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DIRECTOR'S PAGE

It gives me immense pleasure in presenting XXXIst issue of 'J.T.R.I. Journal' to our esteemed readers. The Journal contains articles, transcription of talk and papers by Hon'ble Judges of the Allahabad High Court, Faculty Members of IJTR and also of Law Students.

We are deeply indebted to Hon'ble the Chief Justice and all the Hon'ble Judges of the Allahabad High Court (including Hon'ble Judges of the Lucknow Bench) who have always been a constant source of guidance, inspiration and encouragement to us and to this Institute. We are highly obliged to Hon'ble Mr. Justice Amitava Lala, Hon'ble Mr. Justice Pradeep Kant, Senior Judge, Lucknow Bench, Hon'ble Mr. Justice Yatindra Singh, and Hon'ble Mr. Justice Sunil Ambwani for their valuable contributions to enrich the Journal.

I express my sincere thanks to all who have contributed their articles/ papers for the Journal.

The last six months have been full of activity for the Institute. During this period the Institute conducted Induction Training Programme (IT-2) for the newly recruited officers of Higher Judicial Service from 2.1.2009 to 31.3.2009. Presently the Institute is engaged in conducting yet another Induction Training Programme (IT -1) for newly appointed Civil Judges (Junior Division). The Institute will be continuously imparting Induction Training (IT-I) for almost 18 months. This appears to be a herculean task but with the guidance and encouragement provided by the Hon'ble Judges and with the unflinching cooperation of the Faculty Members of the Institute, we hope we would accomplish the task successfully and be able to provide genuine good Judicial Officers to the system. The reading material which has been prepared by the Faculty has been greatly appreciated by one and all. The emphasis has been on imparting practical and need based training to the officers. Extensive exercises on Judgment and Order writing were undertaken and all the orders/ judgments were individually checked and required corrections and improvements were suggested. As a result of this exercise there was visible improvement in the quality of order / judgment writing. We are striving to change and improvise the conventional teacher and taught system of training by replacing it with interactive and participative mode of training.

Many improvements in the Library have been attempted. The Institute is subscribing more than 20 Journals. Many good books have been added to the library. S.C.C. on-line is being subscribed and Air Conditioners have been installed in the main section of the Library.

The Institute has launched a Judicial Helpline for the officers of the State. Any Judicial Officer encountering legal problem may send his specific legal query through E-mail, Fax or Telephone without disclosing the facts to the Helpline and it is ensured that the reply is sent back within a period of three days. This is a novel idea and has been widely appreciated. The response is encouraging.

The Institute has held many Seminars and Workshops on various subjects of relevance during this period.

Boarding and lodging facilities have been improved considerably. A park is being developed in front of the Officers' Hostel. Trees and plants in big numbers have been planted to provide a better ambience to the campus.

We trust that with the continued patronage and encouragement of all we will be able to take the Institute to new heights.

I take this opportunity to request our esteemed readers to contribute their valuable articles (book reviews) for publication in the next issue of J.T.R.I. Journal.

