.

The provision has been incorporated to ensure that in case a person dies in (police) custody, a fair and impartial inquiry is carried out about the cause of death and no evidence in such regard is lost or tampered with.

Procedure to be followed:

The proceedings under Section 176 Cr.PC can be categorized as an inquiry within the meaning of the expression defined in Section 2 (g) Cr.PC and a judicial proceeding as defined in Section 2 (i) Cr.PC.

Section 176 Cr.PC is not exhaustive. Section 176(2) Cr.PC envisages that while conducting the inquest, the evidence shall be recorded by the Judicial Magistrate in the manner prescribed under the Code. Therefore, the mode and manner of recording evidence, as prescribed under Section 272 to 299 Cr.PC (Chapter XXIII) may be *mutatis mutandis* followed. Further, the Magistrate has been given

sufficient discretion to record the evidence keeping in view the circumstances of the case. The Metropolitan Magistrate may adopt the

scars, etc.

(v) Rectal temperature of the dead body:

'Rectal Temperature' at the first examination of the body is very material while conducting the inquest. For this, the aid of any doctor/medical staff or any other official of remand home/jail can be taken. A simple Rectal Thermometer can be inserted in the anus of the dead body. After waiting for 3 to 5 minutes, reading may be recorded. The temperature so recorded may be mentioned in the inquest report alongwith the time when it is recorded. It must be mentioned here that NHRC has recommended that the rectal temperature should be taken at the spot itself and the temperature should be mentioned in the inquest report and the time of its recording should also be mentioned. It might eventually help in determining the probable time of occurrence of death.

(vi) Dead body examination:

The dead body should be examined at a place where there is sufficient light, preferably in sun light, to see whether there are any scars or bruises which may indicate torture, beating etc. The brief description of the clothes, found on the dead body may be recorded. Thereafter, clothes may be got removed and a close examination of the dead body may be carried out. It includes examination of soles of the feet in case of suspicion of death being caused due to torture.

After the body inspection/examination, the following details should be noted;

(a) Any marks found and the part of body where found;
(b) The cavities such as those of nose, ear, mouth etc may be closely examined;
(c) Position and altitude of the body;
(d) Number, position, length, breadth and description of wounds. For this help of an expert can be obtained;
(e) Signs of ligature marks;

(f) Presence of blood (liquid or clotted), saliva, froth,

(iii) Recording statements of other cell inmates and relatives:

The statements of the other inmates, who were detained alongwith the deceased, may be recorded and a general inquiry may be carried out at the place where the deceased was detained. It should be ensured that the statements are recorded in an environment wherein the witnesses can depose freely. As a safeguard, the statements of the other cell inmates should not be recorded in the presence of Police officials or officials in-charge of remand homes.

(iv) Preservation of viscera and transmitting it to FSL:

In cases where the viscera have been preserved, it may be ensured that it is timely transmitted to the FSL so as to obviate the possibility of tampering. Timely forwarding of the viscera also ensures that the material which is forwarded for evaluation is not spoiled / putrified.

(3) ***Preparation of inquest report***

(i) A memorandum of the proceedings must be recorded on day to day basis and maintained, clearly indicating the time of commencement of inquest proceedings and the time of closure of inquest proceedings.

(ii) The final opinion on the post-mortem examination report is to be obtained.

(iii) The final viscera report is to be obtained.

(iv) After obtaining the final opinion on the post-mortem examination report, the evidence collected during the inquest should be evaluated and the final inquest report drawn. The judicial magistrate is required to give his findings about the probable cause of the death and the circumstances leading to death.

(v) The report may be forwarded to the CMM/ACMM who had assigned the inquest to the judicial magistrate. There should be

timely forwarding of the report to the CMM/ACMM and preferably the same should be sent on the same day when it is

(iv) *M. Yallapa* v. *State of Karnataka* (1993 LCIJ Kat 388).

- It is competent for a magistrate while holding an inquest to record the statement of an accused even if such a statement amounts to confession. It is not hit by Section 26 of the Evidence Act and if proved during the trial, it is admissible.

(v) *Munshi Prasad* v. *State of Bihar* (AIR 2001 SC 3031).

- In case of any discrepancy between the inquest report and post-mortem examination report, the post-mortem examination report shall prevail. Any discrepancy occurring between these reports cannot be termed as fatal. In case a particular injury has not been indicated in inquest report, it would not invalidate prosecution's case.

(vi) *Radha Mohan Singh* v. *State of UP* [(2006) 2 SCC 450].

- No argument on the basis of an alleged discrepancy, overwriting, omission or contradiction in the inquest report can be entertained unless the attention of the author thereof is drawn to the said fact and he is given an opportunity to explain when he is examined as a witness in court. Even where the attention of the author of the inquest is drawn to the alleged discrepancy, overwriting, omission or contradiction in the inquest report and the author in his deposition has also admitted that, by mistake, he omitted to mention the crime number in the inquest report, the court held that just because the author of the report had not been diligent it did not mean that reliable and clinching evidence adduced by the eye witnesses should be discarded by the court.

