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JUSTICE G. ROHINI
CHIEF JUSTICE
HIGH COURT OF DELHI

Sher Shah Road, New Delhi -110503
Phones.: 011-23387949, 011-23382951
(Fax) 011-23782731

MESSAGE

Learning is a continuous process and a *sine qua non* for human development and the society as a whole in its march to achieve excellence.

The Delhi Judicial Academy has, since its inception, been providing a forum for learning and interaction amongst the Judges at all levels to debate on the judicial processes with the objective of providing quality justice to all in accordance with the constitutional values. It has endeavoured to help the officers at all levels to update themselves with the latest developments in the field of law and in assessing the importance of interface between law and society.

It is heartening to know that the Delhi Judicial Academy has, in the past few years, incorporated contemporary areas of law in its curriculum with the objective of preparing the judges and other stakeholders to face the future challenges. It has also made a commendable effort of continuously and effectively sensitizing judges with respect to the realities of the interface between law and the marginalized, focusing on honing their capacities to translate their sensitivity into enhanced access to justice for all. Further, it has included programmes on Law and Information Technology, its relevance and importance and also use of new technology for conducting scientific investigation and to make functioning of courts more efficient.

Legal Journals constitute a site for holistic engagement by incorporating varied perspectives and approaches to legal issues. They are not only important source of knowledge that update readers with latest trends and advances in the legal arena but also stimulate their intellect and thus offer the readers an opportunity to reflect upon and assess the trend. Such a stimulus ensures that further developments in law make the legal regime more fair and just.

The legal Journal being published by the Delhi Judicial Academy gives an opportunity to the judicial officers at all levels, along with the academia, to contribute to the legal literature relevant for judicial education and training and

also for building the capacity of the judicial officers in the new and emerging areas as well as in the traditional jurisdictions. The constructive criticism of the legislation and the judicial decisions help in improving the justice delivery system and the quality of justice as a whole.

The incontrovertible truth is that learning is intricately connected to the performance of a judge. If we want to have an effective, responsive, accessible and fair judiciary, it is crucial that judges at all levels should constantly and effectively engage in the process of pursuing higher intellectual attainments.

I congratulate the Editorial Board and all those who have made contributions to this Journal with commendable efforts. The authors in the present volume have made seminal contributions in their respective articles covering the very sensitive aspect of victim compensation, child rights, law relating to labour rights as also various other contemporary issues and topics. I also extend my best wishes for the success of the publication and look forward to seeing new volumes year after year.

(G. ROHINI)
CHIEF JUSTICE

S. RAVINDRA BHAT
JUDGE

High Court of Delhi, Sher Shah Road,
New Delhi-110003.
Tel.: Court 43010101 Fax : 23782731
Residence : 8, Rajaji Marg, New
Delhi-110011. Tel .: 23012326

MESSAGE

It gives me immense pleasure to convery my best wishes to the Academy to have come up with 'Journal of Delhi Judicial Academy 2016'.

The Journal has good mix of contributions made by academia, judges and advocates covering a wide range of subjects. I am confident that the Journal would - in keeping with the high standards and quality of the Academy's efforts-help contributing to the judicial education and would further provide a platform to judge, academia and others stake holders in the justice delivery system to share their ideas and knowledge.

The considerable effort, which has gone into giving shape to the Journal, is apparent. I congratulate the editorial team as well as the contributors. I am confident that the journal would be well received by its readers and would be of use.

With warms wishes,

(S. RAVINDRA BHAT)

EDITORIAL

Judicial education is an integral part of the Common Law legal system. The changing needs of the society and the plethora of laws made from time to time throw up new challenges for the judiciary, making dispensation of justice a difficult task. In this context, judicial education and training play a crucial role towards improving judicial skills and capacities of the judges and other functionaries in the justice delivery system.

It is also important today to sensitize the judiciary about the socio-economic realities that exist in the society in order to dispel the common myth that judicial decisions are based on inflexible laws and procedures. The evolving jurisprudence has credibly established that the duty of a judge is not confined to delivering judicial decisions alone but entails a bigger challenge of serving the process of justice as such. Hence arises the need to encourage our judiciary to not just follow a technocratic approach, but a humane one in consonance with the constitutional values while deciding cases.

Judicial education is also vital to equip our judges with the necessary decision-making skills in cases that do not involve much of legal or objective base, or that involve questions of morality or subjectivity. Judicial training can also guide judges to write judgements and orders that are concise but reasoned, reader-friendly to the parties and the appellate courts - an essential component of access to justice. The decisions should also be worded clearly to make it easier for the masses to understand since the law laid down by the apex court is the law of the land, ignorance of law being no excuse.

The objective of such training is also to expand capacities of our judicial officers and to make them aware about the latest developments in Science & Technology to make it easier for them to deal with cases in the emerging areas like cyber crimes and to appreciate the nuances of electronic evidence.

The Delhi Judicial Academy (DJA) has, since its inception, directed all its efforts in this direction and has constantly endeavoured to improve and enhance the justice delivery system. Besides undertaking education and training programs for judicial officers and other functionaries in the justice delivery system, the Academy has also initiated publication of a *Journal* to achieve its goals. The *Journal* is intended to act not only as a forum for intellectual discourse for enrichment of existing scholarship, but also for providing a platform to the legal luminaries to highlight the challenges that lie ahead in the justice delivery system.

These apart, the *Journal* is also envisioned to serve the purpose of educating judicial officers to improve their judicial skills, encourage dialogue amongst judges, lawyers, academicians as also experts from other disciplines. Most importantly, it is envisaged to provide a medium to judicial officers to share their views about the emerging and contemporary legal issues.

The present volume is an earnest attempt towards understanding the new and complex issues of law. It contains scholarly articles, essays and case studies, written in clear, coherent, logical and lucid language. The volume covers wide and varied areas of law like constitutional law, environment law, criminal justice system, judicial process, child rights and commercial arbitration, etc., with a view to inform and enlighten the wider legal fraternity associated with these laws.

In his article, Hon'ble Mr. Justice Ibrahim Kalifulla has attempted to highlight the true significance of Law Day as against the ritualistic rhetoric associated with it. Hon'ble Mr. Justice V. Gopala Gowda has stressed on the importance of judicial education and training in consolidating and strengthening the principle of judicial independence.

Prof. V. K. Dixit has probed into the issue of judicial standards, understood in a wider sense as precepts of non-legislative origin used by judges to decide cases. Prof. Parmanand Singh has examined the ways to curb the abuse of Public Interest Litigation (PIL) in India.

The volume also includes an exhaustive article on the legal framework of labour-management relations in India and the extraordinary role played by the Supreme Court of India in upholding the rights of workers in the pre-globalized era. These landmark decisions of the apex court, according to the author, should guide the industrial adjudicators in the coming years to give precedence to social context adjudication in labour disputes.

The present volume also includes articles written by judicial officers and social activists who have voiced their opinion on current legal issues such as: need for judicial education and training, international commercial arbitration, judicial discretion, magistrate's role in criminal investigation, compensation to victims of crime, child custody and visitation rights in matrimonial litigation, law of parole in India, attendance of witnesses and production of documents in departmental inquiries, law and practice on exhibit of documents, legal and regulatory framework on child rights and a critical analysis of the Protection of Children against Sexual Offences Act, 2012.

The Delhi Judicial Academy would like to express its sincere thanks to all

the learned authors who have made their contributions to this issue.

A special thanks is due to our Patron-in-Chief, Hon'ble Ms. Justice G. Rohini, Chief Justice of the High Court of Delhi, and Hon'ble Mr. Justice S. Ravindra Bhat, Chairperson, Judicial Education Programme & Training Committee of the High Court of Delhi, for their inspiring messages.

We would also like to thank Dr. Thomas Paul, our Guest Editor, without whose relentless efforts, impeccable editing skills and valuable inputs it would not have been possible to bring out this volume in such an elegant form.

The valuable assistance of the research team of DJA, past and present, namely Naman Kamboj, Radhika Verma, Niketa Singh, Aarushi Malik, Mahima Mahajan and Rohin Kaul, is duly acknowledged.

And lastly a request to our readers: we place this *Journal* in your hands with the expectation that you will give us your valuable suggestions and critical analysis to help us improve our forthcoming volumes.

Prof. Bushan Tilak Kaul

ROLE OF JUDICIAL STANDARDS IN JUDICIAL PROCESS

VINOD DIXIT*

I INTRODUCTION

In legal circles, judicial standards generally mean the standard of behaviour of judges and judicial officers. Judicial standards usually refer to impartiality, neutrality, honesty, non bias, non discrimination and decision according to law. In this article the expression judicial standards is, however, used in a wider sense, to mean legal precepts of non legislative origin or undefined legislative precepts, used by judges to decide cases, such as reasonability, due process, rule of law, rules of natural justice, strict liability or fair trial. Although it is not possible to deal with all of them, a modest attempt has, however, been made to discuss their importance and role in a legal system specially that of India. Inspiration to write this article came from the books on English legal history, the writings of Ronald Dworkin and Roscoe Pound, some cases decided by the judiciary of various jurisdictions, and a number of other legal and non-legal sources.

In every legal system there are a large number of legal precepts, standing at various levels of generality, with different sources of origin, used by judges to arrive at a fair outcome of a dispute. Roscoe Pound finds two characteristics of legal precepts, imperative (enacted) and traditional (habitual or customary).[1] A third, the ideal (just), may be added. Imperative precepts are precepts made by or under the authority of a legislature, statutory enactments or delegated legislation. Throughout this article, these are called Rules except when the context requires otherwise. Traditional and ideal when incorporated in a judicial decision, or accepted as part of judicial process, will be called Standards. Standards are being used in a wider sense to include concepts, principles, policies and doctrines, etc. Traditional precepts are those standards which originate in social morality or are part of the people's way of life, whereas the ideal relates to the constituency of justice and fairness.

Roscoe Pound has analyzed and classified the varied types of legal precepts as follows:

1. Rules (in the narrower sense) - precepts attaching a definite detailed legal

* Former Professor of Law, University of Delhi.

1 Harold Gill Reuschlein, "Roscoe Pound the Judge", 90 *University of Pennsylvania Law Review* at 295 (1942).

consequence to a definite, detailed factual situation.

2. Principles - authoritative points of departure for legal reasoning, employed continually and legitimately where cases are not covered or are not fully or obviously covered by rules in the narrower sense.

3. Conceptions - authoritative categories to which types or classes of transactions, cases, or situations are referred, in consequence of which a series of rules, principles and standards become applicable.

4. Doctrines - systematic joining of rules, principles, and conceptions with respect to particular situations or types of cases or fields of the legal order, in logically interdependent schemes, whereby reasoning may proceed on the basis of the scheme and its logical implications.

5. Standards - general limits of permissible conduct to be applied according to the circumstances of each case.[2]

In rules, Pound finds 'the bones and sinew of the legal order'.[3] It is through the standards that the law realises a desirable individualisation of application in the province of law in governing conduct and control of individuals and institutions.[4]

While using the word 'principle', the word 'standard' was preferred in a generic sense. Dworkin defined the difference between 'principle' and 'policy'. Policy is that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community, whereas principle is a standard that is to be observed not because it will advance economic or political goal but because it is a requirement of justice or fairness.[5]

II DIFFERENCE BETWEEN RULES AND STANDARDS

For the purpose of this paper, it is not proposed to further discuss the distinction between principles, policies, concepts, and doctrines; for these precepts the term used will be standards or concepts. The primary purpose of this paper is to analyse the difference between rules on the one hand and standards on the other.

Legislative enactments or precepts made under its authority are rules but standards are neither made by the legislature nor explained by the legislature, and

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2 Roscoe Pound, "Hierarchy of Sources and Forms in Different Systems of Law", 7 *Tulane L. Rev.* 475 at 482 (1933).

3 *Id.* at 486.

4 *Id.* at 485.

5 Ronald Dworkin, *Taking Rights Seriously* at 22 (Harvard University Press, 1977).

discretion may be given to the courts to define and apply them according to the circumstances of the situation.

Rules are made but standards are evolved and their scope may be widened or narrowed down or may be abandoned according to the changing situation. Rules are precisely stated, whereas standards are stated broadly so as to make them elastic enough to fit in different situations. Rules must be applied in their entirety if they cover a situation or it must be declared that they do not cover a particular situation. Application of standards is discretionary. Standards, to a great extent, standardise the use of discretion and perform an important function of filling the gap left by the rules. Rules are based on legislative policy though the legislators may be influenced by different types of ideologies or social policies. Standards are influenced by social, political, economic and religious ideologies or policies and may originate in any source but cannot be called standards, unless incorporated in a decision of a court of record.

III FUNCTIONS OF RULES AND STANDARDS

Standards perform many important functions in the judicial process. Some of them are being discussed here. Standards are used to tone down the effect of a rule, if in a specific situation, it produces unfair results. The courts more often than not 'will not permit themselves to be used as instrument of inequity and injustice'.[6] In support of this function of a standard, Dworkin[7] cites a well known U.S. case, *Riggs* v. *Palmer*[8] decided in 1889. The issue before the court was whether a heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court observed that 'It is quite true that statutes regulating the making, proof and effect of wills, and devolution of property, if literally construed, and if their force and effect can under no way or under no circumstances be controlled or modified, give this property to the murderer'.[9] The court further observed that all laws and contracts may be controlled in their operation and effect by the general maxim of the common law, 'No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own inequity, or to acquire property by his own crime'.[10] As a consequence, the murderer of the grandfather did not inherit

6 *Id*. at 24.

7 *Id*. at 23.

8 115 N.Y. 506, N.E. 188 (1889).

9 *Id.* at 509.

10 *Id.* at 511.

any property, notwithstanding the fact that at that time no rule was in force denying inheritance to a murderer.

Related to the preceding application of standards, there is another use of standards. If a rule produces an unjust result in a specific situation, but the application of the rule cannot be avoided, the rule may be reinterpreted in association with a standard to arrive at a just result. To illustrate the point, let us take a hypothetical situation. There is a swimming competition. In a particular event, A has been declared the winner by the referee. B, who stood second, protests the decision of the referee on grounds that the decision was given in violation of a rule of the competition. To consider the protest, the officials of the competition met for two hours and after a heated discussion arrived at a decision. The officials declared that A was disqualified and B was the winner in his place on grounds that A had violated the rule that 'the first swimmer who touches the wall of the pool with both the hands shall be declared winner.' A touched the wall of the pool only with one hand, that disqualified him from winning. But it was impossible for A to fulfil the requirement of the rule. A had only one hand; he had lost his other hand in an accident. But the officials held that the rule was the rule and they had to apply it, howsoever regrettable it may be. They promised to raise the matter in the next meeting of the sports board and try to get the rule suitably changed. But another decision maker might have decided otherwise. He could have interpreted the rule in association with the maxim that 'law cannot make impossible demands' (the maxim, 'Law must provide rules that humans are capable of fulfilling' is part of the concept of inner morality developed by Lon Fuller[11]) and could have decided that 'both' means all the hands a swimmer has. The rule did not use the word 'two' which is enumerative but the word 'both' which is inclusive; therefore, the rule must be interpreted to mean all the hands a swimmer has. But a judge has the option to decide literally, he may ignore the principle.

Sometimes, standards are used neither to apply a rule nor to reinterpret the rule, but to create an exception in or supplement the existing standard. Lord Atkin in the famous case of *Donoghue* v. *Stevenson*[12] successfully used a Biblical parable to create an exception in the principle (standard) of privity of contract. In this case, the victim who was poisoned after drinking beer from the bottle containing decomposed body of a snail, did not have any privity of contract with the manufacturer of beer, therefore the manufacturer was not liable to the victim under the then existing law. When the matter was referred to the House of Lords

11 Lon Fuller, *The Morality of Law* (New Haven, Connecticut: Yale University Press, 1964).

12 (1932) AC 562.

by a Scottish court, Lord Atkin used the Biblical parable of Good Samaritan to create a new standard known as neighbour's rule. The parable of the Good Samaritan is a parable told by Jesus and is mentioned only in one of the gospels of the New Testament. According to the gospel of Luke (10:29-37) a traveller (probably a Jew) is stripped of clothing, beaten, and left half dead along the road by the highwaymen. First a priest and then a Levite come by, but both avoid the injured traveller. Finally a Samaritan comes by. Samaritans and Jews generally despise each other, but the Samaritan helps the man, brings him to an inn and nurses him back to health. The Samaritans and Jews despise each other because of religious reasons. The Samaritans are adherents of Samaritanism, an Abrahamic religion, closely related to Judaism. The Samaritans believe that their religion is the true religion, that their religion is the religion of ancient Israelites from before the Babylonian Exile, preserved by those who remained in the land of Israel as opposed to Judaism, which they see as altered and amended religion. The Levites belong to the tribe of Levi and are either priests or played music in the temples of Israelites. They as well as priests have horror of touching dead bodies.

Lord Atkin relying on this parable and the famous saying of Jesus that 'love thy neighbour' observed: 'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour.'[13] Your neighbour is not necessarily the one who lives next door but one who loves you. In law your neighbour is not only the one with whom you have privity of contract but one whose action adversely affects you. By this analogy the manufacturer of the ginger beer is the neighbour of the victim and is under a duty not to injure him. With the help of this biblical parable, Lord Atkin created a new standard to the derogation of, and to supplement, the existing standard of privity of contract.

The neighbour's rule was further extended and applied to a new situation by the M.P. High Court in *Madhya Pradesh Road Transport Corporation* v. *Basanti Bai.*[14] A driver of the appellant corporation was going to join his duty early in the morning. The city was facing intense communal riots that day and the driver, while going to join the duty, was stabbed to death by a rioter. The widow of the driver brought a suit for damages stating that the corporation was negligent in not providing adequate security to the driver though they were well aware that the city faced a situation of riot. The court applied the principle of neighbour's rule to this situation. Applying another principle (standard) of proximity, the court argued that by the negligence of the corporation the driver was directly affected. The

13 *Id.* at 580.

14 1971 MPLJ 706.

corporation being the neighbour should have foreseen the harm to the driver.

As stated earlier, standards are more broadly stated and flexile than rules. Rules are either applied if the situation satisfied the requirement of the rule, else not applied at all. Whereas the standards are not only flexile but elastic as well. With the change of circumstances and time, they can be further developed to suit the needs of the time. With the development of industrial society, fault liability developed into strict liability and strict liability into absolute, without nullifying the preceding ones. It is quite interesting that though there is a qualitative difference between fault liability on the one hand, and strict and absolute on the other, there is actually no clear visible difference between the two. Absolute liability is different from the strict liability inasmuch as the former is inherently very dangerous whereas the latter is slightly less. It is merely a difference of degree.

Fault liability was developed into strict liability in *Ryland* v. *Flecher*.[15] The defendants had a mill, for better water supply they got a reservoir constructed through a contractor. When water was filled in the reservoir, it escaped and flooded the coal mines of the appellants. It was proved that the defendants were not negligent as they employed competent engineers. The Exchequer court dismissed the suit as there was no negligence. The House of Lords developed the concept of liability without fault into strict liability. Blackburn, J. observed: 'A person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and if he does not do so, is prima facie, answerable for all the damage which is the natural consequence of its escape.'

Blackburn, J. further observed, 'The person whose grass or corn is eaten by escaping cattle of his neighbour or whose mine is flooded by the water from his neighbour's reservoir or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes of his neighbour's alkali is damnified without any fault of his own.' When Blackburn J. formulated the rule in *Ryland* v. *Fletcher*, he began to adapt the principle of strict liability to the era of expanding industrial enterprise in once predominantly agricultural society.[16]

The Indian Supreme Court further developed the doctrine of strict liability into absolute liability to 'meet the requirements of a modern society' as strict liability does not meet such requirements. Possibly, the context of evolving this

15 (1868) LR 3 HL 330.

16 W. Friedmann, *Law in a Changing Society,* at 48 (Universal Law Publishing Co., New Delhi, 2001).

doctrine was the unprecedented industrial disaster at Bhopal. The new doctrine foreclosed the possible option of sabotage available under the doctrine of strict liability to the defendants in the *Bhopal* case. The Supreme Court developed this doctrine in *M.C. Mehta* v. *Union of India,*[17] popularly known as the Oleum Gas leak case. From a factory of Shriram Food and Fertilizer Industry a highly toxic gas, oleum, leaked. The Supreme Court laid down a new law not known to the English law: 'where an enterprise is engaged in hazardous or inherently dangerous activity and harm results to any one on account of an accident in the operation of such hazardous or inherently dangerous activity, resulting for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Ryland* v. *Fletcher*."[18]

The distinguishing point of absolute liability doctrine is 'hazardous or inherently dangerous activity', which is also the distinguishing feature of strict liability. Thus, a subsequent court has the option of following either of the doctrines. The difference between the two doctrines is a matter of degree, and the difference in degree is to be perceived by the relevant court.

Similarly, 'in the field of contract, the development of the doctrine of frustration was stimulated by the upheavals of the first and second world wars. The main impetus was given to it by the requisitioning of the British Merchant Navy in the First World War.'[19] Consequently, these ships were not able to fulfil their contractual obligation.

Standards have dimension that rules do not have. When standards intersect, one who resolves the conflict has to take into account the relative weight of each.[20] Which policy or principle is more important will always be controversial. However, the court giving more weight to one over the other, may not declare the other invalid, it simply does not apply the other. Rules do not have this dimension. If two rules conflict with each other, one cannot be a valid rule to the extent of conflict.

Sometimes, legislature uses phrases, terms or concepts, which though are part of the legislative enactments, yet have most of the characteristics of standards.

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17 (1987) 1 SCC 395.

18 *Id.* at para 31.

19 W. Friedmann, *supra* note 16, *ibid.*

20 Ronald Dworkin, *supra* note 5 at 26.

For example, the Constitution of India uses many terms and phrases which have many characteristics of standards. The use of 'reasonable restrictions' in articles 19 and 304 (b), 'public order and morality' in article 26, 'public interest' in article 302, 'equality before law' in article 14 (originally the term was coined by A.V. Dicey), or 'equality of opportunity' in articles 15 and 16, make these terms similar to judicial standards. These phrases are so vague, general and broadly stated that their meaning can vary depending on the circumstances. When a legislature uses words like 'negligent', 'unjust', '*mens rea*', '*ultra vires*', it depends to an extent on principles, concepts and policies of judicial standards.

The point that standards are different from the rules, inasmuch as the courts have discretion to apply or not to apply standards, will be made more clear by referring to a case decided by the Competition Commission of India (CCI). In 2013, the CCI decided two almost identical cases relating to sport - the first related to hockey and the second to cricket. The majority in the first case, used the doctrine of proportionality to tone down the effect of the provisions of the Competition Act, 2002, but the minority ignored the doctrine. In the second case, though the facts were almost similar, the CCI did not apply the doctrine. These cases have comprehensively been discussed elsewhere.[21] The first case is *Dhanraj Pillay* v. *M/s Hockey India*.[22] The case relates to section 4 of the Competition Act which provides that an enterprise, if it is dominant in the market, will offer fair and non discriminatory terms in its dealings.

The Hockey Federation of India imposed a number of restrictions on its players so as to restrict their participation in hockey games organised by its rival. If section 4 is read plainly, the restrictions were unfair and discriminatory. But the Commission had to make a balance between the two conflicting values, namely, (a) players play for money as sports have been commercialised; and (b) there exists non profit institutional forms of the game for promoting values such as team spirit, solidarity and fair play. The majority of the CCI applied the doctrine of proportionality and held the restrictions to be reasonable and hence did not violate section 4. But the minority ignored the doctrine of proportionality and held the restrictions to be unfair. The case which relates to cricket is *Surinder Singh Barni* v. *Board of Control for Cricket in India*.[23] Though the facts of this case were similar to that of preceding case, yet the Commission did not apply the doctrine of

21 Vinod Dixit, "Competition Law," *Annual Survey of Indian Law, at* 174-178 (Indian Law Institute, New Delhi, (2013).

22 2013 Comp LR 543.

23 2013 Comp LR 297.

proportionality in this case.

IV EQUITY

The history of equity concerns the development of a body of principles, concepts and rules made by equity courts to reform the English law and make it responsive to the needs of changing times. Equity jurisdiction, in later medieval ages in Great Britain, developed the concepts and maxims of equity to tone down the inflexibility and rigours of common law. In the later medieval period, when the United Kingdom was transforming from the agrarian mode to the commercial mode of production, law, statutory as well as precedents, could not keep pace with the needs of the changing society, there came about a gap between law and justice. Legal formalism of law courts and inflexibility of statutory law inculcated a certain *status quo*. Apart from lagging behind the pace of the developing society, English legal system became extremely formal and beset with many technicalities, suffering from shortcomings, procedural and substantive.

There were many such shortcomings as: (a) claims would be allowed only if they fitted into an existing writ, the rule was 'no writ no remedy'. For example, certain writs of trespass would be allowed only if the act was done with force and arms against the King's peace; (b) the common law had only one remedy, damages, which often was inadequate; (c) the common law paid too much attention to formalities, for example, if a contract was made which required written evidence for its enforcement, the lack of such evidence meant that courts would grant no remedy; (d) the law court did not recognise trust, and the distinction between legal owner and beneficial owner - a legal owner was allowed to renege on the claims of the beneficiary; (e) as per the common law under a mortgage, if the mortgagor had not repaid the loan once the legal redemption date had passed, he will lose the property but would remain liable to repay the loan. This state of affairs compelled people to go to the King who was the fountain head of justice. He was not bound by law but would decide according to his conscience. The King would give relief in appropriate cases and it would be given according to his conscience. When the workload increased he transferred this power to the Chancellor who, in earlier stages, was a clergy and would decide according to the conscience of the King. He was the 'Keeper of the Royal Conscience', but later this function was given to the lawyers. Chancery courts in course of time developed a large number of equity principles and maxims which were based on the principles of religion, morality or needs of the contemporary times.

The maxims of equity are not a rigid set of rules, but are rather, general; broadly stated general principles which may or may not be applied depending on the exigencies of the situation. Equity, as a universal moral principle, supplies the required certainty by basing its decisions on principles, rather than on rules which had the defect of undesirable rigidity. The chief principle on which equity is founded is the principle that justice must be done, despite the seeming finality of any rule of law, if that rule actually works an injustice.

Equity jurisdiction introduced many legal reforms in the English legal system, and made the system responsive to the needs of a commercial society. Some of them are: (i) creation of the concept of trust; (ii) equity of redemption which allowed the mortgagor to keep the property, even after the date of payment has passed if he repays the loan with interest; (iii) specific performance, which is an order telling a party to perform its part of the contract; (iv) rectification, which allows a written document to be changed if it did not represent the actual agreement made by the parties; (v) rescission, which allowed parties to a contract to be put back in their original position in case a contract was induced by a misrepresentation; and (vi) injunction, an order stopping a person from doing a particular act.

V MAXIMS OF EQUITY

One of the most important contributions of the development and reform of English law is creation of the maxims of equity. The maxims of equity may fairly be described as a set of general principles which are said to govern the way in which equity operates. They tend to illustrate the qualities of equity, in contrast to the common law, as more flexible, responsive to the needs of the individual and more inclined to take account of the parties' conduct and worthiness. It cannot be said that there is a definitive list of the maxims: different sources give different examples and some works prefer to avoid the term altogether in favour of a broader discussion of the character of equity. Above all, the maxims are applied only when the court feels it appropriate: none of the maxims is in the nature of a binding rule and for each maxim, it is possible to find as many instances of its not having been applied as instances where it has been.

It is neither possible nor needed to give a complete list of maxims but some of them are: (i) 'He who comes to equity must come with clean hands'. (ii) 'Equity follows the law' (This is an attempt to indicate the relationship between common law and equity, which is a complex one. The traditional role of equity was 'to

temper and mitigate the rigour of the law', which implies that equity, would intervene and overrule the common law if justice required it. It was stressed, even at that time, however, it did not attempt to overrule common law judgments), (iii) 'Equity looks to the substance rather than the form' (Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it inequitable to allow a person to insist on such form, and thereby defeat the substance), (iv) 'Equity will not suffer a wrong to be without a remedy.' (v) 'Delay defeats equity' gave the principle of laches even in those cases where there was no statutory limitation.

VI RULES OF STATUTORY INTERPRETATION

Rules of statutory interpretation are non statutory (though in some countries these rules have been codified).[24] Broadly stated, rules are developed over centuries by courts. Many of them, contradictory and non-binding, are applied only when a court finds it appropriate to apply them. The common law courts in the historical development have evolved a number of rules of statutory interpretation. The courts apply the statutory rules, or delegated legislation, to a particular situation. They cannot say that they do not understand the meaning of statutory rules; howsoever ambiguous the statute may be, they must interpret one way or the other. It is a tenet of statutory construction that the legislature is supreme (assuming constitutionality) when creating law and that courts merely interpret the law. Nevertheless, in practice, by performing the construction, the courts can make sweeping changes in the operation of a law. The common law courts have developed certain highly flexile rules (standards) of interpretation as to how statutory rules are to be interpreted, and how to remove conflict between them, if there is any. There is no hierarchy between these rules of interpretation. No rule is to be preferred over the other. A judge is free to apply literal rule, golden rule or liberal rule at his option, depending on the circumstances, the ultimate aim being to dispense justice. These rules of interpretation provide guidelines, on how to remove conflicts and contradictions, what aids, internal or external, if any, to use.

VII RULES OF NATURAL JUSTICE

Most of the rules of natural justice are the result of fair policies perused

24 E.g., Australia, Canada, South Africa, the Republic of Ireland, New Zealand, and United Kingdom.

by the British courts. In the absence of any legislative guidelines, they evolved these rules by invoking ancient scholars or God. The beginning of the rule of *audi alteram partem* can be traced to the decision of Chief Justice Edward Coke of the Kings Bench. In many cases, drawing inference from *Magna Carta*, he insisted on the right of hearing. 'No free man shall be taken or imprisoned, ruined or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land'. From this passage of *Magna Carta*, creative Coke drew the inference that 'no man ought to be condemned without answer'. In the year 1615,[25] Edward Coke reviewed a local body's decision, to remove one of its employees, James Bagg. Coke relied on Seneca's tragedy, the Medea, a passage which as translated (in classical English) in 1648, read:

> Who ought decrees, nor heares both sides discust,
> Does but unjustly, though his Doome be just.[26]

The passage meant that 'no man ought to be condemned without answer'. The passage from Seneca's tragedy means, though a decision be right, it is not just if made without the decision-maker first hearing from the person to be affected by it. Seneca was a Roman philosopher of the first century B.C. Coke further observed '… although they have lawful authority either by charter or prescription to remove any one from the freedom, and that they have just cause to remove him; yet it appears by the return, that they have proceeded against him without hearing his answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party'.[27]

The rule of *audi alteram partem* was further reinforced by Fortescue J. in *R.* v. *University of Cambridge*[28] (popularly known as *Dr. Bentley's case*) in the year 1723. This time, Fortescue J. invoked the biblical parable of the 'Original Sin'. In 1723, the Court of King's Bench issued a mandamus to the University of Cambridge requiring the restoration to one Bentley of the degrees of Bachelor of Arts and Bachelor and Doctor of Divinity of which he had been deprived of by the university without a hearing. Bentley had been served with a summons to appear before a university court in an action for debt. He said the process was illegal, that he would not obey it and that the Vice-Chancellor was not his judge. He was then accused of contempt and without further notice, deprived of his degrees by

25 *Bagg's* case: (1615) 11 Co Rep. 95 b, (77 ER 1271 at 1275).

26 Medea: A Tragedie Englished by ES Esq (1648).

27 *Supra* note 25 at 99a.

28 (1723) 1 Str. 557; 93 ER 698 at 704.

the 'congregation' of the university. Fortescue J. relied on the story of the original sin. Original sin is the Christian doctrine of humanity's state of sin resulting from the fall of man from the Garden of Eden, namely, the sin of eating the forbidden fruit from the tree of knowledge. Fortescue J., on the analogy of this anecdote, observed: 'The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.' It was further explained from a religious source: 'How do you believe it divinely permitted to punish a person unheard when you see that Adam and Eve, the origin of our race, were heard before they were struck by the sentence of God? 'Then God called Adam and said to him, Adam, where are you? And Adam said, I heard your voice, Lord, in paradise, and I was afraid, because I am naked, and I hid myself. And God said to him, Who showed you that you are naked, except that you have eaten from the tree from which alone I commanded not to eat? And Adam said, The woman that you gave me, she gave me from the tree, and I ate. And God said to the woman, Why did you do this? And the woman said, The serpent persuaded me, and I ate …'[29] The woman was Eve and the Serpent was Satan. The judgment of Fortescue J. in the case is often cited as an example of the way in which the Christian idea of natural law formed the concept of *audi alteram partem*.

VIII INDIAN SUPREME COURT

Indian courts, specially the Supreme Court, have also developed concepts and doctrines specific to India. The most important is the concept of basic features. Though some Constitutions[30] of the world have incorporated eternity clauses in their respective Constitutions, India perhaps is the first country where the judiciary has

29 Chief Justice (Australia) Robert S. French, *Procedural Fairness - Indispensable to Justice*, 8 (Sir Anthony Mason Lecture, the University of Melbourne School of Law Student Society, 2010).

30 The basic Law of Federal Republic of Germany, under article 79 para (3) provides that the following cannot be amended: human rights, republican form of the Constitution, federal state, social state (welfare state), rule of law and separation of powers.
The Constitution of Islamic Republic of Iran, under article 177 provides the following features are not amendable: Islamic character, democratic character, and the absolute wilayat-al amr, the leadership of Ummah.
The following features of the Brazilian Constitution are not amendable: format of the federation, direct, secret, universal and periodic voting, separation of powers and individual rights and guarantees.
The French Constitution in Title xvi, article 89 provides that 'the republican form of government shall not be object of any amendment'.

developed the idea of eternity clause. The Supreme Court of India began including the doctrine of entrenchment in the Indian Constitution with *Golaknath* v. *State of Punjab.*[31] The Supreme Court, in this case held that fundamental rights have a 'transcendental position' and are beyond the reach of Parliament. Any amendment that 'takes away or abridges' a fundamental right would be unconstitutional. The Supreme Court delivered an unprecedented judgment in *Kesavananda Bharati* v. *State of Kerala*[32] and declared that while Parliament has wide powers, it did not have the power to destroy or emasculate the basic elements and fundamental features of the Constitution. It also declared that the principle of 'independence of judiciary' is an entrenched principle of the Indian Constitution. Similarly, it was established in the three *Judges cases* that a Supreme Court collegium will appoint judges in the high courts and the Supreme Court.[33] This action of the court was possible because of the principle of 'independence of judiciary'.

IX CONCLUSION

Unlike in an agrarian society, the pace of change in a modern industrial society is very fast. More often than not, law does not keep pace with the rapid movement of the society. Not only there occurs change in the technology, ideology, thinking but philosophy also changes. Legislature do not act rapidly enough to move along with the changing society. Quite often, legislative rules are found to be wanting to provide solution to the problems of the changing society. In this situation, standards, being flexible, highly generalised, elastic and optional may achieve twofold result. Either along with the rules or even without them, they may rise to the occasion. The use of judicial standards also prevents unchannelised exercise of discretion and the jurisprudence from becoming inconsistent and straying off the track. Judicial standards also help the judiciary not to succumb to sterile technicalities of law. Without the concept of rule of law, rules of natural justice and other similar concepts, our legal system might have steered clear of the constituency of justice. But there is a fear also; there is a need to be cautious as well, lest the thoughtlessly evolved standards may, become a source of frustrating the claims of justice: they themselves may become infertile technicalities.

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31 AIR 1967 SC 1643.

32 (1973) 4 SCC 225.

33 *S.P.Gupta* v. *Union of India,* 1981 Supp SCC 87: AIR 1982 SC 149; *Advocates on Record* v. *Union of India,* (1993) 4 SCC 441: AIR 1994 SC 268; *In re the Presidential Reference,* (1998) 7 SCC 39: AIR 1999 SC 1.

HOW TO CURB ABUSE OF PUBLIC INTEREST LITIGATION

PARMANAND SINGH*

I INTRODUCTION: RUNAWAY EXPANSION OF PIL

Public Interest Litigation (PIL) has today become a byword for judicial involvement for the protection of human rights and preservation of rule of law. Ideologically, PIL activism addresses and confronts the dominant formations in civil society and seeks public discourse on practices of power. PIL seeks to hold the government and its functionaries within the leading strings of constitutionalism and correct the episodes of governmental lawlessness and excesses of power by judicial admonition. In essence, PIL movement makes the courts the sites of struggle against state oppression and lawlessness.

PIL today has limitless fields. Every PIL is not propelled by any urge for vindication of the rights of the disadvantaged groups. It is being employed now for remedying all critical ills in the body politic and in the political governance. The sovereign but elusive concept of "public interest" is equated with PIL. In early eighties the predominant concern of PIL was to provide access to justice to the disadvantaged and oppressed groups. Today, PIL is less seen as a medium of social empowerment and is being increasingly used to raise the issues of political governance or to espouse the interests of middle-class Indians. The questions that need to be asked are: was PIL jurisdiction evolved to address largely the issues of governance? What are the reasons for the decline of PIL cases espousing the cause of the poor and the downtrodden? Have the judges become less sensitive towards the problems of the poor? Do the people consider it futile to approach the court for seeking justice for the poor? Social research is necessary to identify the characteristics of the social action groups and NGOs and their linkages with the dispossessed groups. PIL is initiated and controlled by elites and is governed by their own choices and priorities. These elite legal activists may have their own agendas and ideologies.

It is undoubtedly true that in recent years the cause of social justice and emancipation of the oppressed groups has been advanced in many ways through the device of PIL, but the fact that in some cases PIL has achieved positive success does not certify this technique as a sovereign remedy to protect human rights of the poor. Mass production of rights through PIL has resulted in heightened

* Formerly, Professor of Law and Dean, Faculty of Law, University of Delhi.

expectations from the judges that they are available to provide relief from all miseries and misfortunes. Human rights of the poor and the disadvantaged groups will be better protected by subjecting PIL to discipline and control and which should be limited only to the cases focusing on hapless victims of domination and governmental lawlessness. The overuse of PIL for every conceivable public interest might dilute the original commitment to use this remedy only for enforcing human rights of the victimized and the disadvantaged groups.

Due to lack of accountability of the Indian bureaucracy and growing decline of public morality, people approach the court for good governance and preservation of the rule of law. Can judicial governance solve the problem of bad (political) governance? Can the judicial intervention be a substitute for failed institutions? In the author's view in PIL cases, the courts function as a moral pedagogue of the nation radiating norms for a rule of law society and seeking the transformation of political cultures sensitive to values of constitutionalism and human rights. Judicial governance cannot cure all the ills visiting the Indian people.

II PIL AS A REMEDIAL JURISDICTION

PIL was evolved basically to provide access to justice to the downtrodden, the poor and the ignorant, who due to lack of resources and knowledge, were unable to seek redress for violation of their rights. The courts democratized access to justice by relaxing the rule of *locus standi.* Any public-spirited citizen could approach the court on behalf of the disadvantaged groups. The court's attention could be drawn even by writing a letter or sending a telegram. The judges also fashioned new kinds of relief under the court's writ jurisdiction. For example, the court could award interim compensation to the victims of governmental lawlessness or order rehabilitation of bonded or child labour or victims of police brutalities. Earlier cases also involved the judicial monitoring of state institutions such as jails, women's protective homes, juvenile homes, mental asylums and the like. Through judicial invigilation, the judges sought gradual improvement in the management and administration of these institutions.[1] New techniques of fact-

1 Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in Baxi (ed), *Law and Poverty*: *Critical Essays* 387 (1988). For a detailed analysis of the evolution and development of PIL see, Parmanand Singh "Human Rights Protection Through Public Interest Litigation in India" XLV, *Indian Journal of Public Administration,* 731-749 (1999); Upendra Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of (in) justice" in S.K. Verma and Kusum (eds), *Fifty Years of the Supreme Court of India : Its Grasp and Reach*, 156-209 (2000). Also see, Parmanand Singh, "Protecting the Rights of the Disadvantaged Groups Through Public Interest Litigation" in Mahendra P Singh *et al* (eds), *Human Right And Human Needs: Theory and Practice* 305 (2008); Surya Deva, "Public

finding were devised. In most cases the court had appointed its own socio-legal commissions of inquiry or had deputed its own officials for investigation including assistance of lawyers as *amicus curia*e. Sometimes it took the help of the National Human Rights Commission or the Central Bureau of Investigation or experts to inquire into the human rights violations or environmental degradation.

PIL strategy created a new kind of people-oriented social movement invoking judicial power for the emancipation of the poor and the oppressed people. In its initial years, the PIL focused predominantly on issues of failure of criminal justice system. *Hussainara Khatoon* v. *State of Bihar*[2] was the first reported case of PIL seeking relief to the undertrial prisoners languishing in jails. The PIL proceedings in this case resulted in the release of nearly 40,000 undertrial prisoners languishing in Bihar jails. *Anil Yadav* v. *State of Bihar*[3] depicted the police brutalities. About 33 suspected criminals were blinded by the police in Bhagalpur jail in Bihar through putting acid into their eyes. The Supreme Court quashed the trial of blinded persons, condemned the police barbarity in strongest terms and directed the Bihar government to bring the blinded persons to Delhi for medical treatment at state's expense. The court declared free legal aid as a fundamental right as an aspect of right to life and personal liberty. The human rights of prisoners subjected to torture, victims of police excesses, inmates of protective homes and mental asylums, bonded and child labor, victims of sexual harassment and many others have drawn the remedial attention of the court. PIL sought to enhance the accountability of the political class and the administrators towards unfilled constitutional commitment to social and economic justice. Earlier, the PIL cases offered a new paradigm of human rights and created a new people oriented profile of judicial power. Voiceless and powerless people were emancipated from exploitation, brutalities and oppressions on the initiatives of others.[4]

III PROMOTING RESPECT FOR SOCIAL RIGHTS

PIL movement also promoted respect for social and economic rights. In *PUCL* v. *Union of India,*[5] the Supreme Court not only issued directions for the

Interest Litigation in India: A Critical Review", 29 (1) *Civil Justice Quarterly* 19-40 (2009); Parmanand Singh, "Promises and Perils of Public Interest Litigation" 52 *Journal of the Indian Law Institute* 172 (2010).

2 (1980) 1 SCC 81.

3 (1981) 1 SCC 622.

4 S P Sathe, *Judicial Activism in India - Transgressing Borders and Enforcing Rights,* Oxford University Press (2003).

5 (2001) 7 SCALE 484.

implementation of centrally sponsored poverty alleviation programmes but also went to the extent of appointing an expert committee to monitor the compliance of court orders within fixed time frame. In this petition right to food was, for the first time, articulated as a guaranteed fundamental right. The court expressed its deep anguish about the increasing number of starvation deaths and complete breakdown of the system of food security despite overflowing food stock in the country. The court's order made food distribution scheme into entitlements without accepting the plea of lack of resources.[6] The activism of the court has made it clear that social rights can be the subject matter of adjudication and determination and enforceable by a court of law.

In a series of cases, the Supreme Court addressed the issue of health care as a fundamental right and imposed an obligation upon the state not only to provide emergency medical care but also to take all steps to create conditions necessary for good health, including facilities for basic curative and preventive health service. In doing so the court derived support from certain directive principles. While enforcing the right to health, the Supreme Court rejected the argument based on lack of financial resources. The court reasoned that even negative rights require economic resources. In *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal & Anr*[7], it held that in "the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. The said observation would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life."

The activism of the court in the phase of PIL movement had also recognized the right to primary education as an aspect of right to life.[8] The directive principle relating to the right to education in article 45 has now become a fundamental right after a long struggle of the child right activists, educationists and social activists, espousing the right to education, leading to an amendment in the Constitution in 2002, inserting article 21-A in the Constitution declaring right to primary education for children up to the age of 14 a fundamental right. The right to elementary education has become a reality by The Right to Free and Compulsory Education

6 The National Food Security Act 2013 seeks to provide a statutory basis of right to food as it creates special entitlements of food grains upto 25 kg at a subsidized rate of Rs 3.50 per kg.

7 (1996) 4 SCC 37, Also see *Vincent Panikurlangara* v. *Union of India,* (1987) 2 SCC 165; *Murli S Deora* v. *Union of India,* (2001) 8 SCC 765; '*X*' v. *Hospital 'Z'*, (2003) 1 SCC 500; *Parmanand Katara* v. *Union of India,* (1989) 4 SCC 286.

8 *Unnikrishnan* v. *State of A.P.,*(1993) 1 SCC 645.

Act, 2009 (RTE Act). In *Society for Unaided Private Schools of Rajasthan* v. *Union of India*,[9] some unaided private schools challenged the constitutional validity of section 12(1)(c) of the RTE Act. They also opposed the enforcement of the RTE Act's provisions through the threat of fines and/or de-recognition. Relying on the earlier Supreme Court judgments,[10] the petitioners argued that these provisions of the RTE Act impinged on their right to run educational institutions without government interference and violated their fundamental right under article 19(1)(g) of the Constitution.

The Supreme Court, by a majority of 2:1, upheld the constitutional validity of section 12(1)(c) of the RTE Act that makes it mandatory for all private unaided schools to reserve 25 per cent of their seats for children belonging to weaker sections and disadvantaged groups.[11] The majority held that the Act shall apply to: (a) government controlled schools; (b) aided schools (including minority administered schools); and (c) unaided non-minority schools. The court ruled that article 21A places an obligation on the state to provide free and compulsory education to all children between six and 14 years of age. However, the manner in which the obligation shall be discharged is left to the state to determine by law. The state is free to fulfil its obligation through its own schools, aided or unaided. The RTE Act is 'child centric' and not 'institution centric'.[12] Further, the Act places a burden on the state as well as parents/guardians to ensure that every child has the right to education. The right to education envisages a reciprocal agreement between the state and the parents, and it places an affirmative burden on all stakeholders in civil society. The private, unaided schools supplement the primary obligation of the state to provide free and compulsory education to the specified category of students. The cumulative effect of articles 21A, 21 and 45 of the Constitution is that the state should remove all barriers which make the right to education unaffordable.

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9 (2012) 6 SCC 1.

10 *T.M.A. Pai Foundation* v. *State of Karnataka,* (2002) 8 SCC 481; *P. A.Inamdar* v. *State of Maharashtra,* (2005) 6 SCC 537.

11 *Society for Unaided Private Schools*, *supra* note 9. The verdict was given by a three judge bench comprising S.H. Kapadia CJ and S. Kumar and K.S. Radhakrishnan, JJ. Radhakrishnan J. gave a dissenting judgment. For a critique of this case, see V. Kumar, *'The Right of Children to Free and Compulsory Education Act, 2009: A Juridical Critique of its Constitutional Perspective'*, 25 Journal of the Indian Law Institute, 21(2013).

12 *Society for Unaided Private Schools*, *supra* note 9 at 32.

IV COURTS AS INSTITUTIONS OF GOVERNANCE

Since the other branches of the state have been facing crisis of credibility due to the growing decline of public morality, people utilize PIL seeking a corruption free and honest governance. Over the years, the focus of PIL cases has drifted from issues of human rights to the issues of public accountability and governance. Through PIL the judges have unearthed 'scams' where bribes were given to high profile politicians and bureaucrats through "*hawala*" in return for favours in the grant of government contracts, exposed cases of political corruption and abuse of power in distributing state largesse. People raise issues of governance before the courts as the other avenues for redressal of their grievances have become ineffective and unreliable.

PIL has generally been perceived as a success in providing access to justice to the poor and the downtrodden, while some have sought to condemn the PIL movement, often with the specific charge that it has caused the judiciary to usurp the powers assigned to the executive and legislature and thus disturbing the doctrine of separation of powers. The courts have given directions as to how blood should be collected, stored and given for blood transfusion free from hazards; how to impart knowledge about environmental protection; how the children of prostitutes should be educated; how the CBI should be insulated from extraneous influence while conducting investigation of corruption against persons holding high offices; what procedure should be adopted and what precautions should be taken while allowing Indian children to be adopted by foreign adoptive parents; what guidelines should be followed to prevent sexual harassment of women at workplace; how to prevent noise pollution by loudspeakers and fire crackers; how to design the reservation and educational policy, and so on.

The court's growing engagement with issues of governance has encouraged people to invoke PIL jurisdiction on any conceivable matter of 'public interest'. Consequently, the concept of justiciability has been expanded today to such an extent that one can invoke article 32 jurisdiction (which is intended to be used to enforce fundamental rights) to challenge the constitutional validity of a law setting up private universities,[13] or a law dealing with deportation of illegal migrants,[14] or the legality of the dissolution of state assembly under President's

13 *Professor Yashpal* v. *State of Chhatisgarh*, AIR 2005 SC 2026.

14 *Sarbanda Sonowal* v. *Union of India*, AIR 2005 SC 2920.

Rule,[15] or questioning the induction of tainted ministers in the Union Cabinet,[16] or asking for the removal of a bureaucrat with tainted reputation.[17] PIL has been filed for better service conditions of subordinate judiciary,[18] for enforcing ban on smoking in public places,[19] for controlling noise pollution during festivities,[20] for checking ragging in the universities,[21] for electoral reforms,[22] and for questioning irregular allotment of petrol pumps.[23] PIL has been filed by lawyers challenging the commercial transactions of public institutions[24] and for judicial review of appointment of government counsel.[25] PIL was allowed to be filed by a retired IAS officer with regard to power purchase agreement,[26] by a tax payer to prevent misuse of public property by any one,[27] and by guardians of students to challenge the revision of syllabus for VIII class.[28] Advocates practicing in various courts in Tamil Nadu were permitted to file a PIL for the cancellation of bail granted to certain persons.[29] The court has been moved seeking to ban *Koran*[30] and the transmission of TV series.[31]

V AN OVERVIEW OF PIL MOVEMENT

The significance of PIL movement lies in the creation of norms for a just and equal society. In performing the expose function, the judges remind and alert the executive of its failings and lapses and give the public functionaries an opportunity to right the wrong. PIL activism creates a new jurisprudence of state accountability and seeks culture formations sensitive to human values and human

15 *Rameshwar Prasad* v. *Union of India,* (2005) 7 SCC 625.

16 *Satya Narayan* v. *N T Ramarao,* AIR 1988 AP 144.

17 *Centre for PIL* v. *Union of India,* (2005) 8 SCC 202.

18 *All India Judge's Association* v. *Union of India*, AIR 1992 SC 165.

19 *Murli S. Deora* v. *Union of India,* 2001 (8) SCALE 6.

20 *In re Noise Pollution,* 2001 (7) SCALE 481.

21 *Vishwa Jagriti Mission* v. *Central Government,* 2001(3) SCALE 503.

22 *Union of India* v. *Association of Democratic Reforms,* 2001 (3) SCALE 188.

23 *Common Cause* v. *Union of India,* 1996 (6) SCC 530.

24 *N.Parthasarthy* v. *Controller of Capital,* AIR 1991 SC 1420.

25 *Harpal Singh Chauhan* v. *State of U.P*., 1993 (4) JT (SC) 1.

26 *Dr J.C. Almedia* v. *State of Goa*, AIR 1988 Bom 191.

27 *Jayalalitha* v. *Government of Tamil Nadu*, AIR 1999 SC 2330.

28 *West Bengal Board of Secondary Education* v. *Smt Basan Rani Ghosh*, AIR 1982 Cal 467.

29 *R. Ratinam* v. *State District Crime branch Madurai*, AIR 2000 SC 1851.

30 *Chandanmal Chopra* v. *State of West Bengal*, AIR 1986 Cal 104.

31 *Oddyssy Lok Vidyayan Sangathan* v. *Union of India,* (1988) 1 SCC 168.

rights. Therefore, to expect that PIL will automatically bring about legal and social change is a delusion. One should always bear in mind the limits of judicial action in bringing about social change.

The rights based approach of the Supreme Court in interpreting right to life has enabled the people to formulate their claims in the language of rights. It has also enabled people to formulate social goals to be realized by positive state action in terms of rational public spending in social welfare. The court's judgments on the right of school mid-day meals, effective implementation of poverty alleviation schemes, obligation of hospitals to provide medical treatment to the needy, and payment of salaries to the starving employees of public sector undertakings who were denied their salaries for a long time,[32] are some of the positive achievements of an activist court. The far-reaching judgments concerning Bhagalpur blindings,[33] the Bihar undertrial cases,[34] mentally ill in jails,[35] victims of sexual harassment,[36] child and bonded labour,[37] to name a few, have provided the needed relief and have exposed the failings of the executive. The court has also evolved compensation jurisprudence for violation of human rights. PIL has made significant contribution in preventing environmental degradation and in activating the statutory authorities set up under various environmental laws. PIL on environmental matters related to issues such as environmental degradation due to stone quarrying in Dehradun region,[38] environmental pollution in Delhi due to mechanized slaughter houses,[39] development scheme adversely affecting the quantity and quality of a river water,[40] pollution by tannery industry,[41] urban and solid waste management,[42] vehicular

32 *Kapila Hingorani* v. *State of Bihar,* (2003) 6 SCC 1; *Kapila Hingorani* v. *State of Bihar,* (2005) 2 SCC 262. In these cases the Supreme Court directed the States of Bihar and Jharkhand to deposit money with the high courts of the concerned state for disbursement of salaries to the employees of public sector undertakings.

33 *Anil Yadava*, *supra* note 3.

34 *Hussinara Khatoon, supra* note 2.

35 *R.C Narain* v. *State of Bihar,* 1986 Supp SCC 576; *B.R Kapoor* v. *Union of India,* (1989) 3 SCC 387.

36 *Vishaka* v. *State of Rajasthan,* (1997) 6 SCC 241.

37 *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 243; *Neeraja Chaudhary* v. *State of M.P*., (1984) 3 SCC 243; *M.C. Mehta* v. *Union of India,* (1996) 1 SCALE 42.

38 *RLE Kendra* v. *State of U.P*., (1985) 3 SCC 614.

39 *Buffalo (Protection of Wildlife) Traders Welfare Association* v. *Maneka Gandhi,* (1996) 1 SCC35.

40 *DLF Universal Ltd* v. *Prof. Laxmi Sagar,* (1998) 7 SCC 1.

41 *Vellore Citizens Welfare Forum* v. *Union of India,* (1996) 5 SCC 647.

42 *Almitra Patel* v. *Union of India,* (1998) 2 SCC 416.

pollution,[43] protection and conservation of wildlife,[44] degradation of Taj Mahal,[45] and so on. In some environmental matters the Supreme Court took very bold steps such as to move the polluting industries out of Delhi and to force the commercial vehicles to convert to CNG to improve the quality of air and to stop the deforestation across the country to develop public law of nuisance to control pollution.[46]

Recognition of social rights by the courts is indeed commendable and in some cases, they have even tried to enforce these rights. But it must be recognized that it is beyond the judicial function to secure right to food, shelter, health care, housing, education, just to name a few. However, the recognition of social rights by judges is of little avail unless the public policies and economic arrangements are truly designed at social empowerment and there is sufficient social or public spending on food security, elementary education, social insurance, employment guarantee, job security, housing, health care and protection against social exclusion and these policies are properly implemented and there is transparency in governance.

It must be remembered that PIL may not always be utilized to achieve a desired result. The legal resources generated through PIL opinions may be utilized to promote a drive for political mobilization of the issues such as the present national campaign on right to food, gender equality, and environmental protection, reform of criminal justice system, prevention of female feticide, poverty reduction, and rehabilitation of the oustees of mega developmental projects, and so on.

There seems to be a national consensus on the legitimacy of judicial activism and expanded judicial power but it cannot be forgotten that the judiciary having neither the purse nor the sword remains the weakest wing of the government. Hence it is beyond the judiciary to provide effective responses to the growing corruption, wrong development or rights violations. In many cases, the judicial directions remain un-enforced and unimplemented. Despite enunciation of fundamental right to medical care, health care has been neglected to a very large scale. Despite plenty of food in the country, we occasionally hear the reports of farmer's suicides and starvation deaths. Police brutalities and custodial violence is the order of the day. The judicial directions providing safeguard to arrestees and those in police custody, prevention of sexual harassment at work place, forbidding the use of third

43 *M.C.Mehta* v. *Union of India*, AIR 1998 SC 2340.

44 *M.C.Mehta* v. *Union of India,* (1997) 3 SCC 715.

45 *M.C.Mehta* v. *Union of India,* (1997) 2 SCC 353.

46 There are numerous other positive achievements of PIL on environmental matters. Recently, the Supreme Court totally banned the killing of elephants for trafficking in Indian ivory, *Indian Handicrafts Emporium* v. *Union of India*, AIR 2003 SC 3240.

degree methods and custodial rape and violence, to name a few, are not properly implemented. Wilful defiance to PIL orders would surely dilute the credibility of the judiciary.

VI HOW TO CURB ABUSE OF PIL?

In the author's submission, relaxation in the traditional concept of *locus standi* alone is not the sole characteristic of PIL. In the context in which PIL had been evolved, it must fulfill other characteristics as well. A PIL must be filed by a public spirited citizen or a social action organization on behalf of those individuals and groups who are not in a position to approach the court for vindication of their legitimate human rights due to their disadvantaged position. Many PIL cases lack a *lis* or dispute to be adjudicated by a court as a neutral empire as in the adversarial litigation. In PIL, the court normally acts as an investigator, a mediator, a counselor, or a collaborator. PIL requires a judge to play an active role in providing immediate relief to the victims of human rights violations by relaxing procedural technicalities and by exempting the petitioner to prove the alleged facts which are investigated by the court itself. If all these characteristics are not present simultaneously, the matter cannot legitimately be called a PIL. But unfortunately, the judges have not resisted their temptation to treat any and every matter as a PIL, even if such a matter is not even remotely connected with human rights. The result is that over the years the courts have emerged as an institution of governance through the device of PIL. In the author's view, the norms for entertaining a PIL should be laid down so as to eliminate the subjective choices of the judges to entertain anything under the sun as a PIL. As has been stated above, PIL should be limited only to vindicate the rights of the victims of governmental lawlessness and social oppression. Issues involving political governance, or misrule or arbitrary exercise of power and so on, are also important but they should still be handled within the traditional mould of litigation. Such cases need not borrow the nomenclature of PIL.

It is important to investigate how far have the judicial initiatives been effective in providing symbols for rallying victimized or exploited groups before the courts and other forums? How far has the awareness of the new dispensation accompanied by enhanced capabilities of the dispossessed groups to make a sustained and effective use of legal resources to combat governmental lawlessness? How far have the judicial initiatives been able to promote drive for wider legislative changes or law reform or for launching people's movement to force the government to be responsive to judicial prodding? It must be recognized that PIL emphasizes litigation as a means of social change and thus enhances

the dependency of the victim groups on the social activists. Perhaps, it does not generate any effective participation of these groups who remain passive depending upon the efforts of others. PIL strategy is largely controlled by the elites who utilize the legal resources according to their own priorities and choices.

The impact of PIL decisions is hard to measure and requires serious social research. The effectiveness of judicial decisions are powerfully affected by several interlocking factors, too remote from the knowledge and control of the courts, such as traditional resistance to change, alliances of the implementers of law with vested interests (local *dadas*, influential politicians, and other dominant elements), improper or ambiguous dissemination of judicial directions, etc. Weak communication channels accompanied by well-nurtured and well-structured barriers to information may also lead to the diffusion, delay or defiance of judicial directions.

Time and again, the judges have warned against the abuse of this remedy and have laid down parameters for entertaining PIL. In *R M Trust* v. *Kora Mangala Vigilance Group,*[47] the court observed:

> This jurisdiction is meant for the purpose of coming to the rescue of the downtrodden and not for the purpose of serving private ends. It has become now common for unscrupulous people to serve their private ends and jeopardize the rights of the innocent people so as to wreak vengeance for their personal ends.

In *Gurpal Singh* v. *State of Punjab,*[48] the court observed:

> Court must do justice by promotion of good faith, and preserve law from crafty invasions. Court must maintain social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest or public good. No litigant has right to unlimited access over the court's time and public money in order to get his affairs settled in the manner he wishes. Easy access to justice should not be misused as a license to file misconceived and frivolous petitions. Today people rush to courts to file case in profusion under the attractive name of public interest litigation.

Sometime ago, S P Bharucha J. had very rightly remarked:[49]

47 AIR 2005 SC 894 at 906.

48 (2005) 5 SCC 136 at 140.

49 S P Bharucha "Inaugural Lecture of Supreme Court Bar Association's Golden Jubilee Lecture

> This Court must refrain from passing orders that cannot be enforced whatever the fundamental rights may be and however good the cause. It serves no purpose to issue some high profile mandamus or declarations that can remain only on paper…. It is of cardinal importance to the confidence that people have in the Court that its orders are promptly obeyed and it is, therefore of cardinal importance that orders that are incapable of obedience and enforcement are not made.

PIL is also criticized on the ground that in some cases the courts overstep the boundaries of their jurisdiction and enter the area assigned to the legislature and the executive. Justice A. S. Anand, (former CJI) in a public lecture observed:[50]

> With a view to see that judicial activism does not become "judicial adventurism" and lead a judge going in pursuit of his own notion of justice and beauty and ignoring the limits of law, the bounds of his jurisdiction and the binding precedents, it is necessary that "public interest litigation" which is taken recourse to for reaching justice to those who are for variety of reasons unable to approach the Court to protect their fundamental rights should develop on a consistent and firm path. The Court must be careful to see that by their overzealousness they do not cause any uncertainty or confusion through their observations during the hearing of the case or through their written verdicts. The Courts have the duty of implementing the constitutional safeguards that protect individual rights but they cannot push back the limits of the Constitution to accommodate the challenged violation. All it means is that Judges are expected to be circumspect and self disciplined in the discharge of their judicial function.

From the above discussion, it is possible to cull out the following guidelines for curbing the abuse of PIL:

(1) A person acting *bona fide* and having sufficient interest in the proceedings of PIL will alone have *locus standi.* He alone can approach the court to wipe out violation of fundamental rights or genuine infraction of statutory provisions. His objective should not be for personal gain or private profit or

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Series" reproduced in Jaggu Kapur (ed.), *Supreme Court on Public Interest Litigation* vi-vii Vol. IV (2001).

50 A. S. Anand J, "Protection of Human Rights: Judicial Obligation or Judicial Activism?" Rao Memorial Lectures (1997) 7 SCC (*Jour*) 11 at 23.

political motive or any oblique consideration.

(2) A writ petitioner who comes to the court for relief must come not only with clean hands but also with a clean heart and a clean mind.

(3) PIL which has come to occupy an important field in the administration of law should not be 'publicity interest litigation' or 'private interest litigation' or 'politics interest litigation' or the latest trend 'paise income litigation'. There must be a genuine and real public interest involved in the litigation. The attractive brand name of PIL should not be used for suspicious product of mischief. The court must not allow its process to be abused for oblique considerations. Some persons with vested interests indulge in the past time of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity.

(4) When it has not been shown as to how and in what manner the affected party is handicapped in not seeking relief, PIL should not be entertained. Therefore, the courts have to filter down frivolous petitions and dismiss them with exemplary costs so that the message goes in the right direction that the petitions filed with oblique motives will not have the approval of the court.

(5) It is too much to attribute authenticity or credibility to any information, as though it is the gospel truth, just because it was published or reported in a newspaper. Newspaper reports *per se* do not constitute legally acceptable evidence.

(6) PIL should be entertained only when public at large cannot afford litigation and are made to suffer at the hands of the authorities. It must be invoked only in the matter of downtrodden people.

(7) Since the belated PIL cases cast a cloud over the ongoing projects and generate uncertainty, the doctrine of *laches* should apply in PIL cases and such petitions should be thrown out on the ground of *laches*.

(8) The court has to satisfy itself about (a) the credentials of the applicant; (b) the *prima facie* correctness of the nature of information given by him; and (c) the information not being vague or indefinite. The information should show the gravity or the seriousness involved.

(9) The court has to be extremely careful that under the guise of redressing a public grievance it does not encroach upon the spheres reserved by the

Constitution to the executive and the legislature

(10) The court has to strike a balance between two conflicting interests: (a) nobody should be allowed to indulge in reckless and wild allegations besmirching the character of others; and (b) nobody should be allowed to get away with mischievous petitions seeking to assail, for oblique motives, justifiable executive actions.

LAW DAY AND THE EVOLUTION OF OUR CONSTITUTION

F. M. Ibrahim Kalifulla*

I INTRODUCTION

As members of the legal fraternity, we have been celebrating the *'Law Day'*, which is supposed to symbolize and epitomise the emergence and evolution of our marvellous Constitution. The present author has been a part of this wonderful tradition where various luminaries and doyens from both the Bench and the Bar, join hands in celebrating this auspicious day, with great vigour and enthusiasm. But at the same time, it has also been observed, that the majority of us, have not truly understood the real essence and significance behind the celebration of this day or its place in our great constitutional history. This makes one to introspect and ask oneself, *"What is this 'Law Day'?" "Why should there be a celebration at all calling itself as 'Law Day'?"* This uncertainty has been looming large in my mind for quite some time. To provide clarity and to find out the reasons for its celebrations, one needs to probe into the history of the making of our Constitution, with an intent and purpose of understanding the significance of celebrating such a special day, rather than just conducting it as a ritualistic process. This takes us inevitably, to the debates of our Constituent Assembly.

II A BRIEF NOTE ON THE INDIAN CONSTITUTION

The Indian Constitution is the supreme law of the country. It defines the fundamental political principles, formulates the configuration of governance, procedures, respective authorities, and responsibilities of each governmental institutions. It sets out the most significant fundamental rights, directive principles as well as the duties of citizens. The Indian Constitution is the longest written Constitution in the world. Bhimrao Ramji Ambedkar is regarded as the father of the Indian Constitution.

The Constitution of India believes in the parliamentary system of government and the executive is made directly answerable to the legislature. Article 74 provides for a Prime Minister who would be the head of the government. It also provides for a President and a Vice-President under articles 52 and 63, respectively.

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The Constitution lays down a structure which resembles federal governance. Each state and each union territory of India is bestowed with their own government. Analogues to the President and the Prime Minister, is the Governor in case of States (Lieutenant Governor for Union territories) and the Chief Minister, respectively. The third tier governance which is also called the *Panchayati Raj* was introduced in villages and municipalities by virtue of 73rd and 74th Amendment Acts. Due to the peculiar situation in Jammu & Kashmir, the Indian Constitution, under article 370 has given a special status to the state.

The Constitution was adopted by the Constituent Assembly on 26 November 1949, and came into effect on 26 January 1950. This date was chosen to commemorate the *Purna Swaraj* declaration of independence of 1930 which is also celebrated as the Republic Day of the country. Since this day, the Union of India officially became the Republic of India substituting the Government of India Act, 1935 as the country's only foremost document. Article 395 of the Constitution repealed the Indian Independence Act, 1947.

The Preamble of the Constitution declares India to be a sovereign, socialist, secular, democratic republic, assuring its citizens of justice, equality, and liberty, and endeavours to promote fraternity among them. In 1976, the words "socialist" and "secular" were added by a constitutional amendment.

The Constituent Assembly was given the task of framing the Constitution of India. On December 9, 1946, the inaugural meeting of the Constituent Assembly was held. Sachidananda Sinha was the elected provisional Chairman and on December 11, 1946, Rajendra Prasad was elected as the permanent Chairman of the Assembly.

The Constitution makes detailed provisions for the following: citizenship, fundamental rights, directive principles of state policy, structure of the government, parliament and state legislatures, Supreme Court and high courts, relationship between the Union and the states, services, official language and various other matters of basic importance.

III BACKGROUND

'The major portion of the Indian subcontinent was under the British colonial rule from 1857 to 1947.'[1] The impact of economic, political and social exploitation during this period helped the gradual rise of the Indian independence movement

1 Tirthankar Roy, *The Economic History of India 1857-1947* (New Delhi: Oxford University Press, 2000).

to gain independence from foreign rule. 'The movement culminated in the formation of the Dominion of India on 15 August, 1947, along with the Dominion of Pakistan.'[2] 'The Constitution of India was adopted on 26 November, 1949 and came into effect on 26 January, 1950, proclaiming India to be a sovereign, democratic republic.'[3] It contained the founding principles of the law of the land which would govern India after its independence from the British rule. On the day the Constitution came into effect, India ceased to be a dominion of the British Crown. 'The Indian Constitution is the world's longest Constitution.'[4] 'At the time of commencement, the Constitution had 395 articles in 22 parts and 8 schedules.' 'It consists of almost 80,000 words and took 2 years 11 months and 18 days to build.'[5]

In the United Kingdom the office of the Secretary of State for India was the authority through whom Parliament exercised its rule (along with the Council of India), and established the office of Viceroy of India (along with an Executive Council in India, consisting of high officials of the British Government). 'The Indian Councils Act 1861 provided for a Legislative Council consisting of the members of the Executive council and non-official members.'[6] 'The Indian Councils Act, 1892 formulated the provincial legislatures as well as augmented the powers of the Legislative Council.'[7] 'Even though these legislations amplified the representation of Indians in the participation of the governmental activities, their authority was still restricted.'[8] 'The Indian Councils Act 1909 and the Government of India Act 1919 promoted the expansion of the Indian participation in the government.'[9]

IV GOVERNMENT OF INDIA ACT, 1935

'The Government of India Act, 1935 left a huge mark on the Constitution of India as it remained the first constitution of India during 1947-49.'[10] 'The three

2 Burton Stein, *A History of India* at 356 (2nd edition; Blackwell Publishers Ltd., 2010).

3 Shibani Kinkar Chaube, *Constituent Assembly of India*: *Springboard of Revolution* at 90 (Manohar Publishers & Distributors, 2000).

4 P.M. Bakshi, *Constitution of India* (Universal Law Publishing House & Co., New Delhi, 2010).

5 *Ibid.*

6 P.N. Chopra, *et al*, *A Comprehensive History of India*: *Modern India,* Vol. 3 at 125 (Sterling Publishers Pvt. Ltd, 2003).

7 James Stuart Olson, *Historical Dictionary of European Imperialism* at 305 (Greenwood Press, United States of America, 1991).

8 *Ibid.*

9 *Supra* note 6 at 258.

10 Shriram Maheshwari, *The Machinery of Governance in India* at 16 (Macmillan India Ltd., New

salient features of the Government of India Act, 1935 were the introduction of a federation, provincial autonomy and responsible government.'[11] 'Political characteristics like a bicameral union legislature with a federal assembly and a Council of States and the idea of separation of legislative powers between the centre and states are few essential forms which have been heavily influenced from the provisions of the Act.'[12] 'However many authors like Kanahaiyalal Sharma in "Reconstitution of the Constitution of India" has argued that the Government of India Act, 1935 was colonial in nature and many provisions had an undemocratic flare.'[13] 'For example the position of President was formed on the lines of Governor General and Governor as provided in the Act.' 'Even though Jawaharlal Nehru criticized the 1935 Act, however, he did not oppose the adoption of the provisions of the Act in the Constitution.'[14]

V CABINET MISSION PLAN

From 1937 to 1945, India saw many significant developments like the rise of Congress as a political power in the provincial elections (1937);[15] Jinnah's call for establishing a new Muslim country called Pakistan (1940);[16] and the formulation of Cripps Mission to India to conduct negotiations between all political parties and to set up a cabinet government which resulted in the Quit India Movement (1942).[17] The relevant period also witnessed the growing influence of the Muslim League over the Muslim dominated areas and the infamous Action Day riots which ultimately convinced the British that partition was inevitable. 'In 1946, British Prime Minister Clement Attlee formulated a cabinet mission to India to discuss and finalize plans for the transfer of power from the British Raj to Indian leadership as well as provide India with independence under Dominion status in

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Delhi, 2004).

11 *Ibid.*

12 Abbas Hoveyda, *Indian Government and Politics* 62 (Dorling Kindersley (India) Pvt. Ltd., New Delhi, 2011).

13 Kanahaiyalal Sharma, *Reconstitution of the Constitution of India* at 390 (Deep & Deep Publications Pvt. Ltd., New Delhi, 2002).

14 *Ibid.*

15 *Supra* note 1 at 327.

16 Akmal Hussain, "The Crisis of State Power in Pakistan: Militarization and Dependence", *The Challenge in South Asia: Development, Democracy and Regional Cooperation, ed. Ponna Wignaraja et al.*, at 210 (Sage Publications Pvt. Ltd, New Delhi, 1989).