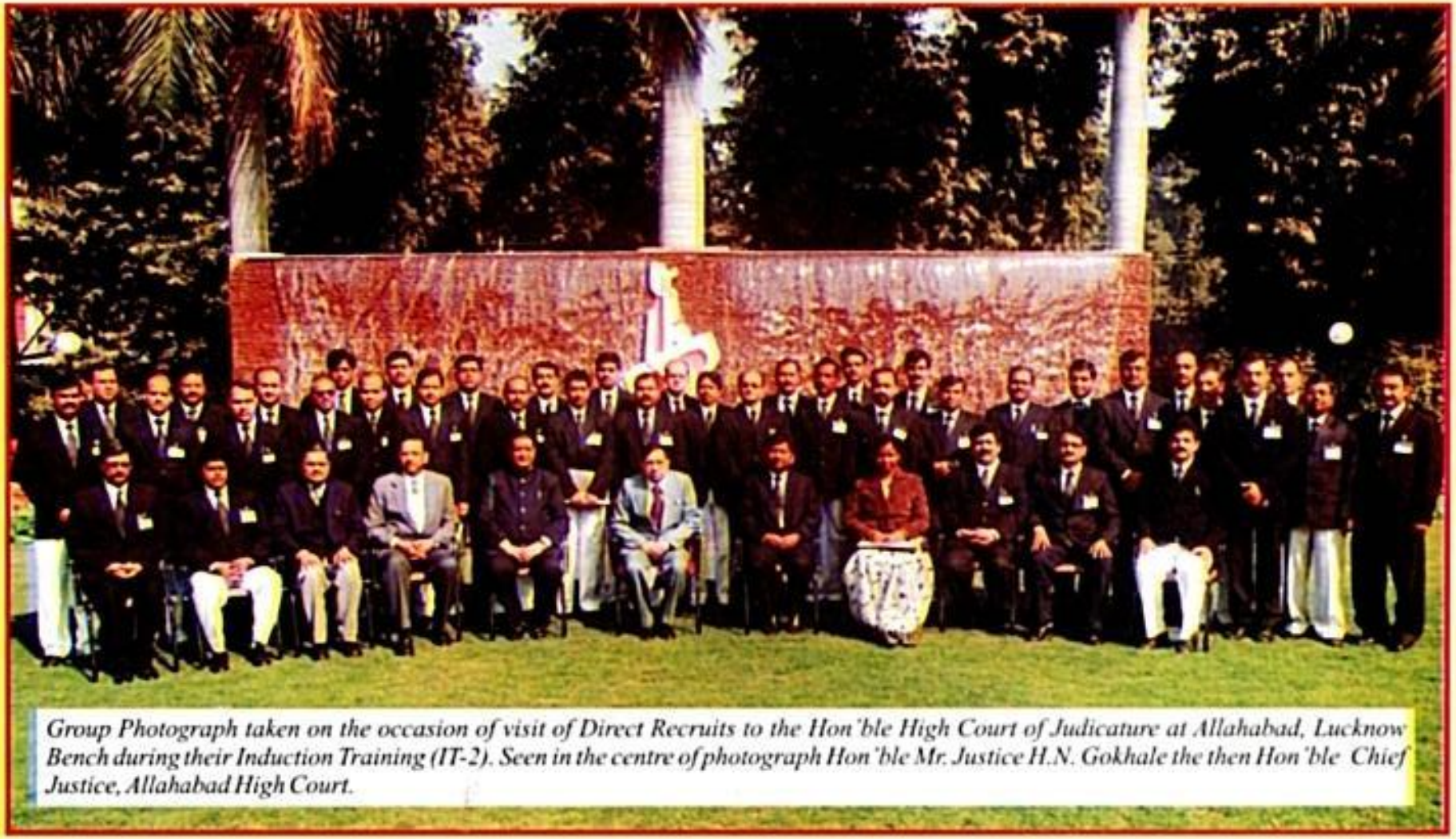
V.K. Mathur
Director, IJTR

Hon'ble Mr. Justice Chandramauli Kumar Prasad, Chief Justice, High Court of Judicature at Allahabad, addressing Probationers of Induction Training Programme Phase-1 (First Batch).

Miss Poonam Singh, Civil Judge (JD) tendering vote of thanks on the occasion of visit of Hon'ble the Chief Justice, Allahabad High Court. Seen in the photograph Sri V.K. Mathur, Direcotr, IJTR.

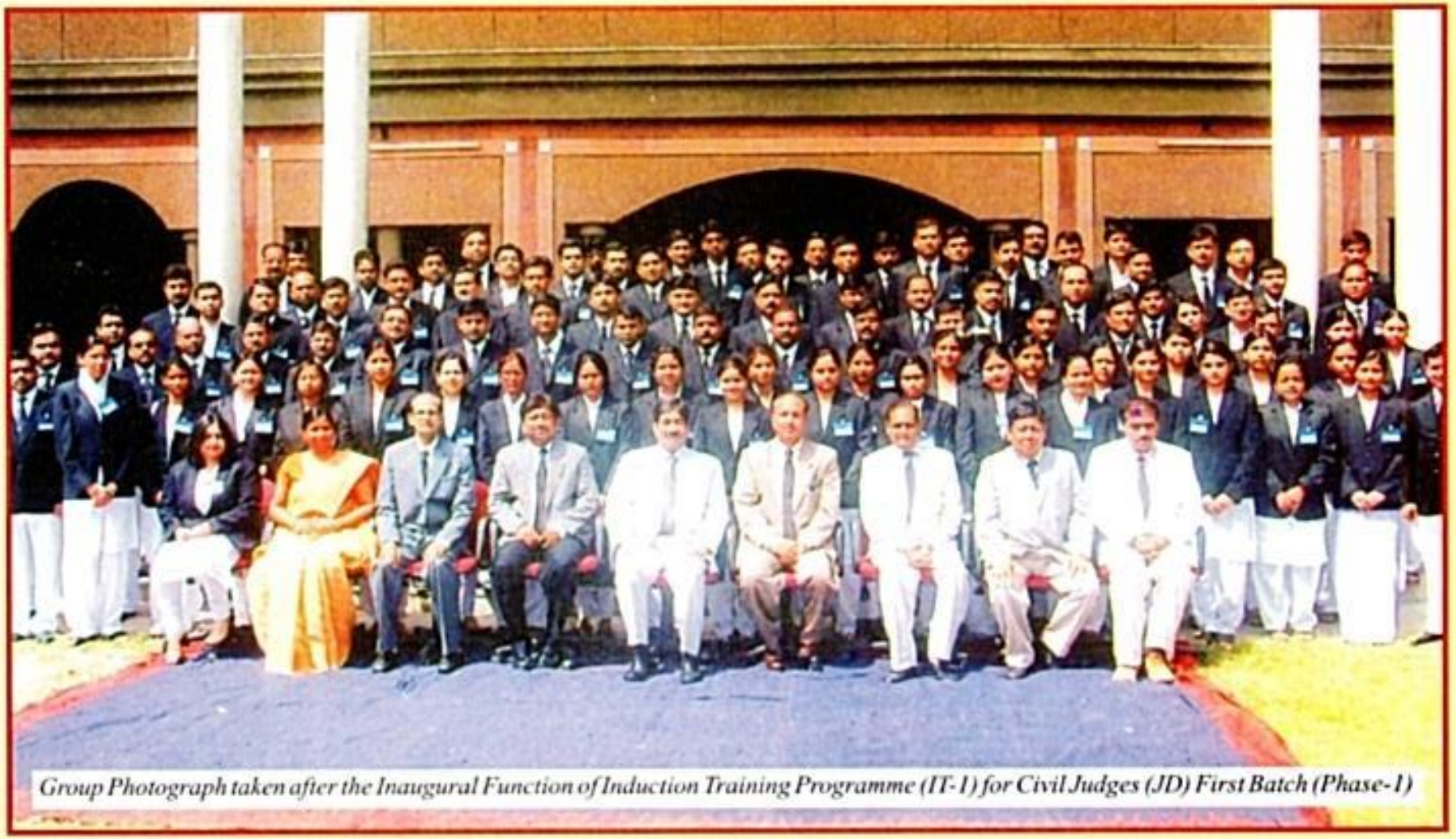
Hon'ble Mr. Justice Pradeep Kant, Senior Judge, High Court of Judicature at Allahabad, Lucknow Bench, Judge Incharge Judicial Education, U.P., Delivering inaugural address on the occasion of Induction Training Programme (IT-2) for newly appointed Additional District Judges (Direct Recruits).

