Delhi Judicial Academy

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Hon'ble Mr. Justice G.S. Singhvi, Judge, Supreme Court of India delivering the key -note address at the Discourse on 'Judicial Ethics and Discipline' held on 24.04.2011.

DELHI JUDICIAL ACADEMY

KARKARDOOMA COURTS COMPLEX, DELHI

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EDITORIAL

We present our second issue of the year 2011. As aspired, it is continued in its renewed form, fulfilling the commitment of publication on a half yearly basis.

In this issue, Hon'ble Mr. Justice G.S Singhvi, Judge, Supreme Court of India, in his article "Judicial Ethics" explains the importance of judicial ethics as being the basic principle of the right action of Judges. He emphasizes that since public confidence is the source of a Judge's power, the following of ethics is a *sine qua non* for every Judge and how the continuing education in judicial ethics will benefit Judges, the legal system and litigants.

Hon'ble Mr. Justice J.R Midha, Judge, High Court of Delhi in his article "Scope of Sections 165 and 167 of Indian Evidence Act, 1872" brings out the importance of the use of the said sections in the adjudication process and explains situations where they can be appropriately applied.

The 'two view' principle which has evolved out of judicial interpretation in precedents in Criminal Law is that, if the evidence on record in a criminal case throws up the possibility of 'two views', one favouring the accused and the other favouring the prosecution, the view which favours the accused should be accepted by the Courts when deciding the case. In his article "Principle of 'Two Views': Application in Criminal Law", Mr. S.K Sarvaria, District Judge & Addl Sessions Judge I/C North West & Outer District Rohini, explains how this principle is working in our criminal justice system and its implications.

Mr. Ashwini Sarpal, Addl. District & Sessions Judge, has analyzed the functioning of Lok Adalats and their effectiveness as

an Alternative Dispute Redressal mechanism in his article "Concepts of Lok Adalat". He argues that the Lok Adalats are beneficial not only to the judicial system but also to the litigants, however, the mutual consent and wishes of both parties should be given paramount importance while passing awards and the emphasis should not be on disposal but on amicable settlement.

The development of the principle of negligence qua medical practice in Tort Law and the manner in which it influences medical practice is analyzed by Ms. Shailender Kaur, Addl District & Sessions Judge in her article "Does Litigation Influence Medical Practice? An Insight into the Consumer Protection Act, 1986". She expresses her belief that the law as laid down by the superior Courts under the Consumer Protection Act, 1986 would help in rejuvenating the faith of the medical fraternity that 'defensive' practice is not the answer to securing legal rights of the public.

In his article "Communication Skills of a Judge", Mr. M.R. Sethi, Addl. District & Sessions Judge, brings out the importance of development of proper communication skills for a Judge both on and of the bench. He explains the importance of active listening by Judges and the advantage of good communication through one's judgments and orders.

In the Refresher Courses held for DHJS and DJS officers, in order to encourage and sharpen research skills so also to encourage participation, the participants are divided into groups for making presentations. One such presentation made by a group comprising of Mr. Vidya Prakash, Mr. Manish Gupta, Mr. Sunil Gupta, Mr. Vikram and Mr. Dhirender Rana, all officers of the DJS on "Forensic Evidence Admissibility and Relevance of Forensic Experts Evidence", has been made part of the Journal because of its informative content. The paper delves into the admissibility and relevance of expert evidence of handwriting experts, invasive techniques of Narco-Analysis, Brain Mapping,

Lie Detector Test and DNA.

The determination of age is of immense importance in criminal cases for deciding questions of jurisdiction and applicability of the Juvenile Justice (Care and Protection of Children) Act, 2000. The case law on the topic is voluminous. Ms. Anuradha, Principal Magistrate JJB, in her article "Age Determination Under the Juvenile Justice (Care and Protection of Children) Act, 2000" has culled out the principles of age determination laid down by precedents and explained their application.

That alternative sentencing is the need of the hour to enable individualized treatment of convicts, prevent overcrowding of prisons besides other benefits, is what is argued by Mr. Pankaj Sharma, Metropolitan Magistrate in his article, " Need for "Alternative Sentencing" In India". He enlists the various forms of alternative sentencing and espouses the benefits of the same.

In the beginning of 2011, a conscious decision was made to open the Journal for contributions from academicians, law students, other State Judicial Academies and international forums like the International Organisation of Judicial Training and the Commonwealth Judicial Education Institute. Contribution to this edition has been made by law students. In his article "Mai Anna Hun?", Mr. Vinam Gupta, a 5th Year student of USLLS, GGSIPU, Delhi explains and analyzes the difference between the Lokpal Bill, 2011 and the Jan Lokpal Bill proposed by Anna Hazare.

Post 2005, several producers came together to set up 'producer companies' and it was realized that this institutional innovation could remove the problems of the role of the government and political functionaries by allowing producers to manage their own affairs with greater freedom. Mr. Anish Chawla, a 2nd year student of Campus Law Centre, Delhi

University, in his article "Producer Company – An Alliance of Cooperative Spirit and Corporate Efficiency" analyzes the genesis and salient features of the concept of 'producer company', under Part IX A of the Companies Act, 1956. He goes further to critically evaluate their working and proposes amendments in the law.

The topics covered by the articles are varied and make engrossing reading besides updating one's knowledge on latest legal trends.

This issue would not have been in the hands of our esteemed readers but for the prompt contributions made by the learned authors of the articles of this issue and I therefore express my gratitude on behalf of the Delhi Judicial Academy to the authors. I take this opportunity to invite our readers to give their valuable suggestions for the improvement of our Journal besides making contributions for our forthcoming issue.

ADITI CHOUDHARY

Inauguration of DJA-CJEI E-Course on Judicial Ethics and Conduct held on 21.02.2011.

Induction Trainee Officers of DJS – 2011 after taking oath, along with (from L to R) Mr. Anil Chawla (DHJS), Mr. S.C. Malik (DHJS), Mr. C.K. Chaturvedi (District Judge, North) Mr. Rakesh Kapoor (District & Sessions Judge, Delhi), Mr. S.K. Sarvaria (District Judge, North West) and Mr. R.B. Singh (DHJS) at the Tis Hazari Court Complex.

Prof.(Dr.) Ved Kumari, then Chairperson, DJA with Ms. Anu Malhotra, Director and Mr. Alok Agarwal, Additional Director with the Malaysian Delegation at DJA (11.02. 2011).

Hon'ble Mr. Justice A.K. Sikri, presently Acting Chief Justice of the High Court of Delhi with Mr. P.S. Teji, Ld. District Judge & Addl. Sessions Judge I/C East District and Faculty Members of DJA with Judicial Officers of North-Eastern States during a Training Programme at the DJA on 26.02.2011.

Officers of DHJS and DJS on a Three Days Personality Development and Stress Management Retreat (11th to 13th February 2011) going for a Safari into the forests of Sariska Wildlife Reserve.

Prof. (Dr.) Ved Kumari, then Chairperson, DJA along with Mr. Pulatsya Parmachala, then Joint Director, DJA with Trainee Officers of DJS and Staff Members of the DJA during a picnic at the Garden of Five Senses, New Delhi on 7th April 2011.

Hon'ble Mr. Justice J.S. Verma, Former Chief Justice of India in the Session on Constitutional Vision of Justice (25.05.2011) during a Refresher Course for DHJS officers.

Officers of DHJS and DJS participating in a Team Building Workshop at the Three Days Personality Development and Stress Management Retreat (11th to 13th February 2011) at Sariska.

Officers of DHJS and DJS participating in a course on Pranik Healing during a Three Days Retreat from 8th to 10th April 2011 at Jim Corbett National Park.

Role Play by Faculty Members of DJA in the Induction Training - 2011 for DJS officers.

Valedictory Function of DJA-CJEI E-Course on Judicial Ethics and Conduct held on 28th April 2011. On the dais (L to R) Hon'ble Ms. Justice Indermeet Kaur, Hon'ble Mr. Justice Vipin Sanghi, Judges, High Court of Delhi, Hon'ble Mr. Justice A.K. Sikri, presently Acting Chief Justice of High Court of Delhi, Hon'ble Mr. Justice Manmohan, Judge, High Court of Delhi and Prof. (Dr.) Ved Kumari, then Chairperson DJA.

Officers of DHJS and DJS on a Three Days Personality Development and Stress Management Retreat (8th to 10th April 2011), going on a Safari in the Jim Corbett National Park

JUDICIAL ETHICS

Justice G.S. Singhvi*

The Constitution of India has defined and declared the common goal for all of us as—"to secure to all the citizens of India, justice, social, economic and political: liberty; equality and fraternity". Accordingly, the judiciary cannot be oblivious of its tremendous responsibilities and continue to play traditional roles when the demand of the time and the need of the hour is to don new robes.

We are all bound to uphold the constitutional values and principles of democracy. But before proceeding further it is imperative that one understands the term 'justice'.

In a democratic society the concept of justice is not confined to the judiciary alone. If people lose faith in the justice dispensed to them, the entire democratic set-up may crumble down. It is the trust and confidence of the people in the responsiveness and ability of every organ of the State to deliver true, fearless and impartial justice which is the foundation of democracy and the bedrock of even civilized society.

It is interesting to note that the expression "justice" has been used in our Constitution only in the Preamble and Article 142. However, nowhere in the Constitution is the term defined. Justice Krishna Iyer in an address to the 18"' Annual Conference of the American Judges Association identified "justice" with 'truth'. So, in his understanding, the quest for justice is the quest for truth, and by analogy, justice is denied when truth is checked by a Judge's "pet social philosophy" that blocks his mutation.

Constitution is a supreme law governing conduct of

*Judge, Supreme Court of India.

government and semi- governmental institutions and their affairs. It is not an ordinary statute enacted on a particular topic of legislation. It contains habits and aspirations of people of that generation, but it is drafted in a way to realize those objectives for future generations. The immortal words of Justice Holmes — "Spirit of law has never been logic but it has been experience" apply with greater force to Constitutional Law. We have, therefore, to interpret the Constitution with regard to the framers intentions, but more with the aid of our own experiences on current issues.

> '*It is not easy to analyse the outstanding qualities which are essential to the making of an eminent judge's abiding faith in honesty, truth and righteousness and a burning indignation for untruth, deceit and devious ways appear to me to be the very foundation of a mind capable of dispensing justice. A proper perspective of the rules of law and true appreciation of the complex motives which govern human conduct can be achieved only by a person possessing such a moral texture.*' **-M.C. Setalvad**

Judicial ethics is an expression which defies definition. In the literature, wherever there is a reference to judicial ethics, mostly it is not defined but attempted to be conceptualized. According to Mr. Justice Thomas of the Supreme Court of Queensland, there are two issues that must be addressed : (i) the identification of standard to which members of the judiciary must be held; and (ii) a mechanism, formal or informal, to ensure that these standards are adhered to.

Simply put, it can be said that judicial ethics are the basic principles of right action of the Judges. It consists of or relates to moral action, conduct, motive or character of Judges: what is right or befitting for them. It can also be said that judicial ethics consist of such values as belong to the realm of judiciary without regard to the time or place and are referable to justice dispensation. Since the judiciary has been entrusted with the task of upholding the Constitution and guarding its values, the role of the Judge as the

defender of justice becomes important. All the Judges owe their allegiance to the Constitution of India which proclaims in the preamble the cherished goals of this fundamental document namely to usher in a Socialist Democratic Republic.

In all democratic constitutions, or even those societies which are not necessarily democratic or not governed by any Constitution, the need for competent, independent and impartial judiciary as an institution has been recognized and accepted. It will not be an exaggeration to say that in modern times the availability of such judiciary is synonymous with the existence of civilization in society. There are constitutional rights, statutory rights, human rights and natural rights, which need to be protected and implemented. Such protection and implementation depends on the proper administration of justice, which in its turn depends on the existence and availability of an independent judiciary. Courts of law are essential to act and assume their role as guardians of the Rule of Law and a means of assuring good governance. Though it can be said that the source of judicial power is the law but in reality, the effective exercise of judicial power originates from two sources. Externally, the source is the public acceptance of the authority of the judiciary. Internally and more importantly, the source is the integrity of the judiciary. The very existence of the justice- delivery system depends on the Judges who, for the time being, constitute the system. The Judges have to honour the judicial office, which they hold as a public trust. Their every action and their every word - spoken or written - must show and reflect correctly that they hold the office as a public trust and they are determined to strive continuously to enhance and maintain the people's confidence in the judicial system.

In this context an aspect that needs to be kept in mind while dispensing justice is judicial ethics. Judges are very much a part of the community. Every time they find a fact they act as a jury. They must apply the law, not personal preference. People with judicial

power are human beings with individual values and mental processes which have a bearing on judgments. Many of these are rightly private. But the public is surely entitled to know the standards that Judges recognize as necessary in relation to their own behavior both in and out of court, as these directly reflect upon the processes and the value of system we have.

It is beyond argument that litigants in particular and the community in general are entitled to know the standards of conduct that Judges expect of themselves. Therefore judicial ethics or rather canons of judicial ethics are important. Canons are the type or the rules perfected by the principles put to practice. 'Canons' are principles put into practice so as to be recognized as rules of conduct commanding acceptability akin to religion or firm faith, the departure wherefrom would be not a pardonable mistake but an unpardonable sin. Hence it is canons and not principles of judicial ethics. The book 'Lives of the Chief Justices of England' (published, in 1858), reproduced eighteen qualities of a Judge written in his own handwriting by Lord Hale which he had laid down for his own conduct as a Judge. In India also, time and again canons of judicial ethics have been attempted to be codified. Several documents of authority and authenticity are available as drafted or crafted by several fora at the national and international level. The fact remains that such a code is difficult to be framed and certainly cannot be consigned to a straitjacket.

a) Restatement of Values of Judicial Life adopted by the Chief Justices' Conference of India

It is a complete code of the canons of judicial ethics setting sixteen principles, they are only the "Restatement of the Values of Judicial Life" and are not meant to be exhaustive but illustrative of what is expected of a Judge. The above "restatement" was ratified and adopted by Indian Judiciary in the Chief Justices' Conference 1999. All the High Courts in the country have also adopted the same in their respective Full Court Meetings.

b) The Bangalore Principles of Judicial Conduct, 2002

It crystallizes the following principles: - (i) independence (ii) impartiality (iii) integrity (iv) propriety (v) equality and (vi) competence and diligence. The Preamble to the Bangalore Principles of Judicial Conduct 2002 states *inter alia* that the principles are intended to establish standards for ethical conduct of Judges. They are designed to provide guidance to Judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary.

c) The Oath of a Judge as contained in the Third Schedule of the Constitution of India

The Constitution of India obligates the Indian Judiciary to reach the goal of securing to all its citizens - Justice, Liberty, Equality and Fraternity. How this goal is to be achieved is beautifully summed up in the form of oath or affirmation to be made by the Judges of the Supreme Court and High Courts while entering upon the office. Every word and expression employed in the oath of a Judge is potent with a message. The message has to be demystified by reading between the lines and looking beyond what meets the eyes.

NEED FOR CONTINUING JUDICIAL EDUCATION

Continuing education in judicial ethics for all Judges is justified by the nature of the subject and its importance to each judge. Ethics cannot be separated from the art of judging. It is its very soul. No one respects the unethical, and respect is the lifeblood of the Judge qua Judge. Abject servility to the person of the Judge is an anathema, but respect for the judicial office and for the Judge as Judge is critical to the operation of our legal system.

Public confidence in the judiciary is the source of a Judge's power. Public confidence in turn rests on respect. But respect does

not come with the territory, or with the titles "Judge" or "Your Honor" or with the robe, or with the bench. Those are but symbols—important symbols—but symbols only. They are loaned to the Judge while he or she holds the office they symbolize. They are not substitutes. Respect cannot be merely donned, or ordered, or bought, or assumed. Nor can respect for long be simply granted. Respect must be, and can only be earned and only the ethical can earn respect. One could point to many examples to show that we are living in an era of confused values, what some have called an ethical crisis. New situations arise in all areas of society that require constant re-examination of ethical constraints. The judiciary is not immune to this process. Judges need to continually discuss and evaluate their role and conduct. Many aspects of the old "Justice of the Peace" system that flourished not so long ago in the United States, when justices of peace were paid by a percentage of the fines they imposed, are now looked upon as manifestly unethical. Self-examination is a never-ending process.

Ethics viewed as a matter of conscience, or as Albert Schweitzer's concern for others, can be taught. Judges can be taught to recognize the ethical content of contemplated conduct and subtle, obscured conflicts of interest. Judges must continuously examine the ethics-intensive situations that confront them and the competing considerations involved in meeting and handling those situations. This examination will help Judges more easily evaluate their role and conduct, whether or not objections are raised by litigants or members of the press or general public. There are ways to earn respect. There are also ways, most often inadvertent, to lose or diminish respect. Judges who constantly reexamine their ethical alarm system will be ahead of the game. Continuing education in judicial ethics will benefit all Judges, and in the end will benefit the public and the legal system itself.

The second justification for continuing ethical education is its effect on the judiciary as an institution. The concern is institutional and not just individual. It is not enough, in the public eye, that there be a high standard of ethics exhibited by most judges in the judiciary—there must be an excellence of ethics exhibited by all Judges.

No institution, judicial or otherwise, has ethics only people have ethics. People who are judges cannot take refuge in the knowledge that they do nothing wrong. They are part of an institution. When one judge does wrong, this reflects on the institution and ultimately on the public's perception of the integrity of each individual Judge.

The public does not see, or see very much of, what a Judge qua Judge does every day. Even the work of trial Judges, who are on the front lines, is seen by fewer than all the people, and they see only the in-court work of the Judge. Even then, busy Judges may tend to forget that the judicial process is mysterious, secretive, confusing, and illogical to the litigants it exists to serve. Judges today are just too pressed to enjoy the gift described by Bums - "to see ourselves as others see us." On the other hand, the people do see Judges' every apparent or real ethical infraction, and if they do not, the media will show it to them.

Compliance with a high standard of judicial ethics is the primary element in the pursuit of a judiciary seen by the public as worthy of its confidence. To meet that standard, every Judge must always remember that ethics and the appearance of ethics, like justice and the appearance of justice, are inseparable. The requirement is for a constant, pervading realization that each Judge must not only be ethical, but must appear to be ethical, not only on the bench, but off, not only as a Judge, but as a person. For it is not the Judges' perception that counts, nor the Judges' confidence in their own ethical rectitude, nor even the Judges' own sense of logic. In building and maintaining the image of the

judiciary, it is the reasonable perception of the people that counts—and that is all that counts. Judges "must expect to be the subject of constant public scrutiny." Constant re-examination of judicial ethics will help ensure over time the ability of the judiciary not only to survive but to welcome happily that public scrutiny. Indeed, a judiciary armoured with a strong reputation for ethical conduct can withstand attacks from any quarter.

It would be nice if the media were to tell the public frequently of the high level of ethics maintained daily by the vast majority of Judges. That is not going to happen. Nonetheless, by maintaining a high level of judicial ethics and by constantly working to raise it even higher, the judiciary as an institution and judges individually will benefit.

A third justification lies in the need for further development of the subject matter.

There is much room for research and development in the field of judicial ethics. Judicial ethics cannot be viewed as a mechanical or mathematical set of plain and easily applied rules. Judicial ethics is too "human" a subject to permit reliance on a supposedly all-encompassing set of "rules" learnable by rote. In the vast array of actions a judge might take, there are too many nuances, too many variables, and too many factual combinations to warrant the view that the Code of Conduct for Judges supplies a complete "handle" on all that is encompassed by the phrase "judicial ethics."

Ethical principles, like all true principles, may themselves be immutable and unchallengeable. It is in their application to specific conduct that discomforting issues are presented and training is needed. The need for value trade-offs, many unforeseen when codes and rules are adopted, arises when the Judge must match an ethical principle with contemplated conduct. The need to re-examine these situations is on-going and a structured continuing education program on judicial ethics

would be helpful.

The practical questions raised by experienced Judges in a continuing education program will be helpful in refining the nuances implicit in any system of judicial ethics. The subject is not purely academic. The practical problems that Judges encounter change over time. It is crucial that new Judges be exposed to the ethical problems that they will, in all likelihood, encounter on and off the bench. It is also crucial that there be a forum where experienced Judges can get together on a regular basis to discuss new ethical developments and problems.

Their shared experiences will provide a solid basis for refining and embellishing present standards and for setting an agenda on ethics in the future.

MATTERS OF CONCERN

There are concerns that must be continuously addressed in a seminar on judicial ethics. They are:

A. Independence vs. Accountability

How does one reconcile the need for Judges to be independent in their decision making with the need for accountability? Judges are not truly independent if they are not ethical. Yet an ethical norm needs to be enforced. How can the public hold a Judge accountable for his or her conduct while assuring the Judge the essential freedom to render independent decisions?

B. Isolation vs. Involvement

Judicial ethics, is towards more and more isolation of the judge and the Judge's family from community affairs. Paradoxically, Judges are being asked to decide more and more questions that involve the management of society. How does a Judge keep a finger on the pulse of society without becoming such an active participant that his or her integrity is compromised?

C. Presumptions — Impartiality vs. Partiality

There is today no public presumption that Judges can be impartial. But how far can this be pushed and does it affect the Judge's self-image? We may not want to put Judges on a pedestal, but we want to ensure that they are accorded the proper measure of respect necessary for them to function effectively.

D. Appearance vs. Reality

Appearances are as important as reality when it comes to judicial ethics. Nonetheless, harried, harassed, and hurried, a Judge may see only the real, unaware that appearances may be quite different. Schooling in judicial ethics must ensure that ethical judicial conduct is so clothed as to make it appear in its true ethical colors.

CONCLUSION

The eminent lawyer. Mr. N.A. Palkhivala once said and I quote:

'God, give us men. A time like this demands
Strong minds, great hearts , true faith and ready hands.
Men whom the lust of office does not kill;
Men whom the spills of office cannot buy;
Men who possess opinions and a will;
Men who have honour, men who will not lie;
Men who can stand before a demagogue and damn his
treacherous flatteries without walking;
Tall men, sun crowned, who live above the fog;
In Public duty and in private thinking.
However, they may be trained to strengthen those who are weak
and wronged.'

This aptly summarises the qualities that a Judge must possess.

It is a fundamental principle of our legal system that Judges should perform their duties impartially, free from

personal interest or bias. There is perhaps no more basic precept pertaining to the judiciary than the one which holds that, Judges should be sufficiently detached and free from predisposition in their decision-making.

As depicted in the classic image of a woman, blindfolded and holding the scales of justice before her, they must weigh conflicting interests dispassionately; see clearly, but not with their own eyes. The considerable power they wield is granted to them precisely on this condition, that they act not as individuals, but as agents of the state, dispensing that social good we call justice. This is part of what we mean when we repeat the time-honoured dictum that "we are a government of laws, not of men." For just this reason, a "mistake" in judging has far-reaching implications. It reflects not only on the character of a particular individual, or even on the reputation of the profession, but on the place of justice as a fundamental right in a free society.

There is a profound conflict at the very center of Judges' professional lives: publicly they must act as though their personal lives were irrelevant, and yet privately they know that having a well-developed sense of personal morality is both essential to doing their job and the ultimate justification for their position of power and privilege. Nowhere is that tension more evident than when Judges exercise discretion, however limited, or when they reflect on their own fallibility.

The tension and potential conflict for Judges between the personal and the professional is, in one sense, a well established fact in our judicial system. The rules governing recusal are a classic illustration of this. Judges are required to disqualify or recuse themselves when they have some personal connection to the parties involved in a case. Our legal system, recognizing that Judges have personal lives that might bias them in a particular case, provides a mechanism to insure that the integrity of the judicial system is not compromised. Thus, at the very point when

a Judge's personal life becomes relevant to a case, it must be excluded out of consideration for the Judge's professional responsibility.

Yet, as we have seen, the relationship between the personal and the professional is more complex than this, for Judges must both acknowledge and ignore the personal element in their professional lives. This paradoxical situation is aptly symbolized by the robe which they don before entering the courtroom and assuming their public role. Its primary intent, of course, is to make all Judges outwardly the same, to reinforce their anonymity. Together with their position set above everyone else in the courtroom, the robe symbolizes the power and authority of their office. Their garb reinforces the perception that the Judge is not an individual, but an agent of the state. Yet, ironically, the robe simultaneously draws attention to the very thing being concealed—the Judge's personal distinctiveness. So cloaking the body of the Judge symbolizes the need to cover up the Judge's personal identity for the sake of his or her professional identity, while at the same time it emphasizes the unmistakable fact that there is a person present whose private life and personal traits need to be hidden. The robe is necessary precisely because the individuality of the Judge is both inescapable and inadmissible.

But of course, the robe is only partially successful in hiding the person of the Judge from view. It can obscure the personal life of the Judge from the perspective of the public, but not in the eyes of the Judge himself or herself. They know only too well who they are and struggle to ensure that their personal failings do not compromise the quality of the professional work they perform. As a Judge notes, and as all Judges surely realize, there is nothing in that robe which imbues them with any special gifts which they do not already possess. So, paradoxically, the very insistence that their professional work must be insulated from their personal lives, together with the need to exercise discretion often based on their own value-system, forces them to have a strong sense of

personal morality. They must know what they believe in and why, in order to stand, cloaked in the robes of their office, and pass judgment on others. And that professional power brings with it personal responsibility. Because they must guard against the danger of using that robe as a pretext for imposing their own idiosyncratic vision of the good on others, they must be diligent in scrutinizing their own actions and motives.

It is ironic, perhaps, that those who must be more circumspect about the influence of their personal values in their professional lives must also be more concerned about cultivating those values. In that sense, the Judge's robe, by strictly delineating personal from professional life, powerfully symbolizes the Judges' need to insure that their own moral values are secure and their moral judgment well developed. As we have seen, in the intimacy of their private lives, religion may play an important role in this respect, for it undergirds their personal ethics and prompts them to reflect seriously on their own values. Thus, the personal and professional dimensions of a Judge's life, which at times appear to conflict, on deeper analysis and somewhat paradoxically, may be complementary. For the requirement that they separate overtly their private morality from their professional responsibility requires Judges to cultivate inwardly that very capacity for careful judgment which constitutes the cornerstone of their professional lives.

I would like to conclude on the note that these ethics cannot be learnt by listing or be taught only by being told. One must live by values to preach and emulating is the best way to learn. Ethics enable the judiciary to struggle with confidence: to chasten oneself and be wise to learn by themselves the true values of life. The discharge of the judicial function is an act of divinity. Perfection and performance of the judicial function is not achieved solely by logic or reason. There is a mystic part which derives from the Earth and the Sun, it is this endurance and consciousness, which enables the participation of the infinite

forces which command us in our thought and action, which, expressed in simple terms and concisely is called "The Ethics".

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SCOPE OF SECTIONS 165 AND 167 OF INDIAN EVIDENCE ACT, 1872

Justice J.R. Midha*

SECTION 165 INDIAN EVIDENCE ACT - JUDGE'S POWER TO PUT QUESTIONS OR ORDER PRODUCTION

Section 165 of the Indian Evidence Act, 1872 (in short 'IEA') reads :

"The Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this Section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149 ; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

This Section invests the Judge with plenary powers to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant. Section 165 is intended to

* Judge, High Court of Delhi.

arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this Section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements.

The Judge contemplated by Section 165 is not a mere umpire at a wit-combat between the lawyers for the parties, whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses so that every point is brought out, is not fulfilling his duty.