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Activities of Delhi Judicial Academy

*Santosh Snehi Mann**

Functional efficiency of an Institution depends on the performance capacity of its work force. Continuous Judicial Education is recognised as a method for capacity building of Judicial Officers. Following the words written in the logo of Delhi Judicial Academy – *Gyan, Darshan aur Charitra,* the Academy is in constant pursuit of excellence in judicial education for strengthening the justice delivery system in the Trial Courts of Delhi.

The year 2012 has been another eventful year of judicial education at the Academy and its my proud privilege to give an account of various activities and programmes conducted by the Delhi Judicial Academy in the year 2012.

I. Entry Level Programmes

a. Orientation Course for the Officers of DHJS on Promotion

The Delhi Judicial Academy conducted 08 Days Orientation Course from 19.11.2012 to 27.11.2012 for a Batch of 12 Judicial Officers of DHJS, promoted from DJS. The course included sessions on topics – Constitutional Vision of Justice, Judicial Aptitude & Conduct, Court Management & Case Management, ADR, Time Management, Stress Management, various aspects of General Administration and Substantive & Procedural Laws related to various jurisdictions (Labour Courts, MACT Courts, CBI Courts, NDPS Courts, HMA Courts, Electricity Courts, TADA/POTA/MCOCA Courts, Land Acquisition Cases Courts and Rent Control Tribunals). District Judges, Senior Judicial Officers of DHJS, Former Judicial Officers and Experts from various fields were called as Resource Persons.

* Director (Academics), Delhi Judicial Academy

b. Induction Training for the Newly recruited Officers of DJS

One year Induction Training of a batch of 36 newly recruited Officers of DJS concluded on 22.02.2012. Focus areas in the last two months of the training were – Court Management and Case Management besides Writing Skills. Extensive sessions on these topics were planned & conducted to enable the Judicial Officers to learn & acquire these Core-Judicial Skills. Simulation exercises, case study, role play and group discussions were used as various methods of training. The Officers had the benefit of guidance of Hon'ble Judges of the High Court of Delhi, District Judges and Senior Judicial Officers of DHJS.

During this period, 03 days course on *'Personality Development'* was conducted for the Judicial Officers from 13-15 February, 2012. The Module was developed with the assistance of an outside Expert, keeping in view the job profile of a Judicial Officer. Communication Skills, Etiquettes, Conflict Management, Leadership, Time Management, Stress Management and Supervisory Skills were the components of this special course.

Judicial Officers were taken on a week long Excursion-cum-Education Tour to Jaipur-Bharatpur-Agra from 06-11 February, 2012. This provided them the opportunity to learn important social skills of bonding, concern and adjustment as a Group Member.

II. Programmes for In-Service Judicial Officers

a. Refresher Courses for the Officers of Delhi Higher Judicial Service (DHJS) and Delhi Judicial Service (DJS)

Delhi Judicial Academy conducted 16 Refresher Courses, of 04 days duration each, which included a day long visit to the Cyber Lab, CBI Academy, Nehru Nagar, Ghaziabad.

141 Judicial Officers from DHJS & 198 Judicial Officers from DJS attended these courses, which were designed keeping in view specific jurisdictions i.e. Labour Courts, General Civil Courts, NDPS Courts, TADA/POTA/MCOCA Courts, JSCC-cum-ASCJs and Civil Judges (above 3 years in service) WAKF Tribunal, IPR, LAC, ACMMs, Mahila Courts, General MM Courts, Courts dealing with Prevention of Corruption Cases, Family Courts and HMA Courts, MACT Courts, Courts dealing with Homicide Cases, Offences against Persons, Trial of Sexual Offences, General Courts, SC/ST Court, SEBI Courts, Electricity Courts.

Focus areas in various sessions of the Refresher Courses included: **1.** Concept: Socio-legal issues, **2.** Appreciation of evidence, **3.** Core issues relevant to the Jurisdiction, **4.** Development of law and 5. Ethical conduct in courtroom.

Feed back of the participants about the format, contents, session plan and interactive methodology used in the Refresher Courses has been very encouraging.

b. An Orientation Course on *'Principles of Mediation, Importance of Role of Referral Judges and Case Management'* was conducted for the Officers of DHJS & DJS at Manesar (Gurgaon) from 13-15 July, 2012. This was the 4th Batch of Judicial Officers to attend this kind of the programme, the earlier three programmes were conducted in the previous years. With the participation of 96 Judicial Officers of DHJS & DJS in this programme, Delhi Judicial Academy became pioneer in conducting series of a programme, which was attended by almost the entire existing strength of the State District Judiciary. Presence of Hon'ble Judges from the Supreme Court of India and High Court of Delhi in various sessions of the programme gave opportunity to the participants to have interaction with the senior Judges. Ambience of the venue made the learning an enjoyable experience.

c. Following the mandate of High Court of Delhi in *Writ Petition (C) No. 8889/2011* titled *Court on its Own Motion* v. *Department of Women and Child Development,* the Delhi Judicial Academy designed and planned one day *Orientation Course for the Metropolitan Magistrates on 'Juvenile Justice',* in consultation with the Delhi Legal Services Authority. Total strength of Metropolitan Magistrates was divided into 04 batches and the programme was conducted on 21.04.2012, 19.05.2012, 21.07.2012 & 18.08.2012. Resource Persons from the Judiciary, statutory bodies, academics & voluntary organisations working in the area of Child Rights provided the desired blend knowledge, skill and sensitization about the subject.