Sitting on Dais on the occasion of Inaugural Function of Induction Training (IT-2) for newly appointed Additional District Judges. Seen in the photograph Hon'ble Mr. Justice Pradeep Kant, Senior Judge, High Court of Judicature at Allahabad, Lucknow Bench; Chief Guest; Sri V.K. Mathur, Director, IJTR; Sri D.K. Saxena, Additional Director (Research), IJTR (Course Director) and Sri S.S. Upadhyay, Additional Director (Training), IJTR.



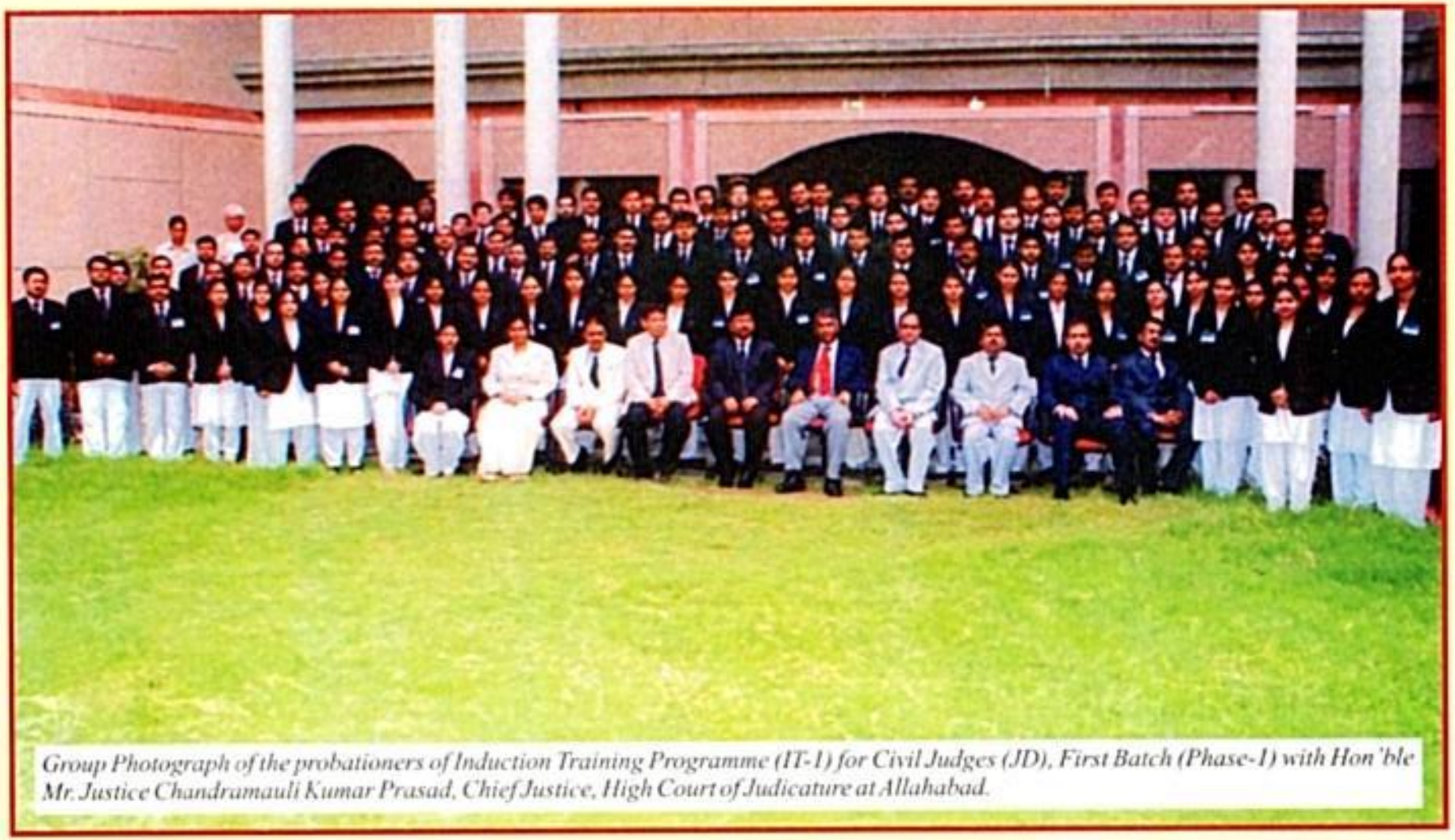
Group Photograph taken on the occasion of visit of Direct Recruits to the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench during their Induction Training (IT-2). Seen in the centre of photograph Hon'ble Mr. Justice H.N. Gokhale the then Hon'ble Chief Justice, Allahabad High Court.