The object of a trial is, first to ascertain truth by the light of reason, and then, do justice upon the basis of the truth and the Judge is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not. The framers of the Act, in the Report of the Select Committee published on 31st March, 1871 along with the Bill settled by them, observed as follows:-

> *"Passing over certain matters which are explained at length in the Bill and report, I come to two matters to which the Committee attaches the greatest importance as having peculiar reference to the administration of justice in India. The first of these rules refers to the part taken by the Judge in the examination of witnesses; the second, to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal.*

> *That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well-educated Bar, co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases – probably the vast numerical majority – the Judge has to conduct the whole trial himself. In all cases, he has to represent the interests of the public much more distinctly than he does in England. In many cases, he has to get at the truth, or as near to it as he can by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him but to inquire to the utmost into the truth of the matter. …"*
>
> *"With respect to the question of appeals, we have drawn a series of provisions, the object of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes. We have gone though the various cases in which, as appears to us, the questions of the improper admission or rejection or omission of evidence can arise; and have provided that whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be, and give, judgment accordingly."*

Cunningham, Secretary to the Council of the Governor – General for making Laws and Regulations at the time of the passing of the IEA, explained the Section as under:-

"It frequently happens that the parties do not, in their questions, elicit all the facts necessary to sound a view of the merits of the case. A plaintiff may have some weak points in his case which he is afraid of betraying and so dexterously avoids or a defendant may fail to perceive the import of some answers given and allow it to pass uncriticised : in any case it is highly important that the Judge should be armed with full power enabling him to get at the facts. He may, accordingly, subject to conditions to be immediately noticed, ask any question he pleases, in any form, at any stage of the proceedings, about any matter relevant or irrelevant, and he may order the production of any document or thing. No objection can be taken to any such question or order, nor are the parties entitled, without Court's permission to cross-examine on the answers given. This general power, however, is very closely restricted. In the first place, the judgment must be based on relevant facts and those relevant facts must have been duly proved : next the Judge cannot compel a witness to answer any question, or to produce any document, which he (witness) would be entitled to refuse to answer or produce at any instance of the opposite party : nor may the Judge ask any of the questions as to credit which would be improper if asked by the adverse party : nor can he dispense with primary evidence of a document unless the facts of the case show that secondary evidence is admissible. A Judge accordingly, cannot, by the exercise of the powers conferred by this section import into the decision of the case any fact which is not relevant under the Act nor can he in any case dispense with the prescribed mode of proof, or ask questions to credit, accept such as would be permitted if asked by the parties. Thus restricted, the power of asking questions is of obvious utility in a country like India, where in the vast majority of cases, no advocate is employed, but the Judge has to make out the truth as best he can from the confused, inaccurate and often intentionally false accounts of ignorant, excited and mendacious witnesses."

Under Section 165, the Court has ample power and discretion to interfere and control conduct of trial properly, effectively and in a manner as prescribed by law. While

conducting trial, Court is not required to sit as a silent spectator or umpire but to take active part within the boundaries of law. The Supreme Court in *Ramchander* v. *State of Haryana*[1] observed as follows:-

"1. *What is the true role of a Judge trying a criminal case? Is he to assume the role of a referee in a football match or an umpire in a cricket match, occasionally answering, as Pollock and Maitland (Pollock and Maitland : The History of English Law) point out, the question 'How is that', or, is he to, in the words of Lord Denning 'drop the mantle of a Judge and assume the robe of an advocate? (Jones* v. *National Coal Board, [1957] 2 All. E.R. 155). Is he to be a spectator or a participant at the trial? Is passivity or activity to mark his attitude? If he desires to question any of the witnesses, how far can he go? Can he put on the gloves and 'have a go' at the witness who he suspects is lying or is he to be soft and suave ? These are some of the questions which we are compelled to ask ourselves in this appeal on account of the manner in which the Judge who tried the case put questions to some of the witnesses.*

2. The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive element entering the trial procedure. If a criminal Court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past:

Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by

[1] (1981) 3 SCC 191.

Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may 'ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172(2) of the Cr.PC enables the Court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial. (Session Judge, Nellore v. *Intha Ramana Reddy, ILR 1972 AP 683 : 1972 CriLJ 1485).*

3. With such wide powers, the Court must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It must, of course, not' assume the role of a prosecutor in putting questions. The functions of the counsel, particularly those of the Public Prosecutor, are not to be usurped by the Judge, by descending into the arena, as it were. Any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses. The danger inherent in a Judge adopting a much too stern an attitude towards witnesses has been explained by Lord Justice Birkett:

> *People accustomed to the procedure of the Court are likely to be over-awed or frightened, or confused, or distressed when under the ordeal of prolonged questioning from the presiding Judge. Moreover, when the questioning takes on a sarcastic or ironic tone as it is apt to do, or when it takes on a hostile note as is sometimes almost inevitable, the danger is not only that witnesses will be unable to present the evidence they may wish, but the parties may begin to think, quite wrongly it may be, that the Judge is not holding the scales of justice quite eventually" (Extracted by Lord Denning in Jones* v. *National Board[1957] 2 All. E.R. 155).*

In *Jones* v. *National Coal Board,* [1957] 2 All. E.R. 155, Lord Justice Denning observed:

> *The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been over looked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the Judge and assumes the role of an advocate; and the change does not become him well.*
>
> *We may go further than Lord Denning and say that it is the duty of a Judge to discover the truth and for that purpose he may "ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant" (Section 165 Evidence Act). But this he must do, without unduly trespassing upon the functions of the public prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. The Court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the Judge. The Judge, like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and (sic the) old'."*

In *Ritesh Tewari* v. *State of Uttar Pradesh*,[2] the Supreme Court held that every trial is a voyage of discovery in which truth is the quest. The power under Section 165 of the IEA is to be exercised with the object of subserving the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth. The relevant portion of the judgment is reproduced hereunder:-

> *"37. Section 165 of the Evidence Act, 1872 empowers the Court to ask questions relevant, irrelevant, related or unrelated to the case to the party to ascertain the true facts. The party may not answer the question but it is not permitted to tell the Court that the question put to him is irrelevant or the facts the Court wants to ascertain* are not

[2] (2010) 10 SCC 677.

in issue. Exercise of such a power is necessary for the reason that the judgment of the Court is to be based on relevant facts which have been duly proved. A Court in any case cannot admit illegal or inadmissible evidence for basing its decision. It is an extraordinary power conferred upon the Court to elicit the truth and to act in the interest of justice. A wide discretion has been conferred on the Court to act as the exigencies of justice require. Thus, in order to discover or obtain proper proof of the relevant facts, the Court can ask the question to the parties concerned at any time and in any form. "Every trial is voyage of discovery in which truth is the quest". Therefore, power is to be exercised with an object to subserve the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth. The purpose being to secure justice by full discovery of truth and an accurate knowledge of facts, the Court can put questions to the parties, except those which fall within exceptions contained in the said provision itself. (Vide: Jamatraj Kewalji Govani v. *State of Maharashtra, AIR 1968 SC 178; 1968 Cri LJ 231 and Zahira Habibulla H. Sheikh and Anr.* v. *State of Gujarat and Ors. 2004 (4) SCC 158; 2004 SCC Cri 999)"*

In *Zahira Habibulla H. Sheikh* v. *State of Gujarat*,[3] the Supreme Court held that Section 165 of the IEA and Section 311 of the Code of Criminal Procedure confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. The relevant portion of the judgment reads :-

"43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is

[3] (2004) 4 SCC 158.

remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary when the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In Mohan Lal v. *Union of India, (AIR 1991 SC 1346), this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to*

produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

45. It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

46. Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be

had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a justice decision in the case."

"51. Need for circumspection was dealt with by this Court in Mohanlal Shamji Son's case (supra) and Ram Chander v. *State of Haryana, [(1981) 3 SCC 191 : 1981 SCC (Cri) 683] which dealt with the corresponding Section 540 of Code of Criminal Procedure, 1898 (in short the "old Code") and also in Jamatraj's case (supra). While dealing with Section 311 this Court in Rajendra Prasad* v. *Narcotic Cell thr. Its officer in Charge, Delhi, [(1999) 6 SCC 110 : 1999 SCC (Cri) 1062] held as follows: (SCC p.113, paras 7-8)*

> *"7. It is a common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the Court could not 'fill the lacuna in the prosecution case'. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up.*
>
> *8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."*"

"54. Though justice is depicted to be blind-folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the Court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of Courts and erode in stages faith inbuilt in judicial system ultimately destroying the very justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

55. The Courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The Trial/First Appellate Courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The Court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.

56. As pithily stated in Jennison v. *Baker, [1972 (1) All E.R. 1006: (1971) 2 QB 52 : (1972) 2 WLR 429 (CA) (All E.R. p.1006d)].*

> *"The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope".*

Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See Shakila Abdul Safar Khan (Smt.) v. *Vasant Raghunath Dhoble and Anr, (2003) 7 SCC 749 : 2003 SCC (Cri) 198)."*

"62. In Paras Yadav and Ors. v. *State of Bihar, (1999) 2 SCC 126 : 1999 SCC (Cri) 104 (para 8), it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand on the way of Courts getting at the truth by having recourse to Sections 311, 391 of the Code and Section 165 of the Evidence Act at the appropriate and relevant stages and evaluating the entire evidence; otherwise the designed mischief would be perpetuated with a premium to the offenders and justice would not only be denied to the complainant party but also made an ultimate casualty."*

In *State of Rajasthan* v. *Ani*,[4] the Supreme Court held that Section 165 of the IEA confers vast and unrestricted powers on the Court to elicit truth. The relevant portion of the judgment is reproduced hereunder:-

"10. Shri Sushil Kumar, learned senior counsel criticized the manner in which the trial Judge had put the question. Counsel submitted that when the cross-examiner has successfully elicited a pivotal answer from PW-3 it was improper for the Court to have interjected to upset the trend.

[4] AIR 1997 SC 1023.

11. We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial *Court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant " in order to discover relevant facts. The said Section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial Court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the Court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.*

12. Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be about or combat between two rival sides with the Judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for trial Judge to remain active and alert so that errors can be minimised."

In *Mohanlal Shamji Soni* v. *Union of India*[5] referring to Section 165 of the IEA and Section 311 of the Code of Criminal Procedure, the Supreme Court stated that the said two sections are complementary to each other and between them, they confer jurisdiction on the Judge to act in aid of justice. Referring to a situation where best available evidence is not brought before the Court for one or the other reason by either of the parties, it was observed thus:

> *"10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the Presiding Officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties to take an active role in the proceedings in finding that truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions – whether discretionary or obligatory – according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted where under any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any*

[5] 1991 Supp. (1) SCC 271:1991 SCC (Cri) 595.

person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

"15. Besides the above specific provisions under the CrPC and Code of Civil Procedure empowering the criminal and civil Courts as the case may be, to summon and examine witnesses, a Judge in order to discover or to obtain proof of relevant facts is empowered under Section 165 of the Indian Evidence Act to exercise all the privileges and powers subject to the proviso to that section which power he has under the Evidence Act. Section 540 of the old Code (Section 311 of the new Code) and Section 165 of the Evidence Act may be said to be complementary to each other and as observed by this Court in Jamatraj Kewalji Govani v. State of Maharashtra "these two sections between them confer jurisdiction on the Judge to act in aid of justice"."

In *Jamatraj Kewalji Govani* v. *State of Maharashtra*,[6] the Supreme Court held that Section 165 of the IEA and Section 540 of the Code of Criminal Procedure, 1898 confer jurisdiction on the Judge to act in aid of justice. In criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it.

In *Jai Prakash* v. *National Insurance Company*,[7] the Supreme Court held that the Motor Accident Claims Tribunal should take an active role in deciding and expeditiously disposing of the

[6] AIR 1968 SC 178.
[7] (2010) 2 SCC 607.

applications for compensation and make effective use of Section 165 of the IEA to determine the just compensation.

In *Somari Devi* v. *Ragwar Singh*,[8] the Delhi High Court has discussed the scope of Section 165 of the IEA.

In *Sessions Judge Nellore Referring Officer* v. *Intha Ramana Reddy*,[9] the Andhra Pradesh High Court held as under:-

"1. In this case we are presented with a difficult problem and faced with a strange situation quite unprecedented, arising out of an unusual attitude adopted by the accused, who quite unmindful of the serious charge of murder made against them, refused to participate in the proceedings before the lower Court and persist in their refusal in this Court also. In the committal Court as well as in the Court of Session, when examined by the presiding magistrate and the Judge respectively, they plainly and bluntly stated that they had no faith in the law Courts of the land, established according to them to protect the interests of the landlords, capitalists and the like, They professed to be 'Naxalbarites.' As they had not engaged any counsel to defend them and as they had refused to answer the question whether they were possessed of sufficient means to engage a counsel, the learned Sessions Judge thought it desirable to appoint a counsel at the cost of the State to defend them. He requested a senior practitioner of the Court to defend them but the accused would have none of it and told the Sessions Judge that they did not want the services of a lawyer. The case therefore proceeded without the accused being defended by a lawyer. The prosecution examined twenty witnesses. At the end of the examination of each witness, the accused were asked by the Sessions Judge whether they wished to cross-examine the witness. They declined to cross-examine any witness. Instead they shouted slogans. When examined by the Sessions Judge at the conclusion of the evidence for the prosecution, they reaffirmed their lack of faith in Court and the present social system. At the close of the trial the learned Sessions Judge convicted the three accused under Section

[8] III (2010) ACC 147.
[9] 1972 CriLJ 1485.

302 read with Section 34 and sentenced A-l and A-2 to death and A-3 to imprisonment for life. While A-3 has preferred an appeal through counsel, A-l and A-2. it is reported by the Jail Superintendent, have refused to prefer an appeal. Their case also is however before us in the reference made by the learned Sessions Judge under Section 374 Cr. P.C. for confirmation of the sentences of death. They have refused to be represented by any counsel at the hearing of the reference. Having regard to the importance of the matter we requested three senior practitioners of this Court, Sri R. Ramalinga Reddy. Ex-Public Prosecutor of the State. Sri P. A. Chowdary and Sri B. P. Jeevan Reddy to assist us on the legal and constitutional questions involyed. We are grateful to them for their assistance.

2. We may at once state that the learned Sessions Judge who tried the case adopted a negative and a passive attitude at the trial. It was as if he was spectator and not a participant in the trial. In a case where the charge is of a capital nature and where the accused are undefended, be it by choice, one would expect the presiding Judge to evince an active interest and participate in the trial by putting questions to witnesses in order to ascertain the truth. Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may ask any question he pleases, in any form at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172(2) Criminal P.C. enables the Court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial. In the present case there were certainly several matters which required clarification and elucidation."

"5… We are prepared to go so far as to say that in every capital case and in every case of a complicated nature it is the duty of the Court to assign a counsel to defend an undefended accused. In other cases also

if the accused appears to be incapable of intelligently following the case, it is the duty of the Court to assign a counsel to defend the accused. If in such cases no counsel is assigned it can perhaps be urged with force that there is a violation of the Constitutional right, not to be deprived of life or liberty except according to procedure established by law. But where the accused refuses to have a counsel assigned to him it cannot be said that there is any such violation. The Constitutional right may extend in appropriate cases to being asked whether the accused would like to have a counsel assigned to him and to the assigning of a counsel if he desires but it cannot extend to have a counsel imposed on an unwilling accused. As pointed out by us earlier no Court can appoint a counsel to represent an accused if the accused does not want a counsel to represent him. That is clear. The Court may perhaps appoint a counsel to act as amicus curiae but such a counsel does, not represent the accused and cannot cross. examine witnesses since cross-examination must be by the adverse party. The only way in which the Court may protect the accused in such a situation is to put necessary questions itself to the prosecution witnesses on all matters requiring clarification. We have already pointed out that the learned Sessions Judge failed to do this. In the circumstances of the case we do not think that we will be justified in quashing the conviction and ordering a retrial. We think that the interests of justice will be adequately served if, in exercise of our powers under Section 375 of the Code of Criminal Procedure we recall and examine the, material witnesses ourselves by putting necessary questions. On such an examination the accused will naturally have a right to cross-examine the witnesses if they so choose and the prosecution will have the right to re-examine the witnesses. Summons will therefore be issued forthwith to PWs. 1 to 3. 5. 6, 13, 14. 17 and 20 to appear in this Court on 22-2-1971. The accused will be produced in this Court on that day."

PROVISO I: [Judgment to be Based on Relevant Facts Duly Proved].- The first proviso emphasizes the width of the powers of the Court to question a witness. The general power given by this section is restricted by this proviso, which declares that the

judgment must be based on relevant facts, and those relevant facts must have been duly proved. The judgment of the Court must be based upon facts declared by the Act to be relevant and duly proved.

PROVISO 2: [Prohibition to Ask Questions or to Compel Production of Documents Protected by Law].- The second proviso preserves the privileges of witnesses to refuse to answer certain questions and forbids the Judge to ask questions or to compel production of documents in contravention of Sections 121 to 131, 148 and 149.

Subject to these restrictions, the Judge has ample and unfettered power to ask any question, in any form, at any stage and of any person. The fullest power has been given by this section to explore all avenues for the discovery of truth including the asking of questions about irrelevant facts with the purpose of getting any information which may lead to the discovery of relevant fact and to prevent justice being defeated by technicalities or rigid rules. It supplements similar powers of Court under special enactments, eg. Order X Rule 4 (I), Order XI Rule 14, Order XVI Rules 7 and 14, Order XVIII Rules 17 and 18 of CPC and Section 311 of Cr.PC. The powers of a Court under Section 311 of Cr.PC are also very wide. Section 310 of Cr.PC makes provisions for local inspection by Court. Section 311 Cr.PC and Section 165 IEA confer a wide discretion on the Court to act as the exigencies of justice require.An improper or capricious exercise of the power may of course lead to undesirable results. But all discretionary powers must be used judicially and not capriciously or arbitrarily. It should be borne in mind that the aid of this section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts.

SECTION 167 IEA – NO NEW TRIAL FOR IMPROPER ADMISSION OR REJECTION OF EVIDENCE

Section 167 of the IEA reads :

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not have varied the decision."

Rules of procedure are not by themselves an end but the means to achieve the ends of justice. Improper admission of evidence is not by itself a ground for reversal of a decision, if there is other evidence to support it. The improper admission or rejection of evidence is not a ground for new trial, unless in the opinion of the Court some substantial wrong or miscarriage has been occasioned. The Section renders it practically a matter of little importance whether evidence improperly dealt with either turned or ought to have turned the scale. The Section is "but one of the many applications of that principle which is at the root of modern legislation respecting judicial procedure, namely, that if legal technicalities cannot be wholly excluded, they shall at least be prevented from materially impeding the course of judicial proceeding, and the attainment of that substantial justice which should be their only aim". Other applications of this principle are to be found in Section 99 of the Code of Civil Procedure, and in Section 464 of the Code of Criminal Procedure.

An objection to the improper admission of evidence is material only if it can be shown that the exclusion of evidence improperly admitted is fatal to the decision. A finding will not, therefore, be disturbed if, throwing aside the evidence which ought not to have been admitted, there, still remains sufficient evidence to support the finding. Under Section 167 of the IEA, the improper admission of evidence is not in itself ground for a new trial or reversal of decision, if independently of the evidence improperly admitted, there is sufficient evidence to justify the decision.

In *Owners & Parties Interested in M.V. "Vali Pero"* v. *Fernandeo Lopez*,[10] the Supreme Court held that the rules of procedure are not by themselves an end but the means to achieve the ends of justice. Rules of procedure are tools forged to achieve justice and are not hurdles to obstruct the pathway to justice. Construction of a rule of procedure which promotes justice and prevents its miscarriage by enabling the Court to do justice in myriad situations, all of which cannot be envisaged, acting within the limits of the permissible construction, must be preferred to that which is rigid and negatives the cause of justice. The reason is obvious. Procedure is meant to subserve and not rule the cause of justice. Where the outcome and fairness of the procedure adopted is not doubted and the essentials of the prescribed procedure have been followed, there is no reason to discard the result simply because certain details which have not prejudicially affected the result have been inadvertently omitted in a particular case. In our view, this appears to be the pragmatic approach which needs to be adopted while construing a purely procedural provision. Otherwise, rule of procedure will become the mistress instead of remaining the handmaid of justice, contrary to the role attributed to it in our legal system.

In *Emperor* v. *Ermanali*,[11] the Calcutta High Court held that the rules and regulations are intended to be the handmaid and not the mistress of law and that in criminal proceedings it is of the utmost importance that a just and reasonable decision on the merits should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure.

In *John* v. *Sherthali Muncipality*,[12] the Kerala High Court

[10] AIR 1989 SC 2206.
[11] AIR 1930 Calcutta 212.
[12] AIR 1959 Kerala 323.

held that the Magistrate committed a grave error in examining the accused person without his request and against his protest, to prove a fact which the prosecution should have established by other evidence. Though this act of the Magistrate was in direct contravention of the provisions of Section 342-A of the Code of Criminal Procedure, 1898, it was no ground to quash the entire proceedings. Section 167 of the IEA provides inter alia that improper admission of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. The question whether the prosecution was sustainable or the conviction was rightly made has therefore to be examined eschewing altogether the evidence furnished by the accused while under examination as a Court witness.

In *Krishna Kumar Agrawal* v. *Jai Kumar Jain*,[13] the Patna High Court discussed the scope of Section 167 of the IEA. The relevant portion of the judgment is reproduced hereunder:-

> *"11. This Section is substantially consistent with modern English Rule that a new trial shall not be granted on the ground of improper admission or rejection of the evidence unless in the opinion of the Court some substantial wrong or miscarriage of justice has been occasioned thereby. This Section 167 of the Evidence Act in substance is one of the many applications of that principle, which is at the root of modern legislation respecting judicial procedure, namely, that if legal technicalities cannot be wholly excluded, they shall at least be prevented from materially impending the course of judicial proceedings, and the attainment of that substantial justice which is their only aim, (See Woodroffe, 9th Edn. 1051). Other applications of this principle are to be found in Section 99 of the Code and in Section 537 of the (Old) Criminal Procedure Code and Section 464 and 465 of Cr.P.C. 1973. Section 99 of the Code is to the effect*

[13] 1995 (2) BLJR 1152.

that no decree shall be reversed or modified for error or irregularity not affecting merits or jurisdiction. The present Section 167 of the Evidence Act in fact contains similar provisions that no decree shall be varied or judgment reversed simply on the ground of improper admission or rejection of any evidence, if it could be shown that irrespective of the evidence admitted or rejected, there was other sufficient evidence on the record which, if taken into account, warrants findings recorded by the Courts below."

The Delhi High Court applied Section 167 of the IEA in *New India Assurance Co. Ltd.* v. *Col. Surinder Pal*[14] and observed that:

"12. Improper admission or rejection of evidence is not by itself a ground for reversal of a decision, if there is other evidence to support it. Where admissible evidence has been improperly rejected or inadmissible evidence has been admitted by the Judge, such improper reception or rejection of evidence shall not of itself be a ground for new trial or reversal of any decision in any case, unless substantial wrong or miscarriage of justice has been thereby occasioned ; or, in other words, if the Court considers that after leaving aside the evidence that has been improperly admitted, there was enough evidence on the record to justify the decision of the lower Court, or that if the rejected evidence were admitted the decision ought not have been affected thereby, no Court of appeal should set it aside.

13. An objection to the proper admission of evidence is material only if it can be shown that the exclusion of evidence improperly admitted is fatal to the decision. A finding will not, therefore, be disturbed if, throwing aside the evidence which ought not to have been admitted, there, still remains sufficient evidence to support the finding. Under Section 167 of the Evidence Act, the improper admission of evidence is not in itself ground for a new trial or reversal of decision, if independently of the evidence of improperly admitted there is sufficient evidence to justify the decision."

[14] III (2010) ACC 208.

Conclusion : -

Section 165 casts a duty on the Judge to discover truth to do complete justice and empowers him to summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case. The Judge has to play an active role to discover the truth. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. But while theoretically the powers of the Judge are limitless and unfettered, certain principles have come to be recognized which he must follow as to the manner in which he exercises the power. The higher the power the more careful should be its exercise. It need hardly be pointed out that he must not take sides, but he must not also "descend into the arena" and forsake the judicial claim for the zeal of a combatant. Evidence to be obtained should appear to the Court essential for a just decision of the case by getting at the truth by all lawful means. Section 167 aims at safeguarding against the unsettling of trial Court decisions on technical grounds of admissibility or inadmissibility of evidence unless it has resulted in miscarriage of justice. The aim of both sections is ultimately to do substantive justice.

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PRINCIPLE OF 'TWO VIEWS': APPLICATION IN CRIMINAL LAW

S. K. Sarvaria*

I

Introduction

The legislature enacts the law and the interpretation of statutes is in the domain of judiciary. By judicial interpretation, higher Courts[1] explain the true meaning of different words and phrases used in the Sections of different statutes which interpretation becomes the precedent to be followed by the lower Courts. The principle of' 'two views', with which we are concerned in this article, is one of the principles evolved out of the judicial interpretation by the higher Courts. It is based upon the principles of distributive justice and egalitarianism. The principle is generally used in criminal cases. The purpose of this article is to explain as to how this principle is working in our criminal justice system. Another purpose is to suggest the exact area and implication of this principle.

What is the principle of 'two views'?

Our judicial system follows the accusatorial basis of administration of criminal justice system, which means that the accused is considered innocent till his guilt is proved beyond all reasonable doubts, which adheres to the principles of equality in the sense that all men are innocent unless proved guilty. This also reaffirms the principles of equal justice and the right to life enshrined in our Constitution.[2] In the light of the aforesaid, the

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1 Supreme Court of India and High Courts of different States.

2 See Arts. 21 and 39A of the Constitution of India.

Criminal Law of our nation recognises the legal principle that if the evidence on the record of the judicial file in a criminal case throws the possibility of 'two views' - one favouring the accused and the other favouring the prosecution/ complainant, the view which favours the accused should be accepted by the Court in deciding the said criminal case.

II

Applicability of the principle at different stages of trial

The principle of 'two views' is applied by Criminal Courts at different stages of the trial, or in appeal, as set out hereunder:

i. Framing of charge
ii. While determining the age/juvenility of the accused
iii. Circumstantial Evidence
iv. Presumption of murder in robbery-cum-murder cases
v. At the stage of passing judgment
vi. At the stage of Appeal

(i) <u>Stage of framing of charge</u>

This principle of 'two views' not only applies to criminal cases at the stage of their final disposal, but also at the stage of consideration before the Criminal Court whether a charge should be framed against the accused or not. It is well settled that the test to determine a *prima facie* case, for framing of charge, would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application.[3] By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only, as

3 See Bhupinder Singh Patel v. CBI, 2008(9) A.D.(Delhi) 349: 2008(4) R.C.R.(Criminal) 605 (Del).

distinguished from grave suspicion, he will be fully within his right to discharge the accused and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure 1973 ('Cr. PC'), the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.[4] At the stage of framing a charge, the Court is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible.[5] But if two views emerge from the material collected by investigating agency, the accused should be discharged by the Court by accepting the view favouring the accused.[6]

(ii) <u>While determining the age/juvenility of the accused</u>

The Supreme Court has also made this principle of 'two views' applicable in the criminal trial to the question whether the accused was a juvenile or not and the view which supported the accused found favour with them. In *Rajinder Chandra* v. *State* ***of*** *Chhattisgarh,*[7] the Supreme Court upheld the claim of the accused that he was a juvenile. In that case, the birth certificate, school record and the ossification test showed that the age of the accused was just on the border of 16 years, when the offence was committed.

[4] See Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 5: 1979 SCC (Cri) 609.

[5] Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra, A.I.R. 2008 SC 2991 : 2008(10) S.C.C. 394: 2008 Cri.L.J. 3872; State of Bihar v. Ramesh Singh, (1977) 4 SCC 39; Dilawar Balu Kurane v. State of Maharashtra, 2002 (1) JCC 172; Ashok Kumar Nayyar v. The State, 2007 (2) JCC 1489.