d. Environment Awareness Retreats

04 Environment Awareness Retreats of the duration of 04 days each were organized in the state of Himachal Pradesh. Carefully selected destinations were: 1. Jim Corbett National Park/Nainital in the month of April, 2012, 2. Mussoorie/Dehradun in the month of May, 2012, 3. Shimla/Chail Wildlife Sanctuary in the month of September, 2012 and 4. Dalhausie/Khajiar/Kalatop Wildlife Sanctuary in the month of October, 2012. In total, 318 Officers of DHJS & DJS participated in these retreats and enjoyed the exposure of wildlife, nature & environment.

III. New Initiatives for strengthening Judicial Education and developing Programmes for In-service Judicial Officers

a. Orientation Course on 'Towards Equality'

Courts are expected to exhibit Constitutional Vision of Justice in their decisions. Judicial Education is a continuous process for capacity building of Judicial Officers to deliver quality, quantity and responsive justice.

Delhi Judicial Academy designed, developed and introduced this special programme for the Judicial Officers, providing them the platform to know, understand, discuss and get sensitized about the issues of discrimination in relation to women, poverty, disability, caste reservation, aspects of distributive justice and identification of biases in the Court system.

Duration of the programme was 2½ days, which was conducted twice, i.e. 18-20 October, 2012 and 01-03 November, 2012. Sessions were planned to generate awareness & discussion on various dimensions of discrimination prevailing in the society and hidden biases in the court system. In total 104 Judicial Officers of DHJS and DJS attended these programmes.

b. Colloquium for District Judges, Registrar General, Registrar (Vigilance) and others

Administration is an important and integral part of Court Management and Judicial Reforms, which are outcome objectives of Judicial Education.

Keeping in view the administrative responsibilities of the District Judges, Registrar General, Registrar (Vigilance), Principal Secretary (LJ & LA) and other administrative positions in the Court System, a Colloquium was designed for them in which sessions were planned to identify and discuss issues of administration, management, finance, human resource and judicial reforms.

1½ day Colloquium was organized on 11 & 12 February, 2012, which was followed by a Review Colloquium on 8 & 9 December, 2012.

Hon'ble Judges of the High Court of Delhi (Hon'ble Chairperson and Hon'ble Members of Judicial Education & Training Programme Committee) presided over various

sessions of the Colloquium in which issues were identified, Best Practices were shared and new initiatives were discussed by the participants to meet the challenges faced by the Justice Delivery System.

c. Judicial Colloquium on "Human Trafficking"

As part of a multi-pronged and multi-stakeholder strategy of Government of India in combating trafficking and related crimes, the Ministry of Home Affairs, Government of India had proposed to conduct a sensitization programme for the Judicial Officers in collaboration with the Delhi Judicial Academy. The proposal was accepted by the High Court of Delhi and the *Judicial Colloquium on "Human Trafficking"* was organized at Delhi Judicial Academy on 02.09.2012. This marked the beginning of partnership between the Delhi Judicial Academy and the Government of India in conducting Judicial Education Programmes.

57 Judicial Officers of DHJS & DJS participated in the programme. Wide range of topics on the subject discussed in various sessions included *Dimensions, Challenges and Response on Human Trafficking; Laws & Conventions relating to Human Trafficking/Sex Trafficking/Labour Exploitation and Juvenile Justice; Offences of Sex Trafficking and Exploitation of Children – Role & Approach of the Courts during Investigation & Trial and Role of Government & NGOs in Rescue, Care, Support, Protection, Prevention & Rehabilitation of Victim.* Hon'ble Judges of the High Court of Delhi, Senior Judicial Officers, Senior Government Officers, Advocates and Members of NGOs were speakers in various sessions.

d. Reflective Programme for the newly posted Officers of Delhi Judicial Service

As desired by Hon'ble the Patron-in-Chief and Hon'ble Chairperson, Judicial Education and Training Programme Committee, High Court of Delhi, the Delhi Judicial Academy

organized one day Reflective Programme for the newly posted Offices of DJS after one year Induction Training.

The Reflective Programme was organized by the Delhi Judicial Academy on 07.07.2012, which was attended by 34 newly posted Officers of DJS. Objective of the programme was to provide a platform and opportunity to the Officers to discuss day-to-day issues arising in the Court and to find solutions through best practices under the guidance of Hon'ble Judges of the High Court of Delhi and District Judges.

Core-components of the programme were Court Management, Docket & Case Management, Handling of Litigants, Witnesses, Media & Bar, Court Infrastructure & Staff and Judicial Conduct Ethics and Discipline.

The participant Judicial Officers found this programme very useful, helpful and relevant.

e. Visit to Lal Bahadur Shashtri National Academy of Administration (LBSNAA), Mussoorie

We understand that for growth of the Delhi Judicial Academy as an Institution, we must constantly work to explore new dimensions and facets of the Judicial Education. With this purpose, the Delhi Judicial Academy, with the approval of Judicial Education and Training Programme Committee, High Court of Delhi took the policy decision to visit and see the functioning of other training and educational institutions.