Group Photograph taken after Inaugural Function of Induction Training (IT-2) for Newly Appointed Officers of Higher Judicial Service.



Group Photograph taken after the Inaugural Function of Induction Training Programme (IT-1) for Civil Judges (JD) First Batch (Phase-1)

A view of the probationers of Induction Training (IT-1) for Civil Judges (JD) taken on the occasion of inauguration of the Course.



Group Photograph of the probationers of Induction Training Programme (IT-1) for Civil Judges (JD), First Batch (Phase-1) with Hon'ble Mr. Justice Chandramauli Kumar Prasad, Chief Justice, High Court of Judicature at Allahabad.

NECESSITY OF WELL EQUIPPED COMMERCIAL COURTS

-By Hon'ble Mr. Justice Amitava Lala
Judge,
Allahabad High Court,
Allahabad

Under present justice delivery system in India, traditional civil courts are hearing commercial causes. But due to present complex situation of the society, necessities of well equipped commercial courts are urgent need. As a result of globalization and market economy, various types of litigations are arising, therefore, the commercial courts are to be technically sound to dispose of those cases. We have no hesitation to say that such disputes are urbanized in nature which require summary disposal by better forum. Such better forum might be High Courts or appropriate civil courts depending upon respective territorial and pecuniary jurisdictions.

It is not a new thought but reiteration of thoughts explored in our country by the Britishers. We can not accept their ruling but we cannot forget their teaching particularly in the field of law. They have introduced concept of Chartered High Courts in Calcutta, Bombay and Madras. Chartered High Courts were originally called as Crown Courts. Delhi High Court had adopted such practice principally and by operation of law. Like other High Courts, the Chartered High Courts were also loaded with other sets of litigations mostly writ petitions by the passage of time, as a result thereof several city civil courts were formed in several cities curtailing the pecuniary jurisdictions of the respective Chartered High Courts with a hope to replace the same methodology. Reputed senior judicial officers were chosen to be placed as judges of those courts. However, by the passage of time those courts become replica of regular civil courts. At least I am witness of such happening in one of the places.

Contra is even in such courts procedural accuracy is needed, yet hearing and disposal are so compact that it is worth seeing. It is paradise of the new comers particularly who are completing 5 years' courses of different colleges showing inclination to join any corporate house instead of joining in the profession. To-day we are not thinking what we shall do in future with such students, if not we can accommodate them in this profession. Law firms are replacement of solicitors' firms. They have their limitations. Assuming, foreign law firms are allowed to practice here directly or in collaboration with Indian Law Firms, but if proper forum for adjudication are unavailable, how the profession will survive and how the professionals will be survived, is a big question. Law courts should be

attractive to all concerned not to be a place of displeasure. It will be well equipped infrastructurally and procedurally. Best persons in the Judiciary should be placed in such courts.