17 Basanta Kumar Mishra, *The Cripps Mission: A Reappraisal* (Naurang Rai Concept Publishing House, New Delhi, 1982).

the Commonwealth of Nations.'[18] 'The Mission discussed the framework of the constitution and laid down in some detail the procedure to be followed by the constitution drafting body.'[19] 'Elections for the 296 seats assigned to the British Indian provinces were completed by August 1946.'[20] 'The Constituent Assembly of India first met and began work on 26 November 1946.'[21]

VI INDIAN INDEPENDENCE ACT, 1947

'The Indian Independence Act, passed by the British Parliament on 18 July 1947, divided British India into two new independent states, India and Pakistan, which were to be dominions under the Commonwealth of Nations until they had each finished drafting and enacted a new constitution.'[22] 'The Constituent Assembly was divided into two for the separate states, with each new Assembly having sovereign powers transferred to it for the respective dominion.'[23] 'The Act also terminated British suzerainty over the princely states, each of which was left to decide whether to accede to one or other of the new dominions or to continue as independent states in their own right.'[24] 'However, in most cases the states were so dependent on central institutions that they were widely expected to accede to a dominion.'[25]

'When the Constitution of India came into force on 26 January 1950, it repealed the Indian Independence Act.'[26] 'India ceased to be a dominion of the British Crown and became a sovereign democratic republic. 26 November 1949 is also known as National Law Day.'[27]

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18 Subrata K. Mitra, *Politics in India: Structure, Process and Policy,* at 35 (Routledge, New York, 2011).

19 *Ibid.*

20 H.P. Chattopadhya, *et al, Indian Administration,* at 76 Vol. I (Global Vision Publishing House, New Delhi, 2009).

21 *Ibid.*

22 S.N. Sen, *History of the Freedom Movement in India (1857-1947)* 339, 3rd Edition (New Age International Private Limited, New Delhi, 1993).

23 Krishna Reddy, *Indian History* C-261(Tata McGraw Hill, New Delhi, 2011).

24 Surya P. Sharma, *India's Boundary and Territorial Disputes,* at 148 (Vikas Publications, New Delhi, 1971).

25 *Ibid.*

26 Mohin Jadarro Harappa*, India Divided Religion 'Then'* (1947) (East-West): *'Now' What Languages* (North South), (Publish America LLP, United States, 2011).

27 *Ibid.*

VII DRAFTING OF THE CONSTITUTION

'The Constitution was drafted by the Constituent Assembly, which was elected by the elected members of the provincial assemblies.'[28] 'On the 14 August, 1947 meeting of the Assembly, a proposal for forming various committees was presented which included a Committee on Fundamental Rights, the Union Powers Committee and Union Constitution Committee.'[29] 'On 29 August, 1947, the Drafting Committee was appointed, with Dr B. R. Ambedkar as the Chairman along with six other members assisted by a constitutional advisor.'[30] 'A Draft Constitution was prepared by the committee and submitted to the Assembly on 4 November, 1947.'[31] 'Finally on 26 November, 1949, the process was completed and Constituent assembly adopted the constitution.'[32] '284 members signed the document and the process of constitution making was complete.'[33]

'The Assembly met in sessions open to the public, for 166 days, spread over a period of 2 years, 11 months and 18 days before adopting the Constitution, the 308 members of the Assembly signed two copies of the document (one each in Hindi and English) on 24 January 1950.'[34] 'Two days later, on 26 January 1950, the Constitution of India became the law of all the States and territories of India.'[35]

VIII ADOPTIONS FROM OTHER CONSTITUTIONS

'The architects of Indian constitution were most heavily influenced by the British model of parliamentary democracy.'[36] 'In addition, a number of principles were adopted from the Constitution of the United States of America, including

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28 B. K. Sharma, *Introduction to the Constitution of India*, at 25, 4th Edition, (Eastern Economy Edition, New Delhi, 2007).

29 First Day in the Constituent Assembly, available at *http://parliamentofindia.nic.in/ls/debates/facts.htm* (last visited on 21.11.2013).

30 *Ibid.*

31 Gopa Sabharwal, *India since 1947: The Independent Years* 18 (Penguin Books (P) India Ltd., Mumbai, 2007).

32 Krishan Lal, *Legislative Process in India: A Study of State Financial Committees* 1 (Deep & Deep Publishing Company, New Delhi, 1992).

33 Thomas M. Frank, *et al.,* "Norms of International Law Relating to the Constitution-Making Process", *Framing the State in Times of Transition: Case Studies in Constitution Making,* Laurel E. Miller (Ed.), at 17 (Endowment of the United States Institute of Peace, United States, 2010).

34 Express News Service, Saluting the Republic, *The New Indian Express,* Jan 26, 2013, *http://newindianexpress.com/cities/bangalore/article1435865.ece?service=print* (last visited on 21.11.2013).

35 *Supra* note 26.

36 *The New Encyclopedia Britannica* 21 (Encyclopedia Britannica, Inc, 2002).

the separation of powers among the major branches of government and the establishment of a supreme court.'[37] 'The principles adopted from Canada were quasi-federalism with strong centre and also distribution of powers between central government and state governments along with placing residuary powers with central government.'[38] 'From Ireland, directive principle of state policy was adopted.'[39] 'From Germany, the principle of suspension of fundamental rights during emergency was adopted.'[40] 'From Australia, the idea of having a Concurrent list of shared powers was used as well and some of the terminology was utilized for the preamble.'[41]

IX A LOOK THROUGH CONSTITUENT ASSEMBLY DEBATES

While perusing through the Constituent Assembly Debates, it was found that it consists of 12 volumes, the debates commencing on the 9th of December, 1946 and continuing till the 24th of January, 1950. The Constitution of India was officially adopted on the 26th of November, 1949 and signed by the Members of the Assembly on 24th of January, 1950. Thereafter, the Constituent Assembly having accomplished the task of framing the Constitution assigned to it, adjourned *sine die* and became *functus officio*.

The first meeting was held on the 9th of December, 1946 in the Constituent Hall, New Delhi, which was initiated by Acharya J. B. Kripalani[42] who requested

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37 Britannica Guide to India - *A Comprehensive Guide to the World's Fastest Growing Country* 313 (Encyclopedia Britannica, Inc., United Kingdom, 2009).

38 Douglas V. Verney, "How Has the Profileration of Parties Affected the Indian Federation?: A Comparative Approach", *India's Living Constitution: Ideas, Practices, Controversies,* at 139 Zoya Hassan, *et al.,* (Eds.), (Permanent Black, Delhi, 2002).

39 Aparajita Baruah, *Preamble of the Constitution of India*: *An Insight and Comparison with Other Constitutions* at 92 (Deep & Deep Publications, New Delhi, 2007).

40 *Supra note* 28 at 33.

41 *Supra note* 4 at 4.

42 I would like to refer to a famous quote of his – "For an unarmed people to fight Great Britain at a time when all its armed might was mobilised, when the inexhaustible resources of America were at its disposal, appeared sheer folly. But then these men forgot that when the Congress under Gandhiji's lead took to revolutionary politics, it abandoned conventional political wisdom. It dared to risk and achieve. Was the Congress wise when it made the Khilafat issue, which it scarcely understood, its own? Was it again wise to resort to Salt Satyagraha to achieve independence? There was apparently no connection between salt and Independence. And what wisdom could there have been in Gandhiji walking with a flock of unarmed followers for 21 days to pick up a pinch of salt on the sea-shore? What political or any other wisdom could there be in Pandit Motilal Nehru manufacturing salt in his study in a laboratory test tube on a spirit lamp from a lump of clay? What wisdom was there in selecting individual satyagrahis to walk from place to place shouting anti-war slogans till they were arrested? The fact is, the Congress

Sachidananda Sinha, the oldest Parliamentarian in India, to take the chair as its temporary chairman. The first thing he did, while speaking to the assembly, was to read three messages received from the United States of America, China and the Government of Australia. In his inaugural address, he traced the history of other ancient Constitutions and while referring to the British Constitution, in particular, stated that it had an unwritten Constitution, since the British Parliament as the supreme authority, used to make and unmake all laws and hence, there was no such thing as a constitutional law in Britain. Having stated this, to gain more insight, he then drew the attention of the members, to the various other Constitutions by stating that France was the only state in Europe, which had a National Assembly in 1789,[43] but they largely followed the Constitutional Convention held at Philadelphia by American Constitution-makers in 1787.[44] Ultimately, he suggested that the Philadelphia Convention and the American Constitution can be taken as a model for a federal set up. In fact, it was stated that the American Convention held in Philadelphia in 1787 had been accepted by the world as a model, for framing independent federal Constitutions for various countries. The basic principle was *"a series of agreements as well as a series of compromises"*.[45] He advised that "reasonable agreements and judicious compromises are nowhere more called for than in framing a constitution for a country like India."[46]

He further stated that:[47]

> The Constitution that you are going to plan may similarly be reared for 'Immortality', if the work of man may justly aspire to such a title, and it may be a structure of 'adamantine strength, which will outlast and overcome all present and future destructive forces.

With these lofty ideas, the basic fabric was mooted. He concluded his inaugural

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under Gandhiji's lead has never done the conventionally obvious thing, and if it does so before the freedom fight is over and complete independence won, it will have missed its revolutionary role." - From the Presidential Address - J.B. Kripalani, I.N.C. Session, 1946, Meerut.

43 St. Rosemary Educational Institution. "The French National Assembly: 1789–1791." *http://schoolworkhelper.net/the-french-national-assembly-1789%e2%80%931791/.*

44 *"[T]he [American] political theory of a second chamber was first formulated in the constitutional convention held in Philadelphia in 1787 and more systematically developed later in the Federalist."* Carroll, "The Background of Unicameralism and Bicameralism, in Unicameral Legislatures," *The Eleventh Annual Debate Handbook*, 1937-38, at 42 (Aly ed. 1938).

45 *http://parliamentofindia.nic.in/ls/debates/vol1p1.html.*

46 *Supra* note 4.

47 *Ibid.*

address by quoting the words of the great Indian poet, Iqbal, thus:[48]

> Yunan-o-Misr-o-Roma sab mit gaye jahan se, Baqi abhi talak hai nam-o-nishan hamara. Kuch bat hai ke hasti mit-ti nahi hamari, Sadio raha hai dusman daur-e-zaman hamara.

He further went on to state: [49]

> It means that Greece, Egypt, and Rome have all disappeared from the surface of the Earth, but the name and fame of India, our country, has survived the ravages of Time and the cataclysms of ages. Surely, surely, there is an eternal element in us which had frustrated all attempts at our obliteration, in spite of the fact that the heavens themselves had rolled and revolved for centuries, in a spirit of hostility and enmity towards us.

Thereafter he called upon the members of the Constituent Assembly to present their credentials and sign the register. There were in total 207 members.

On the 11th of December, 1946, Rajendra Prasad was elected as the permanent chairman of the Constituent assembly.[50] Then S. Radhakrishnan was called upon to be the First Speaker on the 13th of December, 1946. The first Resolution towards the framing of the Constitution was moved by Pandit Jawaharlal Nehru. He made a specific mention that the word *'Republic'* was not mentioned so far, but it would have to be understood that *"a free India can be nothing but a Republic"*.[51] After

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48 English Translation - Greek, Egyptians and Romans have all vanished, but we are still here. There must be something special that we still exist despite the whole world against us. - Muhammad Iqbal (1873-1938).

49 *Supra* note 4.

50 Dr. Sachithananda Sinha: The next item of today's agenda is the election of the permanent Chairman. I have received the following nomination papers:
"I propose the name of Dr. Rajendra Prasad, Member Constituent Assembly, the Chairmanship of the Constituent Assembly. I have secured the consent of the nominee.
Proposer.-J. B. Kripalani.
Seconder.-Vallabhbhai Patel.
I agree to the nomination. Rajendra Prasad."

51 Excerpt from his speech on the 13th of December, 1946 - "We say that it is our firm and solemn resolve to have an Independent sovereign republic. India is bound to be sovereign, it is bound to be independent and it, is bound to be a republic…..Now, some friends have raised the question: "Why have you not put in the word "democratic" here…..Obviously we are aiming at democracy and nothing less than a democracy. What form of democracy, what shape it might take is another matter?..... The democracies of the present day, many of them in Europe and elsewhere, have played a great part in the world's progress... We are not going just to copy, I hope, a certain democratic procedure or an institution of a so-called democratic country. We may improve upon it. In any event whatever system of Government we may establish here must fit in with the temper of our people and be acceptable to them….We stand for democracy. It will be for this

this, he went on to read the Resolution, which consisted of eight points.[52] It read as under:

> *"This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;*
>
> *WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a "Union of them all; and*
>
> *WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the Law of the Constitution, shall possess and retain the status of autonomous Units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting there from; and*
>
> *WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and*
>
> *WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and*
>
> *WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and*
>
> *WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to Justice and the law of civilised nations; and*

House to determine what shape to give to that democracy, the fullest democracy, I hope…."

52 *Supra* note 4.

> *This ancient land attains its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind." (Emphasis Supplied)*

The Resolution was seconded by Purushottam Das Tandon. The Chairman brought to the notice of the Assembly, the receipt of 40 amendments[53] received by then.

The First Amendment to the resolution proposed by M. R. Jayakar, was to the following effect: [54]

> This Assembly declares its firm and solemn resolve that the Constitution to be prepared by this Assembly for the future governance of India shall be for a free and democratic Sovereign State; but with a view to securing, in the shaping of such a constitution, the co-operation of the Muslim League and the Indian States, and thereby intensifying the firmness of this resolve, this Assembly postpones the further consideration of this question to a later date, to enable the representatives of these two bodies to participate, if they so choose, in the deliberations of this Assembly.

He was very particular and wanted the Assembly proceedings to be adjourned, in order to make sure that the Muslim League is given an opportunity to participate in the deliberations, sit by the side of every individual, make speeches, not *ex post facto*, but before and during the passing of the First Resolution. According to him, this would be the real cooperation shown by the members and not get their opinion, once everything is over and done with. He continued that it was his duty to tell the august body that the course it proposes to adopt is wrong, illegal, premature, disastrous and dangerous, and that it would lead them to trouble, should it be avoided.

The Chairman then called upon B. R. Ambedkar to join the discussion. He, though initially stated that he was not well prepared, went on to make one of the most memorable and eloquent speeches of the debates.[55] In that, he pointed out

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53 *Ibid.*

54 *http://parliamentofindia.nic.in/ls/debates/vol1p6.html.*

55 "Will history repeat itself? It is this thought which fills me with anxiety. This anxiety is deepened by the realisation of the fact that in addition to our old enemies in the form of castes and creeds we are going to have many political parties with diverse and opposing political creeds. Will Indians place the country above their creed or will they place creed above country? I do not know. But this much is certain that if the parties place creed above country, our Independence

what Jayakar stated on the previous day that in the absence of the Muslim League and the Indian States (*the Raja's*) it would not be proper for the Assembly to deal with the Resolution. He stated as follows:[56]

> So far as the ultimate goal is concerned, I think none of us need have any apprehensions. None of us need have any doubt. Our difficulty is not about the ultimate future. Our difficulty is how to make the heterogeneous mass that we have today take a decision in common and march on the way, which leads us to unity. Our difficulty is not with regard to the ultimate; our difficulty is with regard to the beginning. Mr. Chairman, therefore, I should have thought that in order to make us willing friends, in order to induce every party, every Section in this country to take on to the road it would be an act of greatest statesmanship for the majority party even to make a concession to the prejudices of people who are not prepared to march together and it is for that, that I propose to make this appeal. Let us leave aside slogans let us leave aside words, which frighten people. Let us even make a concession to the prejudices of our opponents, bring them in, so that they may willingly join with us on marching upon that road, which as I said, if we walk long enough, must necessarily lead us to unity. If I, therefore, from this place support Dr. Jayakar's amendment, it is because I want all of us to realise that whether we are right or wrong, whether that agrees with the Statement of May the 16th or December 6th, leave all that aside. This is too big a question to be treated as a matter of legal rights. It is not a legal question at all. We should leave aside all legal considerations and make some attempt, whereby those who are not prepared to come, will come. Let us make it possible for them to come, that is my appeal.

Alladi Krishnaswamy Ayyar, in his speech, said that without embarking upon a meticulous examination of the different parts of the resolution, what was important was that at this session, the Assembly must be in a position to proclaim to our people and to the civilised world, what we are after. He concluded by saying that the resolution before the House received the blessings and support of Mahatma

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will be put in jeopardy a second time and probably be lost forever. This eventuality we must all resolutely guard against. We must be determined to defend our Independence with the last drop of our blood."

56 *http://parliamentofindia.nic.in/ls/debates/vol1p7.html.*

Gandhi, the architect of India's political destiny, from the distant village in Eastern Bengal and that it would be carried with acclamation by the whole House without dissent and that Jayakar would prefer to withdraw his amendment, unless he had strong conscientious objection to the course suggested.[57]

On the 23rd of December, 1946, the various committees were constituted. By virtue of the Rules, which came to be adopted, the post of Chairman was re-designated as '*President*'. Ultimately on 22nd of January, 1947, all members of the Assembly adopted the Resolution. A proposal to constitute an Advisory Committee consisting initially of 52 members, out of which, 12 would be representing the general sections, and others to be represented by minorities and the tribal and excluded areas was mooted.

After the election of the Business Committee was adopted, Rajagopalachariar moved a resolution for the constitution of a committee consisting of 12 members, the object of the resolution being, to help the Assembly in framing the Constitution, so as not to leave for the future, any overlapping or conflicts that might occur if various proceedings took place without the correlation in different sections of the Assembly or otherwise.

The resolution was then put to vote and adopted. After this, the Report of States Committee, Committee on Union Subjects, Interim Report on Fundamental Rights and the various reports submitted by different committees were discussed and appropriate decisions were taken.

On the 21st of July, 1947, the resolution relating to the present form of our National Flag was moved and adopted and on the 14th of August, 1947, after the last stroke of mid night, the President and all the members stood up and took the pledge as below:[58]

> At this solemn moment when the people of India, through suffering and sacrifice, have secured freedom, I, a member of the Constituent Assembly of India, do dedicate myself in all humility to the service of India and her people to the end that this ancient land attain her rightful place in the world and make her full and willing contribution to the promotion of world peace and the welfare of mankind.

Thereafter, the decision to intimate to the Viceroy about the assumption of power by the Constituent Assembly and the Assembly's endorsement of Lord

57 *http://parliamentofindia.nic.in/ls/debates/vol4p14.html.*

58 *http://164.100.47.132/LssNew/cadebatefiles/C14081947.html.*

Mountbatten's appointment as Governor-General of India was conveyed forthwith to him by the President and Pandit Jawaharlal Nehru. The House also approved it by adopting a motion.

The National Flag was presented thereafter by the Flag Presentation Committee. After this, the National Songs *'Sare Jahan se Achcha'* and the first verse of *'Janaganamana Adhinayaka Jaya He'* were sung.[59] On the 15th of August, 1947, the Assembly resumed at 10.00 a.m. The Governor-General on this occasion, made his address. The Report of the Union Powers Committee was submitted wherein it was stated that the committee had come to a conclusion, *i.e*., a conclusion, which was also reached by the Union Constitution Committee that the soundest framework for our Constitution is a federation, with a strong Centre and in the matter of distributing powers between the Centre and the Units, the most satisfactory arrangement is to draw up three exhaustive lists on the lines followed in the Government of India Act of 1935, viz., the federal, the provincial and the concurrent.[60] These three lists prepared were also submitted as an Appendix. On the 26th of November, 1949, the President in his address pointed out the various provisions in the Draft Constitution and referring to the judiciary, he stated as under: [61]

> We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the Executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence. One of our articles makes it easy for the State Governments to introduce separation of Executive from judicial functions and placing the magistracy which deals with criminal cases on similar footing as Civil Courts. I can only express the hope that this long overdue reform will soon be introduced in the States.

After this, the motion moved by B. R. Ambedkar*, 'that the Constitution as settled by the Assembly be passed'*[62] was adopted amidst cheers.

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59 *Supra* note 20.

60 Brij Kishore Sharma, *Introduction to the Constitution of India,* at 25, 3rd Edition, (Prentice-Hall of India, 2005)

61 Valmiki Choudhary, *Dr. Rajendra Prasad: Correspondence and Select Documents*, at 242 (Allied Publications, 1984).

62 *http://parliamentofindia.nic.in/ls/debates/vol11p12.html.*

Finally, the President authenticated the Constitution. The Constituent Assembly then stood adjourned till the 26th of January, 1950. However, on the 24th of January, 1950, the Song *'Jana Gana Mana'*[63] was adopted as the *'National Anthem'*. Rajendra Prasad was elected as the First President of India, unopposed. All the members then signed the Constitution. Then the Constituent Assembly was adjourned, *sine die*.

This is how 26th January assumes greater significance in the Indian history, i.e., the day on which the Indian Constitution in its un-amended form came to be adopted by the Constituent Assembly and dedicated and delivered to our nation and its people. In total, at its commencement, there were 395 articles in 22 parts and 8 schedules. Subsequently, so far 100 amendments[64] came to be made as between 1951 and 2015.

Thus, the *SOVEREIGN*, *SOCIALIST*, *SECULAR*, *DEMOCRATIC*, *REPUBLIC*[65] India came into being and the Constitution with its Preamble[66], ensured that it would secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief faith and worship;

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

X SALIENT FEATURES OF OUR CONSTITUTION

The salient features of the Constitution can be gathered from certain relevant articles. Under Part-III, the Fundamental Rights and the safeguards of it are provided. Article 14 deals with '*Equality before Law*'.[67] Article 19 provides for

63 *http://parliamentofindia.nic.in/ls/debates/vol12p1.html.*

64 98th Amendment to insert article 371J in the Constitution on the 2nd January 2013. The objective of the amendment was to empower the Governor of Karnataka to take steps to develop the Hyderabad-Karnataka Region.

65 Subs. by the Constitution (42nd Amendment) Act, 1976, sec. 2, for "*SOVEREIGN, DEMOCRATIC, REPUBLIC*" (w.e.f. 3-1-1977).

66 This particular extract from this judgement would be worthwhile to note – "Constitution is not to be construed as a mere law, but as the machinery by which laws are made. A Constitution is a living organic thing which, of all instruments has the greatest claim to be construed broadly and liberally"; *Goodyear India* v. *State of Haryana*, AIR 1990 SC 781: (1990) 2 SCC 712, para 17.

67 The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

protection of *'Freedom of Speech',*[68]*etc*. Article 21 provides for protection of *'Life and Personal liberty'*.[69] Article 25 provides the freedom to practice any religion.[70] Article 30 prescribes the right of minorities to establish and administer educational institutions[71] and as a crown to all these articles Article 32 provides the remedies for enforcement of the rights conferred under Part III.[72] The significance of Article 32 can be better stated by quoting the Speech of B. R. Ambedkar made in the Constituent Assembly, which shall be adverted to shortly.[73]

Part IV deals with Directive Principles of State Policy. The various articles contained in this Part are obligations of the state towards the fulfilment of which, every state can be directed and interpreted. A reading of the articles 38 to 51 would show that conscious, honest and sincere enforcement of the state machinery in its attempt to achieve the above directives would ensure the finest society for a human being to lead a peaceful and harmonious living.

Part IV-A[74] deals with the Fundamental Duties that every citizen of India is expected to follow in order to achieve the goals set out in our Constitution.

Part V deals with the Union, namely, the Central Government Organisation about the Executive set up, the Council of Ministers, the pivotal post of the Attorney General of India, the conduct of the Government business, the Parliament set up, the Legislative Powers of the President, the Judiciary and the Office of the Comptroller and Auditor General of India. Provisions have been made under this chapter in articles 52 to 151.

Part VI[75] deals with the 'States' with identical set up like that of the '*Union*'.

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68 1) All citizens shall have the right- (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (f) omitted; and (g) to practice any profession, or to carry on any occupation, trade or business.

69 No person shall be deprived of his life or personal liberty except according to procedure established by law.

70 (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

71 (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

72 (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

73 *Infra note* 96.

74 Added by the Constitution (42nd Amendment) Act, 1976, sec. 11 (w.e.f. 3-1-1977).

75 The words *"IN PART A OF THE FIRST SCHEDULE*" omitted by the Constitution (Seventh Amendment) Act, 1956, sec. 29 and sch. (w.e.f. 1-11-1956).

In that, it may be stated that article 235 of the Constitution invests *'the control'*[76] with the respective high courts. This makes it clear that the independence of judiciary is maintained at all levels and that justice remains supreme and available to the common man in times of need.

Part VII[77] consists of one single article 238 which concerns with the states in Part III of the First Schedule and the said article was omitted by the 7th Constitution Amendment Act, 1956 since the entire First Schedule was substituted and the division of states into Part A and B was done away with.

Part VIII[78] deals with *'Union Territories'*. Part IX[79] deals with the '*Panchayats*'; Part IX-A[80] deals with the '*Municipalities*'; Part X with the Scheduled and Tribal Areas;[81] and Part XI consisting of articles 245 to 263 deals with the relations between the Union and the states which prescribes the distribution of legislative powers and administrative relations.

Part XII deals with *'Finance, Property, Contract and Suits'*.[82] Part XIII deals with trade, commerce, and intercourse within the territory of India.[83]

Part XIV deals with the services under the Union and the states. In this Part, article 315[84] concerns with Public Service Commission for the Union and for the states, its functions and other related matters. Part XIV-A was introduced by the Constitution 42nd Amendment Act, 1976 with effect from 3-1-1977, under which, the administrative tribunals came to be set up.

Part XV deals with '*Elections*', of which article 324[85] provides enormous

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76 *High Court of Judicature at Bombay* v. *Shirish Rangrao Patil*, AIR 1997 SC 2631: (1997) 6 SCC 339: (1997) 4 SLR 321 : 1997 SCC (L&S) 1486.

77 Rep. by the Constitution (7th Amendment) Act, 1956, sec. 29, and sch. (w.e.f. 1-11-1956).

78 Subs. by the Constitution (7th Amendment) Act, 1956, sec. 17, for article 239 (w.e.f. 1-11-1956).

79 The territories in Part D of the 1st Sch. and other territories not specified in that sch. was rep. by the Constitution (7th Amendment) Act, 1956, sec. 29 and sch. and insserted by the Constitution (73rd Amendment) Act, 1992, sec.2 (w.e.f. 24-4-1993).

80 Ins. by the Constitution (64th Amendment) Act, 1992, sec. 2 (w.e.f. 1-6-1993).

81 Articles 244 - 244A.

82 Articles 264 – 300A.

83 Articles 301 – 307.

84 (1) Subject to the provisions of this article, there shall be a Public Service Commission for the Union and a Public Service Commission for each State.

85 (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).

powers to the 'Election Commission' and article 329[86] prescribes bar of interference by courts in electoral matters. Part XVI deals with special provisions relating to certain classes, such as, reservation of seats for SC and ST in the House of People, and similar such provisions for Anglo Indians and backward classes.[87] Part XVII[88] deals with the *'Official Language'*.

Part XVIII contains *'Emergency Provisions'* which includes Article 356[89] of the Constitution. The provision provides that in case of failure of constitutional machinery in states, the President can proclaim and assume to himself all or any of the functions of the government of the state.[90]

Part XIX consists of miscellaneous articles such as protection of President and Governor,[91] etc. and under Part XX, article 368 prescribes the power of Parliament to amend the Constitution and the procedure therefore.[92] Part XXI deals with *'Temporary, Transitional and Special Provisions'*.[93] While, the last Part XXII[94] contains articles 393 to 395 of the Constitution.

XI ROLE OF JUDICIARY IN EVOLUTION OF OUR CONSTITUTION

As far as the successful working of our Constitution is concerned, we all can proudly proclaim as members of the legal fraternity that when it came to the question of either implementation of the constitutional protection or safeguarding the interest of the state, or for that matter, the continued existence of our independent

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86 (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any Court.

87 Articles 330 and 331, respectively.

88 Articles 343 – 351.

89 (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, made a declaration to that effect [in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation].

90 Article 356 - (I) If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation.

91 Article 361.

92 Subs. by the Constitution (24th Amendment) Act, 1971, sec. 3, for *"procedure for amendment of the constitution."*

93 Subs. by the Constitution (13th Amendment) Act, 1962, sec. 2, for "Temporary and Transitional Provisions" (w.e.f. 1-12-1963).

94 Ins. by the Constitution (58th Amendment) Act, 1987, sec. 2 (w.e.f. 9-12-1987).

India when there was much turmoil, the judiciary played a pivotal role. In fact, as pointed out earlier, Rajendra Prasad as the President of the Constituent Assembly was pleased to remark that in the Constitution itself, they have provided for a '*Judiciary'* which would be independent in its function. Even, the President remarked that it was difficult to suggest anything more to make the Supreme Court and the high court's independent of the influence of the Executive. Thus, great confidence was reposed. While placing the judiciary as one of the pivotal pillars of our Constitution, the members of the Constituent Assembly ensured that the ideals of the constitutional provisions are maintained and no stone was left unturned, in the pursuit of the said goal. It may be observed that when we talk of the judiciary, it does not refer to judges alone, but definitely includes, both the Bench and the Bar and also everyone connected with the judiciary, whose contribution in the functioning of the judicial forum is essential. With that view, when we trace out the five decades of our experience after the framing of our Constitution, it can proudly be stated that at every stage of any crisis, it was the judiciary which came to the rescue and saw that things were kept in order. In light of this context, it will not be out of place to quote what the Father of our Nation, Mahatma Gandhi has said:[95]

> I shall strive for a constitution, which will release India from all thraldom and patronage, and give her, if need be, the right to see. I shall work for an India, in which the poorest shall feel that it is their country in whose making they have an effective voice and India in which there shall be no higher class and low class people, an India in which all communities shall live in perfect harmony. There can be no room in such India for curse of untouchability; women shall enjoy the same rights as men. All interests not in conflict with the interests of the dumb millions will be scrupulously respected.

From a plain reading of the above excerpt, we can sense his broad vision, the high amount of magnanimity and the keen interest for maintaining justice for the fellow citizens of our country, irrespective of their caste, creed, colour or gender. The words spoken by him, were at a time when we were about to achieve independence *i.e.* when a sovereign India was about to be born.

It will also be appropriate to refer to the observations of Lord Bingham of Cornhill, Chief Justice of England and Wales, in his *'Law Day Lecture'* on

95 *The Selected Works of Mahatma Gandhi* , Vol. V - The Voice of Truth, Young India, 10-9-31 at 255.

the occasion of the Golden Jubilee Celebrations of the Supreme Court of India on 26-11-1999 at Vigyan Bhavan, New Delhi, when he quoted as to what B. R. Ambedkar said in the Constituent Assembly about the central importance of article 32 of the Constitution:[96]

> I am very glad that the majority of those who spoke on this article have realised the importance and significance of this article. If I was asked to name any particular article in this Constitution as the most important - an article without which the Constitution would be a nullity - I could not refer to any other article except this one. It is the very essence of the Constitution and the very heart of it and I am glad that the House has realised its importance.

The Chief Justice concluded his lecture by quoting what the then President of the Bar Association of India, Fali Nariman[97] said in his speech, to quote: [98]

> I leave the last word to the President of the Bar Association of India who, of all people, is well placed to pass judgment. I believe that the Judges of the nineties and the Judges of today are somehow more important than the Judges of yesteryears simply because they have been called upon to discharge and have readily assumed, far greater responsibilities than their predecessors ever did. Over recent years 'judging' is no longer what it used to be. Judges have now a dominant role in society - and because of this they are more often criticised for what they do and what they say - and yet today, the highest Judiciary is also held in highest public esteem. This may sound paradoxical, but it is not. The public turns to the Judiciary, and ultimately to the highest Judiciary, more and more for the resolution of its problems - more than it ever did in the past.

Then, the question that would arise for consideration is, how far have we been able to achieve the objectives and realize the goals as set in our Constitution? The implementation of the above said objectives would depend upon the performance of the three wings of the state, namely, the Legislature, the Executive and the Judiciary. The Legislature is the organ of the government in a democracy, which gives shape and direction to national policies and programmes. The

96 (2000) 1 SCC (*Jour*) 29.

97 President during 1991.

98 Tom Bingham, *The Business of Judging: Selected Essays and Speeches*: *1985-1999,* at 127 (Oxford University Press, 2000).

numerous legislative measures in the field of personal laws, marriage, position of women, children and down-trodden, labour welfare, health and land reforms, industrialisation, taxation, etc., have been enacted by the Parliament and the State Legislatures, to cherish the goal of the paramount objective, namely, to secure to all the citizens, justice, social, economic and political.

Many legislation such as, Land Reforms Act, 1954, Untouchability Offences Act, 1955, Child Labour (Prohibition and Regulation) Act, 1986, Factories Act, 1948, Motor Transport Workers Act, 1961, Plantation Labour Act, 1951, Mines Act, 1952, Industrial Disputes Act, 1947, women welfare legislations and other welfare legislations came to be enacted. Apart from these legislations, several other Planning Schemes such as, the Five Year Plans[99] came to be introduced with the above object, to achieve the constitutional goals. The various aforementioned legislations and the plans formulated by the legislative wing of the state, were put into effect with a view to achieve the objectives of our freedom fighters, whose goals were for a free India, to feed the starving millions, to clothe the naked masses, and to afford to every Indian, of any income, high or low, the fullest opportunity to develop himself according to his capacity.

The spirit contained in the Objective Resolution makes it amply clear that our final aim after obtaining freedom from the British yoke was to establish a classless society with equal social, economic and political justice to all. It was with this objective, the legislative wing of our state brought into effect numerous legislative measures in the field of personal laws, marriage, position of women, children and down-trodden, labour welfare, health and land reforms. The executive wing of the state had also made an effective beginning soon after attaining independence to execute policies and programmes designed by it from time to time with regard to the actualization of the goal of distributive justice. Thus, the executive wing of the state also plays a vital role in aiding the other wings of the state to achieve the constitutional goal. Then comes the other important component: trinity of the state, namely, 'The Judiciary'.

In our constitutional scheme, the judiciary has been assigned the role of ensuring and enforcing distributive justice in accordance with the commitment envisaged in the Preamble. The judiciary has been put under the constitutional obligation to hold the scale of justice in any legal conflict between the rich and the poor, the mighty and the weak, and function without fear or favour, by keeping all authorities - legislative, executive, administrative, judicial and quasi-judicial -

99 *http://planningcommission.nic.in/plans/planrel/fiveyr/welcome.html.*

within their respective bounds. Therefore, the need of the hour is that the judiciary in India must capture the imagination of the lawmakers because of its special responsibility for safeguarding the spirit of distributive justice contained in our national charter. It is for this reason, the Indian public, by and large hold the higher judiciary today, in the highest esteem. Large sections of the people increasingly turn to the judiciary, the penultimate forum in the land, for the resolution of their problems, more than they have ever done in the past. In the words of V. R. Krishna Iyer J.: [100]

> Pragmatically speaking, Justice is what Justice does, and Justice, says Justinian, `is the earnest and constant will to render to every man his due'. And so, in a just society, what is due to an individual or group or the collective community, shall be rendered.

It may be apt here to quote from the book of Krishna Iyer J., titled- "*Law versus Justice*", where he quoted the following beautiful passage of Robert Ingersol, who puts it as thus:[101]

> A Government founded on anything except liberty and justice cannot stand. All the wrecks on either side of the stream of time, all the wrecks of the great cities, and all the nations that have passed away--all are a warning that no nation founded upon injustice can stand. From the sand-enshrouded Egypt, from the marble wilderness of Athens, and from every fallen, crumbling stone of the once mighty Rome, comes a wail as it were, the cry that no nation founded on injustice can permanently stand.

To quote another passage from the same book of Krishna Iyer J.: [102]

> In a country where executive and legislative excesses are an obsession with the people where social inequalities and power misuse are writ large, the judiciary should be not only above board--are they?--but also committed to fire-fighting operations wherever people suffer injustice. Not umpires in a boxing bout in a strictly adversary system but activist dispensers of all constitutional means to do justice, individual and collective, by affirmative action, community education in right and justice through the forensic process, mobilisation of the people to join

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100 *Union of India* v. *Sankalchand Himatlal Sheth and Anr.,* 1978 SCR (1) 423.

101 Charles T Sprading, *Liberty and the Great Libertarians* 273.

102 Justice Krishna Iyer, *Law versus Justice* (1981).

the administration of justice.

Nowadays litigating in court has become an indispensable part of social behaviour. Judicial intervention is invariably solicited to run the day-to-day administration in most of the fields. There has been a growing tendency to make strategic use of the judiciary and to exploit procedural niceties. At this juncture, one misconception about the judges and the judiciary may be clarified. People equate the judiciary with the judicial system and they treat both as one and the same. This is a misnomer. The judicial system is a mechanism of dispensation of justice, whereas judiciary is an institution, which operates the system. Judges, lawyers, litigants, witnesses, they being the components of judiciary, are the operators.

There is also another misnomer, which is often referred to and quoted as, '*judicial activism'*. Through a catena of celebrated decisions, which are published, the society was given an impression about the concept of judicial activism. In most cases, the judiciary has activated the law, which was lying idle. By revamping or stimulating the process of law, the regime of law has become more bright and effective. Through certain decisions, they have put life in the law. Hence, the activism is only of law, and not of the judiciary.

XII INSTANCES OF JUDICIAL SUPREMACY

In the context of the predominant role played by the judiciary, which includes both the Bench and the Bar, it is appropriate to refer to an anecdote mentioned in one of the articles of a '*Festschrift*'[103] *on Nani Palkhivala*, a renowned Jurist who appeared in the landmark case in the year 1972, popularly known as *Kesavananda Bharati* v. *State of Kerala*.[104] It was a case challenging the 24th, 25th and 29th Amendments to the Indian Constitution, which in fact, sought to further increase the power of the state to abridge fundamental rights in the name of social justice. That case came to be heard by 13 judges of the Supreme Court, the largest Bench ever convened, in the history of the apex court.

Through this case, the doctrine of basic structure of the Constitution was formulated. This doctrine has been much acclaimed by those who shared the views of Nani Palkhivala's concern over the progressive *civil bar* in India. Through this doctrine, although the Parliament was free to amend any part of the Constitution, (including the fundamental rights) they could not alter the "*basic structure*" or framework of the Constitution. However, in 1975, during the state of emergency,

103 A collection of writings published in honour of a Scholar.

104 AIR 1973 SC 1461.

when there was a move to review the *Kesavananda Bharati* decision by convening yet another Bench of 13 judges for that purpose, Palkhivala, strongly opposed the move, arguing against the review for two full days and on the third day, the Bench was dissolved and the review was dropped. It is one of the more memorable instances to be quoted to proclaim the supremacy of the judiciary in its endeavour to establish justice. Why this instance was referred to is to highlight the initiative and concern of a member of the Bar to see that the basic structure of the Constitution is not touched by all means.

In the field of agrarian reforms, the judiciary showed its considerable response. To be true, the right to property has always been a bone of contention between the Supreme Court and the Parliament. The first challenge to the Constitution came when the Supreme Court held the abolition of *Zamindari* as void on the ground that it discriminated between the rich and the poor in determining the compensation amount for the acquired property.[105] Subsequently, in various judgments ending with *R. C. Cooper* v. *Union of India,*[106] the court rejected the view of the Constituent Assembly that on adequacy of compensation the field of judicial review is narrow. The difficulties arose because the court had given a very wide connotation to clauses (1) and (2) of article 31 regarding the limitations against compulsory acquisition of the property.

The judicial decisions interpreting fundamental rights raised serious difficulties in the implementation of the social revolution programmes, such as, fixing the limits on agricultural holdings, conferment of rights on tenants, property planning of urban and rural areas, clearance of slums, and acquisition of property for commercial or industrial undertakings in public interest. Certain similar enactments like that of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 were struck down by the judiciary. In the famous judgment of *Golak Nath* v. *State of Punjab,*[107] the court construed the term "*compensation*" to mean "*just*" and "*equivalent*" compensation for the property acquired. Following this standard, the court held the statutory provisions on compensation *ultra-vires* on the ground that it was arbitrary and had no relation to the market value of the land on the date of acquisition, which might be much more than on the earlier date prescribed. The judiciary's emphasis on the payment of full market value really created a great hurdle for the state. This resulted in certain constitutional amendments including the introduction of a major change in article 31(2). The amendment withdrew the

105 *Kameshwar Singh* v. *State of Bihar,* AIR 1954 SC 392.

106 AIR 1970 SC 564.

107 AIR 1967 SC 1643.

powers of the court to determine the adequacy of the compensation. It was made the sole business of the legislature to determine the amount of compensation or to lay down the principles or the manner in which it will be paid.

Ultimately, by the 25th Amendment Act, 1971, the Parliament was empowered to determine the quantum of compensation for property for public purpose and sought to protect laws giving effect to the policies of the state, towards securing the object of the directive specified in article 39(b) and (c). It was at that juncture, it is claimed that in the famous *Kesavananda Bharati's* case, the court echoed a novel philosophy by holding that the entire concept of the fundamental rights and specially that of property rights should have social utility and be social service oriented. The court said that property could justifiably be conditioned in the context of demand of the society at large if a community of equals is to be established, which is an elaboration of the ideal of justice economic, social and political. Thus, the court upheld the validity of the Twenty-Fifth Amendment Act, 1971 and allowed precedence to the directive principles contained in article 39(b) and (c) over fundamental rights to discourage concentration of the ownership of material resources and the means of production. In the words of S. M. Sikri, former Chief Justice of India:[108]

> Perhaps the best way of describing the relationship between the Fundamental Rights of individual citizens, which imposes corresponding obligations upon the State and Directive Principles, would be to look upon the Directive Principles as laying down the part of the country's progress towards its allied objective and aims stated in the Preamble, with Fundamental Rights as the limits of that path, like the banks of a flowing river which could be mended or amended by the displacement, replacement or curtailment or enlargements of any part according to the needs of those who had to use the path.

K. K. Mathew J., on his part, observed as follows: [109]

> If the state fails to create conditions in which the Fundamental Freedom could be enjoyed by all, the freedom of the few will be at the mercy of many and then all the freedom will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it.

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108 *Supra* note 104.

109 *Ibid.*

The court held that in an organised society, no right can be absolute; right of one must be consistent with the right of the others. When it is not so, the state has to step in and correct the imbalance and disharmony. In fact, Mathew J., in the course of his judgment, said, "Trust in the elected representative is the cornerstone of the democracy, when that trust fails everything else fails."

It was revealed that great attention was paid by the apex court with regard to these amendments and it, in turn, avoided a major direct confrontation between the Parliament and the judiciary. The judicial approach to the agrarian reforms became quite clear in the case of *Minerva Mills* v. *Union of India,*[110] wherein the Forty-Second Amendment Act, 1976 was challenged. The Act was an attempt to make the directive principles more comprehensive and give them precedence over those fundamental rights which had been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles. The text of the amendment was that no law giving effect to the policy of the state, towards securing all or any of the principles laid down in part IV, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by articles 14, 19 and 31.

Similarly, article 368 of the Constitution was amended to the effect that after clause (3) the following words were added "No amendment of this Constitution (including the provision of Part III) made or purporting to have been made under this Article (whether before or after the commencement of Section 55 of the Constitution (Forty-Second Amendment) Act, 1976) shall be called in question in any Court on any ground." The after effects of these amendments were that all the directive principles of state policy were given primacy over the fundamental rights, and the Parliament was given ultimate power to amend the Constitution with the objective in mind that there was an urgent need to accomplish the goal of distributive justice without further loss of time to avoid frustration and provide timely relief to the poverty-ridden people. The court, however, did not agree with these amendments and held section 55 of Forty-Second Amendment Act, 1976 as void and being beyond amending powers of the Parliament. The Parliament cannot, under article 368 expand its amending power as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic structure.

The judicial trend reflected in *Minerva Mills* discloses that the court made a sincere attempt to harmonize parts III and IV by importing the directive principles in the construction of the fundamental rights. The Supreme Court thus, held that

110 AIR 1980 SC 1789.

where two judicial choices were available, the court must give preference to social philosophy contained in Part IV of the Constitution. The court has shown a great sense of responsibility to uphold agrarian reforms and its legislation in its subsequent cases, with zeal to bring a balance between the individual and social interest.

XIII CONCLUSION

If we take a close look at the Constitution, we will find that the rule of law runs through its entire fabric like a golden thread. Whatever change we wish to bring about in the socio-economic structure, the same has to be brought through the process of law and in order to achieve the new socio-economic structure where the little Indian will be able to enjoy the fruits of freedom; law has to play a definitive and positive role. It is, therefore, in the fitness of things that on the day on which the Constitution was adopted and enacted, we should emphasize and highlight the fundamental role of law in society and remind ourselves of the great and sublime purpose which law is intended to serve in a republic governed by the rule of law. We must realize that the end of law must be justice. Law and justice cannot afford to remain distant neighbours. There must be harmony between the two. We must, in all seriousness, ask ourselves the question as to how far we have been able to fulfil the mission of law to deliver justice and to what extent we have succeeded in using law as a vehicle for ensuring social justice to the large masses of people in the country.

If we look to the balance sheet of the functioning of the judiciary after the Constitution of India came into force, we can see that there are several achievements. At the same time, there are some serious problems which need our urgent attention. Our justice delivery system, in spite of innumerable drawbacks and failings, still commands high esteem and the citizens have placed the judiciary on a high pedestal. We have to ensure that we come up to their expectations; we have to preserve the trust, confidence and faith reposed by the people of this country. As Jan Hus, a reformer and a national hero of the Czech people, wrote in a prayer, our aim should be to "Seek the truth, listen to the truth, teach the truth, live the truth, abide the truth and defend the truth - unto death!" Hence, "Let justice rule though the heavens fall" should be the credo by which we decry tyranny and preserve our freedoms under law, which is the system of law we celebrate as, '*Law Day*'.

JUDICIAL TRAINING AND EDUCATION

V. Gopala Gowda*

"Judiciary is the guardian of civilized life"

Dr. A. P. J. Abdul Kalam[1]

The judicial service is not a service in the real sense of 'employment'. Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the state. The judges, at whatever level they may be, represent the state and its authority, unlike the administrative, executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally.[2]

Rule of law and judicial review are the basic features of the Indian Constitution. As its integral constitutional structure, independence of the judiciary is an essential attribute of the rule of law. Judiciary must, therefore, be free from pressures or influence from any quarter. The Constitution has secured to them their independence. The concept of 'judicial independence' is a wider concept taking within its sweep independence from any other pressure or prejudice. It has many dimensions, namely, fearlessness of other centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the judge belongs. Indian judiciary, therefore, is taken as the "most essential to protect the liberty of the citizens."[3]

It is interesting to observe that while justice may be as old as Socrates, research indicates that the notion of formalized judicial education was first introduced in the early 1970s. Earlier, training was either unstructured or unformalized in or on-the-bench of judicial apprenticeship and mentoring. Since then, the steady spread of a more formalized approach can be observed throughout the jurisprudential world, across common law and civil law systems, across continents and nations of diverse tradition, ideology and culture, in developed and developing economies, and transitional and post-conflict states.

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* Judge, Supreme Court of India.

1 Observed by the former President of India in his inaugural address at the inauguration of National Judicial Academy, Bhopal on September 5, 2002, *available at* http://apj.memoirs.org.in/article/best-judiciary-best-india/.

2 *All India Judges' Association and Others* v. *Union of India and Others,* (1993) 4 SCC 288.

3 *High Court of Judicature of Bombay through its Registrar* v. *Shirish Kuma Rangrao Patil and Another,* (1997) 6 SCC 339.

Judicial education provides the judiciary with the means to consolidate its independence. This is of paramount concern where the judiciary is constitutionally responsible to dispense justice by interpreting and applying the law of the land to any matters in dispute which are brought before the courts. Central to this role of dispensing justice is the need for fairness, that the law is being applied fairly and evenly to both parties in any dispute. Not only must the courts be fair, but they must also appear to be fair in order to establish credibility and secure the confidence of the community in its integrity. Credibility rests on visible independence, independence from any vested interest whatsoever – whether that be governmental, commercial or personal. With judicial independence comes the need for accountability and transparency on the part of the judiciary. Judicial education and training provides the means for the judiciary as an institution to consolidate, develop and perform this crucial, yet fragile, role in society. Recognition of this need is reflected in the observation of Nicholson:[4]

> Judicial education is now an accepted part of judicial life in many countries. It is an enhancement of the mental qualities necessary to the preservation of judicial independence... Judicial independence requires that the judicial branch is accountable for its competency and the proposition is now accepted as beyond debate.

The mission of any continuing judicial education is to improve the quality of judicial performance by helping judges to acquire the tools for professional competence. The concept of competence illuminates the issue of what makes a good judge. It includes mastery of theoretical knowledge, developing problem-solving capacity, cultivating collegiate identity relating to allied professionals, conceptualizing the judicial mission, maintaining an ethical practice and self-enhancement. At an operational level, the goals and objectives of judicial education are to meet the education, training, and development needs of judicial officers. These needs are defined through a variety of analysis techniques and then addressed through the provision of specific education services.[5] Catlin has observed:[6]

> Lawyers don't become good judges by the wave of a magic wand, not even the best lawyers. To reappear behind the Bench

4 Nicholson R.D., *Judicial Independence and Accountability: Can They Co-Exist?* (1993).

5 Houle C.O., *Continuing Learning in the Profession* (1980); Tyler R.W., *Basic Principles of Curriculum and Instruction* (1949): Armytage L*, Educating Judges* (1996).

6 Catlin is the founding head of the Michigan Judicial Institute, 15 *Judicial Studies Board, Report for 1983-1987,* 13.

> as a skilled jurist is a tricky manoeuvre. Going from adversary to adjudicator means changing one's attitude, learning and using new skills, and in some cases severing old ties. In many jurisdictions, judges must learn their new roles by the seat of their pants.

The universally recognized mission of judicial education is to enhance the competence of judges and thereby to improve the performance of courts in providing services, applying the law and resolving disputes. Examples of some programme objectives are to focus on orientation and induction training, or to conduct seminars to improve legal knowledge or workshops to develop judicial skills or computer literacy. Priorities are on those matters identified by the judiciary as needing to be addressed first in its training programme.

This policy-based decision has resulted in the expansion of the training programme with the following curriculum of new training packages: Legal research skills; computer research skills; decision-making skills; judgment writing skills; communication skills; evidence assessment skills; case management skills; and alternative dispute resolution skills.

The broad objectives of Judicial Education are:[7]

I Impartiality

C Competency

E Efficiency

E Effectiveness

C Community Confidence in the Judiciary

The objectives of judicial education are identical to those of judicial reform and it includes the following concepts:[8]

"Impartial" stands for both the reality and the perception of impartiality. This includes the concepts of:

(1) an impartially minded and independent judiciary respected for its integrity; (2) transparency – from the appointment process to the rendering of judgments comprehensible to the public; (3) a transparent and accessible judicial complaint process; and (4) an articulated, annotated and publicized code of judicial

7 The author owes this to Judge Sandra E. Oxner, Chairperson, The Commonwealth Judicial Education Institute, Halifax, Canada.

8 This section is based on a Paper on Judicial Education and Judicial Reform written by the author and published by JUTA in 1997.

ethics and conduct so that the community is aware of the standards and they have the right to require of a judiciary.

A *second aspect* of judicial effectiveness is judicial predictability. A *third aspect* is the collective judicial responsibility of listening to the community's complaints about the justice system and using its influence to shape the justice system to respond to responsible complaints. *For example*, judges do not generally consider a low rate of implementation of their judgments as their responsibility. Difficulties in enforcing judgments can make successful litigation a hollow victory and bring the judiciary into disrepute.

It may be observed here that in the field of judicial education and training the National Judicial Academy is playing an important role. The Judicial Academy was established on 17th August, 1993 at Bhopal (Madhya Pradesh) as a registered society, fully funded by the Government of India. It fulfilled the long felt need of training judicial officers who require training in law and judicial disciplines. Among other objectives, the Academy aims to provide training and continued judicial education to the judicial officers of the states/union territories and to enhance the capabilities of the existing training institutions for judicial officers of the states/union territories to improve the quality of training.

Over the past one decade in particular, the trend of imparting high quality legal education has been embraced by international development, and it has become increasingly common for multilateral and bilateral donors to sponsor judicial education and training projects as sub-objectives of broader programme strategies to strengthen governance systems and the rule of law around the world.

The study of judicial education provides insights on new means of enhancing the quality of justice within the legal system of the country. Continuing education is an integral part of the ongoing professionalisation of the judiciary, and provides both the formalized means to enhance the performance and professional competence of judges, and a visible means of accountability which consolidates judicial independence. Recognition of the need for judicial education is now firmly established in many jurisdictions around the world. The rationale for judicial education is that in the long term it strengthens the independence and impartiality of the judiciary, improves justice delivery system, and builds strong social and institutional credibility of the judges in the country.

In the light of the aforesaid discussion, it may be concluded that with the changing times, the judges of today must guide their judicial conduct and dispense justice by taking cue from the well-established jurisprudential and constitutional

principles. To enable the judges to achieve this goal, the judicial education and training needs to be imparted on continuous basis to the judges and judicial officers of the country.

LABOUR-MANAGEMENT RELATIONS LAW AND THE SUPREME COURT OF INDIA : A CRITIQUE

BUSHAN TILAK KAUL*

I INTRODUCTORY

'Labour Law' as an area of academic interest and research has, in recent years, not received the attention that it deserves. The reasons for this are not far to seek. With the advent of the era of globalization and liberalization and the basic thrust being on market de-regulation, the academia in India has taken it as a *fait accompli* that the pillars of labour jurisprudence, which were built over the years through judicial and legislative initiatives, were going to be lost sight of in the new environment where the main focus of the state is on higher economic growth, at any cost.[1] Such a feeling has been strengthened by the fact that serious inroads into the rights of workers are being made inasmuch as regular work force is being replaced by the contractual and contract labour. The entire period of economic reforms has witnessed the steady dismantling of the floor manufacture by organized adult workers into a preference for unorganized migrant, adolescent and child labour and contractual and home based production systems.[2] Unfortunately, these practices have become the order of the day with, by and large, only occasional denouncement of these by the adjudicators and the judiciary. Resultantly, we find the organized sector which was already miniscule, shrinking further and unorganized sector expanding, leaving vast majority of the labour force with little or no protection under the labour law.[3]

If socio-economic justice to the workers of this country as a basic value under the Constitution of India has to have any meaning, it is high time that the

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* Professor, Faculty of Law, University of Delhi; presently, Chairperson, Delhi Judicial Academy.

1 The Government of India announced the new industrial policy in July 1991 to transform indian industrial and financial sector to be a global player. Several major policy decisions including privatization of the public sector enterprises, modernization and upgradation of technology, manpower training and skill upgradation, rehabilitation of sick industrial units and above all, relaxation of state control by introducing adequate industrial reforms were included in the new policy package. Around this time and thereafter a change in judicial approach is also discernable in various important areas of labour-management relations law; see judgments of the Supreme Court in *Bank of India* v. *T.S. Kelawala,* (1990) 4 SCC 744; *BALCO Employees Union Registered* v. *Union of India,* (2002) 2 SCC 333; *T.K. Rangrajan* v. *Government of Tamil Nadu,* (2003) 6 SCC 581; *U.P. State Brassware Corporation Ltd.* v. *Uday Narain Pandey,* (2006) 1 SCC 479.

2 See Harsh Mander, "A Law against Children" *The Indian Express,* July 29, 2016 at 14.

3 See Preeti Rastogi, "Informal Employment Statistics Some Issues" *EPW* 7, 2015 Vol. L No. 6, 67 at 68.

academia and researchers started grappling with the pressing issues concerning rights of the workers and came out with responses to them so that the goal of higher economic growth is tempered with social justice. For identifying the issues and examining the responses to them, it is worthwhile to keep in mind that the legal framework regulating labour-management relations at the central level is of pre-independence era when it was not conceived as part of any well thought out labour-management policy or strategy of the state. The three central legislation- the Trade Unions Act, 1926, the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947 - on the subject of labour-management relations were enacted to meet specific situations that arose around the time when each of these legislation was enacted.[4] Even in free India, at no point of time, a rational labour-management relations policy or robust legal framework has been put in place except for some sporadic amendments made in the above legislation, from time to time, keeping the basic pre-independence legal framework intact.[5] Notwithstanding the clear and explicit directives under the Constitution of free India to the functionaries of the state to give effect to the cherished values of socio-economic justice, no worthwhile steps in this direction have been or are being taken in favour of the toiling masses.

It goes to the credit of the Supreme Court of India that even in the absence of any rational policy by the state on the labour-management relations and with many areas of it having been left unoccupied by the legislature, it took upon itself in its formative years, with all the constraints, the gigantic task of laying the foundation of the labour jurisprudence in this country. This it did with the intent to bring a proper synthesis amongst the conflicting claims of various stakeholders

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4 See, Bushan Tilak Kaul, "Labour Law-1" (Labour Management Relations) XLII *ASIL* (2006) 489.

5 The important amendments made to the ID Act, 1947 were:
Introduction of Chapter V-A dealing with 'Lay-off and Retrenchment' by the amending Act 43 of 1953 effective from 24.10.1953;
Introduction of Chapter V-B dealing with 'Special Provisions relating to Lay-off, Retrenchment and Closure in certain establishments by the amending Act 32 of 1976 w.e.f. 5.03.1976;
Expanding the definition of 'workman' in s. 2 (s) by the amending Act 46 of 1982 effective from 21.8.1984;
Prohibition of 'Unfair Labour Practices' by adding Chapter V-C by the Act 4 of 1982 w.e.f. 21.08.1984.
The Industrial Disputes (Amendment) Act, 2010 which, *inter-alia*, amended section 2 (A) providing that any workman covered by section 2 (A) can directly approach labour court or industrial tribunal for adjudication of his dispute of non-employment. The adjudication authority shall have power and jurisdiction to adjudicate such dispute and all the provisions of the Act shall apply in relation to such adjudication as they apply in relation to industrial disputes referred to it by the appropriate government.

in the Indian industry in the overall interest of industrial harmony and accelerated economic growth. It pursued this policy relentlessly and strived to give a fair deal, both to the employers and the workers, and this pursuit continued on a regular basis till the late eighties. This indeed is laudable. But from the beginning of nineties, the court seems to have been greatly influenced by the mantra of globalization and liberalization and it started putting breaks on its active role, played by it hitherto, and generally lost the social context while adjudicating important labour disputes[6] of course, with some exceptions in between.[7] The decision of the court in *BALCO Employees Union Registered* v. *Union of India*[8] was the culmination of judicial thinking falling completely in line with the pro-globalization and liberalization policy of the government. In *BALCO* the court held that the decision of the government to disinvest was an economic policy decision and was not justiciable. It held that while it may be fair and sensible to consult the workers in a situation of change of management as laid down by it in *National Textile Workers Union* v. *P.R.Ramakrishnan,*[9] there was, however, in law no such obligation to consult in the process of sale of majority shares in a company. The court's reluctance to interfere with the decision of the government to disinvest may be understandable and may be even right- as it was shown that the PSU had incurred heavy losses. But it is arguable that the court overlooked the basic values of social justice and socialism enshrined in the preamble to the Constitution of India and the principle of industrial democracy envisaged in article 43 (A) of the Constitution which had greatly influenced the court's thinking in the pre-globalization era.[10]

For making socio-economic and political justice enshrined in the preamble

6 See, *Bank of India* v. *T.S. Kelawala,* (1990) 4 SCC 744; *BALCO Employees Union Registered* v. *Union of India*, (2002) 2 SCC 333; *T.K. Rangrajan* v. *Government of Tamil Nadu,* (2003) 6 SCC 581; *U.P. State Brassware Corporation Ltd.* v. *Uday Narain Pandey,* (2006) 1 SCC 479.

7 See, *Workmen* v. *Management of Reptakos Brett & Co. Ltd,* (1992) 1SCC 290; *Municipal Corporation of Delhi* v. *Female Workers (Muster Rolls)*, (2000) 3 SCC 224; *Harjinder Singh* v. *Punjab State Warehousing Corp.*, (2010) 3 SCC 192; *Delhi Jal Board* v. *National Campaign for Dignity and Rights of Sewerage and Allied Workers,* (2011) 8SCC 568; *Hari Nandan Prasad* v. *Employer I/R to Management of Food Corporation of India,* (2014) 7 SCC 190; *Tata Iron and Steel Company Limited* v. *State of Jharkhand,* (2014) 10 SCC 301 and *Raghubir Singh* v. *Haryana Roadways Corporation,* (2014) 10 SCC 301.

8 (2002) 2 SCC 333.

9 (1983) 1 SCC 228.

10 See, S.P. Sathe, *Judicial Activism in India*, lix (2003). Prof. Sathe has expressed his surprise that the petitioner in *BALCO* did not raise the question of socialism in support of their stand before the Supreme Court both on the question of *locus-standi* and justiciability of the issue. According to him if social justice is held to be part of judicially defined term "Socialism," the court may have to interfere with the economic policy decision of the Government in order to uphold social justice.

to the Constitution[11] meaningful for the weaker sections of the society, the constitutional functionaries have to be reminded, time and again, by the academia and the researchers of their constitutional obligation to take adequate measures in this direction. The higher economic growth, which is the buzz word in the corridors of power, has to be inclusive. The state must, no doubt, strive to achieve higher economic growth but at the same time must take steps to protect and promote human rights of the workers who actively contribute to such growth. It is high time that the constitutional functionaries realize that they are under a constitutional duty to take appropriate measures to secure the workers their human rights and remain resolute in this endeavour till their aspirations are translated into reality.

The need of the day is to recollect the contribution made by the Supreme Court especially till the late eighties in some of the areas of labour-management relations law, taking in view the social context and reflect on it in the hope that the philosophy underlying its approach may sensitize the present and future adjudicators to adopt social context adjudication in labour disputes, which in turn, will help them to fix their sights and to forge pathways for the future. After all, judiciary continues to be the institution towards which the common man of this country still looks at as the protector and guardian of his human rights.

Here an effort is being made to delve into the role of the Supreme Court in protecting and promoting the human rights of the workers in the hope that the industrial adjudicators and the higher judiciary realize, sooner than later, that the social context adjudication in labour disputes is a necessary and sure guide for dispensation of justice. They need to once again play an active role in shaping a humane labour jurisprudence and act as a watchdog of the human rights of the working class who are in the state of bewilderment.

The present discussion is confined only to some of the areas of labour-management relations law, which in itself is a vast field. It should give a fairly good idea of the development of law through judicial creativity if we traverse through the areas of the importance of trade unions and their role in promoting collective bargaining, importance of industrial action in an effort to promote bipartite settlements, determining the scope of the applicability of the ID Act, harmonizing the three central legislation, importance of social context adjudication in dealing with issues relating to wage structure, bonus, retrenchment law and disciplinary action to highlight the court's contribution in building labour jurisprudence. Along with the court's attempt to balance the rights of various stake holders in

11 The preamble to the Constitution of India envisages, *inter-alia*, securing to all citizens justice - social, economic and political.

the earlier years, the approach of the court in some of these very areas in the post-liberalization period has also been traversed showing the failures of the court in acting as a custodian of the human rights of the workers for the reason that it has not taken into account social context while addressing some of these issues.

II LEGISLATIVE MEASURES REGULATING INDUSTRIAL RELATIONS IN INDIA

'Labour' falls in the concurrent list of the Seventh Schedule of the Constitution, meaning thereby that both central and state legislatures have competence to make laws on this subject.[12] In the event of conflict between the central law and the state law, the former shall prevail over the latter to the extent of inconsistency unless the state law has been reserved for the consideration of the President and has received his assent in which case it shall prevail.[13] Labour laws can be divided broadly into three heads, i.e., law relating to: i) Labour-Management Relations;[14] ii) Social Security;[15] and iii) Labour Welfare.[16]

Here we shall be dealing with only the first head, namely, law relating to

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12 The following entries in List III of the Constitution are relevant:
Entry 22. Trade Unions, Industrial and Labour Disputes; Entry 23. Social Security and social insurance; employment and unemployment and Entry 24. Welfare of labour including conditions of work, provident fund, employer's liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

13 Art. 254 of the Constitution deals with situations where there occurs inconsistency between a law made by Parliament and the state legislature on a matter enumerated in List III of the VII Schedule of the Constitution of India.

14 The three legislation at the central level which deal with Labour-Management Relations are the Trade Unions Act, 1926, the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947.

15 The legislation which, *inter alia*, deal with social security are:
i. The Workmen Compensation Act, 1923;
ii The Employees Liability Act, 1938;
iii The Employees State Insurance Act, 1948;
iv The Maternity Benefits Act, 1961; The Employees Provident Fund and Misc. Provisions Act, 1952;
v The Payment of Gratuity Act, 1972;
vi Building and other Constructions Workers (Regulation of Employment and Service) Act, 1996); and
vii Unorganized Workers Social Security Act, 2008; Public Liability Insurance Act, 1991.

16 The legislation which, *inter alia*, deal with labour welfare are:
i. The Plantations Act, 1941;
ii. The Factories Act, 1948;
iii. The Mines Act, 1952;
iv. The Contract Labour (Prohibition and Regulation) Act, 1970; and
v. Bonded Labour System (Abolition) Act, 1976.

labour-management relations. The three legislation referred to above which regulate industrial relations in India at the central level, in a way, can be said to form a composite code in itself.[17]

The Trade Unions Act, 1926 provides for registration of trade unions[18] and confers certain immunities to the registered trade unions, their office bearers, and members against general law liabilities like restraint of trade, criminal conspiracy *simpliciter* and conspiracy in tort, respectively, while acting in furtherance of trade disputes and seeking their settlement through collective bargaining.[19] The Act does not provide rules for recognition of trade unions which area at the central level is governed by the Voluntary Code of Discipline (VCD) adopted in the 15th Indian Labour Conference.[20] This legislation primarily aims at promoting bipartite settlement of disputes through collective bargaining.[21]

The Industrial Employment (Standing Orders) Act, 1946 obliges every industrial establishment as defined in the Act, employing 100 or more workers, to have a set of certified plant rules defining the conditions of employment to be maintained in the establishment relating to the subject matters laid down in the Schedule appended to the Act. The Act provides for appointment of certifying authority, the procedure to be followed and the powers to be exercised by it, and

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17 The Government of India has recently prepared a Labour Code on Industrial Relations Bill, 2015 in which all the three legislation are treated as a single Code for regulating industrial relations at the central level. There seems to be a difference of opinion amongst different high courts as to whether these three legislations can be said to form a Code. For difference of opinion, see *Rangaswamy* v. *Registrar of Tamil Nadu,* AIR 1962 Mad. 231; *Registrar of Trade Unions* v. *Government Press Employees Union,* (1976) Lab. I. C 280 (Mad.); and *Central Machine Tool Institute, Bangalore* v. *Assistant Labour Commissioner,* (1979) 1 LLJ 192 (Kant.). Also see the Supreme Court decision in *T.T. Devasthanam* v. *Commissioner of Labour,* (1995) Supp (3) SCC 653; and *Tirumala Tirupati Devasthanam* v. *State of A.P.,* (1995) Supp (3) SCC 654 giving the impression that the Trade Unions Act, 1926 and the ID Act, 1947 were not treated as forming part of the same Code.

18 The registration under the Act is optional. There are various formalities to be complied with and also that the 'Trade Union' must be one covered within the definition of 'Trade Union' in s. 2 (h) of the Act. Ss. 3 to 8 deal with appointment of Registrar of Trade Union, Procedure and Powers of the Registrar under the Act.

19 Ss. 17,18 & 19 of the Trade Unions Act deal with immunities to the registered Trade Union, their office bearers and members against general law liabilities of criminal conspiracy *simpliciter,* conspiracy in tort and restraint of trade, respectively.

20 The Voluntary Code of Discipline was adopted in the 15th Indian Labour Conference, a tripartite body comprising of employees' representatives, representatives, employers' representatives and government representatives, which meets or is expected to meet once in a year to discuss issues relating to labour management relations in Indian industry.

21 See *B.R. Singh* v. *Union of India,* (1989) 4 SCC 710 at 720.

a provision of appeal against its order.[22] The plant rules certified by the Authority under the Act become implied terms and conditions of employment of every worker employed in that establishment which can, in subsequent years, be treated as the baseline for future collective bargaining process. These certified standing orders bring uniformity in the condition of employment in their application to the same category of workers.[23]

The Industrial Disputes Act, 1947 primarily provides for settlement of industrial disputes through third party intervention, namely, conciliation, voluntary arbitration and compulsory adjudication, if the parties to the dispute fail to settle it through bipartite settlement.[24] The Act regulates the right of the workers and employers to resort to industrial actions[25] in general and provides more stringent conditions in public utility services,[26] in particular. The Act empowers the appropriate government to prohibit continuance of industrial actions during the pendency of the dispute before the authorities under the Act, in the interest of the society.[27] The Act is primarily concerned with the settlement of collective dispute, between, *inter alia*, employer and the workmen as a class who may be represented by their union or in the absence of the union by a substantial number of workers of that establishment.[28] Individual disputes, *per se,* are not subject matter of conciliation or adjudication under the Act, but an exception has been carved out in the form of section 2A by an amendment to the Act in 1965 whereunder all kinds of termination of employment of the workers are deemed to be industrial disputes, even if these disputes are neither espoused by the trade union or a substantial number of workers.

The appropriate government has the power to appoint conciliation officers for inducing a settlement between the parties or, if necessary, to constitute board

22 See Ss. 3, 4, 5 & 6 of the Industrial Employment (Standing Orders) Act, 1946.

23 *Barauni Refinery P.S. Parishad* v. *Indian Oil Corporation of India Ltd*., (1991) 1 SCC 4.

24 *Life Insurance Corporation of India* v. *D.J. Bahadur,* (1981) 1 SCC 315 at 334-335.

25 S. 23 of the Act.

26 Ss. 22 and 23.

27 Ss. 10 (3) & 10 (A) (4A).

28 *Central Provinces Transport Services Ltd.* v. *Raghunath Gopal Patwardhan,* AIR 1957 SC 104 at 109; *Workmen* v. *Dharampal Premchand,* AIR 1966 SC 182 and *Workmen of Indian Express Newspapers Pvt. Ltd.* v. *Management of Indian Express Newspapers Pvt. Ltd*., (1969) 1 SCC 228 and *J.H. Jadhav* v. *Forbes Gokak Ltd*., (2005) 3 SCC 202.

of conciliation for settling an industrial dispute.[29] The 'appropriate Government'[30] is also empowered to constitute labour court, industrial tribunal or national labour tribunal depending upon the subject matter of the industrial dispute for adjudication[31] and refer the matter to them for adjudication.[32] However, the parties are free to refer the matter to 'arbitration'[33] under the Act before the dispute is referred to a labour court or tribunal or a national tribunal.[34]

If the management and the workers enter into a bipartite settlement, the Act provides for registration of such settlement under section 18 (1) of the Act which would then be binding and enforceable under the Act.[35] The Act also provides for registration of settlements arrived at with the help of the conciliation officer or board of conciliation which have wider binding nature.[36] The collective industrial disputes are required to be referred by the appropriate government for adjudication to the industrial adjudication machinery. The adjudicator sends his award to the appropriate government for publication which has to be published by it within 30 days from the date of receipt.[37] The award becomes enforceable after the expiry of 30 days from the date of publication, except in the cases falling under proviso to section 17 (A) (1) of the Act.[38] The Act provides for binding nature of awards of voluntary arbitrator, labour court, industrial tribunal or national tribunal.[39] The Act also makes provision for 'retrenchment,' 'lay off', 'transfer of undertaking' and 'closure' compensations.[40] In Chapter V B, the management of the industrial

29 S.4 (1) of the ID Act deals with appointment of conciliation officer and s. 4 (2) read with s. 12 deals with the functions of the conciliation officer. S. 5 deals with the appointment of Board of Conciliation with respect to a dispute and s. 5 (2) read with s. 13 deals with the functions of the Board of Conciliation.

30 S. 2 (a).

31 Ss. 7 to 7 (B). 'National Tribunals' are constituted by the central government and reference of industrial dispute to them is also made by the central government. See s. 10 (1A).

32 S. 10.

33 S. 10-A.

34 S. 10-A (1).

35 S. 18 (1).

36 S. 18 (3).

37 S. 17 (1).

38 S. 17 A (1).

39 S. 18 (3).

40 Chapter V-A the Act. s. 25-C deals with payment of lay off compensation where the management has power to lay off his workmen under the contract of employment or the standing orders of the industrial establishment; s. 25 (F) provides conditions precedent for effecting 'retrenchment' within the meaning of s. 2 (oo) which includes condition of the payment of retrenchment compensation. Ss. 25 (G) & (H) deal with the principle for effecting retrenchment which is "last come first go" rule in the same category of workmen. Ss. 25 FF & FFF provide for payment

establishment, as defined in section 25 L of the Act, employing 100 or more workers cannot order 'retrenchment', 'lay off'', or 'closure' of such establishment without prior permission of the appropriate Government which is a safeguard against arbitrary exercise of such powers by the management.[41]

It also regulates the right of workmen to go on strike and also the right of the employer to declare 'lock-out' in the interest of minimizing dislocation of the supply of goods and services to the society. Violation of the relevant provisions attracts punishment under the Act.[42] There is also provision for punishment against unfair labour practices both on the part of the employer as well as the trade unions.[43] The Act confers appellate powers to the labour court or industrial tribunals under section 11 A of the Act against an order of unfair dismissal or discharge issued by the management.[44]

All these three legislation were passed in the pre-independence era, with some important amendments made in them thereafter, from time to time, but the main edifice of the legal framework remains colonial. In the Independent India, the yearning for having a comprehensive legislation for better industrial relations has not fructified.[45] Even now, no serious effort is being made on the part of the central government to adopt a rational industrial relation policy to meet the challenges posed by globalization. Some sporadic amendments have been made by some state governments in various legislation and based on them the central government is contemplating to bring new Bills to consolidate labour laws. The changes as contemplated in the Bills are to give a free hand to the management and have the effect of diluting further the rights of labour. The labour code relating to Industrial Relations Bill, 2015 framed at the central level lacks both in content and imagination.