[6] *Ibid*; Union of India v. Prafulla Kumar Samal,(1979) 3 SCC 5: 1979 SCC (Cri) 609.

[7] 2002(1) RCR(Criminal) 586 (SC); see also Hari Ram v. State of Rajasthan, 2009(2) R.C.R.(Criminal) 878 : 2009(3) R.A.J. 414 (SC); Santokh Singh v. Harkirat Singh alias Kirat, 2008(2) R.C.R.(Criminal) 938 (P&H); Updesh v. State of Haryana, 2008(3) R.C.R.(Criminal) 676 (P&H) (DB).

The Apex Court took the view that the benefit should go to the accused in such circumstances. It was further held by the Supreme Court in *Arnit Das* v. *State of Bihar*[8] that while dealing with the question of determination of the age of the accused for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted. While appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the Court should lean in favour of holding the accused to be juvenile in borderline cases.

(iii) <u>Circumstantial Evidence</u>

The application of the principle of two views can be equally extended to criminal cases based on circumstantial evidence. The golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. As observed by the Supreme Court,[9] the principle of two views has a special relevance in cases where the guilt of the accused is sought to be established by circumstantial evidence.

(iv) <u>Presumption of murder in robbery-cum-murder cases</u>

The presumption on account of illustration (a) of Section 114 of the Indian Evidence Act, 1872 can be drawn that the accused is either a thief or receiver of stolen property if he is found in the possession of stolen articles, soon after the commission of the offence of theft. This presumption is extended by the case-

[8] (2000) 5 SCC 488; see also Babloo Pasi v. State of Jharkhand, AIR 2009 SC 314: 2008(13) Scale 137.

[9] State of Haryana v. Shibu @ Shiv Narain, 2008(3) R.C.R.(Criminal) 951 (SC): 2008(4) R.A.J. 617; Kali Ram v. State of Himachal Pradesh, AIR 1973 SC 2773: 1974 Cr LJ 1; see also Kalu v. State of Madhya Pradesh, 2006 Cr LJ 1506 (MP) (DB).

laws dealing with cases pertaining to robbery[10] and dacoity.[11] Even the legal position is now settled that in robbery-cum-murder cases, a recent and unexplained possession of looted property not only leads to presumption of commission of robbery by the accused but also the commission of murder.[12] But this presumption cannot be drawn in all cases of robbery-cum-murder. A cautious approach is needed to draw the presumption of robbery and murder in such cases. The principle of two views, in some of such cases, would prevent drawing presumption of commission of murder by the accused person(s) when it is not clear which of the accused persons committed murder of the victim while the robbery was being committed.

In this context, reference may be made to the case in *Lambaji & Ors.* v. *State of Maharashtra,*[13] where the accused persons removed ear-rings causing injuries to the deceased and there was every possibility that one of the accused picked up the stone at that moment and decided to hit the deceased in order to silence or immobilise the victim. If the idea was to murder the deceased and take away the ornaments, there was really no need to forcibly snatch the ear-rings before putting an end to the victim. When there was no pre-meditated plan to kill the deceased, then two possibilities arose – first, the common intention of the accused persons sprang up and they decided to kill the victim instantaneously for whatever reason it be; or second, one of the accused suddenly got the idea of killing the deceased and in furtherance thereof picked up the stone lying at the spot and hit

[10] Sanjay alias Kaka v. State, (NCT of Delhi) 2001 Cri LJ 1231 (SC).

[11] Lachhman Ram v. State of Orissa, AIR 1985 SC 486; State of Karnataka v. Rajan and Ors, 1994 Cri LJ 1042 (Ker) (DB); Robert Peter Kadam v. State of Maharashtra, 1998 Cri LJ 3879 (Bom) (DB); Kunwarlal v. State of Madhya Pradesh, 1999 Cri LJ 3632 (MP).

[12] Sanjay alias Kaka v. State, (NCT of Delhi) 2001 Cri LJ 1231 (SC); Baijur v. State of Madhya Pradesh, AIR 1978 SC 522; Eara Bhadarappa v. State of Karnataka, AIR 1983 SC 446.

[13] 2002 Cr LJ 590 (SC).

the deceased. When there is a reasonable scope for two possibilities and the Court is not in a position to know the actual details of the occurrence, it is not safe to extend the presumption under Section 114 of the Evidence Act, 1872 so as to find the accused persons guilty of the offence of murder with the aid of Section 34, IPC.

(v) <u>At the stage of passing Judgment</u>

A person's liberty is protected in terms of Article 21 of the Constitution of India and in line with the same, when two views are possible, the view which leans in favour of an accused must be favoured,[14] and the accused should be acquitted.[15]

The Supreme Court has, time and again, explained this concept by holding that in administration of criminal justice, an accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him to be guilty of the offence with which he is charged. Further, if two views are possible on the evidence produced in the case, one indicating towards the guilt of the accused and the other towards his innocence, the view favourable to the accused is to be accepted. In case where the court entertains reasonable doubt regarding the guilt of the accused, the benefit of such doubt should go in favour of the accused. At the same time, the Court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on fanciful grounds or on the basis of conjectures and surmises. The case of the prosecution must be judged as a whole having regard to the totality of the evidence. In appreciating the evidence, the approach of the Court must be integrated not truncated or isolated. In other words, the impact of evidence in totality on the prosecution case or the innocence of the accused has to be kept in mind in coming to the conclusions as to

[14] Sami Ullaha v. Superintendent, Narcotic Central Bureau, 2009(1) R.C.R.(Criminal) 40 : 2008(6) R.A.J. 439 (SC).

[15] Ayodhya Singh v. State of Bihar, 2005 Cr LJ 1450 (SC).

the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the Court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses. Ultimately and finally, the decision in every case depends upon the facts of each case.[16] The said principle ensures that miscarriage of justice is prevented.[17]

(vi) At the stage of Appeal

This principle of two views emerging in a criminal case finds application at the stage of appeal also and when two views are possible on the basis of the facts on record, a judgment of acquittal is justified.[18] Explaining the above principle the Supreme Court[19] has often held that if two views are reasonably possible from the evidence on record, one favouring the accused and one against the accused, the High Court is not expected to reverse the acquittal merely because it would have taken the view against the accused had it tried the case. The very fact that two views are possible make it clear that the prosecution has not proved the guilt of the accused beyond reasonable doubt and consequently the accused is entitled to benefit of doubt.

Hence, the application of the principle of 'two views' in criminal appeals suggests that the Appellate Court would not ordinarily interfere with the judgment of acquittal in case where

[16] Harijana Thirupala and Ors. v. Public Procsecutor, High Court of A.P., Hyderabad, AIR 2002 SC 2821.

[17] Surinder Singh v The State, (NCT of Delhi), 2010 (1) JCC 23 (Del).

[18] See for instance, State through Inspector of Police, A.P. v. K. Narasimhachary, (2005) 8 SCC 364: 2005(3) Apex Criminal 415 (SC).

[19] Sambhaji Hindurao Deshmukh & Ors. v. State of Maharashtra, 2008 (1) JCC 42; G. B. Patel v. State of Maharashtra, (1978) 4 SCC 371; Babu v. State of U.P., (1988) 2 SCC 21; Awadhesh v. State of M.P.,(1988) 2 SCC 557; Thanedar Singh v. State of M.P. , (2002) 1 SCC 487; State of Rajasthan v. Rajaram ,(2003) 8 SCC 180 : 2003 (3) JCC 1372; Ram Swaroop & Ors. v. State of Rajasthan, 2004 (1) JCC 555.

two views are possible. This, however, does not mean that the Appellate Court, in a case where a judgment of acquittal is in question, would not go into the evidence brought on records by the prosecution or by the State but the Supreme Court[20] has pointed out that even if the Appellate Court reversed the judgment of acquittal recorded by the Trial Court, it is incumbent on it to arrive at the conclusion that no two views are possible.

III

Determination of the Basis of Applicability of Rule

Up till now, we have seen the working of the principle of two views at the different stages of a criminal trial and also in appeal. The next logical step is to know what should be the basis of applicability of this principle ? The real question which arises is how can it be determined whether the principle of two views would be applicable to a particular case or not ? The reason behind the question is that in case both parties to case (i.e. the Prosecution and the Accused) lead evidence, the respective view in favour of their respective case based on the respective evidence led by the party concerned would emerge. Therefore, in each case where both parties have led the evidence, the views for and against each party would emerge. Hence, though to my knowledge, there is no authoritative pronouncement by higher Courts on this question, it appears that the two views which emerge in a criminal trial - one favouring the prosecution and the other the accused, should be almost equally possible. The other reasonable interpretation in respect of criminal cases appears to be that in criminal law, since unlike the prosecution, which is to

[20] See Kalyan Singh v. State of Maharashtra, 2006 (12) SCALE 577; V. Venkata Subbarao v. State represented by Inspector of Police, A.P., AIR 2007 SC 489: 2007 Cri.L.J. 754; K. Prakashan v. P.K. Surenderan, 2007(12) SCALE 96 : 2007 (10) SCR 1010; M.S. Narayana Menon @ Mani v. State of Kerala, A.I.R. 2006 SC 3366 (2006) 6 SCC 39 ; Mahadeo Laxman Sarane & Anr. v. State of Maharashtra, 2007(3) RCR(Criminal) 210: 2007(7) SCALE 137.

discharge a heavier burden of proving its case beyond reasonable doubt, the burden on the accused to prove his case against the prosecution is lighter and he is entitled to prove his case on preponderance of probabilities, the parity in two views (one favouring the prosecution and the other favouring the accused) would emerge if the accused is able to prove his case/defence on preponderance of probabilities, while the prosecution has already discharged the burden by proving its case beyond reasonable doubt. In such cases, the principle of two views should be applied to give benefit to the accused.

However, at the stage of framing of charge, since the evidence is yet to be led, the equally possible two views in favour as well as against the accused must emerge from the material collected during investigation by the investigating agency and the principle of two views is to be applied based on such material only.[21]

In a criminal case, even if no evidence is led by the accused, the two such contradictory views may also emerge from prosecution case itself due to certain admissions made by important prosecution witnesses in the cross-examination or otherwise, which may also support the plea of the defence taken by the accused in his statement recorded under section 313 of the Cr.PC. In such cases also, the principle of two views would be applicable.

IV

Conclusion

From the above discussion and case laws, the legal position that emerges is that if two views are almost equally possible from the evidence on record in a criminal case as to the guilt or

[21] Since in State of Orissa v. Debendra Nath Padhi, AIR 2005 SC 359, the Supreme Court has held that at the time of framing charge or taking cognizance the accused has no right to produce any material.

innocence of the accused, the view which favours the accused should be accepted by the Court and the accused should be acquitted of the charge framed against him. If the said two views are possible at the stage of charge, the accused should be discharged from the criminal case. In case the two views are with regard to the age of the accused to know whether he is a juvenile or not, the view which favours the accused should be accepted to hold that the accused is a juvenile offender to be handled by Juvenile Justice Board, instead of ordinary criminal courts dealing with the adult accused. If the accused is acquitted by the trial court, the Appellate Court should not interfere with the findings of the trial court if two views are possible as to the guilt or the innocent of the accused in the case.

Further, the principle of two views assumes importance in cases pertaining to circumstantial evidence also. It also appears that like the applicability of the principle by appreciation of totality of the case of the prosecution and the accused, the principle of two views may also be extended to the important aspects of a case such as recovery of weapon of offence from the accused, recovery of stolen property from the accused, presence or absence of the accused at the spot, identity of the case property and the accused and other important circumstances relevant to the charge framed against the accused. I could not lay my hand on any dictum from higher courts on these aspects. So, the question is thrown to the esteemed readers for their legal research and analysis.

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CONCEPTS OF LOK ADALAT

Ashwani Sarpal

Delhi Legal Services Authority in the year 2009 was able to dispose off only 29,924 cases through different Lok Adalats (including in Permanent Lok Adalats and Lok Adalats organized by Delhi High Court Legal Services Committee) in respect of matters pending in different Courts in Delhi as well as at pre-litigation stage but in the year 2010 this disposal increased to 1, 45,362. It is a very big achievement and perhaps is the highest figure of disposal of cases in India, if compared to similar disposal in other States.

The Indian judiciary is highly over burdened and long delay of disposal of cases on merits coupled with the complicated and lengthy procedure of trial ultimately depresses the litigants. A litigant despite winning the case after several years of pendency virtually finds that his everything is lost in fighting that case in Court. In the civilized society, disputes and conflicts between the citizens cannot be avoided and approach to the Court for redressal of the grievance is almost certain. Litigation in the Court involves huge expenditure which includes payment of Court fees, professional fee of engaged lawyers, expenses incurred in summoning witnesses, procuring service of the opposite party and other miscellaneous charges besides wastage of precious time of the litigant in going to the Courts on dates of hearing, waiting for turn of the hearing of his case from morning till evening, loss of business, harassments and mental agony etc. Due to the above problems, an alternative dispute resolution was worked out for settlement of disputes through other means to

* Officer of DHJS.

provide speedy, cheaper and efficacious remedy which ultimately will also reduce the burden of the court.

Lok Adalat which is commonly known as "People's Court" is one of the methods of the alternative dispute resolution. The matter in the Lok Adalat is decided on the basis of mutual consent of both the parties without caring for rules of evidence and technicalities of law. After the decision of the Lok Adalat both parties remain in a win–win position. It is one of the modes where the speedy, inexpensive and efficacious remedy for settlement of their disputes is available to the people at large. Supreme Court in the case *P.T. Thomas* v. *Thomas Job*[1] held that experiment of 'Lok Adalat' as an alternate mode of dispute settlement has come to be accepted in India, as a viable, economic, efficient and informal one. Lok Adalat is another alternative to JUDICIAL JUSTICE. This is a recent strategy for delivering informal, cheap and expeditious justice to the common man by way of settling disputes, which are pending in Courts and also those, which have not yet reached Courts by negotiation, conciliation and by adopting persuasive, common sense and human approach to the problems of the disputants with the assistance of specially trained and experienced Members of the Team of Conciliators.

Lok Adalats are organized under Chapter-VI of The Legal Services Authority Act, 1987 (in short 'Act') and the responsibilities have been put upon every State Legal Services Authority, District Legal Services Authority, High Court Legal Services Committee or Supreme Court Legal Services Committee to organize the Lok Adalats from time to time at such intervals and places as deemed fit. Lok Adalats can be presided over by the serving or retired Judicial Officers who can be assisted by other persons. Different important features of Lok Adalat are described as under:-

[1] AIR 2005 SC 3575.

1) Permanent Lok Adalat and other Lok Adalat

In the year 2002, major amendments in the Act were carried out and the provisions relating to establishment of Permanent Lok Adalat were incorporated. The Permanent Lok Adalat constituted under Section 22-B of the Act is empowered to deal with the matters relating to 'Public Utility Services' only which includes services relating to electricity, telephone, water, insurance, transport disputes etc. Separate Rules have been framed by the Central Government in consultation with the Chief Justice of India for the purposes of appointment of Presiding Officers of these Permanent Lok Adalats, remuneration payable to them, terms and conditions of service, their tenure etc. as well as of other members holding the Permanent Lok Adalat. It is important to mention here that Permanent Lok Adalat can only deal with those Public Utility matters which are specifically mentioned in this provision or are specifically notified by the government.

Other routine Lok Adalats under Section 19 of the Act are organized from time to time and are presided over by the persons appointed by the State or District Authority which decides when and where the same have to be conducted and what type of matters should be referred to it and to be decided by it. These Lok Adalats may be for one day or for few days. Since the year 2008 in Delhi, a new concept of holding Daily Lok Adalat to deal with few category of cases has been invoked which is gaining momentum and is very successful. This Daily Lok Adalat is infact a Lok Adalat under Section 19 of the Act.

Supreme Court in the recent decision of *Inter Globe Aviation Ltd.* v. *N. Satchidanand*[2] elaborately dealt with the difference between Permanent Lok Adalat constituted under Section 22-B and other Lok Adalat under Section 19 of the Act as well as Lok

[2] 2011 VIII AD (SC) 445.

Adalat organized on regular and continuous basis. It held that in order to avoid confusions, the Lok Adalat constituted under Section 19 of the Act and organized on regular or continuous basis should be given the name of 'Continuous Lok Adalat' instead of Permanent Lok Adalat.

2) Type of Matters Referred to the Lok Adalats

Two types of disputes, one pending in Courts and another which have still not been brought before any Court commonly known as at Pre-litigation Cases can be referred to the Lok Adalat for the purpose of settlement.

Section 20 of the Act prescribes three types of modes by which cases pending in the Court can be referred to Lok Adalat (i) either with the consent of both parties or (ii) upon the application of one party but after hearing the opposite party also where Court is of prima facie view that there are chances of settlement between parties or (iii) where the Court itself thinks proper to refer the dispute to the Lok Adalat for disposal.

The Karnataka High Court in *Commissioner, K.S.P. Instructions* v. *Nirupadi Virbhadrappa Shiva*[3] held that where reference is made under clause (i) or (ii) of section 20 of the Act without giving reasonable opportunity of being heard to the parties, then that reference is not valid and Lok Adalat would not derive jurisdiction to determine any dispute and Lok Adalat cannot take cognizance of the case. In respect of clause (iii) mentioned above where the Court itself refers the dispute to the Lok Adalat, the Bombay High Court in *Pushpa Suresh Bhutada* v. *Subhash Bansilal Maheshwari*[4] was of the view that the Court itself need not investigate if there are chances of settlement but Court has to explore the possibility of settlement before reference to Lok Adalat. However even in that situation before making reference

[3] AIR 2001 Karnataka 504.
[4] AIR 2002 Bombay 126.

(despite objection of one party or both), the Court shall give reasonable opportunity of being heard to the parties.

However disputes pertaining to criminal offences which are not legally compoundable cannot be brought before the Lok Adalat. Sometimes while dealing with some matters which are legally brought before the jurisdiction of Lok Adalat, parties also agree to settle cases involving criminal offences which is not legally compoundable, then in that situation, the Lok Adalat Judge can record that compromise and can advise the parties to approach High Court for quashing of that offence. Such a situation arises mainly before the Lok Adalat when matrimonial disputes involving maintenance, divorce etc. are referred to it wherein parties while settling these disputes also agree to settle the criminal proceedings under Section 406/498-A IPC and later on approached High Court to get the FIR quashed.

In the Lok Adalat, disputes are settled with mutual consent and only compoundable criminal cases can be taken up. Allahabad High Court in matter *Sukhal* v. *State of UP*[5] quashed the decision of Lok Adalat which entertained the case of non compoundable offences of cheating and forgery and on the basis of pleading guilty, convicted the accused and sentenced him to the period till rising of court. In another case titled as *State of Karnataka* v. *Gurunath*[6] Karnataka High Court held that jurisdiction of Lok Adalat is not barred merely on the technical ground that in the charge sheet an offence is mentioned by the police which is non compoundable.

A dispute which has not come before any Court till date and is at the stage of pre-litigation also can be sent to the Lok Adalat. Any party to the dispute by moving an application before the State Legal Service Authority or District Legal Services

[5] 2002 Crl. L. J. 1523.
[6] 2000 Crl. L. J. 1192.

Authority giving details therein of the nature of the dispute, relevant facts and the relief to be claimed can get the same referred to the Lok Adalat. The concerned Authority shall call the opposite party, hear him and after informing him of all the consequences and taking his willingness shall refer the matter to the Lok Adalat for disposal. The concerned Lok Adalat shall also after giving proper opportunity of hearings to both the parties try to get the dispute settled through mutual consent. The Kerala High Court in *Moni Mathai* v. *Federal Bank Ltd.*[7] though upheld the reference of pre-litigation matters to Lok Adalat however held that where the referral Legal Services Authority has not given an opportunity of hearing to the petitioner to put forward his case nor the Lok Adalat told him about the legal consequences of the terms of the settlement arrived at without any bargaining or any concession as well as the fact that he was without legal assistance, the award cannot be held as legal.

However before the Permanent Lok Adalat, any party to the dispute pertaining to Public Utility Service at pre-litigation stage can make an application for settlement and after that no party is permitted to invoke jurisdiction of any other Court in respect of the same dispute.

3) Procedure to be Adopted by the Lok Adalats

Under the Act, no specific procedure has been prescribed for the matters which have to come before the Lok Adalat. The award is passed on the basis of mutual compromise between the parties and technical rules of law and evidence are not to be applied. Lok Adalat can specify its own procedure for the determination of the disputes however the Lok Adalat Judge is bound to follow the principal of natural justice, equity and fair play while dealing with the dispute between the parties.

[7] AIR 2003 Kerala 164.

Permanent Lok Adalat is not to be treated as a regular Court but it is a special kind of a Tribunal as held by Supreme Court in *Inter Globe Aviation Ltd.* v. *N. Satchidanand*[8] wherein while conducting proceedings 'CON-ARB' procedure is adopted. Initially conciliation proceedings which is non-adjudicatory in nature is conducted and only if the parties fail to reach an agreement, then Permanent Lok Adalat mutates decides the dispute on merits as an adjudicatory body. Supreme Court further held that since Permanent Lok Adalat is not a 'Court' so any provision in the contract relating to the exclusion of jurisdiction of the court of a particular area will not apply to such forum.

4) How Dispute is Settled by the Lok Adalats

There is a difference in the method of taking decision in Lok Adalat constituted under Sections 19 and 22-B of the Act. The dispute is settled on the basis of the compromise between the parties. Lok Adalat Judge is not competent to decide the matter on merits if he is holding Lok Adalat constituted under Section 19 of the Act. If the matter is not settled between the parties with the mutual consensus then the same is returned to the Court concerned from whom it was referred or parties shall be advised to approach the regular Court in pre-litigation stage dispute.

However in Permanent Lok Adalat constituted under Section 22-B of the Act, firstly the dispute is settled through the conciliation proceedings and on the basis of mutual agreement and if the same fails then the Permanent Lok Adalat decides the dispute on merits which cannot be challenged in any suit, application or in execution proceedings.

5) Benefits of Lok Adalats

The decision or the 'Award' given by the Lok Adalat is final and no appeal lies against the same. Even no Civil Suit is

[8] 2011 VIII AD (SC) 445.

maintainable to get this award set aside. The only remedy available for any grievances against the decision of Lok Adalat is to approach the High Court through a writ petition under Article 226 of Constitution of India. Where Lok Adalat exceeds its powers, commits an error of law, commits breach of the rules of natural justice and abuses its powers, then also High Court can interfere under the powers given in Art. 226 of the Constitution of India and there is no time limit for invoking this power.

It is not necessary for the party to engage a lawyer for conducting the proceedings before the Lok Adalat. No court fees or any other charges are required to be paid. A party himself can come before the Lok Adalat by mentioning his grievances along with the relevant facts on the plain paper and can himself conduct the proceedings. If the matter pending in the Court is referred to the Lok Adalat and is settled there, then the parties concerned are entitled to claim refund of the court fee expenses incurred. The Kerala High Court in *Vasudevan V.A.* v. *State of Kerala*[9] held that the party whose pending case is settled in the Lok Adalat is entitled to claim refund of the entire amount of court fee paid on the plaint and any deduction made in it is not legal.

The decision of the Lok Adalat is final and binding upon both parties and is treated as a decree of the court directly enforceable by the Civil Court through execution proceedings. Supreme Court in the case *P.T. Thomas* v. *Thomas Job*[10] held;

> *" In our opinion, the award of the Lok Adalat is fictionally deemed to be a decree of the Court and therefore the Courts have all powers in relation thereto as it has in relation to a decree itself. This, in our opinion, includes the power to extend time in appropriate cases. In our opinion, the award passed by the Lok Adalat is the decision of the Court itself though arrived at by the simpler method of conciliation instead of the process of arguments in Court."*

[9] AIR 2004 Kerala 43.
[10] *Supra* n. 1.

6) Powers of Lok Adalats

Lok Adalat is not bound to follow the technical procedure of Indian Evidence Act and besides developing its own procedure is also empowered to exercise certain powers as are given in the Code of Civil Procedure. It can compel any person to appear as a witness or to produce any document, call for any public record from any office or Court etc. The proceedings of the Lok Adalat are deemed to be treated as judicial proceedings and it is competent to take action for perjury, making false claim before it and for causing obstruction in its proceedings. The presiding officer and member assisting the Lok Adalat is treated as a public servant within the meaning of Section 21 of the Indian Penal Code.

7) The Importance of Consent and Consensus

The determination of the dispute before Lok Adalat is based upon the mutual consent of the parties and award is passed upon the compromise terms and conditions agreed upon by both sides. The Lok Adalat Judge however can ascertain whether parties are settling their dispute voluntarily and there is no undue pressure or coercion. Supreme Court defined the term 'Compromise and Settlement' in the case of *State of Punjab* v. *Phulan Rani*[11] and held that a 'compromise' is always bilateral and means mutual adjustment whereas 'settlement' is termination of legal proceedings by mutual consent.

The Karnataka High Court in *Kishan Rao* v. *Bidar District Legal Services Authority*[12] was of the opinion that unless and until all the parties to the suit pending in the court enter into compromise, the award passed by the Lok Adalat in respect of some of the parties appearing before it cannot be enforced and is to be treated as null and void. It further held that it is the duty of

[11] AIR 2004 SC 4105.
[12] AIR 2001 Karnataka 407.

the Lok Adalat to see that all parties are present before it.

The Supreme Court in *State of Punjab* v. *Jalour Singh*[13] held that Lok Adalat has no adjudicatory or judicial function and its function relates purely to conciliation. Lok Adalat has no power to hear parties on merits and to adjudicate the case as the court does. The award of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by the parties in the presence of the Lok Adalat in the form of an executable order under the signature and seal of the Lok Adalat.

In the case of *Punjab National Bank* v. *Laxmichand Rai,*[14] parties reached at a consensus that the entire sum claimed by the bank be decreed but the rate of interest, number and period of instalments were left to the Court's discretion. Lok Adalat Judge fixed the terms and conditions of payments as well as interest rate. It was held that the discretion exercised by the Court shall also form part of the consensus reached between the parties and be enforceable as a decree.

Certainly Lok Adalats are very beneficial not only to the judicial system but also to the public at large. If Lok Adalats are organized and work in proper manner, then people will get quick and cheaper justice and redressal of grievances would be easy. However the mutual consent and wishes of both the parties should be given the paramount importance while passing the award. The Gujarat High Court in *Union Bank of India* v. *M/s Narendra Plastics*[15] held that Lok Adalats are not meant for pressurising the people and criticized the approach of the Court to get obsessed with the idea of certain number of disposal in Lok Adalats.

[13] 2008 II AD (SC) 676.
[14] AIR 2000 M.P. 301.
[15] AIR 1991 Gujarat 67.

Lok Adalats should not forget that their duty is not to dispose of cases some how but settle those amicably, then only the objective and intention of the Legislature behind the Act shall be fulfilled.

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INFLUENCE OF LITIGATION ON MEDICAL PRACTICE - AN INSIGHT TO THE CONSUMER PROTECTION ACT, 1986

Shalinder Kaur*

Does Litigation Influence Medical Practice? An insight to Consumer Protection Act, 1986

.....in all of us, even in good men, there is a lawless wild-beast nature which peers out in sleep.

-PLATO, The Republic

This article endeavours to assess, the relationship between the medical professionals' perception of and experience with medical malpractice and expectations of patients from the medical profession in the backdrop of the Consumer Protection Act, 1986 (CPA). It would be naive of medical professionals to ignore the intricacies of the legal system particularly in the present era of consumerism. Public awareness is at its height and expectations from medical professionals are more than realistic.