It is not the fact that Legislature is unaware of the events. They are aware but they are only concerned with arrears and solutions by creating tribunals curving out jurisdictions of the civil courts. In this way Debt Recovery Tribunals etc. were created but at the end of the day arrears are still pending. No body is trying to go to the root of the problem and trying to develop the civil courts in such a way which will also be less costlier.

The Civil Procedure Code has been amended to introduce an idea of conciliation. It is a good gesture. Following the United Nations Commission on International Trade Law i.e. "UNCITRAL" a Model Law on international commercial arbitration now both, in international and domestic purposes, has been introduced in our country. Arbitration and conciliation Act has been introduced repealing the earlier Act. Such international trade law indicated to form an uniform Code to decide the disputes in which arbitration clause is available. If similar gesture is made in our country in disposing commercial causes where arbitration clause is not available then the disputes can be resolved quickly. Resolution of disputes in a quicker process is urgent need for the country's commercial development and economical growth.

It would not be out of place to mention that many writ petitions are filed now-a-days virtually making commercial claims only to avoid procedural hazards. Even unsustainable but those are being made with a hope of summary adjudication of the cause by the highest Courts of the States. Similarly, in the company jurisdiction of the respective High Courts number of winding up applications against various companies are being filed not to wind up in real sense but to recover money from the companies under threat of winding up. These are few examples of misuse of process.

Therefore, if the procedural laws are made uniform and simplified, if the process of summary or less time consuming method is applied and if most modern infrastructure and court ambiances are made, not only it will be attractive for early disposal of the litigations but present and future generations of the lawyers will also be able to develop their skills at par with other countries with whom our global economical transactions are prevailing.

Hoping for the best, I conclude.

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DISCRETION

- **By Hon'ble Mr. Justice Pradeep Kant**
Judge,
Allahabad High Court,
Lucknow Bench*

Friends! I welcome you in this legal fraternity and I am confident and very sure that it was your discretion that you opted for this profession. And you have rightly exercised the discretion. Therefore, I would presume that the class is very easy for me and rather it is not a class, it is only an interaction. I will let you know some practical aspects of this term which is known as Discretion and which the Coke described as a crooked cord, the reason being that discretion may be judicial or administrative or in your da'ly life has the same basic principles. The time when a child grows and becomes capable of understanding he starts exercising discretion. You put toys before him, he would select one, either a ball or a gun or a foot ball whatever it is. You put food before him and he will eat one or two whatever he likes, so discretion is inbuilt in a human being and rather in animals also and when discretion is of pervasive it is inbuilt in every human being or mankind or every person who is alive. It is not very difficult to understand. Judges have to deal with this very often and therefore a whole philosophy or literature you will find on this very one word which is known as Judicial Discretion and its exercise. The philosophical part, the textual part, the definition part all are the matter of book and I know that while studying law and, of course, while practising, some of you must be practising for two or three years, earlier and even otherwise being a law student must have gone through those heavy chapters to find out what is the definition of discretion and judicial discretion. I would quote one or two definitions or explanations which have been given by great jurists only for the sake that you may not feel that in this lecture nothing was taught and only it was talked and therefore it would be my discretion in the right way to quote some definitions regarding discretion before I proceed further and I have noted down that only Law of England in Halsbury's although it is like that it says that how it is to be exercised but then discretion must be exercised in accordance with the rules of reason. Why this definition I am reading, is that I have not been able to find. I have not found that any Legislature, or Parliament or Framers of law have framed any rules of reason but the work is very important. Discretion must be exercised in accordance with the rules of reason and justice and not according to private opinion, according to law and not humour. It is to be not arbitrary, vague or fanciful but legal and

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* Talk delivered on 29.6.2006 to the newly C.J. (J.D.) appointed during the Induction/ Foundation Training

regular. Then another jurist says discretion does not mean arbitrary will or merely individual or personal view of a judge. Then again it implies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste. Evidently, therefore discretion cannot be arbitrary but must be the result of justifiable thinking. After all why this discretion. Aristotle says, 'government of law and not of men'. To my mind he does not mean that there would be no discretionary power with the Government because no legal system or government can function unless there is discretion. You can make any number of laws but there would be grey areas, there would be field where the laws would not be sufficient to give you any guidance and even if there are laws, nobody would be there to tell you how to apply it. That is the stage when it caused for exercise of discretion and in judicial matters of course judicial discretion. I had an occasion to go through few pages, you might have read that "discretionary justice" has a say by way of Davis (Kenneth Culp Davis). I did not read the whole because I was not having the time. I was confined. But then portion he quotes about the edict on the department of Justice building in Washington which says that where law ends tyranny begins and he has very nicely and wisely and appropriately written and rather contradicted it by saying that "no, where law ends tyranny does not begin, discretion begins." These words appealed me much and I thought that this would be the real topic for our discussion today. Because, where law ends tyranny does not begin rather where you do not apply law appropriately or according to the facts or the need within the given parameters of law and within the discretion that you can exercise then it would not only be the abuse of discretion but also abuse of the power of law and it will naturally be a tyranny upon the people against whom you pass such orders. Therefore, discretion plays a very very important role in the system of delivery of justice and to us it is inseparable with the entire system. You cannot put a word in your judgment or in your order without exercising discretion. You will have facts, you will have law but then you will have to apply that law on those facts and then how you come to a conclusion as to what order should be passed and when this is to be done then it is nothing but your discretion. Therefore, discretion in the matter of dispensation of justice is very important and therefore we have to be very cautious because according to me and my experience is that exercise of judicial discretion reflects your honesty. Honesty, when I say it should not be confined to honest of other kind which I do not want to name because I know that you people all are honest on that count. I would explain that no extraneous consideration has to be taken in the judicial system that is one part of the honesty but I am leaving that part of honesty because I know that lecture on that honesty is meaningless because you all have attained this status because of your honest efforts and your zeal to serve this profession or this judicial service. Honest approach towards the issue