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of transfer of undertaking compensation and closure compensation which are equivalent to 'deemed' retrenchment compensation.

41 Ss. 25 M to O in Chapter V-B of the Act are is applicable to industrial establishments as defined in s. 25 K & L of the Act. The Supreme Court has upheld the constitutional validity of Ss. 25 N and 25 O in *Workmen* v. *Meenakshi Mills Ltd.* and *Orissa Textile & Steel Limited* v. *State of Orissa*, (2002) 2 SCC 578, respectively.

42 Ss. 22 and 23 of the Act.

43 Ss. 25 T and 25 U.

44 *Workmen of Firestone Tyre and Rubber Company of India Pvt. Ltd.* v. *Management,* (1973) 1 SCC 813. The newly inserted s. 11 A of the ID Act, 1947 which is based on the Recommendation No. 119 of the International Labour Organization (ILO) came into force with effect from 15.12.1971. It enlarged the scope of the power of interference by the industrial adjudicator in the matters of dismissal and discharge referred to it under s. 10 of the Act.

45 *Supra* note 4.

With the dawn of independence and thereafter coming into force the Constitution of India on 26th January, 1950, the goals that the Indian State set for itself are self-explanatory in this fundamental document. The framers of the Constitution were conscious of the significant role that the labour had to play in the reconstruction of the national life and in the transformation of the social set up. It was but natural that at the time of the drafting of the Constitution the interest of the labour was viewed with care and sympathy by the national government. The worker of the pre-independent India was regarded as a dormant wage earner. However, after independence, his status was raised and recognized as an active builder of the national economy and an equal partner in the production of capital. The preamble of the Constitution commits India to the ideal of converting political democracy established by the Constitution into a social and economic democracy and that also in a democratic way, under the rule of law.[46] This philosophy of the Indian Constitution is more pronounced in Parts III and IV which deal with the Fundamental Rights and the Directive Principles of State Policy, respectively. Directive Principles are an amalgam of several subjects, namely, social policy, administrative policy, socio-economic rights and statement on International Policy of the Indian Republic. They give a vision of the progressive philosophy on which the Indian Republic accepts to function in socio-economic, political and international matters. Highlighting the philosophy underlying the Directive Principles of the State Policy, the first National Commission on Labour, 1969 describes it thus:[47]

> Directive Principles read as a whole have in them the running thread which also binds various elements that are often cited as objectives of socialistic society.

These principles enjoin upon the state to strive to minimise the inequalities in income;[48] endeavour to eliminate inequalities in status, facilities and opportunities of people;[49] secure adequate means of livelihood to its citizens both men and women;[50] ensure that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good;[51] the operation of economic system does not result in the concentration of wealth and

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46 *Report of the National Commission on Labour* 47 (Government of India, 1969).

47 *Ibid.*

48 See, the Constitution, art. 38(2).

49 *Ibid.*

50 *Id.*, art. 39(a).

51 *Id.*, art. 39(b).

means of production to the common detriment;[52] equal pay for equal work for both men and women;[53] ensure good health and strength of workers and children and that the citizens are not forced to enter avocations unsuited to their age or strength because of economic necessity;[54] ensure that the children get opportunities and facilities to develop well and prevent their exploitation;[55] secure justice and free legal aid to all;[56] ensure right to work to all;[57] ensure right to assistance in cases of unemployment, old age, etc.;[58] secure just and humane conditions of work and maternity leave;[59] ensure living wage to industrial and agricultural workers;[60] a decent standard of life and full enjoyment of leisure and social and cultural opportunities to all workers[61] and workers participation in management.[62]

At the same time, the Constitution, among other things, guarantees fundamental rights to equality,[63] freedom of speech and expression,[64] assemble peacefully,[65] form associations or unions,[66] carry on any occupation, trade or business[67] and the right against exploitation.[68] The state has the task of formulating a rational industrial relations policy and evolve rules and procedures which will encourage rapid economic growth, promote industrial harmony, improve real income of groups of wage and salary earners, ensure that inconvenience inflicted by interruption in the supply of essential goods and services are minimized, maintain price stability, ensure reasonable returns to the employer and enforce orderly social conduct. The Preamble, Part III and Part IV of the Constitution,

52 *Id*., art. 39(c).

53 *Id*., art. 39(d).

54 *Id*., art. 39(e).

55 *Id*., art. 39(f).

56 *Id*., art. 39A.

57 *Id*., art. 41.

58 *Ibid*.

59 *Id*., art. 42.

60 *Id*., art. 43.

61 *Ibid*.

62 *Id*., art. 43A.

63 *Id*., art. 14.

64 *Id*., art. 19(1)(a).

65 *Id*., art. 19(1)(b).

66 *Id*., art. 19(1)(c). The Supreme Court in *All India Bank Employees' Association* v. *National Industrial Tribunal*, AIR 1962 SC 171 held that the fundamental right to form an association did not include within it right to resort to strike or collective bargaining.

67 Constitution of India, art. 19(1)(g).

68 *Id*., arts. 23 and 24.

particularly those concerning workers, were made more articulate and clear under the industrial relations policy of the Republic of India. The philosophy permeating these provisions of the Constitution has accorded broad and clear guidelines for the development of the industrial jurisprudence and has thus taken India one-step forward in her quest for industrial harmony.[69]

The Supreme Court has stressed the need for reading even the pre-independence labour legislation in consonance with the constitutional values.[70] This has been the approach adopted generally by the Supreme Court from the very inception while dealing with labour matters before it, with more vigour from *Bangalore Water-Supply & Sewerage Board* v. *R. Rajappa*[71] case onwards till the dawn of the new economic policy era with some zig-zags in between. Even in the era of globalization, the court has emphasized in a number of cases that the ID Act and other similar legislative instruments in the nature of social welfare legislation are required to be interpreted in the light of the goals set out in the preamble of the Constitution and the provisions contained in chapter IV thereof, in general, and articles 38, 39(a) to (e), 43 to 43A, in particular.[72]

In the early years, the court had to deal with a number of collective disputes and it got opportunities to evolve guiding principles for determination of collective disputes even in areas where no specific legislation existed.[73] Some of those areas in the field of industrial relations in which the court was able to make contribution in evolving a rational labour jurisprudence are discussed below.

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69 *Supra* note 46 at 56.

70 See, observations of K.Iyer J. in *Rohtas Industries Limited* v. *Rohtas Industries Staff,* (1976) 2 SCC 82 at 98.

71 1978 2 SCC 213.

72 *Harjinder Singh* v. *Punjab State Warehousing Corp.*, (2010) 3 SCC192.

73 There was no legislation dealing with fixation of wage structure except the Minimum Wages Act, 1948 which applied only to the scheduled industries. Further, before the enactment of the Payment of Bonus Act, 1965, there was no statutory provision providing for payment of bonus to the industrial worker. Also, in the areas of prohibition of unfair labour practices and recognition of trade unions, though legislative provisions were brought in the Trade Unions Act by the Trade Unions (Amendment) Act, 1947 prohibiting unfair labour practices and providing for recognition of trade unions but the notification for its enforcement was not specified. The ID Act was amended in 1982 by the Industrial Disputes (Amendment) Act, 1982 which defined unfair labour practices and prohibited the same on the part of employers, their trade unions, on the part of workmen and their trade unions and under ss. 25 (T) & (U) read with Schedule V to the Act. Recognition of trade unions at the central level continues to be governed by the Voluntary Code of Discipline and no statutory provision has been made even now on this subject.

III DEVELOPMENT OF LABOUR JURISPRUDENCE

Prefatory

The developments in the law of labour management relations in India in the middle of 20th century was heralded by a sound shift from norms grounded in the theory of contract to that of status.[74] The norms grounded in the theory of status were shaped by the efforts of the legislature and the judiciary with a view to secure basic rights of the workers. The judiciary till the late eighties acted primarily as a proponent of sociological jurisprudence while adjudicating disputes viewing law functionally rather than technically. It made great strides in balancing the conflicting interests of employers and workers equitably recognizing the chasm in their bargaining power. However, many assertions of contractual aspects of the relationship now appear to be eclipsing the relationship based on the status. This shift can be primarily attributed to the change in the judicial approach. The social context adjudication which gave due recognition of the differential bargaining power has gradually been overtaken by the ideology of globalization and liberalization culminating in greater emphasis on the contractual relationship which has resulted in undermining the rights and the status of workers. There is, therefore, need to ensure that the rights of workers both collective and individual are protected and promoted, which cannot be secured on the basis of freedom of contract theory. This is amply demonstrated by approach of the court in matters which are situated at the confluence of multiple identities like gender, socially marginalized and economically vulnerable groups.[75] These have been

74 Sir Henry Sumner Maine in his book *Ancient Law* (1886) said that" the movement of the progressive societies has hitherto been a movement from *status to contract*," but the movement in all the industrial societies with the realization in the words of International Labour Organization (ILO) in its 1944 declaration, *inter alia,* that 'labour is not a commodity' and that 'poverty anywhere constitutes a danger to prosperity elsewhere' and the change in the role of the state from non-interventionist to state intervention in favour of workers constituted a dramatic turn from contract to status for workers in developed as well as developing economies. This turn from 'contract' to 'status' is clearly visible in the human rights instruments of the United Nations, the Conventions of the ILO and the Fundamental Rights and Directive Principles of State Policy envisaged in Part III and IV of the Constitution of India (1950). But alas! with the de-regulation and liberalization of the economy, the labour management relations are now being regulated by contractual relationship rather than from the standpoint of the status of the worker which is the heart and soul of the philosophy of the welfare state. See Sanford M. Jacoby, "Economic Ideas and the Labour Market: Origins of the Anglo-American Model and Prospects for Global Diffusion" 25 *Comp. Lab. L. & Pol'y. J.* 43 (2003-2004).

75 The courts by and large world over have demonstrated sensitivity for protecting the rights of multiple identities, which can be categorized into different social groups. In *National Legal Services Authority* v. *Union of India and Others,* AIR 2014 SC 1863, the Supreme Court protected the right of transgenders to determine and express their gender. Similarly, Deepak Mishra, J. in *Shamima Farooqui* v. *Shahid Khan,* AIR 2015 SC 2025 while upholding the right

commendably addressed even in the post globalization era. This only goes to show that whenever the court has taken into account social context, it has protected and promoted the rights of weaker and marginalized groups. The general approach of the court in the post liberalization period has been technocratic in interpreting labour legislation, whereas in the pre-liberalization period it had adopted liberal interpretation keeping the changing social context in view. This technocratic approach of the court in post-liberalization period generally has resulted in dilution of the rights of the workers, both collective as well as individual.

After India attained independence, an important question that came for consideration before the Federal Court related to the powers of the labour court and the industrial tribunals constituted under the ID Act. The Federal Court, predecessor of the Supreme Court, held in the landmark judgment in *Western India Automobile Association* v. *The Industrial Tribunal*[76] that the powers of the industrial tribunal and the labour court under the Act are very wide and it can, unlike the civil court, rewrite or modify the contract of employment entered into between the workmen and the employer. Mahajan, J., speaking for the court, held that in an unfair dismissal case, the labour court or the industrial tribunal can grant the relief of reinstatement, continuity of service and full back wages which a civil court cannot do. The judgment recognized the vast powers that vest in the labour court or the industrial tribunal under the Act and this judgment formed the bedrock for building labour jurisprudence in the country. Normally at common law the remedy for wrongful termination is by way of damages. The labour courts and the industrial tribunals came to exercise enormous powers while adjudicating an industrial dispute, with a view to ensure industrial peace and harmony, while drawing a proper balance between the demands of workers to socio-economic justice, reasonable returns to employers and uninterrupted supply of goods and services to the society.

Another landmark case which needs mention at this stage is the majority

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of women to live with dignity stated that "when centuries old obstructions are removed… the chain get rusted and human endowments and virtues are not indifferently treated and emphasis is laid on 'free identity' and not on 'annexed identity'. In *Safai Karamchari Andolan* v. *Union of India,* (2014) 11 SCC 224 the Supreme Court directed all State governments and union territories to fully implement the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 and stated that "the practice of manual scavenging has to be brought to a close and also to prevent future generations from the inhuman practice of manual scavenging". The 1993 Act has since been replaced by The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. The Supreme Court of United States of America in *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49(1978) stated "to abrogate tribal decisions… for whatever good reason, is to destroy cultural identity under the guise of giving it".

76 AIR 1949 FC 111 (hereinafter referred to as *Western India Automobile Association*).

judgment of the Supreme Court in *Bharat Bank Ltd., Delhi* v. *Employees of Bharat Bank*.[77] The question in this case was whether the Supreme Court had the power to entertain special leave to appeal under article 136 of the Constitution of India against the award of a labour court or an industrial tribunal under the ID Act. The powers of the Supreme Court under the said provision are undoubtedly wide but the same can be exercised provided the order, judgment or determination is one of the 'court' or 'tribunal' within the meaning of article 136 of the Constitution. Undoubtedly, the word 'court' means a pure judicial forum but the moot question was whether the word 'tribunal' also included not only judicial forums within it but also forums which were performing 'quasi-judicial' functions. Labour courts or industrial tribunals are not purely judicial forum as these get jurisdiction to adjudicate upon a matter generally only after getting a reference under section 10 of the Act and their awards are not automatically binding on the parties. The award has to be sent to government for publication under section 17 of ID Act. The government, in certain cases, covered under proviso of section 17 A (1) of the Act can reject or vary the award. The apex court interpreted the word 'tribunal' to include within its fold forums which are quasi-judicial bodies like 'labour court' and 'industrial tribunal' and, therefore, it has the power to hear appeals directly against the awards given by labour courts or tribunals under article 136 of the Constitution. In this judgment, the court noted with approval the observations of the Federal Court about the extraordinary powers of the labour courts or the industrial tribunals under the Act as enunciated in *Western India Automobile Association*. This was a historic judgment relating to industrial relations law. This judgment gave the opportunity to the Supreme Court to build the labour jurisprudence of this country and bring uniformity in the application and interpretation of industrial relations law. In the earlier years, the court was liberal in entertaining challenge to the awards from industrial adjudicators directly under article136, a practice which it discouraged in later years when dockets of the court started getting full.

The court has through public interest litigation from time to time tried to bring justice to the door steps of the poor and the less fortunate. In *PUDR* v. *Union of India,*[78] it enlarged the rights of the working class by reading denial of minimum wage by the state instrumentalities amounting to '*begar*', which is frowned upon by article 23 of the Constitution. The non-payment of minimum wage was held as a form of forced labour amounting to breach of the fundamental right under article 23. Further, the court held that non-enforcement of Equal Remuneration Act, 1976

77 AIR 1950 SC 188.

78 (1982) 3 SCC 235: AIR 1982 SC 1473.

amounts to denial of equality under article 14 and non-observance of the Contract Labour (Regulation and Abolition) Act, 1970 amounts to violation of article 21 in as much as these Acts are clearly intended to ensure basic human dignity to the workers.

Some recent decisions of the Supreme Court also need to be mentioned here which remind us of the labour jurisprudence evolved in the past and the social context adjudication of labour disputes by the court does take place even now, though not on a regular basis. The court has stressed not only the need to take into account the constitutional values but also the international instruments for protecting and promoting the human rights of labour, in general and those of unorganized and female workers, in particular. In *Delhi Jal Board* v. *National Campaign for Dignity and Rights of Sewerage and Allied Workers*,[79] the court has done yeoman service to the unorganized sewer cleaning workers engaged through contractors by the state instrumentality like Delhi Jal Board whose right to compensation in the event of death has been recognized through judicial activism. Further, the Delhi High Court had earlier given directions for their protection against hazards by providing them necessary safety kits for doing their jobs and for their health care in the event of contracting any disease during their operations and for their welfare. These directions are laudable and need to be effectively enforced. However, despite these innovative directions of the Supreme Court and the Delhi High Court, deaths of sewer workers continue to be reported. This only shows the culpable apathy of the administration in not giving effect to the directions in their letter and spirit for which they deserve to be dealt with severely.

The directions issued by the Supreme Court in *Vishaka* v. *State of Rajasthan*[80] were intended for the effective implementation of gender equality, which was threatened by sexual harassment at workplace.[81] In *Medha Kotwal Lele* v. *Union of India*[82] the court gave further push to its earlier directions in *Vishaka* to ensure that there was robust law against sexual harassment at workplace and that its directions were followed in letter and spirit. It seems that the strong stand taken by the Supreme Court in *Medha Kotwal Lele* was greatly responsible for the early enactment of the legislation in the form of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. *Vishaka* and *Medha Kotwal Lele* show the commitment of the judiciary to ensure that there

79 (2011) 8 SCC 568.

80 (1997) 6 SCC 241.

81 S.P. Sathe, *Judicial Activism*, 241 (2003).

82 (2013) 1 SCC 297.

is a formidable legal framework and the redressal mechanism for dealing with cases of sexual harassment of women at workplace.

The sensitivity of the court in protecting the human rights of female workers to motherhood and to the maternity benefit is brought out in its decision in *Municipal Corporation of Delhi* v. *Female Workers (Muster Rolls)*.[83]It has taken notice of the historical factors responsible for causing mobility of women in rural areas from their homes to job market. The court recalled the special concern for women workers shown by the framers of the Constitution in Part-IV of the Constitution and the mounting concern at the international level for the rights of women to have humane conditions of work and elimination of all forms of exploitation. Such concerns have been addressed in international conventions in favour of working women under the Convention for Elimination of All Forms of Discrimination Against Women (CEDAW) adopted by the United Nations on 18.12.1979. The court was greatly influenced by the social context and played an activist role in ensuring that maternity benefits are made available to muster roll women workers. This was to enable them to overcome the state of motherhood with honour, in a peaceful manner, undeterred by the fear of victimisation for forced absence during the pre or post-natal period. The stand of the statutory body before the court, which is supposed to be a model employer, was shocking. It was out to deny these benefits to women muster roll workers even when they had put in long years of service. The court directed the Municipal Corporation to comply with the direction issued by the industrial tribunal by approaching the state government and also the central government for issuing the necessary notification under the proviso to section 2 (1) of the Maternity Benefit Act, 1961, if it had not already been issued, making the said Act applicable to the corporation. In the meantime, the court upheld the direction of the industrial tribunal directing the corporation to provide benefits under the said Act to its women muster rolls employees who had been working with them on daily basis for three years.

In *Female Workers (Muster Rolls)* we can see the activist role of the industrial tribunal which upheld the claim to maternity benefit of muster roll workers even when the Maternity Benefits Act, 1961 had not been extended to the corporation and then the role of the Supreme Court adding life and blood to the concept of democratic socialism which aims at ending poverty, ignorance, disease and inequality of opportunity.

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83 (2000) 3 SCC 224 (hereinafter referred as *Female Workers Muster Rolls*). The court relied heavily on the Universal Declaration of Human Rights adopted by the United Nations on 10.12.1948 and Articles 11 (1), (2) and (3) of CEDAW to support its decision.

(i) Trade Unions: Their Functions

The basic purpose of the Trade Unions Act, 1926 is to provide essential legal basis for organization of workers, collectively bargain with the employers and conduct trade disputes.[84] Ahmadi J. had the occasion to dwell on the importance and function of the trade unions: [85]

> The right to form associations and unions and to provide for their registration was recognized obviously for conferring certain rights on trade unions. The necessity to form unions is obviously for voicing the demands and grievances of labour. Trade unionists act as mouthpieces of labour. The strength of a trade union depends on its membership. Therefore, Trade Unions with sufficient membership strength are able to bargain more effectively with the managements.

The Supreme Court has time and again stressed the importance of collective bargaining and the principles of industrial democracy which permeate the relations between the management on the one hand and the unions on the other.[86] The court has, at the same time, stated that it is important that the settlement through collective bargaining must be fair and just. A fair and just settlement is always beneficial to the management as well as to the body of workmen and society at large creating all round industrial peace and tranquility. After all, the purpose of the industrial relations law is to avoid unnecessary social strife on the one hand and promote industrial and commercial development on the other. Settlement of labour disputes by direct negotiations and collective bargaining is always to be preferred, for it is the best guarantee of industrial peace which is the aim of all labour legislation. Efforts to resolve disputes through amicable settlements cannot be given up merely because the dispute has been referred for adjudication. Even during adjudication proceedings the parties can arrive at an amicable settlement.[87]

The practice of trade unions is further safeguarded by the fundamental right to form association guaranteed under the Constitution. Article 19(1)(a), (b) and (c) guarantees to the citizens freedom of speech and expression, right to assemble

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84 For a detailed account of the developments of Trade Union Law see C.K. Johri, "Labour Law in India" in R. Blanpain (ed.), *International Encyclopaedia for Labour Law and Industrial Relations*, 1-69 vol. 6, (1980). Also see C.K. Johri, "India" in *ELL-Suppl*. 204 (January 1998) 41-54. Also see C.K. Johri, "*India"* in *ELL-Suppl*.391 (August 2012) 225-244.

85 *B.R. Singh* v. *Union of India,* (1989) 4 SCC 710 at 720.

86 *K.C.P. Ltd*. v. *Presiding Officer & Ors,* AIR 1997 SC 2334.

87 *State of Bihar* v. *D.N. Ganguly,* AIR 1958 SC 1018.

peaceably without arms and right to form associations or unions, respectively, as fundamental rights.[88]These freedoms are subject to restrictions permissible under clauses (2), (3) and (4) of article 19, respectively. The Supreme Court has held that even on a liberal interpretation of article 19(1) (c), the fundamental right to form association does not include the right to strike, the right to recognition, or the right to collective bargaining.[89] The court has, nonetheless, recognized the legal right of the workers to resort to peaceful strike for bringing the employer to the negotiating table for collective bargaining.[90]

In recent years a distinction has been made between a peaceful strike and *bandh* resorted to by the political parties in different states (even by the party in power) and trade unions having affiliation with political parties to garner support on economic or political issues.[91] In a landmark decision in *Bharat Kumar K. Palicha* v. *State of Kerala*,[92] a full bench of the Kerala High Court declared '*bandhs'* organised by political parties from time to time as unconstitutional, being violative of the fundamental rights of the people. The court refused to accept it as an exercise of freedom of speech and expression by the party calling for the *bandh*. When a *bandh* is called, people are expected not to travel, not to carry on their trade, not to attend to their work. A threat is held out either expressly or impliedly that any attempt to disobey the call for *bandh* may result in physical injury. The High Court observed that a call for *bandh* was clearly different from a call for general strike or *hartal.* There is often destruction of public property during *bandh*. Accordingly, the court ruled that a call for *bandh* by any association, organisation, or political party and enforcing of that call by it was illegal and unconstitutional. It directed the state and all its law enforcement agencies to take necessary measures to give effect to its order. The Supreme Court dismissed the appeal and refused to interfere.[93] The court accepted the distinction drawn by the High Court between a '*bandh'* and a 'strike.' The court reiterated that the fundamental rights of the people as a whole cannot be regarded as subservient to a claim of fundamental right by an individual or a section of people.

The government servants like any other citizens could claim the fundamental right to freedom of speech, right to peacefully demonstrate and to form association.

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88 See art. 19 of the Constitution.

89 *All India Bank Employees Association* v. *National Industrial Tribunal*, AIR 1962 SC 171.

90 *Supra* note 85.

91 *Communist Party of India (M)* v. *Bharat Kumar,* (1998) 1 SCC 201.

92 AIR 1997 Ker. 291.

93 *Communist Party of India (M)* v. *Bharat Kumar,* (1998) 1 SCC 201.

A person does not lose these fundamental rights by joining government service. A government order requiring municipal teachers not to join unions other than those officially approved was held violative of the freedom to form association. [94] The right to form an association of the government servants cannot be conditioned by the existence of government recognition of the said association.[95] The condition of recognition has the effect of making the fundamental right of freedom of association ineffective and illusory and therefore cannot be termed as a reasonable restriction, much less when it has no connection with public order. In *State of MP* v. *Ramashankar Raghubanshi,*[96] the court held that an order terminating the services of an employee of a government-run school on the basis of a police report that the employee had taken part in RSS or *Jan Sangh* activities before he joined his present service was bad. The action taken against the employee was not a disciplinary action relating to his political activity after entering the services of the government which may be contrary to some conduct rule. The court held that to seek a police report on the political faith or past political association and activity which was neither illegal nor subversive of any incumbent in government service violated articles 14, 16, 19(1) (a) and 19(1) (b) of the Constitution and was repugnant to the basic rights guaranteed by the Constitution and entirely misplaced in a democratic republic dedicated to the ideals set forth in the Preamble to the Constitution.

The judicial view in regard to government servants appears to be that while banning demonstration by law is not valid, a strike can be validly prohibited. [97]A government servant does not, by accepting government service, lose his fundamental rights under article 19. A rule which bans every type of demonstration, howsoever innocent, and did not confine itself to those forms of demonstration alone which might lead to a breach of public tranquility or would fall under other limiting criteria specified in article 19(2) have not been held valid. However, the rule was not held bad insofar as it prohibited a strike, for there was no fundamental right to resort to strike. In *T.K. Rangarajan* v. *Government of Tamil Nadu*,[98] however, the court has surprisingly held that government servants have no constitutional, legal, equitable or moral right to go on strike.

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94 *Ramkrishnaiah* v. *President, District Board, Nellore,* AIR 1952 Mad. 253.

95 *O.K. Ghosh* v. *E.X. Joseph,* AIR 1963 SC 812.

96 (1983) 2 SCC 145.

97 *Kameshwar Prasad* v. *State of Bihar,* AIR 1962 SC 1166; also *Sakal Papers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305 and *Radhey Shyam* v. *P.M.G. Nagpur,* AIR 1965 SC 311.

98 (2003) 6 SCC 581 (hereinafter referred to as *T.K. Rangarajan*).

(ii) Industrial Action

Rights of the workers to go on strike and that of the employer to declare lockout are neither fundamental nor statutory rights but have come to be recognized as common law rights.[99] The Supreme Court in *B.R. Singh* v. *Union of India*[100] recognized the right to strike as a legal and essential right of workers for engaging in the collective bargaining process with the employer for improving their conditions of service. Under the ID Act, the legality or illegality of strike or lockout is dependent upon compliance with the statutory requirements under the Act which have been framed keeping in view the societal interests.[101] Under the Trade Unions Act, 1926, protection granted against the general law liability both under civil and criminal law to the members, office bearers and the registered trade unions is dependent upon the object of combination because trade unions are expected to act in furtherance of the legitimate objectives and in furtherance of the trade dispute defined under the Act.[102] The two statutes have adopted different yardsticks for dealing with the issues related to strikes and lockouts. With a view to bringing about some degree of uniformity and harmony in the two legislation, the court has emphasized the importance of the object of combination and whether proper efforts have been made by the trade unions, workers or employers to exhaust the remedies available under the ID Act for settlement of the dispute, before taking recourse to the industrial action.[103] The court has introduced the concept of 'justified' and 'unjustified' strikes or lockouts for deciding the entitlement or otherwise of wages to the workers for the period of strike. Thus, if the strike is legal and justified, then alone the workers are entitled to wages during the strike period and the principle of no work no pay has no application in such a situation.[104] This effect on contract of employment is introduced by the court through judicial innovation.[105]

However, in the era of globalization, the court in *T.K. Rangarajan* v. *Government of Tamil Nadu*,[106] attempted to rewrite the law on strike in a complete

99 *Raja Bahadur Motilal Poona Mills Ltd.* v. *Poona Girni Kargar Union,* (1954) 1 LLJ 124 (Bom).

100 *Supra note* 85.

101 *Rohtas Industries Ltd*. v. *Rohtas Industries Staff Union, (*1976) 2 SCC 82.

102 *Ibid.*

103 *Chandramalai Estate* v. *Workmen*, AIR 1960 SC 902; *Churakulam Tea Estate (P) Ltd.* v. *Workmen,* AIR 1969 SC 998; *Crompton Greaves* v. *Workmen,* (1978) 3 SCC 155; *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha,* (1980) 2 SCC 593 and *Syndicate Bank* v. *Umesh Nayak*, (1994) 5 SCC 572.

104 *Ibid*.

105 *Ibid*.

106 *T.K. Rangarajan* v. *Government of Tamil Nadu,* (2003) 6 SCC 581(hereinafter referred to as *T.K. Rangarajan*).

departure from the legal position settled in the earlier judgments and without appreciation of the history of the labour movement and the trials and tribulations the workers throughout the world had to undergo before acquiring right to form association and right to strike.[107] The court held that the government employees and other public servants (even if the departments they are working in are 'industry' and the employees fall within the definition of 'workman' under the ID Act), have no constitutional, statutory, legal or equitable right to go on strike.[108]

In this case, the Supreme Court has taken an extreme view on strikes – contrary to the letter and spirit of the law including the court's own earlier pronouncements. The judgment completely avoided the principal issue of mass dismissals. The general law that has been laid down by the court in earlier cases is that automatic termination for participating in a strike cannot be resorted to without hearing the employees.[109] The rules of natural justice which are embedded in the Constitution are applicable to the government employees. These principles can be given a go by only if it is circumstantially impossible to give a hearing to each one of them. In *Satyavir Singh* v. *Union of India*,[110] a hearing was deemed impossible, whereas in *Union of India* v. *R. Reddappa*[111] it was not. Clearly, *T.K. Rangrajan* was crying for natural justice which was abjured by mass dismissal through an ordinance. The judgment is forceful against strikes but silent on mass dismissal.[112]It is settled law that legal strikes are permissible even in public utility services and if the strikes are legal and justified, the workers are entitled to wages during the strike period. Further, as V.R. Krishna Iyer, J. pointed out in *Gujarat Steel Tubes* in 1980, even illegal strikes may be justified – so as not to attract dismissal.

In *T.K. Rangrajan,* the view of Shah, J. that there was no moral or equitable justification to go on strike was not correct appreciation of law. These observations of the judge militate against the views of Ahmadi J. in *B.R. Singh* that "right to strike is an important weapon in the armory of the workers… recognized by almost all democratic countries…as a mode of redress." The observations of Shah J. that even in government departments "strikes cannot be justified on any equitable ground" overstates the democratic tolerance of the law.[113] It has rightly been

107 *Supra* note 46 at 54-55.

108 *Supra* note 106 at 594.

109 *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha,* (1980) 2 SCC 593 at 640 as per K. Iyer, J.

110 (1985) 4 SCC 252.

111 (1993) 4 SCC 269.

112 Rajeev Dhavan, *'The Right to Strike'*, *The Hindu* 22.8.2003 at 8.

113 *Ibid*.

observed:[114]

> To avoid strikes is everyone's responsibility but to assert that strikes under any circumstances are illegal, immoral, inequitable and unjustified is contrary to our law and industrial jurisprudence.

Strikes enable the oppressed to fight against injustice, oppression, victimisation and tyranny in cases where no constructive option is left. The disciplined use of which has hitherto been supported by the Supreme Court.[115]This calls for urgent review of *T.K. Rangrajan* by the Supreme Court. The court needs to be reminded that "it is supreme but not infallible". The court has itself been conscious that it makes mistakes and the emergence of a new concept of curative petition to cure injustice[116]amply explains this. It is in this spirit that it is necessary that the decision in *T.K. Rangrajan* needs to be reviewed.

(iii) Settlements: Binding Nature

A settlement of dispute between the parties themselves is to be preferred, where it could be arrived at, to industrial adjudication, as it is likely to lead to more lasting peace than an award. Settlement is arrived at out of freewill of the parties and manifests that there is goodwill between them. Section 18 of the ID Act divides settlements into two categories, namely (i) those arrived at outside the conciliation proceedings; and, (ii) those arrived at in the course of conciliation proceedings. In terms of the language of the ID Act, a settlement which belongs to the first category has a limited application in that it merely binds the parties to the agreement but the settlement belonging to the second category has an extended application as it is binding on all the parties to the industrial dispute, to all others who were summoned to appear in the conciliation proceedings and to all persons employed in the establishment or part of the establishment, as the case may be, to which the dispute related on the date of the dispute and to all others who joined the establishment thereafter. A settlement arrived at in the course of conciliation proceedings with a recognised union will, by virtue of provisions of section 18(3) of the Act, be binding on all workmen of the establishment, even those who belong to the minority union which may have objected to the same. The recognized union having the majority of members is expected to protect the legitimate interest of the labour as a whole and enter into a settlement in their best interest. This is with the objective of upholding the sanctity of settlement reached with the active assistance

114 *Ibid.*

115 *Supra* note 85.

116 *Rupa Ashok Hurra* v. *Ashok Hurra,* (2002) 4 SCC 388.

of the conciliation officer and to discourage an individual employee or a minority union from scuttling the same.

However, in *Herbertsons Ltd.* v. *Workman*,[117] the court ruled that a settlement arrived at with a majority union precludes a minority union from raising dispute on the same subject matter thereby making such settlement binding even on members of the minority unions. However, if there is a dispute that the settlement is not *bona fide* in nature or that it has been arrived at on account of fraud, misrepresentation or concealment of facts or even corruption and other inducements, it can be the subject matter of an industrial dispute which an appropriate government may refer for adjudication after examining the allegation *prima facie*. The appropriate government must satisfy itself *prima facie* whether the allegation needs to be adjudicated, more so, when there is a settlement reached with the help of a conciliation officer in which case there is a basic assumption that the settlement must be fair and reasonable. A settlement which is sought to be assailed has to be scanned and scrutinized. In supporting its view that section 18 (1) of the Act needs to be given contextual approach the court observed:[118]

> When a recognized union negotiates with an employer the workers as individuals do not come into the picture. It is not necessary that each individual worker should know the implications of the settlement since a recognized union, which is expected to protect the legitimate interests of labour, enters into a settlement in the best interests of labour.

The court further went on to say that a collective agreement with a recognized union was therefore entitled to "due weightage and consideration". It frowned upon the "disquieting feature" of union rivalry whereby "the significance of collective bargaining, which is the *forte* of a union, is sought to be made a flop."[119] This approach got support to some extent in a later case as well.[120] The decision of the court in *Herbertsons* recognized the desirability of enforcing collective bargaining agreement and did so by substituting the terms of the tribunal awards with that of the agreement with the majority union.

But in the later cases[121] the court, by and large, has construed section 18 (1)

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117 (1976) 3 SCC 736.

118 *Id*. at 742.

119 *Ibid*.

120 *K.C.P. Ltd.* v. *Presiding Officer & Ors*., AIR 1996 10 SCC 446.

121 *Tata Chemicals Ltd.* v. *The Workmen represented by Chemicals Kamdar Sangh,* (1978) 3 SCC 42; *General Manager, Security Paper* v. *R.S. Sharma and Others*, (1986) 2 SCC 151; *J.S.*

of the Act literally which has encouraged the minority unions to assert that they were not precluded from raising disputes on subject matters on which settlements were arrived at outside the conciliation proceedings between the management and the majority union. In these cases the court did not appreciate the adverse effect that the literal interpretation of section 18 (1) can have on non-enforcement of collective bargaining agreements arrived at with the representative unions. The interpretation given by the court in the aforementioned cases defeats the very concept of rights of the representative union. This has happened because there is no statutory law at the central level for determining the majority status of a trade union for the purpose of collective bargaining, defining the rights of the representative union and of the minority unions. A law to this effect was made by way of Trade Unions (Amendment Act), 1947 which made a provision for determining the majority status and recognition of representative unions and their rights. This Act was however not enforced as no notification was issued to bring it into force. Both the National Labour Commissions at the central level have recommended statutory law on the subject which till date has not been enacted.

However, recently in *National Engineering Industries* v. *State of Rajasthan*,[122] the Supreme Court has observed that every trade union registered under the Trade Unions Act, 1926 having a few members, if allowed to raise industrial disputes for reference, will defeat the very purpose of a settlement. That is why it is only the representative union which has been given the right to raise an industrial dispute under the voluntary code of discipline and also under various state laws. It is submitted that till the statutory provisions on the subject of rights of the representative union are enacted at the central level, the decision of the court in *Herbertsons* should be preferred in the interest of according sanctity to the bipartite collective bargaining agreements. Such approach would minimize multiplicity of unions and promote industrial peace and harmony.

Jadhav v. *Forbes Gokek Ltd*., (2005) 3 SCC 202 and *ANZ Grindlays Bank Ltd.* v. *Union of India and Others,* (2005) 12 SCC 738.

122 (2000) 1 SCC 371. This case came under the ID Act as amended by the Rajasthan ID (Amendment) Act, 1958 which made provision for granting bargaining agent status to the representative union. Under the said Act, a representative union meant a union for the time being registered as a representative union but did not define 'representative union'. The court observed that in common parlance it means the union which has been registered as the majority union and entitled to represent all the workers and thus precluding the minority union from raising an industrial dispute on the same subject matter. Under the ID Act there is no provision for representative union which aspect at central level is governed by the Voluntary Code of Discipline as adopted in the 15th Indian Labour Conference, a tripartite body comprising of representatives of employees, employers and government representatives which meet or are expected to meet once in a year.

(iv) Harmonization of the law relating to labour management relations

Efforts on the part of either the management or the trade union or workmen to get the benefit under one of the three statutes, if read in isolation, which they may not get if the three statutes are read together, have not been allowed to succeed by the court. In such a situation, the court has insisted that it is the duty of the industrial adjudicator to harmonize the statutes governing the labour management relations so that there was no undue advantage taken by either of them.

In *Barauni Refinery P.S. Parishrid* v. *Indian Oil Corporation of India Ltd.*[123] the court held that during the operation of a settlement under sections 18(3) and 19(2) of the ID Act, the employees could neither raise an industrial dispute on the subject matter of the settlement nor seek modification of the standing orders under the Industrial Employment (Standing Orders) Act, 1946 with regard to any matter which was the subject-matter of the settlement under the ID Act. The workmen had in a specific clause in the aforesaid settlement agreed that during the period of the operation of the settlement, they shall not raise any demand which would throw an additional financial burden on the management other than bonus. The court held that this clause precluded the workmen during the operation of the settlement from seeking even modification of the standing orders under the Standing Orders Act, if such modification had financial implications for the management. In the opinion of the court, the plea of the workmen seeking modification of the standing orders raising the age of superannuation to 60 years from 58 had admittedly financial implications and, therefore, the certifying authority could not modify the standing orders till the earlier settlement was in operation. The court held that the settlement arrived at in the course of the conciliation proceedings with the recognised majority union was binding on all workmen of the establishment, even those who belong to the minority union which had objected to the same. The court observed that there is an underlying assumption that a settlement reached with the help of the conciliation officer will be fair and reasonable. It is for this reason that it is binding not only on the workmen belonging to the union signing the settlement but also on others and is under the ID Act put on par with an award made by an adjudicatory authority. The court upheld the sanctity of the settlements reached with the active assistance of the conciliation officer to discourage an individual employee or a minority union from scuttling the settlement.

The court has, thus, harmonized the three legislation regulating labour-management relations in the overall interest of giving due importance to the

123 (1991) 1 SCC 4.

binding settlements between management and representative trade unions.

(v) 'Industry'- a voyage to determine its contours

Disputes that reached the apex court under the Industrial Disputes Act opened up new challenges for the court. It had to deal with the scope of the activities which would fall within the ambit of the Act and, therefore, the court necessarily was required to examine the true meaning of the terms used in the Act, namely, 'industry', 'industrial dispute' and 'workman' as defined in section 2 (j) (k) and (s), of the Act, respectively. The disputes involved applicability or otherwise of the ID Act to central and state government departments, local bodies, government hospitals, educational institutions, liberal professions, clubs, and other welfare activities of the state etc. These questions came for consideration of the court regularly in a long line of cases starting with *D. N. Banerji* v. *P. R. Mukherjee*[124] and culminating in a reference to a nine judge's bench in *State of U.P* v. *Jai Bir Singh*[125] to reconsider its earlier decision of seven judges in *Bangalore Water Supply & Sewerage Board* v. *A. Rajappa.*[126]

The path traversed by the apex court during this journey while interpreting the definition of 'industry' is interesting as the court moved much beyond the traditional concept of 'industry' in its quest to respond to the felt necessity of the time to bring more and more activities within the net of the Act. However, the court did not in this exercise perceive the problem that it will have to somewhere put limitations on the ambit of the meaning of 'industry' on a sound basis.

In the ordinary or non-technical sense, 'industry' or 'business' means an undertaking where capital and labour cooperate with each other for the purposes of producing wealth in the shape of goods, machines, tools etc., for making profits. All the activities of the central or state governments, state undertakings and local bodies etc., in terms of the ordinary or non-technical meaning of the term, would stand out of the pale of the Act on the ground that these activities are not profit motivated. But the Supreme Court in *D. N. Banerji* observed that there is nothing to prevent a statute from giving the word 'industry' and the word 'industrial dispute' a wider and more comprehensive import than their traditional meaning in order to meet the requirement of the rapid industrial progress and to bring about in the interest of industrial peace and economy, a fair and satisfactory adjustment of relation between employer and its workmen in a variety of fields of activities. The

124 AIR 1953 SC 58 (hereinafter referred as *D.N. Banerji*).

125 (2005) SCC 1 (hereinafter referred as *Jai Bir Singh*).

126 (1978) 2 SCC 213 (hereinafter referred as *Bangalore Water Supply*).

court made it clear that the limited concept of what was in earlier time the meaning of 'industry' had now to yield place to an enormously wider concept so as to take in its fold various and varied forms of activities so that disputes in such activities were resolved without much dislocation and disorganization of the needs of the society. The legislation had to keep pace with the march of time and provide for new situations so that industrial activities are conducted in harmony between the employer and the workers. The court held that though municipal activities cannot be truly regarded as business or trade, yet the definition in the Act also included disputes that might arise between municipalities and their employees in branches of work that can be set to be 'analogous to carrying out trade or business,' though they are carried on with the aid of taxation and no immediate material gain by way of profits is envisaged. The court held that neither profit motive nor investment in capital is a *sine qua non* or necessary element in the modern conception of industry. Accordingly, it held that a dispute espoused by the workers union regarding non-employment of head clerk and sanitary inspector in the municipality was an industrial dispute arising in an 'industry.' However, the court did not elaborate as to what 'analogous to carrying out business or trade' meant.

Filling the gap in *Banerji,* the court attempted an authoritative elucidation of the fluid phrase 'analogous to trade or business' in *State of Bombay* v**.** *The Hospital Mazdoor Sabha.*[127]It held that as a working principle, it may be stated that 'analogous to trade or business' means that an activity systematically or habitually undertaken for the production and distribution of goods or for rendering of material services to the community at large or a part of such community with the help of employees, is an 'undertaking' within the meaning of section 2 (j) of the Act. Such an activity, generally, involves the cooperation of the employer and the employee, with the objective of satisfying the material human needs. It must be organized or arranged in a manner in which trade or business is generally organized or arranged. It must not be casual, nor for oneself (personal) or for pleasure. Thus, applying the aforesaid tests, which later came to be described as the 'triple' test, the court held that there was no doubt that if a hospital was run by a private citizen for profit or no profit, it would nevertheless be an 'undertaking' within the meaning of section 2 (j) and merely because such activity was undertaken by the government, it could not take the activity out of the definition of 'industry'. The fact that the state did not conduct this activity for profit made no material difference. The court held that it had no difficulty in holding the state was carrying on an 'undertaking' within the meaning of the Act when it ran a group of hospitals. It made a distinction between

127 AIR 1960 SC 610 (hereinafter referred as *Hospital Mazdoor Sabha*).

sovereign function of the state and the welfare function of the state. Any activity which can be done by a private person is a welfare function, like, water supply, sanitation, conservancy, electricity supply, etc. Those which are inalienable and inescapable functions of the state are only sovereign functions. The test to be applied is: Can such activity be carried on by any private individual or group of individuals? The court held that running of the hospital was a welfare function and not a sovereign function of the state.

The judgment in *Hospital Mazdoor Sabha* was, subsequently, over-ruled by a six judge bench in *Safdarjung Hospital* v. *Kuldeep Singh*.[128] The question before the court was whether the Safdarjung Hospital in Delhi and also certain charitable and research hospitals in Delhi run by the central government were covered by the definition of 'industry' under the ID Act. The court held that Safdarjung Hospital was being run as a part of the function of the government and, therefore, confused it with the sovereign function of the state which it was not on the basis of the test evolved in *Hospital Mazdoor Sabha* which, it is submitted, was the correct test. Regarding hospitals which were wholly charitable and research institutes, the court held, would not fall under the definition of industry as they were not being run for profit motive. This case had the effect of undoing the law so carefully and purposefully evolved by the court in cases from *Banerji* to *Hospital Mazdoor Sabha.*

The other three important cases were: one, relating to liberal profession, i.e., *National Union of Commercial Employees* v. *M.R. Meher,*[129] the other, relating to educational institutions, i.e., *University of Delhi* v. *Ram Nath*[130] and the third, relating to non-proprietary club employing a large number of employees, i.e., *Madras Gymkhana Club Employees Union* v. *Madras Gymkhana Club.*[131]

In, the first case, popularly known as the *Solicitors'* case, the Supreme Court held that liberal professions are not industry because the co-operation between the employer and the employees is not a direct co-operation between the two in the final service being provided as they are dependent on individual, personal qualification and ability of the professional employer and, therefore, lawyer's firm was not an industry.

In *University of Delhi* case, the court narrowed the concept of service. It

128 (1970) 1 SCC 735 (hereinafter referred as *Safdarjung Hospital*).

129 AIR 1962 SC 1080 (referred to as *Solicitors'* case).

130 AIR 1960 SC 1873 (hereinafter referred as *University of Delhi* case).

131 AIR 1968 SC 554, (hereinafter refereed as *Madras Gymkhana Club*).

held that educational institutions would not fall within the meaning of 'industry' because their aim was education and the teachers' profession was not to be equated with industrial workers. The work in the university was primarily carried on with the help of teachers who were not covered by the definition of ''workman'' and, therefore, educational institutions including the University of Delhi were not 'industry'.

In *Madras Gymkhana Club,* the court held that the non-proprietary club, even when it had large number of members and employed large number of employees, was not a service to the society but personal service to the members and their guests and, therefore, did not qualify for being termed as 'industry' under the Industrial Disputes Act.

It is in these set of cases, the court failed to apply the objective tests already laid down by it earlier and rather evolved subjective tests varying from case to case and thus brought inconsistency in its approach which needed to be ironed out. It is submitted that in all the above mentioned three cases, the triple test principle evolved by the court over a period of time was misinterpreted, creating uncertainty about the contours of the definition of 'industry.' In view of the zig-zag approach in the above cases in the interpretation of the triple test, there arose a need to have a fresh look and review of all the cases decided so far by the Supreme Court on the definition of 'industry' so as to have a pragmatic view of the definition. Thus, a seven judge bench was constituted to review all the decisions and this led to the decision of the court in *Bangalore Water Supply & Sewerage Board.* v. *R. Rajappa*.[132]

An important aspect that needs to be mentioned here is that in *Bangalore Water Supply,* the court adopted the rule of *noscitur a sociis* while interpreting the term 'undertaking' in the definition of 'industry', which is a term of wider import and had to be interpreted in the company of the words, trade, business, manufacturing, and callings of employers. The rule of *noscitur a sociis* is an exception, like the rule of *ejusdem generis*, to the literal rule of construction of statute. The word 'undertaking' could not be given its literal meaning, which means 'any activity undertaken.' The literal interpretation of the said term would have made other words used in the definition superfluous which could not have been the intent of the legislature. The rule of *ejusdem generis* could not be applied because the word preceding it did not belong to common genus of which 'undertaking' could be treated as specie. The appropriate rule to be applied in the circumstance and rightly

132 *Supra* note 126.

applied by the court was the rule of *'noscitur a sociis'* which means that a general word like 'undertaking' had to be interpreted in the company of the narrow words. To use the words of Krishna Iyer, J, section 2 (j) had to be interpreted in such a way so that 'Birds of the same feather could flock together'. The court held that the word 'undertaking' had to suffer contextual shrinkage and needed to be interpreted in the company of the words that preceded and followed it. After surveying the entire case law on the subject, the court in *Bangalore Water Supply* held that the 'triple tests' laid down by it in its earlier decisions to be unexceptionable. Krishna Iyer, J. then proceeded to formulate positively and negatively decisive principles for identifying 'industry' under the Industrial Disputes Act, some of which are summarized hereunder:

(a) Where (i) systematic activity, (ii) organized by co-operation between employer and employees (the direct and substantial element is chimerical), (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss i.e. making, on a large scale, prasad or food) combine, prima facie, there is an 'industry' in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organisation is a trade or business, it does not cease to be one because of philanthropy animating the undertaking.

(e) 'Undertaking' must suffer a contextual and associational shrinkage as explained in *Banerji* and in this judgment; so also, service, calling and the like. Thus all organised activity possessing the triple elements, although not trade or business, may still be 'industry' *provided the nature of the activity, viz.* the employer-employee relationship, bears resemblance to trade or business. This takes into the fold of 'industry', undertakings, callings and services, adventures 'analogous to the *carrying* on of trade or business'. All features, other than the methodology of carrying on the activity, *viz.* in organizing the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy.

(f) However, where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some

of whom are not "workmen" as in *Delhi University* or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in *Corporation of Nagpur* will be the true test. The whole undertaking will be 'industry' although those who are not 'workmen' may not benefit by the statute.

After applying the aforesaid tests to the specific cases, the court held that the activities such as (i) professions, (ii) clubs, (iii) educational institutions, (iv) co-operatives, (v) research institutes, (vi) charitable projects and (vii) other kindred adventures, if they fulfil the triple tests, cannot be exempted from the scope of section 2(j). However, a restricted category of professions, clubs, co-operatives and even gurukuls and little research labs may qualify for exemption if in simple ventures, substantially, and going by the dominant nature criterion, substantively, no employees are employed but in minimal matters marginal employees are hired without destroying the non-employee character of the unit.

In view of the aforesaid tests laid down by it, the court had no hesitation in specifically overruling *Safdarjung Hospital*, *Solicitor, Madras Gymkhana Club, Delhi University* and other rulings whose ratio ran counter to the principles enunciated above and in rehabilitating *Hospital Mazdoor Sabha.* All the judges in *Bangalore Water Supply*, however, pleaded for legislative reform and made it clear that the judgment only sought "to serve the future hour till changes in the law or in industrial culture occur."

The definition of 'industry' in section 2 (j) of the Industrial Disputes Act, 1947 has since been amended in 1984 on the lines of the decision in *Bangalore Water Supply* but has not been brought into force.

A constitution bench of the court in *Jai Bir Singh* has directed that this case as well as other cases listed before it along with this case be placed for consideration before the Chief Justice of India for constituting a suitable larger bench for reconsideration of the judgment in *Bangalore Water Supply* from the angle of all the stakeholders, thus leaving the entire scope and ambit of the definition of 'industry' wide open for consideration. It is submitted that the true ambit of the definition of 'industry' needs to be authoritatively and clearly laid down by Parliament which is its constitutional function and which it has, generally speaking, abdicated after 1984. After all, the principal protection against arbitrariness of the employer lies under this statute and the clarity about its applicability is that of paramount importance to the workers. Let the court not be made to perform the

function which essentially is that of Parliament and which it had failed to perform due to its lack of will.[133]

The Second National Commission on Labour has submitted its report and made recommendations which, if considered, by the government at appropriate level, with the seriousness that it deserves, are likely to clean up the web of forensic hairsplitting of various legalistic definitions.[134] Therefore, a debate for a rational legislative action, rather than a judicial reconsideration of *Bangalore Water Supply*, is urgent and necessary. In the recently framed Labour Code on Industrial Relations Bill, 2015 the definition of 'industry' section 2 (m) is repetition of the core tests of 'industry' laid down in the *Bangalore Water Supply* case without even a streak of originality in it. If the same is adopted by Parliament which, keeping in view the previous history, may not happen so soon and that too without further amendments, is neither novel nor an improvisation over what is the present legal position on the term 'industry.' It may still be necessary to legislatively define the contours of sovereign functions, on which the Bill is conspicuously silent, if litigation in the area of industrial relations law has to be minimized. It all depends on whether the government of the day has the will to do so in all its earnestness. Till that happens, the test laid down by the Supreme Court in *Bangalore Water Supply* must hold the field.

(vi) "Industrial Dispute" - collective dispute

Notwithstanding the wide language of the statute in section 2 (k) of the ID Act to include dispute between the employer and an individual workman, from the very beginning, the Supreme Court held that the scheme of the Act appears to contemplate that the machinery provided under the Act should be set in motion to settle only such disputes which are collective in nature and involve the right of the workmen as a class and not a dispute touching the individual rights of a workman.[135] The term 'industrial dispute' has been held to convey the meaning that the dispute must be such as would affect large groups of workmen and employer, ranged on opposite sides.[136] The dispute or difference must be real and not imaginary or ideological. The dispute between the workmen and the employer must relate to employment, non-employment, or terms of employment, or conditions of labour

133 See Bushan Tilak Kaul, "'Industry,' 'Industrial Dispute,' and 'Workman': Conceptual Framework and Judicial Activism" 50 *JILI* 3 at 49 (2008).

134 *Report of the Second National Commission on Labour* (Government of India, 2002) at 322.

135 *Central Provinces Transport Services Ltd.* v. *Raghunath Gopal Patwardhan*, AIR 1957 SC 104, 109.

136 *D.N. Banerji* v. *P.R. Mukherjee*, AIR 1953 SC 58, 61; The *obiter* in this case was cited with approval in *Newspapers Ltd.* v. *State Industrial Tribunal, U.P.*, AIR 1957 SC 532.

of workmen or any person in whose dispute workmen have a direct and substantial interest and where the employer is in a position to grant relief.[137]

In *Standard Vacuum Refining Co.* v. *Its Workmen*,[138] a dispute was raised by the workmen of the company demanding abolition of the contract labour system in the company, employed by it for cleaning and maintenance work at the refinery including premises and plant belonging to it. They also demanded absorption of the workmen employed through the contractors into the regular service of the company. The Supreme Court ruled that the dispute was an 'industrial dispute' within the meaning of section 2 (k) of the Act because the workmen had a community of interest with the workmen of the contractor. Workmen had a substantial interest in the subject-matter of the dispute in the sense that the class to which they belonged, namely, workmen, was substantially affected thereby, and the apex court ruled that the direction given by the tribunal that the contract labour system should be abolished was just. But with the enactment of the Contract Labour (Abolition and Regulation) Act, 1970, the power to abolish contract labour is now the exclusive domain of the executive i.e., the appropriate government under the Act. Industrial adjudication cannot now order abolition of contract labour. However, in a number of cases including *Steel Authority of India* v. *National Union Waterfront Workers,*[139] the Supreme Court has consistently held that although after coming into force of the 1970 Act, industrial adjudicator does not have the power to order abolition of contract labour, it has the power to examine each case by applying either 'due control and supervision' test or the test of 'lifting the veil' or the 'integral part of the business test' to ascertain whether the arrangement which looks as contract *for* service is in fact a camouflage, ruse, facade to overcome the labour laws and, if so, declare that it is not a genuine contract labour system and in fact the labour is engaged under contract *of* service and treat them as the employees of the principal employer.

The applicability of the Act to an 'individual dispute', as distinguished from a dispute involving a group of workmen, is excluded unless the workmen, as a body, or a considerable section of them, make common cause with the individual workman.[140] The Supreme Court perhaps did not realize the effect of laying down

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137 *Workmen of Dimakuchi Tea Estate* v. *Management of Dimakuchi Tea Estate*, AIR 1958 SC 353.

138 AIR (1960) SC 948.

139 (2001) 7 SCC 1 (hereinafter referred to as *Steel Authority of India* case); also see *International Airport Authority of India* v. *International Air Cargo Workers Union,* (2009) 13 SCC 374; also see *infra* note 145.

140 *Supra note* 137; also *Bombay Union of Journalists* v. *The 'Hindu', Bombay*, AIR 1963 SC 318; *Newspapers Ltd.* v. *State Industrial Tribunal, U.P.*, AIR 1957 SC 532.

the principle that valid espousal is a *sine qua non* for converting an 'individual dispute' into an 'industrial dispute' that it would leave individual worker at the mercy of the trade unions, or his colleagues for espousal even in disputes of non-employment, whether by way of discharge, dismissal, or retrenchment, etc. and that often the unions would show little interest in his case. Resultantly, hardships came to be faced by the workers whose services were terminated by the management, but the trade unions did not, or failed to, espouse their cases of non-employment.[141] To remedy the situation Parliament intervened in 1965 by enacting section 2A in the Act which introduced a legal fiction to the effect that an 'individual dispute' connected with a 'discharge, dismissal, retrenchment or termination' is deemed to be an 'industrial dispute' notwithstanding that no other workman, or any union of workmen, espouses such a dispute. It is important to note that Parliament maintained the distinction drawn by the court between 'individual dispute' and 'industrial dispute' and section 2A endorses such distinction with the exception envisaged therein. Thus, a 'workman' who has been discharged, dismissed or retrenched, or whose services have been otherwise terminated, could raise a dispute with respect to such dismissal, etc. even without the same being espoused by his fellow workers. But that does not mean that such a dispute can be raised by such workman alone and not by the workmen of the establishment collectively. However, except the disputes relating to 'discharge, dismissal, retrenchment or otherwise termination of service', all other disputes relating to the terms of employment, or condition of labour of an individual workman, such as demotion or reduction in rank by way of punishment, transfer, wages, bonus, increments, promotion, etc. will require espousal, by a substantial number of fellow workmen in order to partake the character of an industrial dispute.[142]

(vii) Contract of employment

The concept of employment involves three essential ingredients: i) 'employer' ii) 'employee' and iii) the contract of employment. The contract of employment is an important facet of industrial relations which brings in a very important distinction between 'contract *of* service' and 'contract *for* service'. Conventionally, master and servant relationship means 'due control' and 'supervision' of the employer over his employee which is considered as a *sine qua non* to constitute a 'contract *of* service.'[143] In the 'contract *of* service' the employer has the power of not only asking the workman 'what to do' but also 'how to do it'

141 See *Balmer Lawrie Workers' Union* v. *Balmer Lawrie & Co. Ltd*., 1984 Supp SCC 663 at 672.

142 See *RSRTC* v. *Krishna Kant,* (1995) 5 SCC 75 at 87.

143 16 *Halsbury's Laws of England*, 'Employment' 10-11 (4th ed., 2000).

which brings in the concept of 'due control' and 'supervision'.[144] In 'contract *for* service', there is no such due control and supervision and the person whose services are so engaged is considered to be an independent contractor and not qualified for protection of the ID Act.[145] Kahn-Freund has described the 'due control and supervision' test for determining contract of employment as the cornerstone of the modern labour law system. The due control and supervision test, according to him, could be appropriate for agrarian economy, but is not suited to the industrial society.[146] There was, therefore, need to supplement, if not supplant, this test to determine whether there is or there is not a contract *of* service in a given case. Over the period of time courts in the common law countries including India have devised additional tests for determining as to whether the contract in question is one of contract *of* service or contract *for* service.[147] This has been necessary in view of the change in the pattern of employment. The Supreme Court of India has adopted the corporate law principle of 'lifting the veil' in order to see whether the arrangement which looks as contract *for* service is in fact a camouflage, ruse, facade to overcome the labour laws. If satisfied that the arrangement was a camouflage or smoke screen, the court have shunned the arrangement and treated it as a 'contract *of* service' attracting the provision of the Industrial Disputes Act. Similarly, if the work assigned to the person by the principal employer is the work which is the 'integral part of the business' with some element of due control and supervision, the courts have treated such arrangement as 'contract *of* service' and not one of independent contractor.

It is heartening to notice that the court has not deviated from this purposive approach even in the post-liberalization period but has rather forcefully reiterated these principles in *G.B. Pant University of Agriculture & Technology* v. *State of U.P.*,[148] to stress that the judiciary should not resile from its constant endeavour to add flesh and blood to the concept of democratic socialism permeating the preamble, Parts III and IV of the Constitution which aim at ending poverty,

144 *Collins* v. *Hertfordshire County Council*, [1947] 1 KB 598, at 615(A) cited with approval in *Dharangadhra Chemical Works Ltd.* v. *State of Saurashtra*, AIR 1957 SC 264 at 267. Also see *Donovan* v. *Laing, Wharton and Down Construction Syndicate Ltd.*, [1893] 1 QB 629 and *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ltd.*, 1947 AC 1.

145 *Ibid.*

146 O. Kahn-Freund, "Servants and Independent Contractors" 14 MLR 504 at 505 (1951).

147 See *Hussainbhai* v. *Alath Factory Tezhilali Union*, (1978) 4 SCC 257; *Silver Jubilee Tailoring House* v. *Chief Inspector of Shops & Establishments*, (1974) 3 SCC 498; *M/s. Shining Tailors* v. *Industrial Tribunal,* (1983) 4 SCC 464 and *Ram Singh* v. *Union Territory, Chandigarh,* (2004) 1 SCC 126.

148 (2000) 7 SCC 109.

ignorance, disease and inequality of opportunity. The courts must always rise up to the occasion and grant relief to a seeker of a just cause and just grievance who has for long continued to suffer deprivation, being a weaker section of the society. It cautioned that economic justice is not mere legal jargon but in the new millennium it is an obligation for all to ensure that economic justice is available to all if the society has to remain wedded to the concept of democratic socialism.

In the present case, the university in question was a residential university set up under the UP Agriculture University Act, 1958. It had at the relevant time a number of hostels and a cafeteria to provide food services to the residents of the hostels and others. There were large number of employees employed in that cafeteria who had sought their regularization which demand had become subject matter of reference to the labour court. The labour court upheld their claim and declared them to be regular employees of the university from the date of the award and held them entitled to receive the same salary and other benefits as the other regular employees of the university. The high court upheld the award of the labour court. The university preferred a special leave to appeal in the Supreme Court against the order of the high court on the ground that canteen employees were not employed by the university under contract *of* service but were the employees of the committee comprising of students who were running the canteen. The court held that a number of regulations framed under the UP Agriculture University Act, 1958 showed that the control of the university in the matter of running of the cafeteria was all pervasive. It opined that a residential university having a canteen facility and the inmates of the hostel not being permitted to have food from outside could not possibly said to be a mere welfare service to the students. The regulations pertaining to the hostel accommodations and supplies of food did not warrant any other conclusion than to treat it as an essential requirement so far as the inmates of the hostel were concerned. The court held that continuing of the cafeteria employees as half fed and half clad would not be consistent with the socialism conceived by the founding fathers of the Constitution. Emphasizing the importance of the emerging concept of industrial jurisprudence it observed:[149]

> The deprivation of the weaker section we had for long but time has now come to cry a halt and it is for the law courts to rise up to the occasion and grant relief to a seeker of a just cause and just grievance. Society is to remain, social justice is the order and economic justice is the rule of the day. A narrow pedantic approach to statutory documents no longer survives. The principle

149 *Id.* at 117.

> of corporate jurisprudence is now being imbibed on to industrial jurisprudence and there is a long catena of cases in regard thereto – the law thus is not in a state of fluidity since the situation is more or less settled. As regards interpretation, widest possible amplitude shall have to be offered in the matter of interpretation of statutory documents under industrial jurisprudence. The draconian concept is no longer available. Justice – social and economic, as noticed above, ought to be made available with utmost expedition so that the socialistic pattern of the society as dreamt of by the founding fathers can thrive and have its foundation so that the future generations do not live in the dark and cry for social and economic justice.

The court held that regulations framed under the statute unmistakably depict that the twin conventional test of implicit obligations and factors of overall control and supervision by the university stood satisfied and the legal responsibility could not be shifted to the students. The employees of the cafeteria could not but be termed as the employees of the university. The court directed the university to regularize the services of the employees in terms of the award passed by the labour court so as to entitle them to obtain the monthly wages on par with the other employees of the university with arrears.

In *Indian Banks Association* v. *Workmen of Syndicate Bank*[150] the court dealt with the new methodology started by the banks to conduct their business with flexibility to the employees to regulate their hours of work. On the reference of the dispute of contractual employees engaged on commission basis demanding, *inter alia*, that they be paid the same salary and benefits as were being paid to regular employees of the banks, the industrial tribunal had given findings of fact that the deposit collectors were 'workmen' within the meaning of section 2(s) of the ID Act which finding was held sustainable by the Supreme Court. The court held that the commission received by them was nothing else but 'wage' which was dependent on the productivity and payable for promoting the business of the banks. The deposit collectors, no doubt, were free to regulate their own hours of work but that was because of the nature of the work itself. Their working hours were dependent upon the availability and convenience of the depositors. Although no time could be fixed for such work but nevertheless there was control of the banks over them inasmuch as deposit collectors had to bring the collections and deposit the same in the banks by the very next day. They had then to fill in various

150 (2001) 3 SCC 36.

forms, accounts, registers and passbooks. They also had to do such other clerical works as the bank would direct. They were, therefore, accountable to the bank and under the control of the bank. There was clearly a relationship of master and servant between the deposit collectors and the banks concerned. The proviso to section 10 of the Banking Regulations Act makes it clear that commission can be paid to persons who are not in regular employment and undoubtedly the deposit collectors were not regular employees of the bank. The employee concerned in the aforesaid situations would, nevertheless, qualify as 'workman' within the meaning of section 2 (s) of the ID Act if employed to do pre-dominantly any of the works specified therein and was not excluded by the excluding part of the definition.[151]

(viii) Wage structure

Many countries, even developed capitalist economies, realized that labour legislation should ensure reasonable wage to the workers to prevent their exploitation. State intervention on behalf of workers was the most pressing need in India because of the absence of effective labour organizations, illiteracy, poverty, unemployment, migration and non-committal of workers to industrial way of life.

In 1948 the Minimum Wages Act was passed which enjoined every employer covered by the Act to pay statutory minimum wage as fixed under the Act in the scheduled employments. In the development of the labour jurisprudence, the two early decisions of the Supreme Court in *Edward Mills Co. Ltd.* v. *State of Ajmer*[152] and *Bijay Cotton Mills Ltd*. v. *State of Ajmer*[153] deserve special mention. In these two cases the constitutional validity of the Minimum Wages Act, 1948 came to be challenged before the apex court on the ground that the statutory duty imposed under the Act to pay minimum wage encroached on the fundamental right to carry on trade or business guaranteed under the Constitution of India under article 19 (1) (g). The questions before the court to be adjudicated were whether this obligation intrudes or impinges on the right of the employer to carry on business and whether the obligation to pay minimum wage under the Act is irrespective of the financial capacity of the employer. Upholding the constitutional validity of the Act, the court ruled that the right to carry on business does not mean right to exploit and the Act is a reasonable restriction on the right to carry on business which right is not an unqualified right. Therefore, minimum wage fixed under the Act has to be paid irrespective of the capacity of the employer to pay. If the employer cannot pay minimum wage so fixed, he has no right to carry on business

151 *H.R. Adyanthaya* v. *Sandoz (India) Ltd.,* (1994) 5 SCC 737.

152 AIR 1955 SC 25.

153 AIR 1955 33.

as duty to pay minimum wage is absolute. The court was cognizant of the facts of vast unemployment and illiteracy amongst the people of this country and made it impermissible for the employers to engage a worker on starvation wage even though he may be willing to be so engaged. Therefore, the court enforced the right of the worker to get a wage which is sufficient to meet has basic needs which the state as a welfare state is duty bound to fix considering the social responsibility of the state as well as of the employer. The passing of the Minimum Wages Act and these two decisions of the court can be stated to be landmarks inasmuch as it came to be recognized that wages cannot be left to be determined entirely by market forces. It can be safely stated that the legislation supported by these two decisions of the court contributed to the development of human rights of workers and the labour jurisprudence of the country.

The minimum wage policy as developed in our country makes a clear distinction between the organized industries and the sweated ones. While the Minimum Wages Act seeks to protect the interest of the workers in the sweated industry, the minimum wage fixing authority in the organized sector have generally been guided by the norms prescribed by the report of the Committee on Fair Wages (1948).

For fixing wages over and above minimum wage in the organized industry, a committee popularly known as 'the Committee on Fair Wage' (CFW) was set up by the Government of India in 1948 itself which was required to recommend guidelines therefor. The report of the CFW was a major landmark in the history of formulation of wage policy in India. Its recommendations set out the key concepts - 'living wage' 'fair wage', and 'minimum wage' and principles for fixation of fair wage. CFW recommended 'minimum wage' as the baseline with next level of 'fair wage' which will be over and above 'minimum wage'. The fair wage was to be determined on the basis of the capacity of the employer to pay which in turn was to be fixed on the basis of industry-cum-region formula. The 'living wage', was to be the ideal to be achieved over a period of time with the economic development of the nation. The recommendations of the CFW could not be translated into a statute but the then Prime Minister, Jawahar Lal Nehru, stated in Parliament in April, 1950 that "government was committed to the principles of fair wage as recommended by the Tripartite Committee."[154] The Bill which had been introduced lapsed after the dissolution of the Constituent Assembly and was not pursued in Parliament later. The Supreme Court took judicial notice of the said recommendations and adopted them for determination of wage structures in the organized sector for

154 See, *Report of the National Commission on Labour* 222 (Government of India, 1969).

fixing minimum wage, and wages over and above minimum wage in the organized sector. The court adopted industry-cum- region formula for determining capacity of the employer to pay wages over and above the minimum wage. This formula was intended to achieve the twin purpose of comparing comparable units of the same industry in a particular region which was intended to achieve industrial harmony in the region and stop migration of labour from one unit to another in the same region. This principle prevented comparison of uneven units like struggling with flourishing and thereby prevented causing of hardship to the struggling firms of the same industry in that region. The underlying principle was that the region would be the same and the units to be compared would be of the same industry in that region which are comparable.[155] In various judgments[156] the court has provided the following guidelines which the industrial adjudicator has to keep in mind while comparing an establishment with others belonging to the same industry in the same region: (a) their standing; (b) the strength of labour force employed by them; (c) the extent of their respective customers; (d) the position of profits and losses incurred by them for some years before the date of the award; (e) the extent of the business carried on by the concerns; (f) the capital invested by them; (g) the nature of the business carried on by them; (h) the presence and absence and the extent of their reserves; (i) the dividends declared by them; and (j) the prospects about the future of their business.

It is only when there was no comparable unit of that industry in the region, that a departure would be made from this principle in favour of region-cum-industry formula, i.e., region will remain the same but a comparable unit of some other industry akin to one under consideration will be taken into account for fixation of wage structure in the unit.[157] This was to be an exception to the general rule of industry-cum-region formula.

The court in a number of cases emphasized that fixation of wage structure is among the most delicate tasks that industrial adjudication had to tackle.[158] It

155 *Greaves Cotton & Co. Ltd.* v. *Their Workmen,* AIR 1964 SC 689; *Unichem Laboratories Ltd.* v. *Their Workmen.* (1972) 3 SCC 552.

156 *Novex Dry Cleaners* v. *Its Workmen*, (1962) I LLJ 271 (SC) per Gajendragadkar, J,; *Williamsons (India) (P) Ltd*. v. *Its Workmen,* (1962) I LLJ 302 at 305 (SC), per Gajendragadkar, J,; *Workmen of Balmer Lawrie & Co. Pvt. Ltd.* v. *Balmer Lawrie & Co. Ltd*., AIR 1964 SC 728 at 731, per Gajendragadkar, J,; and *Workmen of New Egerton Woolen Mills Ltd.* v. *New Egrton Woolen Mills Ltd*., (1969) II LLJ 782 at 789 (SC).

157 *Workmen of Orient Paper Mills* v. *Orient Paper Mills Ltd.,* AIR 1969 SC 976; also see *Tata Chemicals Ltd*. v. *Workmen,* (1978) 3 SCC 42.