The team of Delhi Judicial Academy comprising Prof. (Dr.) M.P. Singh, Chairperson and myself visited Lal Bahadur Shashtri National Academy of Administration (LBSNAA) at Mussoorie on 14.09.2012, which is one of the oldest and renowned Institutions for training of Administrative Officers.

Interaction with Sh. Padamvir Singh, the Director of the Academy and his team was very useful. Discussion areas of our mutual interest were – Development of Curriculum of

Training Programmes, Methodology used for Training Programmes, Method of Evaluation and Assessment of Training Programmes, Personality Development, Research and Training Material.

It was a great opportunity to see the working of this Institution and to understand various aspects of Induction Training for the newly recruited Officers and Refresher Courses for In-Service Officers.

f. Research Wing

We at the Academy felt that an empirical study of the issues of Judicial Education and its impact is necessary for the improvement of Judicial Education & Training Programmes and consequential improvement in the Administration of Justice. Thus, a need to create a Research Wing with dedicated team of Researchers.

Our proposal to this effect to the Patron-in-Chief was appreciated and approved. With the approval of the High Court of Delhi, the matter has been taken up with the Government for creating of posts for the Research Wing in the Delhi Judicial Academy.

IV. Exchange Programmes

a. North Zone Regional Judicial Conference

The Delhi Judicial Academy organized *North Zone Regional Judicial Conference on 'Role of Courts in Protection of Human Rights'* in collaboration with the National Judicial Academy from 27-29 April, 2012. 84 Judicial Officers from the states of Delhi, Punjab, Haryana, Uttar Pradesh, Uttarakhand, Himachal Pradesh and Jammu & Kashmir attended this Conference. Participants were addressed by Hon'ble Judges of the Supreme Court of India, Hon'ble Judges from the High Court of Delhi, renowned Jurists and Academicians.

b. Foreign Delegation

A Delegation of 03 Officers from Bhutan National Legal Institute visited the Delhi Judicial Academy from 16-19 May, 2012. It is a newly established Institution in Bhutan, which also functions as Judicial Academy of Bhutan to provide training to Judicial Personnel in that country.

The Delegation attended some on-going training programmes at Delhi Judicial Academy to see and understand various aspects of conducting the training programmes.

c. Visits of Judicial Officers from other States

i. 06 Judicial Officers from the state of Maharashtra visited Delhi Judicial Academy from 06-11 February, 2012 to study the Best Practices of higher rates of productivity followed in the District Courts of Delhi.

ii. 08 Judicial Officers from the State of Gujarat visited Delhi Judicial Academy from 19-23 March, 2012 to study Best Practices and Methodology for Timely Justice followed by the District Courts in Delhi.

iii. 05 Judicial Officers from the State of Madhya Pradesh visited Delhi Judicial Academy from 17-22 December, 2012 to study the Best Practices of productivity and disposal followed in the District Courts of Delhi.

V. Judicial Education & Training programmes for Judicial Officers from other States

On the request of the Gauhati High Court, the Delhi Judicial Academy designed a two weeks Training Module on core-judicial skills for the Judicial Officers from North-Eastern States.

Training was organized and conducted by the Delhi Judicial Academy for the Judicial Officers from the North-

Eastern States in 05 Batches on 08-20 October, 2012; 30th October to 09th November, 2012; 19th November to 01st December, 2012; 03-15 December, 2012 and 28th January to 08th February, 2013. 65 Judicial Officers from Manipur, Mizoram & Meghalaya attended these programmes.

VI. Intensive Study Programme for Judicial Educators

Commonwealth Judicial Education Institute, which has its Head Office at Halifax, Canada, conducts Training Programmes for Judicial Educators from Commonwealth Countries.

Being the Director (Academics) & Additional Director (Academics), I and Ms. Aditi Choudhary had the privilege to be nominated by the High Court of Delhi to attend this course at Halifax, Toronto and Ottawa, Canada. It was an intensive programme of 03 weeks from 03-22 June, 2012, which was attended by 10 Judges from seven Commonwealth Countries. It was a great learning experience about international standards of Judicial Education and Training, the details of which are penned by Ms. Choudhary, in a separate note.

We at the Academy feel that *'excellence'* is an *'attitude'*, which emerges as a result of small acts performed well, consistently and overtime, as aptly stated by ***Aristotle*** in the quote:

"Excellence is an art won by training and habituation. We do not act rightly because we have virtue or excellence, but we rather have those because we have acted rightly. We are what we repeatedly do. Excellence, then, is not an act but a habit".

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Report on 'Environment Awareness Retreats' During The Year-2012

*Gurdeep Singh**

In thematic background of fostering inter generational equity, the Environment Awareness Retreats, were undertaken to make judicial officers understand the relationship of men with the environment, the extent to the threat to the very existence of human being and the efforts being undertaken at different level for conservation of bio-diversity to avert ecological imbalance and to simultaneously de-stress the judicial officers, in pollution free environment to enhance the efficiency.