The 'consumer' culture is relatively new for all medical professionals and is more prevalent in metropolitan cities. At times, even the Courts get confused on various issues pertaining to 'medical misadventure'. There is no consensus of medical professionals on the treatment of various ailments and illnesses. Window-shopping by patients for treatment of diseases and the urge amongst doctors to make quick money have made things worse. Though there can be many reasons for litigation, misadventure is an inevitable part of medical profession. Several

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reports in the medical arena reveal that 'consumer culture' in the field of medicine has resulted in defensive practice in medicine. This has led to increase in cost of public and private health care system. The later aspect is alarming as well. A survey conducted by a group of physicians in Pennsylvania of specialists including emergency medicine, general surgery, neurosurgery, obstetrics & gynecology, orthopedic surgery and radiology revealed about the nature of defensive practices. More than 90% of the medical professionals reported that they sometimes or often engaged in defensive medical practice. Almost 60% reported that they often ordered more diagnostic tests than were medically indicated and over 50% reported that they often referred patients to other specialists unnecessarily.[1] Another survey was conducted in March 2004 by Center for Survey Research & Analysis, University of Connecticut, USA, which expressed that the majority of physicians also believed that usually in most of the jurisdictions the Courts ruled in favour of the consumers.

The distinction between sued and non sued physician and their attention towards threat and actual litigation has started affecting emotions. Some physicians have even started thinking of retiring early, discouraging their children to take up medical studies, stop taking certain types of cases and even referring cases to other higher medical centers prematurely. Therefore, it is imperative for all medical as well as legal professionals to have knowledge of the legal/medical aspects respectively that concern issues of medical negligence and malpractice.

Different jurisdictions have different systems to deal with medical malpractice. Under these systems, the malpractice has been defined as per standard Medical Practicing Norms. Any deviations from those established norms are considered a malpractice. In UK, The National Health Scheme (NHS) is

[1] Mathew A. Adamo, , M.D.J. Richard. Popp. JD, and A. John Popp, " Neurosurgery and Medical Malpractice Litigation,", Contemporary Neurosurgery, Vol. 31 No.10 (May 30, 2009).

prevalent under the strict control of medical insurance. In Turkey, the Supreme Council of Health under the Ministry of Health and the Institute of Forensic Medicine under the Ministry of Justice deal with medical malpractice. Unfortunately, in India there is only a limited regulatory body confined only to some metropolitan cities to consider the issue of medical malpractice. Moreover, health is a state subject and is governed by the policies of individual States, which can make legislation on this subject. In the year 1997, the Delhi State Legislative Assembly passed Delhi Medical Council (DMC) Act to address the issue of medical negligence and related complaints against the medical professionals. It was the first regulation of its kind in India, which was expected to help medical professionals as well as the judiciary.

Consumer Protection Act, 1986 (in short 'CPA'),

The Supreme Court, in a landmark judgment, *Indian Medical Association* v. *V. P. Shanta*[2] brought the medical profession within the ambit of the CPA. Earlier, medical fraternity had vehemently opposed the inclusion of medical profession under the umbrella of consumerism. The judgment changed the entire perception regarding relationship between doctors and patients. The patient was transformed into a 'consumer' and a potential litigant; the doctor became a 'service provider'. Thus, doctors faced a choice between ethics and earnings on the one hand and competence/knowledge and consumerism on the other.

As per the Act[3], Consumer Protection Councils at the Centre and State Government levels have been formed. Such councils are headed by the minister in-charge of Consumer Affairs as its Chairperson. The Consumer Dispute Redressal Agencies look after the day-to-day functioning of the councils.

[2] 1995 (3) CPR 412.

[3] Sub Sections 9-11, 16, 19-20, 27A, Chap. III, CPA 1986.

Complaints under the CPA are filed in the following order:

1. **District forum** – Any complaint can be filed in the district forum within 2 years of the commencement of service.

2. **State Commission** – Appeal against a decision of the district forum can be filed with the State Commission within 30 days of passing the order.

3. **National Commission** – An appeal against an order of the State Commission can be filed within 30 days before the National Commission.

Finally, an appeal against the order of the National Commission can be filed in the Supreme Court within 30 days of passing the order.

Exception to CPA

The only exception to CPA is the category of Government, private or charitable institutions providing completely free services to the poor and rich and only charging a meagre amount for registration. It is worth noting that hospitals where both paid and unpaid services are offered are covered under the CPA even if the complainant has availed free services.

In *Sailesh Munjal & Another* v. *All India Institute of Medical Sciences & Other*[4], the Respondent Hospital claimed to be outside the ambit of CPA on the ground that AIIMS was established for educational and research purposes. Also it rendered service free of charge to poor patients, thus would not be covered by the provisions of the Act. The National Commission did not approve the said contention and held, "it cannot be disputed that apart from registration fee, respondent institute recovers various amounts such as Hospital charges, diagnostic charges etc. from patients". It was further held that "The services rendered at the AIIMS would be covered by the provisions of the Act, despite the

[4] III (2004) CPJ 93(NC).

fact that it is established for educational & research purposes".

Negligence in Medical Practice

There is no specific definition of negligence. It will always remain a slippery word with different connotations in different situations. In addition, it is not expected that a doctor would deliver similar results with the same expertise always. Many aspects determine the competence of a doctor such as individual skills, his education and experience. What is more relevant is the way he conducts himself and discharges his duty in a manner as would be expected from a prudent contemporary in a similar situation and with similar facilities. One can allow for factors such as standard of basic education, facilities available, initial period of training and exposure, stress while executing duties of care. But there is no scope for recklessness, blatant dereliction of duty or non-application of mind resulting in acts of omission or commission leading to negligence.

Before the application of the CPA to medical profession, medical negligence was governed by the law of Tort[5]. Medical negligence is somewhat on a different footing and in certain areas it may overlap with the law of Tort; it falls under the genus of deficiency of services hired. In deciding negligence, the true test lies in the fact that no other doctor of ordinary skill would be guilty if acting with reasonable skill. Background circumstances in which the treatment is given are also to be considered[6].

However, not all deviation from the established mode can be labelled as negligence. In any case expert opinion plays a major role and is a mandatory obligation to be followed. The Madras High Court in the judgment titled *Dr. C. J. Subramania* v. *Kumaraswamy*[7] observed, medicine is an inexact science and it is

[5] Dr. Ravinder Kumar v. Ganga Devi, 1993(3) CPR 255.

[6] Jai Prakash Saini v. Director, Rajiv Gandhi Cancer Institute & Research Center, 2003 (2) CPR 202.

[7] 1 (1994) CPJ 509.

unlikely that a reasonable doctor would intend to give an assurance to achieve a particular result. According to this judgment, no negligence would occur if there is an error of judgment, accident or therapeutic misadventure, error in diagnosis, unavoidable complications, infection or complication of drugs. However, the Court observed that it is the duty of the physician to diagnose, advise and treat the patient.

The Supreme Court in *State of Punjab* v. *Shiv Ram & Others*[8], culled out the principles in defining Medical Negligence and approved the test laid down in *Bolam* v. *Friern Hospital Management Committee.*[9] It held :

> *" The present case deals with the law of negligence in tort. The basis of liability of a professional in tort is negligence. Unless that negligence is established, vicarious liability on the State cannot be imposed. Both in criminal jurisprudence and in civil jurisprudence, doctors are liable for consequences of negligence".*

The golden 'Bolam Test' was once again applied in the case of *Minor Marghesh K. Parikh* v. *Dr. Mayur H. Mehta*[10]. The Supreme Court held :

> *"The test for determining medical negligence as laid down in Bolam Case, holds good in its applicability in India". In this case, the patient was admitted in the hospital with complaint of loose motions. He was put on medication as well as glucose saline was injected through his right shoulder. His condition deteriorated, and then glucose saline was administered through his left foot. Unfortunately, the patient developed gangrene in his left leg which was amputated below the knee.*

The Supreme Court further held:

> *"Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions, which might have prevented the particular happening cannot be the standard of judging the alleged negligence".*

In *M/s Spring Meadows Hospital* v. *Harjot Ahluwalia*[11], the Apex Court ruled that an error of judgment is not necessarily negligence. It held:

> *"The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."*

In *Dr. Kunal Saha* v. *Dr. Sukumar Mukherjee & Others*[12], the National Commission also dealt with medical negligence. It reiterated that error of judgment in diagnosis does not amount to deficiency in service. It was held :

> *" Medical opinion may differ with regard to diagnosis or treatment,*

[8] IV (2005) CPJ 14 (SC).
[9] 1957 (2) AII ELR 118.
[10] AIR 2011 SC 249.
[11] (1998)IV SCC 39.
[12] III(2006) CPJ 142 (NC).

but in a complicated case if they occur then Court will be slow in attributing negligence on the part of the Doctor if he has performed his duties to the best of his ability and with due care and caution".

In many cases, it is also possible that more than one mode of treatment are available for a particular disease and both types of treatment are acceptable in medical practice, Then, the treating physician can employ the mode in which he is well versed. In a significant judgment, titled *N. T. Subramaniam* v. *B. Krishna Rao*[13] the National Consumer Forum observed that:

"The court could not do a greater disservice to the community or advancement of medical services than to place a hallmark of legality in one form of treatment. It is important to note that the patient should be given a second option whenever applicable".

Contributory Negligence

Whenever a patient has not followed the instructions given by the doctor or has taken treatment elsewhere which may have affected the outcome, or has torn the patient records, he gets covered under the umbrella of contributory negligence. Therefore instructions issued to the patient should be clear and legible.[14]

Liabilities in Medical Practice

In any event or mishap, the primary liability is that of the treating doctor under whom the patient is admitted. The vicarious liability lies with the hospital, or nursing home. The hospital has primary liability not to have any kind of deficiency of services such as in the intensive care unit (ICU), lack of equipment, proper working conditions etc. The vicarious liability covers doctors, nurses, technicians and paramedics. State governments are responsible vicariously for covering their hospitals for all kinds of

[13] 1996 CP 3233 (NC).
[14] Anoop K. Kaushal, MEDICAL NEGLIGENCE AND LEGAL REMEDIES, Universal Law Publishing: 2004, p. 148.

employees. Even Employees' State Insurance (ESI) is covered under its penumbra.

In the judgment delivered by National Consumer Disputes Redressal Commission, New Delhi in *Meenakshi Mission Hospital and Research Center*[15] it was held –

"Normally it is the doctors upon whom the specific allegation of negligence would be attributed, but in this case all the operation notes/progress record are silent about the names of the doctors and it is admitted position that it was before the surgery and no name of anesthetists is mentioned anywhere, hence it is the hospital which would be accountable for whatever happens in the hospital".

In the case of *Sheela Hirba Naik Gaunekar* v. *Apollo Hospitals Limited, Chennai & Another*,[16] the National Commission held the hospital liable to pay compensation as deficiency in service in post operative treatment was proved. In this case, angioplasty was successfully carried out. But necessary ECG was not carried out on the pretext that the deceased was fast asleep. The Commission also observed:

"Apart from operation, post operative treatment is equally important in such surgeries because complications may arise at any point of time. For treating such complications alternates on the part of the resident doctors/nursing staff is must. If that is not done, it would be a deficiency in service by the hospital".

S. Ramanujam v. *Dr. C. P. Sree Kumar*[17] is again a case of deficiency in service provided by the hospital. In this case, the complainant was admitted in the hospital for treatment of hairline fracture. He was subjected to rough handling while shifting him to X ray room which resulted in widening of fracture. His post operative infection was also not properly attended to.

[15] I(2005) CPJ 33 (NC).
[16] III(2005) CPH 56 (NC).
[17] IV(2006) CPJ 365 (NC).

The National Commission observed it to be a clear cut case of negligence and deficiency in service and directed the hospital to pay the compensation. Yet in another case titled *Sushma Sharma & others* v. *Bombay Hospital & Others*[18] the National Commission held the hospital vicariously liable irrespective of the fact that the particular doctor was not impleaded or whether there was negligence on his part. It was held:

> *"The various consultants could give orders but the actual administration and supervision is the responsibility of the concerned parent unit of the hospital". The commission further observed that, "there was no proper coordination between various specialists and Resident Staff of ICU of the Respondent Hospital".*

Furthermore in the judgment, *S. C. Mathur & others* v. *All India Institute of Medical Sciences & Others*[19] the Delhi State Consumer Disputes Redressal Commission followed the criteria laid down by Supreme Court in *Indian Medical Association* v. *V. P. Shantha & Others* (supra) and held :

> *"Thus , in our view if the patient dies or suffers injuries due to the negligence of the doctor at the Government Hospitals, health centers and dispensaries the Government, Hospital Health Centre or Dispensary alone is liable for compensating the patient or his legal heirs". Achutrao Haribhau Khodwa & Others v. State of Maharashtra*[20] *is again a case of liability for negligence by a medical professional in civil law. In this case, a patient was admitted in Civil Hospital, Aurangabad, for delivery of a child. After delivery, the patient also underwent sterilization operation. But unfortunately, a mop (towel) was left inside the body during her sterilization surgery. Even though she was operated again and the mop was removed but she did not survive. It was held to be a case of medical negligence. The Apex Court observed "once death by negligence in the hospital is established, the State would be liable to pay the damages".*

[18] II(2007) CPJ 9 (NC).
[19] III(2006) CPJ 414.
[20] IV (2006) CPJ 8 (SC).

Criminal Liability of the Medical Practitioner

The most humiliating experience for a physician is the set of circumstances leading to his arrest. This is mainly due to death of the patient during treatment. The landmark judgments covering this aspect are : In case of *Dr. Suresh Gupta* v. *Government of NCT of Delhi*[21] the Supreme Court laid down following guidelines :-

> *For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness". It is not merely lack of necessary care, attention and skill.... Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as "criminal". It can be termed "criminal" only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.*

Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and the patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.

[21] (2004) 6 SCC 422.

In the judgment titled *Jacob Mathew Another* v. *State of Punjab*[22] the Supreme Court laid down necessary fundamentals while considering Medical Negligence. It was held:

> *"Negligence in context of medical profession necessarily calls for treatment with difference: Difference between occupational negligence and professional negligence: Standard to be applied to hold professional negligence: Simple lack of care, error of judgment or accident is not proof of negligence on part of medical professional : Failure to use special or extraordinary precautions which might have prevented particular happening cannot be standard for judging alleged negligence : Res ipsa loquitur is only rule of evidence and operates in domain of civil law specially in cases of Torts and helps in determining onus of proof in actions relating to negligence : Averments in complaint, even if proved, do not make out case of criminal rashness or negligence on part of accused-appellant. For non availability of oxygen cylinder, hospital may be liable in civil law but accused -appellant cannot be prosecuted against under Section 304A, IPC on parameters of Bolam's test".*

The concept of Medical negligence qua Section 304A IPC was further elaborated by Apex Court in the judgment *Martin F D' Souza* v. *Mohd. Ishfaq*[23] by holding that Courts and Consumer Fora are not experts in medical science, and must not substitute their own views for that of specialists. The Supreme Court observed:

> *"Before issuing notice to the doctor of the hospital against whom the complaint was made, the Consumers Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed and only after that doctor or committee reports that there is a prima-facie case of medical negligence should notice be then issued to the concerned doctor/hospital".*

[22] 111(2005) CPJ 9 (SC).
[23] 2009 (3) SCC 1.

However, in the judgment *V. Kishan Rao* v. *Nikhil, Super Speciality Hospital and Another*,[24] the Apex Court dissented with the observation made in Martin F. D'Souza's case. It was held :

> *"The two-Judge Bench in D'souza has taken note of the decisions in Indian Medical Association and Mathew, but even after taking note of those two decisions, D'souza gave those general directions in paragraph 106 which are contrary to the principles laid down in both those larger Bench decisions. The larger Bench decision in Dr. J. J. Merchant has not been noted in D'souza. Apart from that, the directions in paragraph 106 in D'souza are contrary to the provisions of the governing statute. That is why this Court cannot accept those directions as constituting a binding precedent in cases of medical negligence before consumer Forum. Those directions are also inconsistent with the avowed purpose of the said Act".*

The Apex Court further held that:

> *"It is for the Consumer Forum to decide whether any expert evidence is required to prove the medical negligence alleged by the complainant and it may not be necessary in many cases where the negligence is apparent and the principle of 'res ipsa loquitor' applies to such cases".*

It also observed that:

> *"Before forming an opinion that expert evidence is required, the Forum must reach a conclusion that the case is complicated enough to require the opinion of an expert or that the facts of the case are such that it cannot be resolved by members of the Forum without assistance of experts".*

<u>Frivolous Complaints</u>

Whenever a complaint is filed with mala fide intention to defame or extract money and if so proved, the same can be set aside with imposition of cost. A chronic or habitual litigant may

[24] (2010) 5SCC 513.

be burdened with cost not exceeding Rs.10,000/-[25]

Medical Records

The most important piece of evidence in medico-legal cases or even otherwise while conducting an inquiry is adequate case records. All treatment records should be complete in all respects including history, investigations, daily progress notes and type of treatment given. For serious patients, notes should be taken on daily progress at least twice every day. Condition of the serious patient should be regularly informed and signatures of the information given to attendants should be taken from time to time. The importance of pulse, blood pressure (BP), pupils, respiratory rate, electrocardiogram (ECG), blood sugar, electrolytes and X-ray chest[26] should not be under estimated. Records of a patient should also incorporate informed consent, special risk, pre-anaesthesia charts, intraoperative details of vital parameters as well as surgical events. Postoperative or procedure instructions should be very clear. Complete case records should be made available to the patient or attendants if so desired within 72 hours. According to Medical Council of India (MCI) regulations it is essential to keep the records for at least 3 years, since under the CPA a case can be filed within two years of arising of a cause. Preservation of radiology reports of patient is a part of service, hence it is essential to preserve details of all investigations. Any loss of records or investigations is considered as deficiency of service. Whenever the investigation reports are handed over to the patients, it should be recorded in the case sheet. If an implantable device has been put, a tag of the device should be pasted on the case sheet or in Operation Theater records. Any history of drug allergy during the course of treatment should be mentioned in the records as well as in the

[25] Section 26 CPA, 1986.
[26] *Supra* n.14 at p-35.

discharge summary.[27]

The importance of maintaining proper medical records was considered in the case of *Dr. Paramjit Singh Grewal & Another* v. *Charanjit Singh Chawla*[28] by National Commission. Not maintaining of proper written record of the treatment given to a patient was observed to be deficiency in service. The commission held:

> *"We observe that it is high time that Doctors write correct notes in the operation record and discharge summary. These documents should be made available to the patient at any time without any hue and cry. When information is given orally, it becomes a matter of debates as to who is telling the truth. It is patient's right to know how his case has been dealt with by the treating Doctor. It will also enable him to follow the treatment prescribed for future and, if required, sometimes, even to take a second opinion of an expert. It is the duty of the Doctors to state in the record all the details of the treatment given, medicines which are prescribed and the follow up advice, if any, and give it to the patient for his reference. Patient has a right to get the medical record pertaining to him and he cannot be denied the same when he paid the Doctor/Hospital for his treatment and hired the services".*

The importance of Medical Records was further emphasized in the judgment of *H.S. Sherma* v. *Indraprastha Apollo Hospital & Another*.[29] The commission referred to the rules made by the Medical Council of India. (Indian Medical Council Bare Act) under which doctors are required to maintain medical records.

Thus, maintaining of proper medical records would be a useful practice for benefit of all stakeholders as it would contain

[27] Section 13, Chapter 1, The Indian Medical Council (Professional Conduct, Etiquette and Ethics)Regulations 2002.
[28] 1(2007) CPJ 125 (NC).
[29] II (2007) CPJ 21 (NC).

essential vital details of treatment of a patient.

Delhi Medical Council Act, 1997

The Delhi Medical Council (DMC) is a statutory body constituted by the Legislative Assembly of the National Capital Territory of Delhi in September 1998, as a result of the enactment of the Delhi Medical Council Act in 1997. Among the various functions of DMC, an important role is to receive complaints from the public against misconduct or negligence by a medical practitioner, to proceed for inquest, and to take a decision on the merits of the case and to initiate disciplinary action or award compensation. *Suo moto* action can also be invoked in case of misconduct. Under the DMC Act, there is also provision to take action against frivolous complaints. Similarly, the council can provide protection to its members in discharge of their professional duties.

A Disciplinary Council (DC) under DMC conducts an inquiry against a complaint. Various members of DC are as follows:-[30]

- The Chairman
- A member of the Legislative Assembly (MLA) nominated by the speaker of the Assembly
- A legal expert nominated by the council
- An eminent public figure nominated by the state government
- A medical specialist in the area of specialization nominated by the council
- A nominated member of Delhi Medical Association is usually its president

[30] Section 3, Chapter II, The Delhi Medical Council Act, 1997.

All inquiries conducted by DMC are deemed to be judicial proceedings for the purpose of sections 193, 219, 228 of the Indian Penal Code.

Informed Consent

The concept of informed consent[31] is as much a fundamental principle of medical law as it is an ethical responsibility of the treating physician.

To make a decision, a patient generally must understand the nature and purpose of the procedure to which he or she is agreeing, and this implies that at a minimum, a physician must provide a description not only of the proposed procedure, but also of its intended effects and possible complications. For consent to be legally valid, it must be given voluntarily by a person who has capacity to both comprehend and retain information relevant to the choice he or she has to make. Thus, consent can only be considered voluntary when it is obtained without coercion or other undue influence. In addition, one must give an indication of the imminence of the risk (i.e. immediately post-procedure or decades later). If the risks and complications are serious and have a high probability of occurring, then more disclosure is warranted. It is prudent to provide each patient the opportunity to ask as many questions as it is necessary to ensure that he or she has been given every opportunity to understand the decision to be made. It is also important to assess each patient's capacity for understanding the gravity of serious complications.

In the case of *Dr. Shyam Kumar* v. *Ramesh Bhai Harman Bhai Kachhija*,[32] the patient was operated for Glaucoma and Cataract. But he lost his eyesight. In the revision filed before the National Commission, it up- held the principles of *res ipsa loquitor* and a case of deficiency in service provided, as the risk involved in proposed treatment was not informed to the patient. Moreover,

[31] *Supra* n. 1.
[32] I (2006) CPJ 16 (NC).

the medical records that is the register and consent forms were not produced.

In an unfortunate case *Pravat Kumar Mukherjee* v. *Ruby General Hospital & Others*,[33] a young student of IInd Year B. Tech Engineering was injured in an accident. He was taken to the respondent hospital by a crowd of people. After providing him treatment for 45 minutes, it was discontinued on the ground that the persons who had brought the patient to the hospital had failed to deposit Rs.15, 000/- with the hospital which resulted in denial of treatment and consequential death of young boy. Besides holding that "Status of 'emergency or critically ill patient' would be same as persons belonging to poor class", the National Commission also considered about the requirement of 'consent' for treatment. It held:

> *"It is apparent that emergency treatment was required to be given to the deceased who was brought in a seriously injured condition; there was no question of waiting for the consent of the patient or a passerby who brought the patient to the hospital".*

It further held :

> *"Consent is implicit in such cases when patient is brought to the hospital for treatment, and a surgeon who fails to perform an emergency operation must prove that the patient refused to undergo operation not only at the initial stage but even after the patient was informed about the dangerous consequences of not undergoing the operation".*

The Apex Court in *Nizam Institute of Medical Sciences* v. *Prasanth S. Dhananka & Others*,[34] also considered the scope of 'Informed Consent' and ruled "consent given by the complaint for the excision biopsy cannot, be by inference, be taken as an implied consent for a surgery save in exceptional cases". It held:

[33] II (2005) CPJ 35 (NC).
[34] 2009 Cri LJ 3012.

> *"Unless the unauthorized additional or further procedure is necessary in order to save the life or preserve the health of the patient and it would be unreasonable (as contrasted from being merely inconvenient) to delay the further procedure until the patient regains consciousness and takes a decision, a doctor cannot perform such procedure without the consent of the patient".*

Conclusion

CPA can act as a beneficial legislation for patients and to curtail medical malpractice. Efforts are also required to reduce the practice of defensive medicine by concentrating on educating both patients and physicians regarding appropriate care in the clinical situations that most commonly prompt malpractice litigation. The law laid down by the superior courts under CPA would also be helpful in rejuvenating the faith of the medical fraternity that defensive practice is not an answer to legal rights of public. Moreover, the fraternity is also adequately covered under the umbrella of protection provided by legal system. Also, there is a need to identify the sources of risk in health care and to find ways to reduce the same by the medical fraternity. Above all, the initial 'trust and faith' reposed in medical occupation considering it a divine profession is to be revived through excellent communication between the doctors and patient including good documentation.

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COMMUNICATION SKILLS OF A JUDGE

M. R. Sethi*

Let me begin with a short story:

A blind boy was begging on the side of a New York Street with a board written "I am blind help me". A man passing that side saw him, took his board and wrote something. From that time, the boy got heavy collection; many people started giving money to him.

Can you guess what the man wrote? He wrote "Today is a very beautiful day, but I cannot see it". In fact the way of expressing can change many things. So, one must express ideas differently. The art of expressing ideas is known as communication and to develop expressing better ideas, one has to develop communication skills.

The ability to communicate effectively is a trick learnt by many, but practiced perfectly by few. This is so because for many, communicating is a simple process. However, it is not so. It rather is a simple – complex – net working system that has varying under currents flowing between the speaker and listener.

The skill which stands out above and beyond the rest as a requirement for a quality Judge is "Communication" i.e. the ability to effectively interact with people. How a Judge makes a ruling has a lasting impression on key players of the justice delivery system i.e. lawyers & litigants. A simple cut and paste ruling which is implemented/created in poor fashion will not go over as well, as some of the most difficult rulings made with effective communication skills and techniques. The impression

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left, goes a long way towards assessment of the quality of judgment and judicial skills of a Judge. Judging is not merely a decision making process but a culmination of legal proceedings which is in fairness to all stake holders of the judicial system and also appears to all to be fair and just.

Communication is a process in which there is active involvement in both listening and speaking. A person also communicates through non- verbal signals like actions and body language. How a Judge behaves in Court and also in his personal life also affects the manner in which he communicates with public at large. When a Judge does not engage in quality listening, he/she establishes a rigid power differential and creates an atmosphere of totalitarianism. This does not inspire confidence or trust and does in some manner reflect poorly on the person. When a person feels heard, even the harshest ruling can be implemented smoothly. When a Judge uses the techniques of listening, it helps engender trust and facilitates a smooth rule making process.

Active listening is a style of listening where the receiver of the message participates fully, asking for clarification as and when required, maintaining eye contact with the speaker and paying attention till such time as arguments are over. When a Judge uses the techniques of listening, it helps engender trust and facilitates the Court process. It also helps moderate emotionality in litigants / lawyers as well as build up confidence in the Judge as a "competent Judge". So, we as Judges must engage in active listening and remember that communication is more effective when trust and rapport are established.

The judgment or order or decree, by whatever name it is called, must make clear not only what has been ordered, but also WHY it has been so ordered. The order pronounced by a Judge must be self explanatory and easily communicable to the public at large. Justice will not be done if it is not apparent to the parties why one has won and the other has lost.

Even in our personal lives, we as Judges are ever communicating with public at large, every single moment we are out in public. Our conduct is under constant public view and communicates to others what "Judges should be". We all have to be ever conscious in this regard. We all must not forget that our "actions do speak as loud as our words."