concerned or the issue involved is honesty in the matter of judicial discretion. If you are guided by your personal views or if you are guided by any thing else may be on the ground that it is very pious or good or very serene or very appealing then it is not the proper exercise of judicial discretion. This judicial discretion can be exercised on the settled principles of law judiciously and taking into account the law whatever it is and they should not be fanciful or arbitrary. All these words have been used by different jurists. These are not my words, coined by me but instead of giving those lines I am just quoting it in my own views. Everybody knows it should not be fanciful, everybody knows it should not be arbitrary, everybody knows that it should not be personal or of a person, the reason being that a judge is always impartial and when you see anything impartially without bias or prejudice you will have its true picture and when somebody asks you to comment upon that, you will make a very fair comment on that. For example, if you see a photograph of your next kith or kin, even if it is not good, I mean photograph not the kin, you will not say bad, you will say it is good but it seems that the photographer's camera was slightly tilted or he did take care of getting you focused. But if you see a photograph of a third person, may be a legal luminary or celebrity or a film artist or a authority or a dramatist you will say, Oh! it is bogus. How ugly he is looking. What type of clothes he has put on. So that is an impartial approach in your life and this impartial attitude you have to maintain throughout your life, at least, where you are imparting justice. No one is yours and you are of no one. Discretion not only reflects your honesty but your concern about the society also, your attitude towards litigant public, your knowledge of law and above knowledge of law, your wisdom and then your capability and capacity to handle issues on which the law is silent or the law does not give you any guidance or the law makes you to apply your discretion in passing an order. So, all these capabilities which are the capabilities of a good judge/ judicial officer would reflect in his one single order in which he exercises his discretion and that is why when you are going to hold your office or court. You will be faced with annual remarks every year and those annual remarks are given by your superiors and of course by the High Court also. While granting the annual remarks nobody sees the entire work, only discretionary matters are seen. How many temporary injunctions you have granted, how many temporary injunctions you have refused. Were there some complications or some matters where some injunctions should have been granted or not. What has been your attitude towards the granting of bail. How you have been dealing with the adjournment, how you have been dealing with the strikes, how you have been dealing with the subordinates, how you have been dealing with the lawyers and of course all this is your discretion which is to be judged. Therefore, I would suggest in this lecture today not in the next lecture and in the other lecture

that all of you must keep more close view or vigil upon your exercise of discretion whenever you are doing anything as a judge. Because your discretion to go out in a party, to a friend or at a place where you should not go would, also mean that you have wrongly exercised your discretion. Although this is not the topic today but since the discretion I find that it is so pervasive everywhere that it becomes very difficult for me because earlier also I had been invited to deliver my talk on this topic of discretion and every time I found that I always deviated from the topic as discretion is such a thing that I cannot control myself in telling young judges. It is a friend but it can be turned to be an enemy also. Therefore, you have to be very cautious. न इससे दोस्ती अच्छी, न इससे दुश्मनी अच्छी। But you have to be very cautious about that.

Davis has further said very nicely. He says that in our system of government where law ends tyranny does not begin. Where law ends discretion begins and the exercise of discretion being either beneficent or tyranny, either justice or injustice, either reasonableness or arbitrariness. Now, how to exercise this discretion will depend upon the issue which is before you. As a judge, you will find that you are dealing with criminal matters and you are dealing with civil matters also. In civil matters, most frequent and common matters are grant of temporary injunction but before that or apart from that there are matters like grant of adjournment. Now, adjournment, unless some body tells you or unless you feel by your experience, you will find it one of the greatest enemy of speedy justice which is the fundamental right declared by the Supreme Court of every litigant but it is very difficult for a presiding officer to refuse adjournment when an illness slip is received or when a senior advocate or a senior counsel says that I would not be able to do this case today and there is an opposition from the other side or there is no opposition from other side. In either case it is the duty of the court to see that the cases are not lingering and therefore sometimes it would require you to pass an order either accepting or rejecting the adjournment application by giving reasons. Because, how have you exercised discretion, can only be substantiated or appreciated by the appellate court or any one else in the public, by the reasons given by you. One line sentence would not be sufficient. You have to give reasons either rejecting or accepting the adjournment application, and this difficulty you will face very frequently, when you are sitting in the court. So you have to be very cautious in dealing with such a situation. Then service of notice/summons. Though the CPC has been amended and many loopholes have been sought to be removed from that which put an embargo upon frequent adjournment and delay failing in filing of written statement etc. but even then those provisions are not absolutely final or binding. You still have the discretion to grant more time though the defendant has failed in filing the written statement within the time given in the procedure or period of time given in the C.P.C.