In April, 2012, in retreat to Jim Corbett National Park/Nainital mixed group of DJS & DHJS of 67 judicial officers participated. Interactive session on Conservation of Wildlife and Bio-diversity was given in the wild environment of wildlife sanctuary under the project Tiger.

In May, 2012, a mixed group of 85 judicial officers participated in retreat to Mussoorie/Dehradun and visited to Eco Park, Dhanolti away from maddening crowd of Delhi and witnessed the flora fauna, species of birds and got awareness of bio-diversity conservation.

In September, 2012, retreat to Shimla/Chail Wildlife Sanctuary was taken in which a group of 83 judicial officers participated. In the serene, calm and quiet environment Mr. Ashok Arora, renowned advocate and social worker gave discourse on Personality Development & Communication Skills and emphasized to develop ones' into sensitive human being. The group also visited Satellite Conservatory of Cheer Pheasentry (endangered bird) at Blossom, Chail and developed love towards the *flora fauna*.

* Director (Admn.), Delhi Judicial Academy

In October, 2012 in retreat to Dalhousie/Khajjiar/ Kalatop Wildlife Sanctuary, a mixed group of 83 judicial officers participants, visited to Kalatop Wildlife Sanctuary where on the spot the presentation was given by the ground level work force of forest department regarding conservation, *flora fauna*. They also satisfied the curiosity of officers with their real life encounters with wildlife. Dr. Archana Sinha, one of the participants, gave presentation on stress management and shared her own experience with the fellow participants and gave tips how to conquer ones' own stress. The participants visited Khajjiar also known as Switzerland of India and also enjoyed speed boating in Chamera Lake.

Birds eye view of Environment Awareness Retreats of the Year-2012 is as under:-

Sl. No	Place	No. of officers participated	Duration/ Days	Session on/Resource Person
1	Jim Corbett National Park/ Nainital, Uttrakhand	DHJS – 29 DJS – 38 TOTAL – 67	12-15 April, 2012 (4 days)	· Session on "Conservation of Wildlife" and "Bio-Diversity"
2	Mussoorie/ Dehradun, Uttrakhand	DHJS – 25 DJS – 60 TOTAL – 85	10-13 May, 2012 (4 days)	· Interactive session · Visit to Eco Park (nature trail, bird watching and awareness reg, bio-diversity conservation), Dhanolti
3	Shimla/Chail Wildlife Sanctuary, Himachal Pardesh	DHJS – 31 DJS – 52 TOTAL – 83	6-9 Sept., 2012 (4 days)	· Session on "Personality Development and Comm. Skills" by Mr. Ashok Arora Advocate · Satellite Conservatory of Cheer Pheasantry (endangered) Visit at Blossom, Chail.
4	Dalhousie/Khajjiar/ Kalatop Wildlife Sanctuary, Himachal Pardesh	DHJS – 46 DJS – 37 TOTAL – 83	11-14 Oct., 2012 (4 days)	· Visit to Kalatop Wildlife Sanctuary where on the spot the presentation given by the Wildlife staff reg. conservation, *flora fauna*. · Presentation on stress management was given by one of the participants Dr. Archana Sinha, DHJS

Report on The 'intensive Study Programme For Judicial Educators' Organized By The Commonwealth Judicial Education Institute, Canada

*Aditi Choudhary**

The Commonwealth Judicial Education Institute (CJEI), is an independent official Commonwealth non-governmental organization established in 1998. Its office is located in the Dalhousie Law School, Halifax, Nova Scotia, Canada. The CJEI has been established to provide support and linkage amongst existing Commonwealth judicial education bodies. Its aim is to encourage the sharing of information, human and fiscal resources internationally and inter-regionally and maintain linkages with American judicial education bodies to share information and resources. It also aims inter alia at encouraging the establishment of new national and regional judicial education bodies in the Commonwealth; developing programmes and teaching tools for the use of all; delivering judicial education programmes at the invitation of the Chief Justice in partnership with national judicial education bodies; providing sustainable infrastructure for judicial education; conducting research to support judicial reform; and designing judicial education programmes to encourage and support judicial reform.

The CJEI is directed by a Governing Committee which consists of a President, Vice President, Chairperson and other members. Hon'ble Justice Madan B. Lokur, Judge Supreme Court of India, is presently the Vice President of CJEI. The other members are esteemed judges of various countries. Chief Justices of the Commonwealth countries are patrons of the Institute. The funding partners of the CJEI include the World Bank, Asian Development Bank, Ford Foundations etc.

* Additional Director (Academics), Delhi Judicial Academy.

The CJEI organizes various training programmes. One such programme is the 'Intensive Study Program for Judicial Educators'. This prograramme for the year 2012 was held from 3rd June to 22nd June, 2012 in Canada. Ms. Santosh Snehi Mann, Director (Academics), Delhi Judicial Academy and I were nominated by the High Court of Delhi for this training programme in our capacity as judicial educators. The other participants included, Hon'ble Mme. Justice Cynthia C.L.A. Valstein-Montnor, Chief Justice Hof van Justitie Suriname, Hon'ble Mr. Justice Ambeng Kandakasi, Judge Supreme Court of Papua New Guinea, Hon'ble Mr. Justice Winston Anderson, Caribbean Court of Justice, Her Honour Mrs. Victoria Harrigin, Industrial Court of Trinidad and Tobago, Hon'ble Mr. Justice Edward M. Muriithi, High Court of Kenya, The Hon'ble Mr. Justice Noor-ul-Haw N. Qureshi, Islamabad High Court, Ms. Samia Asad, Civil Judge, Class I/Magistrate and Ms. Eva Klaki Nyka, Deputy Registrar, High Court of Tanzania.