It has often been said that there are five principles of clear communication. Success of a person in all areas of life is contingent on his ability to communicate effectively. The five principles of CLEAR communication are:

- C- Choice
- L- Listening
- E- Expression
- A- Accountability
- R- Relationships

The old saying that we have two ears and one mouth and so we should be listening twice as much, is so true. Lack of listening is the primary reason for communication breakdown. The reason that many people feel angry is because they feel they have not been heard. Conflict, arguments, nagging and frustration are all fruits of the "Not Being Heard Tree".

How often many of us have sat up there on the dais and 'half' listened to an argument being advanced, but were more focused on self needs or rebuttal. We know how it feels when we are not being heard, and also know how it feels when we are truly being consciously listened to. It is a day and night experience for all of us.

The primary job of a Judge in my humble opinion is to hear and listen and not to speak. A Judge speaks through his judgment and not by word of mouth. Impression that a Judge wants to make on the society through his judgment must in fact be through the

judgment alone and not by way of word of mouth. A Judge should not be accused of "*Sunne ka kaam hai, Suna rahe ho*".

We as judicial officers, by virtue of the nature of our profession are barred from communicating our views to the society by way of interviews, speeches and writeup. Our views can be reflected to the society only through our orders and judgments and the same should speak for themselves on our behalf. Synthesizing our idea into a tight, pointed form is a challenge for most of us. Basic problem being faced by all of us is as to "How to cut short without losing important points". Our judgments must be brief, but must cover all essential points i.e

- Fact
- Law
- Analysis
- Conclusion

Clear communication is jargon free, uses proper grammar, has a logical order, and SPEAKS TO THE LISTNER. Whether the words are written or spoken, they are communicated in a way that is simple to understand regardless of the depth of the concept.

Synthesizing an idea into a tight, pointed form is a challenge for most of us. Basic idea behind being concise is "How to cut without losing important points". The same is possible by:

1. Eliminating redundancies
2. Selecting precise words
3. Giving to the reader/listener what they need to know, not necessarily what you want them to read/hear.

I for myself find it easier to draft more than is needed and then edit down, rather than to labour over each word and potentially loose an idea. While drafting our judgments and

orders we Judicial Officers must follow the three Cs of communication i.e Clear, Concise & Correct. Words are more powerful than a sword. It is words which can create great joy and respect but some words can cause great pain and suffering. So everyone including the Judicial Officer must be accountable for everything they say. Specially in case of a Judicial Officer, nothing should come from our mouth that we wish we could retract or delete. We must remember that there are repercussions, be it positive or negative, that go on long after we say what we have said in our judgment. We all are accountable for each and every word penned in our judgment and orders. As such, we must choose our words carefully and as such we all must develop our communication skills so as to put our best foot forward while expressing our ideas and understanding of law while delivering judgments. Nothing which need not be said should be stated and all that need be said, must be so mentioned in our orders. We must say what we mean and mean what we say. We must activate the VHF Chanel i.e. Visualise – Hear – Feel – before passing a judgment. Speak in such a way that people listen to you and listen in such a way that people like to speak to you.

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FORENSIC EVIDENCE ADMISSIBILITY AND RELEVANCE OF FORENSIC EXPERTS EVIDENCE

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Introduction

Admissibility and appreciation of evidence are one of the most significant aspects of judicial administration. The Indian Evidence Act (in short 'IEA') permits evidence on relevant facts only to be led before the Court. Term “Relevancy” means a fact which is logically probative. A fact which helps the Court in deciding the controversy or fact in issue is a relevant fact. Rule of relevancy implies that certain facts are so connected or are so important that it is imperative to prove them for adjudicating the controversy or facts in issue. The IEA has eschewed from confining 'relevant facts' in a strait jacket formula. As per Section 3 IEA one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of IEA relating to the relevancy of facts. Therefore, relevancy of fact is a contextual term which is to be understood in the backdrop of the facts and circumstances of every case. Relevant facts are those which in a context are necessary, probative and those which lead the Court to a just conclusion. The evidence is to be confined to relevant facts and facts in issue.

Sections 5 to 55 of IEA mandates which are those facts which are relevant in the light of facts of a particular case. Once being clear as to which facts can be proved, next question arises as

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to how such relevant facts are to be proved. Admissibility of evidence deals with this aspect which simply means, mode of proof of facts which are relevant in any trial of a case. 'Relevancy' and 'Admissibility' is not the same thing. In general, relevancy is determined by logic and human experience. Generally speaking, facts which directly tend to prove or disprove a fact in issue are relevant. Admissibility of facts is no doubt mainly determined by their logical relevancy to the matters in issue, or that relation between the two which renders the latter probable from the existence or the non-existence of the former. But everything that is logically probative is not legally admissible in evidence. Admissibility is founded on law and not on logic. Admissibility presupposes relevancy. The distinction between 'proof' and 'relevancy' should here be borne in mind. In a trial the first question that presents itself is – what facts will a party be allowed to lay before the Court? This is a matter of relevancy and is determined by the pleadings or the facts in issue. The next question is – How will the Court allow the party to prove those relevant facts? This is a matter of proof.

"Mode of proof" of a particular fact or admissibility is important because it is based on law and is required to be followed in all circumstances. We experience many situations where questions as to admissibility of some evidence or document is raised in the course of trial of a matter. Whether a particular document is to be exhibited or not? If a document is to be exhibited, then whether it amounts to proof or not? These questions have no direct answers. The IEA is the most significant statute which is to be understood with only one purpose that how a particular fact can be proved.

Once a fact is sought to be proved by the best possible evidence, then the question of truthfulness or veracity of such evidence arises. The Judge assesses the facts proved from both sides to see if the case or version of which side is worth acceptance. So evaluation of evidence is the last stage in the mode

of proof which is also known as "Appreciation of evidence". Appreciation of evidence depends upon various factors like peculiar facts, peculiar category or class of witness, peculiar situation.

Above all appreciation of evidence also depends on perception and approach of a particular Judge who is to assess the facts. Thus appreciation of evidence is some thing which cannot be confined to some stated rules. Evaluation of facts is in one sense evaluation of human conduct which is of many folds and therefore every one may not assess the facts or evidence in one way. But at the same time there is equal necessity of being fair while assessing facts and one cannot be arbitrary in appreciation of evidence and then to claim that it is my way of looking at the things. Experts help the court in appreciation of evidence by giving their opinion on various subjects which is their area of specialization.

Three types of expert evidence have been discussed. These are:-

1. Handwriting expert
2. Invasive techniques namely Narco-Analysis, Brain Mapping and Lie Detector Test.
3. DNA

Before discussing these three, we shall briefly discuss what is meant by expert evidence and its history.

HISTORY OF EXPERT EVIDENCE

The Courts have been usually acting on the opinion of experts from very early times. Heropelus and Eracis were the two physicians who conducted a postmortem in 300 BC in Alexandria. A European collector William Hershal discovered the factum that persons could be distinctly identified with the help of fingerprints. Before the 16th Century, the trial was merely a submission to a mechanical process of proof. At that time there

was no person named as an expert. Cases were tried by a group of rational men, using reasoning process upon the information before them. Jury system was there and witnesses who were acquainted with the facts of the case were included in the jury panel. For the first time, it was in 1562, that a process was issued to compel witnesses to attend and testify in the Common Law Courts. At that time, Courts used two types of methods for obtaining the specialised knowledge. One was to empanel a jury of persons specially qualified to pass judgments in a particular case. The second was for the Court to summon skilled persons to inform about matters beyond its knowledge.

WHAT IS 'EXPERT OPINION' AND WHO IS AN EXPERT?

It is very difficult to give a precise definition for the term 'expert opinion'. Simply one can say that 'expert opinion' is opinion given by an expert. But that is not sufficient.

In Indian law, the term 'expert opinion' is not directly defined any where in the IEA or in any other Statue. Section 45 of the IEA simply says that the persons who are specially skilled in foreign law, science, art, handwriting or finger impressions are called experts. Thus Section 45 limits the subject to expert testimony.

As a stepping-stone, Patna High Court got an opportunity to interpret Section 45 of the IEA in *Basudeo Gir* v. *State*.[1]

The facts were that one Basudeo Gir was charged and convicted by the judicial commissioner of Chotanagpur for the offence of dacoity with an attempt to cause death of one Ramkishan Ram. The only evidence against the accused was the sole testimony of Ramkishan Ram and a footprint found in his house on a gramophone record. The said print was photographed and sent to a foot print expert along with the print taken from the accused in triplicate. The question before the Court was whether

[1] AIR 1959 Pat 534.

footprint evidence could be made admissible under Section 45 of the IEA. Giving a liberal interpretation to Section 45, Mishra J. referred to the word "science" as defined in the Universal Dictionary of English Language as proficiency, dexterity, skill based on long experience and practice and came to the conclusion that it was sufficiently wide enough to include the evidence of foot print expert. Analysing Section 45 he said that the very amendment made out in Section 45 to include finger impression showed that it was the policy of the legislature to take the merit of developments in science.

From this case it is clear that in India the words "Science and Art" can be interpreted liberally to include all relevant changes in the science and technology. The only limitation is that in each case the new subject to testimony should come under 'Science and Art'.

Handwriting Expert

Identification of handwriting is important because under Section 67 of the IEA identifying the handwriting or the signature in the documents can prove the identity of the executor of the document. The ordinary methods of proving handwriting are:-

1. By calling as a witness a person who wrote the document.
2. By own admission of the person against whom the document is tendered.
3. By calling as a witness a person who saw the document being signed.
4. By comparison of handwriting under Section 73 of the Act.
5. By a person qualified to express an opinion as to hand writing under Section 47 of the Act,
6. By expert opinion under Section 45 of the Act.

The first and second methods mentioned above are

excluded whenever the author of the document in question is an interested party. The third method is not feasible as more often than not there is no eyewitness of the execution of the document unless law mandates presence of witnesses for execution of that document. Out of other three methods, expert opinion under Section 45 of the IEA is the most common method employed by Courts.

Section 45 of IEA states that opinion of a person skilled in question as to identity of handwriting is relevant in determination of the identity of handwriting before the Court. There are two ways in which handwriting experts give their opinion. In most cases their opinion is based on an ocular comparison of the handwriting in the questioned document with authentic samples of handwriting of the author. In other cases, their opinion is based on observing the questioned documents under certain scientific instruments.

Origin of Expert Opinion

Expert opinion on handwriting identification, developed in the United States and the United Kingdom in the latter half of the nineteenth century. Expert opinion on handwriting was called for because juries had to struggle with decisions on the authenticity of the documents and thus, expert opinion prospered in an environment where there was nothing better to determine the authenticity of the documents. Similarly, under Section 67 of the IEA, the execution of a document can be established by proving the identity of the handwriting or signature in that document.

Expert opinion in handwriting originated in such a backdrop. Thus, expert evidence for proof of handwriting arose not on its own merits as a means of handwriting identification but due to the lack of other effective means to determine the authorship of a questioned document.

Whether accused can be compelled to give his handwriting samples during investigation?

In the case of *State of Bombay* v. *Kathi Kalu Oghad*,[2] the Supreme Court clearly held that "to be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification". The Supreme Court further observed that "the giving of fingers impression or of specified signature or of handwriting, strictly speaking, is not "to be a witness". The expression "to be a witness" was held by the Court to mean imparting knowledge in respect of the relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a Court or to a person holding an enquiry or investigation.

Post amendment in Section 311-A of the Code of Criminal Procedure, 1973 (amended on 23-6-2006) the Court can direct taking of handwriting samples even in the course of investigation.

Appreciating Hand Writing's Expert Evidence

Evidence of hand writing expert is to be appreciated with most caution. It has been the consistent view of the Apex Court and different High Courts that evidence of hand writing expert though can be useful for deciding crucial question of identification of hand writing of parties in civil or criminal proceedings, but such evidence can not be the sole basis for concluding either way.

It is again to be kept in mind that evidence of hand writing expert in some case may prove to be most important, thus value to be attached with such evidence also depends on other facts and

[2] AIR 1961 SC 1808: 1961 (2) Cri LJ 856.

evidence proved on record. In *Murari Lal* v. *State of M. P.*,[3] it was observed that:

> *"There is no rule of law, nor any rule of prudence which has crystallized into a rule of law, that opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach should be one of caution. Reasons for the opinion must be carefully document in question is an interested party.*
>
> *All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of a handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a question of testimonial weight."*

In *State of Maharashtra* v. *Sukhdeo Singh*[4] it was held that a handwriting expert is a competent witness whose opinion evidence is recognized as relevant under the provisions of the Evidence Act and has not been equated to the class of evidence of an accomplice. It would, therefore, not be fair to approach the opinion evidence with suspicion but the correct approach would be to weigh the reasons on which it is based. The quality of his opinion would depend on the soundness of the reasons on which it is founded. But the Court cannot afford to overlook the fact that the science of identification of handwriting is an imperfect and frail one, as compared to the science of identification of finger-prints. Courts have, therefore, been wary in placing implicit reliance on such opinion evidence and have looked for corroboration but that is not to say that it is a rule of prudence of general application regardless of the circumstances of the case

[3] 1980 AIR 531, 1980 SCR (2) 249.
[4] 1992 AIR 2100, 1992 SCR (3) 480.

and the quality of expert evidence. No hard and fast rule can be laid down in this behalf, but the Court has to decide in each case on its own merits what weight it should attach to the opinion of the expert. In the instant case, the opinion evidence of handwriting expert was not so 'high' as to commend acceptance without corroboration.

The Fundamental Problems with Expert Opinion on Handwriting

1. The non-scientific nature of expert opinion based on comparison.

While comparing handwriting samples, large numbers of variables are compared. However, these variables on which the expert bases his opinion are only evidence of some tendencies, which can also be affected by numerous extraneous factors such as state of mind, hurry, self-consciousness, intoxication, nature of paper, type of pen, etc. Consequently, the nature of this evidence is fundamentally different from other forensic evidence which can be determined by the objective and impersonal nature of criteria such as the kind of blood, the nature of a fingerprint which are objective facts and can be determined under a microscope or any other scientific instrument. It is not surprising that some tests conducted in the United States show that as few as thirteen percent of the experts to whom samples were sent for identification, could identify the correct author.

Position of expert opinion on handwriting has become jeopardized as the reasoning and methodology underlying the handwriting expert testimony is a sample method of comparison which is not backed by any solid scientific technique.

2. Problem caused due to conflicting opinion of experts.

An interesting situation arises when expert opinion on handwriting which is, in any case, considered to be one of the weakest kinds of evidence, is countered by contrary expert

opinion. In such a case the Court may follow one of the two paths. It may see which of the two experts is more reliable and thus, rely on testimony of that expert or it may on its own analyze the reasons given by both the experts for their view.

Invasive Techniques Namely Narco-Analysis, Polygraph and Brain Mapping Tests

For some time now, a set of scientists has been glorifying the "magic" of a "truth serum". They insist it can make hard-core criminals talk and spill the truth about their misdeeds. The narco analysis method during the past was used only by psychiatrists to find out psychological truth which was achieved by using one or two barbiturates such as sodium amytal or scopolamine. The application of this technique for criminal investigation was adopted in the early 1950s. The first successful report of this technique came from the University of Minnesota. The real credit goes to Robert House, who in 1922 first used it on two prisoners in the Dallas County jail. His experiment and conclusion attracted wide attention and the idea of 'truth serum' is believed to have first appeared in a news report of House's experiment.

Medical professionals are often involved in experiments, for many decades now, with the various technologies that are used in "lie detection", including brain mapping (polygraph and functional magnetic resonance imaging) and the so-called truth serum (use of sodium pentothal) in narco-analysis.

A Brief Outline of the Narco-Analysis Test

The term Narco-Analysis is derived from the Greek word narkç (meaning "anesthesia" or "torpor") and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly barbiturates, to induce a stupor in which mental elements with strong associated affects come to the surface, where they can be exploited by the therapist. The narco analysis test is conducted by mixing three grams of Sodium Pentothal or Sodium Amytal dissolved in 3,000 ml of distilled

water. Narco Test refers to the practice of administering barbiturates or certain other chemical substances, most often Pentothal Sodium, to lower a subject's inhibitions, in the hope that the subject will more freely share information and feelings. A person is able to lie by using his imagination. In the Narco-Analysis Test, the subject's inhibitions are lowered by interfering with his nervous system at the molecular level. In this state, it becomes difficult though not impossible for him to lie. In such sleep-like state efforts are made to obtain "probative truth" about the crime.

Polygraph or Lie Detection Test

It is an examination, which is based on an assumption that there is an interaction between the mind and body and is conducted by various components or the sensors of a polygraph machine, which are attached to the body of the person who is interrogated by the expert. The machine records the blood pressure, pulse rate and respiration and muscle movements. Polygraph test is conducted in three phases- a pretest interview, chart recording and diagnosis. The examiner (a clinical or criminal psychologist) prepares a set of test questions depending upon the relevant information about the case provided by the investigating officer, such as the criminal charges against the person and statements made by the suspect.

The subject is questioned and the reactions are measured. A baseline is established by asking questions whose answers the investigators know. Lying by a suspect is accompanied by specific, perceptible physiological and behavioral changes and the sensors and a wave pattern in the graph expose this. Deviation from the baseline is taken as a sign of lie. All these reactions are corroborated with other evidence gathered. The polygraph test was among the first scientific tests to be used by the interrogators.

It was Keeler who further refined the polygraph machine by adding a Psycho-galvanometer to record the electrical

resistance of the skin.

P300 or the Brain Mapping Test

This test was developed and patented in 1995 by neurologist Dr. Lawrence A. Farwell, Director and Chief Scientist "Brain Wave Science", IOWA. In this method, called the "Brain-Wave Finger Printing"; the accused is first interviewed and interrogated to find out whether he is concealing any information. Then sensors are attached to the subject's head and the person is seated before a computer monitor. He is then shown certain images or made to hear certain sounds. The sensors monitor electrical activity in the brain and register P300 waves, which are generated only if the subject has connection with the stimulus i.e. picture or sound. The subject is not asked any questions. Dr. Farwell has published that a MERMER (Memory and Encoding Related Multifaceted Electro Encephalographic Response) is initiated in the accused when his brain recognizes noteworthy information pertaining to the crime. These stimuli are called the "target stimuli". In a nutshell, Brain Finger Printing Test matches information stored in the brain with information from the crime scene. Studies have shown that an innocent suspect's brain would not have stored or recorded certain information, which an actual perpetrator's brain would have stored. In USA, the FBI has been making use of "Brain mapping technique" to convict criminals.

Narco-Analysis in India

A few democratic countries like India still continue to use narco analysis. This has come under increasing criticism from the public and the media in that country. Narco-Analysis is not openly permitted for investigative purposes in most developed and/or democratic countries.

In India, the Narco-Analysis test is done by a team comprising of an anesthesiologist, a psychiatrist, a clinical/ forensic psychologist, an audio-video grapher, and supporting nursing staff. The forensic psychologist will prepare the report

about the revelations, which will be accompanied by a compact disc of audio-video recordings. The strength of the revelations, if necessary, is further verified by subjecting the person to polygraph and brain mapping tests. Narco-Analysis is steadily being mainstreamed into investigations, court hearings, and laboratories in India. However, it raises serious scientific, legal, and ethical questions.

Efficacy of These Techniques from Constitutional & Legal Stand Points

The main provision regarding crime investigation and trial in the Indian Constitution is Art. 20(3). It deals with the privilege against self-incrimination. The privilege against `self incrimination is considered to be a fundamental canon of Common law criminal jurisprudence. As per it, the accused is presumed to be innocent, that it is for the prosecution to establish his guilt, and that the accused need not make any statement against his will. These propositions emanate from an apprehension that if compulsory examination of an accused were to be permitted then force and torture may be used against him to entrap him into fatal contradictions. The privilege against self-incrimination thus enables the maintenance of human privacy and observance of civilized standards in the enforcement of criminal justice. Art. 20(3) which embodies this privilege, reads :

"*No person accused of any offence shall be compelled to be a witness against himself*".

If the confession from the accused is derived from any physical or moral compulsion (be it under hypnotic state of mind) it should stand to be rejected by the Court. In the Cr.P.C, the legislature has guarded a citizen's right against self-incrimination. Section 161 (2) of the Cr.P.C states that every person "is bound to answer truthfully all questions, put to him by a police officer, other than questions the answers to which, would have a tendency to expose that person to a criminal

charge, penalty or forfeiture".

In the context of above Constitutional and statutory rights available with an accused in a criminal matter, the application of Narco-Analysis Test involves the fundamental question pertaining to judicial matters and also to Human Rights. Subjecting the accused to unwillingly undergo the test, as has been done by the investigative agencies in India, is considered violation of Art. 20(3) of Constitution. It is said that this practice is against the maxim *Nemo Tenetur se Ipsum Accusare* that is, 'No man, not even the accused himself can be compelled to answer any question, which may tend to prove him guilty of a crime, he has been accused of'."

It is well established that the Right to Silence has been granted to the accused by virtue of the pronouncement in the case of *Nandini Sathpathy* v. *P. L. Dani*,[5] no one can forcibly extract statements from the accused, who has the right to keep silent during the course of interrogation (investigation).

The main issue thus is the question of its admissibility as a scientific technique in investigations and its ultimate admissibility in court as forensic evidence. Till the recent past, Narco-Analysis on the accused was not being considered to be violative of the above Constitutional and statutory provisions. In *Dinesh Dalmia* v. *State*[6] where the accused had allegedly siphoned off huge amount of money and the investigating agency was completely in the dark as to the end use of such amount, it sought to conduct scientific test on the accused like Polygraph, Narco-Analysis and Brain Mapping to bring out clinching evidence. This was challenged. It was held that conducting of polygraph, Narco-Analysis and Brain Mapping tests would amount to breaking his silence by force and intrusion of his constitutional right to remain silent.

[5] (1978) 2 SCC 424: 1978 AIR 1025.
[6] 2006 CRI. L. J. 2401.

Article 20(3) gives protection against testimonial compulsion. In *Nandini Satpathy* v. *P. L. Dani*[7] the Apex Court has held protection given to the accused commences as soon as a formal accusation is made whether before or during prosecution.

Bombay High Court in *Abdul Karim Telgi* case held that "certain physical tests involving minimal bodily harm" like narco-analysis and brain mapping did not violate Article 20(3) and did not compromise the constitutional protection against self-incrimination. The saving grace is that the confession or the statement made during narco-analysis is not admissible as evidence in a court of law, and that is the reason why the protection against self-recovery incrimination under Article 20 (3) is not breached. The disclosure leading to the recovery of incriminating material, like a murder weapon or forged documents, is admissible. In the above-mentioned case Bombay High Court apparently held that Narco-Analysis is permissible because it involves "minimal bodily harm", which implies that all such methods of extracting information that inflict minimal bodily harm are legally permissible. Also, in *Shailender Sharma* v. *State & Another*,[8] decided on 14th November 2008 by the Delhi High Court, it was held that these tests are aid to investigation and were held to be Constitutional.

Now, the controversy on the issue in hand has been set at rest by the Apex Court in the matter titled as *Selvi* v. *State of Karnataka*[9] wherein it has held as under:-

> *"The compulsory administration of the impugned techniques violates the right against self-incrimination. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20 (3) of the Constitution (No person accused of any offence shall be compelled to be a witness against himself)*

[7] *Supra* n. 5.
[8] WP (Crl) 532/2008, MANU/DE/1626/2008.
[9] (2010) 7 SCC 263, MANU/SC/0325/2010.

protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory."

Further, it was held "We are of the considered opinion that no individual can be forced and subjected to such techniques involuntarily, and by doing so it amounts to unwarranted intrusion of personal liberty".

DNA TEST

One of the persistent and major problems of the law of evidence has been to bridge the gap between legal validity and reality. Technology to some extent provides some ways to achieve this purpose. The introduction of DNA technology into forensic science has given startling dimensions to the justice delivery system. DNA fingerprinting or DNA profiling or any of the several similar techniques for analyzing and comparing DNA from separate sources are used especially in law enforcement to identify suspects from hair, blood, semen, or other biological materials found at the scene of crime. It is a powerful investigation tool because with the exception of identical twins, no two persons can have the same DNA. This fact makes DNA technology more authentic and effective.

DNA evidence, apart from its use in criminal law to determine the killer or the rapist, is also employed for various other purposes. Amongst its varied applications, paternity testing, personal identification (of a mutilated body or skeletal remains), study of the evolution of the human population and study of inherited diseases like Alzheimer's disease etc. are included. The success rate in solving complex cases in Criminal Law has greatly increased after the discovery and use of DNA evidence technologies. The introduction of DNA evidence in the field of Criminal Law has particularly facilitated convictions in the matters involving the offence of rape.

Definition of DNA Testing

DNA is an abbreviation of Deoxyribo Nucleic Acid. It is an organic substance, which is found in every living cell and gives an individual a personal genetic blue print. It can be extracted from a whole variety of different materials like, blood, saliva, semen, hair, urine, body fluids, bones, body organs etc.

The development of forensic DNA testing has expanded the types of useful biological evidence. In addition to semen and blood, such substances as saliva, teeth, and bones can be sources of DNA. These sources are expanding still further, as researchers explore the potential of other biological substances, such as hair, skin cells, and fingerprints.

DNA & its Evidentiary Value

DNA testing has become an established part of the criminal justice procedure, and the admissibility of the test results in Court has become routine. Although DNA testing has accomplished a great deal in opening up new sources of forensic evidence, its full potential to identify perpetrators and exonerate people falsely convicted has yet to be realized. This requires further advances in testing technology and in systems to collect and process the evidence.

However the real problem lies in collection of accurate samples and matching it with the sample of the suspect or accused. In this regard the question arises whether sample can be taken only by consent or with force, when consent is not given. This issue involves two type of protection available to any one under the Constitution. The first is general protection relatable to the right to privacy as part of right to life and liberty guaranteed under Art. 21 of the Constitution. The second protection is specific as available to person, accused of an offence and guaranteed under Art. 20 (3) of the Constitution .

Regarding evidentiary value of DNA technology, the

leading decision is *Goutam Kundu* v. *State of West Bengal*[10] where the Supreme Court held that no person can be compelled to give sample of blood for analysis against his or her will and no adverse inference can be drawn for such refusal.

This decision was followed in *Banarasi Dass* v. *Teeku Dutta*[11] where the Supreme Court held again that the DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given, as was noted in Goutam Kundu case.

Second Test for DNA When Permissible

Sample for DNA can be allowed to be taken as per guide lines laid down by the Apex court in Goutam Kundu's case. However, second sample for DNA test in normal circumstances are not to be allowed. The matter relating to DNA finger printing and the order for conducting the second DNA test was subjected to judicial scrutiny before the Gujarat High Court in *Vishal Motising Vasava* v. *State of Gujarat*.[12] Here, an earlier DNA test of the husband was undertaken and was found to be negative. When the evidence was recorded, it was the case of the original complainant that she came to know at a later point of time that the DNA test was already undertaken of the accused husband and therefore she moved an application before the trial Judge for conducting a second DNA test of the husband and the child. It was held that, the order allowing the second DNA test to be conducted, cannot be a said to be without jurisdiction or illegal which would cause any great injustice to the party. As such, the order can be said to be a discretionary order which would not call for interference.

It is to be noted that keeping note of guidelines as laid down by the Apex court in an appropriate case, the Court can always resort to this technology for bringing most authentic

[10] (1993) 3 SCC 418 : 1993 Cri LJ 3233.
[11] (2005) 4 SCC 449.
[12] 2004 CRI. L. J. 3086.

evidence possible. In cases where allegations are that the accused had sexual relations with the victim on assurance of marriage as a result of which children were born, a strong prima facie case can be made out by the victim. Denial to direct conduct of DNA test in order to determine paternity of children is not proper. Courts have wider power to issue direction to police officer to collect blood sample from accused and conduct DNA test for purposes of further investigation under Section 173(8). However, the Court must have sufficient material before it, to enable it to exercise its discretion.