There again a question will rise, how do you exercise the discretion? Of course, it is exercised by looking into the facts as to what were the reasons. Why the written statement could not be filed within the extended period or maximum period of time allowed under the Code. Are the reasons sufficient? Are they genuine? Or are they only camouflage? What is the effect of not granting the discretion of filing written statement? Will it make a plaintiff suit which otherwise is lacking or, it is not to be decreed or decreed in favour of the respondent. Whether the question involved would affect the society or it is an individual dispute? All these questions or many more you have to consider while refusing time for filing written statement for the simple reason that if you refuse time for filing written statement it will incur either of the two or following conditions:-

1. The defendant may go in appeal or revision as may be prescribed. It will further delay the proceedings because if a higher court passed stay order in the proceedings or full stay
2. May be that the defendant was having very good case and the plaintiff was having no case but merely you could not understand the issue or the plight of the person for not filing the written statement within time. You have taken away that right with the result that gross injustice is likely to be caused to him.

We are not sitting there for causing injustice or for punishing a litigant for the folly of his lawyer or his agent or the pairokar. Likewise, dismiss in default, ex parte decree, ex parte proceedings. I do not say that you should be liberal to the extent that it may defeat the very purpose because is you go so liberal then it would certainly affect the right of the other side. What is more required from a judge is that you have to balance the rights, the difficulties, the problems of the two sides, both the sides. Somebody asked me when I was practising and was likely to be elevated and Hon'ble The Chief Justice wanted to meet me and I had gone to meet him. He said about one or two particular judges that there are lots of complaints that they are very strict and they do not give relief, so, what do you say? I said, My Lord, I failed to understand how a judge can withhold giving the relief. He has no power. Even if a judge wishes that he would not grant relief, it is not in his control. He cannot do it. Because, there are two parties in front of you and I said that one is asking for a stay order or an injunction, the other is opposing. I do not grant injunction as the other party is getting the relief. If I grant injunction, the plaintiff is getting relief. Let me know the third way in which a judge can act. I mean, he cannot stop giving the relief. A judge can never stop giving relief. Then Order 9 Rules 13. Like for example, then striking of defence, for not filing of statement or in rent control matters, for not depositing rent etc. Earlier the law was little strict in these matters but time told that such a strictness

was not in the interest of justice and therefore again discretion has been given to the courts to see the reason and then pass orders on that. Very common injunction which becomes the subject matter of criticism amongst many, are in the matter of demolition or eviction and that too by the State Authorities may be the Development Authority or the Nagar Nigam, as the case may be, or the Awas Vikas Parishad and of course in the mattes of contracts and if those contracts are of high stakes then all the more reasons for a watchful eye upon every order of a judge both by the media as well as by the public and the litigant on courts. The basic principles of grant of temporary injunctions may be prima facie case, balance of convenience, irreparable loss and injury. They have to be always kept in mind, and of course, in temporary injunctions it have been specifically prohibited in the CPC or in which they cannot be granted in view of the provisions of the Specific Relief Act need not any discretion because there you know the law then you cannot grant temporary injunction or a permanent injunction as the case may be, but where the law is silent you have to deal with such a situation and apart from that when some body comes and tells you look here, Sir, I have got my construction made even before the master plan was carved out or even before the development authority came into force even before the Nagar Nigam Act and they are demolishing it and look here these are the receipts of bills etc. etc. all that. Now you feel, because injunction in demolition matters are given very frequently and very rightly you think that in case the building is demolished or structure is removed then what would remain for deciding in the suit. But if you read one or two judgment of the Supreme Court and not many more you will find that even in the matters of demolition where the notices of demolition are issued may be by the Cantonment Board, may be by the Nagar Nigam may be by the Development Authority may be by any authority you have to see prima facie as to whether the plaintiff has got any right to get constructions over this plot or not and if not it is a simple case of encroachment. If it is a matter of simple encroachment, you will not grant injunction. You are aware and you are reading in the newspapers that the courts have intervened, High Courts and Supreme Court have intervened and issued directions for removal of unauthorized constructions, the reason being that by mere misplaced sympathy I would not charge any officer of any extraneous considerations but his leniency towards the litigant who comes to the courts and say that look here my constructions are there since long and they are demolishing it. We casually grant temporary injunctions and one such case I was just going through it of 2006 itself. Vol. 11 page I in Judgment Today. This is Seema Arshad Zahir Hasan v. Municipal Corporation Greater Mumbai and others. In this case, the Municipal Commissioner of Municipal Board Greater Mumbai gave notices for demolition as the construction was raised on the land of

the Central Public Works Department in Mumbai. The Trial Court granted injunction but the High Court vacated it. The same pleas were taken and instead of telling you I just read one paragraph.