In order to best do the task of reporting on this training programme, I feel giving a gist of 'happenings' in sessions in seriatim, would give the proper picture of the objectives and content of this special study course.

The programme commenced on 3rd of June 2012 (Sunday) at 12.30 p.m. at the Centennial Room, Cambridge Suites Hotel, Halifax. The first session was chaired by Judge Sandra E. Oxner, Chairperson, CJEI, a former judge of the Provincial Court, Nova Scotia, Canada. The session began with our introductions and us identifying our personal objectives in attending the programme. This was followed by a one hour 'Session on Orientation' to enable us to be familiar with the logistics of the three weeks programme. Following which we had another one hour session on the programme objectives, overview of the course and assignments which we were required to submit during the three weeks programme. For the purposes of assessment, we were required to submit six assignments for assessment, which included assignments on: the Developments of Objectives and Standards for the Judiciary; Needs Assessment (identifying needs of

judicial officers as target groups); Programme on Small Group Topic; Session Programme; Three Day Orientation Programme; and Long Range plan. Training sessions were from 9 a.m. to 4.30 p.m.

On 4th June 2012, the first session was on 'Understanding the Objectives and Scope of Judicial Education' with Judge Sandra E. Oxner as the speaker. In this session we were made to understand the objectives, standards, functions, definitions, targets and levels of judicial education. The objectives of judicial education were identified as "Impartiality, Competency, Efficiency and Effectiveness." We were told of the importance of curricula development and faculty development for a well functioning judicial education body. We were also introduced to the interface between judicial education and judicial reform and the manner in which the former can influence the latter. Countries around the world are engaged in judicial reform as part of a wider effort to make state institutions more responsive to the needs of citizens as the quality of judges is crucial for a well functioning judiciary. A judiciary that attracts public confidence is essential to social and economic development. We learnt that there was a need to evaluate sessions of judicial education not only to determine learning achieved and cost effectiveness of the programme but also the degree of positive impact the session would have on increased public confidence in the judiciary, which is the ultimate aim of both judicial education and judicial reform. This session was followed by a 'Workshop on Developing National Objectives and Standards', in which we identified national objectives for judicial education in our respective countries. We came to learn that a well functioning judicial academy is one which analyzes the judiciary to identify areas which require strengthening through training (this includes topics to be studied and processes to be improved); engages in research both to identify and prepare programs that respond to the judiciary's and community's perception of judicial weaknesses as well as to evaluate their impact; it ensures its faculty are trained and skilled in interactive learning techniques congenial for adult learning; prepares teaching plans and tools; presents and evaluates its sessions and provides judges and support staff with information to improve the quality of justice.

Next was the session on 'Structure of Judicial Education Bodies – Legal Structures and Organizational Structures'. We learnt about the judicial education bodies of various countries and their structures. This made us aware of many ways in which judicial education bodies can be organized for effective functioning. This session was an eye opener on the extent of institutionalization of judicial education that has taken place across the globe in the past few decades. The post-lunch session was a workshop on 'Developing Organizational Structures', in which we structured 'our own' judicial education bodies at the national and state level. The above sessions were chaired by Judge Sandra E. Oxner and the Hon'ble Mr. Justice Adrian D. Saunders, Judge Caribbean Court of Justice.

The last session of 4th June, 2012 was on 'Judicial Ethics and the Appearance of Bias in the World of Social Media.' In this session Mr. James Eaglin, Director Research Division, Federal Judicial Centre, Washington D.C. addressed us on the new challenges to judicial ethics posed by the internet and use of social networking sites. He generated interaction and discussion on the appropriate responses and appropriate additions to the Bangalore Principles and Commentaries. We were cautioned about the misuse of information put by us or by persons known to us on social networking sites like facebook or twitter and informed that out of caution judges in USA are advised not to use skype. In the evening from 7 p.m to 8.30 p.m. we had a session on 'Using Videos in Judicial Education Programmes', in which Hon'ble Judge Michael Sherar made us understand the use of videos as a tool in judicial education. We were asked to form groups for video production and select topics for videos to be enacted and filmed by us participants, on topics relevant for judicial education, in order to be used as tools of judicial education.