It cannot be said that the Court has no power to order blood test or DNA test to be conducted. Nobody has got a fundamental right as such without anything more on facts to object to such test being conducted. As a matter of fact whether or not such a DNA test is required to be done is a matter that will have to be considered in the facts and circumstances of the case.

Appreciation of Evidence of DNA Test in Detecting Truth

The remarkable feature of DNA is that individuals leave traces of it almost everywhere. A variety of offences such as murder, rape, armed robbery, extortion and drug trafficking yield themselves to the application of DNA collection and testing. As regards the offence of murder, DNA samples that are collected from the blood, mucous, saliva, skin, hair samples etc, found on the crime scene are employed to extract the DNA sample. For example blood samples from a scene of murder or samples of seminal fluids deposited on the clothes or furniture or in the body of the victim of rape can be used to acquire a sample of the culprits DNA. These samples can be compared with those taken from a possible suspect in the case. This provides for a very effective technique to nail the culprit. The DNA samples of the culprit can be obtained from the scene of crime itself.

Prior to the use of DNA evidence, matters involving the offence of rape could be solved primarily by circumstantial

evidence only. It was very difficult for the victim of rape to prove the offence in the absence of either circumstantial evidence or an eyewitness, which was very rare. Since, the introduction of the DNA evidence, this has been greatly simplified. First samples of the seminal fluids found at the scene of crime by the investigating officer are analyzed. If this is not available, then samples of the seminal fluid are extracted from the victims body itself. The DNA from this sample is then compared with the DNA sample taken from the accused. If the report establishes that these samples match, then this acts as evidence in the Court to prove rape.

Denial of Paternity: Whether DNA Test A Solution

In a case where paternity of a child is disputed or where question in issue is regarding parentage of child, provisions of Section 112 Evidence Act are available which provides:

> "*That fact that any person was born during the continuance of a valid marriage between his mother and any man or within 280 days after it's dissolution the mother remaining unmarried shall be conclusive proof that he is legitimate son of that man unless it can be shown that the parties to marriage had no access to each other at any time when he could have been begotten.*".

However, this presumption shall be rebutted if it is shown that the mother of child and that man had no access to each other at any time when the child would have been begotten. Indian Courts have time and again held that the evidence for proving non-access must be strong, distinct, satisfactory and conclusive. DNA tests can be strong evidence as they are correct upto 99% if positive and 100% if negative.

The Apex Court in *Goutam Kundu* v. *State of W. B.*,[13] held as under:-

> "*This section 112 is based on the well-known maxim "pater est quem nuptiae demonstrant"(he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate. It throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiations (parentage) may be presumed, the law in general presuming against vice and immorality.*
>
> *It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.*"

The Apex Court in a later decision in *Kamti Devi* v. *Poshi Ram*,[14] with particular reference to modern scientific advancements with Dioxy Nucleic Acid (DNA) and Ribonucleic Acid (RNA) tests, observed:

> "..... *Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d`etre is the legislative concern against illegitimatizing a child. It is a sublime public policy, that children should not suffer social disability on account of the latches or lapses of parents.*"
>
> *We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with*

[13] 1993 AIR 2295: 1993 SCR (3) 917.

[14] AIR 2001 SC 2226.

Dioxy Ribo Nucleic Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g., if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

Thus on the basis of what has been discussed, it can be safely concluded that with advancement in Science, the detection and proving of aimes or facts has become more accurate.

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AGE DETERMINATION UNDER THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

Ms. Anuradha*

20th century Jurisprudence took a big leap when it acknowledged and amalgamated liberal and humane theories of juvenile justice and extended immunity from criminal responsibility to the persons below the age of 18 years. Original Jurisdiction of criminal courts over juveniles in India has accordingly been shifted to Juvenile Justice Boards, constituted under Section 4 of the Juvenile Justice (Care & Protection of Children) Act, 2000. This shift germinated from the philosophy that humans while growing up to a particular age, do not possess sufficient maturity to take the responsibility for their acts. The First Jail Committee Report also recommended that young persons should not be kept in jails as far as possible. Studies done in the science of human behavior established that a person up to the age of 18 years was capable of being reformed, if provided with suitable environment. In recognition of such findings and their acceptance by United Nations General Assembly in the Convention on the Rights of Child (CRC) in 1989, Juvenile Justice Law introduced "Rehabilitative and Reformative Measures" instead of "Punishment".

Understandably, "Determination of Age" assumes enormous significance in deciding the question of jurisdiction and applicability of the Juvenile Justice Act and a voluminous case law has come up in this regard, making "Age

* Principal Magistrate, JJB.

Determination" as the most complex and crucial subject. The historic *Ram Deo Chauhan* v. *State of Assam*[1] case is the most classic case study on this subject wherein a person succeeded in establishing his claim of juvenility after litigating over his claim for 13 years in the Trial Court, High Court and several times in Supreme Court. Age determination still remains a highly complex and technical issue.

Section 2(k)[2] of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'Act of 2000') defines child/ juvenile as a person who has not completed the age of 18 years and as per Section 2(l)[3] a juvenile in conflict with law (in short 'JCL') is the person who was less than 18 years of age on the date when he got involved in a situation of conflict with law. Thus two categories of juveniles may come before the Juvenile Justice Board (hereinafter referred to as JJB) - the ones who are actually juveniles when they are brought before the Board and the ones who are not juveniles when they are brought before the Board but are covered by the definition of JCL as per Section 2(l) being juveniles at the time when they got involved in the commission of an offence. The JCLs of the second category can be of any age when they are brought before the Board, being the persons who were juveniles on the date of commission of an offence or where the offence was committed earlier but the persons involved in the offence are apprehended much later.

II. Relevant Date for Computing the Age for Juvenility

1 AIR 2001 SC 2331.

2 Section 2 (k) -"juvenile" or "child" means a person who has not completed eighteenth year of age.

3 Section 2 (l)- "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.

Earlier there was a conflict as to what was the relevant date for computing the age of juvenility with the Act of 1986 not being clear on the same. This led to much hardship, as the date was variously interpreted and in some cases, even the date on which the person involved in the offence was produced before the Board was considered the relevant date which deprived many juveniles of the benefit of the provisions of the Act of 2000. The issue came up before the Hon'ble Supreme Court in many cases and the decision given by the Apex Court in *Pratap Singh* v. *State of India*[4] which was further elaborated in *Hari Ram* v. *State of Rajasthan*[5] holds good till date. The issue of the relevant date was first settled by the Apex Court in *Umesh Chandra* v. *State of Rajasthan*[6]:

> *"The relevant date for applicability of the Act was held to be the date on which the offence takes place. The court was of the opinion that it was quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child."*

The issue was again raised in *Arnit Das* v. *State of Bihar*[7] where the Supreme Court held that:

> *"The crucial date for determination of juvenility is the date when the person concerned is brought in front of the competent authority. The date of the commission of offence is irrelevant."*

In 2005, the issue of relevant date for determination of age was reconsidered by the Supreme Court in *Pratap Singh's case*[8] when the Supreme Court once again held that:

> *"The reckoning date for the determination of the age of the*

4 AIR 2005 SC 2731.

5 2009 (6) SCALE 695.

6 AIR 1982 SC 1057.

7 AIR 2000 SC 2264.

8 *Supra* n. 3.

juvenile is the date of an offence and not the date when he is produced before the authority or in the Court."

The issue has been made clear by the present Act that it is the date of the offence which is the relevant date for computing the age of the person involved in the offence.

III. Applicability of Act to Juveniles not so Under the Act of 1986

Another issue arose regarding the applicability of the Act to the juveniles who were JCL's as per the Act of 2000 but were not so as per the Act of 1986 i.e. the persons who were between sixteen and eighteen years of age at the time of commission of offence. The issue stands settled by Section 20 of the Act of 2000 which says that all such persons who were above sixteen years but below eighteen years on the date of coming into force of the Act of 2000 shall be covered by the Act of 2000. This provision brought many persons who were not considered juveniles as per the earlier legislation within the ambit of the Act. In fact the Explanation[9] incorporated in this section further requires that in all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a JCL in any court, the determination of juvenility has to be in terms of Section 2 (l),[10] even if a juvenile had ceased to be so on or before the date of commencement of the Act and the provisions thereof would apply as if it had been in force for all purposes at all material times, when the alleged offence had been committed.

[9] Section 20. Explanation.—In all pending cases including trial, revision or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.

[10] *Supra* n.2.

The Explanation to Section 64[11] further clarifies that in all cases where a JCL was undergoing a sentence of imprisonment at any stage on the date of commencement of the Act of 2000 i.e. 1.4.2001, his case including the issue of juvenility, shall be deemed to be decided in terms of Section 2 (l) and other provisions contained in the said Act and the rules made thereunder, irrespective of the fact that he ceases to be a juvenile on or before such date and accordingly he shall be sent to the special institution, as the case may be, for the remainder of the period of the sentence but such sentence shall not in any case exceed the maximum period provided in Section 15 of the Act. Rule 98[12] also

[11] Section 64. Juvenile in conflict with law undergoing sentence at commencement of this Act.—In any area in which this Act is brought into force, the State Government shall direct that a juvenile in conflict with law who is undergoing any sentence of imprisonment at the commencement of this Act, shall, in lieu of undergoing such sentence, be sent to a special home or be kept in fit institution in such manner as the State Government thinks fit for the reminder of the period of the sentence; and the provisions of this Act shall apply to the juvenile as if he has been ordered by the Board to be sent to such special home or institution or, as the case may be, ordered to be kept under protective care under sub-section (2) of section 16 of this Act:
Provided that the State Government or as the case may be the Board, may, for any adequate and special reason to be recorded in writing, review the case of a juvenile in conflict with law undergoing sentence of imprisonment, who has ceased to be so on or before the commencement of this Act, and pass appropriate order in the interest of such juvenile.
Explanation.-- In all cases where a juvenile in conflict with law is undergoing a sentence of imprisonment at any stage on the date of commencement of this Act, his case including the issue of juvenility, shall be deemed to be decided in terms of clauses (1) of section 2 and other provisions contained in this Act and the rules made thereunder, irrespective of the fact that he ceases to be a juvenile on or before such date and accordingly he shall be sent to the special home or a fit institution, as the case may be, for the remainder of the period of the sentence but such sentence shall not in any case exceed the maximum period provided in section 15 of this Act.

[12] Rule 98. Disposed off cases of juveniles in conflict with law.—The State Government or as the case may be the Board may either suo motu or on an application made for the purpose, review the case of a person or a juvenile in conflict with law, determine his juvenility in terms of the provision contained in this Act and the rule 12 of these rules and pass an appropriate order in the interest of the juvenile in conflict with law under section 64 of the Act, for the immediate release of the juvenile in conflict with law whose period of detention or imprisonment has exceeded the maximum period provided in section 15 of the said Act.

similarly provides so.

The retrospective effect of the Act of 2000 and the applicability of Sections 7A and 2(k) read with Section 20 was dealt with by the Supreme Court in *Hari Ram* v. *State of Rajasthan*[13] where it was held that:

> *"Section 7A of JJ Act made provision for the claim of juvenility to be raised before any court at any stage…….accordingly a juvenile who had not completed 18 years on the date of commission of the offence was also entitled to the benefits of JJ Act, 2000 as if the provisions of 2(k) had always been in existence even during the operation of 1986 Act. The said position was re-emphasized by virtue of the amendments introduced in Section 20 of the 2000 Act, whereby the proviso and explanation were added to Section 20, which made it even more explicit that in all pending cases, including trial, revision, appeal and any other criminal proceedings in respect of a juvenile in conflict with law, the determination of juvenility of such a juvenile would be in terms of clause (1) of Section 2 of the 2000 Act, and the provisions of the Act would apply as if the said provision had been in force when the alleged offence was committed."*

Thus the position is now well established that even where the persons involved in the offence were not juveniles as per the Act of 1986, if they were juveniles as per the Act of 2000, the latter would prevail. The position is further clarified by the proviso to Section 7A which provides that the claim of juvenility may be raised at any stage, even after final disposal of the case and such claim is to be determined in terms of the provisions of the Act of 2000 and the Rules made thereunder, even if, the juvenile has ceased to be so on or before the date of the commencement thereof.

[13] *Supra* n.4.

IV. Applicability of Act to Persons who Cease to be Juveniles During the Pendency of Inquiry.

A juvenile once he is found to be a juvenile in conflict with law, remains so irrespective of his acquiring the age of majority during the period of inquiry. Section 3 of the Act of 2000 takes care of the situation and lays down that where an inquiry has been initiated against a juvenile in conflict with law and during the course of such inquiry the juvenile ceases to be so, the inquiry may be made and orders may be made in respect of such person as if such person had continued to be a juvenile. This has been done to ensure that a person once declared a juvenile and treated so for the purposes of inquiry is not denied the benefits of the provisions of the Act of 2000 by virtue of the delays that may take place during the inquiry and he would continue to enjoy the benefits of the Act of 2000.

V. Provisions that Apply When Courts not Competent to Deal with Juveniles have to Deal with Juvenility.

Sections 7[14] & 7A[15] are the relevant sections for the Courts who are not empowered to exercise control over the juveniles but have to deal with juvenility, the issue being raised by a person

[14] Section 7. Procedure to be followed by a Magistrate not empowered under the Act.—(1) When any Magistrate not empowered to exercise the powers of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile or a child, he shall without any delay record such opinion and forward the juvenile or the child and the record of the proceeding to the competent authority having jurisdiction over the proceeding.

[15] Section 7A. Procedure to be followed when claim of juvenility is raised before any court.—(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that any accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be.

produced before them terming him/her as an adult. Section 7A was introduced by way of amendment in 2006 but the two sections have been an area of confusion for the courts as regards their interpretation and applicability. A bare reading of the provisions would show that Section 7 applies only to the Court of the Magistrate and Section 7 A to all Courts where the claim of juvenility is raised. Section 7 refers to cases where a person is produced before the Magistrate "as per provisions of the Act" which in its ordinary connotation could only mean such cases where a person had prima-facie been found to be covered by the Act of 2000 but for certain reasons which could be non availability of the Board after Board hours or on holidays had been brought before the Magistrate's court. The Magistrate in such cases, without any delay, after recording his opinion has to forward the juvenile to the Competent Authority.[16] However the view that has generally been taken on the issue and mainly keeping in view the fact that a Magistrate's Court is different from the Sessions Court procedurally being the Court of remand as well prior to filing of charge-sheet, is that the Magistrate before whom a child is brought and where the charge-sheet has not yet been filed, shall forward him to the JJB forthwith, if he is of the opinion that the person produced before him could be a juvenile.

Another view has been that Section 7 can be used at any time by the Magistrate if he on any date forms an opinion as stated hereinabove. However, the word "*brought*" connotes that the provisions under Section 7 are to be used during the period of remand as it is only during the said period that the accused is brought before the Court though not summoned. After the investigation the accused appears in the Court in answer to summons or warrants as the case may be, though technically he

[16] Section 2(g) – "competent authority" means in relation to children in need of care and protection a Committee and in relation to juveniles in conflict with law a Board.

might still be produced being in judicial custody. There is a basic difference in production without summons and production in answer to summons or warrants after the challan has already been filed in the court. Thus if the latter view is taken it would lead to discrimination between children on the basis of the court in which they are produced and here lies the difference in applicability of Sections 7 and 7A.

Section 7 A creates an obligation on the Court before which a claim of juvenility is raised, to make an inquiry and declare juvenility after taking such evidence as may be necessary and to record a finding if the person who claimed juvenility is or is not a juvenile. Section 7 on the contrary says that the juvenile is to be sent to the Board immediately, if the Magistrate has formed an opinion that the person could possibly be a juvenile leaving it for the Board to take up the inquiry and declare the age of the child as per law.

VI. Procedure for Determination of Age

The Government of India in 2007 had framed the Juvenile Justice (Care and Protection of Children) Rules, 2007 for better implementation and administration of the provisions of the Act which are in the form of "model rules" leaving it to the states to formulate their own rules. Rule 12[17] of the model rules lays down

[17] Rule 12. Procedure to be followed in determination of Age.—(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
(2) The court or the Board as the case may be the committee shall decide the juvenility or otherwise of the juvenile or the child as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.
(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or as the case may be, the Committee by seeking evidence by obtaining—

the chronology in which the documents of age are to be considered by the Boards for declaring the age of a person claiming juvenility or prima facie held a juvenile.

Sub rule 2 of rule 12 has often led to confusion and juvenility or otherwise is declared on the basis of physical appearance or whatever documents that may be available such as an I-card or other document without much verification of the same. The correct interpretation however is that sub-rule 2 has a limited applicability when a juvenile is produced and the court or the Board is required to form an opinion regarding sending him to an Observation Home or Jail. If the person standing before the Court/Board prima facie appears to be a child and no document of his age is available his physical appearance should be the guiding factor for the court to decide where he should be kept during the period his age is inquired into as per law.

Rule 12 says that if the documents mentioned in the list are unavailable then and only then can the Boards/Courts order

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
(ii) the date of birth certificate from the school (other than a play school) first attended; and in absence whereof;
(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in absence of either (i) , (ii) or (iii) of clause (a) above the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the board or as the case may be, the committee, for the reasons to be recorded by them may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year

And while passing orders in such cases shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of he evidence specified in any of clauses (a) (i),(ii), (iii) or in absence whereof, clause (b) shall be the conclusive of proof of age as regards such child or the juvenile in conflict with law.

medical examination for the purpose of determining the age of a person. Thus if the documents of age of a juvenile as mentioned in (i), (ii) or (iii) are available it would be contrary to the rules to order medical examination of a child unless the said documents are proved to be forged or otherwise inadmissible under law. Often the Courts order medical examination in-spite of documents of age being available resulting in bias in declaration of age on the basis of medical documents.

It has been held by the Supreme Court that wherever there is a conflict between documentary evidence and medical report the documentary evidence will be considered as correct. It was held that the appellant had produced school certificate correctness whereof was not questioned and although he was medically examined for determination of age, the doctor based his opinion only on an estimate and possibility of an error of creeping into the said opinion could not be ruled out.[18] The Supreme Court, recently in *Shah Nawaz* v. *State of UP & Anr.*[19] reiterated that the document of age if available has to be considered over and above the medical examination report and it was held:

> *"Rule 12 of the Rules categorically envisages that the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any panchayat or municipality is not available. We are of the view that though the Board has correctly accepted the entry relating to the date of birth in the mark sheet and school certificate, the Additional Sessions Judge and the High Court committed a grave error in determining the age of the appellant ignoring the date of birth mentioned in those documents which is*

[18] Bhoop Ram v. State of U.P., AIR1989SC1329.
[19] 2011 STPL (Web) 666 SC.

illegal, erroneous and contrary to the Rules."

Thus the issue stands well settled that the medical examination can be ordered and the report relied upon to declare the age only if no other documentary proof of age as specified in rule 12 is available. At the same time there have been a series of pronouncements by the Apex Court on when the documents filed by a person can be rejected and when would they have a binding affect. It has been held that even if there are two dates of birth of a child mentioned in two different documents produced on his behalf, the records should not be discarded presuming them to be forged without considering the reasons for the existence of the two and the variance therein. In *Umesh Chandra* v. *State of Rajasthan*[20] it was held:

> *"In our country, it is not uncommon for parents sometimes to change the age of their children in order to get some material benefit either for appearing in examination or for entering a particular service which would be denied to a child as under the original date of birth he would be either under-aged or ineligible. Thus, the appellant's father has given a cogent reason for changing the date of birth and there is no reason not to accept his explanation particularly because the offence was committed seven years after changing the date of birth, and, therefore, there could be no other reason why the father should have gone to the extent of filing an affidavit to change the date, except for the reason that he has given."*

It has been held that the records of public school can be relied upon but the ones which are recorded without any basis cannot be relied upon. In *Birad Mal Singhvi* v. *Anand Purohit*[21] it was held:

> *"The entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value and the dates of birth as mentioned therein could not be accepted."*

Similarly in *Babloo Pasi* v. *State of Jharkhand and Anr.*[22] it was held:

> *"There was nothing on record to show that the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in Section 35 of the Indian Evidence Act. No statement has further been made by the said Head Master that either of the parents of the appellant who accompanied him to the school at the time of his admission therein made any statement or submitted any proof in regard thereto. The entries made in the school leaving certificate, evidently had been prepared for the purpose of the case. All the necessary columns were filled up including the character of the appellant. It was not the case of the said Head Master that before he had made entries in the register, age was verified. If any register in regular course of business was maintained in the school; there was no reason as to why the same had not been produced."*

Thus the Courts have repeatedly endorsed that the Courts should lean in favour of the documentary record if available as against the medical record of age, but it has also been clarified that the Courts/Boards do not have to accept the documentary evidence on the face of it and have to satisfy themselves about the genuineness thereof. It is also the settled law that the Courts/Boards should lean in favour of juvenility if two different

[20] *Supra* n.5.
[21] 1988 Supp. SCC 604.
[22] 2009(1)JCR73(SC).

views are possible from the material on record. In *Arnit Das* v. *State of Bihar*[23] it was held that:

> *" While dealing with the question of determining the age of a person for the purposes of finding out whether he is a juvenile or not, a hyper technical approach should not be adopted while appreciating evidence in support of the plea of juvenility if two views may be possible on the said evidence, the court should lean in favour of holding him to be a juvenile in border line cases".*

VII. Delhi Juvenile Justice (Care and Protection of Children) Rules 2009 *vis-à-vis* the Juvenile Justice (Care and Protection of Children) Rules 2007.

Delhi has drafted its own rules based on the "model rules" known as the Delhi Juvenile Justice (Care and Protection of Children) Rules 2009 (hereinafter referred to as the Delhi JJ Rules). In the Delhi JJ Rules there is a deviation from the "model rules" in the chronology of documents prescribed for consideration for the declaration of age.[24] Rule 12 of the Delhi JJ Rules categorically says

[23] *Supra* n.6.

[24] Rule 12. (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:-

(a) (i) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(ii) the date of birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) the matriculation or equivalent certificates, if available;

(b) and only in the absence of either (i), (ii) and (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a) (i), (ii) and (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

that it is the record of the first attended school which is to be treated as the record of age of child and if this document is not available, the Board can look into the birth certificate and the matriculation certificate in that order. This has perhaps been done as in many cases the children may not have completed Class X and many children drop out from school at an early age. This also rules out the later stage manipulations where the parents get a different date of birth recorded in higher classes contrary to what is recorded in the first attended school.

This however, creates a problem as the "model rules" say that the first document to be relied upon for the purposes of declaring age of a child is the matriculation or equivalent certificate whereas the Delhi JJ Rules lay down that it is the record of the first attended school of the child which shall be accepted as the first document of proof of the age of child. Both the "model rules" and the Delhi JJ Rules provide that it is only in the absence of the document mentioned first in the chronology that the Board can look into the next document available. The necessary conclusion is that if record of Class X of the child is available then as per the "model rules" the competent authority cannot look into any other document of age and similarly for the Boards/ CWCs in Delhi, if the record of Class I is available then the other documents of age cannot be looked into. Where a child has his cases in Delhi as well as in some other State which follows the "model rules" it would lead to two interpretations and declaration of age where age inquiry is taken up by two Boards as per their respective State rules, where a child has two different dates of birth written in the two records and he may be concluded to be a juvenile as per one Board and an adult as per the other Board. This is a practical difficulty faced by the Boards.

Similarly where the record of a child of first attended

school has been produced but it has a date recorded on the basis of affidavit given by the parents and the record of his birth maintained by Municipal Corporation also comes before the Board which has a date written on it different from the one stated in the school certificate, can the Boards rely upon the Municipal Corporation certificate disturbing the hierarchy of the rule 12 and bypassing the words "*in absence whereof*" ? At the same time if the juvenile is an adult as per the Municipal Certificate would it be appropriate to declare him so as per the said document and discard the record of first attended school.

VIII. Section 49 of the Act of 2000.

Section 49[25] of the Act of 2000 speaks of the presumptions which are associated with determination of age. It says that the competent authority has to make an inquiry by taking evidence but not on an affidavit and shall record the finding regarding the age of the juvenile or child as nearly as possible. Sub section 2 of the section is important and has become very controversial after the coming into the force of the Delhi JJ Rules which prescribe a different chronology of documents than the "model rules". This sub section says that the age of a child once declared by a competent authority (JJB or Child Welfare Committee) shall remain his age for the purpose of the Act of 2000 (not the inquiry); and that if subsequent to declaration of the age of the child some

[25] Section 49. Presumption and determination of age.—(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be. (2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person.

other document is produced or is brought, the age declared after due inquiry shall not become invalid.

The sub section uses the words 'for the purpose of the Act' meaning thereby that the age once declared in an inquiry after due inquiry as per rule 12 of the "model rules" or the Delhi JJ Rules or the State rules as the case may be, becomes the age of the juvenile or the child and has to be considered for all times to come where an action is recommended/ contemplated for the child under this Act. It is this sub section that gives the power to the Board to accept the age once declared by the Board, in an inquiry to be used as his age in the subsequent inquiries, where he is found involved.

Prior to coming into the force of the Delhi JJ Rules the Boards were governed by the "model rules" whereby the age was to be declared on the basis of the matriculation or equivalent certificate, if available. In the present scenario there may be cases wherein the children have been declared juveniles as per the "model rules" on the basis of the matriculation certificate and have their ages declared as per the inquiry for all times to come. However where these children get into a situation of conflict again and their age as per the first attended school's record shows them to be adults, a difficulty arises. The Act of 2000 being clear that the age is declared for the purpose of the Act and that the discovery of subsequent document does not render the age declared by the authority invalid, it creates a situation of uncertainty for the Boards as to whether a fresh inquiry should be taken up for each case or the Board remains bound by the age declared once for all the inquiries to come up subsequently.

Conclusion

To sum up, juveniles are juveniles if they were so on the

date of the offence. The Magistrate's Court where a juvenile who is still a juvenile is produced should forward the juvenile to the JJB immediately during the period of remand, but the Courts in all other cases are bound to conduct an inquiry into the issue of juvenility and to declare age before sending a juvenile to the JJB. The juveniles who were between 16 to 18 years on the date of coming into the force of the Act of 2000 are juveniles as per the Act of 2000. The age in Delhi is to be declared as per Rule 12 of Delhi JJ rules and not JJ model rules. The Delhi JJ Rules recognize the record of first attended school as the first document for declaration of age. Medical examination should not be ordered if the documents of age are available and the report cannot be considered if the documents of age exist. The age once declared does not become invalid because of discovery of a subsequent document.

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NEED FOR "ALTERNATIVE SENTENCING" IN INDIA

Pankaj Sharma*

Infliction of harsh punishment is a relic of the past and regressive times.[1] Protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate punishment.[2] A sentence or its system which does not work properly can undermine respect for law. Therefore, punishment awarded should be commensurate with the gravity of the misconduct.[3] Although it is not possible to formulate any cut and dry formula in this respect but the object should be to see that crime does not go unpunished and victim of the crime and society have the satisfaction that justice has been done to them. Undoubtedly there is a cross cultural conflict where living law must find answer to the new challenges and the Courts are to mould the sentencing system to meet the challenges. Today there is need of alternative sentencing for a particular class of offenders and offences.

Alternative sentencing is a sentencing programme that is an alternative to jail. It is designed to alleviate the problem of prison overcrowding and to provide a different way of monitoring prisoners during the period of punishment. Alternative sentencing is a necessity borne from prison overcrowding and shrinking budgets. Also, incarceration usually leaves released offenders ill-equipped to adjust to live in

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1 O.P. Srivastava, PRINCIPLES OF CRIMINAL LAW, Eastern Book Company, Lucknow (2005), p. 96.