158 *Hindustan Times Limited* v. *Their Workmen,* AIR 1963 SC 1332 (hereinafter referred to as '*Hindustan Times'*).

involves determination of the shares of rival claimants of the product of the industry, but there may be often conflict between short term and long term objectives as well as between profits and social interests. There has to be fair balancing of the interest of various stakeholders, namely, employer, workers and the society at large. The court in *Hindustan Times* observed thus:[159]

> On the one hand not only the demands of social justice but also the claim of national economy requires that attempts should be made to secure to workmen a fair share of the national income which they help to produce. On the other hand, care has to be taken that the attempt at a fair distribution does not tend to dry up the source of national income itself. On the one hand, better living conditions for workmen that can only be possible by giving them a 'living wage' will tend to increase the nation's wealth and income. On the other hand, unreasonable inroads on the profits of capitalists might have a tendency to drive capital away from fruitful employment and even to affect prejudicially capital formation itself. The rise in price that often results from the rise of the workmen's wages may in its turn affect other members of the community and may even affect prejudicially the living conditions of the workmen themselves. The effect of such a rise in price on the country's international trade cannot also be always ignored. Thus numerous complex factors, some of which are economic and some spring from social philosophy, give rise to conflicting considerations that have to be borne in mind. Nor does the valuation of the numerous factors remain static. While international movements in the cause of labour have for many years influenced thinking and sometimes even judicial thinking in such matters in this country, the emergence of an independent democratic India has influenced the matter even more profoundly.

It is, therefore, but natural that the industrial adjudicator has to keep in mind right of the employer to a fair return, the legitimate expectation of the worker to a decent living, the interest of the society to have services and goods at reasonable cost without disruptions and the concern for national economy. The court has emphasized that wage scales are devised and wage structure constructed as a matter of long term policy and so the industrial adjudicator would naturally be reluctant to interfere with the existing wage structures without justification or in

159 *Id.* at 1336.

a light hearted manner.[160] When the wage structure is fixed all relevant factors including those referred to above in *Hindustan Times,* are taken into account and, therefore, it should remain in operation for a fairly long time. Wage revision may be justified if the paying capacity of the employer increases over the period of time or if the cost of living shows an upward trend or there is rise of wage structure in comparable industries in the region. At the same time, the industrial adjudicator has to keep in mind that it is possible that sometime the capacity of the employer to pay wages may go down over the period of time and, therefore, may warrant revision of wage structure downwards. In such a situation, the court has recognized that downward revision of wages is permissible as long as it does not go below the minimum wage which has to be paid irrespective of the capacity of the employer to pay.[161]

The CFW laid down that a standard working class family should be reckoned as one consisting of three consumption units, supported by a single male earner and including his wife and two children below the age of 14. The wage, according to the CFW, should cover five categories of needs considered essential for the worker's well being viz., food, clothing, housing, light, fuel and miscellaneous. In calculating the wage, the norms for the food category should be based on Dr. W.B. Aykroyd's formula for an adequate and balanced diet. It thus came about that a wage linked to needs was suggested as a desirable minimum.

It is true that CFW took the view that an industry which was not capable of paying minimum wage related to workers' need had no right to exist and considered that minimum wage must provide not merely for bare sustenance of life but also for some measure of education, medical requirements and amenities. But the committee did not attempt a detailed statement of goods and services that would fulfil the requirements of minimum wage as recommended by it and thus left some scope for flexibility. In other words, the CFW defined the components of the minimum wage which should be taken into account but did not quantify them. To transform them into monetary terms is a hazardous proposition. There are several hurdles that have to be overcome in an attempt to do so. It was the Indian Labour Conference (15th Session), (ILC) which, for the first time, moved in the direction of formally quantifying its main components.

While accepting that the minimum wage was need-based and should ensure the minimum human needs of the industrial worker, the following norms were

160 *Ahmedabad Mill Owners Association* v. *Textiles Labour Association,* AIR 1966 SC 497 at 518-519.

161 *Crown Aluminum Works* v. *Their Workmen*, AIR 1958 SC 30 at 34.

accepted by the ILC as guide for all wage-fixing authorities, including minimum wage committees, wage boards, adjudicators, etc.:

i) In calculating the minimum wage, the standard working class family should be taken to consist of three consumption units for one earner; the earning of women, children and adolescents should be disregarded.

ii) Minimum requirements should be calculated on the basis of net intake of calories, as recommended by Dr. Aykroyd for an average Indian adult of moderate activity.

iii) Clothing requirements should be estimated at per capita consumption of 18 yards per annum which would give for the average worker's family of four a total of 72 yards.

iv) In respect of housing, the rent corresponding to the minimum provided under the government's industrial housing scheme should be taken into consideration in fixing the minimum wage.

v) Fuel, lighting and other miscellaneous items of expenditures should constitute 20 per cent of total minimum wage.

Whenever the minimum wage was below the norms recommended above, it would be incumbent on the authorities concerned to justify the circumstances which prevented adherence to the norms. In *All India Reserve Bank Employees Association* v. *RBI*[162] Hidaytullah J, observed that there was no doubt that in our march towards a truly fair wage in the first instance and ultimately the living wage, we must achieve the need based minimum wage. The judge expressed the difficulty in fixing wages on need-based wage criteria without considering the capacity of the employer to pay. Attaching proper value to the 15th ILC Resolution on payment of need based minimum wage to the workers, the court observed thus:[163]

> It was passed as indicating the first step towards achieving the living wage. Unfortunately, we are constantly finding that basic wage instead of moving to subsistence plus level, tends to sag to poverty level while there is a rise in prices. To overcome this tendency our wage structure has for long time been composed of two items (a) The basic wage, and (b) Dearness Allowance which is altered to neutralize, if not entirely, at least the greater part of the increased cost of living. This does not solve the problem of

162 AIR 1966 SC 305.

163 *Id.* at 319-320.

> real wage. At the same time, we have to beware that too sharp an upward movement of basic wage is likely to affect the cost of production and lead to fall in our export and to the raising of prices all around. This is a vicious circle which can be broken by increasing production and not by increasing wages. What we need is introduction of production bonus, increased fringe benefits and free medical, educational and insurance facilities. As a counterpart to this capital must also be prepared to forgo a part of its return. There is much to be said about the consideration of need-based formula in all implications for it is bound to be our first step towards living wage. As in many other matters relating to industrial disputes the problem may, perhaps, be tackled by agreement between capital and labour in an establishment where a beginning can be safely made in this direction.

In *Workmen* v. *Management of Reptakos Brett & Co. Ltd.*,[164] the court felt that the concept of need-based minimum wage as evolved by the 15th session of the Indian Labour Conference, must have in it the component relating to children education, medical requirement, minimum recreation, including festivals/ ceremonies and provision for old age, marriage etc., which should constitute 25% of the total minimum wage.

A panoramic view of the various decisions of the court show that it has, in a number of judgments, consistently done balancing of the interest of various stake holders so that there is over all industrial harmony between the labour and the capital in the overall interest of the national economy. The court has added flesh and blood to the work of CFW in its pursuit to do complete justice to all the stakeholders in the Indian industry.

(ix) Bonus: from ex-gratia payment to statutory obligation

Bonus came to be paid as an *ex-gratia* payment by the textile employers to their workers as 'war bonus' during the first world war because of the high profits made by the industry during this period. This extra payment gave boost to the production yielding higher profits to the employers. When the lean years came, payment of bonus was sought to be stopped but disputes and strikes followed. During the second world war when the law enjoining compulsory reference to adjudication of industrial disputes came, the question of bonus, as did many others, reached the courts and the claim for bonus became an industrial claim and had to

164 1992 (1) SCC 290.

be settled on some tangible principle.[165] It was the short lived Labour Appellate Tribunal (LAT) which evolved the principles for payment of bonus in an award in a dispute in textile industry at Bombay in 1950. The LAT observed thus:[166]

> It (bonus) cannot any longer be regarded as an ex-gratia payment, for it has been recognized that a claim for bonus, if resisted, gives rise to an industrial dispute which has to be settled by a duly constituted Industrial Court or Tribunal.

The LAT was keen to have consistent policy in the matter of grant of bonus in the interest of harmonious industrial relations and, therefore, it evolved what came to be known as 'Full Bench Formula' under which the surplus available for distribution had to be determined by debiting certain prior charges which, *inter alia*, included 'reserve for rehabilitation' and from the balance called 'available surplus,' the workmen were to be awarded a reasonable share by way of bonus for the year. [167] However, soon there was a demand made by workmen seeking revision of the formula centered round the provision for rehabilitation accepted by LAT as a prior charge. The Supreme Court considered the applicability of this formula to claim bonus in various decisions.[168] The court did not commit itself to acceptance of the formula in its entirety, but ruled that bonus is not a gratuitous payment made by the employer to his workmen, nor is it a deferred wage. Where contractual wages fall short of living standard and the industry makes profit, part of which is due to the contribution of the labour, a claim for bonus may legitimately be made by the workmen. The court, however, neither examined the propriety nor the order of priorities as between the several charges and their relative importance nor did it examine the desirability of making any variation, change or addition in the formula. However, the court, while affirming the principles underlying the LAT formula, in *Associated Cement Companies Limited* v. *Workmen*[169]observed:[170]

> If the legislature feels that the claims for social and economic justice made by labour should be re-defined on a clearer basis, it can step in and legislate in that behalf. It may also be possible

165 *Jalan Trading Co. Pvt. Ltd.* v. *Mill Mazdoor Sabha*, AIR 1967 SC 691.

166 (1950) II LLJ 1247.

167 For a detailed discussion on the development of law relating to Bonus, see *Report of the National Commission on Labour* 252 to 256 (Government of India, 1969).

168 *Muir Mills Co. Ltd.* v. *Suti Mills Mazdoor Union, Kanpur,* (1995) 1 SCR 991; *Baroda Borough Municipality* v. *Its Workmen,* (1957) SRC 33. See *Meenakshi Mills Ltd.* v. *Workmen,* (1958) SCR 878; and *State of Mysore* v. *Workers of Kolar Gold Mines,* (1959) SCR 895.

169 AIR 1959 SC 967 (hereinafter referred as *Associated Cement Companies*).

170 *Id.* at 984.

> to have the question comprehensively considered by a high-powered Commission which may be asked to examine the pros and cons of the problem in all its aspects by taking evidence from all industries and bodies of workmen.

This suggestion was reiterated by the court in *Ahmedabad Miscellaneous Industrial Workers Union* v. *Ahmedabad Electricity Company Ltd*.[171]Soon after the aforesaid observations made by the Supreme Court showing its concern for redefining the claims of the workers for social and economic justice, the bonus issue came up for discussions before the Standing Labour Committee, 1960 which recommended setting up of a Bonus Commission to consider the question of profit bonus in a comprehensive manner.[172] The bonus legislation gave effect to recommendations of the commission substantially and addressed the concerns of the workers. The object of the Payment of Bonus Act, 1965 is to introduce new uniform formula for calculation of bonus with limits of maximum and minimum and a principle of set on and set off to smoothen inequalities of payment over a number of years.[173]The constitutional validity of the Payment of Bonus Act was challenged in the Supreme Court under article 32 of the Constitution. The Supreme Court upheld the Act; its provision relating to the minimum and maximum bonus and system of set on and set off were kept intact.[174] But the main safeguard for which labour had fought, namely, the choice of the formula which was to its advantage, as provided in section 34 (2), was not sustained by the majority decision. Section 33 (applicability to the pending disputes) and section 37 (powers of the government to remove difficulties) were also struck down by the majority decision.

In the quest for social justice, we have, over the period of time, travelled a long way from the position of *ex-gratia* payment passing through the stage of legal right dependant on the availability of allocable surplus to the stage of payment of bonus becoming a statutory obligation under the Payment of Bonus Act, 1965. Unlike dearness allowance, which was introduced to neutralize the increase in

171 AIR 1962 SC 1255 (decided on 28.07.1961).

172 The Government of India set up a Commission on December 6, 1961 to, *inter alia,* define the concept of bonus, consider in relation to industrial employments the question of payment of bonus based on profit and recommend principles for computation of such bonus and methods of payment, determine what the prior charges should be in different circumstances and how they should be calculated, consider whether there should be lower limits in respect of losses in particular establishments and upper limits for distribution in one year, and if so the manner of carrying forward profits and losses over a prescribed period, and suggest appropriate machinery and method for the settlement of bonus disputes.

173 *Jalan Trading Co. Pvt. Ltd*., *supra* note 165.

174 *Ibid.*

the cost of living and to protect the real wage, bonus was intended to fill the gap between the actual wage and the living wage of the labour which it looks forward to receive in due course.[175]

(x) Retrenchment compensation: social obligation of the employer

The Industrial Dispute Act, 1947, in its original form did not have provisions for 'retrenchment' or 'lay off' compensation which were introduced for the first time in 1953. The ordinary meaning of 'retrenchment' is labour surplusage which may result due to variety of reasons. However, the definition given in section 2 (oo) was found quite comprehensive by the Supreme Court in cases starting from *State Bank of India* v. *Shri N. Sundara Money*[176] to *Punjab Land and Reclamation Corp*. v *Presiding Officer Labour Court*[177] and beyond.

The Supreme Court has treated retrenchment compensation as a social security for a workman for the period of 'job lost' and 'job found.'[178] It has been regarded as the social obligation of the employer to provide a measure of social security to the retrenched worker to tide over the financial difficulty faced by him on account of loss of his job. A constitution bench of five judges of the Supreme Court in *Punjab Land Development & Reclamation Corporation Ltd.* v. *Presiding Officer, Labour Court*,[179] addressed the question regarding the true interpretation of the definition of retrenchment in section 2(oo). Whether retrenchment under the Act meant termination of the services of the workmen as surplus labour for any reason whatsoever or it meant termination by employer of the services of the workmen for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action and those expressly excluded by the definition, was the principal question before the court. In the words of Saikia J, who delivered the judgment for the court, "the question to be decided was whether the word retrenchment in the definition has to be understood in its narrow, natural and contextual meaning or in its wider literal meaning."[180] The court reviewed its earlier decisions[181]to find out validity of the oft-repeated argument by the management

175 *Supra* note 169.

176 (1976) 1 SCC 822.

177 (1990) 3 SCC 682 (Sabyasachi Mukherji, CJ, B.C. Ray, H.K. Kania, K.N. Saikia and S.C. Aggarwal JJ).

178 *Santosh Gupta* v. *State Bank of Patiala*, (1980) 3 SCC at 342; also see *Indian Huma Pipe Co. Ltd*. v. *Workmen*, AIR 1960 SC 251.

179 *Supra* note 177.

180 *Id.* at 691.

181 *Hari Prasad Shiv Shanker Shukla* v. *A.D. Divikar,* AIR 1957 SC 121 (also reported sub-nomine *Barsi Light Railway Co.* v. *K.N. Joglekar); Pipraich Sugar Mills Ltd.* v. *Pipraich Sugar Mills*

that the division benches of the court in cases starting from *Sundara Money* had gone against the judicial interpretation of the term 'retrenchment' by a constitution bench of the court in *Hari Prasad Shukla*.[182] On a careful analysis of the ratio of *Hari Prasad Shukla*, the court held that the ratio in this case did not extend beyond holding that termination on the ground of 'closure' did not fall within the definition of retrenchment in section 2(oo). It held that *Hari Prasad Shukla* was no authority for the proposition that section 2(oo) covers only cases of labour surplusage.[183] The court held that although *Hari Prasad Shukla* appears not to have been brought to the notice of the division bench of the court in *Sundara Money*, but to hold that the subsequent decisions have ignored a binding precedent would not be correct in view of the fact that the Division Benches in *Hindustan Steel Ltd*.[184] and *Santosh Gupta*[185] have not only referred to both these cases but also have considered the ratio of *Hari Prasad Shukla* threadbare. The court held that the division benches in *Hindustan Steel Ltd*. and *Santosh Gupta* were right in holding that *Hari Prasad Shukla* only decided the question that the words 'for any reasons whatsoever' used in the definition of retrenchment in section 2(oo) do not include termination on account of *bona fide* closure of the whole business because it would affect the scheme of the Act which pre-supposes that retrenchment can take place only in a continuous business. Saikia J, speaking for the court, held: [186]

> In fact the question whether retrenchment did or did not include other termination was never required to be decided in *Hari Prasad* and could not, therefore, have been or taken to have been decided by this court.

The court did not find anything in *Hari Prasad Shukla* which was inconsistent with the decision in *Sundara Money* and the subsequent decisions in

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Mazdoor Union, AIR 1957 SC 95; *Anakapalle Co-operatives Agriculture & Industrial Society Ltd.* v. *Workmen.* AIR 1963 SC 1489; *Workmen of Subong Tea Estate* v. *Outgoing Management of Subong Tea Estate,* AIR 1967 SC 420; *Delhi Cloth & General Mills Ltd.* v. *Shambunath Mukherjee,* (1977) 4 SCC 415; *State Bank of India* v. *N. Sundara Money,* (1976) 1 SCC 822; *Hindustan Steel Ltd.* v. *Presiding Officer, Labour Court,* (1976) 4 SCC 222; *Santosh Gupta* v. *State Bank of Patiala,* (1980) 3 SCC 340; *Karnataka SRTC* v. *M. Boraiah,* (1984) 1 SCC 244; *Indian Hume Pipe Co. Ltd.* v. *Workmen,* AIR 1960 SC 251; *Mohanlal* v. *Bharat Electronics Ltd.,* (1981) 3 SCC 225; *Surendra Kumar Verma* v. *Central Government Industrial-cum-Labour Court, New Delhi,* (1980) 4 SCC 443; *Gammon India Ltd.* v. *Niranjan Das,* (1984) 1 SCC 509.

182 *Ibid.*

183 For similar views see Bushan Tilak Kaul, "Law of Retrenchment in India" 12 *Delhi Law Review* 141 at 144-52 (1990).

184 *Hindustan Steel Ltd.* v. *Presiding Officer, Labour Court,* (1976) 4 SCC 222 at 225.

185 *Supra* note 178.

186 See *supra* note 177 at 710.

the line on the definition of retrenchment.[187] The court quoted with approval the following observations of Ranganath Misra J from *Karnataka S.R.T. Corpn.* v. *Boraiah*:[188]

> We are inclined to hold that the stage has come when the view indicated in Sundara Money case has been 'absorbed into the consensus' and there is no scope for putting the clock back or for an anti-clockwise operation.

On an analysis of the mental process involved in drafting the definition of retrenchment, the court observed that had Parliament "envisaged only the question of termination of surplus labour alone in mind," there would be no question of excluding cases falling in sub-clauses (a), (b) and (c) of the definition. The court held that the same mental process was evident when section 2(oo) was amended inserting another exclusion clause (bb) by the amending Act of 1984 with effect from August 18, 1984.

On the question whether the literal meaning of section 2(oo) is inconsistent with the scheme under sections 25G and 25H, the court held that to answer this question it has to be kept in mind that the definitions contained in section 2, which include the definition of 'retrenchment', are subject to anything repugnant in the subject or context. In view of this, the court preferred to adopt the rule of harmonious construction in reading sections 25G, 25H and 2(oo). It held that the extended meaning given to retrenchment under section 2(oo) being, like other definitions in section 2, subject to the context and subject matter, the rule laid down in sections 25G and 25H could have no application to cases of termination on closure and transfer of undertaking[189] and retrenchments other than those on account of labour surplusage. In other words, sections 25G and 25H apply only to retrenchments which occur on account of labour surplusage. This view, it is submitted, is correct[190] because even in cases of retrenchment on account of labour surplusage, no inflexible rule is laid down under section 25G. Section 25G,

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187 The court, however, observed that since *Delhi Cloth & General Mills Ltd., supra* note 179, a change in interpretation of retrenchment in section 2(oo) is clearly discernible, see *supra* note 175 at 703. It is submitted that this change is visible because cases of different forms of termination of service clamouring to fall within the definition of retrenchment, which had hitherto not been agitated, came for judicial consideration only in cases starting from *Delhi Cloth &. General Mills* and *Sundara Money* and not because the Supreme Court disregarded its earlier decisions.

188 (1984) 1 SCC 244 at 254.

189 See ss. 25FF and 25FFF.

190 For detailed discussion see *supra* note 182 at 153.

while enacting the rule of last come-first go, provides that the rule be followed "ordinarily".

The court held that section 2(oo) read with section 25G does not affect or take away the rights of the employer under the standing orders or under the contract of employment but these two provisions only put an additional social obligation on the employer to give retrenchment benefit to the affected workmen for immediate tiding over of the financial difficulty. The court observed: [191]

> Looked at from this angle, there is implicit social obligation. As the maxim goes- *stat pro ratione voluntas populi*- the will of the people stands in place of a reason.

The court held that retrenchment as defined in section 2(oo) means termination for any reason whatsoever except those excluded in the section and disposed of 17 appeals.

The court has consistently held that retrenchment compensation provisions are mandatory and it is payable to a workman who has put in 240 days in 12 calendar months preceding his termination of service which may be for any reason whatsoever except those which have been specifically excluded in the definition of 'retrenchment.' The court has held that the conditions for effective retrenchment under section 25F (a) & (b) are mandatory and non compliance of which makes retrenchment as *non-est* in law. Any 'retrenchment' without following mandatory retrenchment compensation provisions under the Act renders such termination as *non-est* and illegal. Further sections 25 G & H provide for the rule of last come first go in a particular category of workers as the guiding principle for effective retrenchment. In the event the said employer proposes to take in his employment any persons in future he is duty bound to give an opportunity to the retrenched workmen, provided they are citizens of India and offer themselves for re-employment. In other words, they shall have preference over other persons. Any violation of this rule gives cause of action to the retrenched workmen, to raise an industrial dispute for proper adjudication of his claim for re-employment with all consequential reliefs. Till recently, only the 'workman' concerned would ordinarily be entitled to the relief of reinstatement, full back wages and continuity of service.

In the post-liberalization period, the court in *U.P. State Brassware Corpn. Ltd*. v. *Udai Narain Pandey*,[192] observed that although direction to pay back wages

191 *Supra* note 177 at 720.

192 (2006) 1 SCC 479.

in the situation of illegal retrenchment used to be the usual rule, but now with the passage of time a pragmatic view of the matter is being taken by the courts that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing to it. It is curious to note that where the worker is not allowed to work due to his 'retrenchment' contrary to the mandatory provisions, denying him back wages amounts to rewarding premium for illegal action of the employer. Sinha J. opined that "Payment of full back wages, therefore, cannot be the natural consequence". The court in this case limited the relief only to 25% of the back wages.

However, in *Harjinder Singh* v. *Punjab State Warehousing Corp,*[193] the Supreme Court admitted that the plea of globalization or liberalization of the economy has been used by the employers, both public and private, before the higher courts as of ploy to defeat or dilute the rights that have accrued to the industrial or unorganized workers under the labour jurisprudence developed by the apex court in the last three decades. The court observed thus:[194]

> Of late, there has been a visible shift in the courts' approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalization are fast becoming the *raison d'etre* of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman/employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrongdoer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his

193 (2010) 3 SCC 192.

194 *Id*. at 209-210.

livelihood.

The court observed that it needs to be emphasised that if a man is deprived of his livelihood, he is deprived of his fundamental and constitutional rights. For him the goals of social and economic justice, equality of status and of opportunity enshrined in the Constitution remain illusory. Therefore, the judicial approach has to be compatible with the constitutional philosophy and vision of which the Directive Principles of State Policy constitute an integral part. Justice to workmen should not be and cannot be denied by entertaining spacious and untenable grounds put forward by the employer, whether public or private.

In this case the court upheld the award of the labour court granting reinstatement with 50% back wages in favour of the worker and set aside the order of the high court which had replaced the award of the labour court by ordering consolidated amount of compensation.

Daily rated workers: issues relating to retrenchment and regularization

The distinction between the consequence that follow violation of the mandatory provisions of the retrenchment law applicable to daily rated workers and the issue of regularization of such workers are two distinct issues.[195] Earlier, the court had not been able to clarify the distinctness of the two issues with precision.[196] The Supreme Court in *Hari Nandan Prasad* makes it crystal clear that no labour court or industrial tribunal can order regularization as a relief to a daily rated worker in case of violation of mandatory provisions of the retrenchment law or put the worker in a better position than he held immediately prior to the one before his disengagement. Such a relief is permissible only and only when the worker has also raised the issue of unfair labour practice or sought regularization in terms of the regularization scheme on the ground of unreasonable discrimination in violation of article 14 in public employment law. If such a claim has been referred for adjudication and the issue of regularization was one of the subject matters of reference to the labour court or industrial tribunal or if there is a specific relief prayed for before the high court or the Supreme Court seeking the relief of regularization, then regularization as a relief in an appropriate case can be granted. In *Hari Nandan Prasad* the court also got an opportunity to finally harmonize the decision of the constitution bench of the court in *State of Karnataka* v. *Umadevi, (3)*[197] with the later decision in *Maharashtra SRTC* v. *Casteribe Rajya Parivahan*

195 *Hari Nandan Prasad* v. *Employer I/R to Management of Food Corporation of India* (2014) 7 SCC 190. (hereinafter referred to as *Hari Nandan Prasad*).

196 See Bushan Tilak Kaul, "Labour Management Relations" XLIX *ASIL* 827-858 at 837 (2013).

197 (2006) 4 SCC 1(hereinafter referred as *Umadevi (3)*).

Karamchari Sanghatana.[198]

Regularization of daily rated workers: situations discussed

In *Hari Nandan Prasad*, the reference made to the Central Government Industrial Tribunal (CGIT) by the appropriate government itself referred to the determination of the validity of the termination and the grant of relief of regularization.

Dealing with the question of validity of termination, the court observed that this issue hardly posed any problem in the face of admitted position between the parties that the appellants had worked for more than 240 days continuously preceding their disengagement and there was infraction of the mandatory procedure prescribed in section 25-F of the ID Act rendering the orders of termination illegal. The only question to be decided by it, therefore, was the issue of relief to be granted. Taking note of the various judgments,[199] the court came to the conclusion that in cases of short term appointments, it is now the settled law that reinstatement is not the ordinary relief but compensation is the proper relief in such cases. Therefore, monetary compensation was the appropriate relief. The court, however, added a caveat. It pointed out that where termination of a daily wage worker is found to be illegal on the ground that it was resorted to as an unfair labour practice or in violation of the principle of last come first go; and where the person junior to him was regularized under some policy but the workman concerned was disengaged, the disengaged worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of compensation. In such cases, reinstatement should be the rule and only in exceptional cases, for reasons to be recorded, such a relief can be denied.

Again, where the reference made to the industrial adjudicator, like in *Hari Nandan Prasad* was not limited to the validity of the termination but also contained the claim for regularization of service, it would be appropriate to grant the relief of reinstatement as a natural corollary. The court, therefore, thought it necessary, to examine as to whether the order of the CGIT, as affirmed by the single judge of the

198 (2009) 8 SCC 556 (hereinafter reffered as *Maharashtra SRTC*).

199 *BSNL* v. *Mansingh,* (2012) 1 SCC 558; *In-charge Officer* v. *Shanker Shetty,* (2010) 9 SCC 126; *Jagbir Singh* v. *Haryana State Agriculture Mktg. Board,* (2009) 15 SCC 327; *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey*, (2006) 1 SCC 479; *Uttranchal Forest Development Corpn.* v. *M.C. Joshi,* (2007) 9 SCC 353*; State of M.P.* v. *Lalit Kumar Verma*, (2007) 1 SCC 575; *M.P. Admn.* v. *Tribhuban*, (2007) 9 SCC 748; *Sita Ram* v. *Moti Lal Nehru Farmers Training Institute*, (2008) 5 SCC 75; *Jaipur Development Authority* v. *Ramasahai*, (2006) 11 SCC 684; *GDA* v. *Ashok Kumar*, (2008) 4 SCC 261; *Mahboob Deepak* v. *Nagar Panchayat, Gajraula*, (2008) 1 SCC 575.

high court directing regularization of service of the workers, was justified or the approach of the division bench of the high court in denying that relief was correct.

The court stated that had it been a case limited to the validity of termination in *Hari Nandan Prasad*, neither of the two appellants before it would be entitled to reinstatement. However, the terms of reference in the instant case also included the issue as to whether their claim for regularization of services was legal and justified. If the appellants were entitled to get their services regularized, then the two issues of reinstatement and regularization would overlap because it would have been axiomatic to grant the relief of reinstatement as a natural corollary to the grant of regularization. However, before dealing with the question of regularization, the court examined *Uma Devi* to ascertain whether it has any applicability in the matters concerning industrial adjudication.

The court observed that undoubtedly the powers of the industrial adjudicator were not directly in issue in *Uma Devi (3)* but the foundation at logic of the said judgment was based on article 14 of the Constitution. Though the industrial adjudicator can vary the contract of employment, it cannot do something which is in violation of article 14. If the case was one which was covered by the concept of regularization, the same could not be viewed differently. Therefore, in terms of *Uma Devi* it was impermissible to order regularization of a daily rated worker while considering the relief to be granted in the case of illegal termination. The same would be impermissible being violative of article of 14. Thus, the industrial court could not issue a direction for regularization of the service of the daily rated worker where such regularization would tantamount to infringing the provisions of article 14 of the Constitution. But for that, it would not deter the industrial tribunals/ labour courts in issuing such directions which the industrial adjudicator otherwise possesses, having regard to the provisions of the ID Act specially conferring such powers.

Coming to the ratio of the judgment in *Maharashtra SRTC*, the court observed that in this case the post of the cleaners were in existence on regular basis and that there was a finding of fact recorded that the corporation had indulged in unfair labour practice by engaging these workers on temporary/ casual/ daily rated basis and was paying them a paltry amount even when they were discharging eight hours of duties in a day and performing the same kind of duties as that of the regular employees. It was in this backdrop that the court was of the opinion that directions of the industrial court to accord permanency to these employees against the post which were available, was clearly permissible and was within the powers, statutorily conferred upon the industrial / labour court under section 30 (1) (b) of

the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971(MRTU & PULP Act) which enables the industrial adjudicator to take affirmative action against the hiring employer. Those powers are wide enough to include granting of direction to the employer to reinstate the worker permanently. The court held that a close scrutiny of the decisions of the court in *Uma Devi (3)* and *Maharashtra SRTC* would show that these are not contradictory to each other.

It is clear from these judgments that the power to regularize casual / temporary workers by labour court/ industrial tribunal is to be exercised when the employer has indulged in unfair labour practice by not filling the permanent post even when available and continuing with workers on temporary/ daily rated basis or as contract workers and taking the same work from them as are being performed by regular employees but paying them much less wages. This power is to be exercised only in such circumstances or where the employer has discriminated the temporary workers in the matter of regularization though placed on the same footing and thus acted in violation of article 14 of the Constitution.

The court has very clearly brought parity in the provisions MRTP & PULP Act[200] wherein specific powers have been given to the labour courts to pass such orders of regularization and the implicit powers of the industrial adjudicators in the ID Act by reading them in it and stating in explicit terms that such wide powers equally exist even under the ID Act.

This way the court has given a beneficial construction to the provision of the ID Act which has to be welcomed and such powers are to be exercised in the situations enumerated in this case. The court has read this power in the ID Act keeping in view the objective of the Act which is to frustrate the unfair labour practice of the management and secure the objective of encouraging collective bargaining failing which adjudication of the disputes have to be based on principles of fair play and justice as a road to industrial peace and harmony.

On a harmonious construction of *Uma Devi (3)* and *Maharashtra SRTC,* the court was of the view that when there was post available in the absence of any unfair practice, the labour court would not give directions for regularization only because a worker has continued as a daily wage / ad-hoc/ temporary worker for a number of years. Further, where there are no posts available, such a direction for regularization would be impermissible. In the aforesaid circumstances giving a direction to regularize such a person, only on the basis of the number of years

200 Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1970.

put in by a daily wage worker may amount to a backdoor entry into the service which is not permissible under article 14 of the Constitution. Further, such a direction should not be given when the workers concerned are ineligible as per the recruitment rules. However, where it is found that similarly situated workmen are regularized by the employer itself under some scheme or the other and the workmen in question who have approached the industrial court are on par with them, direction of regularization in such cases may be justified, as otherwise their non-regularization would amount to invidious discrimination *qua* them and would be violative of article 14 of the Constitution. Here the industrial adjudication would be achieving equality by upholding article 14, rather than violating the constitutional provision. The court stated that the aforesaid examples are only illustrative. It would depend upon facts of each case as to whether the order of regularization is necessitated to advance justice or it has to be denied if giving such a direction impinges upon the employer's rights.

It is in the backdrop of the above principles that the court finally took up the case at hand for decision. The court referred to the circular of regularization dated 06.05.1987 under which many similarly placed workers had been regularized and granted benefit of regularization. The eligibility condition under the said circular was whether the worker has rendered 240 days of service in a calendar year as daily rated or temporary worker. As regards the appellant no. 2, whose services were engaged in 1986 and thereafter disengaged in 1990, when the scheme under which many daily rated workers had been regularized was in operation, the court had no difficulty in holding that he was entitled to regularization having put in more than 240 days of continuous service on the day when the scheme came into force on the principle of equality before law under article 14 of the Constitution. The court held that the division bench of the high court had erred in reversing the direction given by the CGIT which was rightly affirmed by the single judge as well, ordering reinstatement of appellant no.2 with 50% back-wages and regularization of his services from the date of the coming into force of the scheme in terms of that circular.

However, as regards the appellant no. 1 his services were disengaged in 1983 when no such scheme of regularization was in vogue hence, the court came to the conclusion that he was not entitled to regularization and was entitled only to compensation. But it needs to be emphasized that the court ought to have granted compensation over and above the wages paid on the basis of section 17-B of the ID Act which was a sustenance wage and to meet the litigation cost which was imposed upon him by the management. On this aspect the court has faltered.

It is important to state here that in the post liberalization period the apex court has in a catena[201] of decisions, consistently held that the award of reinstatement in violation of section 25 F under the ID Act should not be passed by way of relief on setting aside the order of termination. However, this approach raises concern. The trend has been to order compensation on a case to case basis without any effort being made on the part of the Indian judiciary to lay down proper guidelines for determining the same to bring consistency in awarding compensation which must be deterrent so that the management weighs pains and pleasures before effecting retrenchment in violation of law.

(xi) Dismissal and discharge: Powers of the industrial adjudicator

The Industrial Disputes Act, as it originally stood, did not have a provision specifically dealing with the scope of the powers of the industrial adjudicators in the matter of dismissals and discharges. The Supreme Court, taking clue from the principles laid down by the labour appellate tribunals which existed for a short period of time from 1950 to 1956, in appeals against the awards of labour courts and labour tribunals, authoritatively pronounced that the power of the management was not unfettered. It was liable to be interfered with by industrial tribunals on reference of the dispute to it.

Position prior to enactment of section 11-A

It was within the preview of the industrial adjudicator to examine 'whether the termination of service of a workman is justified and to give appropriate relief'. Highlighting the legal position under the industrial law in India, the Supreme Court in *Indian Iron and Steel Company Ltd.* v. *Their Workmen*[202] observed:[203]

> Undoubtedly, the management of a concern has power to direct its internal administration and discipline; but the power is not unlimited and when a dispute arises, the Industrial Tribunals have been given the power to see whether the termination of service of a workman is justified and to grant appropriate relief.

The court, however, stated that this jurisdiction of an industrial tribunal to interfere with the managerial prerogative of taking disciplinary action is not of appellate nature, as the 'legislature has not chosen to confer such jurisdiction upon it.'[204] Hence, it could not substitute its own judgment for that of the management.

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201 *Supra* note 199.

202 AIR 1958 SC 130.

203 *Id*. at 139.

204 *Bisra Stone Lime Co. Ltd.* v. *Industrial Tribunal,* (1970) I LLJ 626 at 628 (SC).

The court, however, held that the industrial tribunal could interfere with the disciplinary action taken by the employer in the following situations:

i. when there was want of good faith;

ii. when there was victimisation or unfair labour practice;

iii. when the management had been guilty of a basic error or violation of the principles of natural justice; or

iv. when on the materials, the finding was completely baseless or perverse

The decision of the court in *Indian Iron and Steel Ltd.* became classic for the justification of the tribunal's interference with the disciplinary sanctions of discharge or dismissal imposed by industrial employers on delinquent workmen. The court, likewise, insisted that in the matter of inflicting punishment also the employer should act fairly.

In *Hind Construction & Engineering Co. Ltd.* v. *Their Workmen*,[205] the court pointed out that even if the enquiry was proper and valid, if the punishment was shockingly disproportionate, the tribunal might treat the imposition of such punishment as itself showing victimisation or unfair labour practice. In such cases, the labour court or industrial tribunal will be justified in setting aside the order of punishment. It is important to note here that the choice before the industrial adjudicator in such a case was either to sustain the order of punishment of dismissal, or if found shockingly disproportionate, to set aside the order of dismissal. But the industrial adjudicator did not have the power to reduce the punishment or substitute it with one which it thought to be just and fair.

The legal position emerging from the judicial decisions prior to the incorporation of section 11A in the Industrial Disputes Act prior to December 15, 1971 as summarized by the Supreme Court itself in *Workmen of Firestone Tyre & Rubber Co. of India Pvt. Ltd.* v. *Management*[206] was that the adjudicatory jurisdiction dealing with disciplinary cases was confined merely to see whether the employer did not act *mala fide*, or as a measure of victimisation or unfair labour practice in the manner of initiating action and inflicting the punishment, and the enquiry officer had not violated the rules of

205 AIR 1965 SC 917.

206 (1973) 1 SCC 813. The newly inserted provision i.e. s.11A of the Industrial Disputes Act, 1947 which came into force with effect from 15.12.1971 enlarged the scope of the power of interference by the industrial adjudicator in the matters of dismissals and discharges referred to it under s. 10 of the Act.

natural justice and his findings were not baseless or perverse. In the absence of these infirmities, it was beyond the reach of the tribunal to interfere with the managerial action. The issues whether the material before the enquiry officer was adequate or not, or whether a particular witness upon whom reliance was placed by the enquiry officer should have been believed or not, were matters for the consideration of the enquiry officer alone. Similarly, the legal position was well settled that punishment was the 'managerial prerogative' and could not normally be interfered with by examining its propriety or adequacy, except in cases where the punishment was shockingly disproportionate to the act of misconduct committed by the delinquent workman. Further, in the case of defective enquiries or no enquiry, the management had the right to adduce evidence for the first time before the tribunal in which case it was the satisfaction of the tribunal, that was conclusive, and not that of the management, as to whether a misconduct was proved or not. This opportunity to adduce evidence had to be sought at the earliest. This position considerably changed, as will be noticed below, after the powers of the industrial adjudicator were enlarged by the legislature by incorporating section 11A in the Industrial Disputes Act.

Position after the enactment of section 11A

The International Labour Organization (ILO) in its recommendation No.119 concerning 'termination of employment at the initiative of the employer' adopted in June, 1963 had recommended that a worker aggrieved by the termination of his employment should be entitled to appeal against the termination, among others, to a neutral body such as an arbitrator, a court, an arbitration committee or a similar body, and that neutral body concerned should be empowered to examine the reason given for the termination and the other circumstances relating to the case and render a decision on the justification of his termination. The ILO further recommended that the neutral body should be empowered (if it finds that the termination of employment was unjustified) to order that the worker concerned, unless reinstated with unpaid wages, should be paid adequate compensation or afforded some other relief. The Government of India in accordance with these recommendations considered that the tribunal's powers in adjudication proceedings relating to discharge or dismissal of a workman for an alleged misconduct should not be limited and that the tribunal should have the power, wherever necessary, to set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it may deem fit or give such other relief to the workman, including the award of any lesser punishment in lieu of dismissal or discharge as the circumstances of the case may require. For this

purpose, a new section 11A was inserted in the Industrial Disputes Act, 1947 by the Industrial Disputes (Amendment) Act, 1971 (Act No. 45 of 1971) which came into force with effect from 15th December, 1971.

The Supreme Court pointed out the significant changes brought about by section 11A in *Firestone Tyre & Rubber Co.* It had the effect of altering the law laid down in this respect by abridging the right of the employer, inasmuch as it gives power to the tribunal for the first time to differ both on the findings of the misconduct arrived at by the employer as well as the punishment imposed by him. The tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the evidence relied upon by the employer established the misconduct alleged against the workman. What was originally a plausible conclusion that could be drawn by an employer from the evidence has now given place to a satisfaction being arrived at by the tribunal that the findings of misconduct are correct. What was earlier largely in the realm of satisfaction of the employer, ceased to be so and now it is the satisfaction of the tribunal that finally decides the matter. As stated earlier, under section 11A, though the tribunal may hold that the misconduct is proved, it may nevertheless be of the opinion that the order of discharge or dismissal for said misconduct is not justified. Elaborating on this issue, the court observed:[207]

> In other words, the Tribunal may hold that the proved misconduct does not merit punishment by way of discharge or dismissal. It can, under such circumstances, award to the workman only lesser punishment instead. The power to interfere with the punishment and alter the same *has been now* conferred on the Tribunal by Section 11A. (Emphasis supplied)

The court held that the position, however, remains unchanged in cases where there is either no enquiry held by the employer or if the enquiry is held to be defective, and it is open to the employer even now to adduce evidence for the first time before the tribunal justifying the order of discharge or dismissal. Of course, an opportunity will have to be given to the workman to lead evidence contra. The employer has to ask for such an opportunity at the stage of filing of its reply to the statement of claim or by moving an application for leading such evidence and that must be before the tribunal decides as a preliminary issue the validity of the

207 *Id.* at 832.

enquiry proceedings, if held. The procedure may be time-consuming, elaborate and cumbersome, but this right of the management to sustain its order before the tribunal in case no enquiry has been held, or if the enquiry is held to be defective, has been given judicial recognition over a long period of years for obvious reasons. The reasons for giving recognition to such right is to do justice between the parties without relying too much on technical considerations and with the object of avoiding delay in resolution of industrial disputes.

It is submitted that this approach of the court is consistent with the object of the Act that there should be no prolixity and inordinate delay in adjudication of the disputes. The court in *Firestone,* cognizant of the fact that such wide powers have now been conferred on tribunals, pointed out that the legislature obviously felt that some restrictions have to be imposed regarding what matters could be taken into account by the tribunal. Such restrictions are found in the proviso to section 11A. The proviso emphasizes that the tribunal has to satisfy itself one way or the other regarding the misconduct, the punishment and the relief to be granted to workmen only on the basis of the 'materials on record'. The court held that materials on record before the tribunal by and large are:

i. the evidence taken by the management at the enquiry and the proceedings of the enquiry, or

ii. the above evidence and in addition, any further evidence led before the tribunal, or

iii. evidence placed before the tribunal for the first time in support of the action taken by an employer as well as the evidence adduced by the workmen contra.

The court held that the expression 'fresh evidence' which the tribunal cannot take into account by virtue of the proviso has to be read in the context in which it appears, namely, as distinguished from 'materials on record' explained above. If so read, according to the court, the proviso does not present any difficulty at all. In subsequent cases, the court has, by and large, followed the aforesaid explanation of 'materials on record'. However, the explanation of 'materials on record' given in *Firestone* and also the phraseology used in the proviso to section 11A are far from satisfactory.

In *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha*,[208] the Supreme Court by majority held that the powers exercised by the labour court and industrial tribunals under section 11A over the disciplinary jurisdiction

208 (1980) 2 SCC 593.

of the management were also available to a 'voluntary arbitrator' under the Act at par, while dealing with industrial disputes in respect of managerial actions of dismissal and discharge. The court heavily relied on the ILO recommendations as accepted by India as the basis for putting arbitrators at par with industrial tribunals and labour courts empowered to exercise wide powers under section 11A of the Act. This was done to achieve uniformity, *inter alia*, in the matter of exercising powers in disciplinary matters relating to discharge and dismissals to encourage parties to resort to voluntary arbitration as an industrial dispute resolution mechanism.

Reformative judicial perception

In *Scooters India Ltd., Lucknow* v. *Labour Court,*[209] the labour court, in a reference, was satisfied that the departmental enquiry held by the public sector concern against the workman was fair, lawful and the findings were not vitiated in any manner for violation of the principles of natural justice. Although the charges against the workman stood proved and his conduct, though motivated by ideals had been far from satisfactory, yet, in the circumstances of the case, it substituted the order of termination of service by an order of reinstatement, together with 75% of back wages. This award of the labour court was sustained by the Allahabad High Court. On special leave to appeal preferred by the management, the Supreme Court held that it could not be said that the labour court had exercised its power under section 6(2A) of the UP ID Act (same as section 11A of the Industrial Disputes Act) in an arbitrary and non-judicial manner. The court observed:[210]

> The labour court had taken the view that justice must be tempered with mercy and that the erring workman should be given an opportunity to reform himself and prove to be a loyal and disciplined employee of the petitioner company. It cannot, therefore, be said that merely because the labour court had found the enquiry to be fair and lawful and the findings not to be vitiated in any manner, it ought not to have interfered with the order of termination of service passed against the respondent on exercise of the powers under section 6(2A) of the Act.

209 1989 Supp (1) SCC 31. The reference was made under s. 4K of the U.P. Industrial Disputes Act, 1947 (corresponding to s. 10 of the Central Industrial Disputes Act).

210 *Id*. at 34. S. 6(2A) of the U.P. Industrial Dispute Act, is analogous to s.11A of the ID Act.

The court hoped that in the light of the reformatory approach adopted by the labour court, the workman will conduct himself in a manner as to prove himself to be a worthy employee of a public sector concern and will, along with other employees, perform his duties in such manner as to promote the interest and welfare of the employer.

In *Assistant General Manager, SBI* v. *Thomas Jose*,[211] however, the court did not adopt a reformist approach as it had adopted in *Scooters India*. In this case, the industrial tribunal had held that though the misconduct was proved, the punishment of dismissal was too harsh and ordered his reinstatement without back wages. The Supreme Court held that the appropriate order in the present case would be reinstatement without back wages and denial of any increments for a substantial period of 10 years to run from the date of its judgment, with cumulative consequences. The court distinguished a public sector undertaking, such as Scooters India Ltd., from a public sector bank and observed that the bank deals with public money and misappropriation by an employee of the bank is misappropriation of public money which must be treated seriously.

New judicial perception

In the recent judicial decisions, however, the reformist approach has been completely replaced by the theory of deterrence with the view that the latter will bring discipline in the industry.[212] The deterrent approach is being justified by the court keeping in view the change in economic policy of the country which emphasizes on higher production for which discipline in industry has to be given top priority. Therefore, the employees who break discipline need to be dealt with severely.[213] The court has further observed that India being governed by rule of law, all actions taken must be in accordance with law. Also, it has directed the tribunals not to normally interfere with the quantum of punishment imposed by the employers unless an appropriate case was made out for doing so. It has ruled that the tribunals could neither ignore the ratio laid down by the court nor refuse to follow the same. The court has repeatedly emphasized the importance of maintenance of discipline in the workplace. It has emphasized that the recent trend in the decisions of the court is intended to strike a balance between the present need and the earlier approach of the court to the industrial relations where only the interest of workman was sought to be protected. According to the court, the earlier approach made discipline at the workplace suffer a setback.

211 (2000) 10 SCC 280.

212 *Infra notes* 219-224.

213 *Hombe Gowda Educational Trust* v. *State of Karnataka*, (2006) 1 SCC 430.

The change in its approach in recent decisions is intended to achieve the avowed object of faster industrial growth of the country. The power to reduce punishment has to be exercised only in cases where it is totally disproportionate to the misconduct as to shake the judicial conscience or the existence of any mitigating, circumstances which require the deduction of the sentence, or good conduct of the workmen which may persuade the labour court to reduce the punishment.[214] To arrive at this conclusion the court has relied upon its earlier decisions rendered in appeals arising out of judgments from decisions of the Central Administrative Tribunal (CAT) or the high courts in matters not covered by the Industrial Disputes Act, or where the employees concerned had exercised the choice of not seeking reference of their disputes under the Act, but approached the high court or the CAT challenging the order of removal or dismissal. The classic example, in this line of cases is the judgment given in *Mahindra & Mahindra* where the court has mostly relied on its earlier decisions which had reached the apex court against orders of the CAT or high courts.[215]

It is submitted that discipline in the workplace, surely, is important but the power to consider the justness of the punishment cannot be taken away from the industrial adjudicators which has been expressly conferred on them under the express provisions of section 11A of the Act. Section 11A confers on them wide powers to interfere with the quantum of punishment in appropriate cases, not necessarily confined only to cases where punishment is disproportionate to the misconduct, as is being asserted by the court in a number of decisions.[216]

In recent years, in disciplinary matters the court has departed from the reformative theory advocated in *Scooters India Ltd.* in favour of deterrent theory in the hope that it will help in improving industrial discipline. It has also circumscribed the discretion of the industrial tribunal or labour court in cases involving loss of confidence,[217] unauthorized absence,[218] misconduct involving driving in drunken state,[219] violence,[220] participation in illegal strikes[221]and

214 *Mahindra and Mahindra Ltd*. v. *N. B. Narawade*, (2005) 3 SCC 134.

215 *Ibid.* The court has relied on its earlier judgement in *B.C. Chaturvedi* v. *Union of India,* (1995) 6 SCC 750 and *Kailash Nath Gupta* v. *Enquiry Officer,* (2003) 9 SCC 480.

216 *Ibid*.

217 See *Regional Manager, Rajasthan SRTC* v. *Sohan Lal*, (2004) 8 SCC 218.

218 See *Delhi Transport Corpn*. v. *Sardar Singh*, (2004) 7 SCC 574..

219 See *U.P. State Road Transport Corporation* v. *Subhash Chandra Sharma*, (2000) 3 SCC 324.

220 See *Krishnakali Tea Estate* v. *Akhil Bharatiya Chah Mazdoor Sangh*, (2004) 8 SCC 200.

221 See *Ranbaxy Laboratories Ltd.* v. *Sewa Singh*, (2000) 10 SCC 600.

the misconduct of insubordination. The court has, in its attempt to advocate strict discipline in the industry, departed from the express statutory language of section 11A which provides that even when misconduct is proved, the industrial tribunal or labour court can, in appropriate cases, reduce the punishment if it comes to the conclusion that the case at hand calls for reformatory approach and the employee need not be subjected to economic death.

The need for disciplined labour force is paramount, but to say in the face of clear legislative provision that the industrial tribunal can interfere only in cases where the punishment is shockingly disproportionate is not a correct appreciation of the legal position.

IV CONCLUSION

In the pre–liberalization period, the Supreme Court played the role of an architect laying down a fine blue print for development of the labour jurisprudence of this country in tune with the values envisaged in the preamble, parts III and IV of the Constitution of the India for which it won laurels. It was sensitive to the right of the workers to form association as a fundamental right but expressed its inability to read the right to strike and the right to collective bargaining within the said right. But at the same time, it recognized the significance of the trade unions and the important role they play in institutionalizing collective bargaining as the primary mechanism for the resolution of industrial disputes. For encouraging collective bargaining and ensuring that there was meaningful engagement of the parties, it recognized the right of the workers as also of the management to resort to industrial action, but only as a measure of last resort. The concept of 'legal and justified' strike evolved by the court making the object of strike along with its legality as the basis for entitlement to full wages during strike period was a departure from the common law principle of 'no work no pay.' Thus, the contract of employment was looked upon by the court not only from the stand point of contract but also from that of status as well. If collective bargaining could not attain the status of being the primary mode of resolution of industrial disputes in India, much of the blame must lie with the successive central governments for their failure to bring appropriate law on the recognition of trade unions, defining the rights of recognized and unrecognized trade unions and making the collective bargaining agreement binding on all the workers and not merely on the parties thereto.

The right of the workers to be entitled to wages in some of the circumstances

during strike was in recognition of two stark realities - firstly, the recognition that trade unions of workers would take some time to gain strength and, secondly, because of the lack of social security in India, they needed some measure of sustenance during the strike period to enable them in appropriate cases to coerce the reluctant employers to engage in the collective bargaining process. It, therefore, pursued the path of balancing the interests of all the stakeholders in the industrial activities which was not an easy task. The quest was to ensure that in a developing economy like that of India, predominance was given to social context adjudication in labour disputes. This was done to build a harmonious relationship between the management and the labour which is a *sine qua non* for better productivity and overall congenial workplace environment. Even in the absence of legislative measures governing fixation of wages, the court through judicial activism, laid down workable principles for fixation of wage structures which have worked to the satisfaction of all the stakeholders. To protect the real wage of the workers, the court, on the ground of social justice, stressed the need of paying dearness allowance to them as a component of wage packet to neutralize the effect of higher cost of living. Further, before the payment of bonus became a statutory obligation under the Payment of Bonus Act, 1965, it accepted that the workers were entitled to bonus as a legal right where there was sufficient allocable surplus available. The payment of bonus was, thus, intended to fill the gap between the minimum wage and the living wage.

However, in the post-liberalization era, the court has, through many of its pronouncements, weakened the basic structure of the labour jurisprudence built by it earlier. The right to industrial action to promote collective bargaining which had been recognized as a legal right has suffered dilution in *Rangarajan*. The *BALCO* judgment was *de hors* the vision of the Constitution articulated in the preamble, the fundamental rights and the directive principles of state policy. The relief of compensation in cases of violation of retrenchment law as a substitute for reinstatement has been meager when it should be deterrent and based on some definite principles.

In recent years, there are hardly any collective disputes which have engaged the attention of the court. A look at the law reports makes it obvious to anyone that collective disputes in the post-liberalization era have hardly been coming to the courts and have almost reached the vanishing point. The possible reasons may be that the trade unions have either lost relevance for workers or have become weak; or the workers are now more concerned about protecting their jobs at any cost or that the industrial adjudicators, including higher judiciary, is no more

giving primacy to social context in labour dispute adjudication. The concern for job security seems to be other reason why collective disputes are not coming for adjudication. It is high time for the industrial adjudicators and the higher courts to take a re-look at their roles and assume again the role of the watchdog of the weaker sections of the society, including the workers. It is hoped that the decisions of the court referred to in this work, most of which were based on social context adjudication, will provide sufficient guidance to the industrial adjudicators and help them to resort to social context adjudication and, thereby, strengthen labour jurisprudence and ensure higher economic growth with the constitutional values of social, economic and political justice to all.

In the end, it needs to be emphasized that the constitutional functionaries must realize that labour is not a commodity and is made of flesh and blood with legitimate aspirations and are entitled to all the basic human rights. Labour contributes directly to the health and wealth of the nation and failure to meet their aspirations amounts to denial of social and economic justice to them. It would be too much to expect the judiciary to solve all the ills of our society or to develop all the moral and legal norms to achieve higher economic growth with social justice. The successive governments at the centre have been almost in a state of slumber and have failed to discharge their primary responsibility in laying down a rational labour-management policy. The need of the day is a well conceived legal framework for regulating employer-employee relationship; a legal regime to foster co-operation and collaboration between the employers and the workers, where the latter contribute their share wholeheartedly and are ensured of wages commensurate with their immediate and future needs, and the former as well as the trade unions, shun unfair labour practices.

Also, there is much to be desired in the approach of the government. The latest Code relating to Industrial Relations Bill, 2015 does not inspire much confidence. It can best be described as – old wine in new bottle. What is important is not packaging, but the stuff within, that's the crux of the matter.

THE INDIAN SEAT OF INTERNATIONAL COMMERCIAL ARBITRATION

ABHILASH MALHOTRA*

I INTRODUCTION

In order to give impetus to "Make in India" programme and increase FDI inflows, India is doing its best to improve its World Bank "Ease of doing business" ratings by introducing reforms in the area of Company Law, Arbitration, FIPB approvals, New Foreign Trade Policy and Model Bilateral Investment Treaty etc. Investment and litigation co-exist. A foreign investor is diffident about the protracted ligation and over burdened Indian courts. Arbitration is the need of the hour, but undue intervention by courts and maladies of *ad hoc* arbitration are halting the progress. Institutionalization of arbitration is the mandate of the Law Commission. Along with the United States of America, United Kingdom, Paris, The Hague, Singapore has also, of late, emerged as a favourite international seat of arbitration. India is emerging at world platform. Investors are looking forward to invest. Will India be able to bolster its alternate dispute mechanism and setup the stage for "The Indian Seat of International Commercial Arbitration?"

II CORPORATE REFORMS

Since the day the Bharatiya Janta Party[1] led by Prime Minister Narendra Modi (the Government of India) came to power, it is working towards liberalizing the business environment in India. The efforts to streamline the investment and business environment are evident from the Make in India Programme,[2] the New Foreign Trade Policy, 2015,[3] setting up of the Micro Units Development and Re-

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* B.Com (Hons.), LL.M, Company Secretary, Masters in IPR; Metropolitan Magistrate/Civil Judge, Delhi Judicial Service.

1 In 2014 Lok Sabha election Bhartiya Janta Party (BJP) won 282 seats in the *Lok Sabha* (House of People) out of a total of 543 seats. BJP became the first non-Congress party in history of independent India to win a parliamentary majority on its own.

2 http://www.makeinindia.com/. The project is featured in KPMG's '100 Most Innovative Global Projects' as one of the world's most innovative and inspiring infrastructure projects. The Government of India has opened sectors like automobile, automobile components, aviation, biotechnology, chemicals, construction, defence manufacturing, electrical engineering, electronic systems, food processing, IT and BPM, leather, media and entertainment, mining, oil and gas, pharmaceuticals, ports, railway, renewable energy, roads and highway, space, textile and garments, thermal power, tourism and hospitality and wellness.

3 http://dgft.gov.in/exim/2000/ftp2015-20E.pdf.

finance Agency Ltd (MUDRA) Bank,[4] and the Policy to repeal unwanted laws,[5] etc.

Investors, especially the foreign institutional investors and corporations, look forward to a stable and predictable rule of law where the compliance and intervention in business is minimum and that's what a *laissez faire* state is! The work towards the revamping of corporate laws to bring them at par with international standards is continuing in India since the last decade. A Concept Paper on New Companies Law[6] was prepared by the ministry on 04.08.2004. The government also constituted an expert committee under the chairmanship of J.J. Irani which presented its report[7] on 31.05.2005. After considering the inputs from various stakeholders, the Companies Bill, 2008[8] was introduced in the *Lok Sabha* (House of People) which could not be passed.[9] Later on, the Companies Bill, 2009[10] was introduced in the *Lok Sabha* on 03.08.2009. It was also referred to the Parliamentary Standing Committee on Finance. This committee gave its 21st Report[11] dated 26.08.2010. Keeping in view the suggestion of the standing committee and stakeholders, this Bill was withdrawn.[12] Thereafter, the Companies Bill, 2011[13] was introduced in the *Lok Sabha*. It was again referred to the Parliamentary Standing Committee on Finance which gave its Fifty-seventh Report[14] dated 15.06.2012. This Bill was

4 *Pradhanmantri Mudra Yojna* had been launched with a corpus of INR 20,000 crore which will finance money needs of small entrepreneurs ranging from INR 50,000 to 10,00,000/-. Mudra is at present registered as a Non Banking Finance Company with Reserve Bank of India. Micro Finance Institutions (MFIs) and Non-Banking Finance Companies (NBFCs) can avail of loans from MUDRA.

5 Law Commission of India by its 248th Report has recommended immediate repeal of obsolete laws (http://lawcommissionofindia.nic.in/reports/Report248.pdf). The Government of India has passed the Repealing and Amending Act, 2014 recommending repealing of 36 obsolete laws.

6 http://www.mca.gov.in/Ministry/pdf/conceptpaper.pdf.

7 http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf.

8 http://www.mca.gov.in/Ministry/actsbills/pdf/Companies_Bill_2008_27oct2008.pdf.

9 The Companies Bill, 2008 was referred to Parliamentary Standing Committee on Finance. However, it lapsed due to dissolution of the 14th *Lok Sabha*.

10 http://www.prsindia.org/uploads/media/Company/Companies%20Bill%202009.pdf.

11 http://www.prsindia.org/uploads/media/Companies%20Bill%202009.pdf.

12 In view of large number of amendments to the Companies Bill, 2009 arising out of the recommendations of the Parliamentary Standing Committee on Finance and suggestions of the stakeholders, the Central Government decided to withdraw the Companies Bill, 2009 and introduce a fresh Bill incorporating therein the recommendations of the Standing Committee and suggestions of the stakeholders. Later on the revised Bill i.e. the Companies Bill, 2011 was introduced in Parliament.

13 http://www.prsindia.org/uploads/media/Company/companies%20bill%202011.pdf.

14 http://www.prsindia.org/uploads/media/Company/Companies_Bill_%20SC%20Report%20 2012.pdf.

passed in the *Lok Sabha*[15] and *Rajya Sabha.*[16]

The outdated Companies Act, 1956 was repealed and the new Companies Act, 2013[17] was made *lex loci*. The new Companies Act has helped in keeping the law in vogue with international requirements. The new legislation has made incorporation of new companies easy and fast. Concept of one person company has been introduced. Investors' rights have been strengthened. Corporate social responsibility has been introduced with fresh vigour. The new Companies Act mandates establishment of a National Company Law Tribunal (NCLT). The NCLT will have jurisdiction over issues like management and oppression, winding up, company reconstruction, etc. Accordingly, the winding up jurisdiction of the high courts and the reconstruction jurisdiction of the Board for Industrial and Financial Reconstruction (BIFR), will vest with NCLT. The key purpose behind establishing NCLT is to provide a single platform for disputes redressal. The Serious Fraud Investigation Office[18] (SFIO) has been designated as the sole investigation agency to investigate into corporate frauds. The National Financial Reporting Authority (NFRA)[19] is proposed to be constituted in order to investigate professional or other misconduct by chartered accountants/firms of chartered accountants, to monitor and enforce accounting standards and recommend accounting and auditing policies. The NFRA will have powers to impose penalties and debar a chartered accountant or firm from practicing. This deterrent mechanism will ensure accurate accounts and audit which in turn will help in projecting transparent financial statements to an investor looking forward to invest in a company. Keeping in view the requirements of Indian as well as foreign professionals, the Limited Liability Partnership Act, 2008[20] was also brought into force. The Negotiable Instruments Act, 1881 has been amended with effect from 15.06.2015 to sort out the issues relating to territorial jurisdiction and to give an ease to payee/recipient to present the complaint at the place where his banker is situated.[21]

In order to make flow of Foreign Direct Investment (FDI) hassle free in India,

15 Passed in *Lok Sabha* on 18.12. 2012 and 13.08.2013.

16 Passed in *Rajya Sabha* on 08.08.2013.

17 http://www.prsindia.org/uploads/media/Company/Companies%20Bill%20Passed%20by%20LS.pdf.

18 http://www.sfio.nic.in/websitenew/main2.asp.

19 Section 132, Companies Act, 2013.

20 http://www.mca.gov.in/Ministry/actsbills/pdf/LLP_Act_2008_15jan2009.pdf.

21 http://www.prsindia.org/upload/media/Negotiable%20instrument/Negotiable%20Instruments%20Act,%202015.pdf.

Foreign Investment Promotion Board[22] (FIPB) was set up by the Government of India. The FIPB is housed in the Department of Economic Affairs, Ministry of Finance. It is an inter-ministerial body responsible for processing of FDI proposals and making recommendations for government approval. The FIPB offers a single window clearance for applications on FDI in India that are under the approval route. As per the Consolidated FDI Policy, 2014,[23] coming into effect from12.05.2015, the sectors under automatic route do not require any prior approval from the FIPB and are subject only to sectoral laws. The Minister of Finance who is in-charge of FIPB would consider the recommendations of FIPB on proposals with total foreign equity inflow of and below Rs. 2000 crore. The recommendations of FIPB on proposals with total foreign equity inflow of more than Rs. 2000 crore would be placed for consideration before the Cabinet Committee on Economic Affairs (CCEA). The CCEA would also consider the proposals which may be referred to it by the FIPB/the Minister of Finance (in-charge of FIPB).

The aforesaid measures clearly reflect the seriousness of the Indian Government to open up its market, attract foreign capital and entrepreneurs to establish their businesses in India. The impact of these reforms was also seen in improved FDI inflows and India gained 9th place in A.T. Kearneys FDI Confidence Index Report.[24] But the happy story has some serious patches also. It cannot be denied that business co-exists with litigation. In order to have a successful flourishing economy, it is paramount that commercial litigation is not only dealt with speedily but by specialized agencies. The Indian judiciary is burdened with backlog of crores of cases. In the Joint Conference of Hon'ble Chief Justices and the Chief Ministers of States[25], realizing the shortage of judges decided to avail services of retired judges in the high courts on ad hoc basis to expeditiously dispose off the pending cases.[26] As per the Report of the Working Group[27] for 12th Planning Commission (prepared by the Department of Justice, Ministry of Law and Justice) the total pendency of cases in subordinate courts in India at the end of 2010 was over 2.7 crore, of which approximately 72% are criminal cases.

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22 http://fipb.gov.in.

23 http://dipp.nic.in/English/Policies/FDI_Circular_2015.pdf.

24 https://www.atkearney.com/documents/10192/8064626/2016+A.T.+Kearney+Foreign+Direct+Investment+Confidence+Index%E2%80%93FDI+on+the+Rebound.pdf/e61ec054-3923-4f96-b46c-d4b4227e7606.

25 Held in April, 2016 at Vigyan Bhawan, New Delhi.

26 http://indianexpress.com/article/india/india-news-india/three-crore-cases-pending-before-judiciary-retd-judicial-officers-to-work-as-ad-hoc-judges-2768526/.

27 http://planningcommission.gov.in/aboutus/committee/wrkgrp12/wg_law.pdf.

The data of pendency in Indian courts shows that the heavy pendency has impacted speedy disposal. The Supreme Court of India in the Policy and Action Plan[28] under the National Court Management System dated 27.09.2012 has recommended a "five Plus free" policy with the aim to make judicial system free of more than five year old cases.

III REFORMS IN ALTERNATE DISPUTE RESOLUTION MECHANISM

A foreign investor is always circumspect about the protracted and delayed court procedures. Delays in justice dispensation are directly proportional to volatility and risk of investment/interest loss. Investment is always militated by the cruel hands of inflation, currency fluctuations and fiscal measures. The delays in court proceedings in an investment dispute may significantly diminish the value of money till the time final verdict is passed. Being cognizant of this problem and in order to cope up with such high pendency of cases, the Indian legislature and the judiciary have given special impetus to Alternate Dispute Redressal (ADR) System. ADR includes mediation, arbitration and conciliation. Order 10 Rule 1A,[29] 1B,[30] 1C[31] and section 89[32] of the Code of Civil Procedure, 1908, makes

28 http://supremecourtofindia.nic.in/ncms27092012.pdf.

29 *1-A. Direction of the court to opt for any one mode of alternative dispute resolution.*—After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of Section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

30 *1-B. Appearance before the conciliatory forum or authority.*— Where a suit is referred under Rule 1-A the parties shall appear before such forum or authority for conciliation of the suit.

31 *1-C. Appearance before the Court consequent to the failure of efforts of conciliation.*— Where a suit is referred under Rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.

32 *89. Settlement of disputes outside the Court.*— (1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for—
(*a*) arbitration;
(*b*) conciliation;
(*c*) judicial settlement including settlement through Lok Adalat; or
(*d*) mediation.
(2) Where a dispute has been referred—
(*a*) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for

it mandatory for the courts to refer civil disputes for settlement as per various ADR mechanisms. The mediation settlement[33] and the award passed in *Lok Adalats* are made a deemed decree of the civil court as per section 21 of the Legal Services Authorities Act, 1987. Even the compoundable offences like, cheating, cheque dishonour etc., are being referred by courts for mediation settlement. As a benchmark project, pre-litigation mediation has been started in Delhi by setting up Delhi Dispute Resolution Society.[34] *Lok Adalats* are also quite successful. The Law Commission in its 246th Report[35] has also recommended creation of special commercial benches for dealing with arbitration disputes. Keeping in view the said directions, Parliament has passed the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015[36] with effect from 23.10.2015. A commercial dispute is defined to include any dispute related to transactions between merchants, bankers, financiers, traders, etc. The specified value of a commercial dispute that will be dealt with by commercial divisions in high courts and commercial courts will be an amount not below one crore rupees (which will be specified by the central government). The commercial appellate division is mandated to endeavour for disposing of appeals within a period of six months. No civil revision is maintainable against any interlocutory order passed by the commercial court.[37] In cases of international commercial arbitration where the subject matter of the arbitration is a commercial dispute, all applications or appeals shall lie before the commercial division in the high court.[38] All pending

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settlement under the provisions of that Act;

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

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

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

33 As directed by C. the Supreme Court of India in *Afcons Infrastructure Limited & another* v. *Cherian Varkey Construction Company Pvt Ltd & Anr.*, (2010) 8 SCC 24.

34 http://delhi.gov.in/wps/wcm/connect/doit_ddrs/DELHI+DISPUTES+RESOLUTION+SOCIETY/Home/.

35 http://lawcommissionofindia.nic.in/reports/Report246.pdf.

36 http://www.prsindia.org/uploads/media/Commercial%20courts/Commercial%20courts%20Act,%202015.pdf.

37 S. 8, The Commercial Courts, Commercial Division and commercial Appellate Division of High Courts Act, 2015

38 *Id.,* s. 10.

commercial arbitration cases shall be transferred to the commercial division[39].

It is now realized that a successful alternate dispute settlement mechanism and especially arbitration, is imperative to help the Indian judicial system to shed its burden. However, in respect of arbitration awards, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts.[40] Therefore, it is cardinal that ADR methods and especially arbitration laws in India work in conformity with the UNCITRAL model and international standards to match the need of the hour.

Arbitration provides not only speedy disposal of disputes, but choice of curial law, freedom of venue, language of proceedings, choice of specialist adjudicator, privacy, economy in litigation cost and so on. A country like India which is liberalising its market to set up industries, welcoming foreign investment, doing collaborations, entering bilateral investment promotion and protection agreements[41], free trade agreements and easing up Indian financial market, cannot ignore to have strong dispute redressal mechanisms like arbitration with strong focus on Indian Seat of International Commercial Arbitration.

IV HISTORY OF ARBITRATION LAW IN INDIA[42]

India has more than 100 years of history with regard to arbitration legislation. During the British rule, India had its first legislation on arbitration in the form of Indian Arbitration Act, 1899. Its jurisdiction was limited to the Presidency towns of Calcutta, Bombay and Madras. Thereafter, in the Code of Civil Procedure, 1908 the Second Schedule was introduced which was completely devoted to arbitration. In order to consolidate the law, the Arbitration Act, 1940 was passed. It repealed the Arbitration Act, 1899 and the relevant provisions in the Code of Civil Procedure, 1908, including the Second Schedule thereof. The 1940 Act did not deal with enforcement of foreign awards. To enforce the Geneva Convention on Foreign Awards, the legislature passed the Arbitration (Protocol and Convention) Act, 1937. The Foreign Awards (Recognition and Enforcement) Act, 1961 was brought into picture to enforce the New York Convention. The working of the 1940 Act was reviewed in the 210th Report of the Public Accounts Committee of the Fifth

39 *Id.,* s. 15.

40 246th Law Commission Report.

41 http://finmin.nic.in/bipa/bipa_index.asp.

42 *Supra* note 40.

Lok Sabha and Law Commission's 76th Report.[43]

The Indian economy had a bad patch in the early nineties and foreign reserves were touching nadir. To attract investment, Indian economy was opened up in 1991 and the industrial, financial and foreign policy was overhauled. After liberalisation of the economy, it was imperative to provide a stable, efficient and swift rule of law and dispute resolution mechanism. In order to address these problems, the Arbitration and Conciliation Bill, 1995 was introduced in Parliament to bring the Indian legislation at par with the international standards. The Act aimed at bringing the international commercial arbitration standards in line with UNCITRAL model, enforcement of foreign awards, domestic awards and conciliation. Since the requisite legislative sanction could not be accorded to the 1995 Bill, the President of India promulgated the Arbitration and Conciliation Ordinance, 1996 on the same lines as the 1995 Bill. The Ordinance was promulgated twice because Parliament could not enact the law in the required time period. Finally, Parliament passed the Bill in terms of the Arbitration and Conciliation Act, 1996 which received the assent of the President of India on 16.08.1996 and came into force on 22.08.1996.[44] However, the Act was applicable to arbitration proceedings commenced on or after 25.01.1996.[45]

In the year 2001, the government made a reference to the Law Commission to undertake a comprehensive review of the Arbitration and Conciliation Act, 1996 in view of the various shortcomings observed in its working and also the various representations received by the government in this regard. The Commission in its 176th Report[46] pointed out that the UNCITRAL Model which is mainly intended to have a common law for 'International Commercial Arbitration' has been made applicable also to cases of purely domestic arbitration under the 1996 Act. It was also observed that there are conflicting judgments of various high courts with regard to the interpretation of the provisions of the 1996 Act. The government considered these recommendations and after consulting the state governments and various institutions, decided to accept almost all the recommendations. Accordingly, the Arbitration and Conciliation (Amendment) Bill, 2003[47] was introduced in the *Rajya Sabha* on December 22, 2003.

Thereafter on 22.07.2004, the government constituted a committee known

43 http://lawcommissionofindia.nic.in/51-100/Report76.pdf.