On 5th June, 2012 the two pre-lunch sessions were on 'Providing Instruction for Adults'. The resource persons for the session were Ms. Taralee Hammond, Acting Director, School of Access and Ms. Susan Nelson, Manager, Curriculum Development of Nova Scotia Community College. This session taught us that adult learners

(target group of judicial education) are different and have special needs since they are self-directed, have already accumulated life experiences and knowledge, are practical and goal oriented. Thus the requirement to strategize for their learning differently. We were taught the importance of motivation in adult learning, the barriers in their learning, tips for being effective instructors and the various interactive teaching techniques and instructional styles which can be used for adult learning to make judicial education effective. It was interesting to study the learning pyramid which told us that the average retention rate for adults through lectures was 5%, reading was 10%, audio-visual was 20%, demonstration was 30%, group discussion was 50%, practice by doing was 75% while teaching others/immediate use of learning was 90%. The two post-lunch sessions were workshops by the same resource persons (who now acted as facilitators) on 'Development of Session Objectives'. We undertook the exercise of framing of objectives for training sessions and development of training session plans, which we did in groups. The role of objectives is to describe what trainees will be able to do when they have gained mastery. The session cautioned us about the pitfalls in framing objectives for training sessions. We were taught to frame objectives with the use of action verbs and simple, straightforward English.

The first session of the day on 6th June, 2012 was on 'Recent Developments in Electronic and other Teaching Tools'. The speaker was Mr. Phillips O'Hara, Assistant Director (Teaching), Academic Computing Services, Dalhousie University. He introduced us to user-friendly technologies for developing stand alone and instructor-led e-learning and to the process of selecting the appropriate e-learning delivery method(s) to achieve the intended learning objectives. The second session of the day was on the topic of 'Balancing National Security and Human Rights'. Hon'ble Mr. Justice Adrian D. Saunders, Judge, Caribbean Court of Justice, informed us about the fundamental elements of the doctrine of Rule of Law and told us about judicial techniques that would assist in achieving an acceptable balance between national security and human rights. At the end of the session, we designed programmes that illustrated the techniques learnt

Post lunch, there was a session on 'Teaching Tool Presentations' and the teaching tool demonstration was of a paper quiz with Judge Sandra Oxner explaining to us the use of this and other teaching tools like power point presentations, lecture method, hypothetical fact situations, overhead projector, audio tapes, role plays, flip charts etc. We participants were required to make presentations using one of the above mentioned teaching tools. This session was followed by a session where a 'motivational' movie was filmed, post which a discussion on the movie took place. We were taught about the importance of films as a mode of judicial education, how to select the appropriate film for a target group and how to frame questions to achieve the learning objective of the session.

On 7th June, 2012, in the first two sessions we were taught how to develop programmes on 'Impact of Judicial Decisions on the Environment'. In the sessions we were made to understand the core principles and assumptions of Environmental Law and the judicial challenge they presented. We learnt how to design judicial education programmes on the said topic. Post lunch Mr Phil O'Hara, Assistant Director (Teaching), Academic Computing Services, Dalhousie University taught us how to turn developed programmes of judicial education into e-programmes.

In the first session of 8thJune, 2012, Professor Bruce Archibald, Q. C., Faculty of Law, Dalhousie University, taught us the use of hypotheticals as an effective teaching technique. He conducted a workshop using hypotheticals as a vehicle for sentencing workshops. This was followed by a workshop on curricula development including needs assessment in which Judge Sandra Oxner was the speaker. She taught us the technique of curricula development and helped us understand national needs assessments as a basis for the development of National Judicial Education Curricula. This was followed by a discussion on 'Sessions of a Programme' which enabled us participants to identify the essential elements of designing a programme session. In the next session we analysed the orientation programme to enable us to design our own national orientation programme. This was followed

by a workshop on 'Developing an Orientation Programme'. In which we developed model orientation programmes in groups.

On 9th June, 2012, which was a Saturday, from 9 a.m. to 2 p.m. we had our practical session on 'Use of Videos as Teaching Tools' in which we participants formed groups to enact and film our judicial education videos. We did enactments of court scenes in the Provincial Court of Halifax. The video enacted and filmed by both of us participants from India along with the participant judges from Pakistan (clubbed together because of similarity in our social and legal systems) addressed the issue of 'judicial bias', portraying how bias can distort a judge's perception and in turn lead to injustice.

The next day Dr. James C. Raymond from the International Institute for Legal Writing and Reasoning, New York, USA, in his session 'Problems and Solutions in Legal Writing Styles - Several Patterns for Organizing Judgements' explained what constituted the essentials of a good judgment and introduced us to the many patterns of organizing judgments. He scrutinized the judgments sent by us in advance to him and told us about the manner in which we could improve on them. His sessions taught us how to conduct workshops on judgment writing. He also helped us to sample schedules for conducting workshops on judgment writing.

On 12th June, 2012 the CJEI faculty helped us to identify strategies and tools to be used in developing long range plans for judicial education and to develop a national long range plan of judicial education. Post lunch Professor A. Wayne Mackay, Faculty of Law, Dalhousie University explained to us the concept of judicial impartiality and the distinction between judicial independence and judicial impartiality. He taught us how to explore the subjective and objective components of impartial judging, distinguish between an open mind and a blank or neutral one and evaluate the importance of diversity in achieving impartial judgments. He enlisted and explained the many threats to judicial independence and impartiality in various societies and articulated the importance of judicial independence and impartiality in the dispensing of justice.