2 Sevaka Prumal v. State of T.N., (1991) 3 SCC 471 : 1991 SCC (Cri) 724.

3 Amrut Lal Someshwar Joshi v. State of Maharashtra (1994) 6 SCC 186 : 1994 SCC (Cri) 1591.

mainstream society and more likely to re-offend. Forced to face prison overcrowding and failed attempts at deterrence or rehabilitation, stake holders in the criminal justice system should think of encouraging "alternative sentencing," which refers to any punishment other than incarceration. At the same time alternative sentencing provides for more latitude for making the punishment fit the crime, thus achieving the sentencing objective of just desert. Alternative sentencing can be beneficial to the victim, the community, and the offender, while at the same time easing prison overcrowding. Alternative sentencing is beneficial to the victim, because the victim may receive some financial compensation for the crime. Alternative sentencing is beneficial to the community, because services performed can better neighborhoods. It is beneficial to the offender, because many individuals are made to work or pay fines instead of incarceration. There are various terms used in relation to alternative sentencing that people tend to employ inter-changeably, but which do not dovetail precisely with one another. The term alternative sentencing is used interchangeably with non-custodial sentencing, yet both concepts refer the same thing " sentences that are alternatives to imprisonment and that avoid the use of custody". (However, some alternative sentences are not completely non-custodial). For example:

a) Work release or work furlough programmes;

b) House arrest or home detention;

c) City jail or private jail;

d) Weekend sentencing;

e) Shock incarceration [boot camps];

f) Reporting centre;

g) Intensive probation supervision;

h) Residential community corrections;

Throughout the years and around the globe there have been several types of punishments enforced upon criminals. Punishments ranging from crucification, flogging, whipping, caning, and of course imprisonment have been used. Imprisonment does not serve the purpose which the society expects it to. Punishment should invoke remorse on the part of the criminal. Society expects criminals to be punished in such a manner that it would deter a criminal from committing the crime again. If these two things do not occur, what good comes from the punishment of these criminals through the criminal justice system? If imprisonment is not serving its purpose, an alternative form of punishment should be adopted. Criminals who are placed in cages do not feel remorse for the crimes they have committed. Sadly, most criminals leave prison as more dangerous individuals to the society than what they were when they entered the prison gates. Several problems can arise from prison overcrowding such as damages to state budgets, endangering the lives of jail officers, and endangering of inmates, themselves.

It has been revealed through research world over that incarceration leads to higher rates of recidivism.[4] The increase in rate of recidivism owing to incarceration is due to the fact that first time offenders when placed with hardened criminals inside prison turn out as potential offenders. By alternative sentencing the risk of recidivism can be reduced to a great extent since the offender is not subjected to any such company which leads to recidivism.

Punitive strategy of the Indian Penal Code, 1860 does not sufficiently reflect the modern principles of correctional treatment and personalized sentencing.[5] Indian judicial system has no provisions relating to intermediate punishment for crime. Offenders are either incarcerated or given routine probation,

[4] Commission on Safety and Abuse : Report and Recommendations, accessible at : www. prison commission. org/ report.asp.

[5] Shivaji Sahebrao Bobade v. State of Maharashtra, 1973 SC 2627.

which sometimes equates with perfunctory supervision. Because seriousness of crime does not fall into two neat compartments, sentencing often errs in one direction or another. It is either too harsh, putting behind bars people whose crimes and criminality does not warrant it, or too lenient, giving routine probation to people whose crimes and criminality deserve stronger punishment or supervision. Jail time could limit the ability of an offender to support and care for his family. Family dynamics are often strained from the emotional and financial implications of prison terms. Accent must be more and more for rehabilitation of offenders rather than retribution punitively inside the prison.[6] The judicial system as a whole needs some major implements in order to ease prison overcrowding and putting in place alternative sentencing mechanisms.

Too often sentencing practices laws needlessly hold offenders in prison, sometimes for long terms, when community based alternatives would safely serve society's interest in punishment. The problems associated with crime in society, and the sheer number of offenders, have prompted a serious search for alternative methods of dealing with crime. Basically, the argument is whether the punishment for a crime should be deterrent? This idea with this type of sentencing is that fewer members of the society will be tempted to go on and offend. The alternative is whether it is best to focus on the rehabilitation of offenders so that they don't return to crime once their sentence is over. Alternative sentencing is not always rehabilitative and reformative in nature. It may be punitive in nature. What type of alternative sentencing be offered to accused is a point which is worth deliberation and which largely depends upon the attending facts and circumstances of each case in addition to age, antecedents, qualification and conduct of the offender. Today the criminal justice system has been asked to deal with more and more of what we call behavioral problems, rather than more

[6] Nadela Venkata Krishnarao v. State of A.P., 1978 SC 480.

traditional violent offences and property offences.[7] Different types of offenses and offenders require different types of alternative sentencing. The sentencing should be tailored to meet the needs of the accused and for that emphasis should be given on individualized sentencing. For instance, a thief may be granted vocational training during his sentence, so that he may earn his livelihood when he is out of jail after completing his sentence ; a traffic offender may be sentenced to a series of lectures along with training in a training college; an offender of 'drunken driving' may be subjected to community service and informing other fellow citizens about drawbacks of drunken driving; a person convicted of cruelty on his wife may be sentenced to community service in the form of social welfare programme; a person convicted of road rage may be sentenced to undergo an anger and stress management programme; a person convicted for quarreling and beating may be sentenced to community service programmes.

In case of low risk and non-violent offenders who are poor and have a family to support, they may be sentenced to open jails so that during the day time, they may earn their livelihood and feed their families and in the night, they may return to the jail. This concept is prevalent in Himachal Pradesh since 1960 and needs to be adopted by the rest of India, so that families of the offenders can be saved from destitution. The open Jail concept is also in function in Rajasthan since 1963. At present in Rajasthan thirteen open jails are functioning which are home to 504 inmates. Noting their success the government has planned ten more such jails in the next year.[8] In Hoshangabad, Madhya Pradesh, the State Prison Authority has started a rehabilitation programme in the year 2010 wherein the convicts who are nearing the end of their sentences are put in houses which are built by the State so that the

[7] Ann Skelton, "Civil Society Prison Reform" , Initiative Research Paper No. 6, Series 6, May 2004.

[8] http://indiatoday.intoday.in.

convicts get an opportunity to acclimatize themselves in society.[9] In Delhi there is a proposal by the Prison Authority to start a semi-open prison in Tihar Complex which is a step ahead towards reformation, rehabilitation and reintegration of the convicted prisoners.[10] These rehabilitatives technique help the convicts to be rehabilitated in the society after their sentences are over and also are helpful in transforming them into socially useful persons. In cases of repeated sex offenders, they may alternatively be sentenced to chemical castration so that they be made physically unable to repeat such kind of offences in future .[11]

In India, correctional homes and observation homes are in existence for Juvenile Delinquents. However, no such infrastructure is available for major offenders. There is a need to re-look the ground situation of India, because a large number of people are in prison and the potential of these offenders in not being utilized by the State for the development of the State and welfare of the society.

Instead of spending tax money to support non-violent inmates, these inmates could be working and paying tax money to support worthier causes. It is high time the legislature gives a re-think to the existing penal laws so that possible amendments in the substantive and procedural laws pertaining to powers to the trial court judges along with requisite infrastructure be created. All it can be said is that a philosophical shift is required from an offender - rehabilitation focus to a community protection-punishment focus and for which the wide proliferation of intermediate sanction is necessary. Justice not only demands that like cases be treated alike, but that different cases be treated differently.[12] Bringing back the lost individual into the system as a

[9] The Hindu, January 3rd, 2011.
[10] Tihar News Letter, Issue: May to August 2011.
[11] State v. Dinesh Yadav, Sessions Case No. 1159/2009 Delhi, date of decision 21.04.2011, Dr. Kamini Lau, PS/FIR No. 138/2009.
[12] Clarkson and Keating , CRIME AND PUNISHMENT, Sweet and Maxwell, England, (2007) .

useful social unit should be the goal of sentencing.

Use of Alternative Sentencing in Other Jurisdictions of World

Most of the developed democracies of the world are using alternative sentencing methods to alleviate the prison overcrowding problems and other related problems. Some of the alternative sentences which are prevalent in some developed democracies used in lieu of incarceration or condition of probation are :

a) Work release or work furlough programmes;

b) House arrest or home detention;

c) City jail or private jail;

d) Drug Courts;

e) Diversion programmes;

f) Sober living;

g) Mediation and restitution;

h) Weekend sentencing;

i) Shock incarceration [boot camps];

j) Day reporting centre;

k) Intensive probation supervision;

l) Residential community corrections;

Legal Position in India

Section 53 of The Indian Penal Code, 1860 provides the following types of punishment:

a) Death;

b) Life Imprisonment;

c) Imprisonment which is of two description namely :-

1. Rigorous i.e with hard labour;
2. Simple ;

d) Forfeiture of property;

e) Fine;

Section 360 of Code of Criminal Procedure, 1973 prescribes ''order to release on probation of good conduct or after admonition''. But no other alternative sentencing has been prescribed in the Indian Penal Code, 1860 except releasing the offenders on probation of good conduct. Section 361 of Code of Criminal Procedure, 1973 prescribes “Special reasons to be recorded by Court for not according a benefit of Section 360 of Code of Criminal Procedure or Provision of Probation of Offenders Act, 1958”.

The Probation of Offenders Act, 1958 empowers the Court to release certain offenders after admonition or on probation of good conduct. It further empowers the Court to pass a supervision order along with probation and appoint a probation officer. However, the Probation of Offenders Act, 1958 does not empower the Court to impose intermediate sanctions while a person is on probation.

Problem with Current Model

As per Prison Statistics Report, 2000 more than 2,48,115 people in India are in the prison. This number has gone up by passing of each successive year. Given the competing priorities for spending in India, money should be spent on the country's developmental needs such as education, health care, housing and job creation. If the Government is to spend more money on dealing with crime, it should be in the areas of crime prevention and detection. Instead of warehousing offenders, there is a need to find ways to make them repay the community for their crimes through community service, restitution, and compensation. In this endeavor, community-based alternatives to imprisonment

would move to centre stage. Himachal Model of Open Jail System for offenders helps them to take care of their families while serving their sentence which helps the family dynamics of the offender to remain stable and thereby helps the family from destitution.

Observing a serious 'law lag' in India while dealing with certain categories of cases and offenders, the challenge of exploring the alternative sentences which can be imposed assumes significance because of the fact that it can help offenders in rehabilitation and reformation along with reduced rate of recidivism and State's budget. The degree of alternative sentencing which can be given to the offenders depends upon several factors and also the stage of trial at which it is sought to be given. For instance the degree of alternative sentencing may vary in the following undermentioned stages of trial:

1. Where an offender pleads guilty on the day of arraignment;
2. Where an offender plea bargains in the midst of trial;
3. Where the offender is convicted by the Court after complete trial.

All the three stages require different treatment since the offender who pleads guilty on the day of arraignment should be given the lightest mode of alternative sentencing. However the offender who plea bargains in the midst of the trial should be given higher degree of alternative sentencing than the offender who pleads guilty on the day of arraignment. Likewise the offender who is convicted by the Court after conclusion of a trial should be given highest degree of alternative sentencing. The purpose of degree of alternative sentencing at different stages of the trial would be to motivate offenders to admit the guilt in first place so as to have lightest degree of alternative sentencing. Considering the advantages of alternative sentencing to all the stake holders, in many Penal statutes of India, use of alternative

sentencing instead of the model of custodial sentencing can be profitably made. In India, in Andhra Pradesh, Community Services of Offenders Act, 2007 has been enacted. This Act is applicable to convicts to attract jail terms of less than one year.[13] The viability of the Andhra Pradesh model should be studied and applied to other states of the country by the Government so that sentencing should be made meaningful and beneficial to the society apart from offenders.

Alternatives to prison sentences are important because they treat offenders as individuals and, in circumstances that are appropriate, offenders are given an opportunity to redress the wrongs they have committed by contributing to society. In most forms of alternative sentencing, this obviates the need to reintegrate them back into the community, as they will have remained there throughout. It also means that they are not exposed to the criminalizing influences that abound within a prison environment. Trial Court Judges do not have discretion to sentence in the alternative of traditional sentences, due to which the goal of personalized sentencing cannot be achieved. In order to bring in the concept of alternative sentencing, as discussed above, the feasibility of the alternative sentencing, methods should be studied keeping in mind the existing infrastructural framework of our country. Further the viability of alternative sentencing methods should be studied with respect to the Indian conditions. At the same time adequate legislative amendments are required to be incorporated in the substantive and procedural laws so as to empower the trial court judges to sentence offenders alternatively. Above all alternative sentencing would immensely help in furthering the goal of personalized sentencing as envisioned by the Supreme Court of India .[14]

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[13] Community Services of Offenders Act, 2007 (Andhra Pradesh).

[14] Shivaji Sahebrao Bobade v. State of Maharashtra, AIR 1973 SC 2627 : AIR 1973 SC 2622: MANU/SC/0167/1973.

Mai Anna Hun ?

Vinam Gupta*

The most written upon, read, sought, discussed and speculated topic of the year without a doubt is the Jan Lokpal bill. Now that Hazare has taken over Kournikova to be poised as the most popular "Anna", I could not help but wonder why everybody went off the deep end over a bill without even taking the pains of reading it. The "Mai Anna Hun" (I am Anna) cap became the latest must have in the fashion pundit's diary, Facebook got flooded with "Anna" posts, the newspapers seemed to have stopped covering other things, (murder of RTI activist Shehla Masood almost went unnoticed), yet despite all this dedication and commitment to the bill, I couldn't find one soul who could enlighten me about the difference between the Jan Lokpal Bill proposed by the Anna Brigade and the one proposed by the government i.e., the Lokpal Bill, 2011. The frustrated common man of R.K. Laxman with all his worries, falling hair and puzzled expressions seems to be content following the leader without reading the banner he is holding.

However, due to a very urgent desire to join the band wagon I couldn't help but pick up the two bills and analyze as to what is that Anna really wanted and did not get. Before decoding the difference, the readers need to first realise that why was this demand made in the first place? The 2G , the CWG, the coal mines and every possible penny of the people spent, these scams are nothing but triggers that fired the gun. The gun that the "Gandhi", as he is now popularly referred to, seeks to disarm is that fundamental deficiency in our system that allows these scams to happen. A very major argument that is advanced against

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the Jan Lokpal Bill is that we already have the required machinery to tackle these problems so what difference will the Lokpal bring? So let's take a closer look at the "machinery"- At the Central Government level, we have Central Vigilance Commission (CVC), Departmental Vigilance and Central Bureau of Investigation (CBI). CVC and Departmental vigilance deal with vigilance (disciplinary proceedings) aspect of a corruption case and CBI deals with criminal aspect of that case.

Central Vigilance Commission (CVC)

CVC is the apex body for all vigilance cases in the Government of India. However, it does not have adequate resources to deal with the large number of complaints that it receives. CVC is a very small set up with staff strength of less than 200 and is supposed to check corruption in more than 1500 Central Government departments and ministries, some of them being as big as Central Excise, Railways, and Income Tax etc.[1] Therefore, it merely acts as a post office and forwards most of the complaints to the vigilance wings of respective departments. Directly it enquires into very few complaints of its own. Further, CVC is merely an advisory body. The departmental vigilance wing of any Central Government Department first conducts an enquiry into any case and then seeks CVC's advice on what punishment may be given in the same. However, the head of that Department is free to accept or reject it.[2] Even in those cases, which are directly enquired into by the CVC, it can only advise the government.[3] With regards to its ambit, the CVC has jurisdiction only on bureaucrats. It does not have powers over politicians. If there is an involvement of a politician in any case, then CVC can enquire only into the role of bureaucrats.[4] Further, what limits its

[1] http://www.indianexpress.com/oldStory/58746.
[2] Provisos to Sections 8(1)(b), 8(1)(h) and 17(3) of the Central Vigilance Commission Act, 2003.
[3] http://cvc.gov.in/comp_policy.pdf- Page 2, clause 2.
[4] http://cvc.gov.in/comp_policy.pdf - Page 1, Clause 3.

ambit is that it does not have any direct powers over departmental vigilance wings, to which it forwards all complaints. If the departments do not comply, the CVC does not have any powers over them to seek compliance of its orders.[5] Lastly, but most conveniently, the appointments to the CVC are directly under the control of ruling political party. But, let's not get all cynical, we have other bodies too.

Departmental Vigilance Wings

Each Department has a vigilance wing, which is manned by officials from the same department (barring a few which have an outsider as Chief Vigilance Officer. However, all the officers under him belong to the same department). The officers in the vigilance wing of a department can be posted to any position in that department anytime, thus denying them the independence required to enquire against their colleagues and seniors.[6] In some departments, some field officials double up as vigilance officials implying that an existing field official is given additional duty of vigilance. So, if a citizen complains against that officer, it is expected to be enquired into by the same officer. Even if someone complains against that officer to the CVC or to the Head of that Department or to any other authority, it is forwarded by all these agencies and it finally lands up in his own lap to enquire against himself. Further the Departmental vigilance does not investigate into criminal aspect of any case. It does not have the powers to register an FIR, and again, they do not have any powers against politicians. But we still have the 'blue eyed boy' of the nation to go through.

Central Bureau of Investigation (CBI)

CBI has powers of a police station to investigate and register FIR. It can investigate any case related to a Central

[5] http://www.cvc.nic.in/AR2009.pdf - Chapter 5.
[6] http://www.bis.org.in/other/vig.htm, http://apvc.ap.nic.in/Handbook forCVOVOs.pdf, http://vigilance.up.nic.in.

Government department on its own or any case referred to it by any State Government or any Court.[7] Firstly the CBI is more than overburdened with every NGO, politician, and citizen demanding a CBI probe for every offence.[8] The independence of the CBI is not something to boast about either. It is directly under the control of the Central Government. CBI Director and all other officials in it are directly appointed by the Central Government .[9] CBI has to seek Government's permission to start investigation into any case involving a person at the post of joint secretary and above. It has to seek the permission of the Government to initiate prosecution in any case.[10] What about the cases against the persons authorized to sanction these investigations? But moving on from these procedural technicalities, after investigation is completed in any case, when a case is filed by CBI in a Court, CBI's lawyer is selected and appointed by the Law ministry.[11] So, if a complaint pertains to any minister or politician which is part of ruling coalition or an "adjusting" bureaucrat, it is practically impossible for the CBI to conduct a fair investigation or prosecution. Again, because CBI is directly under the control of Central Government, CBI has often been used to settle scores against 'inconvenient' politicians. Therefore, if the common man needs to file a complaint against a politician of the ruling party, an impartial investigation tends to remain a far cry.

CBI has powers but it is not independent. CVC is independent but it neither has the powers nor the resources. Similar is the scenario as far the Lokayuktas in the states are concerned. This brings us to the Lokpal. Rather than going into the details of the two bills; for the sake of brevity we shall analyze the difference between the two. What was it that the Government

[7] http://cbi.nic.in/aboutus/aboutus.php.
[8] http://www.hindu.com/2001/06/09/stories/0209000w.htm.
[9] Sections 4A, 4B and 4C of the Delhi Special Police Establishment Act, 1946.
[10] Section 6A of the Delhi Special Police Establishment Act, 1946.
[11] http://cbi.nic.in/recruitments/recruitmentrules.php.

did not give Anna that made him pull out his flute once again and draw the masses on the streets in a way that is only seen when India wins the World Cup?

Though it is difficult to say with any amount of certainty or confidence whether the Bill[12] proposed by Anna Hazare will bring about any change in the present system. At the risk of being called a pessimist, I believe it is as likely to promote corruption as it is to curtail it. The powers that are proposed to be vested in the body are unparallel. Vesting such power in one single body can go either way. It may prove to be the milestone that puts our country on the right path, or it may just be the ditch that plunges our country to new lows in corruption.

On the other hand, what the Government in its Lokpal Bill, 2011 has tried to do is, strike a balance. The government cannot hold a mob mentality and pass a draconian law that would cause more hardship than justice. The difference can be seen in the approach of the two bills. While the Jan Lokpal Bill proposes to end a case within a period of one year, the procedure provided for in Sections 23 and 24 of the proposed Bill entails at every step a hearing for the accused. One could argue that this would cause delay in the disposal of the case, but at the same time one cannot compromise on the principles of fair play and justice especially when the employee is facing a certain suspension in case the chargesheet is filed.

Further the Jan Lokpal Bill seeks to cover within its ambit the office of the Prime Minister, but the Lokpal Bill, 2011, vide Section 17 (1) (a) puts the PMO outside its ambit as the PM can be investigated against only after he has left the office. This has been one of the most controversial issues in the Jan Lokpal Bill debate. However, personally I feel that the PMO may not be covered under the bill. We as a responsible electorate should respect the

[12] http://www.box.net/shared/tyqqc9d0rl8xgglqxpmj.

choices we make and maintain faith in the person we have elected to hold the office. We must understand the repercussions of our acts before we vote our caste rather than casting our vote.

But not everything in the Jan Lokpal Bill is over played. One of the most impressive points I came across in the Jan Lokpal Bill was that it provides for a Citizens Charter,[13] which provides for the government departments to declare who does what job and in how much time. For instance, the Charter will have to mention which officer will make the ration card and in what time. However, the Bill does go slightly overboard when it lays down that when a complaint of violation of Citizens Charter reaches a Vigilance Officer, it will be deemed to have a corruption angle. The Bill also proposed a penalty to be imposed on the Government official who fails to perform his duties within the stipulated time; however this has not been included in the Lokpal Bill, 2011. A delay in processing a file may be caused by a million reasons ranging from improper paper work, to strikes, to weak infrastructure. Deeming it to have a corruption angle would only compromise on compliance and diligence on the part of the employee as he would be more concerned about disposing the file in time. Therefore, though the spirit behind the Bill is beyond question, its implementation cannot be so, as to violate the inherent rights of the people who run the government machinery.

Another commendable provision of the Jan Lokpal Bill is that it seeks to merge the Anti Corruption branch of the CBI into the Lokpal.[14] In the recent past the independence of the CBI has been questioned time and again. The investigation body has been often used as a weapon against political adversaries by the ruling party. In order to stop such a misuse of government offices, it is important to put investigation agencies in an independent sphere to allow them the space, to perform their duties efficiently.

[13] Section 25(1).
[14] Section 32(1).

Therefore it is nothing short of a necessity to make the CBI independent and merge it with an equally powerful body.

A very significant departure that the Lokpal Bill, 2011 makes from the Jan Lokpal Bill relates to the selection procedure. The Jan Lokpal Bill proposes that the 10 members and the Chairperson will be selected by a *Selection Committee*[15] that would comprise of the PM, Leader of the Opposition in Lok Sabha, two youngest Judges of Supreme Court, two youngest Chief Justices of High Courts, Comptroller and Auditor General (CAG) and the Chief Election Commissioner (CEC). However with 5 out of 9 members from ruling establishment, 6 politicians in selection committee, the Bill proposed by the government does not exactly draw the best confidence as far as the selection is concerned.[16]

Further as far as the removal is concerned, any citizen can approach the Supreme Court for the removal of the Jan Lokpal and the actions of the Lokpal shall fall within the purview of judicial review under the Jan Lokpal Bill,[17] whereas under the proposed bill only the government shall have the power to seek the removal.[18] One may argue that the Jan Lokpal Bill provides for more accountability and transparency, but what one may tend to ignore in this provision, is a scenario where the Jan Lokpal will be faced with an unprecedented amount of litigation against himself if everybody is allowed to approach the Apex Court against him. Certain safeguards are provided to certain offices keeping in view their importance. Their efficiency cannot be compromised even at the cost of accountability.

Thus, in the conclusion of the analysis, it can be safely said that the apprehension of the Government in enacting the Bill as proposed by Mr. Anna Hazare is, if not just, but justifiable to some

[15] Section 4(1)(6).
[16] Section 4(1).
[17] Section 11.
[18] Section 8.

extent. Though the government has agreed in principle to the three point demand of the "civil society", it shall be interesting to see how this agreement shapes up in the houses when the Bill[19] is presented. The old proverbial saying that "absolute power corrupts absolutely" is as timeless as power and corruption. However, in times like these when corruption and nepotism are rampant in the country, the call for the Bill cannot be overlooked. No doubt, balance that needs to be struck has to be tilted towards the Lokpal, but getting carried away in the sudden rush of blood to find a magic wand would only put us in a situation worse than what we are facing today. However, having said that, one still cannot rebuff that when an office is being created, the Government has to repose the required trust in it. Corruption germinates from the seed of weak values. Its eradication has to be a process. A magic wand is not what we should aspire for, because at the end of the day magic is nothing but an illusion.

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[19] The new Bill shall introduce the citizen's charter, cover the lower bureaucracy and also provide for the establishment of Lokayukts in the states.

PRODUCER COMPANY - AN ALLIANCE OF COOPERATIVE SPIRIT AND CORPORATE EFFICIENCY

Anish Chawla*

Genesis of Producer Companies

Growth rate of agriculture in India has been stagnating at very low levels for the past many years. Slow agricultural growth has been a concern for policymakers as approximately two-thirds of India's population depends upon rural employment for a living.[1] Many problems were identified, the major ones being infrastructure weakness, namely, poorly maintained irrigation systems and almost universal lack of good extension services. Farmers' access to markets is hampered by poor roads, rudimentary market infrastructure, and excessive regulation.[2] Adoption of modern agricultural practices and use of technology is inadequate, impeded further by ignorance of such practices, high costs, illiteracy, slow progress in implementing land reforms, inadequate or inefficient finance and marketing services for farm produce and impracticality in the case of small land holdings. The allocation of water is inefficient and irrigation infrastructure is deteriorating.[3] Several institutional models were adopted by our Government to solve this problem, the most common being producer cooperatives. However, the experience was not very fruitful. Cooperatives were found to be weak and inactive due to the restrictive cooperative laws that govern them.

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1 Ashis Mandal, "Farmers' Producer Company (FPC) Concept, Practices and Learning, A Case from Action for Social Advancement", Financing Agriculture, p.29.

2 World Bank: "India Country Overview 2008".

3 World Bank Retrieved, 2011."India: Priorities for Agriculture and Rural Development".

The producer's share in the consumer rupee remains to be small and most of the value addition occurs post production.

Secondly, though agri-business enterprises were making huge capital investments yet they had to look for adequate supplies of produce on a consistent basis. These enterprises faced the difficulty in having direct tie ups with small landholding farmers. Therefore, there was an increasing demand by such enterprises for aggregators or intermediary institutions that can pool the produce in sufficient quantities.[4]

Third, with the advent of globalization, the world was seeing a greater integration of markets across the world. Further, the WTO guidelines opened a plethora of opportunities for multi-nationals to invest huge amounts in food and primary sector. This increasingly lead to sidelining of small farmers in the contemporary world trade scenario.[5]

The Ministry of Company Affairs analyzed all above stated problems and also considered the recommendations of an expert committee led by Dr. Y.K. Alagh - a noted economist. It then introduced a Bill for amendment of the Companies Act, 1956 by inserting Part IXA, paving way for the incorporation of Producer Companies in 2002. The Committee was under the mandate to frame a legislation that would enable incorporation of cooperatives as companies and conversion of existing cooperatives into companies, which would nurture the cooperative spirit and marry it with corporate efficiency. Through this institutional innovation the Government wanted to bring a transformation in Indian primary sector by making it more commercial than subsistence in nature. Countries like USA,

[4] EV Murray, "Producer Company Model – Current Status and Future Outlook." accessible at http://cab.org.in/Lists/Knowledge%20Bank/Attachments/2/Producer%20Company%20Model.pdf , visited on 1st September, 2011.