44 Notification No G.S.R. 375(E), dated 22.08.1996.

45 *M/s. Fuerst Day Lawson Ltd* v. *Jindal Exports Ltd,* (2001) 6 SCC 356.

46 http://lawcommissionofindia.nic.in/arb.pdf.

47 *Supra* note 43.

as the "Justice Saraf Committee on Arbitration" under the chairmanship of Justice B.P. Saraf to make an in-depth study of the analysis of the recommendations of the 176th Report of the Law Commission and all aspects of the Arbitration and Conciliation (Amendment) Bill, 2003. The Justice Saraf Committee gave a detailed report on 29.01.2005. In the light of this Committee's Report, the Arbitration and Conciliation (Amendment) Bill, 2003 was then referred to the Departmental Related Standing Committee on Personnel, Public Grievances, Law and Justice for study and analysis. The committee was of the view that the provisions of the Bill gave room for substantial intervention by the court in the arbitration process. *It stressed upon the need for promoting institutional arbitration in India and called for establishment of an institution in our country in this regard which would be on par with international standards.* In view of these recommendations and observations, the 2003 Bill was withdrawn from the *Rajya Sabha.*

In order to undertake a study for suggesting amendments to the 1996 Act, the Ministry of Law and Justice also issued a Consultation Paper[48] inviting suggestions/ comments from eminent lawyers, judges, industry members, institutions and various other sections of the government and other stakeholders. Taking into account the comments and suggestions, the ministry prepared draft proposals and 'Draft Note for the Cabinet'. Thereafter, the Ministry of Law and Justice requested the Law Commission to undertake a study of the amendment proposed to the Act in the 'Draft Note for the Cabinet'. Pursuant to the said reference the Law Commission gave its 246th Report[49] dated 05.08.2014.

V RECOMMENDATIONS MADE BY THE LAW COMMISSION IN 246TH REPORT

The Law Commission in its 246th Report has recommended many changes in the existing Arbitration and Conciliation Act, 1996 to bring it at par with international standards. The highlights of proposed changes are enumerated below:

a) The Law Commission has proposed to encourage the culture of institutional arbitration in India. It is proposed that the high courts and the Supreme Court, while acting in the exercise of their jurisdiction to appoint arbitrators *should take steps to encourage the parties to refer their disputes to institutionalised arbitration*. It also recommended that trade bodies and commerce chambers should start new arbitration centres with their own rules, which can be

48 http://lawmin.nic.in/la/consultationpaper.pdf.

49 *Supra* note 35.

modelled on the rules of the already established centers. It has suggested that the government can help by providing land and funds for establishment of new arbitration centers.

b) It has also proposed the government to consider formation of a specialised body like an Arbitral Commission of India in order to encourage the spread of institutional arbitration in the country.

c) It has proposed to accord legislative sanction to rules of institutional arbitration and the concept of an "emergency arbitrator".

d) For domestic arbitration, the commission has recommended a *model schedule of fees* based on the fee schedule set by the Delhi High Court's International Arbitration Centre[50] and recommended empowering the high courts to frame appropriate rules for fixation of fees for arbitrators. However, in the case of International Commercial Arbitration (ICA), the commission recognised the fact that, ICA involves foreign parties who might have different values and standards for fees for arbitrators or institutional rules which may have their own schedule of fees. Therefore, it has expressly restricted its recommendations in the context of purely domestic arbitration.

e) The commission has recommended to discourage the practice of frequent and baseless adjournments and ensure continuous sittings of the arbitral tribunal for the purposes of recording evidence and for arguments. It also recommended that technology, like teleconferencing, video-conferencing etc., should be encouraged to replace the need for purely formal sittings and thereby aid in a smoother and more efficient conduct of arbitral proceedings.

f) In respect of judicial interventions in the arbitral process, it has opined that it is necessary to carefully calibrate the balance between judicial intervention and judicial restraint. It clarified that the scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. However, if the judicial authority is of the opinion that *prima facie* the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. It recommended that in case the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not *prima facie*. In the event that the judicial authority refers the dispute to arbitration and/ or appoints an arbitrator, such a decision will be final and non-appealable.

50 http://www.dacdelhi.org/.

An appeal can be maintained only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator.

g) On the lines of successful experience of commercial benches in the Delhi High Court, the commission has recommended the government and requested the Chief Justices of the high courts to consider creation of specialised and dedicated arbitration benches.

h) In order to discourage frivolous and misconceived litigation, it has recommended a regime for actual costs as is implemented in the United Kingdom and also other jurisdictions.

i) To enable the courts in delegating power of appointing arbitral tribunal to specialized, external persons or institutions, the commission has recommended that the power of appointing arbitral tribunal be vested with the Chief Justice of the high court and the Supreme Court *shall not regard it as a 'judicial act'*. It has further recommended that the decisions of the high court in respect of appointment of arbitrator shall be final and non-appealable. The court should make an endeavour to dispose off the matter within 60 days from the service of notice on the opposite party.

j) It has suggested that challenges to domestic and foreign awards shall be disposed off expeditiously and in any event within a period of one year from the date of service of notice.

k) It has proposed that counter claims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent, provided that the same falls within the scope of the arbitration agreement.

l) The commission has also recommended mandatory disclosures by the prospective arbitrators in relation to their ability to devote sufficient time to complete the arbitration and render the award expeditiously.

m) It has recommended that the arbitrator should maintain certain minimum levels of independence and impartiality. It suggested that the concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. When the party appointing an adjudicator is the state, the duty to appoint an impartial and independent adjudicator is that much more onerous and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes. The commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible

appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts.

n) It has proposed the incorporation of the Fourth Schedule, which was drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a guide to determine whether circumstances exist which give rise to such justifiable doubts. It has also proposed the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule.

o) It has recommended that in the case of international commercial arbitration, the relevant "Court" which should be competent to entertain proceedings arising out of the arbitration agreement, should be the high court, even where such a high court does not exercise ordinary original jurisdiction.

p) In order to provide a balance and to avoid excessive intervention, it has clarified that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence. Any contravention of a term of the contract by the tribunal should not *ipso jure* result in rendering the award becoming capable of being set aside.

q) It has also opined that the term "interests of India"[51] is vague and is capable of interpretational misuse, especially in the context of challenge to awards arising out of international commercial arbitrations. Under the formulation of the commission, an award can be set aside on public policy grounds only if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice".

r) The Law Commission has recognised the concept of "seat of arbitration" as adopted by the Supreme Court in *Bharat Aluminum and Co.* v. *Kaiser Aluminium Technical Services, Inc.and Ors.*[52] (hereinafter called *"BALCO"*

51 The Supreme Court in *Renusagar Power Plant Co Ltd* v. *General Electric Co.*, AIR 1994 SC 860 while construing the term "public policy" in section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 held that an award would be contrary to public policy if such enforcement would be contrary to "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality".

52 (2012) 9 SCC 552. The Supreme Court overruled its own judgment in *Bhatia International* v. *Bulk Trading SA and Anr.,* (2002) 4 SCC 105 wherein it was held that Part I mandatorily applied to all arbitrations held in India and also applied to arbitrations conducted outside India unless it was expressly or impliedly excluded. As a result, the Indian courts were competent to provide

case). The Supreme Court in *BALCO* decided that Parts I and II of the Act are mutually exclusive of each other. Part I will apply only when the seat of arbitration is in India. The seat is the "centre of gravity" of arbitration, and even where two foreign parties arbitrate in India, Part I would apply and the award would be a "domestic award". The court recognized the "seat" of arbitration to be the juridical seat; in line with international practice and observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between "seat" and "venue" was, therefore, recognized. In such a scenario, only if the seat was determined to be India, Part I would be applicable, otherwise, it would be inapplicable. Even if Part I was expressly included "it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the foreign procedural law/curial law."

s) In the wake of the decisions of the Delhi High Court in various cases[53], the commission has recommended that the orders of the arbitral tribunal should be statutorily enforceable in the same manner as the orders of a court.

t) It has recommended that issues of fraud be expressly made arbitrable and amendments be made to section 16.

u) The commission has recognised that a "Party" does not necessarily mean only the "signatory" to the arbitration agreement but includes apart from signatory, persons "claiming through or under" such signatory.

v) It has also proposed that the scope of powers of the arbitral tribunal be clarified to include powers to award compound interest, as well as to rationalize the rate at which default interest ought to be awarded and move away from the existing rate of 18% to a market based determination in line with commercial realities

w) It has further proposed that the loser-pays rule be adopted for payment of cost of litigation, so that economic deterrence against frivolous conduct of proceedings may be there.

x) It has opined that the test for determining the residence of a company must be based on its place of incorporation and not the place of central management/

interim relief pending arbitration, appoint arbitrators and set aside arbitral awards even if the arbitration was conducted outside India. This position now stands overruled following *BALCO*.

53 *Sri Krishan* v. *Anand*, (2009) (112) DRJ 657, (followed in *Indiabulls Financial Services* v. *Jubilee Plots and Housing Private Ltd. & Ors.,* OMP No's 452-453/2009 Order dated 18.08.2009).

control.

y) In order to bring the Indian law in conformity with the UNCITRAL Model Law, it is clarified that an arbitration agreement can be concluded by way of electronic communication as well.

The Indian Parliament is already on the path of revamping the Indian laws with a view to improve the World Bank's Ease of Doing Business rating[54] (currently on 130th position) of India for making the 'Make in India'[55] programme successful. Parliament has taken the recommendations made by the Law Commission very seriously and has amended the Arbitration and Conciliation Act, 1996. The amendments came into force with effect from 23.10.2015.

VI IMPORTANT JUDGMENTS BY THE INDIAN COURTS

Not only on the legislative and policy front there is activism to make ADR a successful mechanism, but also there are landmark judgments by the Supreme Court of India which has helped Indian law to come in conformity with international standards. In *Bharat Aluminum Co.* v. *Kaiser Aluminum Technical Service,*[56] a five-judge constitutional bench of the Supreme Court overturned its own earlier judgment in *Bhatia International* v. *Bulk Trading S.A. & Another*[57] and *Venture Global Engineering* v. *Satyam Computers Services Ltd & Anr.*[58] It brought Indian law in line with the well settled principle recognized internationally that "the seat of arbitration is intended to be its center of gravity". It concluded that Part I of the Arbitration and Conciliation Act, 1996 has no application to arbitrations seated outside India, irrespective of the fact that whether parties chose to apply the Act or not. The court concluded that Part I of the Act would be applicable only in cases where the seat of arbitration was in India. No annulment proceedings would lie in India against an award made outside India. The judgment has brought the Indian arbitration law at par with other international jurisdictions. It has eased the difficulties, which foreign investors/ players have been facing in enforcing foreign awards against Indian parties. However, the judgment is given prospective effect w.e.f. 06.09.2012 and provides no relief to parties who have executed their arbitration agreements prior to the date of the judgment. The aforesaid view was

54 http://www.dnaindia.com/money/report-ease-of-doing-business-india-s-world-bank-ranking-improved-from-142-to-130-says-govt-2206779.

55 http://www.makeinindia.com/home.

56 *Supra* note 52.

57 (2002) 4 SCC 105.

58 (2008) 4 SCC 190.

reiterated by the Supreme Court in *Enercon (India) Ltd. & Ors.* v. *Enercon GMBH & Anr.*[59]

In *Union of India* v *Reliance Industries Ltd. and Ors.,*[60] the Supreme Court of India clarified the position of jurisdiction and applicability of Indian law in respect of pre-*BALCO* scenario (before 06.09.2012). It was held that *BALCO* judgment has to be read with two caveats: (a) where the court comes to a determination that the juridical seat is outside India; or (b) where law other than Indian law governs the arbitration agreement. In both the scenarios Part I of the Arbitration Act, 1996 would be excluded by necessary implication. Therefore, even in the cases governed by the *Bhatia* principle (before 06.09.2012), it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the *Bhatia* principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the *Bhatia* rule.

In *Reliance Industries Ltd. & Ors.* v. *Union of India,*[61] the Supreme Court considered impartiality and independence as important factors to be kept in mind while appointing an arbitrator. It reaffirmed that under section 11(9) of the Act, it is not mandatory for the court to appoint an arbitrator not belonging to the nationality of either of the parties to the dispute. After relying on renowned scholars, it held that qualification, experience and integrity should be the criteria for appointment of an arbitrator.

In *NBCC Ltd.* v. *J.G. Engineering Pvt. Ltd,*[62] the Supreme Court, emphasizing on the need of time bound disposal of arbitration proceedings, held that the mandate of the arbitrator expires in case an award is not delivered within the time-limit stipulated by the parties in the arbitration agreement.

In *World Sport Group (Mauritius) Ltd* v. *MSM Satellite (Singapore) Pte. Ltd,*[63] the Supreme Court held that the only bar to refer parties to foreign seated arbitrations are those which are specified in section 45 of the Act i.e., in cases where the arbitration agreement is either: (i) null and void; or (ii) inoperative; or (iii) incapable of being performed. It expressly removed allegations of fraud as a

59 (2014) 5 SCC 1.

60 (2015) 10 SCC 213.

61 (2014) 7 SCC 603.

62 (2010) 2 SCC 385.

63 AIR 2014 SC 968.

bar to refer parties to foreign seated arbitrations. It was held that section 45 of the Act does not provide that the court will not refer the parties to arbitration if the allegations of fraud have to be inquired into. Section 45 provides that only if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, it will decline to refer the parties to arbitration.

In *Chloro Controls (I) P. Ltd.* v. *Severn Trent Water Purification Inc. & Ors,*[64] the Supreme Court has held that the expression 'person claiming through or under' as provided under section 45 of the Act would mean, and take within its ambit, multiple and multi-party agreements and hence, even non-signatory parties to some of the agreements can pray for and be referred to arbitration. In certain exceptional cases involving composite transactions and interlinked agreements, even non-parties, such as the parent company, subsidiary group companies or directors can be referred to and made parties to ICA.

VII HIGHLIGHTS OF ARBITRATION & CONCILIATION (AMENDMENT) ACT, 2015

Keeping in view the recommendations of the Law Commission 246th report, Parliament amended the Arbitration & Conciliation Act, 1996, by the 2015 amending Act. The amendments came into force with effect from 23.10.2015. The amendments focus on strengthening the institutional set up of arbitration, disclosures in appointments of arbitrators, time bound procedures, minimum intervention by courts and streamlining the arbitral set up in the country. The highlights of the amendments are enumerated below:

- The designated court for dealing with the applications and petitions in the cases of international commercial arbitration is the high court. In order to expedite the procedure, international commercial arbitration and compliance of Law Commission recommendations, it is now ensured that the cases/ applications pertaining to the international commercial arbitration be dealt with at the level of the high court and that too in a time bound manner. This amendment is in sync with the legislative intent as enshrined in the Commercial Courts, Commercial Divisions and Commercial Appellate Division of High Courts Act, 2015 to deal with the commercial disputes of specified amount at the high court level by establishing commercial benches. Dealing of ICA cases by specialized benches will help not only in expeditious disposal but also development of precedents and ICA jurisprudence.

64 (2013) 1 SCC 641.

- To attract ingredients of ICA, it is necessary that one of the parties is a national of or habitually resident of a country other than India. In cases of companies, before amendment, it was presumed that if the central management and control of a company is exercised out of India, it would be deemed to be a foreign party. Post amendment, that criterion has been done away with and now the place of incorporation is the relevant test to determine the nature of arbitration i.e., domestic or international. [S.29(f)(iii)]
- As per the proviso added to s. 2(2), part I [ss.9, 27, 37(3)(1)] has been made applicable by default to international commercial arbitration. The only exception is "subject to agreement to the contrary" i.e., in case the parties choose the seat of arbitration other than India or curial law to be a foreign law, part I shall not apply. This implies that even if India is chosen as the venue for arbitration but the curial law is foreign, part I would not apply to it. The aforesaid amendment is in sync with the recommendations of the Law Commission and the direction given by the Supreme Court of India in *BALCO*. This amendment has brought Indian position in conformity with the UNCITRAL model and it will go a long way in establishing institutional arbitration set up in India and in attracting foreign parties to choose India as a destination for arbitration.
- Exchange of emails which provides record of agreement, may also constitute arbitration agreement. [s. 7(4)(b)]
- If any case is pending before the judicial authority/court in which the *lis* is the subject matter of arbitration, any of the parties or *the persons claiming through or under him*, may apply to the court to refer the dispute to arbitration. Parliament, conceding to the recommendations of the Law Commission, has given rights to the persons/entities other than primary parties, to apply to the court for referring the case to arbitration. This provision will go a long way in protecting the rights of stakeholders interested in protecting their interest in litigation involving or affecting their rights. [s. 8(1)]
- In case any interim order is passed by the court under section 9 before the commencement of arbitration, the arbitration proceedings shall be commenced within a period of 90 days from the date of interim order. This provision will help in curtailing the practice of parties, who sit complacent and tend to delay arbitral proceedings, after obtaining interim orders. [s. 9 (2)]
- In order to reduce the intervention of court in arbitration proceedings, it is

mandated that interim applications under section 9 shall not be entertained by the court after the arbitral tribunal is constituted unless the court finds that circumstances exist which may render remedy under section 17 inefficacious. This provision will help in motivating the parties to move interim applications before the arbitral tribunal and will reduce court intervention to only exceptional circumstances.

- Section 11 has been amended and the power to appoint arbitrator has been conferred on the court i.e., the high court or the Supreme Court, replacing the earlier provision authorizing the Chief Justice to appoint arbitrator. Section 11(6A) mandates that while appointing arbitrator the court shall limit the examination to the extent of existence of arbitration agreement. Acknowledging the recommendations of the Law Commission, provision has been made enabling the court to authorize any institution to appoint arbitrator. It is clarified in section 11(6B) that appointment of arbitrator through arbitral institution shall not amount to delegation of judicial power. As per section 11(7), the decision on appointment of arbitrator by the court shall be final and no appeal, including letters patent appeal, shall lie against it. This provision will help in strengthening the roots of institutional arbitration in India and get rid of maladies of *ad hoc* arbitration. The finality of decision will also help in reducing the unnecessary delays caused in appointment of arbitrator. Arbitral institutions, having a panel of specialists, trained arbitrators, can appoint arbitrator keeping in view the nature of dispute and the qualification, experience and exposure of professional on panel. The arbitral institutions will also offer administrative support; record keeping, translations and rules bound arbitration, ensuring checks and balances on conduct of arbitrator, thereby bringing transparency in the system.
- Appointment of arbitrator is made time bound i.e., within the period of 60 days from the date of service of notice on other party. [s.11(13)]
- Taking a long leap in ensuring transparency and denting the abominable approach of having favourable arbitrator, section 11(8) has mandated disclosures in writing by the prospective arbitrators before their appointment. The disclosures involve financial, professional and business; the other kinds of disclosures include those on qualification and the independence of arbitrator. Section 12 mandates the proposed arbitrator to give disclosure on the relations specified in schedule V as per the form specified in schedule VI. A person whose relationship falls in categories specified in VII schedule shall become ineligible for appointment. However, parties may waive this

ineligibility, by an agreement in writing. This provision will curtail the practice of government or public sector institutions of appointing their employees or consultants as arbitrators and will go a long way in bringing transparency and fair play in arbitral proceedings.

- In the case of ICA, the Supreme Court has been given leverage to appoint arbitrator of a nationality, other than the nationalities of parties confronting in arbitration. [s.11(9)]
- As per section 11(14), in the case of domestic arbitration, fees/rates for arbitration is specified in schedule IV and the high courts have been given leverage to frame their own rules based on the model rates given in the said schedule. However, no fee structure is recommended for international commercial arbitration or for the cases where parties have agreed for a fee structure as per the structure of an arbitral institution. The schedule IV is kept open for amendment by the central government (s.11A)]. By this provision Parliament has prescribed model rates to ensure fair play on the one hand, and given freedom to litigants to go under institutional framework and pay fee keeping in view the amenities offered to them, on the other.
- In order to avoid unnecessary delay in arbitration proceedings, the legislature has ensured that if the arbitrator failed to act without undue delay, it may be a ground for termination of his mandate and he will be substituted by another arbitrator. [s. 14(1)]
- Earlier, the enforceability of interim orders passed by the arbitral tribunal was an issue and therefore the parties preferred application under section 9 in courts to have the force of court sanctioned enforceability. By making amendments in section 9 and section 17, not only the court's intervention for passing interim orders is discouraged, but the power of arbitral tribunal is honed, as the interim orders passed by it shall be deemed to be order of the court for all purposes and be enforceable under the Civil Procedure Code, 1908 as if it were an order passed by the court. This provision will help in reducing the backlog of application under section 9 pending before the courts and will motivate the parties to seek interim relief from arbitral tribunal, thereby reducing the court intervention to the minimal level.
- In order to avoid multiplicity of proceedings pertaining to the same transaction, the legislature has permitted the respondent to plead counter claim or set off, if it falls within the scope of arbitration agreement.
- To ensure expeditious disposal, the arbitration tribunal has been empowered

to conduct proceedings on a day to day basis and to discourage unnecessary adjournments, it has been conferred with power to impose costs including exemplary cost. [Proviso to s. 24(1)]

- In case the respondent fails to communicate the statement of defense, the arbitral tribunal has been permitted to forfeit the right of respondent to file the statement of defense. However, the tribunal shall continue the proceedings without treating such failure as admission to the claim. [s. 25(b)]
- Arbitration is made time bound. The award shall be made by the arbitral tribunal within 12 months from the time of reference i.e., the date of receipt of notice of appointment. However, the parties by mutual consent can extend the period for another six months. If the award is not made in the specified period the mandate of arbitrator terminates, unless the court extends it. This is in sync with the mandate contained in section 14 (1)(a) which mandates that arbitrator shall act without undue delay failing which his mandate shall terminate. While extending the mandate if the court comes to the conclusion that reasons for delay were attributable to arbitral tribunal, the court may order for reduction of fees of arbitrator(s) by not exceeding five percent for each months delay. While extending the period, the court may substitute all or any one of the arbitrators. The arbitration proceedings shall commence from the same stage after such extension. The court shall decide the application seeking extension of period within 60 days from the date of service of notice to the opposite party. [s. 29A]
- The legislature by taking a long leap has introduced *Fast Track Arbitration* in India. Notwithstanding anything contained in the Act, the parties may, at any stage before or after the appointment of arbitral tribunal, agree in writing to get the dispute resolved by *fast track procedure.* In fast track procedure, the tribunal shall consist of sole arbitrator. The case will be decided on the basis of written pleadings, documents and submissions without oral hearings. Oral hearing will take place only when all parties request or when the tribunal deems it expedient to clarify some issues. In fast track procedure, the award shall be made within the period of six months from the date the arbitral tribunal enters upon reference. The fees and the manner of payments shall be subject to mutual agreement of the parties. [s. 29B]
- In addition to *pendente lite* interest, the arbitral tribunal is also empowered to award future interest at a rate of two percent over and above the prevailing market interest rate, from the date of award till the date of payment. This

provision is another impetus to motivate parties to choose arbitration as dispute settlement mechanism. [s. 31(7)(b)]

- Section 31A enables the court or arbitral tribunal to make orders as to payment of costs pertaining to fees and expenses of arbitrators, legal fees and expenses, administration fees of institution supervising arbitration or any other expenses. As a general rule the unsuccessful party shall be ordered to pay the costs to the successful party. While awarding costs, the court or tribunal may consider the conduct of the party, frivolous counterclaims leading to delay, refusal of reasonable offers for settlement etc. Any agreement in respect of costs shall be valid only if it has been arrived at after the dispute has arisen. It means that parties will be relieved from the burden of onerous clauses as to payment of arbitration costs, included in single sided contracts executed between parties with unequal bargaining power. For example, a general clause in agreement that parties will share the cost of litigation equally, will not inhibit the tribunal from imposing all the cost on the unsuccessful party.
- Section 34 of the Act deals with grounds for setting aside the domestic arbitration award. One of the most debated volatile ground is 'Public Policy of India'. Courts have interpreted this ground in narrow as well as broader sense and clarifications have come from various decisions of the apex court. In sync with the recommendations of the Law Commission, the grounds for setting aside an award are narrowed down to:
  - making of award is induced by fraud or corruption;
  - in contravention to fundamental policy of India; or
  - conflict with most basic notions of morality or justice.

  It is clarified that, to test whether the award is in contravention of the fundamental policy of India, does not entail a review on the merits of the dispute. It is further clarified that the ground of patent illegality is only available for domestic arbitration and not for international commercial arbitration. The award shall not be set aside merely because of erroneous application of law or by re-appreciation of evidence. The ground of 'against the interest of India' has been done away with in line with the recommendations of the Law Commission. [s. 34]
- In order to cut short the procedure, prior notice of section 34 application to the opposite party is made mandatory. The court is mandated to decide the said application expeditiously and in any event within a period of one year

from the service of notice to the other party. This clause interestingly does not provide any scope for extension of period. [s. 34(6)]

- The procedure of automatic stay of award on filing of application under section 34 has been done away with. As per section 34(2), merely filing an application under section 34, shall not by itself render the award unenforceable unless the court grants an order of stay on a separate application. The court, while staying the operation of impugned award, may impose such conditions as it may deem fit.
- Post amendments, appeal can be filed against the following orders:
  - refusal to refer parties to arbitration under section 8;
  - granting or refusing to grant any interim measure under section 9;
  - setting aside or refusing to set aside award under section 34;
  - accepting plea refereed in section 16(2) or 16(3); or
  - granting or refusing to grant any interim measure under section 9.

  No second appeal shall lie against aforesaid orders.
- Section 48 (New York Convention) and section 57 (Geneva Convention) of the Act deal with grounds for refusal to enforce foreign arbitration awards.
- Where the court is satisfied that foreign awards are enforceable it shall be treated as deemed decree of the court. [s. 49 (New York Convention), s. 58 (Geneva Convention)]

From the aforesaid amendments it is amply clear that Parliament has incorporated the directions of the Supreme Court as well as the recommendations of the Law Commission in the statute. The aforesaid amendments have recognized the institutional set up of Arbitral Institutions and will pave way for reform in the area of institutional arbitration in India.

VIII ENFORCEMENT OF AWARDS

One of the major problems faced in the area of international commercial arbitration is related to recognition and enforcement of an arbitral award made in one country by the courts of other countries. In order to strengthen the enforceability of arbitration award in a foreign territory, the Geneva Protocol was entered on initiative of the International Chamber of Commerce under the auspices of the League of Nations. The Geneva Protocol aimed at making of arbitration agreements and enforcement in the territory of the state in which they were made.

The Geneva Protocol of 1923 was followed by the Convention on the Execution of Foreign Arbitral Awards, 1927. "Geneva Convention of 1927",[65] was also drawn up under the auspices of the League of Nations. The purpose of this Convention was to widen the scope of the Geneva Protocol of 1923 by providing recognition and enforcement of protocol awards within the territory of contracting states, (not merely the state in which the award was made).[66]

India was a signatory to the Protocol of 1923 and the Convention of 1927. With a view to implementing the obligations undertaken under the said Protocol and Convention, the Arbitration (Protocol & Convention) Act, 1937 was enacted. Geneva treaties had limitations in relation to their field of application. A party seeking enforcement had to prove the conditions necessary for enforcement and in order to show that the awards had become final in its country of origin, the successful party was often obliged to seek a declaration in the countries where the arbitration took place to the effect that the award was enforceable in that country, before it could go ahead and enforce the award in the courts of the place of enforcement.

In 1953 the International Chamber of Commerce (ICC) promoted a new treaty to govern international commercial arbitration. The proposals of ICC were taken up by the United Nations Economic and Social Council and it led to the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York, 1958[67] (hereinafter referred to as 'the New York Convention'). The New York Convention is an improvement on the Geneva Convention of 1927 in the sense that it provides for a much simpler and effective method of obtaining recognition and enforcement of foreign arbitral awards and it replaces Geneva Convention of 1927 as between the states which are parties to both the Conventions. The New York Convention also gives much wider effect to the validity of arbitration agreements than does the Geneva Protocol of 1923. India is a party to the New York Convention. Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted to give effect to the New York Convention and for purposes connected therewith.

Part II of the Arbitration and Conciliation Act, 1996 is divided into two chapters. Chapter 1 deals with foreign awards delivered in arbitration conducted in the signatory territories to the Convention on the Recognition and Enforcement

65 http://interarb.com/vl/g_co1927.

66 See, Alen Redfern, *et al, Law & Practice of International Commercial Arbitration,* at 61-62 (2nd Edn.).

67 http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

of Foreign Arbitral Awards, 1958 ("New York Convention"). Chapter 2 covers foreign awards delivered under the Convention on the Execution of Foreign Arbitral Awards, 1927 ("Geneva Convention").

As per section 44,[68] a foreign award under Part II contains the following elements:

(i) an arbitral award;

(ii) on differences between persons arising out of *legal relationships*, whether contractual or not;

(iii) considered as commercial *under the law in force in India*;

(iv) made on or after 11th day of October, 1960;

(v) in pursuance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies; and

(vi) in one of such territories as the central government, being satisfied that reciprocal provisions are made, *may by notification in the Official Gazette*, declare to be territories to which the said convention applies.

From the aforesaid definition it is clear that, a foreign award passed in the territory of any of the convention countries, will be enforceable only when it offers reciprocal arrangement and the central government (Government of India) has declared reciprocity with a convention country.

Any civil litigation can ordinarily be divided into two limbs, firstly, the trial and the judgment, and secondly, the execution. Execution is the most important area in any litigation. In the absence of strong execution mechanism a decree or award is nothing but a piece of paper lacking enforceability. It is experienced that most of the time the execution proceedings are stalled because of innumerable objections and legal technicalities are raised by the judgment debtors. The Indian Arbitration and Conciliation Act, 1996 also recognizes the theory of raising objections against the awards. It has separate provisions for challenging domestic and international awards. Section 34 deals with the grounds for setting aside domestic awards and

68 *44. Definition.* — In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-
(*a*) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
(*b*) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

section 48/57 deals with grounds under which enforcement of a foreign award may be refused. From the bare language of sections 34 and 48, it is clear that, while in the case of domestic awards, the court has power to set aside the award, in the case of the international commercial arbitration awards, the court can only refuse to enforce the awards. This implies that the court cannot set aside the international arbitral award under the Indian legislation and can only refuse to execute it.

So far as the grounds for stalling the awards are concerned, sections 34 and 48 are similarly worded. The most volatile ground which hovers around the majority of arbitration awards is the ground of *"Public Policy"*. For an international investor, looking forward to invest in India and relying on arbitration as dispute settlement mechanism, it is fundamental to understand this concept. The whole planning to have comprehensive investment agreements, arbitration clauses, choice of best curial law, best arbitration institution and arbitrators etc, may go futile, if the execution of arbitration award (domestic or foreign) is hit by the inclusive definition of the term "Public Policy". If a foreign award is in conflict with "Public Policy" of India, it will not be treated as deemed decree of court and cannot be enforced in India.

Now, let us understand the term "Public Policy". Explanation to both the sections 34 and 48 explains that, if the making of the award is induced or affected by fraud or corruption, it is in conflict with the public policy of India. But this is not the end as regards the definition. The definition has been appreciated and developed on case by case basis. The interpretations of expression "Public Policy" have been intertwined by the Indian courts in cases of domestic and international awards. None of the other grounds for setting aside the arbitration award deals with merits of decision rendered by an arbitral award. It is only when an award is in conflict with the public policy of India; merits of an arbitration award can be looked into.[69] Let us focus on some landmark judgments of the Supreme Court of India dealing with the concept of "Public Policy".

In *Renusagar Power Co. Ltd.* v. *General Electric Co.,*[70] the Supreme Court while dealing with a foreign award held as under:

> 66. Article V (2) (*b*) of the New York Convention of 1958 and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement

69 *Associate Builders* v. *DDA*, (2015) 3 SCC 49 (para 17).

70 1994 Supp (1) SCC 644 at 682.

> and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(*b*) of the New York Convention and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(*c*) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. *This would mean that "public policy" in Section 7(1) (b)(ii) has been used in a* ***narrower sense*** *and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India.* Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. *Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.*

Later on, in *ONGC* v. *Saw Pipes Ltd*,[71] the Supreme Court while deciding a domestic dispute concluded that the term "Public Policy" is required to be given a wider meaning. The relevant text of the judgment is reproduced below:

> *Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning.* It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. *However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public*

71 (2003) 5 SCC 705 (para 30).

> *policy" in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal.*
> The result would be award could be set aside if it is contrary to:
> (*a*) fundamental policy of Indian law; or
> (*b*) the interest of India; or
> (*c*) justice or morality, or
> (*d*) in addition, if it is patently illegal.
> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

In *Saw Pipes*[72] the court further concluded that it may set aside the award if it is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract. This judgment was followed in many other cases by the Supreme Court of India.

In *DDA* v. *R.S. Sharma & Co,*[73] the Supreme Court, after examining the various precedents, concluded the grounds of public policy on which the award can be set aside. It concluded as follows:

> 21. From the above decisions, the following principles emerge:
> (*a*) An award, which is
> (*i*) contrary to substantive provisions of law; or
> (*ii*) the provisions of the Arbitration and Conciliation Act, 1996; or
> (*iii*) against the terms of the respective contract; or
> (*iv*) patently illegal; or
> (*v*) prejudicial to the rights of the parties;
> is open to interference by the court under Section 34(2) of the Act.
> (*b*) The award could be set aside if it is contrary to:
> (*c*) fundamental policy of Indian law; or
> (*d*) the interest of India; or
> (*e*) justice or morality.
> (*f*) The award could also be set aside if it is so unfair and

72 *Ibid.*

73 (2008) 13 SCC 80 at 91.

unreasonable that it shocks the conscience of the court.

(*g*) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

Thereafter, a three judge bench of the Supreme Court in *Shri Lal Mahal Limited* v. *Progetto Grano Spa,*[74] reconciled the views taken in *Renusagar* and *Saw Pipes* and held as follows:

> 26. From the discussion made by this Court in *Saw Pipes* in para 18, para 22 and para 32 of the report it can be safely observed that while accepting the narrow meaning given to the expression "public policy" in *Renusagar* in the matters of enforcement of foreign award, there was departure from the said meaning for the purposes of the jurisdiction of the Court in setting aside the award under Section 34.
>
> 27. In our view, what has been stated by this Court in *Renusagar* with reference to Section 7(1)(*b*)(*ii*) of the Foreign Awards Act must apply equally to the ambit and scope of Section 48(2)(*b*) of the 1996 Act. In *Renusagar* it has been expressly exposited that the expression "public policy" in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act refers to the public policy of India. The expression "public policy" used in Section 7(1)(*b*)(*ii*) was held to mean "public policy of India". A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in *Renusagar*. For all this there is no reason why *Renusagar* should not apply as regards the scope of inquiry under Section 48(2)(*b*). *Following Renusagar, we think that for the purposes of Section 48(2)(b), the expression "public policy of India" must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in Renusagar. Although the same expression "public policy of India" is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the concept of "public policy in India" is same in nature in both the sections*

74 (2014) 2 SCC 433 at 447.

but, in our view, its application differs in degree insofar as these two sections are concerned. The application of "public policy of India" doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

28. We are not persuaded to accept the submission of Mr Rohinton F. Nariman that the expression "public policy of India" in Section 48(2)(*b*) is an expression of wider import than the "public policy" in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act. *We have no hesitation in holding that Renusagar must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] would govern the scope of such proceedings.*

29. *We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in Saw Pipes is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).*

30. It is true that in *Phulchand Exports*, (2011) 10 SCC 300 a two-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression "public policy of India" in Section 34 in *Saw Pipes* must be applied to the same expression occurring in Section 48(2)(*b*) of the 1996 Act. However, in what we have discussed above it must be held that the statement in para 16 of the Report that the expression "public policy of India used in Section 48(2)(*b*) has to be given a wider meaning and the award could be set aside, if it is patently illegal" does not lay down correct law and is overruled.

From the judgment in *Shri Lal Mahal Limited*[75] it is clear that the term

75 *Ibid.*

"Public Policy" has to be construed narrowly in the context of foreign awards and the objections under the head "Public Policy" under section 48 of 1996 Act, are limited to only three grounds i.e., (i) fundamental policy of Indian law; (ii) the interest of India; or (c) justice or morality.

After understating the aforesaid principles, it is important for a foreign investor to decipher and decode the scope and ambit of aforesaid three areas of concern. This demystification was done by the Supreme Court in *Associate Builders*[76] where it elaborated the grounds of 'public policy' as follows:

> **A.** *'Fundamental Policy of Indian law'* would include factors such as:
>
> i. disregarding orders of superior courts;
> ii. judicial approach, which is an antithesis to an arbitrary approach;
> iii. principles of natural justice;
> iv. decision of arbitrators cannot be perverse and irrational insofar as no reasonable person would come to the same conclusion.
>
> The Supreme Court held that an arbitrator is the sole judge with respect to quality and quantity of facts and therefore an award is not capable of being set aside solely on account of little evidence or if the quality of evidence is of inferior quality. The Supreme Court further held that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently "errors of fact" cannot be corrected unless the arbitrators approach is arbitrary or capricious.
>
> **B.** The Supreme Court described *'Interest of India'* as something which deals with India in world community and its relations with foreign nations. The Supreme Court did not illustrate this ground in detail as the same is a dynamic concept which needs to evolve on a case by case basis.
>
> (Note: The law commission in its 246th report has suggested that term *'interests of India'* is vague and is capable of interpretational misuse, especially in the context of challenge to awards arising out of international commercial arbitration. Under the formulation of the Commission, an award can be set aside on public policy

76 *Supra* note 69 (para 12).

grounds only if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice").

C. The Supreme Court held that the term *'award is against justice and morality'* would include the following:

i. with regard to justice, the award should not be such that it shocks the conscience of the court;
ii. with regard to morality, there can be no universal standard however, the Supreme Court observed that both the English and the Indian courts have restricted the scope of morality to "sexual immorality" only;
iii. with respect to an arbitration, it would be a valid ground when the contract is not illegal but against the mores of the day, however, held that this would only apply when it shocks the conscience of the court.

D. The term *'Patent Illegality'* would include:

i. fraud or corruption;
ii. contravention of substantive law, which goes to the root of the matter;
iii. error of law by the arbitrator;
iv. contravention of the Arbitration Act itself;
v. where the arbitrator fails to consider the terms of the contract and usages of the trade as required under Section 28(3) of the Act; and
vi. if arbitrator does not give reasons for his decision.

IX BILATERAL INVESTMENT TREATIES

Another area of concern is the investor state arbitration arising out of the Bilateral Investment Treaties (BIT), Free Trade Agreements,[77] Energy Charter Treaty, Regional Agreements and other multilateral agreements where investment protection measures have been incorporated. In 1965 International Convention on the Settlement of Investment Disputes between states and nationals of other states ("ICSID Convention") created an international forum for resolution of disputes between investors and states through the inclusion of arbitration clauses in state contracts. India has not signed or ratified this convention. But to fill the gap, the

77 Chapter 11 of NAFTA included investment protection measures similar to those of BIT.

Indian Government has signed Bilateral Investment and Promotion Agreements (BIPA) with 83 countries out of which 72 BIPA have come into effect.[78] Realizing the importance of BIT's, the Government of India has revised its model Bilateral Investment Treaty.[79] Bilateral investment treaties are entered into between two nations in order to promote and protect investment in partnering countries. The terms and conditions may differ from one BIT to the other. BIT may apply to existing as well as to future investments depending upon the terms negotiated between the parties.

While investing abroad, the companies take into account the BIT between their country as well as the BIT entered into by other countries and route the investment by creating special purpose vehicles. For example, a U.S. investor looking forward to invest in China, in the absence of a BIT, may route his investment through other countries having a BIT with China. However, one needs to be circumspect whether the given BIT recognizes substantial business presence or mail box companies doing forum shopping can also survive. The basic premises on which a BIT works is: (a) expropriation redress; (b) fair and equitable treatment for investors by providing stable legal and business environment; (c) predictable legal framework; (d) full protection & security; (e) currency transfers; (e) most favoured nation treatment and national treatment; (f) market access in restricted areas; and (g) access to international arbitration. A claim under the BIT may trigger pursuant to expropriation, cancellation of permit, licence or breach of contract etc. In a BIT, an investor can directly initiate international commercial arbitral proceedings against a state without approaching its own government.

Under the model treaty, an investor has the option to initiate arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, or under the Additional Facility Rules of the International Convention for Settlement of Investment Disputes ("ICSID").The issues like identification of appropriate respondent in BIT, applicability of Indian Arbitration and Conciliation Act, 1996, multiplicity of proceedings, possibility of overlapping of issues in contract arbitration and BIT arbitration, and the anti arbitration injunction are the areas of concern.[80] The growing number of BITs has made India more vulnerable to investment claims initiated under investor to state dispute settlement mechanism, which is evident from the claims faced by

78 http://www.finmin.nic.in/bipa/bipa_index.asp?pageid=4

79 https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

80 *The Board of Trustees of the Port of Kolkata* v. *Louis Dreyfus Armaturs SAS,* 2014 SCC Online Cal 17695.

the Indian Government in the case of *White Industries* v. *Republic of India*[81] and claims filed by the *Khaitan Holdings Mauritius Ltd.*[82] after cancellation of 122 licences by the Supreme Court of India in the 2G Spectrum case. In order to cope up with the international arbitration resulting from BITs and other international agreements, it is necessary to have a deep rooted institutional set up of arbitration in India and also there is need to have Indian seat of arbitration wherein India can be chosen as a venue for international arbitration.

X INSTITUTIONALIZATION OF ARBITRATION IN INDIA

With the legal predictability and clarity given by the aforesaid landmark judgments of the apex court, the Law Commission reports and the consequent legislative amendments made in the Arbitration and Conciliation Act, 1996, the arbitration law in India has become more and more UNCITRAL compliant. The area which needs to be revamped and developed is the Institutional Arbitration in India. *Ad hoc* arbitration has many limitations like individual biases, cost uncertainty, lack of ministerial support, absence of regulatory supervision over arbitrator, etc. On the other hand, in the case of institutional arbitration the procedure is governed by the standard rules and regulations. Large number of professionals on the panel enhances the choice of professional adjudicators who may understand the technicalities of a dispute; the barrier of language is not an issue in institutions with facility of real time translation services; expenditure on arbitration can be predetermined as per standard formulas; venue can be fixed as per suitability of parties at different chapters of institutions; disposal can be made time bound and, most importantly, there is a regulatory frame work to keep a check on the arbitrator.

In India there are some institutions which are already doing good work in the area of arbitration: Delhi International Arbitration Center[83] was set up by the High Court of Delhi. Indian Council for Arbitration[84] was established jointly by the Indian Government and the FIICI. It has signed cooperation agreements with 46 major arbitration centers around the world. It is providing arbitration services in the area of international commercial and maritime arbitration. International Center for Alternate Dispute Resolution[85] is an autonomous body working under the aegis

81 http://www.italaw.com/cases/documents/1170.

82 http://indianlawyer250.com/news/article/230/telecoms-company-sues-india-talks-fail/.

83 http://www.dacdelhi.org/.

84 http://www.icaindia.co.in/.

85 http://icadr.nic.in/.

of the Ministry of Law and Justice, Government of India. It is head quartered in New Delhi and has regional centers in Hyderabad and Bengaluru. The Nani Palkhiwala Arbitration Centre[86] situated at Chennai, is modeled on the lines of the International Council of Arbitration set up by the International Chamber of Commerce, Paris.

The establishment of the aforesaid arbitral institutions clearly shows that a tone is already been set in India to make institutional arbitration a big success. The neighbour country of Singapore, realizing the potential of arbitration, has already set up the Singapore International Commercial Court (SICC)[87] as a prime destination for International Commercial Arbitration. It is looking forward to become an arbitration hub of southeast Asia and south Asia. The SICC is a division of the Singapore High Court and part of the Supreme Court of Singapore designed to deal with transnational commercial disputes. It offers translation, interpretation and e-filing services for arbitration. It permits representation by a foreign lawyer subject to laws of Singapore.

Similarly, institutions like ICC International Court of Arbitration,[88] London Court of International Arbitration (LCIA),[89] International Centre for Settlement of Investment Disputes (ICSID)[90] and International Centre for Dispute Resolution[91] set up by the American Arbitration Association, are providing arbitration services worldwide.

The market in India is been opened up, the Indian government is pushing FDI in the country and laws have been simplified to meet the need of the hour. The Indian ratings in World Bank's ease of doing business norms have improved. The Law Commission of India has recommended setting up of arbitration institutions and Arbitration Commission of India. Arbitration Act has been amended in consequence. Procedures have been made time bound. Disclosures in appointment have been introduced. India has a long list of countries with whom it has reciprocal

86 http://www.nparbitration.in/.

87 http://www.sicc.gov.sg/.

88 http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/.

89 http://www.lcia.org/.

90 https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx. It is one of the organisation of world bank group. ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties.

91 https://www.icdr.org.

arrangements for execution of arbitration awards. The arbitration claims under Bilateral Investment Treaties is on the rise. The Society of Indian Law Firms (SILF) and the Bar Council of India have agreed to the government proposal to gradually open legal sector for the foreign players on reciprocal basis.[92] The legal framework is looking healthy and ready. If India wants to go northwards in FDI Confidence Index, it is imperative that efforts be made to institutionalize the International Commercial Arbitration by establishing the Indian Seat of International Commercial Arbitration where India can be chosen by foreign players as the venue and arbitration hub for International Institutionalized Arbitration.

XI CONCLUSION

The amendments to the Arbitration Act have brought in the necessary changes to streamline the process of arbitration. FDI is being boosted and Bilateral Investment Treatises are being negotiated. India is being looked at from worldwide as a favourite investment destination. It is high time to set up stage for International Arbitration in India by establishing Arbitral Institutions offering professional panel of arbitrators, administrative services, real time translations, record keeping and time bound transparent disposals. The Indian legal system needs to deliver to its potential and look forward to hosting the worldwide international arbitration at 'The Indian Seat of International Commercial Arbitration'.

92 http://timesofindia.indiatimes.com/india/Bar-council-okay-with-foreign-lawyers-entry/articleshow/47942641.cms.

CARDOZO'S CONTRIBUTION TO JUDICIAL PROCESS IN INDIA IN THE EXERCISE OF JUDICIAL DISCRETION

APOORV SARVARIA*

I INTRODUCTION

No discussion on the subject "Judicial Process" can possibly be made without dealing with Benjamin Nathan Cardozo's philosophy of law. As Andrew Kaufman puts it in his biography on Cardozo, "Benjamin Nathan Cardozo lived for the law, and the law made him famous."[1] Cardozo was a twentieth century pragmatist, sharing the same basic values as Roscoe Pound, Oliver Wendell Holmes and John Dewey.[2] There are different kinds of judges and different recipes for judicial greatness. Cardozo achieved greatness because of his professionalism, his felicity of expression, his aptitude for careful analysis, and his combination of detachment, self-awareness, modesty of judgment, and imaginative sympathy. Together, these attributes enabled him as a judge to operate simultaneously inside and outside of the law. Cardozo regarded himself as a participant in the practice of law; he maintained the "internal point of view" of the legal practitioner.[3]

Besides being a great judge, Cardozo was also a great philosopher. As Edwin W. Patterson puts it, "Cardozo's contributions to the juristic culture of his time are not confined to the doctrinal illuminations and improvements which are to be found in his judicial opinions."[4] Cardozo's book *The Nature of the Judicial Process*[5] is one of the most memorable sources[6] of his philosophy of law. The present paper is an attempt to discuss the impact of his philosophy on the judicial process in India. The area of coverage would be limited to judicial discretion and judicial restraint. In this context, Part II would analyse Cardozo's philosophy on judicial discretion. In Part III, analysis would be made of selected rulings of the Supreme Court of India that have explicitly relied upon Cardozo's philosophy, as

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* Judge, DJS.

1 Andrew L. Kaufman, *Cardozo* (Harvard University Press, 1988).

2 James M. Boland, "Constitutional legitimacy and the culture wars: Rule of law or dictatorship of a shifting Supreme Court majority?" 36 *Cumb. L. Rev.* 245 at 274 (2005-06).

3 John C.P. Goldberg, "The Life of the Law", 51 *Stan. L. Rev*. 1419 at1473 (1999).

4 Edwin W. Patterson, "Cardozo's Philosophy of Law", 88 *U Penn L. Rev.* 71 (1939).

5 Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press (1921).

6 Cardozo's philosophy of law is also to be found in his judicial opinions and his three other books, namely, *The Growth of the Law* (1924), *The Paradoxes of Legal Science* (1928) and *Law and Literature and Other Essays and Addresses* (1931).

reflected in his work *The Nature of the Judicial Process*.

II CARDOZO'S PHILOSOPHY

Cardozo was a careful, thoughtful judge with the instincts of a moderate.[7] As a jurist, he conceived of law as conceptual but not sterile, principled but not rigid, autonomous but not alien.[8] He was a "pragmatic conceptualist." His unusual combination of philosophic acumen, detachment, self-awareness, humility, and perceptiveness helps explain why he was capable of careful conceptual analysis, while remaining aware of the limitations and dangers that attend it.[9]

Cardozo structured his work *The Nature of the Judicial Process* around a basic tension. According to him, to maintain its fairness, predictability and legitimate authority, the law must always seek conceptual coherence.[10] In the above quoted work, he discussed the sources of information to which he appealed for guidance and analysed the contribution that considerations of precedent, logical consistency, custom, social welfare, and standards of justice and morals have in shaping the court's decisions. Cardozo has described in simple and understandable language the conscious and unconscious processes by which a judge decides a case. His work beautifully conveys analytic insights into the substantive issues that it addresses.

He argued that judges have an obligation to be creative and humanistic as they deliberate in the interstices of legislative rules. Cardozo's approach begins with the assumption that "judge-made law [is] one of the existing realities of life."[11] Cardozo made explicit use of the aesthetic analogy, suggesting that logic and legal rules were simply tools in the hands of the judicial artist: "Much must be left to that deftness in the use of tools which the practice of an art develops. A few hints, a few suggestions, the rest must be trusted to the feeling of the artist."[12] Cardozo reminds us that on pragmatic level cases arise quite regularly which the legislature never anticipated, or anticipated poorly. In these cases *stare decisis* fails as a necessary and sufficient decision procedure and judges must fill the gap. This is why a judge must be more than a computer, where wisdom and inventiveness are required. If law were merely the process of deriving conclusions from major

7 *Supra* note 3 at 1446.

8 *Id.* at 1475.

9 *Id.* at 1461-62.

10 *Id*. at 1458.

11 *Supra* note 5 at 10.

12 *Id.* at 36.

premises provided by Parliament, a turing machine would do for a judge. But law is inductive, and though logical consistency is good, it is not the only good. Complete justice demands an artistic sensibility as well.[13] In a way, Cardozo introduced the element of discretion in judicial process the moment he introduced a judge as an "artist", since wisdom can be exercised and inventions can be made only when there is discretion inhering in judges while deciding cases.

Cardozo's traditional legal analysis used expressions of reasonableness and expectations, and invoked social norms, moral impulses, economic insights, and other intuitions of substantive justice.[14] He effectively discredited the legal formalists' view of the law as a closed system of preordained rules that were logically to be discovered and mechanically to be applied.[15] Judicial discretion being an essential part of the judicial process, all the methods[16] given by Cardozo were aimed to act as a guide in its exercise.

In Cardozo's view, judges must be rational, but more importantly, they must be wise, and wisdom requires a kind of flexibility and practiced artistry that reason alone can never capture.[17] Hence, being different from reason, wisdom covered a broader spectrum than that surmounted by reason. As Lynne Henderson has said, "Wisdom is more than reason. Born of experience, it is both. It has its 'intuitive' elements and its 'cognitive' elements. It is based on the dialogue of heart and head, and includes emotion and compassion."[18] The judge's internal compass -- his sense of justice, of good results, of proper professional conduct -- can exert a powerful influence on decisions. Various external influences inform this sense, including the views of friends, of public and professional commentators, of politicians, and so on. But there are instances wherein a sense of right not significantly moderated by any discernible current source of public reaction guides the judge.[19] These sub-conscious forces do play a significant role in exercise of judicial discretion. As Cardozo eloquently observed:[20]

13 Rebecca S. Henry, "The Virtue in Discretion: Ethics, Justice, and Why Judges Must be 'Students of the Soul'" 25 *N.Y.U. Rev. L. & Soc. Change* 65 (1999).

14 Lawrence A. Cunningham, "Traditional versus Economic Analysis: Evidence from Cardozo and Posner" 62 *Fla L. Rev.* 667 (2010).

15 Kim McLane Wardlaw, "Umpires, Empathy, and Activism: Lessons from Judge Cardozo", 85 *Notre Dame L. Rev.* 1629 (2010).

16 The methods of philosophy, history, tradition and sociology and adherence to precedent.

17 *Supra* note 13 at 88.

18 Lynne Henderson, "The Dialogue of Heart and Head", 10 *Cardozo L. Rev.* 123 at 139 (1988).

19 Ronald A. Cass, "Judging: Norms and Incentives of Retrospective Decision-Making" 75 *B.U. L. Rev*. 941 (1995).

20 *Supra* note 5 at 12.

> All their lives, forces which they do not recognize and cannot name, have been tugging at them -- inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense ... of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall.

Cardozo's lectures provide a beacon to those who seek less tempestuous ground.[21] He reminds us that judges are people, engaged in a public service and shaped by their life experiences: [22]

> [T]hey do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.

In sum, Cardozo portrayed the judicial process as embedded in an environment that is replete with gaps and ambiguities. Fallible people are called on to solve these intricate, seemingly intractable problems, with no obvious solution simply waiting to be found. The making of decisions inevitably entails creation of law, and the results of the process are bound to be subjective and somewhat imprecise.[23] This is not to say that Cardozo held a view of radical indeterminacy. He explained that at times the judicial task will amount to no more than matching the case to the extant precedents, "much like matching a new colour to a sample of colours spread out on the desk." However, for him, simple matching did not capture the essence of the judicial process: "It is when the [colours] do not match, when the references in the index fail, when there is no decisive precedent that the serious business of the judge begins."[24] Overall, Cardozo's account of the process of making a judicial decision can be characterized as openness. [25]

III INDIAN CASE LAW INFLUENCED BY CARDOZO'S PHILOSOPHY ON JUDICIAL DISCRETION

Since the role of the courts, particularly the Supreme Court and the various

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21 *Supra* note 15 at 1662.

22 *Supra* note 5 at 168.

23 Dan Simon, "On the Double-Consciousness of Judging: The Problematic Legacy of Cardozo" 79 *Or. L. Rev.* 1033 at 1045-46 (2000).

24 *Supra* note 5 at 21.

25 *Supra* note 23 at 1045-46.

high courts, is not only limited to deciding the disputes before them but also includes the law-making process, the manner of exercise of discretion is an area extremely significant to the judicial process. Time and again, the Indian Supreme Court has reminded of the limits on exercise of judicial discretion, since the independence of judiciary also demands judicial restraint on the exercise of unprecedented powers conferred on the judges. The Supreme Court[26] has quoted the following passage from Cardozo's *The Nature of Judicial Process* while condemning arbitrary law-making and warning that as a law-maker, a judge must exercise judicial restraint:[27]

> The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in social life.

Hence, the exercise of judicial discretion also includes the exercise of judicial restraint where the situation demands so and the courts are not competent enough to decide the matter in dispute. Such incompetence may be an outcome of the matter being too technical or the interference by the courts not being proper within the four corners of the law. As Mark Greenlee has said, "While there is often room for the exercise of discretion or interpretation, the law exerts an influence that presses toward common results."[28]

In this Part, a brief analysis would be made of the different case-law where

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26 *Sumer Singh* v. *Surajbhan Singh,* (2014) 7 SCC 323; *Vinod Seth* v. *Devinder Bajaj*, JT 2010 (8) SC 66; *Meerut Development Authority* v. *Association of Management Studies and Anr*, AIR 2009 SC 2894: (2009) 6 SCC 171; *Divisional Manager, Aravali Golf Club and Anr* v. *Chander Hass and Anr.,* (2008) 1 SCC 683; *State of UP* v. *Jeet S Bisht,* (2007) 6 SCC 586; *Common Cause (A Regd. Society)* v. *Union of India*, AIR 2008 SC 2116; *Zahira Habibullah Sheikh* v. *State of Gujarat,* AIR 2006 SC 1367; *State of Rajasthan* v. *Prakash Chand,* AIR 1998 SC 1344; *Idul Hasan* v. *Rajindra Kumar Jain*, AIR 1990 SC 678; *State of H.P.* v. *Umed Ram Sharma*, AIR 1986 SC 847; *Suraj Prakash Bhasin* v. *Raj Rani Bhasin*, AIR 1981 SC 485; *P. S. R. Sadhanantham* v. *Arunachalam*, AIR 1980 SC 856; *Gudikanti Narasimhulu* v. *Public Prosecutor, High Court of Andhra Pradesh*, AIR 1978 SC 429; *Joseph Peter* v. *State of Goa, Daman and Diu*, AIR 1977 SC 1812; *Carew and Company Ltd.* v. *Union of India*, AIR 1975 SC 2260.

27 *Supra* note 5 at 141.

28 Mark B. Greenlee, "Faith on the bench: The role of religious belief in the criminal sentencing decisions of judges" 26 *U. Dayton L. Rev.* 1 (2000).

the above passage[29] of Cardozo has influenced the philosophy of Indian judges while exercising discretion or determining the limits of discretion to be exercised upon a matter. An analysis would be made of how Cardozo has influenced the decision-making process of the judges of the Indian Supreme Court in the above context.

i. **Judicial discretion in interpreting technical statutes**

In *Carew and Company Ltd.* v. *Union of India,*[30] while interpreting the meaning of the expression "undertaking" to determine the applicability of section 23(4) of the Monopolies and Restrictive Trade Practices Act, 1969, Krishna Iyer, J. quoted Cardozo's indications[31] in order to highlight a court's role while interpreting economic and technological statutes where "expertise needed to unlock the statute is ordinarily unavailable to the judicial process and the subject matter is too sensitive and fundamental for the uninstructed in the special field to handle with confidence".

In *Common Cause (A Regd. Society)* v. *Union of India*,[32] the relief sought in the writ petition filed under article 32 of the Constitution was for direction to the Central Government to formulate a suitable Road Traffic Safety Act to meet effectively the various requirements for minimisation of road accidents and also to pass further orders dealing with traffic safety and minimisation of road accidents. Since these measures were already taken care of by the Motor Vehicles Act, 1988, the Supreme Court observed that if there is any lacuna or defect, it is for the legislature to correct it by amending the said Act and not the court. The Supreme Court[33] reminded itself of Cardozo's formulation of principles[34] guiding the exercise of judicial discretion. Emphasising upon the need to exercise judicial restraint, Markandey Katju, J. observed that: [35]

> 57. The worst result of judicial activism is unpredictability. Unless Judges exercise self-restraint, each Judge can become a law unto himself and issue directions according to his own personal fancies, which will create chaos.

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29 *Supra* note 5.

30 AIR 1975 SC 2260.

31 *Supra* note 5.

32 AIR 2008 SC 2116.

33 *Id.* at 2130.

34 *Supra* note 5.

35 *Supra* note 32 at 2129.

> 58. It must be remembered that a Judge has to dispense justice according to the law and the Constitution. He cannot ask the other branches of the State to keep within their constitutional limits if he exceeds his own.

Analysing these two decisions, Cardozo's philosophy on the exercise of judicial discretion was a determining factor for the apex court to exercise judicial restraint in technical matters outside the domain of the judiciary.

ii. Judicial discretion and exercise of restraint in administrative matters

In a public interest litigation[36] filed by hill men for direction for construction of a part of a road, the Himachal Pradesh High Court directed the executive to favourably consider the demand for additional funds and also gave a direction to report to the court what progress had been made. The special leave petition against the Himachal Pradesh High Court's judgment was considered in *State of H.P.* v. *Umed Ram Sharma.*[37] The Supreme Court, while holding that existence of roads in reasonable conditions for residents of hilly areas is encompassed in their right to life under article 21 of the Constitution, also emphasised upon the need to exercise judicial restraint in purely administrative matters. Dealing with the issue regarding additional or excess grant for any project, it observed that it is the executive which can make recommendations to the legislature and the high court could not impinge upon the judgment of the executive. While holding that "[t]he Court must know its limitations in these fields", the Supreme Court noted the warning[38] of Benjamin N. Cardozo in *The Nature of Judicial Process*. In that view of the matter, the Supreme Court held that the first direction was enough and there was no need for the high court to direct that the matter be listed again before it. The Supreme Court, however, did not delete that part of the order of the high court, out of deference, but directed that the information be placed before the high court to inform it as to what steps had been taken and thereafter the high court need not take any further action and leave the priorities and initiative to the judgment both of the executive and legislature to pursue the matter. It may be noted that Cardozo was quoted to justify the need to impose self-restraint among judges and to be confined to their limits as members of the judicial organ of the state while deciding cases.

In *State of UP* v. *Jeet S Bisht,*[39] Markandey Katju, J. strongly condemned

36 CWP No. 231 of 1984 (HP).

37 AIR 1986 SC 847.

38 *Supra* note 5.

39 (2007) 6 SCC 586. However S.B. Sinha, J., the other member of the bench, differed with Katju, J., and held that in a situation where the action or inaction on the part of the executive

the Allahabad High Court's directions regarding the salaries and allowances of the members of the state and district consumer fora. He went on to hold that such directions were an encroachment into the legislative and executive domain. Speaking for exercising judicial restraint in such matters, Katju J. observed as under:[40]

> 55. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimisation of the judges' preferences. The Court must not embarrass the legislature or the administrative authorities and must realize that the legislature and authorities have to take into account various considerations, some of which the court may not even be aware of.

While emphasising upon the need to exercise self-restraint among judges, Katju, J., referred, *inter alia*, to Cardozo's saying that a judge "is not a Knight errant, roaming at will in pursuit of his own ideal of beauty and goodness".[41]

In *Divisional Manager, Aravali Golf Club* v. *Chander Hass*,[42] the Supreme Court held that courts cannot direct the creation of posts. Stressing on the need to exercise judicial restraint, the court, *inter alia*, referred to Cardozo,[43] as done in *Jeet S Bisht*.[44] The bench comprising A.K. Mathur and Markandey Katju, JJ. observed as under: [45]

> 15. ...Creation and sanction of posts is a prerogative of the executive or legislative authorities and the Court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organization.

Judicial restraint was held to be consistent with and complementary to the balance of power among the three independent organs of the state. The Supreme

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government lead to virtual closure and/or non-functioning of consumer fora, it is permissible for the superior courts, especially the Supreme Court to issue necessary directions for proper and effective implementation of the provision of the Consumer Protection Act, 1986. Sinha, J., also emphasised upon two other doctrines viz., judicial discipline and respect for the brother judges. In that view of the matter, the case was directed to be listed before another bench.

40 *Id.* at 613.

41 *Ibid.*

42 (2008) 1 SCC 683.

43 *Supra* note 5 at 41.

44 *Supra* note 39.

45 *Supra* note 42 at 688.

Court further held in *Chander Hass*[46] that judicial restraint not only recognises the equality of the other two branches with the judiciary, it also tends to protect the independence of judiciary. On that account, it was held that creation of the post of a tractor driver and regularising the services of the respondents against the said newly created posts was completely beyond the court's jurisdiction. In *Meerut Development Authority* v. *Association of Management Studies,*[47] again the Supreme Court observed that judges must observe the constitutional limits upon the exercise of power of judicial review. The court also iterated Cardozo[48] on the limits of exercising judicial discretion. While discussing the scope of judicial review in contractual matters, it was held that it all would depend on contextual facts to determine whether decisions were unreasonable in order to be susceptible to be interfered with and corrected in judicial review proceedings.

iii. Judicial discretion in entertaining special leave petitions

In *PSR Sadhanantham* v. *Arunachalam,*[49] the Supreme Court was considering the validity to permit a private citizen, in the absence of any legislative provision vesting in him any right to appeal, to invoke the special power under article 136 of the Constitution for leave to appeal against an acquittal in a murder case. While considering the scope and nature of article 136 of the Constitution, Krishna Iyer, J. observed that article 136 did not confer a right of appeal on a party as such but it conferred a wide discretionary power on the Supreme Court to interfere in suitable cases. The court found a discretionary element under article 136 of the Constitution. However, such element related to the powers of the Supreme Court and not the right of the petitioner. It was observed that there was procedure necessarily implicit in the power vested in the Supreme Court. Emphasising upon the judicial exercise of discretion, as granted by article 136, Krishna Iyer, J. further observed as under: [50]

> The founding fathers unarguably intended in the very terms of Art. 136 that it shall be exercised by the highest judges of the land with scrupulous adherence to judicial principles well established by precedents in our jurisprudence. Judicial discretion is canalised authority, not arbitrary eccentricity.

Thereafter, he quoted a passage from Cardozo's *The Nature of Judicial*

46 *Ibid.*

47 AIR 2009 SC 2894.

48 *Supra* note 5.

49 AIR 1980 SC 856.

50 *Id.* at 859.

Process.[51] The apex court went on to hold that "[i]f Article 21 is telescoped into Article 136, the conclusion follows that fair procedure is imprinted on the special leave that the Court may grant or refuse". In other words, the court meant that judicial discretion, while granting or refusing to grant special leave under article 136, must adhere to the "just, fair and reasonable"[52] procedure as envisaged in article 21 of the Constitution. This was said in the context of the fundamental right of a person who has been acquitted and adjudged innocent by the lower courts. The court highlighted the fact that such wide discretionary powers under article 136 are sparingly exercised and it may not, save in special situations, grant leave to one who is not a nominee of a party on the record.

iv. Judicial discretion in civil matters

At various stages of a civil suit, we find that the courts have been enthroned with discretionary powers to adjudicate on different procedural aspects such as condoning delay in filing written statement, amendment of pleadings, granting limited exemption from producing original documents, etc.[53] The inherent powers vested in a civil court by section 151 of the Code of Civil Procedure, 1908 do itself call for great deal of analysis and discussion in the context of judicial discretion.

It is well known that amendments of pleadings in a civil suit are within the discretion of a court. In *Suraj Prakash Bhasin* v. *Raj Rani Bhasin*,[54] the Supreme Court considered the propriety of a revisional order of the high court refusing to interfere with the order of the trial court allowing amendment of plaint in a suit for partition and share in super structure of a cinema theatre. The amendment of plaint sought inclusion of relief of dissolution of partnership and rendition of accounts. While observing that "judicial discretion is not wild humour", the court again referred to the passage[55] from Cardozo's *The Nature of the Judicial Process* to express the principles governing judicial discretion. Since avoidance of multiplicity of proceedings is one criterion for allowing amendment of pleadings, the apex court, in a way, emphasised upon the exercise of judicial discretion in advancing the said criterion. The court held that since the amendment did not totally alter the nature of action, the discretion exercised by the court in allowing amendment was not illegal.

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51 *Supra* note 5.

52 As propounded in *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

53 See Order VI Rule 17 and Order VIII Rule 10 of the Code of Civil Procedure, 1908.

54 AIR 1981 SC 485.

55 *Supra* note 5.

In *Idul Hasan* v. *Rajindra Kumar Jain,*[56] a suit for eviction of tenant was filed on the ground of material alterations under the U.P. (Temporary) Control of Rent and Eviction Act, 1947. It was held that such suit was valid even after the coming into operation of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, since the landlord's right to evict the tenant was guided by the Transfer of Property Act and not by either the Act of 1947 or Act of 1972. The court observed that the rights of the parties must be determined in accordance with the provisions of law and justice is to be delivered to everyone, be it a landlord or a tenant. The court reminded itself of Cardozo's philosophy: [57]

> The Judge is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness.

It would be pertinent to mention here that reference to Cardozo was made by the Supreme Court in *Idul Hasan*[58] to emphasise upon strict follow-up of the provisions of law where the courts are determining substantive rights of parties and hence, the conclusion that a judge should not "innovate at pleasure".

In *Vinod Seth* v. *Devinder Bajaj,*[59] the Supreme Court dealt with the issue whether a civil court has inherent power under section 151 of the Code of Civil Procedure, 1908 to pass an order directing the plaintiff in a suit for specific performance, to file an undertaking that in the event of not succeeding in the suit, he shall pay Rs. 25 lacs by way of damages to the defendant. The Supreme Court held that section 151 is not a provision of law conferring power to grant any kind of substantive relief, rather it is a procedural provision saving the inherent power of the court to make such orders as may be necessary for the ends of justice. The Supreme Court, therefore, disapproved the method adopted by the high court which was wholly outside law. It held that in a suit governed by the Code of Civil Procedure, no court can, merely because it considers it just and equitable, issue directions which are contrary to or not authorized by law. In this context, Cardozo's warning[60] in exercise of judicial discretion was adumbrated. Thereafter, the Supreme Court held: [61]

> The High Court can certainly innovate, to discipline those whom

56 AIR 1990 SC 678.

57 *Supra* note 5.

58 *Supra* note 56.

59 2010 (8) SC 1.

60 *Supra* note 5.

61 *Supra* note 59 at para 15.

it considers to be adventurers in litigation, but it has to do so within the four corners of law.

v. Judicial discretion in criminal law

The stage of granting or refusing to grant bail is an important stage of the criminal proceedings where personal liberty of an accused person is at stake during the whole length of the trial. In *Gudikanti Narasimhulu* v. *Public Prosecutor, High Court of Andhra Pradesh*,[62] the Supreme Court, while defining judicial discretion in the bail context, *inter alia*, noticed the elegant words of Benjamin Cardozo[63] and thereafter set out the relevant criteria for grant or refusal of bail in pre-trial and post-conviction stage. Since the discretion to grant or refusal to grant bail is an extremely significant area of judicial discretion, the Supreme Court, while stressing upon the cautious approach to be adopted by the criminal courts while granting or refusing to grant bail, laid down certain factors influencing the exercise of such discretion. It held that when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the court may reasonably presume, some evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged. It was further observed that the nature of the charge is a vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue. Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the court to be freed for the time being.

In *Joseph Peter* v. *State of Goa, Daman and Diu,*[64] while upholding the validity of a death sentence, it was, however, emphasised by the Supreme Court that in the Code of Criminal Procedure, 1973 the legislative emphasis is on life imprisonment for murder as the rule and capital sentence an exception. In that context, the courts were held to have limited jurisdiction and can never forget Cardozo's wise guidance[65] on the exercise of judicial discretion.

In *Sumer Singh* v. *Surajbhan Singh*,[66] recalling Cardozo's warning, the Supreme Court emphasised that discretion in sentencing cannot be exercised in a

62 AIR 1978 SC 429; see also *Babu Singh* v. *State of UP*, AIR 1978 SC 527; *Sanjay Chandra* v. *CBI*, (2012) 1 SCC 40.

63 *Supra* note 5.

64 AIR 1977 SC 1812.

65 *Supra* note 5.

66 (2014) 7 SCC 323.

fanciful and whimsical manner. It held that very strong reasons on consideration of the relevant factors have to form the fulcrum for lenient use of the said discretion.

In *Sidhartha Vashisht @ Manu Sharma* v. *State of NCT of Delhi*,[67] the Supreme Court expressed opinion upon the subconscious forces[68] acting in the mind of a judge while exercising judicial discretion in deciding a case. The opinion came in the context of trial by media where in the said case, certain articles and news items appeared in the newspapers immediately after the date of occurrence of offence and they did cause certain confusion in the mind of public as to the description and number of the actual assailants/suspects. Reference was made to Cardozo: [69]

> 146. Cardozo, one of the great Judges of American Supreme Court in his "Nature of the Judicial Process" observed that the judges are subconsciously influenced by several forces. This Court has expressed a similar view in *P.C. Sen In Re:* AIR 1970 SC 1821 and *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express,* 1988 (4) SCC 592.

The Supreme Court held that presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending. In that event, it will be opposed to the very basic rule of law and would impinge upon the protection granted to an accused under article 21 of the Constitution. Based on the above observations, the Supreme Court concluded on the aspect of media trial as under: [70]

> 11. Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held as impermissible.

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67 AIR 2010 SC 2352.

68 *Supra* note 20.

69 *Supra* note 67 at 2428.

70 *Id.* at 2430.

IV CONCLUSION

It can be seen that the impact of Cardozo's philosophical thought has extended not only to the American courts but also to the Indian judicial thought. The judges of our Supreme Court have certainly drawn inspiration from Cardozo's ideology while exercising their mind judicially and deciding cases. His thought has been referred to by the apex court of our country consistently for over the last three decades, which fact in itself is an evidence of how great a philosopher Cardozo was and what contribution he has made to the judicial process not only in the American legal system but all around the world, including India. As Dan Simon has said: "Understanding the reputation of this complex figure [i.e. Cardozo] thus helps us better understand the double-consciousness of the judicial function and the contradictory nature of our legal system."[71] Cardozo's philosophy strikes at the core of judicial process, i.e., "the mind of a judge"; and, therefore, has been referred in cases dealing with all kinds of subject-matter, be it civil or criminal or even constitutional. The measure of impact on the judicial mind around the whole world in itself evidences the greatness of his philosophy.