Our first session on 13th June, 2012 was on 'Judicial Ethics' wherein we learnt how to identify the appropriate responses to hypothetical fact situations posing issues of judicial ethics. In the second session on 'Judicial Performance Feedback' Mr. John Merric, Q.C told us about the importance and manner of designing proper feedbacks for judicial performance evaluations. Appropriate judicial performance evaluations give the judiciary an opportunity for professional self-improvement. They also provide an accepted method of communication between the court users and the judge. He discussed a mechanism of feedback implemented as a pilot project in Nova Scotia. Post lunch Professor Emeritus John A. Yogis, Q.C taught us how to use popular films as an effective teaching tool for judicial education. He showed us excerpts of films which can be used as tools for judicial education on various themes and topics. The session taught us how films can be used as an effective vehicle for raising legal, moral and ethical issues which confront judges and the manner in which they can teach judges something about themselves which will enable them to explore their own feelings and opinions.

In the first two sessions of 14th June, 2012, we had presentations, discussion and evaluation of session programmes designed by us. Post lunch Professor Richard Devlin and Professor Sheila Wildeman, Faculty of Law, Dalhousie University, made us do a speech enactment of the 'Merchant of Venice' written by Shakesphere, in order to understand the use of great literature in judicial education programming. This was also to enable us to understand that judicial education programmes need to provide intellectual stimulation, and that "entertainment" sparks interest in controversial issues from a safe distance.

On 15th June, 2012, the first session was on the importance and use of video conferencing in judicial education. This was followed by a presentation by us participants of the orientation programmes and long range plans designed by us and evaluation of the same.

We left for Ottawa on 17th June, 2012. On 18th June, 2012, we visited the Supreme Court of Canada, where we interacted with

Hon'ble Mr. Justice Marshall Rothstein, one of the nine judges of the Supreme Court of Canada. He told us that about the nature of cases heard by the Supreme Court which was a general court of appeal. The Supreme Court reviews cases from the provincial and territorial appellate courts and the Federal Court of Appeal in civil, criminal, constitutional and administrative law matters. The minimum number of judges required to hear an appeal is five. However, most cases are heard by a panel of seven or nine judges. Each year it received about 600 applications for leave to appeal but it hears only approximately 80 appeals. To give easy access to justice, litigants can present oral arguments from remote locations through video conferencing. Leave to appeal is granted only if there is a question of public importance involved or if there is an important issue of law. After our interaction with the Hon'ble judge we were taken for a tour of the Supreme Court building. The building housing the Supreme Court is a heritage designation built in 1941 near the Ottawa river. It has an imposing structure. Post lunch we visited the National Judicial Institute, Canada where Mr. Brettel Dawson, Academic Director and Stephane Emard-Chabot, informed us about the Canadian approach to judicial education and the challenges facing judicial education in Canada.

The next day we visited the Superior Court of Justice where Master Calum Macleod and Master Pierre Roger informed us about the mandatory mediation process in certain category of cases, recently introduced by the Ottawa Court. This was followed by a tour of the Parliament. Post lunch we visited the Office of the Commissioner for Federal Judicial Affairs, Mr William Brooks. The Commissioner, introduced us to the key concepts in the Canadian Judicial appointment process and made us understand the Canadian model for buffering improper political influence from judicial affairs. This was followed by a visit to the Canadian Judicial Council where we learnt about the functioning of the Canadian Judicial Council including the Canadian Federal Discipline Process.

Our next destination was Toronto where we arrived on 20thJune, 2012. The next day we visited the Courts located in the Old

City Hall which included the Drug Treatment Court, Mental Health Court and Aboriginal Persons Court. We met Hon'ble Justice Faith Finnestad, Regional Senior Judge, Hon'ble Justice Kathleen J. Caldwell, Local Administrative Judge, Hon'ble Justice Mary L. Hogan, Drug Treatment Court, Hon'ble Justice Richard D. Schneider, Mental Health Court and Hon'ble Justice S. Rebecca Shamai, Gladue Court. We were introduced to the remedial therapeutic approach of the above noted Courts and the advantages/disadvantages of the specialized approach. We thereafter visited the Ontario Court of Justice (Provincial Division) where Hon'ble Chief Justice Annemarie Bonkalo, introduced us to the working of the Ontario court of Justice and the reasons for the strength of the first level court which she told as being - quality of judicial appointees; wide criminal jurisdiction; opportunity to work with creative projects to improve the judicial service; salary and benefits approximate to those of the High Court; judicial control of budget and impartial, accessible, transparent and fair discipline process.

On our last day i.e 22nd June, 2012 we visited the Ontario Justice Education Network where Hon'ble Madam Justice Frances Kiteley and Sarah McCoubrey, Executive Director, Ontario Justice Education Network introduced us to the working of the Ontario Justice Education Network. The course ended with a farewell lunch organized by the CJEI faculty.

The course was indeed informative and taught us a lot. It equipped us to be better judicial educators. We became aware of the new trends in judicial education emerging the world over. The course taught us the new tools and techniques of judicial education and helped us sharpen our understanding and skills for conceptualizing, planning and executing better training programmes of various kinds for imparting effective judicial education. The manner in which we participants from different parts of the world, together benefited from this course made one realize that though we may belong to nations having institutions differing in nomenclature for justice dispensation and judicial education, yet the basic principles on which the edifice of

the discipline of judicial education is built (and still developing) are the same across the globe.

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