[5] Various newspapers reported that between 1995 and 2005 there were about 1.5 lakh farmers who committed suicide in different parts of India.

Switzerland, Italy, Denmark and New Zealand etc. already have provisions for functioning of such enterprises.

Salient features of Producer Companies (under Companies Act):

Definitions

In a `Producer Company', only producers, i.e. persons engaged in an activity connected with or relatable to any primary produce can participate in the ownership.[6]

Primary produce has been defined as produce of farmers arising from agriculture including animal husbandry, horticulture, floriculture, pisciculture, viticulture, forestry, forest products, re-vegetation etc: produce of persons engaged in handloom and other cottage industries; any product resulting from above two activities; and products arising out of ancillary activity; and finally any activity intended to increase production of anything mentioned above.[7]

Formation and Registration

Any ten or more producers, any two or more producer institutions, that is, producer companies or any other institution having only producers or producer companies as its members or a combination of ten or more producers and producer institutions, can get incorporated as a producer company. The companies shall be termed as "limited" and the liability of the members will be limited to the amount, if any, unpaid on the shares. On registration, the producer company shall become as if it is a private limited company, with the difference that a minimum of two persons cannot get them registered, the provision relating to a minimum paid-up capital of Rs. 1 lakh will not apply and the maximum number of members can also exceed 50.[8]

[6] Section 581A(k), The Companies (Amendment) Act, 2002.

[7] *Ibid.*, Section 581A(j).

[8] *Ibid.*, Section 581C.

Equity

Members' equity cannot be publicly traded but only transferred to an active member at par value after prior approval of the Board.[9] This shall protect producer companies from being taken over by multi-national companies. The Producer Company is formed with the equity contribution by the members and limited to them. Shares held by member shall as far as may, be in proportion to the patronage of that company.[10]

Objects

The objects of a producer company shall include one or more of the eleven items specified in Section 581B of the Act, the more important being: (i) production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of members or import of goods or services for their benefit; (ii) processing including preserving, drying, distilling, brewing, venting, canning and packaging of produce of its members; and (iii) manufacture, sale or supply of machinery, equipment or consumables mainly to its members. The other objects include rendering technical or consultancy services, insurance, generation, transmission and distribution of power and revitalisation of land and water resources; promoting techniques of mutuality and mutual assistance; welfare measures and providing education on mutual assistance principles.

Directors and Management

Every producer company is to have at least five and not more than fifteen directors.[11] A full time chief executive is to be appointed by the board.

The day to day work operation is expected to be managed by professionals, hired from outside, under the direction of the

[9] *Ibid.,* Section 581ZD.
[10] *Ibid.,* Section 581ZB.
[11] *Ibid.,* Section 581-O.

Board of Directors elected by the General Body of the Producer Company for a specific tenure.

Every producer company has to maintain a general reserve in every financial year and in case there are not sufficient funds in any year for such transfer, the shortfall has to be made up by members' contribution in proportion to their patronage in the business.[12]

Benefits to Members

Members will initially receive only such value for the produce or products pooled and supplied as the directors may determine. The withheld amount may be disbursed later either in cash or in kind or by allotment of equity shares. Every member will receive only a limited return, provided such member may be allotted bonus shares as per Section 581ZJ. There is a provision for distribution of patronage bonus (akin to dividend) after the annual accounts are approved. Patronage bonus means payment out of surplus income to members in proportion to their respective patronage (not shareholding). Patronage, in turn, is defined as the use of services offered by producer companies to their members by participation in their business activities.[13]

Dispute Settlement

Disputes relating to producer companies are to be settled by conciliation or arbitration under the Arbitration and Conciliation Act, 1996 as if the parties to the disputes have consented in writing to such procedure.[14]

Option to Inter-State Cooperative Societies to convert to Producer Companies

Inter-State Cooperative Societies not confined to one State

[12] *Ibid.,* Section 581ZI.
[13] *Ibid.,* Section 581E.
[14] *Ibid.,* Section 581ZO.

can also make an application to the Registrar for recognition as producer companies. The statute also provides for re-conversion of such producer companies to their former status as Inter-State Cooperative Societies subject to the approval of the High Court.[15]

Voting Rights

If membership consists solely of individual members then a single vote exists for everyone. And if it consists solely of Producer Institutions then voting rights determined on the basis of the participation in business. But if membership consists of both then there is a single vote for every member.[16]

It can thus be seen that the basic purpose of a Producer Company is to organize and bring together small producers, say, for example in case of farmers, for (a)backward linkage for inputs like seeds, fertilizers, credit, insurance, knowledge and extension services, and (b) forward linkages such as collective marketing, processing, market led agriculture production, etc. This will help them achieve benefits of collective bargaining.

Critical Evaluation of a few Producer Companies

Post 2005, several producers came together and set up producer companies with the help and guidance of support organizations. It was realized that this institutional innovation could remove the problems of role of Government and political functionaries by allowing the producers to manage their own affairs with greater freedom. Several NGOs like Development Support Centre and PRADAN came forward to promote these producer companies. A few case studies from different sectors have been provided as follows:

- **Dhari Krushak Vikas Producer Company Limited (DKVPCL)[17]**

[15] *Ibid.,* Section 581J.
[16] *Ibid.,* Section 581D.
[17] http://www.afcindia.org.in/PDF/Agri_July.pdf - visited on August 17, 2011.

Study was conducted by BASIX and was supported by Asian Development Bank to understand the functioning and success of some producer companies, one of them being DKVPCL:[18]

Initially farmers of 10 Watershed Users Associations (WUA) around Dhari (Amreli district, Gujarat) implemented a watershed program. They later came together and formed a federation. This federation was then registered as a Producer Company under the Companies Act, 1956, in June, 2005. It was promoted by a Gujrat Promoting Agency: Development Support Centre, Ahmedabad. Each WUA contributed Rs.10000 towards the share capital of Rs.0.1 million. The Board consists of ten members, one from each WUA. The chairman is elected from these ten members.

The registration process was very tedious and required a voluntary service from one of the lawyers in Ahmedabad to draft the Memorandum of Association for the company. It was a new concept and other lawyers and even Registrar of Companies was not abreast with the new Act.

Focus of operations was on productivity enhancement, cost reduction, risk migration, value addition, market and capacity building. It involved 2 core activities: Agri Business and technical support services to farmers. DKVPCL provides technical services at the farmer's doorstep. Collaborations have been established with agriculture universities and research stations to train the farmers, and spreading out successful experiments and demonstrations in various villages. Due to the erratic rainfall patterns, the company has got a rainfall insurance cover on 28 acres in collaboration with Agriculture Insurance Company.

[18] Financing Agriculture: Special Article – Experience of Producer Organizations, A Case Study of Five Producer Companies.

- **Mahila Sut Tasar (MASUTA) Producers Company Limited**[19]

MASUTA was registered on 26th December 2005 as a Producers' Company.[20] It was promoted by Professional Assistance for Development Action (PRADAN), a National Development Organization working on enhancing livelihood opportunities for the underprivileged across India.[21] It was formed with the objective of providing sustainable livelihood to poor women by introducing new technology to reel and spin tasar yarn.

MASUTA holds the only type of share available – equity share. To become a member, one needs to produce and supply a minimum quantity of tasar yarn. Once granted by the Board of Directors, a woman or her group can purchase a minimum of one equity share, currently priced at Rs 100, to become a member of MASUTA. All producers are organized into village based groups comprising of 15-30 women within the same, or neighboring villages, drawn from one or more SHGs are registered as Mutual Benefiting Trust (MBTs). Each of the MBTs elects its representative to represent respective MBTs in the collective named MASUTA. The company started with the paid-up capital of Rs 100,000. Within five years of operation, its ownership base has increased from nil to 2,668 women which is organized into 165 MBTs over 120 villages in three states (Jharkhand, Bihar and Chattisgarh) with annual turnover of Rs 95.2 million in the FY 2009-10. The enterprise has total 140 clients with major customers as- Eco-Tasar Silk Pvt. Ltd, Bhagalpur; JHARCRAFT, Ranchi; UCRF Dehradun and KOSA Saree Sansar, Raigarh. Through MASUTA, a full-time weaver can earn an average of Rs 20,000 per year. MASUTA has 33 full time staff that assists various

[19] Bharat Varshney – A Case Study on MASUTA - http://www.seepnetwork.org/PDFfiles/MASUTAProfile.pdf.

[20] http://www.masuta.org/.

[21] http://www.pradan.net/index.php?option=com_content&task=view&id=17&Itemid=3.

operations like, finance, production, membership development and marketing.

- **Indian Organic Farmers Producer Company Limited (IOFPCL)**[22]

IOFPCL is a company of farmers producing organic products, headquartered in Aluva, Kerela. It is the largest of its kind in India and serves more than 2500 primary producer members in Kerela, Karnataka and Tamil Nadu. Only producers with organic certification are eligible for membership of the company, where the patronage for one share is fixed at Rs. 40,000 per share. A member with one share can market his produce through the Producer Company. An individual can purchase more than one share, but will have only one vote. Provision for two types of shareholding has been made: (a) individual shareholders have to purchase atleast one share of Rs 1000 each; (b) institutional shareholder has to purchase a minimum of 10 shares of Rs 1000 each. Equity share cannot be traded on the stock exchange. It is transferable to active members at par value with the previous approval of the Board.

IOFPCL has been involved in empowering its members with knowledge, technologies, providing advice and services and imparting training at different levels. Due to lack of manpower and infrastructure, the company has tied up with 'Foundation for Organic Agriculture and Rural Development', an organization in Kochi. The company has been able to pay to its members a higher price than that prevailing in open market.

Changes Proposed for Part IXA of the Companies Act[23]

Though there have been several success stories of

[22] http://www.iofpcl.com/; http://nraa.gov.in/ProducerCompanyCaseStudyOfIOFPCLKerala.pdf - visited on August 13, 2011.

[23] http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf – JJ Irani Committee Report – visited on August 22, 2011.

producer companies in a short span of time, however studies show that the 2002 amendment did not achieve all the objectives with which it was drafted. Government constituted the J.J. Irani Committee for revamping the Companies Act, 1956.

The Committee went to the ground level and received feedback from various stakeholders that the following changes should be made in the new proposed legislation:[24]

1. Producer companies should be a given a liberal charter of functions to take up any primary activity as per financial and technical capability;
2. Law should provide for flexibility in investment of funds and in abolishing/creating managerial posts;
3. Audits and accounts should be in tune with the size of company's operation;
4. Permit proxy voting for smooth functioning of elections and general meetings.

Thereafter, it recommended that:

1. The administration and management of 'Producer Companies' is not in tune with general framework for companies with liabilities limited by shares/guarantees. The shareholding of a 'Producer Company' imposed restrictions on its transferability, thereby preventing the shareholders from exercising their exit options through a market determined structure. It was also not feasible to make this structure amenable to a competitive market for corporate control.
2. If it is felt that Producer Companies are unable to function within the framework and liability structure of limited liability companies. The Corporate Governance regime applicable to companies could not be properly imposed on this form. Government may consider introduction of a separate Act to deal with the regulation of such 'Producer Companies'. Part IX A in the present Companies Act, which has hardly been resorted to and is more likely to create disputes of interpretation and may, therefore, be excluded from the Companies Act.

[24] ARC, 9th Report, Chapter 6.

The Companies Bill, 2009 was introduced in the Lok Sabha on 3rd August, 2009 and was subsequently referred to the Department Related Parliamentary Standing Committee on Finance for examination and report. The Committee had submitted its report to the Parliament on 31.8.2010. The report and the recommendations of the aforesaid Standing Committee have been examined in the Ministry and a revised draft Companies Bill, 2011 prepared in consultation with Ministry of Law (Legislative Department), has been circulated to the various Ministries and Departments for views and comments. Once the consultations with Ministries and Departments are completed, a revised Bill as Companies Bill, 2011 is proposed to be introduced in the next session of the Parliament after obtaining due approvals. Consequent upon introduction of the Companies Bill, 2011, the Companies Bill, 2009, pending in the Lok Sabha, will be withdrawn.[25]

Conclusion

The experience over the past decade shows that most of the companies that are emerging in this space are start-ups rather than existing cooperatives transforming into producer companies. Most of them have been promoted by a sponsor institution like development agencies or an NGO. Government has played a negligible role in promotion of producer companies. There is lack of awareness about this new Act and provisions.

The next few years should see more activity where

[25] Monthly Summary of MCA for June,2011 – visited on 20th August, 2011 - http://www.mca.gov.in/Ministry/pdf/Monthly_Summary_June_2011.pdf.

corporate houses come together with farmers through commercial farmer corporate/ retailer partnerships. The aim is to have producer companies with their own processing infrastructure and developing their own identity, brand value, goodwill and supply chain. Only then will the producers be able to have a standing in the markets and a greater share in the retail pie.

According to an article in *Financing Agriculture*, There are several other stimuli required for the uptake of a producer company in a fast track mode, some of them being:[26]

a) Arrangement of initial working capital. Some relaxation is needed so the financial institutions can provide collateral free loan to the producer company;

b) Relaxation on VAT, Sells & Income Tax and simplification of registration process;

c) Small producers' products need to be brought under Export Promotion Policy;

d) Financial support for establishment of State support systems or State Resource Centre;

e) Support for training and capacity building of Service Providers/Paraprofessional associated with the Producer Companies;

f) Establishment of semi academic institutions in pattern of ITI for creating professionals;

g) Overall a National Common Guidelines on how to establish small Producer Companies.

Thus, proper implementation of such institutions can help

[26] Farmers' Producer Company Concept, Practices and Learning – Financing Agriculture, Vol 42 Issue 7 July 2010.

solve the conventional agricultural problems in India, reduce farmer suicides, improve food security, increase primary sector productivity and thus push India on a resilient path of growth.

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Activities Of The Delhi Judicial Academy During January 2011 To June 2011

Aditi Choudhary*

The aim of the Delhi Judicial Academy (DJA) is to produce an ideal judicial workforce, instilled with judicial ethics, comprising of professionally competent, socially relevant, sensitive and responsive Judicial Officers. The Academy aims at training which would equip officers not only with knowledge but with administrative and management skills, while making them independent, accountable and endowed with the Constitutional vision of justice .

The DJA conducts regular training programmes for fresh entrants (Induction Training), as well as in-service Judicial Officers (Refresher Training) and undertakes research both in quality and efficiency focused fields. In pursuance thereto, the Training Calendar for 2011 was designed after consultation with the Judges of the High Court of Delhi, Delhi Higher Judicial Service (DHJS) and Delhi Judicial Service (DJS) officers through a questionnaire consisting of a list of courses to cover new laws, amendments in the law, problem areas as identified during earlier training programmes, critical aspects of skill development, and social issues requiring attitudinal change. The questionnaire was also sent to the Judges of the Supreme Court. A consultation meeting with academics, lawyers, members of the Bar Council, and retired Judges of the District and High Court was organized to seek their opinions on the training schedule. Suggestions from these consultations were incorporated. The training programmes were approved by the Judicial Education and Training Programme Committee of the High Court of Delhi.

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In all its training programmes for Judicial Officers, the Academy focuses on updation of knowledge, sharpening of judicial skills, sensitization and strict adherence to ethics. Sensitization is related to social issues in fields *inter alia* of gender, physical and mental disabilities, poverty, access to justice and environment. Emphasis is on recognition of biases and their minimization. The resource persons comprise of Judges of the Supreme Court of India and High Court of Delhi, Senior Advocates, academicians, activists, experts in the field of Forensic and Cyber Science besides other experts in various disciplines.

The highlights of the first half of 2011 besides our training programs has been the E-Course on Judicial Ethics and Conduct, three out station Retreats for Stress Management and Personality Development and a Discourse on Judicial Ethics. The main events of the first half of 2011 have been enlisted below:

1. SEVEN REFRESHER COURSES FOR THE IN-SERVICE JUDICIAL OFFICERS OF DELHI HIGHER JUDICIAL SERVICE (DHJS) & DELHI JUDICIAL SERVICE (DJS) :

The objectives of the In–Service Refresher Training Programmes for Judicial Officers *inter alia* is to keep the Judicial Officers abreast with the latest developments in the field of law, provide a forum for exchange of knowledge and experience about timely and responsive disposal of cases. The aim is also to ensure that access to justice issues are effectively addressed, with specific reference to socially marginalised, weaker, and poverty stricken sections of the society, besides instilling judicial ethics, and accountability as essential attributes of judging.

The year 2011 saw a new format for refresher courses held for the in-service officers of the DHJS and DJS. The duration of the course was 5 ½ days from Monday to Saturday (as compared to 4 days duration of last year), with participation strength of about 20 officers. The foundation subjects for all the 19 Refresher Courses

for the year were planned to include Constitutional law, Forensic Evidence, Electronic Evidence, Judicial Ethics, besides two workshops each on the DJA Draft Code of Judicial Conduct-2011 and Case Flow Time-LineManagement. Draft documents were circulated to the participants on the subject for these workshops.

The objective of the workshop on the 'DJA Draft Code of Judicial Conduct-2011' is to enable officers to identify the best practices of judicial ethics by comparing the Draft Code with other National codes of ethics and the Bangalore Principles and to identify appropriate behaviour for judges.

The objective of the workshop on 'Case Flow Time-Line Management' is to emphasise on a shift towards securing qualitative, responsive and timely justice for all citizens and to bring forth the estimated optimum workload that may be allocated to Courts of specific jurisdictions.

During the period January 2011 to June 2011, four Refresher Courses were held for ADJ's (10th - 15th January, 21st - 26th February, 28th March - 2nd April and 2nd - 7th May) two for the ASJ's (23rd - 28th May and 30th May - 4th June) and three for Civil Judges (31st January - 5th Februrary, 14th -19th March & 25th -30th April). Each Refresher Course contained components focusing on knowledge, skill, attitude and judicial ethics, as per the target group. Each course was divided into 22 sessions. The first session was devoted to the 'Ice breaker' and the last to the ' Feedback'. Each course had two sessions each for the above mentioned two workshops, sessions for the other foundational subjects besides the target group specific sessions on bias minimization, health or environment, field trips, depiction of judges in films, new law/ best practices and practice directions. The sessions on bias minimization focused on bias towards persons with disability, HIV/ AIDS, poverty and women. Health/ environment sessions were on topics of global climate change, regulation on anti smoking, ozone depletion, medical negligence, right to

reproductive health, wild life conservation besides laws relating to pollution and waste management. Field trips were made to institutions like Sudinalya, Prayas, Institution for the Deaf and Dumb, National Trust Institution for Persons with Disability, Nari Niketan so also orphanages, beggar homes and slums. To sensitize Judges to the 'role of a Judge', participants were shown English and Hindi feature films where there was depiction of various 'kinds' of Judges following which there was a discussion on the positive, negative and neutral characteristics of Judges as observed. For the topic of new law/best practices for the ADJ's and Civil Judges, the focus was on Executions and Injunctions besides CPC amendments, while for ASJ's was on sentencing, bail, probation, plea bargaining and examination of children and women besides recording of statement of witnesses during investigation. For the session on new law/best practices and practice direction, focus was on specific laws dealt with by the jurisdiction of the target group.

In order to prepare the participants for the course, they were supplied with well researched reading material on each topic in a CD, well in advance. To enhance participation besides sharpening research skills, the participants were divided into groups of 4-5 and each group gave a presentation on the topic assigned to it. The objectives of each session were listed out and were conveyed to the resource person in advance for proper focus on the topic. Each session which was for 1 ½ hours, had 45 minutes allocated for discussion, which ensured effective participation and experience sharing by the participants.

2. INDUCTION TRAINING FOR THE NEWLY RECRUITED OFFICERS OF DELHI JUDICIAL SERVICES (DJS)

The newly recruited DJS Officers are either fresh law graduates or have just a few years experience at the Bar. The principal aim of the Induction Course is to build a strong

foundation for their grooming as Judges. The prime focus of the Induction Course, therefore, is on inculcation of judicial ethics, development of judicial skills and aptitude, and sensitization to social issues.

The programme has the necessary four components of Knowledge, Ethics, Attitude and Skills. The contents have been chosen on the basis of judicial pronouncements, wide consultations, past experience, feedback from previous batches, and also inputs on judicial education deliberated at the National Judicial Academy.

The new batch of 36 induction trainees (freshly recruited officers of the DJS) joined the DJA on 22nd of February 2011 to commence their one year Induction Training. The methodology of training at the DJA for induction trainees comprises of academy training, field visits, court placements, village immersion programme and education and excursion programmes with divided time duration slots. During the period of January 2011 to June 2011 the training comprised of institutional training with sessions on substantive and procedural Law, teaching and sensitization through feature films, documentaries besides training through other teaching material. Also the training included practical work like order and judgment writing through Mock Trial exercises. Computer training was imparted besides training for sharpening of the skills of research. The trainees were given practical training during their court attachment with Judges in the High Court and District Court. Field training included visits to the Delhi Legal Services Authority, Mediation Centres, GTB Hospital, Revenue Department, Copying Agency, Record Room, Nazarat Branch and Accounts Branch, Delhi Stock Exchange, Police station, Juvinile Justice Board, Nari Niketan, Children's Home and Beggar's Home.

3. E-COURSE - 21ST FEBRUARY - 20TH APRIL 2011

A pilot E-Course on Judicial Ethics and Conduct was conducted by the DJA in collaboration with the CJEI (Commonwealth Judicial Education Institute) Canada from 21st February – 20th April 2011. The E-Course was officially inaugurated by Hon'ble Justice Dipak Misra, the then Chief Justice of the High Court of Delhi (presently Judge, Supreme Court of India) *via* a video conference on 21st February 2011. Hon'ble Justice A.K.Sikri (Presently Acting Chief Justice of the High Court of Delhi) and other Companion Judges of the High Court of Delhi, Hon'ble Judge Sandra Oxner, Chairperson of the CJEI, and Professor Ved Kumari, the then Chairperson of the DJA joined the programme from different geographical locales. The video conference connected the three District Courts, the High Court of Delhi and the CJEI. The DJA faculty anchored the programme from four court complexes located at different places in Delhi, and they introduced the participants of the course stationed in those Courts Complexes. Twenty participant judges of the district judiciary enrolled for the course and nineteen of them completed the course and received certificates of completion.

The broad objectives of this course *inter alia* were to familiarise the participants to the different canons of judicial ethics, both at the national and the international levels with special emphasis on the Bangalore Principles of Judicial Conduct, 2002; compare these principles and identify their preferred canons of ethics; analyse thirty-two case situations and determine which appropriate principle to apply; and analyse the elements that determine the quality of judicial ethics and conduct.

This Course provided the participants with an opportunity to apply the canons of judicial ethics to real-life situations. It was not designed to provide a definite answer to each, and every situation presented – indeed, in many situations, there are no definite answers. The course was designed to help the participant Judges identify problematic situations, to know and

understand the appropriate canon of Judicial ethics that governs them and develop the analytical skills necessary to apply the canon principles to the facts in issue to achieve an appropriate resolution of the issue at hand. Feedback was received from both the participants and the facilitators which was encouraging.

Completing the Course work required the participants to spend forty hours reading, watching podcasts, joining the chat room, participating in forum discussions, preparing and submitting assignments, feedback and reading the feedback from the facilitators. The course included podcasts on Principles of Judicial Ethics; Indian and International Canons, cases and articles on Judicial Ethics; forum discussions; chats and online submission of assignments by the participants.

4. THREE RETREATS (3-DAYS EACH) FOR STRESS MANAGEMENT AND PERSONALITY DEVELOPMENT FOR OFFICERS OF DHJS AND DJS AT SARISKA, JIM CORBETT NATIONAL PARK AND KASAULI.

The very nature of our duties as Judges causes a certain amount of stress which if unchecked may lead to grossly adverse effects on our health. However, stress upto certain limits can be effectively managed. The DJA therefore, lays great emphasis on learning simple techniques of stress management and self effectiveness which helps soothe the strained minds.

For the year 2011, it was decided that Stress Management, and Personality Development Programmes be held at locations outside the usual premises. This breaks the monotony and has other obvious added advantages like connecting to the nature and environment. It also helps the participants develop stronger bonds amongst themselves, thereby strengthening the institution. This helps develop team building and leadership skills, in the process of learning by activity, which would result in greater institutional efficiency and output.

The first Three Day Retreat of the year for Stress Management and Personality Development was held from 11th February to 13th February 2011 for 92 officers of the DJS and DHJS at Sariska in Rajasthan. The second was held from 8th April to 10th April 2011 for 94 officers of the DJS and DHJS at Jim Corbett National Park and the third for 121 officers of the DJS and DHJS from 13th to 15th May 2011 at Kasauli in Himachal Pradesh.

5. DISCOURSE ON JUDICIAL ETHICS AND DISCIPLINE, 24TH APRIL 2011

On 24th April 2011, a special discourse on Judicial Ethics and Discipline for all the officers of the DJS and DHJS was held at the Auditorium of the Integrated complex of the Delhi Judicial Academy, National Law University, Delhi and the National Institute for Mediation and Conciliation, Dwarka, New Delhi. This discourse was addressed by Hon'ble Mr. Justice G.S. Singhvi, Judge, Supreme Court of India.

6. TRAINING FOR JUDICIAL OFFICERS OF THE NORTH-EASTERN STATES:

During the period January to June 2011, two training programmes from 14th - 26th February and 9th - 21st May 2011 were conducted by the DJA for Judicial Officers of Manipur, Nagaland, Mizoram & Meghalaya. The training included a tour of the court complex at the Karkardooma District Court and visit to the E-Court, where they were explained the benefits of computerization. To watch the mediation proceedings and to be sensitized to the use of Alternate Dispute Resolution mechanisms (ADR's), the officers also visited the Mediation Centre at Karkardooma Court. The officers were given inputs on the topics of judicial ethics, issues pertaining to grant, refusal, cancellation of bail and the principles relevant thereto, managing trials, necessity of following proper procedure, recording and appreciation of evidence etc. The officers were sent for Court attachment (practical training) with Judicial Officers in Delhi

where they got an opportunity to interact with the Judicial Officers in Delhi, sit with them on the dais and learn how to effectively conduct both criminal and civil cases. For sensitization towards the problems of the poor and to watch the Legal Aid proceedings, the officers visited the office of the Delhi Legal Services Authority. The Judicial Officers also visited the Supreme Court of India and High Court of Delhi to enlighten themselves, by watching the Court proceedings. They also visited the Central Jail, Tihar so that they are sensitized to the need to provide human treatment and basic appropriate living conditions for those confined in jail.

7. TRAINING FOR LAW OFFICERS OF CBI:

A one week training was conducted for 25 Law Officers/Special Public Prosecutors of CBI from 18th to 23rd April 2011, with the aim of improving the Criminal Justice Administration System. The objective of the course was to enable the participants to critically examine previously acquired knowledge and to bring about attitudinal shifts to ensure responsible and sensitive prosecution.

8. VISIT OF MALAYSIAN DELEGATION

A seven member delegation from Malaysia headed by the Hon'ble Chief Judge of Malaya, Malaysia comprising of other Judges from Malaysia made a visit to the DJA on 11th February 2011. The purpose of the visit was to see the working of the DJA, exchange views on training programs and take back new ideas for implementation.

LOOKING FORWARD

The remaining part of the year has planned for it further Refresher Courses, Stress Management and Personality Development Retreats besides continuation of the Induction Training which comprises of important initiatives like the one-week village immersion programme in which the officers will be

having a week long stay at a village. The objective of the village immersion is to sensitize the newly appointed officers to the realities and complexities of lives of the majority of the population of India living in villages. We are also looking forward to an International Seminar on Intellectual Property Rights scheduled for September.

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