71 *Supra* note 23 at 1080.

ROLE OF MAGISTRATE IN CRIMINAL INVESTIGATION

BHARAT CHUGH*

I INTRODUCTION

A young bank official named Joseph is arrested by two policemen one fine morning, without even being informed why. Joseph is outraged. Right till his death, Joseph remains unaware of what is he being tried for. Joseph is the protagonist of Franz Kafka's seminal work '*The Trial',* which is the story of Joseph's case, his trial and tribulations with the invisible Law, absent judge, opaque court processes, police excesses and the high-handedness of our criminal justice system. He dies a year later at the hands of the very policemen who had arrested him, in a striking finale of how the system consumes him. True, it is a fictional story, but one that says a lot of truth about our criminal justice administration or at any rate, its prevailing stereotype, which has a definitive imprint of truth.

In *State of Gujarat* v. *Kishanbai,*[1] a 6-year old girl was taken to a field, enticed with sweets, and then raped; her delicate face was smashed beyond recognition, having been bludgeoned to death by bricks. Her little feet were chopped off from right above her ankles. She was wearing silver anklets which wouldn't come-off otherwise. The case was tried on circumstantial evidence. The accused Kishanbai was acquitted by the courts - on all counts, primarily on account of grave lapses by the investigative/prosecution agencies, non-examination of material witnesses and obliteration of vital evidence. The sheer agony of the court is palpable in the judgment.

Joseph in '*The Trial'* was arbitrarily arrested, falsely prosecuted and ultimately lost his life, while the court remained oblivious. Conversely, in *Kishanbai*, the accused who brutally cut short an innocent life went scot free, on account of glaring omissions in the investigation. The irregularities could have been nipped in the bud had the magistracy been more involved, responsive and pro-active. In both these cases, it is not Joseph or Kishanbai who is at trial, it is 'us'.

In this research paper a case for a more pro-active and responsive magistracy is made out. Here the endeavour is to highlight the areas in which magistrates, as the protectors of rights of people, can make meaningful interventions during

* Delhi Judicial Services, presently Metropolitan Magistrate, Delhi.

1 (2014) 5 SCC 108.

investigation, with a view to protect liberty of the accused and at the same time ensure an effective investigation. An attempt has been made to analyse the relevant statutory provisions under the Criminal Procedure Code, 1973 and the judicial decisions on the subject and also to give an insight into the role of magistracy under the French criminal justice system._

II CRIMINAL INVESTIGATION AND MAGISTRATE

Every criminal case begins with investigation. An investigation, shorn of legal niceties, is a systematic enquiry into facts constituting an alleged offence, in order to unearth its true perpetrators. It is an attempt to recreate the unknown from the known, by collection and presentation of pieces of evidence, with a view to aid the court in arriving at a just conclusion. Every investigation is followed by at least some form of judicial scrutiny (often termed 'inquiry') which acts as the safety valve, wherein cases which are groundless on the face of it are sifted and filtered out at the very threshold, and only those cases where there are sufficient grounds to presume the commission of the offence, graduate to the next stage i.e., trial. A trial, as the term connotes, is a test. Test of truth and falsehood which is examined in proceedings where the evidences collected during investigation and conclusions reached by the investigators are allowed to be proved or disproved and a finding as the guilt or innocence of the accused is arrived at. In an adversarial model (as opposed to an inquisitorial system), the job of investigation is in the domain of the executive, acting through the police.[2] Inquiry and trial are entrusted to the judges. This broad separation of powers is with a view to ensure that a judge does not get directly involved in the process of collection of evidence, which might prejudice or taint his conclusions. This is in view of a very real fear that he might make an opinion on the case prematurely and facilitate the collection of only those pieces of evidence which reinforce his initial opinion and neglect the rest.[3] Being the investigator himself, he would have difficulties disassociating himself from the result of his investigation, or rather its eventual success. The principle of investigation by the police also pays due homage to the traditional principle of separation of powers, wherein each organ acts in its respective area of functioning and assumption of powers of one organ by the other is frowned upon as undue interference and adventurism. The job of a judge, therefore, in a

2 CrPC s. 2(h) reads: "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.

3 See 'Confirmation Bias & Belief Perseverance'.

traditional adversarial model is supposed to be minimalist and he is not supposed to don the mantle of an investigator, much less a Sherlock Holmes. Formalistic adherence to adversarial legalism and minimalism is not just the norm, but also the bane of our system, as this paper would attempt to demonstrate.

III CASE FOR A MORE RESPONSIVE AND PRO-ACTIVE MAGISTRACY

"The fault, dear Brutus, is not in our stars, but in ourselves, that we are underlings"[4]

The adversarial system envisages the judge as an impartial arbiter: who decides which way the truth lies, after a clash of adversaries, who are assumed to be equal in strength and out of the dialectical contest between whom-, the truth is supposed to emerge. These parties fight on the question of the probative worth of the evidence and the inference that ought to be drawn from the material collected by the investigating agencies and the office of the judge is to preside over this contest and to ensure that parties play by the rules. The parties are expected to play by the rules fairly and reasonably and begin from equal starting points. However, the reality is less simple, and mostly never this straight. If men were such angels, external controls would be unnecessary.[5] It is now widely accepted that only seldom is the playing field - level. Deeply pervasive inequalities and power imbalances - on account of sex, caste, gender and class often result in a totally asymmetric judicial system, skewed against the Davids and in favour of the Goliaths. The executive is often prone to abuse of power for ulterior ends, and owing to lack of police reforms - the quality of investigation is mostly appalling, either due to incompetence (innocent) or plain extraneous considerations (blameworthy). Many of these investigating lapses often result in the real perpetrator escaping the clutches of law or the innocent being falsely implicated or in some cases - both.

Flaws in the investigation often leave the court with a practical *fait accompli* as the court becomes seized of the matter only after vital evidence is obliterated, lost or fabricated. The large number of acquittals relative to total prosecutions[6] is a cause of huge concern and demonstrates major systemic failures. Non-examination

4 Julius Caesar (I, ii, 140-141) Shakespeare.

5 James Madison, Federalist no. 51.

6 45.1% conviction rate under IPC crimes as per NCRB: *Crime in India, 2014*. This has to be read with a caveat as this figure stands good only for those cases where the matter goes to trial and the trial is finished; this does not include cases in which no cognizance was taken by the magistrate at the very first instance, or accused was discharged for lack of evidence.

of vital witnesses, non-application of forensic methods, inept handling of forensic evidence at the crime scene, non-protection of witnesses has been the ruination of many prosecutions. Pained by such lapses leading to the eventual acquittal of a man accused of raping and murdering six-year-old, the Supreme Court[7] directed that a post-acquittal analysis be made in every case of acquittal, as to the reasons for the acquittal and mandatory departmental proceedings be initiated against investigating officers and prosecutors found guilty of misconduct in relation to investigation and trial. The need for an effective and impartial investigation, therefore, can hardly be overemphasised: to check not only unmerited acquittals, but also unjust prosecutions.

In this, the magistrates have to drop minimalism as the ruling mantra, and pro-actively act as the protector of rights (especially the weaker sections) and correct wrongs. Magistrates being judiciary's first interface with the public at large, and the courts of first resort, ought to guard personal liberty and constitutional rights and have a greater responsibility on their shoulders. Investigation is the stage where most excesses take place. Investigation also forms the basis for the superstructure of the trial and *faux pas* in investigations and unjust prosecutions are best checked by magisterial vigil, right from the point of registration of FIR, throughout the investigation, and later even after filing of police report. Magisterial checks and balance, therefore, is the pressing desideratum. The next section deals with the statutory provisions & judicial decisions that permit the exercise of such interventions, at various stages of the investigation and even during inquiry.

IV MAGISTERIAL VIGIL DURING INVESTIGATION

In chronological order, the role of the magistrate in investigation can be understood in terms of these five stages:

Stage – I Soon after the registration of FIR.

Stage – II In cases where the arrest is effected by the Investigating officer, on his production before the court and while deciding the question of the validity of arrest and need for further custody - Judicial or Police.

Stage – III Magisterial interventions while deciding applications for recording of statement(s) u/s 164 of the Cr.P.C, test identification parades, applications seeking conduct of narco-analysis, taking of handwriting/ signature specimen, etc.

Stage – IV Monitoring of investigation.

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7 *Supra* note 1.

Stage – V Further investigation, post-filing of police report u/s 173 of the CrPC.

Stage – I – Soon after the Registration of FIR

Criminal justice administration is set into motion with the receipt of information with respect to the commission of a cognizable offence[8]. Section 157 mandates the sending of a report to this effect to the area magistrate forthwith, to bring the matter to his scrutiny. This is a safeguard meant to prevent police excess, embellishments, false prosecutions and non-investigation at a crucial stage. A copy of the FIR (often termed 'occurrence report') is sent to the magistrate as soon as possible, and any delay can adversely affect the prosecution case at trial, if not explained adequately. In heinous cases, a copy of the FIR along with an endorsement is dispatched via a special messenger to the area magistrate or duty magistrate. The Delhi High Court Rules[9] require the magistrate to make an endorsement on the copy of the FIR regarding date/time and place of receipt. The Delhi High Court recently in *Rafiq* v. *State*[10] has directed magistrates to mention the aforesaid details and sign such copy of the FIR legibly, forthwith on its receipt, so that the time of registration of FIR can be ascertained with exactitude. The magistrate, on receiving a report in which the police officer indicates that he is not taking up investigation, may direct investigation nevertheless, or if he thinks fit, proceed at once to the spot, to hold a preliminary enquiry himself.[11] The latter course, however, is rarely adopted, more so because of the burgeoning case load than a sense of apathy. However, wherever warranted, the magistrate should not hesitate to exercise this power to get to the crux of the matter.[12]

Stage II – Production of the Accused before the Court for the First Time

"Eternal Vigilance, is the price of liberty...." [13]

Law of arrest

Arrest leads to deprivation of liberty and, therefore, has great ramifications for the person arrested. Any denial of personal liberty has to be through a due process[14] A process that is non-arbitrary, just, fair and reasonable. On account

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8 S. 154, CrPC.

9 Delhi High Court Rules – Vol. III, Chapter 11, Part A, Rule 4.

10 (Crl. A. No. 1505/2013 - Date of Decision 23.07.2015).

11 S. 159, CrPC.

12 The Judge, even at the time of inquiry and trial, can conduct a local inspection with a view to appreciate the evidence better. Such power is expressly provided-for in Section 310 of the CrPC.

13 Attributed to Thomas Jefferson.

14 Article 21 of the Constitution. *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248.

of a catena of judicial decisions[15] and statutory changes to that effect, no arrest shall be made, merely because it is lawful for the police officers to do so and each arrest has to be justified on ground of its imperative need and reasons are to be recorded in writing by the police officer effecting the arrest. According to the latest amendments to the CrPC, in cases covered u/s 41(1) (b) of the CrPC i.e., where the case relates to an offence punishable with imprisonment of seven years or less, arrest can be made by the police only on satisfaction (recorded in writing) to the effect that, the arrest is imperative for:

(i) prevention of further offences;

(ii) proper investigation of the offence;

(iii) prevention of tampering or disappearance of evidence;

(iv) prevention of any undue influence/threat to the complainant or witnesses;

(v) ensuring his presence in the court.

The requirement of recording of reasons is expected to transcend the essentially subjective decision of arrest, to encourage greater objectivity and to rule out arbitrary arrests, made with a view to wreak vendetta.[16] The magistrate is a bulwark against unnecessary detention and abuse of power and process.[17]

The recording of these reasons, therefore, is a condition precedent for arrest.

Magisterial check on police powers of arrest

The sufficiency of reasons for arrest recorded by the police officer is to be examined by magistrates and not to be accepted at the mere *ipse dixit* of the police. After examining the validity of the arrest, the next point of inquiry is: whether there are grounds to keep the accused in detention or whether he can be released on bail, or otherwise discharged. The Supreme Court recently in *Arnesh Kumar* v. *State of Bihar* [18] has ruled that decision to detain and remand is not a mechanical act and a remand order has to be a reasoned order and should reflect due application of mind. Mere mechanical reproduction of above elements in remand applications is also to be deprecated. These conditions have to be justified

15 *D.K.Basu* v. *State of West Bengal,* (1997) 6 SCC 416; *Joginder Kumar* v. *State of U.P*, (1994) 4 SCC 260. Also see Code of Criminal Procedure (Amendment) Act, 2008.

16 According to the Third National Police Commission - 60 % of the arrests made were unjustified and unnecessary arrests account for 43 % of the expenditure in jails (*Joginder Kumar, ibid.*).

17 Fair Trial Manual: A Handbook for Judges and Magistrates, CHRI, (http://www.humanrightsinitiative.org/publications/police/fair_trial_manual.pdf).

18 (2014) 8 SCC 273.

in the factual matrix of each case. The fact that 76 % of prisoners in Tihar Jail[19] are under trials is evidence of a rather trigger-happy (or custody-happy) magistracy. Magistrates, to borrow the expression of Lord Atkin, ought to avoid being more executive-minded than the executive[20] and consider the question of bail/release by special order on the first production *suo motu*. In a deeply entrenched, but no less despicable practice: magistrates routinely grant remand for 15 days (that being the maximum permissible at a time) without independent reflection on whether the same is required or not. Each day's remand ought to be justified in order to be granted. The fact that magistracy is overburdened with work cannot be an alibi. Such mechanical extension of remand reflects apathy and culpable indifference to the values of personal liberty and human rights.

The anxiety as to participation in investigation by the accused is allayed by Section 41A of the CrPC, which provides for service of a notice on the accused by the Investigating Officer (in short 'IO') seeking participation in the investigation and the necessary information from him. If the accused does not comply with the notice, he can be arrested, after recording the factum of his non cooperation in writing.

Arrest by magistrates

Conversely, in cases where the offence happens within the presence of the magistrate and within his local jurisdiction, the magistrate may himself arrest a person, or order any other person to effect the arrest.[21]

Safeguards relating to arrest

The magistrate is also under an obligation to peruse the arrest memo/medical examination report of the accused (to rule out cases of police torture) as well as the victim (to preserve crucial medical evidence).[22] It is also incumbent on the magistrate to ensure production of the accused before itself within 24 hours of arrest,[23] communication of information to relatives/friends about his arrest, and compliance of the detailed guidelines laid down by the Supreme Court in *D.K.Basu* v. *State of West Bengal*.[24] The magistrate should also ensure that the copy of the FIR is uploaded on the internet, forthwith, except of course in cases where the

19 As on 31.12.2015, by a report of the Tihar Prison (available at: http://www.delhi.gov.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Prisoner+Profile).

20 Lord Atkin's dissenting judgment in *Liversidge* v. *Anderson,* [1941] UKHL 1.

21 S. 44, CrPC.

22 Ss. 53, 53A and 164A, CrPC.

23 S. 57, CrPC and article 22 of the Constitution of India.

24 (1997) 6 SCC 416.

matter is sensitive in nature or issues of privacy are involved.[25]

Importance of case diary

Case diary is an effective instrument for the magistrate to keep a tab on the propriety of an investigation. The Supreme Court has repeatedly reiterated that the case diary should be maintained with scrupulous completeness and efficiency, since it is an extremely important document.[26] When a person arrested is produced before a magistrate for remand, the magistrate has to: peruse and scrutinise copies of FIR/Case Diary 'Zimnis', which ought to be in the form of a volume, duly paginated[27] and contain statements of the witnesses recorded u/s 161 of the CrPC,[28] and also to ensure that the same are in chronological and reflect the progress of investigation. The Delhi High Court Rules[29] make it incumbent upon the magistrate to record reasons for the grant of remand and to sign and date every page of the case diaries or copies thereof as a token of his having seen them. This rules out any fabrication, embellishment or interpolation of case diary at a later stage.

Audi alteram partem

Even God did not banish Adam and Eve from the Garden of Eden for their proverbial sin, before giving them an opportunity of making their case. The magistrate can claim little immunity from this salutary principle of natural justice, wherein no man ought to be condemned without hearing him. The magistrate is duty bound to ensure legal representation for the accused at the very first production and to give him an effective opportunity of being heard. If the accused does not have a private counsel, legal aid from the state is to be ensured.[30] In Delhi - Remand Advocates have been appointed by the District Legal Services Authorities, in each court, to ensure fair representation for each accused. The magistrate ought to ensure that the legal aid counsel appointed for the accused is provided with a copy of the FIR and other documents, with a view to enable him to prepare his defence. However, the job of the magistrate does not end at the appointment of the legal aid counsel; he is also duty bound to ensure that the legal aid counsel appointed effectively represents the accused. This involves a fair bit of recalibration of scales of justice to ensure a level playing field. If the legal aid counsel provided is not

25 *Court on its Own Motion* v. *State*, (Writ Petition (Crl.) No. 468 of 2010).

26 *Bhagwant Singh* v *Commissioner of Police, Delhi*, AIR 1983 SC 826.

27 S. 172 (1-B), CrPC.

28 *S*. 172(1-A), CrPC.

29 Delhi High Court Rules – Vol. III, Chapter 11, Part B, Rule 3.

30 *Md. Ajmal Amir Kasab* v. *State of Maharashtra*, (2012) 9 SCC 1. The Supreme Court has also held that any lapse on this count by the magistrate may entail departmental action.

very competent, the magistrate can, nay ought, to bring this to the attention of the District Legal Service Authority, who can appoint a new counsel and make a note of this information while deciding the question of empanelment of lawyers as legal aid counsel.

Non-filing of police report within stipulated period - default bail

If the arrest is justified at the anvil of the considerations as discussed, and no case for release on bail is made out, the accused can be remanded to Police or judicial custody during the first 15 days, and thereafter, only judicial custody for a further period of 45 days (in case of offences punishable with imprisonment of 10 years or less) or 75 days (in cases of offences punishable with imprisonment greater than 10 years). If the investigation is not concluded within the said period, the accused, if still confined in custody, becomes entitled to statutory bail (also known as 'default bail' or 'compulsive bail') and an indefeasible right accrues in his favour. It deserves reiteration that CrPC does not fix a time limit for investigation, but by entitling the accused to bail on the expiry of specific periods, it puts a pressure on the police to complete the investigation within time. It has been judicially held that this right accrues to the accused on the expiry of the 60th or the 90th day, as the case may be, from the date of the first remand, and once this beneficial right has accrued in favour of the accused and availed by him (the accused should apply for bail, albeit not necessarily by a formal application), the same cannot be defeated by subsequent filing of charge sheet; however, if after grant of bail, the accused does not meet the conditions of bail, for example : non furnishing of bail bonds, and in the meanwhile police report is filed - in that eventuality, the right stands defeated.[31] The Supreme Court[32] has recently held that such bail applications ought to be decided on the very day of filing, in order to avoid the salutary purpose from being frustrated by subsequent filing of police reports. The magistrate should also be on the guard for incomplete reports masquerading as police reports, filed hastily with the sole motive to defeat the right of the accused. The police report has to conform to the essentials laid down in section 173 of the CrPC.

Remand to police custody

Detention in police custody (permissible only within 15 days of the first remand), is usually disfavoured by law, which guards personal liberty zealously.[33] Courts are cognisant of the police's predilection for disclosure statements and

31 *Uday Mohanlal Acharya* v. *State of Maharashtra*, (2001) 5 SCC 453.

32 *Union of India through CBI* v. *Nirala Yadav*, (2014) 9 SCC 457.

33 *CBI* v. *Anupam J. Kulkarni*, AIR 1992 SC 1768.

confessions (often extorted), instead of scientific and objective methods of investigation. Therefore, at the time of giving police remand, the magistrate ought to ensure and record the imperative need for police custody, and as to why it is necessary for an effective investigation. The need for discovery of the weapon of the offence, fruits of crime, unearthing a larger conspiracy and facilitating the arrest of co-accused by disclosure are important considerations. However, mere verification of information given by the accused is not a ground for police custody. Similarly, the magistrate should also ensure that remand is not taken merely to make a 'pointing out' memo. Such 'pointing out' memo, needless to state, has no statutory sanction or admissibility in a court of law. Only when there is a certain physicality to a discovered fact that the same falls within the definition of section 27 of the Evidence Act. Practice has shown that 'pointing out' memos are recorded with a view to circumvent the clear embargo on police confessions under section 25 of the Evidence Act, and to permit a rather insidious inclusion of incriminating facts through a circuitous route.

One more thing that a magistrate ought to be extremely cautious about is that in almost every criminal case - there is an (alleged) confession made to the police by the accused; however, practice shows that only seldom does the police file an application for the confession to be recorded in the presence of the magistrate, after compliance with section 164 of the CrPC. It defies reason as to when so many accused are penitent and inclined to confess, then why no confessions are being recorded through the magistrates. This becomes crucial since the confession before the police officer is inadmissible in law and has to be totally excluded from consideration. However, such confessions are employed by IOs routinely to have at least some semblance of a case against the accused and seek repeated police custody/judicial custody on that basis. Expediency should never be allowed to supersede the legal principle and magistrates ought not to blink at such a practice, as the very fact of there being a police confession in every case and judicial confession in none, reflects a pernicious, and a rather appalling state of affairs. In every case where the accused has allegedly confessed to the police, the magistrate ought to put a question to the IO as to what prevented him from getting the confession recorded before the court. This will keep the coerced confessions in check and encourage police officers to explore other avenues of investigation, which are more legitimate.

It is also important for the magistrates to remember that police custody ought not to be given at the drop of a hat and at the mere asking of the police. While giving police custody, a copy of the order ought to be sent to the CJM/CMM of the

area to bring the matter within his seisin.[34] It is also advisable for the magistrate to scrupulously ensure medical examination of the accused before and after the grant of police custody, so as to rule out torture at the hands of the police. In many a case, the injuries on the person of the accused are suppressed in the medical certificates. In such cases, the magistrate may order a fresh medical examination of the accused by a team of doctors at a reputed and independent medical institution and entrust the safety of the accused personally to a higher police functionary. It also needs to be remembered that the accused has a right to interview with his legal advisor during this time.[35]

Release by special order in case of unjustified arrests

If the arrest seems unwarranted in the facts of the case, the magistrate can always disallow both judicial and police custody and release the person on bail (on surety or personal bonds), or even by way of a special order u/s 59 of the CrPC. A more active use of this provision is the need of the hour. In cases of totally unjustified arrests, the magistrates should not shirk from pointing this out in their orders and direct initiation of disciplinary proceedings against the erring police officers.

Immediate succour to the (oft forgotten!) victims

The magistrate, when seized of the matter for the first time, ought to enquire about the status of the victim of the crime and whether the victim needs immediate first aid or any other interim compensation. A recommendation in this regard can be made by the magistrate concerned to the District Legal Services Authority (DLSA).[36] DLSA shall go on to grant compensation in accordance with the Victim Compensation Scheme. In cases relating to motor accidents, the magistrate may ensure that the SHO concerned informs the Motor Accident Claims Tribunal of the accident within 48 hours and files the mandatory Accident Information Report (which is entertained as a Claim Petition), within the stipulated 30 days from the registration of the FIR[37], so as to ensure timely dispensation of compensation to the victims.

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34 S. 167(4), CrPC.

35 *Adjudication in Trial Courts: A Benchbook for Judicial Officers*, N.R.Madhava Menon, *et al, (Lexis Nexis Publications,* 2012*)*.

36 S. 357A (6), CrPC.

37 S. 158(6), Motor Vehicles Act, as amended in 1994. Detailed guidelines passed in: *Rajesh Tyagi* v. *Jaibir Singh*, (2009) ILR 8 Delhi 234.

Special provisions relating to juveniles

While dealing with juveniles, the court ought to proceed strictly in line with the principles of *parens-patria*[38] and best interests of the child and zealously guard their welfare. Any offender under the age of 18 ought to be tried by the Juvenile Justice Board (JJB) and is not to be exposed to the rigours of ordinary criminal law process.

Whenever a plea of juvenility is taken by an accused, the age determination enquiry has to be conducted by the court only, in accordance with section 7A of the JJ Act and rule 12 of the Delhi JJ Rules, 2009. Where, in the opinion of the magistrate, the accused is patently (from the physical appearance or otherwise) below 18, the court shall immediately transfer the child to an observation home and order production of the juvenile before the JJB concerned. In other cases, the inquiry has to be conducted by the court, and if the accused turns out to be a juvenile, he shall be ordered to be transferred to observation home the same day and if the person has turned an adult on the date of such order, in that case, to a place of safety. As per the Delhi JJA Rules, the documents forming basic input for age enquiry are:

(i) Date of birth certificate from school first attended (not the play school), and in absence whereof;

(ii) Birth certificate by corporation/municipal authority or a panchayat;

(iii) Matriculation or equivalent certificates, if available;

(iv) And only in the absence of above – medical board, who shall, in case age cannot be ascertained with exactitude, give the benefit of one year to the accused on the lower side, and give an opinion; the court to declare juvenility on the basis of this. Order once made is conclusive on the point.

Contrary to popular misconceptions, an age inquiry, envisaged under the act, is a summary inquiry to be completed within 30 days[39] and not a full blown investigation or trial. Oral evidence need not be recorded to arrive at a finding. Lengthy examination/cross examinations are also out of the question, unless of course, a vexed question of fact arises. The input for such an inquiry may be *prima*

38 Black's Law Dictionary, Sixth Edition, at 1114 "Parens patriae," literally "parent of the country," refers traditionally to role of the state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, *State of W.Va.* v. *Chas. Pfizer & Co*., C.A.N.Y., 440 F.2d 1079, 1089, and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents.

39 Rule 12 of the Delhi JJA Rules, 2009.

facie opinion on the basis of documents.[40]

Experience has shown that in many cases, investigating officers would deliberately state the age of the accused to be above 18 years in order to defeat the benevolent provisions of the Juvenile Justice Act. To counter this, the Delhi High Court[41] has directed that: in cases of persons arrested being within 18 to 21 years of age, the investigating officer of the case has to mandatorily prepare an age memo and collect proof regarding the age of the accused, and the court also has to conduct an age inquiry in such cases, if juvenility is pleaded. The copies of such age memo have to be provided by the IO to accused, his/her family members and officials of DLSA, giving them an opportunity to contest the finding.

STAGE – III – Magisterial Interventions while deciding applications for Recording of Statement u/s 164 of the CrPC/Test Identification Parade, and the like

While recording statements u/s 164 of the CrPC

Recording of statements of the witnesses is a vital part of the investigation. This not only allows an investigator to come to a finding, but also captures the testimony of the witness, when the same is still fresh and unsullied. However, the code reflects a palpable distrust of police officers in the matter of impartial recording of statements. Statements recorded by the police officers during investigation are inadmissible in evidence, except in limited cases where it can either be used as a dying declaration or only insofar as it leads to a recovery.[42] These statements, however, can be used for contradiction and cross examination of the prosecution witnesses, at the time of trial.

However, section 164 of the CrPC does permit recording of the testimony of a witness before the magistrate, during investigation. This statement, though not a substantive piece of evidence, can be used at trial to corroborate or contradict the substantive testimony of the witness at the time of trial.

In India, the statement u/s 164 of the CrPC is recorded by the same magistrate who goes on to conduct inquiry or trial, or his link magistrate (in Delhi). In contrast to this, in the French system, the statements of the witnesses are recorded by an 'Examining Magistrate', a judge who carries out investigation and also arranges prosecutions. The conception of a magistrate under the French System will be

40 *Ashwani Kumar Saxena* v. *State of M.P,* (2012) 9 SCC 750.

41 *Court on its Own Motion v. Dept. of Women and Child Development & Ors,* WP(C) 8889 of 2011, Date of Decision – 11.05.2012.

42 S.162, CrPC.

dealt in greater details in the following paras.

Coming back - under the present Code, section 164 allows recording of statement of witnesses and confessions by the magistrate. The statement of witnesses under this section is recorded on oath. The underlying objective is to preserve evidence, get an account of the testimony of the witness at the first instance (while it is still fresh), and to prevent retraction of testimony at a later stage. Another upside of a statement recorded u/s 164 of the CrPC is that the same can be used for corroboration of the witness's testimony at trial,[43] thereby strengthening the veracity of prosecution's case. Applications for recording of statement of witness u/s 164 CrPC are usually filed by the prosecutor/IO. In *Jogendra Nahak* v. *State of Orissa,*[44] the Supreme Court has held that all and sundry cannot approach the magistrate for the recording of their statement u/s 164 and any witness, unsponsored by the IO/prosecutor, cannot seek to get his examination recorded u/s 164 CrPC.

However, this view which has held primacy for long can be taken to have been statutorily diluted in cases concerning crime against women.[45] The amended section 165(5A) of the CrPC casts a duty on the magistrate to record the statement of the persons against whom such offence is committed, as soon as the commission of the offence is brought to the notice of the police, and this obligation is not contingent on the IO moving an application to that effect. In this regard, it would be incumbent on the area magistrate to be cognisant of such situations and pass the necessary orders to ensure examination of the witness promptly in such cases. Although, there is no direct decision on this point yet, however, on a purposive reading, the new amendments can be read to have carved out an exception to the rule of sponsorship of witness as a pre-requisite, in cases of women complaining of sexual assault, whose statement can be recorded even without sponsorship by the IO. However, the magistrate ought to be extremely careful as regards the identity of the witness/complainant before proceeding to record the statement.[46] This ensures that in a case of apathy of the IO to the case, the magistrate is not to remain a mute spectator and ought to record the statement himself.

Another exception has been carved out by the Supreme Court in *Mahabir Singh* v. *State of Haryana*[47] to the effect that: an accused can approach the court with a request for recording of his confession; however, in that situation also,

43 S. 157 of the Evidence Act.

44 (2000) 1 SCC 272.

45 Ss. 354, 354A to D, 376, 376A to E, 509, IPC.

46 *Ajay Kumar Parmar* v. *State of Rajasthan*, (2012) 12 SCC 406.

47 AIR 2001 SC 2503.

the magistrate has to ensure his identity as the accused and also the fact that investigation into that offence is currently underway, otherwise such statement shall not amount to a statement 'in the course of investigation' and, therefore, not a valid statement within the meaning of section 164 of the CrPC.

The safeguards in place to ensure the voluntariness of a confession/statement made before the magistrate are too well established to be reiterated. However, there are certain cases that deserve extra care and caution: for instance, in cases of rustic/illiterate and other vulnerable witnesses, the magistrate is duty bound to cull out the truth from the witness by asking the relevant questions.[48] In cases of child victims, the statement ought to be recorded in the special child witness/vulnerable witness room, away from the grim dynamics of the court. The magistrate can also take the aid of visual guides/diagrams and anatomically correct dolls with a view to ensure that the young witness, who might not be articulate or possess an adult vocabulary, is able to communicate and explain as to what happened. POCSO[49] also envisages the presence of a parent/support person with the victim at the time of recording of statement. It also permits the services of a special educator/interpreter/translator to aid the judge to understand and record the statement better.[50] Wherever possible, the magistrate must direct the IO to make the necessary arrangements for video recording of the statement. The expectation, therefore, is of utmost sensitivity and responsiveness while recording the testimony of a vulnerable witness, being alive to the trauma and stigmatic impact that the witness has undergone.[51]

Bond by witnesses

Usually, statements of the witnesses are recorded u/s 161 of the CrPC, which have no evidentiary value. The statements of the witnesses are to be recorded at trial to be considered in evidence. Usually, recording of evidence commences a long time after investigation. Very often, problems are faced securing their appearance before the court. Only seldom IOs get the witnesses to execute bonds of appearance before the court. Provisions of section 171 of the CrPC, in this regard, are observed in their stark disregard. Intervention to this effect by the Magistrate would be extremely useful, and would go a long way in ensuring witnesses' presence at the time of trial.

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48 *R. Shaji* v. *State of Kerala*, (2013) 14 SCC 266.

49 S. 25 of the POCSO; s. 164(5A) in cases of women victims of sexual assault.

50 In such cases the video recording of the statement is mandatory as per the mandate of s.164(5A) (a) 2nd proviso.

51 See exhaustive guidelines for various stakeholders with respect to vulnerable witnesses, laid down by the High Court in *Virender* v. *State of NCT of Delhi*, (Crl. Appeal No. 121/2008 - Date of Decision : 29.09.2009).

Test identification parade

While entertaining a request for the conduct of TIP, the magistrate has to bear in mind that the accused is produced before him in a muffled face and his identity has not been disclosed to the witness directly or through the media. The consent of the accused is required to be obtained before the conduct of TIP and by consent; it goes without saying that it should be an *'informed consent'*, after an opportunity to consult his lawyer. In case of no consent, an adverse inference may be drawn against the accused; however, that is a matter of trial before the concerned court and not for the magistrate to consider at that moment. The magistrate has to ensure that the accused or his photograph has not been shown to the witness before the conduct of TIP so as to influence its result. A frank question in this regard to the witness before the conduct of TIP shall go a long way in checking false TIPs, which may be stage managed by the police.

The magistrate should also ensure legal representation and informed consent of the accused in cases where handwriting/signature specimens or conduct of narco-analysis is sought by the police, for the purposes of investigation.

Magistrate and witness protection

Witnesses disappearing or turning hostile is a major stumbling block in a successful criminal justice administration. The need for a specific witness protection legislation has been sorely felt for many years. Pursuant to the repeated directions of the High Court of Delhi with respect to a law to this effect, the Delhi State Government has notified the 'Delhi Witness Protection Scheme, 2015'. Under the scheme, witnesses are categorised under three categories, depending on the threat perception. The Delhi State Legal Services Authority (DSLSA) has been appointed as the competent authority for the implementation of the scheme. As per the scheme, the witness facing a threat is required to file an application for protection before the Member Secretary/Officer on Special Duty, DSLSA, which has to be routed through the prosecutor. However, the Magistrate too, has a vital role to play in this. The magistrates establishes a direct dialogue with the witness at various stages of the investigation; therefore, in appropriate cases, where there is sufficient cause to believe that a threat to the witness exists, there is nothing that prevents the magistrate from referring the case to the DSLSA for consideration under the scheme, even *sans* a formal application. The witnesses' oral request may be treated as an 'application'. Considering the fact that most witnesses are laypersons, without adequate legal advice and knowledge as to their rights, this latitude will go a long way to serve the spirit of the scheme.

STAGE – IV – Monitoring of Investigation

Apart from the magisterial interface with the investigation, as discussed above: The question as to how a case has to be investigated has been traditionally considered to be the sole prerogative of the investigating officer, premised on (the now defunct!) ideals of formalistic separation of powers. The dangers of unfettered power and insulating investigation from court's vigil have already been demonstrated in the introductory paragraphs of this paper.

Such anachronistic notions of a passive magistrate have taken a thorough beating over the last couple of years and a definitive shift towards a more inquisitorial and participative system is clearly discernible. The argument that there is no provision in CrPC that allows the magistrate to monitor an investigation has been debunked by the Supreme Court conclusively in *Sakiri Vasu*[52] wherein such power has been read within Section 156(3) of the CrPC. It has been held that the power to direct investigation u/s 156(3) is wide enough to include all such powers in a magistrate which are necessary for ensuring a proper investigation. Therefore, in appropriate cases, the victim, complainant or a witness can approach the court seeking necessary directions to the police and supervision of investigation.

This reflects a definitive shift in the perception of a magistrate and recognition of his social function. He ought not to remain a mute spectator to the distortions and inadequacies of investigations, but can make meaningful interventions. At the same time, the magistrate ought to desist from investigating himself, as in the system we have adopted in India; the same magistrate often conducts the trial. However, the magistrate is empowered to monitor the investigation, with a view to ensure that it is free and fair.

The exact import of the expression '*monitoring of investigation'* is too circumstantial to be put in a straitjacket formula. Placing a narrow interpretation on the phrase will render it sterile. The phrase, therefore, ought to receive a social context or liberal interpretation. Illustrative cases, where the power to pass necessary directions may be used are: to protect witnesses, check disregard of vital evidence (which may get obliterated in course of time), non-examination of witnesses, deliberate shielding of some accused, or the investigating officer being interested in the case. In such cases, a magistrate ought to push the envelope

52 *Sakiri Vasu* v. *State of U.P*, (2008) 2 SCC 409 (Note on position post *Sakiri Vasu* -The correctness of *Sakiri Vasu* was subsequently questioned by the Supreme Court in *Nirmal Singh Kahlon* v. *State of Punjab,* (2009) 1 SCC 441 by saying "correctness whereof is open to question", however, since the matter was not referred to a larger bench for reconsideration and no reasons given as to why *Sakiri Vasu* was not acceptable - it still holds field and has since been endorsed by a catena of judgments including *T.C.Thangaraj* v. *V.Engammal & Ors*, (2011) 12 SCC 328.

and actively monitor the investigation, while avoiding investigating himself, or directing investigation by a specific agency, with respect to which there is a specific embargo on the powers of the magistrate.

Monitoring of investigation by the magistrate is, therefore, of vital importance to protect the integrity of prosecution. In this regard, the magistrate has to walk a tightrope and balance, on one side, the separation of executive from judiciary and the investigative autonomy of the police, and on the other, the imperatives of a fair, free and impartial investigation. The magistrate is to ensure that the search for truth is not muddied by police lapses, whether innocent or blameworthy.

The Malimath Committee had recommended that a provision on the following lines be added immediately below section 311 of the CrPC:[53]

> Power to issue directions regarding investigation: Any court shall, at any stage of inquiry or trial under this Code, shall have such power to issue directions to the investigating officer to make further investigation or to direct the Supervisory Officer to take appropriate action for proper or adequate investigation so as to assist the Court in search for truth.

The above amendment remains elusive. Similarly, amendments to section 482 of the CrPC so as to acknowledge 'inherent powers in the trial court' to pass any orders to do complete justice, have also remained on the paper. However, even *dehors* these amendments, there is nothing that prevents the court from reading this 'pursuit of truth' within the existing framework and more particularly, within section 156(3) of the CrPC.

Comparison of the Indian magistrate with the French system of juge d'instructions'

Any analysis of the role of a magistrate cannot be complete without a comparison with the extraordinary role of a magistrate in the French system. France's investigating magistrates, or *juge d'instructions',* as they are called in French, have been a central pillar of the French criminal justice system for the last 200 years. Under the French system - investigation in respect of serious and complex offences is done under the supervision of an independent judicial officer, who for the purpose of discovering truth: collects evidence for and against the accused and then decides whether the accused ought to be tried or not. In case of there being adequate material, the matter is forwarded for an adversarial trial by

53 Malimath Committee on Reforms in Criminal Justice System, 2003. Available at: http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf.

jury.

The institution of a *juge d'instruction* was made in the mid 19th century. *Juges* are appointed by none other than the President himself - for fixed three-year terms (which are renewable) upon the recommendations of the Ministry of Justice. The *juge d'instruction* commences investigation on either a referral by the prosecutor or on a private complaint. Once the *juge d'instruction* is seized of the matter even the accused gets right to all the documents and evidences collected during the investigation, and the right to be assisted by a counsel throughout the investigation. In contrast to this, in a strictly adversarial system - such as ours- the accused has a little role to play in the investigation. The investigating officers usually collect only incriminating material, totally disregarding exculpatory material. The accused does not get to participate in the investigation process, till the filing of the police report, and not even thereafter, strictly speaking, as even upto the stage of charge, he cannot adduce any evidence of his own to assist the court. He can only address submissions, punch holes, and expose intrinsic infirmities in the case of the prosecution. This results in the court having a totally one sided view of the case, at least till the stage of charge. This also results in a warped investigation; as much of what the accused can possibly rely on, is lost. This is especially problematic having regard to the fact that: most accused persons have little investigative prowess compared to the state, and by dictates of logic - a negative (innocence) is always more difficult to be proved than a positive (guilt).

Coming back to the institution of *juge d'intruction,* to assist fact finding, *juge* has a wide range of powers available. He may issue search warrants and order seizure of property. He also may issue warrants requiring attendance of other witnesses; he may even require experts to testify. In fact, if there is a conflicting testimony, witnesses are confronted with each other and often with the accused. This exercise is not done, in an adversarial system, till the recording and appreciation of evidence, which is usually years after the actual occurrence and when the recollection of the incident is allowed to be muddied.

The evidence collected and the testimony of witnesses recorded make up what is known as a 'dossier of a case', which serves as a guide for the *juge* in the preliminary hearing in the court. It is also made available to the defence, so that the element of surprise, so prevalent in common-law trials, is eliminated from the main hearing. It is on the strength of this file that the *juge d'instruction* bases his decision as to whether to commit a case to trial. The trial is conducted by another judge or the jury, which allows a fresh set of eyes to evaluate the evidence collected.

The institution of *juge d' instruction'* has been instrumental in unearthing many large scale political and financial scams by their incisive and fearless investigations, especially against the high and the mighty. On account of the legendary role played by them, these investigating magistrates have been immortalised in French literature and films. French novelist Honore de Balzac once described a French examining magistrate as the 'most powerful man' in the country. The *juges* are known for being impartial and objective and their services are invoked in the most complicated of all cases. Expectedly, by their dauntless and rather unsparing investigations, the institution has ruffled a lot of feathers and there is a definitive attempt on the part of the powerful in France to clip their wings. This has also succeeded in a fair measure as investigating magistrates today handle less than five per cent of all cases; however, most of these cases are sensitive. This constant dilution of their powers has been opposed by many in France as a major step backward for individual liberties. It has also been argued that the move will leave nation's legal process tenuous, broken and vulnerable to political manipulation.

It will be naive to suggest that the institution of examining magistrates is devoid of imperfections. An inquisitorial system is not at all infallible. An apt illustration will be - Albert Camus' famous work - 'The Stranger', where an examining magistrate allows extremely prejudicial past character evidence (which ought to have been excluded) and societal retribution to creep into the trial against the defendant. Where in a trial for murder of an assailant, evidence was allowed to show that the defendant did not believe in God; evidence was also allowed to the effect that the accused displayed a lack of emotion/grief at his mother's funeral some months back. Strangely, this fact was allowed to be led in evidence to prove his guilt in a totally unrelated murder case.

One more opposition to the French model is that that there is no constitutional right of *habeas corpus* in France. Investigating magistrates have a right to keep suspects in detention for extended periods of time without trial.

It is also argued that the 'examining magistrate' system is also less effective in ordinary crimes. It is slower and sometimes chokes the system; it is relatively more opaque and the concentration of power in one magistrate sometimes leads to arbitrariness in exercise thereof.

Having said this, the inquisitorial system has certain undeniable advantages. It can be used to avoid misunderstandings at an earlier stage in the case. In addition to this, in an inquisitorial system - 'truth seeking' is the fundamental value, and

the very 'end' of the system. This is in contrast to the adversarial system, wherein by competing to prove one's case to the judge, parties are encouraged to win, not uncover the truth. This can lead to unnecessary complications during the trial and more technical objections. Truth seeking is lost somewhere in this dialectic clash, which is seldom played by the rules. Such a passive system also ends up rewarding the better lawyer and not the more truthful case.

Relatively, trial procedures in this non-adversary model are simpler, less technical, and fewer lawyers dominated than in the adversary model where a complex system of evidentiary and procedural rules governs the parties' judicial duel.[54]

It is undeniable that the move towards a more pro-active and participative magistracy, on the lines of the examining magistrate is the need of the hour. Incidents of transgression of power will not be common-place, and in any event, a magistrate can be credited with greater objectivity than the average investigating officer. The argument of possibility of bias creeping in is not very convincing as bias can never be completely ruled out as long as investigation is done by any human agency. However, a judge's very training gives him at least some amount of transcendence and objectivity; although aberrations are always there.

Therefore, there is a juxtaposition of the two systems. Both have certain advantages and concerns. But on a fair analysis the trade off should not be difficult; the benefits of a more inquisitorial approach far outweigh the pitfalls. Across the world there is a move towards more involved and less passive legal systems. Within the Indian legal framework these benefits can be achieved with the expansion, or at least better use of section 164 of the CrPC - wherein statements of more material witnesses are recorded before the magistrate during investigation, more proactive use of section 156 (3), inclusion of powers to pass specific directions to the investigating officers, with a view to aid the search of truth as recommended by the Malimath Committee and saving of inherent powers with the trial court. This paper is an attempt to demonstrate that all this can be achieved, at least in a fair measure, within the existing judicial framework.

Stage – V – Further Investigation after filing of Police Report

Magisterial vigil does not terminate on the filing of the police report on the conclusion of the investigation and the court is not bound to accept the results of an investigation conducted by the police. In case the police conclude that no

54 Edward A. Tomlinson, "Non-adversarial Justice: The French Experience", 42 *Md. L. Rev.* 131 (1983).

case is made out against the accused, the magistrate has to issue a notice to the informant/victim and hear him out.[55] After hearing the informant, the court can, notwithstanding the closure report, choose to proceed with the matter, as a case based on police report or even a prior complaint.

The third option available is ordering further investigation. Section 173(8) of the CrPC expressly lays down such a course of action. However, the section does not enlist considerations that will govern the exercise of such power. Illustrative cases where further investigation may be ordered are: where the police act in a partisan manner to shield the real culprits and the investigation has not been done in a proper and objective manner but is tainted,[56] non-examination of crucial witnesses, clearing of doubts and to substantiate the prosecution case. To conduct fair, proper and an unquestionable investigation is the obligation of the investigation agency and the court in its supervisory capacity is required to ensure the same.[57]

Having said that, further investigation is to be distinguished from re-investigation or a *de-novo* investigation, which is not permissible. In cases where vital evidence has been disregarded by the police, the court can order further investigation into that aspect. The result of the further investigation is called a 'supplementary report' and can supplement the primary police report, already on record.[58] The earlier investigation is not wiped-off from the record and the subsequent investigation only supplements the earlier investigation.

The magistrate also cannot order a further investigation by a different agency (agency other than the original investigating agency) either, as that will amount to re-investigation. Only the higher courts have the power to order reinvestigation by a different agency, such as the CBI.[59] In such cases, the magistrate is not powerless; if he suspects foul play in investigation, he can always pass orders for senior officers to supervise the investigation personally and file periodic compliance reports, in a process akin to a continuing *mandamus*.

However, this has to be hedged with a caveat that: this power ought to be exercised sparingly, since the judge is also vested with inquisitorial powers as engrafted u/s 165 of the Evidence Act, and sections 91 and 311 CrPC that allow

55 *Bhagwant Singh* v. *Commissioner of Police and Another*, AIR 1985 SC 1285, *Gangadhar Janardan Mhatre* v. *State of Maharashtra and Others*, (2004) 7 SCC 768).

56 *Kashmeri Devi* v. *Delhi Administration and Others*, AIR 1988 SC 1323.

57 *Vinay Tyagi* v. *Irshad Ali*, (2013) 5 SCC 762.

58 *Ibid.*

59 *Chandra Babu* v. *State*, (2015) 8 SCC 774.

a judge to seek any information necessary to obtain proper proof of relevant facts and to seek production of vital evidence, examination of witnesses - not a part of prosecution or defence case, if the same is essential for a just decision of the case.

The power of further investigation, it must be remembered, can be exercised even *suo motu*,[60] and even after taking of cognizance[61] to ensure that no crucial aspect of the case goes uninvestigated and subsequent facts are brought to the fore.

V CONCLUSION

"Trial judge as the kingpin in administration of Justice.." [62]

It is apparent that ample powers are vested in the magistrate to check arbitrary arrests, police excesses and to facilitate a more incisive probe into the discovery of truth, at various stages of an investigation, and even after filing of the police report. Never should a judge find himself in a situation where he has to make a grudging confession of acquitting a known culprit due to lack of evidence or investigative lapses. A conscientious magistrate's *Dharma* also lies in the deft use of these provisions, in order to uphold constitutional values and the rule of law, and in this he ought not to hesitate in recalibrating the scales of justice and even protectively discriminating to correct systemic asymmetries and disadvantages towards the weaker accused, witness or the complainant. Existing provisions can be interpreted creatively. Cues can be taken from the magisterial role, as envisaged in other jurisdictions. No doubt, there would be questions raised over the magistrate having descended into the arena. But the magistrate ought not to be unnecessarily wary of such aspersions; or be a worshipper of dead habit, convention, or the complacency of the *status quo*, for no ideals, howsoever hallowed, can be allowed to impede the voyage of discovery, an affirmative duty for the search of truth.

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60 *Vinay Tyagi, supra* note 57.

61 *Kishan Lal* v. *Dharmendra Bafna*, (2009) 7 SCC 685 at 693.

62 *All India Judges Association* v. *Union of India*, (1992) 1 SCC 119.

OUTLINE OF LEGAL MECHANISMS OF COMPENSATION TO VICTIMS OF CRIMES: INTERNATIONAL PERSPECTIVE

GURPREET SINGH*

I INTRODUCTION

Compensating the victims of crime may provide them with some kind of relief in certain cases, though it cannot restore the original position in many cases such as murder of the victim or severing of any organ of the body, etc. Yet, an adequate compensation may heel their bleeding wounds. Therefore, the modern criminal justice has tilted towards the compensatory mechanism in addition to physical incarceration. Suitable amendments have been made in the Indian criminal justice system particularly after the *Delhi Gang Rape Case* in 2012. However, in the present article, an attempt has been made to examine the compensatory mechanism prevalent in the United States (US) and the United Kingdom (UK) including the various declarations and conventions regarding compensation by the United Nations (UN).

II COMPENSATION UNDER THE UNITED NATIONS

The UN General Assembly on November 11, 1985 adopted the "UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power".[1] This was the first constructive effort by the UN to provide some substantial rights to the victims of crime. Compensation[2] and restitution[3] are the two very effective tools to assist the victims of crime. Paragraph 8 of this declaration provides for restitution to victims or to their family by offenders or third parties responsible for their behaviour.[4] Such restitution should include

* Assistant Professor, Department of Laws, Panjab University, Chandigarh.

1 General Assembly Resolution 40/34 (November 29, 1985), *available at:* www.un.org/ (Visited on July 24, 2015).

2 According to Black's Law Dictionary, "Compensation means payment of damages, or any other act that a court orders to be done by a person who has caused injury to another and must therefore make the other whole."

3 Restitution is the restoration of the victim suffering and loss. It is victim's restoration of his place in the community and the rights that were injured or extinguished in the process of victimization. It is penal in character and it stands for a correctional goal. Hence, restitution calls for a decision by a court and payment or work by the victimizer. A restitution order requires the criminal offender to pay money or render services to his victim in order to redress the loss he has inflicted. Restitution may be imposed at any stage of the criminal process.

4 Offenders or third parties responsible for their behaviour should, where appropriate, make fair

the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights. Under paragraph 12 of the declaration, it has been provided that when the compensation is not available from the offender or other sources, then the states should endeavour to provide financial compensation to: (a) victims; and (b) the family, particularly the dependants.[5] Paragraph 13 provides for establishment, strengthening and expansion of national funds for compensation to victims; it also provides for encouraging the establishment of other appropriate funds, including in those cases where the state, of which the victim is a national, is not in a position to compensate the victim for the harm.[6]

The second landmark effort which was made by the UN was to provide the 'Right of Reparation for the Victims of Human Rights Violation 1997'.[7] Under principle 6, reparation[8] can be claimed by the victims themselves or by the immediate family, dependants or other persons or groups of persons closely connected with the direct victims for violations of human rights and international humanitarian law.[9] Under principle 7, it is the duty of the states that they should adopt special measures, where necessary, to permit expeditious and fully effective reparations in accordance with international law.[10] Reparation shall include

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restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

5 *Para 12*. When compensation is not fully available from the offender or other sources, the states should endeavour to provide financial compensation to:
(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

6 The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the state of which the victim is a national is not in a position to compensate the victim for them.

7 Right of Reparation for the Victims of Human Rights Violation 1997, *available at:* www.un.org/ (visited on July 24, 2015).

8 Black's Law Dictionary defines "reparation" as *"*payment for an injury or damage, redress for a wrong done. Payment made by one country to another for damages during war.*"*

9 Reparation may be claimed individually and where appropriate collectively, by the direct victims of violations of human rights and international humanitarian law, the immediate family, dependants or other persons closely connected with direct victims.

10 (In accordance with international law,) the states have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and

restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The United Nations 'Convention on Justice and Support for Victims of Crime and Abuse of Power' adopted on 14 November 2006 also reiterated the right of compensation and restitution to victims of crimes.[11] Article 9 provides for restorative justice. Accordingly the state parties (to this convention) shall endeavour to establish or enhance systems of restorative justice, that seek to represent victims' interests as a priority and emphasize the need for acceptance by the offender of his or her responsibility for the offence and the acknowledgement of the adverse consequences of the offence for the victim.[12] Article 10 lays down that states parties shall legislate to make offenders responsible for paying fair restitution to victims, their families or dependants in terms of the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, as also services and the restoration of rights. The states parties shall also review their practices, regulations, laws and their constitutions to ensure that restitution is available at the sentencing option in criminal cases and in cases of environmental crime. The states parties shall legislate to include restitution to restore the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of the community. The states parties shall also legislate to provide restitution to victims from the state whose officials or agents were responsible for the harm inflicted. The states parties shall also be responsible to enforce the order of the court for the restitution.

In cases, where the victim seeks restitution through civil remedies, states shall endeavour to expedite these proceedings and minimize expenses. Under article 11, compensation shall be provided to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of intentional violent crimes. The article further provides for compensating the victims' family, in particular, dependants of persons who have died as a result of such victimization. Compensation shall be provided for: (a) treatment and rehabilitation of physical injuries; and (b) pain and suffering and other psychological injuries caused to the victims.[13]

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guarantees of non-repetition.

11 Convention on Justice and Support for Victims of Crime and Abuse of Power, *available at:* www.worldsocietyofvictomology.org (Visited on July 24, 2015).

12 Article 10 of the Convention, 2006.

13 Article 11 of the Convention, 2006 - Compensation**:**
(1) When restitution is not fully available from the offender or other sources, States Parties shall

The states should also consider compensation for loss of income, funeral expenses and loss of maintenance for dependants and also encourage the establishment, strengthening and expansion of national, regional or local funds for compensation to victims. The states parties may consider providing funds through general revenue, special taxes, fines, private contributions, and other sources. These funds shall guarantee fair, appropriate and timely compensation with emergency and/or interim payments. Special care should be taken to make the funds accessible.[14]

Besides these, the United Nations has also drafted a *'Handbook on Justice for Victims'* in 1999 for the use and application of the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power."[15] The *Handbook* is designed as a tool for implementing victim service programmes and for developing victim-sensitive policies, procedures and protocols for criminal justice agencies and others who come into contact with victims. The *Handbook* outlines the basic steps in developing comprehensive assistance services for the victims of crime in terms of compensation and restitution.

III COMPENSATION IN THE UNITED KINGDOM

In England, a white paper presented in the UK Parliament in 1959 suggests

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endeavor to provide compensation to:(a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of intentional violent crime; (b) the victims' family, in particular dependants of persons who have died as a result of such victimization.
(2) Compensation shall be provided for:
(a) treatment and rehabilitation for physical injuries; (b) pain and suffering and other psychological injuries caused to victims;
(3) States should also consider compensation for loss of income, funeral expenses and loss of maintenance for dependants.
(4) The establishment, strengthening and expansion of national, regional or local funds for compensation to victims should be encouraged. States Parties may consider providing funds through general revenue, special taxes, fines, private contributions, and other sources.
(5) These funds shall guarantee fair, appropriate and timely compensation. They should also allow for emergency and/or interim payments. Special care should be taken to make the funds accessible. This requires, *inter alia*, extensive dissemination of information on the eligibility criteria and the procedure to be followed. States should also consider other means to raise public awareness of the existence of these funds.
(6) Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.
(7) In cases of cross border victimization, the State where the crime has occurred should pay compensation to the foreign national, subject to the principle of reciprocity.

14 *Ibid.*

15 *Handbook on Justice for Victims* (UNODCCP, New York, 1999).

that, "Society has concentrated so much on the rehabilitation of the offender that it has lost sight of the victim's welfare, i.e., the reformation policy is offender-oriented and not victim-oriented. It is necessary that victim's loss and offender's ability to pay should be assessed."[16] The plight of the victims received recognition from both the Council of Europe in its 1983 Convention and its Guidelines.[17] Before this, the criminal injuries compensation scheme was introduced for the first time in England in 1964 and from 1970s onwards, legislative provisions were made for court ordered compensation.[18] Compensation payable by the offender was introduced in the Criminal Justice Act, 1982 which gave the courts powers to make an ancillary order for compensation in addition to the main penalty in cases where 'injury, loss, or damage' had resulted. The Criminal Justice Act, 1982 made it possible for the first time to make a compensation order as the sole penalty. The Act also required that in cases where fines and compensation orders were given together, the payment of compensation should take priority over the fine. These developments signified a major shift in penology thinking, reflecting the growing importance attached to restitution and reparation over the more narrowly retributive aims of conventional punishment.

The Criminal Justice Act, 1982 furthered this shift. It required the courts to consider the making of a compensation order in every case of death, injury, loss or damage and, where such an order was not given, imposed a duty on the court to give reasons for not doing so. It also extended the range of injuries eligible for compensation. These new requirements meant that if the court failed to make a compensation order it must furnish reasons. Where reasons were given, the victims were entitled to apply for judicial review.[19] In 1988, the payment of compensation was formalized by the state by enacting the "Criminal Justice Act." But still, under this Act the victims still had no rights to claim compensation since the payment was at the discretion of the 'Criminal Injuries Compensation Board' (CICB). For claiming the compensation, it was most important that the victim should be adjudged as 'innocent' and was not at fault for the injuries suffered. Therefore, this scheme had limited application. The 1991 Criminal Justice Act contained a number of provisions which directly or indirectly encouraged an even greater role for compensation.

16 Ram Ahuja, *Criminology* 395 (Rawat Publications, Jaipur & New Delhi, 2000).

17 Council on Europe, *Convention on State Compensation for Victims of Violent Crime* (1983).

18 Chris Hale, Keith Hayward *et al* (eds.), *Criminology* 8 (Oxford University Press, 2005).

19 Mike Maguire, Rod Morgan *et al* (eds.), *Oxford Handbook of Criminology* 1237-1238 (Oxford University Press, 1994).

In 1990, the United Kingdom published the Victim's Charter which largely set out, in general terms, the existing arrangements for victims. It includes under most of the heads covered by the international documents, but interestingly it omits any mention of informal dispute resolution. The Charter's main limiting factor is that there is no means for enforcement. Therefore, it does not give victims any right, yet it does represent an official recognition of the interests of victims and provides victims organizations with a powerful tool to lobby with Parliament.[20]

Under the Victim's Charter, the provisions are made for the setting up of the Criminal Injuries Compensation Authority (CICA) and the setting up of the Criminal Injuries Compensation Appeals Panel (CICAP). The obligations of the CICA are that it must process all applications for compensation made under the Criminal Injuries Compensation Scheme (in short, the Scheme) in accordance with the rules of the Scheme. It is required to make available clear information on eligibility for compensation under the Scheme. It is required to respond to all correspondence regarding applications for compensation under the Scheme which requires a reply, not later than 20 working days from the day the correspondence was received by the CICA. In the event of a claim for compensation under the Scheme being refused or reduced, it is duty bound to give reasons for its decision to the applicant. If the CICA is unable to send a decision letter to an applicant for compensation under the Scheme within 12 months of receipt of the application, it is required to notify the applicant of the status of his claim. When issuing its decision, it must notify applicants of their right to a review of the decision, and provide information on the procedure and the time limit for applying for review. Where an applicant requests for a review, the CICA must process the review efficiently, fairly, and entirely afresh on the basis of all available information. It must provide explanations of the review decision to the applicants, and inform them of the process of applying for an independent appeal to the CICA.

The administrative staff of the CICAP is under an obligation to make available to claimants the relevant information regarding the procedure for appeals by producing and keeping up to date guidance materials. They must respond to all the correspondence relating to appeal cases under the Scheme which needs a reply, not later than 20 working days from the day the correspondence was received by the CICAP and it must ensure that explanations for appeal decisions under the Scheme are available to all the applicants.

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20 Katherine S. Williams, *Textbook on Criminology* 114-115 (Universal Law Publishing, 2001).

IV COMPENSATION IN THE UNITED STATES

In the US, compensation is being provided to the victims under both, the federal as well as the state laws. Many of the earlier penal codes in the U.S. included restitution provisions and in 1913 the U.S. Supreme Court, in *Bradford* v. *United States*,[21] sanctioned restitution as a condition of pardon. By providing for restitution in the penal sections of the state codes and authorizing it as a sentencing option in addition to fines or imprisonment or as a condition for parole or probation, legislatures have even today preserved restitution as a criminal penalty.[22] Federal governments have passed many laws to provide rights to the victims, particularly right of restitution and compensation. There are many major enactments and a few among them are the Victims of Crime Act of 1984 (VOCA), the Victims' Rights and Restitution Act of 1990, the Mandatory Victims Restitution Act of 1996 and the *Attorney General Guidelines for Victim and Witness Assistance Act of 1995.*

Besides these federal enactments, different states in the U.S. have also enacted their own laws to provide compensation and restitution to victims of crime. The court may order a defendant to pay a victim of crime costs relating to physical injuries, mental health, counseling, lost wages, property lost or damaged or other related costs. The restitution is important because it "forces the defendant to confront, in concrete terms, the harm his or her actions have caused."[23] All the states allow the courts to order restitution to be given to the victims at different stages of the trial. More than one third of the states in the U.S. require ordering of restitution, unless there are extraordinary or compelling circumstances why it should not be ordered. Out of 32 states which have provided for the victims' rights, 18 states have amended their constitutions to provide the right of restitution to victims. The defendant's assets, earning capacity, and other financial obligations are considered when payment schedule is set.

The first compensation programme was implemented in 1965, and nine states were operating such programmes by 1972, when the earliest programmes providing other types of victim assistance were established. Today, compensation programmes across the country are paying out close to $265 million annually to more than 115,000 victims. Fittingly, most of this money comes from the offenders, since a large majority of the states fund their programmes entirely through fees and fines charged against those convicted of crime, rather than by taxing the people.

21 228 US 446 (1913).

22 'Victim Restitution in the Criminal Process: A Procedural Analysis', 97 *Harvard Law Review* 934 (1984).

23 *People* v. *Moser*, 50 Cal. App.4th 130 at 135 (1996).

Federal grants to compensation programmes, providing close to 25% of the money for payments to victims, also come solely from the offender fines and assessments. The victims of rape, assault, child sexual abuse, drunk driving, and domestic violence, as well as the families of homicide victims, are all eligible to apply for financial help. Nationally, close to a third of the recipients of compensation are children, most of whom are victims of sexual abuse.[24]

The compensation programmes can pay for a wide variety of expenses and losses related to criminal injury and homicide. Beyond medical care, mental health treatment, funerals, and lost wages, a number of programmes also cover crime-scene clean up, travel costs to receive treatment, moving expenses, and the cost of housekeeping and child care. The states continue to work with the victims and the advocates to find new ways to help the victims with more of the costs of recovery.

Telling the victims about compensation is the responsibility of every individual who works in the victim services and the law enforcement including those who provide medical and counseling services. Compensation programmes depend largely on these professionals who work with the victims daily to get the message out that financial assistance is available, and the programmes typically expend a great deal of time and effort in providing training and information to them.

California established the nation's first compensation programme in 1965, and five other states started the programme in the next three years. By 1980, 28 states were providing victim compensation, and most of the rest of the states authorized programmes during the next decade. Currently, all the 50 states, plus the District of Columbia, the Virgin Islands and Puerto Rico, are operating compensation programmes.[25] California has the largest programme in the country by far, paying out about a third of the total benefits paid by all programmes combined. California awards about $75 million annually, while Texas pays out nearly $30 million each year. The median annual payout per state is about $2 million (half the states pay a total less than that, and half pay more), but the range is considerable, with nine of the smallest states paying less than $500,000 annually, and 13 states paying more than $5 million.

Staff size tends to be quite small, with 36 states operating with less than 10 people, and half of those employing five or less. Only a few states operate with

24 *Crime Victim Compensation an Overview,* U.S.A., www.usa.crimrevictimcom.com (visited on July 1, 2015).

25 It is worth noting that a number of European countries, plus Canada, Australia, New Zealand, and Japan also have victim compensation programmes fairly similar to those in the US.

more than 20 employees. California again being the largest has over 400 workers. The programmes function within a variety of governmental settings. Nearly one third are affiliated with departments of public safety or criminal justice planning, and another fifth function within offices of the Attorney Generals. Eight are independent agencies, workers' compensation bureau houses and other affiliations including corrections departments, social services agencies, and finance and management departments. Colorado and Arizona are unique in operating compensation programmes through local prosecutors' offices. Twenty-two compensation boards in Colorado (one in each district) and 15 boards in Arizona (one in each county) adjudicate claims under the state law and work in coordination.[26]

V VICTIMS OF CRIME ACT, 1984

Federal funds provide about 20-25% of the state compensation programmes' total budgets, through programmes authorized by the VOCA. Under the VOCA, for every $100 a state awards to victims, it gets $40 in federal funds to spend; this results in a 72-28% split in the state-federal dollars spent each year (of every $140 awarded to victims, $100 is state money and $40 is federal funds). The states also must bear all or nearly all of the administrative costs for operating their programmes (only 5% of each state's VOCA grant is available for administrative purposes). While the large majority of funds spent in operating the programmes and paying victims comes from the state budgets, the VOCA grants have enabled many states to expand coverage, and they make a significant difference in ensuring that there is enough money available to cover all eligible victims who may apply. The VOCA was to provide about $81 million to state compensation programmes in the federal fiscal year 2000.[27]

To be eligible for a federal grant, there are certain conditions which must be met. Programmes must cover medical expenses, mental health counseling, and lost wages for victims, as well as funeral expenses and lost support for families of homicide victims. They must consider drunk driving and domestic violence as compensable crimes, and must not categorically exclude domestic violence victims on the basis of their being related to or living with the offender.[28] Programmes must agree to consider for eligibility all US citizens who are victims of crimes within their states, regardless of the residency of the victim. Each state must offer benefits to its own residents who are victimized in the states without compensation

26 *Ibid.*

27 Victims' Service Annual Report, *available at:* www.portal.state.pa.us/ (visited on July 5, 2015).

28 Programmes may deny claims when an award to the victim would unjustly enrich the offender.

programmes, but since all the states currently have viable programmes offering eligibility to non-residents, this is no longer a real concern. Programmes must also cover their own residents who are victims of terrorism in foreign countries. Finally, they must also cover crimes falling under the federal jurisdiction within the states.

The VOCA grant programme is administered by the Office for Victims of Crime in the US Justice Department, which also provides funding for other victim services like domestic violence shelters and rape crisis programmes. In close to half the states, these VOCA assistance funds are administered by the same agency handling victim compensation. All the compensation programmes cover the major types of expenses, though their specific limits may vary. The primary compensable costs covered by all the states are the following: medical expenses, mental health counseling, lost wages for victims unable to work because of crime-related injury, lost support for dependants of homicide victims, and funeral expenses.[29]

Statistically, fees to hospitals, doctors and therapists comprise well over half of the amounts paid. Lost wages and support payments are the next largest expense category for most states. In addition, a number of other costs are paid for by some states, but not all programmes, including the following:

- Moving or relocation expenses, often limited only to instances where the victim is in imminent physical danger, or if the move is medically necessary (because of severe emotional trauma from sex assault, for example);
- Transportation to medical providers, usually limited to occasions when the provider is located in a place distant from the victim's residence, or when other special circumstances exist;
- Replacement services for work, if the victim is unable to perform because of crime-related injury (primarily child care and housekeeping), sometimes limited to payments to non-family members;
- Crime-scene cleanup, or the cost of securing a home or restoring it to its pre-crime condition;
- Rehabilitation, which may include physical therapy and/or job therapy;
- Modifications to homes or vehicles for paralyzed victims; and
- Fees for attorneys who help victims apply, usually in limited amounts and sometimes only for appeals.

Personal property stolen, lost or damaged during the crime is not covered

29 *Ibid.*

in all states, with a few exceptions.[30] All states will cover medically necessary equipment, such as eyeglasses or hearing aids and currently only three states pay for pain and suffering - Hawaii, Rhode Island, and Tennessee.

VI COLLATERAL RESOURCES

All the compensation programmes are "payers of last resort". This means that any other "collateral" sources of payment to the victim, such as medical or auto insurance, employee benefit programmes, social security, and medical aid, must be accessed first before these compensation programmes will consider payment. Since restitution, if paid at all, is often received over a long period of time, compensation programmes usually will pay in advance rather than force the victim to wait for restitution.

In addition, if the victim recovers any money from the offender or any other party liable for the victim's expenses, the compensation programme must be paid back for that portion of the expenses which it has covered, unless the victim's total out-of-pocket losses exceed the amount paid by both the programme and that recovered from another source.

VII OUTREACH AND AWARENESS

Compensation programmes depend largely on professionals in law enforcement and victim services to inform the victims about the financial assistance opportunities available to them. Providing this information is the responsibility of everyone who works with the victims; in fact, for the VOCA-funded assistance programmes, it is a condition for receiving the federal grant. In some states, police are required by the Victims Rights Statutes and constitutional amendments to supply this information. Compensation programmes provide ongoing training and information to police, advocates, and service providers, and also try to reach the general public through posters, PSAs, and community contacts. A number of states have established web-sites to improve awareness.

VIII CONCLUSION

The above given narrative of the compensation mechanisms shows that the present criminal justice system is regaining the earlier position wherein the victims used to be the central point. However, by introduction of the adversarial

30 Exceptions are Florida, New Jersey and New York.

criminal justice system in the modern time, the focus shifted from the victims to the criminals and the latter became the matter of concern for all states. Yet, revival of the victim oriented criminal justice system in the late 20th and 21st centuries in many parts of the world, particularly in the US and England has re-shifted the focus towards the victims and resultantly, 'victimology' as a subject has been also introduced in the legal curriculum of many universities of the world.

The impact of these new developments can also be noticed on the Indian criminal justice system. The amendments in the various criminal laws (CrPC, IPC, and the Evidence Act) reflect this new trend. However, at the same time, it must be made clear that the present compensatory mechanism in the Indian criminal laws do not match with that of the US and the UK. Therefore, we may take help from the US and the UK models of compensation for improvement in our compensatory mechanism.

India is a proud original member of the United Nations and has been a party to many of the Conventions and Declarations made by the UN. Under the international law, if a state becomes the party of such Convention or Declaration, then that state is bound to implement them. Therefore, our courts without any formal legal requirements in the form of statute or law or enactment, can implement the provisions of these Declarations or Conventions in the interest of making justice meaningful for the victims of crime. Article 51 of the Indian Constitution directs the state to make an endeavour to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another."[31] The Supreme Court as well as the various high courts have referred to many International Conventions, Covenants and Declarations in a number of judgments while interpreting the provisions of the fundamental rights in the past. It is high time for the district judiciary to rise to the occasion and as guardians of the rights of the people invoke these international conventions and declarations in appropriate cases to advance the rights of the victims of crime.

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31 Article 51. Promotion of international peace and security—The State shall endeavour to—
(a) promote international peace and security;
(b) maintain just and honourable relations between nations;
(c) foster respect for international law and treaty obligations in the dealings of organized people with one another; and
(d) encourage settlement of international disputes by arbitration.

CHILD CUSTODY AND VISITATION RIGHTS DECISION IN MATRIMONIAL LITIGATION

SHALINDER KAUR*

I INTRODUCTION

Relationships and marriages ending in separation or divorce are on the increase. Many couples have no choice but to face family breakdown and the difficult consequences that it brings. Inevitably, child custody and access rights are extremely delicate and emotional issues ensuing from such separations.

Custody involves basically the child's right to have a relationship with both the parents. As long as there is no court order to the contrary, parental rights and responsibilities are to be exercised jointly by both as they are the natural guardians of their child. However, when disputing parents cannot come to an agreement and a custody battle ensues, it is upto the court to make a decision about, how custody is to be split between both the parents. In India, primarily sole custody orders are made wherein the child lives with one parent who enjoys the right to make all the decisions independently regarding all the needs of the child and visitation rights rest with the other parent.

II EMOTIONAL ABUSE OF A CHILD

The children of divorced parents are divided between the two and the emotional stress they undergo is considerable. One spouse uses the child to browbeat the other into submission. In the legal battle of the parents, the children get emotionally and psychologically entangled and the warring parents are generally oblivious of the social and mental upheavals faced by their children. In many cases, where the court battles are lengthy and complex, the child invariably stays with the mother and attains majority during the prolonged custody and other matrimonial litigations.

III CUSTODY STATUTES

Although in India all matrimonial laws contain provisions regarding custody of children, the main laws governing child custody are, the Hindu Minority and Guardianship Act, 1956 which governs Hindus only and the Guardians and Wards

* Judge Incharge, Delhi Mediation Centre, Karkardooma Courts, Delhi.

Act, 1890, which governs the general populace and is a secular law.

Both the custody legislation provide for supremacy of the "parental right" to the father as the natural guardian of the child. The disparity is such that section 19 of the Guardians and Wards Act offers "a preferential right to the husband (of a minor girl) or the father (in all other cases) to be the guardian unless unfit to be appointed as such."

Moreover, section 25 of the Guardianship Act provides for the "arrest of a ward if the ward leaves or is removed from the custody of guardian, if such arrest is for the welfare of the ward". Even the Hindu Minority and Guardianship Act 1956 does not treat the mother on an equal footing with the father as the natural guardian of the child and property.

According to this Act, the father is the primary guardian for a legitimate boy and unmarried girl and their property while the mother is the secondary guardian. However, the mother is the primary guardian for all children under the age of five. For illegitimate children, the mother is the primary guardian, while the father is the secondary guardian. A married minor girl's husband becomes her guardian. For an adoptive son, the adoptive father is the primary and the adoptive mother is the secondary guardian.

Both the statutes provide for permanent custody, interim custody and visitation right.

Permanent custody

Permanent custody is awarded by the court after determination of all aspects of the case. The prime criterion before awarding final custody in favour of one spouse as against the other is the welfare of the child. Two of the other factors that are given importance are: the needs of the child and the child's adjustment to home, but the primary consideration always is the "best interests and welfare of the child". However, there are no codified rules governing the issue of custody. In the absence of any rules, the custody matters essentially rest on the discretion of an individual judge. Generally, "the best interests and welfare of the child" includes:

- Ensuring the greatest possible protection of the child's physical, psychological and emotional safety.
- The child's need for stability, taking into consideration the child's age and stage of development.
- The history of care for the child.
- The child's cultural, linguistic, religious and spiritual upbringing and

heritage.

- The child's views and preferences.
- Any plans proposed for the child's care and upbringing.
- Any family violence.
- Any civil or criminal proceedings that is relevant to the safety or well-being of the child.

So the entire child custody jurisprudence vests in the discretion of the court in formulating the "best interest and welfare of the child"- the golden standard.

Interim custody and visitation right

Interim custody is awarded by the court during the pendency of the case. Generally, the court awards interim custody when such an order does not affect the overall development of the child and the same is in no way prejudicial to his interest. The court tries to bring equilibrium between the husband and the wife and also keeps a vigilant eye that the child should not become a shuttle cock between the warring spouses. While awarding interim custody, the court has power to impose certain conditions so that the child is not removed from the jurisdiction of the court.

Visitation right is granted by the court at two stages: Firstly, at the stage of trial, and secondly, after determination of the entire issue of the appointment of guardian of the minor by the court. Indian law is clear on the point.

The proper development of the child is possible only after the child is showered with love and affection of both the father and the mother. Once permanent custody is granted to one of the spouses, the other parent has an inalienable right to meet the child(ren) once or twice a week or as directed by the court. The object of this law is that the emotional bond between the child and the father or the mother, as the case may be, should not be snapped.

An alarming situation is witnessed when the parent entrusted with the permanent sole custody of the child defeats the vital visitation right of the other parent by shifting the child without the consent of the other parent from the jurisdiction of the Indian courts leading to inter-parental child abduction. In such cases, the child is severely distressed. Therefore, visitation guidelines should be clearly mentioned in the court orders and visitation should be suspended if there are repeated violations of its terms.

IV LEGAL TRENDS

The custody law thus reflects the patriarchal edifice of the Indian society and does not view legal guardianship to be co-terminus with physical custody of the child. The legislation fails to address the concerns of single unwed mothers and women estranged from their spouses. The right to privacy of such women is eroded where the mother does not want to disclose the identity of the father. Single mothers have the onus on them to fight legally as well as socially to establish themselves as the guardian of the child.

Over the past years, there has been a considerable change in legal trends. In *Rosy Jacob* v. *Jacob Chakramakkal,*[1] the apex court observed: "The controlling consideration governing the custody of the children is the welfare of the children and not the right of the parents". In *Mohini* v. *Virendra,*[2] the Supreme Court verdict again emphasised on the paramount consideration before the courts in custody matters should be the welfare of the minor.

In the landmark judgment, *Githa Hariharan* v. *Reserve Bank of India,*[3] the apex court considered the word 'after' appearing in section 6 (a) of the Act and observed:

> In the phrase "the father and after him, the mother" the word 'after' need not necessarily mean after the lifetime of father. In the context in which it appears in section 6 (a) it means 'in the absence of'; the word 'absence' therein refers to the father's absence from the care of minor's property or person for any reason whatsoever. If the father is wholly indifferent to the matters of the minor or if by virtue of mutual understanding between the parents, the mother is put exclusively in charge of the minor or if the father is physically unable to take care of the minor for any reason whatsoever, the father can be considered to be absent and the mother being a recognised natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will keep the statute within the constitutional limits otherwise the word 'after' if read to mean a disqualification of a mother to act as guardian during lifetime of father the same would violate one of basic principles of constitution i.e. gender equality.

1 AIR 1973 SC 2090.

2 AIR 1977 SC 1359.

3 AIR 1999 SC 1149 (para 10).

In *Jajabhai* v. *Pathankhan,*[4] the apex court has observed that "where the mother and father had fallen out and were living separately and the minor daughter was under the care and protection of her mother, the mother could be considered as the natural guardian of the minor girl."

In a remarkable judgment dealing with interim custody of the child, *Roxan Sharma* v. *Arun Sharma*,[5] a two Judge Bench of the Supreme Court laid down various propositions of law while awarding interim custody to the mother till final disposal by the trial court. The court held that "Parliament rightly considered that the custody of a child less than 5 years of age should ordinarily be with the mother and this expectation can be deviated from only for strong reasons."

The Supreme Court in yet another judgment, *ABC* v. *State of (NCT) of Delhi,*[6] upheld the right of an unwed mother to apply for sole guardianship over her minor son without prior consent of the child's biological father. The apex court allowed the mother to apply for guardianship without disclosing the name of the biological father.

V RECOMMENDATIONS OF THE LAW COMMISSION

To overcome the many other hardships concerning the permanent and sole custody issues, the Law Commission in its 257th Report submitted a draft law to the government in May 2015 recommending sweeping changes in the existing custody arrangements for the children of divorced parents. The Report submitted that children are being used as "pawns to strike their own bargains." It has recommended legislative amendments to the Guardians & Wards Act and the Hindu Minority & Guardianship Act. For the first time in India, the concept of 'shared parenting' has been proposed, to provide 'joint custody rights' of a child to both parents in the case of divorce and to demolish the concept of supremacy of one parent over the other as natural guardian. It has also recommended extending child support from the existing age of 18 years to 25 years and lifetime support in cases where the child is suffering from mental or physical disability. The draft law empowers courts to fix an amount specifically for child support, to meet basic living expenses of the child. Financial resources of parents and standard of living of the child must be considered when fixing such amounts. It has also been proposed that parents consider 'expert-led' and 'time-bound' mediation not only

4 AIR 1971 SC 315.

5 AIR 2015 SC 2232.

6 AIR 2015 SC 2569.

to ensure better results for themselves but also with a view to reduce the pressure on the overstrained court system.

Also, it has proposed statutory guidelines to judges on determining child welfare rights in cases of joint custody. Guidelines have also been suggested in the draft law to include some new concepts such as parenting plans, grand parenting time, visitation rights and relocation of parents.

VI CONCLUSION

It is high time that the recommendations of the Law Commission of India made in its 257th Report is accepted and appropriate amendments inserted in the legislation in order to strengthen child custody jurisprudence. This is expected to both put an end to the frustration faced by the children during and post-emotional legal battle of their parents and strengthen the belief that equal parenting after divorce is what is in the "Best Interest of a child".

PAROLE IN INDIA: AN ANALYSIS

Anupama Gupta*

I INTRODUCTION

"*Society must strongly condemn crime through punishment, but brutal deterrence is fiendish folly and is a kind of crime by punishment. It frightens, never refines; it wounds, never heals."*

- Justice Krishna Iyer

The above cited quotation by Krishna Iyer J. is a reflection on the modern criminal jurisprudence that criminals are not born but made, since when a crime occurs it takes place due to the combination of a variety of factors and that majority of crimes are committed actually as a result of socio-economic milieu. Thus, modern laws try to reform criminals in order to control crime.

II MEANING OF PAROLE

Technically speaking, parole is conditional release of a prisoner for a limited duration and for a specific purpose. It is not commutation of sentence or amnesty. It is a legal mechanism that allows a prisoner to leave the prison for a short duration, on the condition that he behaves appropriately after release and reports back to the prison on termination of the parole period. It is granted to a prisoner detained for any offence, irrespective of the duration of imprisonment.

The law relating to release on parole is governed by the Indian jail laws. Parole release cannot be claimed as a matter of right but is granted at the discretion of the authorities involved. It is essentially an executive function.

According to section 5(B) of the Prisons Act, 1894, parole system means "the system of releasing prisoners in Jail on parole, by suspension of their sentences in accordance with the rules for the time being in force." The parole and furlough rules are part of the penal and prison system with a view to humanize the prison system. Those rules enable the prisoner to obtain his release and to return to the outside world for a short prescribed period.[1]

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* Assistant Professor of Law, K. R. Mangalam University, Gurgaon.

1 https://criminallawyersindia.wordpress.com/2014/04/04/rule-of-parole-in-india/ (Last visited 11/4/2015).

III HISTORY OF PAROLE

The term Parole is of French origin which literally means "voice" or "spoken words". During the mid-nineteenth century in the English colonies an Englishman, Captain Alexander Maconochie, and an Irishman, Sir Walter Crofton introduced the concept of parole for the first time.

Maconochie, with a view to eliminate the flat sentence structure, initiated a "mark system" whereby a convict could earn freedom by hard work and good behaviour in the prison.[2] The earned marks could be used to purchase either goods or a reduction in sentence. The prisoners had to pass through a series of stages beginning with strict imprisonment through conditional release to final freedom. Movement through the stages was dependent upon the number of marks accredited.

Similarly, Sir Walter Crofton, an administrator in the Irish prison in 1854 was also against the long term sentences of the offenders for an arbitrary period of time and emphasized on the need for rehabilitation of the offender. And as a result, he initiated a system incorporating three classes of penal servitude: *strict imprisonment*, *indeterminate sentences*, and *ticket-of-leave.* This indeterminate system permitted convicts to earn marks to move from solitary confinement to a return to the community on a conditional pardon or ticket-of-leave.

The similar ideology was adopted by a Michigan penologist, Zebulon Brockway in the United States who believed that inmates should be able to earn their way out of prison through good behaviour. According to him such a system will serve dual purpose : firstly the prisons will not be overcrowded, and secondly, it will provide another opportunity to the offenders to reform.

Thus, release on parole is a wing of the reformative process and is expected to provide an opportunity and status to the prisoner in those cases where the convict prisoner has served a part of his sentence in jail on a condition that he will abide by the terms and conditions of parole for release.

IV OBJECTIVES

Parole is an alternative approach to the traditional debate between whether the focus should be on the rehabilitation of offenders or on awarding punishment to them for their wrong deeds under the criminal justice system. Release of convicts on parole and furlough are measures taken towards the psychological

2 http://www.encyclopedia.com/doc/1G2-3403000205.html (Last visited on 3/3/2015).

well-being of the inhabitants of jail. Prison is a place where the criminal justice system puts its entire hopes. The whole criminal procedure will be futile if it fails to serve its sole purpose which is the correctional mechanism. With the evolution of new human rights jurisprudence, the entire concept of imposing punishment has changed. The concept of reformation has become the watchword for prison administration. Human rights jurisprudence greatly favours the idea that no crime should be punished in a cruel, degrading or inhuman manner. On the contrary, it advocates that any punishment that amounts to cruel, degrading or inhuman treatment should be considered as an offence by itself. So this transitional change caused to the criminal system from a deterrent one to a correctional mechanism has been accepted worldwide in the form of concepts like parole and furlough.

The Model Prison Manual itself lays down the main objectives of parole technique which includes the following:[3]

(1) to enable the inmate to maintain continuity with his family life and deal with family matters;

(2) to save the inmate from the evil effects of continuous prison life; and

(3) to enable the inmate to retain self-confidence and active interest in life.

That means the system of parole aims at meeting the ends of justice in two ways: Firstly, it serves as an effective punishment by itself inasmuch as the parolee is deterred from repeating crime due to threat of his return to prison or a similar institution if he violates parole conditions; and secondly, it serves as an efficient measure of safety and treatment reaction to crime by affording a series of opportunities to the parolee to prepare himself for an upright life in society.

The Jail Reforms Committee, 1983 recommended that besides the system of parole, there should also be a system of release of prisoners on furlough under which well behaved prisoners of certain categories should, as a matter of right, have a spell of freedom occasionally after they undergo a specified period of imprisonment, so that they may maintain contact with their near relatives and friends and may not feel uprooted from the society. The furlough period should count towards the prisoner's sentence.

3 http://www.shareyouressays.com/121725/essay-on-main-objectives-of-parole-technique-as-stated-in-the-model-prison-manual (Last visited on 5/5/2015).

V KINDS OF PAROLE

In India, the grant of parole is largely governed by the rules made under the Prisons Act, 1894 and the Prisoners Act, 1900. Each of the states has its own parole rules, which have minor variations with each other.

Parole may be classified as (a) *Custody Parole;* and (b) *Regular Parole.*[4]

A. ***Custody Parole*** **:** The custody parole is granted in emergency circumstances which includes:

a. Health-related concerns[5] like:

- Complete and incurable blindness.
- Advanced pulmonary tuberculosis, which incapacitates the prisoner from committing further crimes of the nature for which s/he was sentenced.
- If he is dangerously ill, and is likely to have a better recovery outside prison.
- If he has become mentally unstable and requires treatment in an asylum.

b. Death in the family;

c. Serious illness; or

d. Marriage in the family.

It is limited to a time span of six hours during which the prisoner is escorted to the place of visit and return therefrom. The grant of parole is subject to verification of the circumstances from the concerned police station and is granted by the superintendent of jail.

B. ***Regular Parole*** **:** The regular parole is allowed for a maximum period of one month, except in special circumstances, to convicts who have served at least one year in prison. It is granted on certain grounds such as:

- to perform funeral rites;

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4 http://delhi.gov.in/wps/wcm/connect/b9eff18047292516981d9d741ca07a0fGUIDELINE.pdf?MOD=AJPERES&lmod=1922745342&CACHEID=b9eff18047292516981d9d741ca07a0f (6/3/2015).

5 http://qna.economictimes.indiatimes.com/Law-Regulations/Criminal-Law/what-parole-means-for-a-prisoner-in-india-what-are-the-valid-grounds-of-parole-in-india-496082.html (Last visited on 4/3/2015).

- serious illness of a family member;
- accident or death of a family member;
- marriage of a member of the family like that of son, daughter, brother or sister;
- delivery of child by wife of the convict;
- maintain family or social ties;
- serious damage to life or property of the family of convict by natural calamities; and
- pursue filing of a special leave petition.

VI INELIGIBILITY TO BE RELEASED ON PAROLE[6]

The ineligibility criteria is dependent on several factors such as the kind of offence in which the convict is involved, the gravity of offence he committed, whether his temporary release would hinder the national security, etc.

Thus, under the following circumstances, a convict may be debarred from availing the benefit to be released on parole :

- convicts whose release on parole is considered dangerous or a threat to national security;
- there exists any other reasonable ground such as a pending investigation in a case involving serious crime;
- prisoners who have been involved in crimes and offences against the state, like sedition or who have been found to be instigating serious violation of prison discipline; or
- prisoner who is not a citizen of India.

There are cases when parole ordinarily would not be granted except, if in the discretion of the competent authority, special circumstances exist for grant of parole:

- if the prisoner is convicted of murder after rape;
- if the prisoner is convicted for murder and rape of children;
- if the prisoner is convicted for multiple murders; or
- if there are more than one convict in a case who are lodged in the same

6 http://delhi.gov.in/wps/wcm/connect/b9eff18047292516981d9d741ca07a0f/GUIDELINE.pdf?MOD=AJPERES&lmod=1922745342&CACHEID=b9eff18047292516981d9d741ca07a0f (Last visited 6/3/2015).

prison, the co-accused convicts would not be released simultaneously except upon special circumstances to be mentioned in the order granting parole.

The period of release on parole shall not, ordinarily, exceed one month at a time except in special circumstances to be mentioned in the order granting parole. The government shall decide the period of release on the merits of each case, for reasons to be specified in the order granting parole.

VII PROCEDURE FOR DISPOSAL OF APPLICATIONS[7]

The procedure begins with the submission of an application form by the convict or a relative (on his behalf) to the superintendent of jail. This application form shall contain all the basic details about the convicted person including his reasons for seeking parole. The superintendent of jail has to maintain a parole register in this respect. The superintendent would first verify the grounds stated in the application upon an oral interview with the prisoner. A copy of the application would then be forwarded by the superintendent to the concerned police station. The police station (if within NCR) shall furnish the report in the format prescribed in the schedule within seven days from the date of the receipt of the copy of the said application. In case such report is not received within seven days, then the superintendent will send a communication in writing to the deputy commissioner of police of the concerned district with a copy to the concerned police station requiring the submission of a report within five working days from the date of receipt of the communication. If a verification report is required from the police of any other state, the same should be sought from the concerned deputy commissioner of police/senior superintendent of police of the district concerned. The said report shall be furnished by the concerned authority in accordance with the form prescribed in the schedule within ten days of the receipt of the copy of the application for parole. The superintendent of the jail shall in case of failure to receive any such report, forward a communication in writing to the director general of police of the state to submit the report within seven days. In spite of frequent requests to furnish the above details, if the superintendent doesn't receive any such report, it shall be presumed that there is no objection to the grant of parole. The above application is then required to be forwarded to the Deputy Secretary Home (General), Government of NCT of Delhi with a forwarding note of the fact that since no report has been received, so there is no objection in granting parole to the

7 http://delhi.gov.in/wps/wcm/connect/b9eff18047292516981d9d741ca07a0f/GUIDELINE.pdf?MOD=AJPERES&lmod=1922745342&CACHEID=b9eff18047292516981d9d741ca07a0f (Last visited 6/3/2015).

convict.

The Deputy Secretary, Home (General), GNCT would scrutinize the application and ensure that the home department (including approvals at all levels) decides the application of parole within three weeks. The decision will be communicated to the superintendent of jail who in turn will communicate the same to the prisoner/convict. In addition, he will ensure that a copy of the order is served on the convict/prisoner. In some states, the application along with the police report and recommendation is sent to the inspector general of prison, which is then considered by the district magistrate. The state government takes the decision in consultation with the district magistrate.

While granting parole, the competent authority may impose suitable conditions such as execution of personal bonds with or without sureties. It may also require the convict to report to the local police station and may also restrict his movement to a limited area. In case the request for parole is rejected, the competent authority is required to give reasons.

VIII DIFFERENCE BETWEEN PAROLE, FURLOUGH AND PROBATION

In general parlance, the terms – parole, probation and furlough – are used synonymously. But in practice these words connote different meanings. The only similarity amongst these words is that these terms are alternatives to incarceration.

Difference between parole and furlough

Parole and furlough are two different concepts which allow the prisoner to leave the jail premises during the course of his sentence. These rules are part of the penal and prison system with a view to humanize the prison system and enable the prisoner to return to the outside world for a short prescribed period. In such cases, the prisoner is under supervision and is expected to follow certain rules and guidelines and submit to warrantless searches, without probable cause. These two procedures are governed by separate state regulations. The difference between the two is that furlough is a matter of right while parole is not and both depend on the discretion of the authorities. The furlough granted to Sanjay Dutt, for example, was under the Prisons (Bombay Furlough and Parole) Rules, 1959.

a) Parole is an early release of inmates from correctional institutions prior to the expiration of the sentence or after serving a part of a sentence on the condition of good behaviour and supervision in the community.

Furlough is a prisoner's right. It may be granted to the prisoner periodically, irrespective of any particular reason, merely to enable him to retain family and social ties and avoid ill-effects of continuous prison life. But the right is not absolute. The period of furlough is treated as remission of sentence.

b) Parole changes are not usually the result of a court order. Instead, parole conditions are usually set by the parole board, and they are for all defendants. For example, all defendants are banned from committing new offences. Changes in conditions or procedures related to those conditions do not come from the original judge, but they come from the parole officer or parole board. Instead of criminal proceedings these changes are referred to as administrative proceedings. This is an important distinction, because a defendant is afforded more state and constitutional protection in a criminal case than in an administrative hearing.

In the case of furlough, it is not necessary to state reasons while releasing the prisoner on furlough but in the case of parole, reasons have to be indicated.

c) In *State of Maharashtra and another* v. *Suresh*,[8] referring to the provisions of section 59 of the Prisons Act (9 of 1894) and rules 4 and 6 of the Prisons (Bombay Furlough and Parole) Rules, 1959, the Supreme Court has clearly brought out the distinction between furlough and parole .

It was held that the underlying object of the rules relating to 'parole' and 'furlough' are mentioned in the *All India Jail Committee's Report* and the *Model Prison Manual*.

In the instant case, the accused person had allegedly committed rape on his step-mother and was convicted for offences punishable under sections 376 and 354 of IPC and was sentenced to seven years imprisonment with fine. Despite objections to the release of the offender on furlough by the district magistrate and the superintendent of police, on the ground that he was likely to disturb the peace and tranquility, he was ordered to be released on furlough by the high court on furnishing surety of amount lying in deposit with the jail authorities.[9]

On appeal by the state against this order, the Supreme Court held that since rule 4(4) of the Bombay Prisoners Furlough Rules provided that furlough can be granted only when recommended by the district magistrate and the superintendent of police and rule 6 of the Prisons (Bombay Furlough and Parole) Rules, 1959 made

8 (2000) 1 SCC 471.

9 http://www.shareyouressays.com/121581/what-is-the-difference-between-parole-and-furlough-559-words.

it mandatory that unless the prisoner has a relative willing to receive him while on furlough and enters into a surety bond, he shall not be granted furlough. This meant that some relative of the prisoner must bear the responsibility to ensure that the prisoner would be under his supervision and would report back to the jail as and when required. The relative was also required to sign a bond to this effect and if the prisoner failed to comply with these regulations, this relative would then be answerable to the police authorities. So, in this case since the sister refused to enter into a surety bond, his release on furlough was held to be illegal and the state government's appeal was, accordingly, allowed.

In *Sharad Bhiku Marchande* v. *State of Maharashtra,*[10] it was further held that leave on furlough is considered as a part of the punishment period. This means that a month long leave on furlough is part of the total duration of the imprisonment given to the accused. Therefore, the prisoner is practically spending his punishment period outside the premises of the jail, if the leave is granted under furlough.

For parole, on the other hand, it is required that the state government must provide the reasons for which the leave is granted to the prisoner. Besides this, since parole is a form of privilege, the state government can deny the leave on reasons other than public interest. Also, leave on parole is not a part of the imprisonment period, and hence, the period of the punishment increases if the prisoner is given leave on parole.

- When a person is released on parole, specific reasons are required to be mentioned in the order. But the same is not necessary to be stated in the case of release on furlough.
- Release on furlough is not an absolute right of the prisoner. It is allowed periodically under the rules, irrespective of any particular reason, merely to enable the prisoner to have family and social ties and to avoid the ill-effects of continuous prison life. It is treated as a period spent in prison. But, the period spent on parole is not counted as remission of sentence.
- Since furlough is granted for no particular reason, it can be denied in the interest of society, whereas parole is to be granted on sufficient cause being shown.

d) Parole, however, is not a matter of right. It may be denied to a prisoner even when he makes out a sufficient case for release, if the competent authority

10 1991 CriLJ 2109.

is satisfied on valid grounds that his release on parole would be against the interest of the society or the prison administration. Thus, it cannot be contended that a prisoner released on parole and surrendering later, is disqualified for furlough. His application for release on furlough has to be considered on merits and cannot be rejected at the threshold.

Difference between parole and probation

The aims of probation and parole process tend to be very similar. Although both probation and parole have a strong rehabilitation component, each process has the additional goal of protecting the community. Both are different forms of supervision after sentencing.[11]

The major points of difference between these terms are as follows:

a) Probation refers to a period of time before a person is actually sent to prison or jail. The judge, instead of pronouncing the sentence, gives the offender an opportunity to rehabilitate. In this case, either the party is given probation without a pre-determined sentence, or having found him guilty, temporarily suspends the sentence and is released on probation.

b) Releasing an offender on probation is completely a judicial function. The Indian laws on probation are contained in section 360 of the CrPC 1973, and the Probation of Offenders Act, 1958 which specifically deals with the procedure to release a person on probation.

c) Probation is a front-end decision that is made prior to confinement in a jail or prison. That means it occurs prior to and often instead of jail or prison time; while parole is a back-end decision to release inmates early from jail or prison.

d) In contrast to probation, parole is the early release of inmates from correctional institutions prior to the expiration of the sentence on the condition of good behaviour and supervision in the community. It is also referred to as supervised release, community supervision, or after-care. The parole board is the legally designated paroling authority. It has the authority to release on parole adults (or juveniles) who are committed to correctional institutions, to set conditions that must be followed during supervision, to revoke parole and require the return of the offender to an institution, and to discharge from parole.

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11 http://criminal.lawyers.com/parole-probation/criminal-law-sentencing-parole-and-probation-faq.html.

e) Parole has the additional function of trying to reintegrate a defendant into the society. Depending on the nature of a defendant's offence, his conditions of probation or parole can be amended or changed. For example, if a defendant is convicted of molesting a child, he may be ordered to stay away from parks and playgrounds where children frequently come.

The conditions of both parole and probation must somehow relate to a defendant's rehabilitation or underlying offence. How conditions are set depend on whether a defendant is on probation or parole. A defendant on probation is usually still subject to the jurisdiction of the court. This means the judge has the right to amend or modify a defendant's conditions of probation. Any changes usually come in the form of an order that modifies a defendant's conditions.

IX CONCLUSION

The efficiency of parole administration is generally a debatable one because of the quasi-judicial nature of the parole board as it raises the presumption of undue political and executive pressures on its decisions. Such undesirable influences defeats the very purpose of the entire criminal justice system since it helps to procure the release of undeserving prisoners and restrain the release of deserving ones.

Thus, it would be an appreciable step if certain judicial policies are formulated on the matters of parole. Despite the inadequacies in legislation, the judiciary on its own initiative has contributed much to prison administration thereby ensuring fundamental human rights of prisoners. Many of those rights are recognized by the international human rights law.[12] However, the judiciary alone cannot solve the problem *in toto* because it might create new problems since the courts are likely to take shifting stands on the question of fitness of the inmates for release on parole due to its lack of proper psychological insight into human behaviour.

Moreover, parole being a treatment reaction to crime, it will be grossly unjust to confine the system strictly to the parole board which is only a quasi-judicial body. Therefore, as a workable alternative, it would be expedient that the executive functions performed by the parole board should be subject to judicial review.

This, in other words, it would mean that the parole board should assess the suitability of prisoners for release on parole and provide guidance to the judges in

12 http://www.iosrjournals.org/iosr-jhss/papers/Vol9-issue5/F0952429.pdf.

taking a final decision in the matter. This would certainly help to make the entire parole system more equitable.

It must be reiterated that a great majority of persons sentenced to imprisonment wants to return to society as law-abiding citizens. Only a few anti-social elements have no intention of changing their lawless attitude after their discharge from prison. So, it would not be wrong to say that prisons do not serve the purpose of training and rehabilitation for all categories of offenders, particularly those who are beyond reformation or are hard-core criminals. Penal reform should always be introduced with an aim to have a nexus between reform and the theory of punishment.

It is a paradoxical situation that on the one hand our purpose of sending the convict to jail is to rehabilitate him. But on the other hand, we fail to realize the fact that the stigma which the society attaches to the released inmate, makes it difficult for him to return to community despite his sincere efforts to live honestly. As a result an ex-convict finds himself handicapped and stigmatized. Therefore, releasing a prisoner on parole is a very efficient mode of slowly integrating the person with the society so that when he comes out of jail on completion of the sentence, his social rehabilitation is possible without much difficulty.

Thus, it may be concluded that parole is one of the most effective and efficient modes for the convict to re-socialize and readjust with society and continue with his normal life. Releasing prisoners on parole also relieves the state of its burden of expenditure on prisons to a considerable extent.

ENFORCEMENT OF ATTENDANCE OF WITNESSES AND PRODUCTION OF DOCUMENTS IN DEPARTMENTAL INQUIRIES

ARUN BHARDWAJ*

Any officer, whether belonging to the Delhi Higher Judicial Services or the Delhi Judicial Services can be appointed as an inquiry officer to conduct a departmental inquiry against a member of the Delhi District Courts Establishment Service (hereafter referred to as 'Service').

As per the Delhi District Courts Establishment (Appointment and Conditions of Service) Rules, 2012 (hereafter referred to as 'Rules of 2012'), a District Judge i.e., a District and Sessions Judge (Headquarters), Delhi, is one of the disciplinary authorities for members of the service, the other being the Delhi High Court. A member of the service posted in any one of the 11 districts will be under the disciplinary authority of the District and Sessions Judge (Headquarters), Delhi. Further, it is his/her discretion to nominate an inquiry officer to conduct an inquiry against the delinquent member for the alleged misconduct or misbehaviour.

There have been instances in the past where one of the witnesses cited in the inquiry was a general member of the public and not a member of the service. Ensuring the attendance of such witnesses and/or ensuring production of documents in such cases have proven to be difficult at times for innumerable reasons.

It is relevant to note here that the provisions of the central enactment, namely, the Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1972 (hereafter referred to as 'Act of 1972'), apply to every departmental inquiry held in relation to:

(a) persons appointed to public services or posts in connection with the affairs of the Union;

(b) persons who, having been appointed to any public service or post in connection with the affairs of the Union, are in service or pay of-

  (i) Any local authority in Union Territory;

  (ii) Any corporation established by or under a Central Act and owned or controlled by the Central Government;

  (iii) Any Government company within the meaning of Section 617 of the Companies Act, 1956 (1 of 1956), in which not less than fifty-one

* Joint Registrar, Delhi High Court.

percent of the paid-up share capital is held by the Central Government or any company which is a subsidiary of such Government company;

(iv) Any society registered under the Societies Registration Act, 1960 (21 of 1860), which is subject to the control of the Central Government.

Paras 4 and 5 of the Act which are relevant are as under:

4. *Power of Central Government to authorise the exercise of power specified in Section 5.* – (1) Where the Central Government is of opinion that for the purpose of any departmental inquiry it is necessary to summon as witnesses, or call for any document from any class or category of persons, it may, by notification in the Official Gazette, authorise the inquiring authority to exercise the power specified in Section 5 in relation to any person within such class or category and thereupon the inquiring authority may exercise such power at any stage of the departmental inquiry.

(2) ....

5. *Power of authorised Inquiring authority to enforce attendance of witnesses and production of documents.* – (1) Every inquiring authority authorised under Section 4 (hereafter referred to as the "authorised inquiring authority") shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely –

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) requiring the discovery and production of any document or other material which is admissible as evidence;

(c) the requisitioning of any public record from any Court or Office.

(2) ....

(3) Every process issued by an authorised inquiring authority for the attendance of any witness or for the production of any document shall be served and executed through the District Judge within the local limits of whose jurisdiction the witness or other person, on whom the process is to be served or executed voluntarily resides or carries on business or personally works for

> gain, and, for the purpose of taking any action for the disobedience of any such process, every such process shall be deemed to be a process issued by the District Judge.

The States of Maharashtra, Karnataka and Uttar Pradesh have enacted similar provisions akin to the central enactment whereby inquiring authorities have been conferred with the powers vested in the civil courts under the Code of Civil Procedure, 1908, to enforce attendance of witnesses and production of documents.

However, the Government of NCT of Delhi has not enacted any such law on the lines of the Act of 1972. It follows the CCS (CCA) Rules, 1965, CCS (Conduct) Rules, 1964 and CCS (Pension) Rules, 1972 in matters of disciplinary actions against its employees apparently on the ground that Delhi is a Union Territory; hence, the rules framed by the Central Government are made applicable to its employees.

Rule 42 of the Delhi District Courts Establishment (Appointment and Conditions of Service) Rules, 2012 dealing with the residuary provision is as under:

42. *Residuary provision*

> The conditions of service of the members of the Service for which no express provision is made in these rules shall be determined by the laws, rules and orders for the time being applicable to members of the State Civil Services in the State, holding equivalent grade posts.
>
> Provided that any rules other than those referred to above applicable to members of the service immediately prior to the commencement of these rules shall continue to apply to them.

Relying on this provision, the inquiring authorities have been making references to the competent authorities for authorizations under section 4 of the Act. However, these authorizations used to take unduly long time resulting in closure of inquiries.

To surmount this problem, the Government of India appointed a committee of experts under the chairmanship of P. C. Hota, former Chairman, UPSC to review the procedure for disciplinary/vigilance inquiries and recommend measures for their expeditious disposal. Considering that the practice of issuing a separate notification in each case of departmental inquiry empowering the inquiry officer under the Act of 1972 was a time taking process which was not serving any useful

purpose, the Hota Committee recommended to the Central Government that the Act of 1972 be amended to confer powers on all inquiry officers to exercise powers of a civil court for enforcement of attendance of witnesses and production of documents.

The aforesaid recommendation was considered by a Committee of Secretaries (CoS) under the chairmanship of the Cabinet Secretary which observed that since the need to enforce attendance arose only in a few cases there might not be any requirement to amend the Act of 1972 conferring powers of a civil court on all inquiry officers. The purpose would be served by issue of administrative instructions laying down specific time lines for consideration of requests for issuance of notifications under the said Act.

The above recommendation of the CoS was accepted by the Government of India vide OM No.372/3/2007-AVD-III (Vol.10) dated 14th October, 2013, and it was decided that:

> Every reference from an inquiring authority, seeking the issuance of a notification by the Central Government/competent authority, under Section 4 of the Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1972, to confer powers on an Inquiring Authority to exercise powers of Civil Court for enforcement of attendance of witnesses and production of documents, shall be decided within 30 days from the date of receipt of such reference.

The Delhi High Court has also taken a decision now that in future whenever there is a need for summoning witnesses or production of documents in any departmental inquiry, notification under section 4 of the Act shall be issued within 30 days of the reference from the inquiring authority to exercise all powers of a civil court for enforcement of attendance of witnesses and production of documents in the departmental inquiries.

By the virtue of rule 27 of the Delhi Higher Judicial Service Rules, 1970 and rule 30 of the Delhi Judicial Service Rules, 1970 (provisions dealing with residuary matters), the provisions of the Act would *mutatis mutandis* apply to inquiries pertaining to officers of both DHJS and DJS.

EXHIBITS OF DOCUMENTS – LAW, PROCEDURE AND PRACTICE

INDER JEET SINGH*

I INTRODUCTION

In domestic law, there are two kinds of laws – substantive law and adjective law. The substantive law defines the rights and obligations and the adjective law defines the procedure as to how to achieve those rights or get the obligation enforced. In order to achieve the rights, through the court of law, it requires establishing them by way of proof, which is generally done by adducing evidence. That is to say, the things are to be restructured by way of evidence before the court for the realization of the rights or for achieving the ends of justice.

Normally, there are three kinds of evidence, viz, the oral evidence (the things/facts which are generally perceived by senses), the documentary evidence and material things and the opinions/expert opinions (which may be oral or in writing). The present topic confines only to documentary evidence and things.

There are three stages of proving the documents, in civil and criminal case trials. The first stage is of admission and denial of documents. It has been described under Order XII Rule 3A of the Civil Procedure Code, 1908 (CPC) in respect of civil cases and section 294 of the Code of Criminal Procedure, 1973 (CrPC), in respect of criminal cases. The second stage is recording of evidence. It has been dealt under Order XVIII and Order XIX of the CPC. Similarly, sections 274, 275 and 276 of the CrPC deal with summons trial cases, warrant trial cases and session's trial cases, respectively. The third stage is of appeal and there is also the procedure for additional evidence, being dealt under Order XLI Rule 27 of the CPC and it is also dealt under section 391 of the CrPC. But the additional evidence in appeal is to be recorded as evidence in trial. Thus, it can be said that basically there are two stages to deal with the documents and they are at the stage of admission and denial of documents and of evidence.

II ADMISSION AND DENIAL OF DOCUMENTS – STAGE 1

In addition to the procedure laid down in the CPC, there are instructions to civil courts in Delhi by the High Court Rules and Orders,[1] which also prescribe

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* Additional Sessions Judge-03, North East District, Room No. 53, Karkardooma, Delhi.

1 Volume 1 – Chapter 1G, particularly Rule 14.

the procedure as to how the documents are to be endorsed during evidence, which could be adopted for admission and denial of documents. When the plaintiff tenders documents to the defendant, he/she may admit or deny them. In case the documents are admitted they are to be endorsed as 'admitted' by appending his/her signature with date below the admitted documents. Thence, the presiding officer will endorse the admitted documents numerically as Ex. P-1, Ex. P-2, Ex. P-3, Ex. P-4... (a specimen is enclosed at end for ready reference). In case the defendant denies the plaintiff's documents, they will be endorsed as 'denied' and below it the defendant will sign with date. It does not require any endorsement by the presiding officer. On occasions, where the documents are not to be tendered in admission and denial of documents, the same may be proved by the party in evidence.

Similarly, the defendant may also tender the documents to the plaintiff. In cases where the plaintiff admits the documents, the same will be endorsed as 'admitted' and will be signed by the plaintiff with date. The presiding officer will make an endorsement with signature by numerical number like Ex. D-1, Ex. D-2, Ex. D-3, Ex. D-4... (a specimen is enclosed at end for ready reference). In cases of denial of documents, appropriate endorsement of 'denied' will be made on the documents with the signature of the plaintiff with date.

Section 294 of CrPC (and Rule 12 of Chapter 1, Part E of Volume 3 of the instructions to the criminal courts in Delhi, of the High Court Rules and Orders lays down that the state shall prepare the application by enumerating certain documents (eg., copy of FIR, MLC of concerned accused, arrest memo, seizure memo, etc., pertaining to an accused) which may be tendered to the accused (individually, if there are more than one), inclusive of any record called under section 91 Cr PC. The admitted documents will be endorsed like Ex. P-1, Ex. P-2, Ex. P-3 and Ex. P-4 etc and the denied documents will also be endorsed, alike the civil cases as discussed above. The accused persons will also be at liberty to tender certain documents to the state. The same may also be tendered to the state or its officials and endorsement like Ex. D-1, Ex. D-2, Ex. D-3, and Ex. D-4 will be made in respect of admitted documents. In the case of denied documents, appropriate endorsement of 'denied' will be made.

Many a time when there is more than one plaintiff or defendant, each individual party may exercise the option of admission and denial of documents. To identify a party with a document at a glance, the similar pattern may be followed and an appropriate endorsement may be made like Ex. P1/1, Ex. P1/2,... in respect of one plaintiff and for another, it may be written like Ex. P2/1, Ex. P2/2,... and so on : and for the purpose of defendant, the pattern may be like Ex. D1/1, Ex. D-1/2

and so on, Ex. D2/1, Ex. D2/2 and so on.

III EVIDENCE – STAGE 2

Section 61 of the Indian Evidence Act, 1872 says that contents of the documents may be proved either by primary evidence (section 64) or by secondary evidence (section 65).

When the contents of the document are to be proved and the document itself is produced, it is called the primary evidence. The documents will be endorsed in plaintiff's case, as Ex. PW-1/1, Ex. PW-1/2, Ex. PW-1/3,.....or Ex. PW-1/A, Ex. PW-1/B, Ex. PW-1/C, Ex. PW-1/D..(if there are more than one plaintiff, the documents may be endorsed like Ex. P1W1/1, Ex. P1W1/2, Ex. P1W1/3, ... or Ex. P1W-1/A, Ex. P1W-1/B, Ex. P1W-1/C,... and Ex. P2W1/1, Ex. P2W1/2, Ex. P2W-1/3, ... or Ex. P2W1/A, Ex. P2W-1/B, Ex. P2W-1/C ...). In case there is more than one witness, the numerical numbers with the number of witnesses may be increased as per requirement (e.g., P1W1, P1W2, P1W3; P2W1 P2W2; P3W1, P3W2P3W3...). This is to say, the documents may be endorsed either numerically or alphabetically. Sometimes, the documents are shown to the witness during cross examination, if so, for the purposes of identification, those documents may be endorsed as Ex. PW-1/D-1, Ex. PW-1/D-2, or Ex. PW-1/AD-1, Ex. PW-1/AD-2,.. (here D-1, D-2 indicates that the document was introduced by the defendant during cross examination of PW1). Below the endorsement of the document, the presiding officer is required to make his signature for the purpose of record.

In the same way, in case the documents are produced by the defendant/ respondent, in civil cases, the same are to be endorsed as Ex. DW-1/1, Ex. DW-2/2, ... or Ex. RW/1, Ex. RW/2, Ex. RW/3 or Ex. DW1/A, Ex. DW1/B, ... or Ex. RW1/A, Ex. RW1/B..... and so on. In case the defendant/ respondent's witness is confronted with any document, during his cross examination, by the plaintiff's side, the document will be endorsed like Ex. DW-1/P-1, Ex. DW-1/P-2, .. or Ex. RW-1/A-P1, Ex. RW-1/A-P2.... (here P-1, P-2 indicates that the document was introduced by the plaintiff during cross examination of the DW1).

The same pattern and procedure is followed in criminal trial cases also. However, care should be taken to assign a single number on a single document. In case a number has been assigned on a document during the admission and denial of document, such number is to be maintained during recording of evidence also, so as to avoid multiplicity of numbers on a single document. Secondly, if there is more than one sheet in a document, it may be assigned a single number (by writing

collectively=colly. in bracket).

When things/ articles are also produced during evidence (e.g., clothes, cosmetics material, compact disc, specific moveable items, etc., in the civil matters and the case property in the criminal matters), the word 'exhibit' should not be written/mentioned; instead, the number like P-1, P-2 or article P1 or P2, R1, R2 or article R1, R2 etc., should be assigned.

IV WHETHER EXHIBITS OF DOCUMENT AMOUNTS TO PROOF OF DOCUMENT

Meaning of proof

The endorsement of the document with the word 'exhibit' is generally believed; in practice, it implies that the document is proved and the document endorsed with the word 'marked' is inferred as not a proved document. Whereas the apex court in *Sait Taraje Khimchand* v. *Yelamarti Satyam,*[2] has held that the mere marking of a document as an Exhibit does not dispense with its proof. Further, while dealing with Order XIII rule 4 CPC read with section 3 of the Evidence Act, the High Court of Delhi – in *Sudhir Engineering Co.* v. *M/s NITCO Roadways Ltd.*,[3] has held that (a) a mere admission of the document in evidence does not dispense with proof thereof; (b) the admission of document in evidence does not amount to its proof; and (c) endorsement of an exhibit number on a document has no relation with its proof. Neither the marking of an Exhibit number can be postponed till the document has been held proved, nor can the document be held to have been proved merely because it has been marked as an Exhibit. In other words, the endorsement of document either as 'exhibit' or 'mark' is just for the sake of identity of the document to be referred with the oral statement of witness, who tendered it. The document is required to be proved as per law.

Sometimes objections are raised by the parties either on the point of marking or exhibiting the document, during the course of recording of evidence. There are two aspects with regard to proof of document, viz., admissibility of document and its proof; they are not synonymous. First of all, the document should be admissible in evidence and only then can it be tendered in evidence. Many a time objections are raised with regard to deficiency of court fee or insufficiency of stamps on the instrument. The apex court in *Bipin Shantilal Panchal* v. *State of Gujarat,*[4] has

2 AIR 1971 SC 1865.

3 1995 (34) DRJ 86.

4 (2001) 3 SCC 1.

held that whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence, the trial court can make a note of such objection and mark the objected document as an Exhibit in the case (or record the objected part of such oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is substantial the judge or magistrate can keep such evidence excluded from consideration except the objection of deficiency of stamp duty of documents to be decided before proceeding further. In *Manohar Lal* v. *State,*[5] it has been held that if a document is not proved or it is wrongly exhibited, it cannot be read in evidence.

Another kind of objection is also raised with regard to original documents being not filed with the plaint or with the written statement, particularly under summary procedure of Order XXXVII CPC. The scheme of CPC is spelt out in various provisions (like Order VII Rule 1, Order VIII, Order XIII Rule 1 & 2, Order XII, Order XXXVII) and by reading them together, a plain inference can be drawn that the law mandates production of original documents, at different stages of the case, either at the admission and denial of documents or for evidence or for inspection of opposite party. There is no mandate for filing the original documents. Further, the High Court of Delhi in *Aktiebolaget Volvo & Ors.* v. *R Venkatachalam & Anr,*[6] has held that it is permissible in law to permit a party to a civil suit to file only a photocopy of the document and exempt such party from placing the original document on the file of the court and merely to give inspection thereof to the opposite party at the time of admission/denial of documents and at the time of tendering the document into evidence and to put the exhibits mark on photocopy on the file of the court.

The Indian Evidence Act, 1872 lays down the general adjective law, inclusive of provision of proof of document. The legislature in its wisdom has also incorporated certain provisions with regard to documents admissible in evidence in different legislations, like sections 610(3) and 610A in the Companies Act, 1956, that certain record/copies would be admissible in evidence, when produced from the record kept by the Registrar of Companies and record of micro films, facsimile copies of documents, computer printouts, documents on computer media as documents and as evidence, without production of original, notwithstanding anything contained in any other law for the time being in force. There is also section 493 of the Delhi Municipal Corporation Act, 1957, which lays down that

5 1990 RLR Note 22.

6 160 (2009) DLT 100.

copies of record duly certified by the legal keeper thereof, would be admissible in evidence of the existence of the document or entry, and shall be admitted as evidence of the matters and transactions therein recorded in every case where, and to the same extent to which, the original document or entry would, if produced have been admissible to prove such matters and transactions.

Further, in section 146 of the Negotiable Instruments Act, 1881 it is provided that bank's slip is *prima facie* evidence of certain facts to presume the fact of dishonour of such cheque. Section 49 (c) of the Indian Registration Act, 1908 defines the effect of non-registration of the documents required to be registered and that such document shall not be received as evidence of any transaction affecting such property unless it has been registered. Section 35 of the Indian Stamp Act, 1899 also carry similar bar, that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped.

In other words, a document, which is required to be registered compulsorily but not registered, would not be admissible in evidence and similarly, an insufficiently stamped instrument would also not be admissible in evidence. Also, if a document is sufficiently stamped but unregistered, the same would not be admissible in evidence. The court is required to satisfy that only admissible document could be proved. In cases where the unregistered document, which is required to be compulsorily registered, or an insufficiently stamped document is endorsed, as exhibit or mark, it would not be treated as proved document just because of such endorsement.

V ELECTRONIC EVIDENCE UNDER SECTION 65 B OF THE INDIAN EVIDENCE ACT

Section 65 of the Indian Evidence Act talks about secondary evidence. It enumerates the circumstances, one of them as laid down in section 65(b), that when the original is of such a nature as not to be easily movable and the electronic data is stored in server/hardware, which is not easily movable. The law permits to prove the facts/ data stored in such hardware and the court is required to ensure that a process has been followed so that such data are produced before the court intact. The High Court of Delhi has dealt in detail with regard to proof of data/ call detail etc., in *State* v. *Mohd Afzal & Ors*.,[7] It was held therein that the law as

7 107 (2003) DLT 385.

it stands enacted in India does not have a provision analogous to section 69 of the Police and Criminal Evidence Act, 1984 of England. The conditions which are required to be satisfied are the ones set out in sub-section (2) of section 65B. The conditions, as noted above are:

(a) The computer from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over the period, and relates to the period over which the computer was regularly used;

(b) Information was fed in the computer in the ordinary course of the activities of the person having lawful control over the computer;

(c) The computer was operating properly, and if not, was not such as to affect the electronic record or accuracy of its contents;

(d) Information reproduced as such is fed into the computer in the ordinary course of activity.

When anyone uses a personal computer and a hard copy is generated of any fact or data, the person concerned may furnish his personal certificate in the court satisfying the requirement of law that the hard copy has been generated from his computer, while working and it reflects the actual data generated from the server. The certificate issued is also to be proved.

VI DISCIPLINARY INQUIRIES

In disciplinary inquiry under the Central Civil Services (CCS) Rules 1965, evidence is also recorded by the inquiry officer, which is produced by the presenting officer on behalf of disciplinary authority/department and by the government servant through the defence assistant. However, the provisions of the Indian Evidence Act are not applicable to the disciplinary inquiry but he holds the inquiry like quasi judicial authority, on the principles of natural justice and rules of 1965, based on article 311 of the Constitution of India. The inquiry officer may call the record and witnesses under the provisions of Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1972 but by calling the witnesses on record, it does not mean he is exercising the authority as a court.

HOW TO PRACTICE/ CONDUCT ADMISSION OR DENIAL OF DOCUMENTS

SPECIMEN

{Plaintiff will tender document to Defendant (s) one by one}

Endorsement of Admitted

Documents by the defendant

Admitted Ex. P-1

Signature of Defendant Signature of ADJ/Delhi

Date Date

SPECIMEN

Endorsement of denied

Documents by defendant

Denied

Signature of Defendant

Date

(NB: Only relevant document will be shown to the defendant, wherein either he is author or he is acquainted with the document or otherwise able to answer the document)

HOW TO PRACTICE/ CONDUCT ADMISSION OR DENIAL OF DOCUMENTS

SPECIMEN

{Defendant will tender document to Plaintiff one by one}

Endorsement of Admitted

Documents by the Plaintiff

Admitted Ex. D-1

Signature of Plaintiff Signature of ADJ/Delhi

Date Date

SPECIMEN

Endorsement of Denied

Documents by the Plaintiff

Denied

Signature of Plaitniff

Date

(NB: Only relevant document will be shown to the plaintiff, wherein either he is author or he is acquainted with the document)

VICTIM COMPENSATION – A NEW LEAP FORWARD

SAMAR VISHAL*

Every man is guilty of all the good he did not do - Voltaire

I INTRODUCTION

Jehangir, the Mughal Emperor of India from 1605 to 1627, was known for his justice delivery methods. He is most famous for his golden "chain of justice". The chain was set up as a link between his people and Jahangir himself. Standing outside the castle of Agra with 60 bells, anyone was capable of pulling the chain and having a personal hearing from the Emperor himself.

One day the Empress, in a fit of anger, hit her launderer whose work was not satisfactory. The washerman fell down dead. Somebody persuaded the widow to attend the Jehangir "darbar" the next morning.

The laundress waited trembling till all the others had mentioned their grievances and received redress from the Emperor. Finally, Jehangir looked at her and said "Who are you? What do you want?" In great trepidation she replied that she was the court laundress and recapitulated the previous day's calamity. "Your husband was killed? By whom?" queried Jehangir.

"By the Empress" replied the woman. It is said that Jehangir was stunned and leaned back on his throne, but only for a moment. He then came down the steps of his throne and faced the laundress. Drawing his sword from the gilded holster, he held it out to her and said, "Hold it".

The woman did not know what she was being led up to. But she obeyed the command of the Emperor. Then he spoke to her along the following lines: "The Empress killed your husband. Now, with that sword, you kill the Empress's husband. I command you to do it." The laundress was non-plussed. She fell at the Emperor's feet, recovered her equanimity soon enough, and said, "Sire, I have suffered, but I do not want either the Empress or the country to suffer by my obeying Your Majesty's command. I am prepared to take any punishment for this disobedience."

The story goes that Jehangir was so touched by the words of the washerwoman that he made her a baroness and showered her with riches beyond measure.[1] It is

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* Secretary, South District Legal Service Authority, District Court, Saket.

1 Jocelynne A. Scutt, *Victims, Offenders and Restitution : Real Alternative or Panacea?, 56 The Australian Law Journal* 156 (1987).

perhaps one of the classic cases of victim compensation in the medieval Indian history.

II HISTORICAL DEVELOPMENTS

The ancient Indian history is a witness to the fact that the victims of crimes have sufficient provisions of restitution by way of compensation to injuries.

Priyanath Sen, has observed: [2]

> It is, however, remarkable that inasmuch as it was concerned to be the duty of the King to protect the property of his people, if the King could not restore the stolen articles or recover their price for the owner by apprehending the thief, it was deemed to be his duty to pay the price to the owner out of his own treasury, and in his turn he could recover the same from the village officers who by reason of their negligence, were accountable for the thief's escape.

Reparation or compensation as a form of punishment is found to be recognized from the ancient times in India. In ancient Hindu law, during Sudra period, awarding of compensation was treated as a royal right. The law of Manu requires the offender to pay compensation and to pay the medical expenses in case of injuries to the sufferer and also pay to the satisfaction of the owner where goods were damaged. In all cases of cutting of a limb, wounding or bleeding, the assailant shall pay the full medical expenses.[3]

III PRESENT DAY POSITION

It shows that the victim compensation was never an alien concept in the justice delivery systems of the country. The edifice of the law in our present day legal system relating to the victim compensation are provisions contained in the Criminal Procedure Code, 1973 (CrPC) and the various judgments of the Supreme Court. The question that arises for consideration is that despite having laws for victim compensation, are these laws being satisfactorily used by those upon whom lies the duty of the execution of these laws and to give beneficial effects to it? The answer very often is no. The reasons are many. Some more prominent ones are like, the 12th century distinction of English law of wrongs into civil wrongs and

2 Priyanath Sen, *General Principle of Hindu Jurisprudence* 335.

3 M.J. Sethna, *Society and the Criminal* 218 (M.N. Tripathi, Bombay 1952); M.J. Sethna, *Jurisprudence* 340 (1969).

criminal wrongs which led to a misconception that the area of compensation was something exclusively belonging to the domain of civil law. The other less obvious reason was like the ignorance of those who could give effect to these benefactions.

The present criminal justice system is based on the assumption that the claims of a victim of crime are sufficiently satisfied by the conviction of the perpetrator. It is a truth that in our present day adversarial legal system between the state and the accused, the victim is not only neglected but is lost in oblivion. The role of the victim is limited to reporting the offence and deposing in the court on behalf of the prosecuting party which is the state. That's all. The Malimath Committee reflecting on the present criminal justice system has observed that not only the victim's right to compensation was ignored except as token provision under the CrPC but also the right to participate as a dominant stakeholder in criminal proceedings was taken away from him. He has no right to lead evidence, he cannot challenge the evidence through cross-examination of witnesses nor can he advance arguments to influence decision-making.

IV COMPENSATION UNDER CRIMINAL PROCEDURE CODE

Now, accepting that there is no uniformity in the legal system in the country to address the issue of compensation to the victims of crime, it is expedient to discuss the legal position in respect of compensation to the victims of the offence. Post independence, the criminal trials were governed by the Criminal Procedure Codes, 1898 and 1973. Till the year 2008, there was a provision more or less similar in both the Codes for compensation to the victims of the offence, that is, section 545 in the old Code and section 357 in the new Code. Section 357 CrPC reads as under:

357. Order to pay compensation-

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) When any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such

an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) When any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentence.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

So, this was the only provision in the CrPC to compensate the victims of offences. The compensation was to be payable by the accused on his conviction. This provision, therefore, prescribes the person as well as the circumstance (i.e., conviction of the accused) in which the compensation can be paid to the victim. It is a fact that majority of the people who are accused of and are convicted of crimes are poor and, therefore, this provision of the accused-dependant compensation was never a satisfactory answer to the woes of the victims of crime. The payment of compensation by the offender is not possible where there is acquittal or where the offender is not apprehended. Further, the payment remains suspended till the limitation period for the appeal expires or if an appeal is filed, till the appeal is disposed off. The delay in the realization of the amount often adds to the woes of the victim.

V BENTHAM'S VIEW

Jeremy Bentham, an English jurist and philosopher, advocated compensation to victims, holding that, "satisfaction" should be drawn from the offender's property, but if the offender is without property.... It ought to be furnished out of the public treasury, because it is an object of public good. He advocated the theory of strict liability which claims that compensation should be awarded because the social contract between the victim and his government has been broken. That is, the victim has a legal claim against the state for its failure to prevent the crime that produced the victimisation.

Since the government limits the ability of an individual to protect himself and instead gives that power to law enforcement personnel and taxes the individual to support that personnel, the government can then be held liable by the victim when its law enforcement activities are unsuccessful. And, the case against the government is enhanced when one considers the barriers it creates against the victims being restituted by the offender, including the aforementioned doctrine of mutuality which limits the chances of civil recovery, and the state's imprisonment of the offender which impedes his ability to reimburse the victim.[4]

VI CHANGES BROUGHT ABOUT IN LAW

The state's duty to rehabilitate the victim of crime cannot be put any lower than its responsibility of rehabilitating the criminal.

In India, however, the state remained itself away from this obligation of compensating the victims till 2009, when the CrPC was amended to impose a liability on the state for such compensation. The 14th Law Commission in its report recommended state compensation, which is justified on the grounds that it is the political, economic and social institutions of the state system that generate crime by poverty, discrimination, unemployment and insecurity. The Malimath Committee[5] was also of the view that the principle of compensating the victims of crime has for long been recognized by the law, though it is recognized more as a token relief rather than part of a punishment or a substantial remedy. Victim compensation is a state obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organized in a separate legislation by Parliament.

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4 Robert Liias, *Victims of the System* 24 (1983).

5 *Report of the Committee on Reforms of Criminal Justice System*, Vol. 1, Ministry of Home Affairs, Government of India (2003).

Victim compensation is an important aspect of the victim restitution in criminal justice system. The Supreme Court has recently in *Ankush Shivaji Gaikwad* v. *State of Maharashtra,*[6] observed that in a long line of judicial pronouncements the apex court has recognized a paradigm shift in the approach to dealing with the victims of crime who are held entitled to reparation, restitution or compensation for the loss or injury suffered by them.

It is in consonance with this shift in the approach that an amendment was introduced in the CrPC whereby a new provision i.e., section 357A has been added which provided for the Victim Compensation Scheme. The earlier provision for compensation to the victims of crime was section 357 CrPC in which the mandate was a direction to the convict to pay compensation to the victims of crime, if the court on conviction of the accused so directs. However, in many cases the convicts are from very poor background or are reluctant to pay the compensation considering their prolonged incarceration. In such cases, the victims remain remediless.

It appears that it was in order to overcome this situation, that a new section 357A was added in the CrPC by an amendment in 2009. This provided the much needed relief to the victims of offences and, therefore, can be considered as one of the most progressive legislation in recent times. It reads as under:

357A. - Victim compensation scheme

(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of

6 (2013) 6 SCC 770.

compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

Under this section, every state government in co-ordination with the central government has to prepare a scheme for providing funds for the purpose of compensation to the victims or to the dependents who have suffered loss or injury as a result of crime. The purpose of preparing the scheme by the state governments in consultation with the central government was to have uniform schemes of victim compensation throughout India, but this was probably not done while preparing the schemes and the result is that there is a great disparity in the payment of compensation to the victims under these schemes. For example, under the scheme of Goa, there is a provision to pay compensation of Rs. 10 lacs to the rape victims, whereas the compensation scheme of Delhi provides for only Rs 3 lacs as the maximum compensation. States like UP have provisions providing for even lower compensations to such victims. The Government of Delhi in compliance of section 357A, CrPC has framed a Victim Compensation Scheme called "Delhi Victim Compensation Scheme, 2011". It came into force on 02.02.2012. Earlier, the compensation under this scheme was decided by the Delhi State Legal Services Authority but now this power has been conferred upon the District Legal Services Authorities (DLSA) from 01.10.2013 onwards in Delhi. The nodal agency for deciding the quantum of compensation under this scheme is the DSLA or the State Legal Services Authority, as the case may be. Clause 1 also speaks of creating a separate fund under the scheme (which has already been created in Delhi) for compensating the victims of crimes.

Under section 357A, the state is also liable to pay compensation to the victims of crime apart from the accused under section 357 CrPC. Also, there are many situations after the commission of the offences where the court can award compensation. One is at the conclusion of the trial. If the trial court is satisfied that the compensation awarded under section 357 is not adequate for rehabilitation of

the victim or where the case ends in acquittal or discharge and the victim has to be rehabilitated, it may make recommendations for compensation. The other is, where the convict is not traced or identified but the victim is identified and where no trial takes place. Earlier, under section 357, the compensation was awarded only in the eventuality of the conviction of the accused but now it is awarded not only on conviction but also on acquittal or discharge of the accused or in case of untraced status of the accused. This is an extremely progressive development that takes into account the practical reality of an overburdened criminal justice system, which is unable to identify all offenders and prosecute them.

It means that the new section 357A has substantially widened the scope of compensating the victims of crimes. Furthermore, section 372 of CrPC has been amended, and now includes the following proviso: "Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

The term "Dependent" of the victim as defined in the victim compensation scheme includes wife, husband, father, mother, unmarried daughter and minor children of the victim as determined by the authority empowered to issue dependency certificate, that is, the Collector or any other authority authorised by the government.

For disbursement of compensation to the victim, there shall be a fund called "The Victim Compensation Fund" from which the amount of compensation, as decided by the DLSA has to be paid to the victim or to her dependents. The procedure for granting compensation is provided in section 5 of the aforesaid scheme. Whenever a recommendation is made by the court for compensation under sub-sections (2) and (3) of section 357A, or an application is made by the victim under sub-section (4) of the said section to the DLSA, it shall examine the case, verify the contents of the claim with regard to the loss or injury or rehabilitation as a result of the crime and may also call for any other relevant information necessary for consideration of the claim. The inquiry by the authority is to be completed expeditiously and within 60 days from the receipt of the claim/petition. The quantum of compensation is to be decided by the DLSA on the basis of loss or injury or requirement for rehabilitation, medical expenses incurred on treatment and such incidental charges, such as funeral expenses etc. The compensation amount is to be deposited in a nationalized bank in the name of the victim or her dependents. Out of the amount so deposited, 75 per cent of the same is to be put in

a fixed deposit for a minimum period of three years and the remaining 25 per cent shall be made available for the utilisation and initial expenses of the victim.

In the case of a minor, 80 per cent of the amount of compensation is to be deposited in the bank which can be withdrawn only on attainment of the age of majority, but not before three years of such deposit being made. However, in exceptional cases, the aforesaid amount may be withdrawn for educational or medical needs of the beneficiary at the discretion of the DLSA. The interest on the same has to be credited directly by the bank in the saving account of the victim/dependent on a monthly basis. The scheme also provides for the provision of immediate first aid and medical benefit or any other interim relief to the victim on a certificate of a police officer not below the rank of officer in-charge of the police station or magistrate of the area concerned. The Legal Services Authorities can also provide interim compensation in suitable cases where the victim needs immediate medical treatment/rehabilitation. Such interim compensation can be payable on the recommendations of the Station House Officer (SHO) concerned and the magistrate dealing with the case. This interim compensation is provided under section 8 of the scheme. The Legal Services Authority also has the power to institute legal proceedings before the competent court of law for recovery of compensation granted to the victim or his/her dependents from the persons responsible for causing loss or injury as a result of the crime.

The victim compensation scheme also has a schedule providing for minimum and maximum amount of compensation for different categories of offences. The quantum of compensation cannot be less than the minimum amount and cannot be more than the maximum amount provided in the schedule. For example, in cases of rape the minimum amount of compensation that can be recommended is Rs. 2 lacs and the maximum is Rs. 3 lacs.

The limitation period for filing a claim under section 357(4) CrPC, i.e., in cases when the offender cannot be traced or identified, is three years from the date of occurrence of the crime.

VII JUDICIAL RESPONSE

The judicial response has always been positive in dealing with the benevolent provisions of compensation. In *Hari Krishna & State of Haryana* v. *Sukhbir Singh,*[7] the Supreme Court mandated the courts to apply section 357 liberally and award adequate compensation, particularly in cases where the accused is released

7 (1988) 4 SCC 551.

on admonition, probation or when the parties enter into a compromise. At the same time, the court cautioned that the compensation must be reasonable, fair and just, taking into account the facts and circumstances of each case, nature of the crime, veracity of the claim and the ability of the accused to pay. What is reasonable, just and fair would depend upon the facts and circumstances of each case. In cases where there is more than one accused, they can be asked to pay in equal terms, unless their capacity to pay varies considerably. A reasonable period for payment of compensation, if necessary by instalment, may also be given. The court may enforce the order by imposing a sentence in default. Thus, the court must be satisfied that the victim has suffered loss or injury due to the act, neglect or default of the accused to be entitled to recover compensation. This loss or injury may be physical, mental or pecuniary.

Recently, the Supreme Court in *Ankush Shivaji Gaikwad,*[8] while considering the amended provision of the Code, reiterated its view and further observed that henceforth the courts have to give reasons for not compensating the victim while deciding the case. The court also observed that the amendments to the CrPC brought about in 2008 focused heavily on the rights of the victims in a criminal trial, particularly in trials relating to sexual offences. Though these amendments left section 357 unchanged, they inserted the new section 357A under which the court was empowered to direct the state to pay compensation to the victim in such cases where the compensation awarded under section 357 was not adequate for such rehabilitation, or where the case ended in acquittal or discharge and the victim had to be rehabilitated. Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, he/she may request the state or DLSA to award him/her compensation. This provision was introduced due to the recommendations made by the Law Commission of India in its 152nd and 154th Reports in 1994 and 1996, respectively. In India the principles of compensation to victims of crime need to be reviewed and expanded to cover all cases. The compensation should not be limited only to fines, penalties and forfeitures realized. The state should accept the principle of providing assistance to victims out of its own funds.

The court summed up its judgment as under:[9]

> While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed

8 *Supra* note 6.

9 *Id*. at 797.

> by recording reasons for awarding/ refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 Code of Criminal Procedure would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/ her family.

The prominent feature of this judgment is that now the courts are obliged to give reasons for not recommending compensation to the victims of the crime.

VIII CONCLUSION

To conclude, it is hoped that the judgment of the Supreme Court in *Ankush Shivaji Gaikwad* gets the attention it deserves from all those who are concerned with the administration of the criminal justice system and that in the changed legal scenario in favour of the victims, this "neglected and forgotten lot" called the victims may not again be lost in oblivion and left groping in the dark for their precious rights of compensation for their injuries.

CHILD RIGHTS: AN OVERVIEW OF THE LEGAL AND POLICY FRAMEWORK

Dipa Dixit*

I INTRODUCTION

The world has long known that childhood is the period of human development when the pace of growth and maturation is more rapid than at any other time of life. As each human develops, his or her capabilities and unique characteristics emerge, gradually enabling increased competence. Life experiences during infancy and early childhood profoundly affect the physical, mental, social, and emotional characteristics of the person during childhood and in later years. Development continues throughout life, though the pace decelerates and the nature of maturation changes and the opportunities to build the person's capacities are never again as ripe as in the early years. It is therefore, vital that a comprehensive regime of policies, laws and rules is put in place to adequately address the issues affecting children and secure their basic entitlements and interests.

India is home to the largest number of children in the world, significantly larger than the number in China.[1] This child population, however, is unevenly spread over the country's 28 states and seven union territories. Children of today are the future of tomorrow; this powerful statement assumes special significance in India's context as children in the age group of 0-18 years, comprise almost 40 percent of the total population of our country.[2] This puts an onerous responsibility on us to mould and shape their future in the best way possible. The journey in the life cycle of a child involves the critical components of child participation, survival, development and protection. Child participation which envisages their active involvement and say in the entire process, adds a new dimension. Child survival entails children's basic rights of being born in a safe and non-discriminatory environment and to grow through the formative years of life in a

* Lawyer & Former Member, Law and Policy, National Commission for Protection of Child Rights, Government of India.

1 According to UNICEF, the child population in the age-group 0-4 for India in 2010 was estimated to be (medium variant) 126 million against 88 million in China. The population of children in the age group 0-14 for the same year for India was estimated at 374 million as compared to 269 million in China. See, *The Situation of Children in India: A Profile* (UNICEF, 2011), *available at* http://www.unicef.org/sitan/files/SitAn_India_May_2011.pdf.

2 The data is gathered from the Childline India Foundation (CIF), an NGO based in Mumbai and its projects are supported by the Union Ministry of Women and Child Development (MWCD) under the Integrated Child Protection Scheme (ICPS). For details, see http://www.childlineindia.org.in/child-in-india.html.

healthy and dignified way.

Adverse sex ratio at birth, high child mortality rates and the rapidly declining child sex ratio reflect the ensuing challenges. Reducing the level of malnutrition and micronutrient deficiency and increasing enrolment, retention, achievement and completion rates in education are the focus areas in child development. Safeguarding the children from violence, exploitation and abuse fall under child protection. Realising the deprived and vulnerable conditions of children, the law makers of the country have accorded a privileged status to children. The number of rights and privileges given to the children in the Constitution of India, duly supported by statutory framework, bears testimony to this. During the past 15 years or so, various path breaking legislations such as the Right to Education Act, 2009, Protection of Children Against Sexual Offences Act, 2012 (POCSO Act), Food Security Act, 2013, etc., have been enacted to suitably strengthen the legal mechanism for the overall development and protection of children's interests. On the policy side, the Government of India have initiated a series of measures cutting across the boundary of gender, caste, ethnicity or region in the past several years to realize their all inclusive growth. The 11th Five Year Plan paved the way, and the commitments made therein have been reiterated with renewed vigour in the 12th Five Year Plan. However, it remains a matter of regret that even today, after six decades of independence and despite taking various initiatives both on the legal as well as policy and programme levels, the condition of children remains a cause of concern in this country. The statistics emanating from various censuses, surveys and administrative records show the grim reality.

II STATISTICAL FIGURES ON THE CONDITION OF CHILDREN IN INDIA

The condition of children in India is officially documented by the Government and NGOs.[3] Some of the statistical data as provided below paint an alarming trend in the country:

Birth Registration - The value of birth registration in India is often neglected in many communities. As a result, there is a lack of support for birth registration from national and local authorities, and little demand from the public, who remain unaware of its importance.[4] From the government data, in India, an estimated 27

3 See generally, *Children In India 2012 - A Statistical Appraisal* (Ministry of Statistics and Programme Implementation, Government of India, 2012), *available at* http://mospi.nic.in/Mospi_New/upload/Children_in_India_2012.pdf.

4 This is despite the fact that Indian lawmakers enacted a relevant Act, namely, Registration of

million births take place every year. The current level of birth registration in the country is 70%. Thus, around 30% (about 8 million) newly born children are not registered even within one year of their birth,[5] leading to difficulty in providing access to basic services and protection, preventing child labour, child trafficking and countering child marriage. It is very likely that these children will continue to live without a birth certificate during their entire childhood and beyond.

Child health and death **-** India accounts for more than 20 per cent of child deaths in the world; 1.83 million children die annually before completing their fifth birthday – most of them due to preventable causes; 25 million children under the age of five years are wasted and 61 million are stunted, that is 31% and 28% of wasted and stunted children respectively, in the world.[6]

Education **-** The Indian education landscape in relation to children saw significant developments during the 11th Five Year Plan (2007-12). There was a surge in school enrolments along with considerable narrowing down in the gender and social category gaps. Expansion in the number of schools and improvements in infrastructure and facilities significantly widened access to schooling. The most significant development, however, was the insertion of article 21-A in the Constitution of India[7] making elementary education a fundamental right. The consequential legislation, the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act), became operative on 1st April 2010.

The current trend on child education as per the *ASER Report, 2014*[8] is depicted hereunder:

- 96.7% of children (in the age group 6-14 years) are enrolled in school in rural India.
- Percentage of schools with availability of drinking water has gone up from 72.7% in 2010 to 75.6% in 2014.
- Percentage of schools with useable toilets has gone up from 47.2% in 2010 to 65.2% in 2014.

Births and Deaths Act, 1969. The Act seeks to register every birth/stillbirth and death with the concerned state/UT Government within 21 days of its occurrence.

5 *Supra* note 3 at 32.

6 *Supra* note 1 at 4-6.

7 Art. 21 A was added by the Constitution (86th Amendment) Act, 2002.

8 The data is published by Pratham, an NGO devoted to bringing quality education to children in India. See, *Annual Status of Education Report 2014* (Pratham, January 2015) *available at* http://img.asercentre.org/docs/Publications/ASER%20Reports/ASER%202014/National%20PPTs/aser2014indiaenglish.pdf.

- Percentage of schools with useable girls' toilets has increased from 32.9% in 2010 to 55.7% in 2014.
- Of all children enrolled in class V, about half cannot read at class II level.
- A growing proportion of class II children do not know numbers 1 to 9. An increasing number of children in class III do not recognize numbers till 100. This emphasizes the poor quality of teaching/ education being imparted.

Child labour **-** An estimated 28 million children in the age-group of 5-14 are engaged in work. In addition, nearly 85% of them are hard-to-reach, invisible and excluded, as they work largely in the unorganised sector, both rural and urban, within the family or in household-based units.[9]

Child marriage **-** The percentage of women in the age group of 20-24 years who married before attaining the minimum legal marriageable age of 18 is 43%.[10]

Crime statistics **-** The National Crime Records Bureau (NCRB), under the Ministry of Home Affairs collects and publishes data on crime against children and juvenile delinquency on the basis of administrative records. The report shows the increasing trend in the incidences of both 'Crime against children' and 'Crime committed by children'.[11]

Out of the total of 33887 juveniles apprehended in the year 2011, 1,211 were in the age-group of 7-12 years; 11,019 were in the age-group of 12-16 years; and the largest number 21,657 were in the age-group of 16-18 years. The percentage shares of juveniles apprehended under these age groups are 3.3%, 32.5% and 63.9%, respectively. There has been an increase in the number of juveniles apprehended in all these age groups when compared to statistics of 2010, the highest percentage increase being in the age group of 7-12 (30.6%) and the rise in crimes in the age groups of 12-16 years and 16-18 years, the percentage being 8.9% and 12.5%, respectively. The overall increase in juveniles apprehended at the national level is 11.8% in 2011 as compared to 2010.[12]

In addition, statistical figures of juvenile crimes in India as compiled by NCRB for the period 2000 to 2012 reveal that juvenile crimes accounted for only 0.5% of the total crimes in 2000 and 1.0% in 2012.[13]

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9 *Supra* note 1 at 29.

10 *Id*. at 32.

11 See generally, *Crime in India 2014* (National Crime Records Bureau, Ministry of Home Affairs, 2015).

12 *Ibid.*

13 *Supra* note 3.

Sexual crimes **-** The new law i.e., Protection of Children from Sexual Offences Act was enacted in 2012 and it, *inter alia,* provides for establishing special courts for ensuring speedy trial in sexual abuse cases, but most of the states are yet to establish such special courts. The lackadaisical approach on the part of states has hindered the emergence of child friendly system. As of now, only one such child-friendly court in the country is functioning from the premises of the Karkardooma courts in New Delhi.

Pendency rates in cases relating to child sexual assault are over 84.5%. The data presents a very gloomy picture with nearly 95% of the cases still pending decision. In addition, the conviction rate also remains very poor.[14]

Socio-economic status**:** Out of the total juveniles involved in various crimes, 81.4% were children living with parents; 5.7% were by homeless children; and the remaining were children living with guardians. Out of these total number of juveniles involved, 6,122 (18.1%) were illiterates; 12,803 (37.8%) had education up to primary level; 31 % had above primary but below secondary level; and 13.11% had secondary, higher secondary and above level education. A large chunk of juveniles (57%) belonged to the poor families whose annual income was up to Rs. 25,000/ per annum. The share of juveniles from families with income between 25,000/- and 50,000/- per annum was 27%, whereas those hailing from middle income group (50,000- 2,00,000) was 11%.[15]

It cannot be denied that India has made some significant efforts towards providing the basic rights of children. Overall progress is noticeable in some areas, in that infant mortality rates have subsided and literacy rates have improved leading to reduction in school dropout rates. But the issue of child rights in India is still lagging far behind in several other indicators. In terms of increasing socio-economic status of children, the existing data paints a very poor picture.

III INTERNATIONAL LEGAL FRAMEWORK FOR PROTECTION OF CHILD RIGHTS

One basic human rights principle laid down in the Universal Declaration of Human Rights is that all human beings are born free and equal in dignity and rights.[16] However, specifically vulnerable groups such as women, indigenous people, and children have been assigned special protection by the UN legal framework. The

14 *Supra* note 11.

15 *Supra* note 3.

16 Article 1, Universal Declaration of Human Rights, 1948.

protection of children's rights under international treaty law can be traced back to the Declaration of the Rights of the Child adopted by the General Assembly in 1959.[17] In 1978, however, a fresh proposal for a new convention on children's rights was made by Poland, which served as the basis for the 1989 Convention on the Rights of the Child (CRC).[18] The Convention is the most prominent UN manifestation to advance children's rights globally. To date, the Convention has 196 parties.[19] India ratified UNCRC on 11 December 1992, agreeing in principle all articles except with certain reservations on issues relating to 'child labour.' The CRC, which consists of 54 Articles, incorporates the full range of human rights – civil, cultural, economic, political and social – and creates the international foundation for the protection and promotion of human rights and fundamental freedoms of all persons under the age of 18. The Convention represents widespread recognition that children should be fully prepared to live an individual life in society, and brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

The Universal Declaration of Human Rights, as the most prominent and fundamental UN human rights document, provides in its article 25 that childhood is entitled to special care and assistance. Furthermore, the UN International Covenant on Civil and Political Rights, a legally binding document which came into force in 1978, contains provisions specifically referring to children.[20] The Human Rights Committee has emphasised that the rights provided for in article 24 are not the only ones that the Convention recognizes for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant.[21] The International Covenant on Economic, Social and Cultural Rights contains several child-specific provisions, with a focus on the right to education and protection from economic and social exploitation.[22] Moreover, the Convention on the Elimination of All Forms

17 UN General Assembly, Declaration of the Rights of the Child, 20 November 1959, A/RES/1386(XIV), *available at*, http://www.refworld.org/docid/3ae6b38e3.html.

18 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, *available at*, http://www.refworld.org/docid/3ae6b38f0.html.

19 *Ibid*., See also, UN Treaty Series, Vol. 1577, at 3, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

20 International Covenant on Civil and Political Rights, 1966, articles 14(1), 23(4) and 24, *available at*, http://www.refworld.org/docid/3ae6b3aa0.html.

21 Human Rights Committee, General Comment No. 17, The Rights of the Child (Art. 24 of the International Covenant on Civil and Political Rights) (1989) *available at* http://www.unhcr.org/4517ab402.pdf.

22 International Covenant on Economic, Social and Cultural Rights,1966, articles 10(3) & 13.

of Discrimination against Women also contains child-protective provisions. For example, it encourages State Parties to specify a minimum age for marriage[23] and it emphasises that the interests of children are paramount.[24] Another important legal document also applicable to children is the Convention on the Rights of Persons with Disabilities,[25]which establishes the principle of respect for the evolving capacities of children with disabilities. The same applies to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[26] The Committee established under the latter Convention has already expressed its concern about the general vulnerability of abandoned children, who are at risk of torture and other cruel, inhuman or degrading treatment or punishment, especially children used as combatants.

In addition to the abovementioned rules contained in International Conventions, there are a number of other legal instruments, which together constitute the international regime on child rights protection. These are:

- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.[27]
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[28]
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice[29], often referred to as the 'Beijing Rules', is a resolution of the United Nations General Assembly regarding the treatment of juvenile prisoners and offenders in member nations.
- The Riyadh Guidelines, 1990[30] advocates for a positive and pro-active

23 Convention on the Elimination of All Forms of Discrimination Against Women, 1979, article 16(2).

24 *Id*., articles 5(b) & 16(1)(g).

25 Convention on the Rights of Persons with Disabilities, adopted by the General Assembly, 24 January 2007.

26 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

27 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000.

28 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 16 March 2001.

29 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 29 November 1985.

30 United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) 14 December 1990.

approach to preventing the rise of crime in the youth population. The said guidelines recognize children as human beings and list various methods to discourage juvenile delinquency.

- The *Paris Principles,* 1993 contain a set of international standards which frame and guide the work of National Human Rights Institutions (NHRIs).[31].
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children[32] 2000 is a Protocol to the Convention against Transnational Organised Crime.

It can be stated that children's rights are adequately covered by a multitude of human rights provisions under international law. The growth of children's rights as reflected in international law has considerably transformed the thinking of national governments across the globe. The domestic implementation of international rules is vital for securing the interests of children.

IV CHILDREN IN INDIA: LEGAL AND POLICY FRAMEWORK

In India, childhood has been defined in the context of legal and constitutional provision, mainly in the context of aberrations of childhood. It is thus a variable concept to suit the purpose and rationale of childhood in differing circumstances. Essentially they differ in defining the upper age-limit of childhood. Biologically, childhood is the span of life from birth to adolescence. According to Article 1 of United Nation's Convention on the Rights of the Child (UNCRC), "A child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier." The definition of the child as given by the UNCRC has a definite bearing not only on child development programmes and budgetary provisions for them, but also on production of statistics as applicable to different cross sections of children in terms of reference ages. A child domiciled in India attains majority at the age of 18 years. However, various legal provisions address children with differing definitions. The child related legal and constitutional provisions are kept in view while statistics are generated for different cross-sections of children that align with specific age-groups standing for specific target groups of children such as, child labourers, children in school

31 Paris Principles, A/RES/48/134, 20 December 1993 (Drafted at an International National Human Rights Institutions' workshop in Paris in 1991, they were adopted by the United Nations General Assembly in 1993).

32 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.

education, children in crimes, etc.

The UNCRC, adopted by the UN General Assembly in 1990, is the widely accepted UN instrument ratified by most of the developed as well as developing countries, including India. The Convention provides standards to be adhered to by all state parties in securing the best interest of the child and outlines the fundamental rights of children.

Constitutional and statutory provisions

Several provisions in the Constitution of India impose primary obligations on the state for ensuring that all the needs of children are met and that their basic human rights are fully protected.[33]

Constitutional mandates as to the protection of child rights are further reflected in many statutory provisions as under:[34]

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33 Article 14, *inter alia*, guarantees that children enjoy equal rights as adults; article 15(3) empowers the state to make special provisions for children; article 21 guarantees life and liberty to all citizens; article 21-A directs the state to provide free and compulsory education to all children within the ages of 6 and 14 in such manner as the state may by law determine; article 23 prohibits trafficking of human beings and forced labour; article 24 explicitly prohibits children below the age of 14 years from being employed to work in any factory, mine or any other hazardous form of employment; article 39(f) directs the state to ensure that children are given equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against moral and material abandonment; article 45 specifies that the state shall endeavour to provide early childhood care and education for all children until they complete the age of 6 years; article 51A clause (k) lays down a duty that parents or guardians provide opportunities for education to their child/ward between the age of 6 and 14 years.

34 In addition to the abovementioned laws, a series of other relevant legislation add to the extensive domestic regime on child rights protection. They are: The Guardian and Wards Act, 1890; the Reformatory Schools Act, 1897; the Prohibition of Child Marriage Act, 2006; the Children (Pledging of Labour) Act, 1933; the Hindu Minority and Guardianship Act, 1956; the Hindu Adoption and Maintenance Act, 1956; the Immoral Traffic Prevention Act, 1956; the Women's and Children's Institutions (Licensing) Act, 1956; the Young Person's Harmful Publication's Act, 1956; the Probation of Offender's Act, 1958; the Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960; the Juvenile Justice (Care and Protection of Children) Act, 2015; the Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply Distribution) Act, 1992, as amended in 2003; the Pre-conception & Pre-natal Diagnostic Technique (Regulation, Prevention and Misuse) Act, 1994, as amended in 2002; the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995; the Right to Education Act, 2009; the Protection of Children from Sexual Offences (POCSO) Act, 2012; the Food Security Act, 2013; and the Commissions for Protection of Child Rights Act, 2005 (This Act provides for the constitution of National and State Commissions for protection of child rights in every State and Union Territory. The functions and powers of the National and State Commissions will be to examine and review the legal safeguards provided by or under any law for the protection of child rights and recommend measures for their effective implementation; inquire into violations of child rights and recommend initiation of proceedings where necessary; spread awareness about child rights among various sections of society; and

- The Apprentices Act, 1961 lays down that 'A person is qualified to be engaged as an apprentice only if he is not less than 14 years of age ….'
- The Factories Act, 1948 provides that 'a child below 14 years of age is not allowed to work in any factory. An adolescent between 15 and 18 years can be employed in a factory only if he obtains a certificate of fitness from an authorized medical doctor….'
- The Child Labour (Prohibition and Regulation) Act, 1986 defines a child as 'a person who has not completed his 14th year of age.'
- The Prohibition of Child Marriage Act, 2006 declares that a 'Child means a person who, if a male, has not completed 21 years of age and, if a female, has not completed 18 years of age'.
- The Juvenile Justice (Care and Protection of Children) Act, 2015 specifies that a "juvenile" or "child" means a person who has not completed 18th year of age.
- The Indian Penal Code, 1860 in section 82 states that 'Nothing is an offence which is done by a child under age of seven years. Further, under section 83, the age of criminal responsibility is raised to 12 years if the child is found to have not attained the ability to understand the nature and consequences of his/her act.

The Constitution of India in tandem with framework of statutory laws provides a comprehensive understanding of child rights. A fairly extensive legal regime mandates for the effective implementation of child protection laws. India being a party to several international conventions including the Convention on the Rights of the Child (CRC) is obligated to realise the goals of achieving the international standards in child care and protection. However, one can only shudder to say that even after an extensive legal regime, child rights activists in India are faced with challenges of promoting and protecting child rights as a positive social value.

National policies and programmes for children

Faced with the daunting task of bringing an end to child discriminations and various other related problems, the Government of India over the years has brought forth several child-centric national policies to address directly the issues of child survival, child development and child protection. They are discussed hereunder:

help in establishment of Children's Courts for speedy trial of offences against children or of violation of child rights).

National Policy for Children*, *1974 is the first policy document concerning the needs and rights of children. It recognizes children to be a supremely important asset of the country. The goal of the policy is to take meaningful steps for implementing the constitutional provisions meant for protection of children and the UN Convention on the Rights of the Child. It outlines services the state should provide for the complete development of a child, before and after birth and throughout a child's period of growth for his/her full physical, mental and social development. A new National Policy for Children was introduced in 2013, which has vastly updated the 1974 policy.[35]

National Policy on Education (NPE)*, *1986 has called for "special emphasis on the removal of disparities and to equalize educational opportunity", especially for Indian women, Scheduled Tribes (ST) and the Scheduled Caste (SC) communities. To achieve these, the policy called for expanding scholarships, adult education, recruiting more teachers from the SCs, incentives for poor families to send their children to school regularly, development of new institutions and providing housing and services. The NPE called for a "child-cantered approach" in primary education, and launched "Operation Blackboard"[36] to improve primary schools nationwide.

National Policy on Child Labour*, *1987, contains the action plan for tackling the problem of child labour. It envisages a legislative action plan and focuses on convergence of general development programmes for benefiting children wherever possible, and includes plan of action for launching of projects for the welfare of working children in areas of high concentration of child labour.

National Nutrition Policy*, *1993, was introduced to combat the problem of mal-nutrition and under-nutrition. It aims to address this problem by utilizing direct (short term) and indirect (long term) interventions in the area of food production and distribution, health and family welfare, education, rural and urban

35 On April 18th, 2013 the Union Cabinet approved the National Policy for Children to help in the implementation of programmes and schemes for children all over the country. The policy gives utmost priority to right to life, health and nutrition and also gives importance to development, education, protection and participation.

36 See, Balusu Veena Kumari & Digumarti Bhaskara Rao, *Operation Blackboard* 36 (APH Publishing, 2009) The programme action of the NPE aims at achieving the goal of a common school system, through strategies that focus effort on the underprivileged, the economically weak, the educationally disadvantaged, and the areas that need special attention. It recommends that at the elementary level a child-centred approach will be adopted and the academic programme and school activities built around the child. It also proposes measures to effect improvement in the quality of education through reform of the content and process of education, improvement in school facilities, provision of additional teachers, laying down minimum levels of learning, etc.

development, women and child development, etc.

National Population Policy*, *2000, *inter alia*, aims at improvement in the status of Indian children. It emphasizes free and compulsory school education up to the age of 14 years, universal immunization of children against all preventable diseases, 100% registration of birth, death, marriage and pregnancy, substantial reduction in the infant mortality rate and maternal mortality ratio, etc.

National Health Policy, 2002, aims to achieve an acceptable standard of good health amongst the general population of the country. The approach is to increase access to the decentralized public health system by establishing new infrastructure in deficient areas, and by upgrading the infrastructure in the existing institutions. Overriding importance is given to ensure a more equitable access to health services across the social and geographical expanse of the country.

National Charter for Children (NCC)*, *2003 highlights the constitutional commitments towards the cause of the children and the role of civil society, communities and families and their obligations in fulfilling children's basic needs. It endeavours to secure for every child its inherent right to be a child and enjoy a healthy and happy childhood, to address the root causes that negate the healthy growth and development of children, and to awaken the conscience of the community in the wider societal context to protect children from all forms of abuse, while strengthening the family, society and the nation. The charter provides that the state and community shall undertake all possible measures to ensure and protect the survival, life and liberty of all children. For empowering adolescents, the NCC states that the state and community shall take all steps to provide the necessary education and skills to adolescent children so as to equip them to become economically productive citizens.[37]

National Plan of Action for Children (NPA)*, *2005 was adopted by the Government of India in the pursuit of well-being of children. NPA has a significant number of key areas of thrust out of which the one's relating to child protection are:

(i) Complete abolition of female foeticide, female infanticide and child marriage and ensuring the survival, development and protection of the girl child.

(ii) Addressing and upholding the rights of children in difficult circumstances.

(iii) Securing for all children legal and social protection from all kinds of abuse, exploitation and neglect.

37 For critical assessment of the fulfilment of CRC obligations by India, see, Bharti Ali & Praveena Nair, *Twenty Years of CRC: A Balance Sheet* 21 (HAQ Centre for Child Rights, 2011).

Over the years, various child-centric policies as formulated and pursued by successive governments have helped form an ambience for child rights in India; insofar as stakeholders at various levels now recognise the centrality of child protection regime in meeting the socio-economic goals of the country. While continuing with the rights-based approach[38] to child development, the governmental plans *vis-a-vis* children recognise the importance of a holistic approach, focusing both on outcomes and indicators for child development.

V MEDIA POLICY AND CHILD RIGHTS

Media can act as the eyes, ears and voice of the public, drawing attention to abuses of power and human rights, often at considerable personal risk. Through their work, journalists and reporters can encourage governments and civil society organisations to effect changes that will improve the quality of people's lives. Journalists, photographers and programme-makers frequently expose the plight of children caught up in circumstances beyond their control, or abused or exploited by adults. However, it is equally important to consider the 'children's angle' in more conventional news coverage. A good way of testing the value of changes in the law or fiscal policy, for example, is to consider the extent to which children will benefit or suffer as a consequence. The way in which the media represents, or even ignores children, can influence decisions taken on their behalf, and how the rest of society regards them. The media often depicts children merely as silent 'victims' or charming 'innocents'. By providing children and young people with opportunities to speak for themselves - about their hopes and fears, their achievements, and the impact of adult behaviour on their lives - media professionals can remind the public that children deserve to be respected as individual human beings.

Child rights advocates view media as an extremely important and powerful agency to promote and ensure that children are able to access their entitlements, to create public awareness and opinion related to their issues, and to exert the necessary pressure on the government to discharge their responsibilities in this context. Yet, many such advocates in India, express strong concerns on what they see as the media's consistent failure to play its part in this effort. The media is repeatedly criticized for its lack of adequate, balanced and sensitive coverage on

38 See, United Nations Office of the High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation* 15 (United Nations Publications, 2006). The children's rights approach is based on an understanding of and commitment to ending discrimination against all children and to supporting and holding to account those bearing duties (such as, parents/carers, particular services, agencies or bodies) to meet their obligations for implementing children's and human rights principles.

child-related issues. As stated by one freelance senior journalist and human rights author, "The trigger for a media story is always an incident, and a tragedy serves as a "strong" trigger point; the bigger the tragedy, the more popular the news item."[39] Incidents such as child rape or child sexual abuse are, therefore, readily picked up by the media and are presented in a sensational manner. More importantly, there is limited media understanding of the child rights sector, as a result of which many reporters do not have the background knowledge or capacity to appropriately and comprehensively report on a child rights issue or violation that takes place and this situation often leads to insensitive coverage and sensational stories, with the added risk of distorting the truth.

It is universally recognized that media coverage is an extremely important and powerful stakeholder in enhancing the public awareness about child rights, and in providing the much-needed push for policy and legislative changes. The key expectations from the media are increased coverage of child-centric success stories, responsible child-rights' reporting, engagement of journalists in more in-depth reporting and improved background knowledge of journalists on child rights issues. Thus mass media, whether print or electronic, if put to effective use, can go a long way in ameliorating the conditions of children and in sensitizing the entire country about legal, social and economic relevance of a strong child rights protection regime.

VI CONCLUSION

Child-centric public policies and legislation must be prioritised for development of the nation.

Kailash Satyarthi, Nobel Laureate

National and international efforts are underway across all continents to stop systematic abuse of the rights of children. Even so, shockingly high levels of child rights violations continue. In India, hundreds of millions of children live with hunger, homelessness and illiteracy, and suffer sexual violence, physical abuse, forced labour and other varied and complex risks. A staggering number of children remains at risk today and are living in conditions where their basic rights are violated on a daily basis.

The United Nations Convention on the Rights of the Child (UNCRC) in tandem with other relevant international instruments sets out what governments

39 Susan Angle, Neeti Daftar, Lorena Lucas, *et al*, *Protecting the Rights of Children: The Role of the Media Lessons from Brazil, India and Kenya* 40 (Internews Europe, 2014).

and individuals should do to promote and protect the indivisible human rights of all children. The UNCRC provides a benchmark against which the efforts of each government to improve the lives of children can be measured. Every five years governments must report on the progress to the UN Committee on the Rights of the Child.

Right to life, survival, health and nutrition are rights of every child and must receive the highest priority. The law and policy must ensure equitable access to comprehensive, essential, preventive, promotive, curative and rehabilitative health care, of the highest standard, for all children before, during and after birth, and throughout the period of their growth and development. Every child has a right to adequate nutrition and to be safeguarded against hunger, deprivation and malnutrition. The Indian state is, constitutionally and under international law, obligated to securing the right for all children through access, provision and promotion of required services and supports for holistic nurturing and wellbeing, keeping in view their individual needs at different stages of their life.

As today's children are the citizens of tomorrow's world, their survival, protection and development are the prerequisites for the future development of humanity. Empowerment of the younger generation with knowledge and resources to meet their basic needs and to grow to their full potential should be the primary goal of national development. As child's individual development and social contribution shapes the future of the world, investment in children's health and education is the foundation of national development.

PROTECTION OF CHILDREN AGAINST SEXUAL OFFENCES ACT, 2012 - A WELCOME *FIRST* STEP

MICHELLE MENDONCA*

"Children have a very special place in life which law should reflect".[1]

I INTRODUCTION

Child sex abuse is the involvement of a child in sexual activity that she[2] does not fully comprehend, is unable to give informed consent to, or that violates the law and taboos of society.[3]

The Protection of Children against Sexual Offences Act, 2012[4] was long overdue, till its enactment the Indian law did not criminalize many kinds of serious sex abuse against children.[5] Even in cases where abuse was punishable, children could not confidently expect sensitive handling in court or an empathetic appreciation of their evidence. In *Tukaram* v. *State of Maharashtra,*[6] the Supreme Court not only acquitted police officers for the rape of a 16-year old victim, it did so despite the evidence that the accused were strangers to her and she promptly reported the incident. The Supreme Court was insensitive to the fact that the police officers who were investigating the case had subjected the victim to sexual intercourse against her will and without her consent. The court acquitted the police officers which led to public outcry against such insenstivity.

POCSO is the first legislation towards protecting children: it not only punishes all forms of sex offences against children but also envisages a criminal

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* Advocate; Currently, Partnerships at Justice and Care, a non-governmental organization that works internationally with governments and law enforcement agencies focusing on prevention, prosecution, protection of victims of trafficking, slavery and other abuse. She is a guest faculty at Judicial Academies in Maharashtra, Delhi and West Bengal. Research assistance received from staff members of Justice and Care is acknowledged.

1 *May* v. *Anderson,* 345 U.S. 528, 536 (1953).

2 The use of the feminine pronoun in this article is inclusive of all genders.

3 *Guidelines for Medico-Legal Care,* World Health Organization.

4 Hereinafter referred to as "POCSO".

5 *Sakshi* v. *Union of India,* AIR 2004 SC 3566 where the Supreme Court urged Parliament to draft a law punishing child sexual abuse.

6 (1979) 2 SCC 143. This acquittal led activists including Upendra Baxi to write an open letter to the Supreme Court in which they made a clear distinction between submission and consent. See Baxi, U., Dhagamwar, V., Kelkar, R., & Sarkar, L. *An Open Letter to the Chief Justice of India,* (1979) 4 SCC *(Jour)* 17.

justice system that responds to their "unique vulnerability."[7]

This article will focus narrowly on POCSO's child-protection measures within the context of the courtroom and offer further steps that India can take to make this protection meaningful.

II PROTECTION OF CHILDREN THROUGH MANDATORY REPORTING

POCSO calls for mandatory reporting of offences.[8] Though this law has attracted much controversy but still it is a step in the right direction. Evidence shows that reporting must increase: according to the study by the Ministry of Women and Child Development, child sex abuse in India is "shrouded in secrecy and there is a conspiracy of silence around" it: 72% of child victims did not report the abuse to anyone and only 3% reported it to the police.[9]

People in general, including law enforcement authorities like police, prosecutors and judges, find it inexplicable that an abused child will not immediately report or at least distance himself from the abuser. In fact, children return to an abuser - in one *Justice and Care* case, two children aged 14 and 16 were sexually violated and video-taped by a 78-year man.[10] The children neither disclosed the abuse nor did they stay away from the abuser.[11] This is not unusual. Because the skepticism of law enforcement authorities about child sex abuse stems from non-disclosure or delayed disclosure, this article will take a short detour to explain why children do not disclose.

Children and families hesitate to report sex abuse for various reasons like: a) internal conflicts; and b) the offender's manipulative techniques.

Often children do not report the abuse because of internal conflicts such as shame, guilt or fear. Even when children gather the courage to report, family members may greet the accusation with anger or disbelief (especially when the family trusts the offender) causing the child to retract the accusation and continue to suffer the abuse.

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7 From the Speech of P. Sathasivam J. at Tamil Nadu State Judicial Academy, 23.03.2013.

8 POCSO, s. 19-22.

9 *Study on Child Abuse: India 2007,* Ministry of Women and Child Development. (Note that the methodology of this study attracted criticism).

10 *State of Maharashtra* v. *Narsi Kataria,* Case No.405 of 2012 (Court of Sessions for Greater Bombay).

11 *Ibid.*

Children also do not report because offenders use techniques like "grooming" to evade detection. Grooming is premeditated behaviour aimed at manipulating children into complying with the abuse.[12] The offender (1) wins the trust of child and adults around him; (2) gains free access to the child and lures him into sexual activity;[13] (3) desensitizes the child to sexual activity by gradually introducing sexual elements to the relationship;[14] and (4) lowers the child's defenses so he accepts sex acts as normal rather than abusive.[15] Because of the "trust" element, reporting is less likely or delayed.[16]

Offenders groom children with gifts, offers of care and friendship, emotional manipulation, verbal coercion, physical threats, etc.[17] Adults surrounding the child are also less likely to believe allegations against trusted adults.[18]

Even when offenders do not groom children, delayed disclosure may occur due to the Child Sexual Abuse Accommodation Syndrome where the offender takes advantage of: (1) the secrecy that surrounds the abuse; (2) the helplessness of the child who tends to defer to adults and will obey demands for secrecy; (3) accommodation because the child feels trapped by a situation he believes he is responsible for; (4) delayed disclosure; and (5) retraction when child may withdraw allegations that are not believed.[19]

All these factors make it difficult for children to disclose. Even in the few instances when they do report abuse, family members are also reluctant to go to the police because they fear (a) the child will face stigma, ostracism or retaliation if the abuse becomes public; and (b) a dispassionate, almost hostile, criminal justice system from which they expect apathy and blame.

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12 Pryor, D.W. (1996), *Unspeakable Acts: Why Men Sexually Abuse: Children,* New York University Press.

13 *Child Sexual Abuse It's Your Business,* (Canadian Centre for Child Protection).

14 Lanning, K.V. (2002), *Law Enforcement Perspective on the Compliant Child Victim. The APSAC Advisor,* 14(2): 4-9.

15 Schell, B.H., Martin, M.V., Hung, P.C.K. & Rueda, L. (2007). *Cyber Child Pornography: A Review Paper of the Social and Legal Issues and Remedies and a Proposed Technological Solution, Aggression and Violent Behavior,* 12(1): 45-63.

16 Olson, L.N., Daggs, J.L., Ellevold, B.L. & Rogers, T.K.K., (2007), *Entrapping the Innocent: Toward a Theory of Child Sexual Predators' Luring Communication, Communication Theory,* 17(3): 231-251.

17 Pryor, D.W. (1996), *Unspeakable Acts*: *Why Men Sexually Abuse Children.* New York: (New York University Press); Also see *Child Sexual Abuse It's Your Business, supra* note 13.

18 *Child Sexual Abuse It's Your Business, ibid.*

19 Summit, R.C. (1983), *The Child Sexual Abuse Accommodation Syndrome, Child Abuse & Neglect,* 7, 177- 193.

The law addresses the first fear (of publicity) by safeguarding the privacy and confidentiality of children.[20] Even if a case of sex abuse becomes part of the public record, the child still has a lifelong fundamental right to be safeguarded from further disclosure of identity.[21]

But the second fear is more daunting: the long-drawn out, victim-shaming method of investigation and prosecution of sex crimes in India which assists the predator in intimidating victims into silence. Though these fears are valid, staying silent or opting for out-of-court settlement is dangerous because it leaves the abuser free to inflict damage on others and the abused child himself.

Mandatory reporting[22] is, therefore, a welcome step towards breaking the "conspiracy of silence."

III PROTECTION OF CHILDREN THROUGH FRIENDLY COURTROOM PROCEDURES

Protection of children through mandatory reporting must be accompanied by protection of children in the criminal justice system. A law that mandates reporting of sex abuse must ensure that children are protected in the process or at the very least not damaged.[23] By implementing child-friendly procedures, courts will encourage children to report such abuses of their own free will.

Children take a great risk by entering into a system designed for adults, a system that is more likely to work against rather than for them.[24] But the risk can be worthwhile: research demonstrates that children are resilient and can experience healing rather than permanent harm[25] through a compassionate delivery of justice.[26]

At the same time, there are no simple solutions to dealing with children in

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20 POCSO, s. 23 (1 and 2), s. 33 (7).

21 *ABC* v. *Commissioner of Police,* WP (c) No. 12730/2005 DOJ: 05.02.2013. See also *A.K. Asthana* v. *Union of India,* W. P. (C) 787/2012 where the Delhi High Court ordered the dissemination of guidelines for Media Reporting on Children.

22 POCSO, ss. 19-21.

23 Eastwood, C., & Patton, W. (n.k.), *The Experiences of Child Sexual Abuse Complainants in the Criminal Justice System* (this study was conducted across 3 jurisdictions in Australia: Queensland, New South Wales and Western Australia).

24 Smart, C., (1989), *Feminism and the Power of the Law* (London: Routledge).

25 See Myers, J.E., Saywitz, K.J., & Goodman, G.S., (1996), *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony,* 28 *Pac. L. J. 3* 1996-1997.

26 Ryan, B., Bashant, C., & Brooks, D. (2006), *Protecting and Supporting Children in the Child Welfare System and the Juvenile Court, 57 Juv. & Fam. Ct. J. 61 2006.*

court. Children, at their happiest, are a delightful challenge for the adults around them.[27] They present an even greater challenge when, laden with trauma, they try to navigate an adversarial legal system. [28] This section will address causes of trauma and how courts can use the law to alleviate trauma and promote the truth-seeking function of the trial.

The child's own trauma

Even before ever entering a courtroom, children struggle with trauma caused by sex abuse. Research demonstrates that sex abuse has emotional, physical and behavioural effects on children.[29] While it is out of the ambit of the court's function to deal with the child's own trauma, it can at least ensure that this suffering is not compounded by "courtroom trauma".

Courtroom trauma

Courtroom trauma has two "serious identifiable" effects: (i) psychological damage to the child preventing him from testifying freely; and (ii) the consequent failure of the truth-seeking function of the trial.[30]

Abused children experience three unique challenges:[31] firstly, they go through anticipatory stress - stress caused by waiting for testimony to take place;[32] secondly, they go through anxiety during trial due to fears of the defendant and of an intimidating, unfamiliar courtroom environment;[33] children may also experience crime flashbacks[34] and thirdly, the adversarial process is particularly hard on children.[35] These factors affect the demeanour, credibility and memory of the child, thereby negatively impacting his testimony.[36]

Courtroom trauma is not limited to the Indian context: even in countries

27 *Supra* note 25.

28 *Ibid.*

29 "Emotional effects include: self-blame, distrust of others, depression, fear, anxiety, anger and shame; physical effects include headaches, stomachaches and sleep problems; behavioural effects include: withdrawal, aggression, suicidal tendencies, compulsion to self-harm inappropriate sexual behaviour and high-risk sexual behaviour which leaves them vulnerable to STDs and pregnancy. Eastwood, C., & Patton, W. (n.k.) *supra* note 23.

30 Dissent of Blackmun, J. and Rehnquist, C.J. in *Coy* v. *Iowa,* 487 U.S. 1012, 1032 (1988).

31 Thoman, D.H. (2013), *Testifying Minors: Pre-trial Strategies to Reduce Anxiety in Child Witnesses,* 14 *Nev. L.J.* 236 2013-2014.

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

with better-developed judicial infrastructure than ours, the justice system is "unfriendly" to children.[37] South Africa's Constitutional Court observed that the forbidding court atmosphere, people clad in black and white, the presence of the offender and trauma (both personal and caused by the courtroom) reduce the child to a state of "terrified silence."[38]

Routine systemic challenges like lack of continuity with different officials involved at different stages; waiting for the case to be called, often within the sight of the defendant, lack of trained personnel and poor resources affect children deeply[39] and also place an unconscionable burden on children. It is difficult for adults to share pleasant sexual experiences with strangers and yet, we expect exactitude and precision from children testifying about traumatic sexual abuse because the legal system views them as "witnesses" rather than as "children".

The child encounters the courtroom at two stages: at the recording of section 164 statement[40] and at trial. During both these stages, courts can take measures to alleviate trauma and restore a semblance of comfort by (i) summoning the child in the post-lunch session so that he need not wait all day;[41] (ii) gently providing the child with clear and specific instructions; (iii) explaining the importance of speaking the truth and of correcting any mistakes he may make.[42] This will also aid the truth- seeking function of the court.

At the same time, each of the stages - recording of section 164 statement and trial require specific measures as well.

Alleviating courtroom trauma during recording of statement under section 164

The process of eliciting the statement under section 164 calls for sensitivity: this is the child's first encounter with a courtroom and may determine whether he will agree to testify at trial. The Delhi High Court has directed courts to sensitively aid the child during this process by: (a) promptly recording the child's statement

37 Bala, N., Lindsay, R.C., & McNamara, E. (2000), *Testimonial Aids for Children: the Canadian Experience with Closed Circuit Television, Screens, and Videotapes,* 44 *Crim.L.Q.* 461 2000-2001.

38 *State* v. *Rahul,* (2013) ILR III Delhi 861 citing *Director of Public Prosecutions, Transvaal* v. *Minister of Justice and Constitutional Development* reported in (2009) 4 SA 222 (CC).

39 See Bala, N., Lindsay, R.C., & McNamara, *supra* note 37.

40 Child victims of sexual abuse provide a statement to a magistrate under CrPC, section 164, *Court on its own motion* v. *State of Delhi,* 146 (2008) DLT 429.

41 *Sheeba Abidi* v. *State,* 113 (2004) DLT 125.

42 Ryan, B., Bashant, C., & Brooks, D. (2006), *Protecting and Supporting Children in the Child Welfare System and the Juvenile Court,* 57 *Juv. & Fam. Ct. J. 61.*

in child-friendly rooms within court premises; if the child is hospitalized, the magistrate should record his statement in the hospital; (b) avoiding adjournments wherever possible; (c) recording testimony via video-conferencing and video-taping the child's testimony; and (d) permitting the presence of parents and guardians during the statement unless their presence is not in the interests of justice.[43]

Alleviating courtroom trauma during trial

Special courts and prosecutors, speedy trials, *in camera* or in chamber hearings, offering the child breaks and support persons can help alleviate courtroom trauma.

Special courts and prosecutors:[44] Theoretically,[45] specialization ensures that (i) the judges and the prosecutors gain expertise and a clearer perspective of these cases; (ii) centralization may enable speedy implementation of the best practices recommended by the Delhi High Court: staffing courts with females to increase the child's comfort; [46] ensuring continuity of persons handling the trial, including the judge and the prosecutor; [47] and conduct of trial by female judges.[48]

Speedy trials: These can alleviate courtroom trauma caused by anticipatory stress.[49] Children experience conflict and distress during the wait for trial: they vacillate between wanting the trial to end and not wanting it to begin because they dread confrontation with their abuser. [50] Moreover, there is ambiguity about the outcome - they are unsure if their ordeal will result in conviction and vindication or acquittal and blame.[51] Until they testify, children are expected to recall as much of their abuse as possible.[52] Speedy trials are critical to help children move on with their lives so that their "emotional, social and cognitive development" continues unhindered.[53] Recording their testimony within 30 days of the court's taking

43 *Supra* note 41.

44 POCSO, s. 28-32.

45 Unfortunately, Special Courts are overburdened with cases and the purpose of speedy trial is defeated.

46 *State* v. *Rahul, supra* note 38.

47 *Ibid.*

48 *Virender* v. *State of NCT Delhi,* Cr.A.No. 121/2008 DOD: 29.11.2009.

49 Thoman, D.H., *supra* note 31.

50 Eastwood, C., & Patton, W. (n.k.), *supra* note 23.

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

cognizance of the offence is critical for their restoration.[54]

Clamping down on adjournments can alleviate courtroom trauma: the child should not be repeatedly called to court[55] because adjournments hinder his recovery.[56] Therefore, courts must factor in the impact of the adjournment on his welfare.[57] If the defendant absents himself when the child is present, either he must exempt identification or his bail must be revoked.[58] Adjournments should not be granted on grounds of inconvenience to counsel[59] or counsel's lack of preparation;[60] in fact, disciplinary action should be taken against lawyers who absent themselves without arranging for the examination of witnesses.[61]

In-camera hearings:[62] This can alleviate courtroom trauma by ensuring that all persons unconnected with the proceeding leave the courtroom, the advocate not directly cross-examining the child[63] and removing excess courtroom staff.[64] In fact, an in-chamber hearing is the best way to alleviate courtroom trauma.[65] In fact, POCSO goes further and also provides for the child to be examined in any place other than the courtroom if the special court thinks it fit.[66]

Breaks: Breaks can help alleviate courtroom trauma.[67] Because children may be too intimidated to request for breaks,[68] courts should set guidelines for breaks i.e., a break every 15 minutes - this would also protect the defendant so that the child does not get a break during moments crucial to the defence.[69] At the same time, courts should not be rigid and if the child appears to be in need of a break at any time, they should be given relief.

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54 POCSO, s. 35 (1).

55 *Ibid.*

56 See Myers, J.E., Saywitz, K.J., & Goodman, G.S., *supra* note 25.

57 *Rahul,supra* note 38.

58 See, *State of Uttar Pradesh* v. *Shambhu Nath,* AIR 2001 SC 1403.

59 *Akil* v. *State,* 2013 CrLJ 57.

60 *Delhi Administration* v. *Vishwanath Lugnani,* 1982 SCC (Cri) 139.

61 *Dastane* v. *Shivde,* AIR 2001 SC 2028.

62 POCSO, s. 37.

63 *Sumeshwar Choudhury* v. *State,* ILR [1993] MP 664, holding that junior lawyers must leave if their seniors are cross-examining the victim. See also *Varadaraju* v. *State*, 2005 CriLJ 4180.

64 *Rahul*, *supra* note 38.

65 *Sheeba Abidi* v. *State,* 113 (2004) DLT 125.

66 POCSO, s. 37. The Special Court can issue a commission under CrPC 284.

67 *Id.,* s. 33 (3). Also see *Sakshi* v. *Union of India,* AIR 2004 SC 3566.

68 Myers, J.E., Saywitz, K.J., & Goodman, G.S., *supra* note 25.

69 *Ibid.*

Support persons:[70] Support persons play a critical role in alleviating courtroom trauma. By the time the child comes to court either for the section 164 statement or the trial, he has already shared his story several times - to a trusted person or to the police. Not only does he re-live his trauma each time,[71] he may also get impatient and gloss over important details if he doesn't realize the importance of the court process. A purely legal approach may be inadequate: what might work better is a multi-disciplinary perspective where support persons collaborate with the legal system to provide compassionate treatment for children.[72]

Support persons can alleviate courtroom trauma by orienting children to the courtroom prior to the date of testimony. Research demonstrates that children who understand the legal system report the least amount of courtroom anxiety.[73] In fact, psychiatrists recommend that children be desensitized to courtroom trauma through courtroom visits.[74] Support persons can also help the child understand the importance of the trial so that he is fully equipped to aid its truth-seeking function.

The support person should be a friendly, neutral or independent adult who has earned the confidence of the child.[75] These support persons can help children (a) manage their stress; (b) understand the court process; and (c) provide truthful testimony.[76] In the interests of a fair trial, the court should ensure that (i) the support person does not influence the child's testimony;[77] and (ii) if the support person is a witness (e.g. parents) then their testimony is recorded first.

Alleviating courtroom trauma by balancing rights of child and defendant

The state's compelling interest in protecting children in court mandates a balance between the special needs of children and the rights of the defendant.[78] While cross-examination and confrontation with witnesses are the defendant's lawful right, courts must act *in parens patriae* over children and promote their interests over all others, including those of the defendant.[79]

Confrontation with the defendant exacerbates courtroom trauma. The

70 POCSO, s.33 (4).

71 *Rahul, supra* note 38.

72 See Myers, J.E., Saywitz, K.J., & Goodman, G.S., *supra* note 25.

73 Thoman, D.H., *supra* note 31.

74 *Ibid.*

75 *Virender* v. *State of NCT of Delhi,* Cr.A.No. 121/2008 DOD: 29.11.2009.

76 Myers, J.E., Saywitz, K.J., & Goodman, G.S., *supra* note 25.

77 *Rahul*, *supra* note 38.

78 Myers, J.E., Saywitz, K.J., & Goodman, G.S., *supra* note 25.

79 *Shankar Kisanrao Khade* v. *State of Maharashtra,* 2013 CriLJ 2595.

defendant's right of "confrontation" stems from the assumption that it produces on the witness a "certain subjective moral effect" - it is easier to lie about a person in their absence.[80] Also, the court can ascertain the veracity of the witness through their demeanour in the presence of the defendant (often the only other person who knows whether the witness is being truthful).[81]

However, abusers generally threaten children into silence and they may fear these threats even at trial.[82] Studies show that fear of the defendant can trigger painful memories[83] and lead to immense stress.[84] In one rape case, the child suffered an emotional breakdown on seeing the defendant - she left the courtroom in violation of the judge's order.[85] The Supreme Court validly held that she lacked mental maturity to testify[86] but it is probable that her trauma prevented her from obtaining justice. Abusers should not be allowed to benefit from conditions their crimes have caused.

POCSO balances the rights of the defendant and the child by (a) protecting the child by providing for testimony via video-conferencing,[87] shielding of the child through screens, curtains, single-visibility mirrors,[88] curtains, etc.;[89] and (b) protecting the rights of the defendant by ensuring that s/he should be able to hear the child and aid his defense by communicating with his advocate. [90]

Cross-examination exacerbates courtroom trauma. While a fair trial requires that the child's evidence be subjected to scrutiny, cross-examination designed to break down the child rather than the case[91] can (i) strain his coping strategies to the limit;[92] (ii) mirror the dynamics of abuse because he is again reduced to

80 *Coy* v. *Iowa,* 487 U.S. 1012 at 1032 (1988).

81 *Ibid,* See also, *California* v. *Green,* 399 U.S. 149, 158 (1969).

82 Eastwood, C., & Patton, W. (n.k.), *supra* note 23.

83 *Coy* v. *Iowa, supra* note 80.

84 Thoman, D.H., *supra* note 31.

85 *K. Venkateshwarlu* v. *State of Andhra Pradesh,* AIR 2012 SC 2955.

86 *Ibid.* She also agreed to all the suggestions of the defense again demonstrating her vulnerability.

87 Through video-conferencing or closed circuit TV, the child can be deposed in a place other than the courtroom in which the trial is proceeding, *supra* note 48.

88 *Virender, ibid,* holding that single visibility mirrors protect both the rights of the child and the rights of the defendant during cross examination.

89 POCSO, s.36.

90 *Id.,* s.36 (1).

91 Henderson, E. (2002), *Persuading and Controlling: The Theory of Cross-Examination in Relation to Children* in Children's testimony: A handbook of psychological research and forensic practice 279-294 (Chichester: John Wiley & Sons).

92 Summit, R.C. (1983), *The Child Sexual Abuse Accommodation Syndrome,* Child Abuse &

helplessness; [93] and (iii) retard his healing process with suggestions that he is lying.[94] In India, for instance, defense lawyers close their cross-examination by suggesting to each and every witness (without a good-faith basis) that they are lying.[95] If the same baseless suggestions were made in a non-judicial context, laws of slander would apply. Should courts acquiesce when children are harmed by unfounded allegations? Fairness is not the prerogative of the defendant alone - children have an equal right to be treated fairly.[96]

To alleviate trauma caused by cross-examination, courts can (a) require lawyers to submit questions to the judge who will then question the child gently;[97] (b) ask simple questions in plain language to elicit the truth rather than to confuse;[98] (c) clamp down on aggression, sarcasm, humiliation or any attempt to draw out sexually explicit descriptions that would traumatize the child;[99] and (d) insist that every question has a good-faith basis. Courts should ensure that cross- examination - "the greatest legal engine ever invented for the discovery of truth" - does not intimidate a child into saying things that are not truthful.[100]

IV PROTECTION OF CHILDREN THROUGH CHILD-FRIENDLY PROSECUTIONS

Historically, justice systems throughout the world placed little weight on the reliability of children[101]which made them more vulnerable to abuse;[102] and

Neglect, 7, 177- 193.

93 Eastwood, C., & Patton, W. (n.k.), *supra* note 23.

94 Summit, R.C., *supra* note 92.

95 It is one thing if the defense counsel has valid reason to suggest that children are lying - it's quite another to label each and every witness a "liar".

96 Easteal, P. (2001), *Less than Equal: Women and the Australian Legal System*, (Sydney: Butterworth's).

97 POCSO, s. 33 (2). Also see *Sakshi* v. *Union of India,* AIR 2004 SC 3566.

98 Myers, J.E., Saywitz, K.J., & Goodman, G.S., *supra* note 25. Questions containing a negative or double negative should be avoided, *Virender* v. *State of NCT of Delhi,* Cr.A.No. 121/2008 DOD: 29.11.2009.

99 POCSO, s. 33 (6). Also see, *Rahul*, *supra* note 38.

100 *White* v. *Illinois,* 502 U.S. 346, 356 (1992).

101 Since 1692 when children made false allegations in the Salem witch trials, child testimony has been treated with caution, Kendrick, E.M. (2014), *Diagram Debate: The Use of Anatomical Diagrams in Child Sexual Abuse Cases,* Liberty University Law Review, *8 Liberty U. L. Rev*. 125 20132014.

102 Bala, N., Lindsay, R.C., & Mc Namara, E. (2000), *Testimonial Aids for Children: the Canadian Experience with Closed Circuit Television, Screens, and Videotapes, 44 Crim.L.Q. 461 (2000-2001).*

emboldened sexual predators to abuse children with impunity.[103] Increase in child sex abuse in the United States in the 1970s required judges to adopt a more discerning approach.[104]

Research supports a different approach in dealing with children because of differences in their mental and emotional capacity. Though young children can provide "relevant and reliable" testimony, they respond better with (i) cues and prompts for accuracy;[105] and (ii) questions which are focused and specific without being leading.[106] Children can remember core features of stressful, emotional events (the substratum of the case) much better than peripheral events.[107] Like adults, children are more likely to be inaccurate and suggestible about peripheral events than about the substratum of the case.[108] Research demonstrates that by the time children reach the age of 11, they are no more likely to be suggestible than adults.[109]

However, it is true that children's testimony can be inconsistent - "some children, like some adults lie".[110] However, children's inconsistency also stems from their "developmental immaturity" and the stress of disclosing traumatic facts to strangers.[111] In cases of prolonged abuse, children may struggle to recall specific instances accurately.[112] Very young children appear inconsistent because they: (a) do not monitor their communications for consistency; (b) try to answer questions even if they do not understand them; (c) find it difficult to maintain chronological, sequential narratives till around age 7-10; (d) do not realize when they are being misunderstood or misinterpreted; and (e) their memory development may prevent them from being completely consistent. [113]

However, disregarding their testimony, without making appropriate allowances for their tender years, would increase the risk of abuse because the younger the child, the greater the likelihood of impunity for sexual predators.

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103 See Bala, N., Lindsay, R.C., & McNamara,E.*, ibid.*

104 Kendrick, E.M., s*upra* note 101.

105 Myers, J.E., Saywitz, K.J., & Goodman, G.S., *supra* note 25.

106 *Ibid.*

107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

110 *Ibid.*

111 *Ibid.*

112 *Ibid.*

113 *Ibid.*

Courts throughout the world, including India, have adopted a more realistic and compassionate approach towards such crimes.

Preliminary enquiry or competency testing

Through a sensitively conducted preliminary enquiry,[114] the court can evaluate the testimonial intelligence of the child by assessing if he: (i) understands questions; (ii) is capable of giving rational answers; (iii) is influenced by tutoring; (iv) will testify truthfully; [115] (v) understands the meaning of the "oath" - even a child who does not understand the meaning of the oath is permitted to testify though his evidence must be scrutinized more carefully.[116]

The Delhi High Court has laid down guidelines for a child-friendly preliminary enquiry:[117] Judges should use questions appropriate to the socio-economic background, education, age as well as the capacity of the child.[118] Judges can also ask questions unconnected with the case in order to relieve the child's discomfort and build a rapport to help him to speak the truth.[119]

Courts have a role in eliciting truthful evidence from child

Courts must play an active role in recording evidence - they are not "mere spectators" or "recording machines".[120] Even if the prosecutor is indifferent, the judge can ask questions[121] to (a) improve the quality of evidence so that the actions of the defendant are not "camouflaged"; (b) ensure that shame or shyness are not preventing the child from speaking the truth; (c) help children correct their evidence if they have made an error; (d) gently elicit the meaning of ambiguous terms like *"gandi harkatein"* or *"batamezein"*. [122]

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114 The Supreme Court has held that if a judge omits to hold the preliminary enquiry, the courts should not discard the testimony; instead they should scrutinize the evidence to assess whether the child possessed testimonial intelligence; see *Khomanlal* v. *State of Chhattisgarh,* 2013 CriLJ 924 where the Supreme Court accepted the evidence of a child, despite the lack of a preliminary enquiry, because she answered questions rationally, in detail and withstood cross-examination. See also, *Jibhau Vishnu Wagh* v. *State of Maharashtra,* 1996 CriLJ 803, where the Bombay High Court held that absence of a preliminary enquiry is not fatal as the child's evidence will reveal her level of testimonial intelligence.

115 *K. Venkateshwarlu, supra* note 85.

116 *Jhinge* v. *State of Uttar Pradesh,* 2006(7) ADJ 411.

117 *Rahul, supra* note 38.

118 *Ibid.*

119 *Ibid.*

120 *Ram Chander* v. *State,* AIR 1981 SC 1036.

121 *Rahul, supra* note 38, holding that judges are empowered to elicit evidence under Indian Evidence Act, s. 165 and CrPC, s. 311.

122 *Ibid.*

Courts must ensure that the record is completely truthful: if the child uses gestures to explain the evidence, the court must enter the description of the gesture into the record.[123]

Most importantly, courts should not automatically pre-judge or look at children's evidence with skepticism. Because children are "incapable of having any malice or ill will against any person," the Supreme Court held that allegations of false implication by the child must be supported with evidence.[124]

Even when children appear tutored, courts must consider all the evidence to reach a just conclusion. In the case of a rape of an 11-year old child, the Delhi High Court held that despite tutored improvements, evidence supported the material facts because the tutored testimony was "clearly severable" from the untutored portions.[125]

The mere fact of delayed reporting by children is not a ground for skepticism. The Supreme Court has directed courts to expect delayed disclosure in sexual offences and to evaluate these delays using different measures[126] because victims agonize over the possibility of stigma, the honour of their family and the wishes of their family members before approaching the police.[127] Further, as this article has explained, grooming and Child Sexual Abuse Accommodation Syndrome cause an inevitable delay in reporting.

V PROTECTION OF CHILDREN BY BREAKING CYCLE OF CRIME

Denying bail to child sex offenders

The safety of the victim and his family, progress of trial,[128] possibility of witness tampering, [129]gravity and seriousness of the offence,[130] are grounds for denial of bail to child sex offenders.

Meting out severe punishments to child sex offenders

The Bombay High Court has called for a sentencing policy that reflects the

123 *Ibid.*

124 *State of Madhya Pradesh* v. *Ramesh,* (2011) 4 SCC 786.

125 *Sunil Kumar* v. *Delhi,* Cr. Appeal No. 532/1999 DOD: 30/01/2009.

126 *Satpal Singh* v. *State,* 2010 CriLJ 4283.

127 *Bhawna Garg* v. *State,* Civil Appeal Nos. 6304-6305 of 2012 DOD: 05.09.2012.

128 *Shri Asharam Bapu* v. *State of Rajasthan,* 2014 (3) RLW 2407(Raj.).

129 *Sachin* v. *State of Himachal Pradesh,* Cr.MP(M) Nos. 1362 of 2014 DOD: 12/12/2014.

130 *Meyyappan* v. *Station House Officer,* 2014 (4) CTC 23.

"rising graph" of offences against children and the consequent public outcry.[131] These "grave and heinous crimes"[132] deserve deterrent sentences - sentencing policy should not only consider the brutality of the crime but also its social impact.[133]

Yet often, all that the rapist has to fear is marriage to his victim. Rape is one of the most horrific crimes against children. Yet our culture dictates that the child's "honour" and future be protected by marriage to the person who has, according to the Supreme Court, assaulted her human rights and left her with mental scars.[134] The victim must share her life with her rapist in order to protect her "defiled virtue".

Law does not approve of these "marriages of convenience" - the Supreme Court had strong words for courts who bless these marriages with lesser sentences.[135] Reminding judges that rape is a non-compoundable offence, the Supreme Court ordered all courts to take into account the pressure the victim faces to "consent" to marriage due to (a) the rapist's "adroit" tactics; and (b) the trauma she has undergone.[136] The Supreme Court rightly rejected the grant of lesser punishment because of the lack of "genuine consent".[137]

Sanctioning such "marriages" is dangerous for society. Sentencing policy must deter others.[138] Where is the deterrent effect if marriage to his victim is all that the rapist has to fear?

VI PROTECTION OF CHILDREN THROUGH COMPENSATION

As this article has explained, sex abuse haunts children long after the abuse has ended - the recovery process is long and expensive. Yet, the narrow focus on the defendant in our criminal justice system often leads to disregard the child's needs. However, the legal position is clear - "criminal justice will look hollow" if the victim is not provided solace.[139] At the time of the conviction, courts must record reasons not only for providing compensation but also for denying it.[140]

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131 *State of Maharashtra* v. *Dattatraya,* 2014 ALLMR (Cri) 2078.

132 *Parhlad* v. *State of Haryana,* 2015(8) SCALE 436.

133 *State* v. *Kashiram,* 2009 CriLJ 1530.

134 See the Supreme Court's characterization of child rape in *Parhlad* v. *State of Haryana,* 2015(8) SCALE 436.

135 *State* v. *Madanlal,* AIR 2015 SC 3003.

136 *Ibid.*

137 *Ibid.*

138 *Zulfiqar Ali* v. *State,* 1986(10) ACR 429.

139 *State* v. *High Court of Gujarat,* AIR 1998 SC 3164.

140 *Ankush Gaikwad* v. *State,* AIR 2013 SC 2454.

Children are also entitled to state-funded interim compensation.[141] Awarding Rs.3 lakhs as interim compensation to a victim under POCSO, the Rajasthan High Court held that interim compensation is essential due to lack of institutional support for rehabilitation.[142] Compensation should be determined on the basis of: (i) the severity or gravity of offence; (ii) medical expenditure on pregnancy, contraction of STDs / HIV etc.; (iii) loss of education / employment opportunity; (iv) relationship with offender; (v) whether it is a repeat offence; and (vi) financial condition of victim and other relevant factors.[143]

Unfortunately, victim compensation has now become a double-edged sword: often government stakeholders, including judges, tend to see it as an incentive for false complaints compounded by the fact that children have immunity under the law. On the other hand, punishing children for false complaints would be counter-productive: predators would misuse the provision to intimidate children and their families with threats of counter-suits. Good investigations can weed out false complaints. Approaching every case with skepticism based on stray incidents defeats the law and perpetuates the conspiracy of silence.

VII PROTECTION OF CHILDREN BY REVERSAL OF BURDEN OF PROOF

Indian law has come a long way - from "ciphers",[144] children are now the rightful center of criminal trials. At the same time, POCSO's reversal of the burden of proof has attracted criticism. POCSO requires the defendant to bear the legal burden of proof whereas the prosecution, according to the plain reading of the Act, would not even bear an evidentiary burden of proof.[145] This article argues that the reversal of the burden of proof is justified due to the following reasons:

(i) Children are vulnerable

Children, whether abused or not, warrant special care - they are a "supremely important national asset".[146] The Constitution of India permits the legislature to make special provisions for them.[147]

141 POCSO, s. 33(8). See also POCSO, rule 7.

142 *Shiva@Savaram* v. *State* 2014 (1) Crimes 102.

143 POCSO, rule 7.

144 See the *Malimath Committee Report* (2003) which observed that "the hopeless victim is indeed a cipher in modern Indian criminal law and its administration."

145 See POCSO, ss. 29 and 30.

146 *Lakshmi Kant Pandey* v. *Union of India,* (1984) 2 SCR 795.

147 Article 15(3) permits the state to make special provisions for children; article 39 (e) and (f)

Child sex abuse stems from the secretive exploitation of vulnerability: abusers target children who lack safe spaces, hail from lower socio-economic backgrounds, children whom law enforcement and society neglect. Moreover, the trauma and pain of sex abuse increases children's vulnerability. This warrants a greater duty of care. Resting the burden of proof on the slender shoulders of a traumatized child makes it easy for predators to escape punishment. Adults must bear the responsibility of explaining their actions if they (a) insinuate themselves into sexual relationships with children; or (b) place themselves in a position where their actions are misinterpreted.

Children's vulnerability also increases due to the stigma Indian culture places on victims of sexual abuse. Indian law and courts are still moving from a position of victim-shaming and blaming to a compassionate approach and the reversal of the burden of proof will assist in this paradigm-shift. Children face (a) immense cultural and family pressure not to report; and (b) fear of ostracism when they do report. A poverty-stricken 11-year old child, the author encountered (pre-POCSO), was overpowered and raped by a fellow-villager - she was unwilling to report the abuse even to her parents. Because of her fear of blame and ostracism, the abuser remains free to prey on others in the community. Sadly, Indian culture is squarely on the side of the offender - supporting him at every turn. Should Indian law not be on the side of the child? POCSO mandates that Indian law and courts stand firmly on the side of children.

(ii) Reversal of the burden of proof is not unconstitutional

Several other Acts reverse the burden of proof, for instance, the Narcotics Drugs and Psychotropic Substances Act, 1985.[148] The constitutionality of a provision reversing the burden of proof is determined by (a) the nature of the case; (b) the statutory objectives; and (c) the state's responsibility to protect innocents.[149] In upholding the reversal of burden of proof under NDPS, the Supreme Court referred to two British statutes: the Road Traffic Act, 1956 and the Counterfeiting Act, 1981 where the reversal of the burden of proof was justified by the legislative intention: to "keep death off the road" and to combat counterfeiting, respectively.[150] The Supreme Court held that as long as the defendant's human rights are protected,

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requires the state to protect children of tender age from abuse, to be provided equal opportunities and facilities to develop in a healthy manner and to be protected from exploitation and moral and material abandonment.

148 Hereinafter referred to as "NDPS".

149 *Noor Aga* v. *State of Punjab,* (2008) 16 SCC 417.

150 *Ibid.*

Parliament can deal with social problems as best as it can.[151] If prevention of road accidents, counterfeiting and drug trafficking can, in various jurisdictions, justify reversal of the burden of proof, child sex abuse certainly warrants this protection.

At the same time, POCSO prescribes a much higher standard for the defendant than NDPS does[152] because POCSO (a) does not specify a minimum burden for the prosecution to meet; and (b) the defendant must prove absence of a mental state beyond a reasonable doubt rather than a preponderance of probability.[153] However, the presumption of innocence is a human right rather than a fundamental right.[154] Placing a legal rather than an evidentiary burden on the defendant must be weighed against the loss or protection he is entitled to, fair and reasonable trial and also his dignity.[155] Both extremes on the spectrum of presumption of guilt (whether the burden lies on the defendant or on the prosecution) have fearful consequences for society but the state owes a paramount duty to sexually abused children.

VIII PROTECTION THROUGH PREVENTION OF CHILD SEXUAL ABUSE

Recognizing the inadequacy of penal laws that operate only after the abuse (much of which is unreported), the Supreme Court has urged more efforts towards prevention.[156] Some recommendations include: (i) strengthening the ICPS system so that its benefits reach children; (ii) training and sensitization of police; and (iii) monitoring children's homes strictly.[157]

Institutional abuse demands special attention: therefore, the Allahabad High Court issued directions to promote (a) prevention by directing that the state select institutional staff not only on the basis of seniority but on proven merit including sensitivity; (b) protection by directing that traumatized victims' are not exposed to publicity-seeking bodies; and (c) prosecution by directing inquiries, suspensions, and expedited investigations and trials.[158] The legal system must substantially

151 *Ibid.*

152 Under NDPS, the prosecution had to prove its case beyond reasonable doubt, whereas the defendant's standard of proof was "preponderance of probability".

153 The plain reading of POCSO would not be justified by the Supreme Court's holding in *Noor Aga, supra* note 149.

154 *Ibid.*

155 *Ibid.*

156 *Shankar Kisanrao Khade* v. *State,* 2013 CriLJ 2595.

157 *State of Tamil Nadu* v. *Union of India,* 2013 (2) SCALE 620.

158 *In Re: Govt. Children's Home at Shivkuti Allahabad,* 2012 ACR 1812.

increase the risk of non-reporting of institutional abuse through fines and sentences.

The National and State Commissions for Protection of Child Rights have an important role under POCSO[159] and they can spearhead prevention mechanisms. These commissions can also review cases of failure of justice and ensure accountability for those who place children at risk by letting offenders escape punishment.

IX REVIEW OF COMPARATIVE LAW

This section summarizes the best practices in other jurisdictions that Indian law and policy-makers might consider to: (a) improve the quality of evidence; (b) increase support for children; and (c) promote speedy justice.

Law and policy reform to improve the quality of evidence

Use of anatomical dolls or diagrams

The Delhi High Court has recommended examination of the utility of anatomical dolls[160] in eliciting the truth.[161] Investigators in many jurisdictions use these dolls[162] to help children who lack the vocabulary or are too traumatized[163] or feel too shamed[164] to communicate effectively. But use of dolls could also lead to inaccurate descriptions because of: (i) their exploratory use by children of tender age; (ii) their potential for suggestion; and (iii) interviewer bias leading to undue influence.[165]

Therefore, the use of anatomical dolls must be accompanied by safeguards:[166] (a) the investigator's use of the dolls while taking a statement must be video-taped; and (b) investigators should use dolls only for description, clarity[167] and

159 POCSO, s. 44.

160 Male and female dolls that incorporate the structures of the human body.

161 *Rahul, supra* note 38.

162 Kendrick, E.M., *supra* note 101.

163 Weinerman, A. (1994), *The Use and Misuse of Anatomically Correct Dolls in Child Sexual Evaluations: Uncovering Fact... or Fantasy? Women's Rights Law Reporter*, Vol. 16, 347 (1995).

164 Everson, M.D. and Boat, B.W. (1994). *Putting the Anatomical Doll Controversy in Perspective: An Examination of the Major Uses and Criticism of the Dolls in Child Sexual Abuse Evaluations, Child Abuse and Neglect 2,* 113-29 (1994).

165 Kendrick, E.M., *supra* note 101.

166 *Ibid.*

167 Weinerman, A.*, supra* note 163.

corroboration.[168] In the Indian context, anatomical diagrams might work better - they are also less likely to be used by children for exploratory purposes.

Admission of multi-disciplinary expert evidence during trial

Courts across jurisdictions accept expert medical evidence that (i) the child is sexually abused; (ii) the child's condition is consistent with sexual abuse; (iii) sexual abuse cannot be ruled out despite the lack of physical evidence.[169] However, while a doctor's evidence that a child has STDs is accepted as evidence of illegal sexual contact, a psychologist's evidence that a child is demonstrating age-inappropriate sexual awareness is considered "hearsay" evidence[170] which is not admissible except according to stringent legal rules.[171] However, certain symptoms of child sex abuse like fear, anxiety, avoidance, regression, nightmares, depression, enuresis, etc., provide affirmative psychological evidence of abuse; and the hearsay testimony of behavioral scientists could aid the truth-seeking function of the trial.[172]

Therefore, in some foreign jurisdictions, the testimony of the child is supplemented with that of experts such as physicians, psychiatrists, social workers and psychologists.[173] The Canadian Supreme Court has permitted the "principled" rather than the "categorical" use of hearsay testimony - the two principles being "necessity and reliability".[174] Grounds for necessity could be the inadmissibility of the child's evidence or psychological assessment that testimony might traumatize the child, etc.[175] Grounds for reliability might be the spontaneity of the child's disclosure ruling out prompting; lack of a motive to lie; the age-inappropriate knowledge of sexual acts; the timing of the statement, the demeanour, intelligence

168 Myers, J.E., Saywitz, K.J., & Goodman*, G.S.,supra* note 25.

169 Not all types of abuse result in injury; in fact, even penetration may not always result in physical injury, Myers, J.E.B., Bays, J., Becker, J., Berliner, L., Corwin, D.L., & Saywitz, K.J. (1989). *Expert Evidence in Child Sexual Abuse Litigation,* Hein Online Citation 68 *Neb. L. Rev*. 1 1989.

170 *Ibid.*

171 The law considers this caution necessary because: 1) the defendant cannot confront the accuser (i.e. the declarant-person whose statements are used) or test their evidence through cross-examination; 2) the judge cannot assess their demeanor; and 3) the declarant was not under oath when the statement was made, Cunningham, A., & Hurley, P. (2007), *Hearsay Evidence and Children.* Center for Children and Families in the Justice System, London Family Court Clinic Inc.

172 Myers, J.E.B., Bays, J., Becker, J., Berliner, L., Corwin, D.L., & Saywitz, K.J., *supra* note 169.

173 *Ibid.*

174 *R.* v. *Khan,* 1990 2 S.C.R. 53 cited in Cunningham, A., & Hurley, P., *supra* note 169.

175 Cunningham, A., & Hurley, P., *ibid.*

and understanding of the child. [176]

Law and policy reform to increase support for children who testify

Creating a multi-disciplinary unit to depose the child

In order to minimize the number of times the child must provide a statement, the state should create a multi-disciplinary team involving police, social services and the prosecutor who will interview the child together.[177]

Institutionalizing systems to facilitate child witness preparation

Though POCSO provides for support persons, affluent children have access to a much higher quality of support persons than poor children. Therefore, there is a need to standardize the level of support provided to all children who testify in sex abuse cases. The author recommends institutionalizing of children orientation by the state authorities. For instance, San Diego, United States, offers "neutral support" to children in terms of an orientation to the court, a courtroom tour and an introduction to court staff.[178] The child is desensitized to courtroom anxiety and develops trust in the criminal justice system so that they are able to focus on their role as witnesses.[179] Similarly, in Canada, all children play an interactive video game that simulates a courtroom environment, orients the child on courtroom procedures and helps the child find validation and affirmation through the process of testifying.[180]

Apart from the support person who can provide physical and emotional support in court, India can contextualize these practices so that every child receives the same standard of support.

Increasing protection for victims of incest

Incest victims are the most vulnerable - unlike other victims, reporting the abuse might mean loss of a home for the child.[181]

In some foreign jurisdictions, courts appoint- *guardians ad litem*[182] in order

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176 *Ibid.*

177 *Rahul,* citing *Director of Public Prosecutions, Transvaal* v. *Minister of Justice and Constitutional Development* reported in (2009) 4 SA 222 (CC).

178 Ryan, B., Bashant, C., & Brooks, D. (2006), *Protecting and Supporting Children in the Child Welfare System and the Juvenile Court,* Hein Online Citation: 57 *Juv. & Fam. Ct. J.* 61 2006.

179 *Ibid.*

180 www.childcourtprep.com/children/.

181 *Gajjan Singh* v. *State of Uttar Pradesh,* 2013 (4) RCR (Criminal) 1047 where the child had to take recourse to a state shelter home once she reported the abuse by her father.

182 These are called "safeguarders" in Scotland and "volunteer advocates" in the United States.

to ascertain and represent the wishes of the child and to advise the court of the child's best interests.[183] The *guardians ad litem* must weigh competing priorities: (i) child's rights; (ii) the rights of the family; and (iii) the duty of the state to protect the child.[184] In India, the court is still in a position of *parens patriae* for all children who depose[185] but courts might find *guardians ad litem* helpful in cases of incest - where the child experiences inner conflict, and family and society pressure[186] to tolerate the abuse rather than report it. Court-appointed *guardians ad litem* would weigh all these conflicting interests and present the court with recommendations regarding the best course of action.

Law and policy reform to promote speedy justice

Focus on cases of predatory child sex abuse

Indian law makes no distinction between predators and partners - in fact POCSO even penalizes sexual acts between children. This floods courts with cases that waste law enforcement resources and finally end up in acquittal because the "victim" is unwilling to testify against the partner. The Canadian law has a "peer group exception" in cases where (i) the two sexual partners are close in age; and (ii) there is no evidence of exploitation of a position of trust or authority; and (iii) there exists no dependency between the two.[187] This leaves courts free to focus on cases of predatory sexual abuse. In India, special courts are overwhelmed with "romeo-juliet" cases because outraged parents take recourse to the criminal justice system to separate their children from their partners. While some of these cases may bear scrutiny (if there is a predatory, exploitative or grooming element), a vast majority of them represent a misuse of the law that clogs the justice system and makes it dysfunctional for all children.

Indian courts may be recognizing the necessity of such an exception: the Bombay High Court recently ruled that cases are fit for bail where (a) the "offender" is between 19-22 years of age; (b) the victim is between 15-18 years; (c) there is some indication of a marriage; (d) the section 164 statement of the minor supports

183 Carr, N. (2009), *Guiding the Gals: A Case of Hesitant Policy-making in the Republic of Ireland, (*2009) 12 (3) *IJFL* 60.

184 *Ibid.*

185 *Shankar Kisanrao Khade* v. *State of Maharashtra,* 2013 CriLJ 2595.

186 In *Lokesh Mishra* v. *State,* Criminal Application No. 768/2010 DOD: 12.03.2014, the child's step-mother urged her not to report the abuse to protect the family honour. In *Mohd. Salauddin* v. *State,* Criminal Application No. 1366/2010, the child delayed reporting abuse by her father due to threats from him. In *Ram Prakash Sunar* v. *State,* 2015 (88) ALLCC 503, the child's mother supported her husband against the child.

187 The Criminal Code of Canada, s.150. It also prescribes the age under which exemptions apply.

the contention of the offender; and (e) consent can be "safely inferred".[188] Indian law and policy-makers can call for a review of cases to assess if justice is served by penalizing all cases of sex with minors.

X CONCLUSION

POCSO is a much-needed first step towards child protection in our country but it is only the first step. Without an effective, holistic system, a law designed to protect abused children will cause them irrevocable damage. Nothing would be more cruel than to mandatorily force children into a criminal justice system that ignores their needs.

We need political will and cultural transformation to meaningfully protect our children. A nation's laws and policies reflect its priorities. Gandhi ji said that *"a nation's greatness is measured by how it treats its weakest members."* Till we learn to value every one of our children and set up caring systems that will protect the poorest and most vulnerable among them, the idealism of our legislature will be a guilty reminder of how much we have failed and how far we still need to go.

188 *Sunil Mahadev Patil* v. *State of Maharashtra,* 2016 ALL MR(Cri) 1712.