"It is true that in cases relating to orders for demolition of building irreparable loss may occur, if the structure is demolished even before trial and opportunity to establish by evidence that the structure was authorized and not illegal. In such cases, where prima facie case is made out, the balance of convenience automatically tilts in favour of the plaintiff and a temporary injunction will be issued to preserve the status quo but where the plaintiffs do not make out a prima facie case for grant of injunction the documents clearly show that the structures are unauthorized the court may not grant temporary injunction merely on the ground of sympathy or hardship. To grant a temporary injunction where the structure is clearly unauthorized and the final order, passed by the Commissioner after considering the entire material, the act of demolition is not found to suffer from any infirmity." Then it says, "where the lower courts act arbitrarily, capriciously and perversely in exercise of discretion", because you are at this stage today therefore I am reading it. "Where the lower court acts arbitrarily, capriciously and perversely in the exercise of discretion the appellate court will interfere. Exercise of discretion by granting a temporary injunction when there is no material or refusing to grant a temporary injunction by ignoring the relevant documents both are there. Your rejection or your approval both are subject to judicial review. Exercise of discretion by granting a temporary injunction when there is no material or refusing to grant temporary injunction by ignoring the relevant documents produced are instances of action which are termed as arbitrary, capricious or perverse. When we refer to acting on no material similar to no evidence we refer not only to cases where there is total dearth of material but also the cases where there is no relevant material or where the material taken, as a whole, is not reasonably capable of supporting exercise of discretion. In this case there was no material to make out prima facie case and therefore the High Court with its appellate jurisdiction was justified in interfering in the matter and vacating the temporary injunction granted by the trial court.

So, what do you have to see is that whether there is any material. Even if there is any material whether it is relevant. If relevant material is not there you are not to grant injunction and at this very juncture I would like to take a few minutes in a judgment. Incidentally, it was delivered by a Bench of which I was a member , two or three years back and I had requested at the last occasion, perhaps Mr. Vijay Varma was there or not to circulate that amongst the trainees of that batch that is Manoj Kumar Tiwari v. State of U.P. In that case what happened that there were a building/ house belonging to a mill. That mill was lying closed for several years rather decades but in one of the houses which was given to its

General Manager in lieu of his services, the daughter of the General Manager was living because the General Manager had died. It was only the courtesy of the proprietor of the mill that they allowed the daughter of the General Manager to remain in possession of that house. Subsequently it transpired that the mill owner wanted to construct a township over there and therefore they handed over the entire land and other properties to the builders and requested the daughter of the General Manager to vacate the premises which she agreed but one person on coming to know about this filed a suit for injunction saying that look here I am in possession of this house since 1980. I still remember the facts because that is relevant for young freshers. In 1980, I got it through one of my relatives who were residing therein since before and these respondents / defendants are forcibly trying to take possession of this house in the garb of the title though they do not have any title. The learned Civil Judge, before whom the application for injunction was filed, initially refused to grant the injunction and he simply issued notices and fixed a date for disposal after service. What that gentleman did that he served the summons of that date upon the defendants saying that the case is fixed in the court of Civil Judge on such and such date but in the mean time he went into revision against the order of issuing notice. The revisional court passed an order fixing that revision to any other date after 10 days or so and till then issued an order of status quo. After the order of status quo was passed this gentleman entered into the premises and when the proprietors came to know about that they wanted to throw him out or oust him. Police was summoned then he showed the order saying look here I got an order of status quo and I am already in possession and you cannot throw me out. The police went back and the possession could not be taken. Incidentally the case came before the High Court and a prayer was made by the proprietors that this is my house. This was given to General Manager and he has forcibly occupied it. Therefore, their possession should be restored and of course the order of status quo passed by the Civil Judge be quashed. Now the defence was taken that whether I have entered into possession prior to the passing of the order of status quo or subsequent to that, is a matter of evidence because I say that I have been in possession since 1980 and therefore this matter cannot be decided by the High Court because it involves disputed questions of fact and which would require evidence to be led and therefore the matter may be sent back to the trial court where the matter will be decided and at the most what the High Court can do is to issue directions that the matter be decided within two months, four months or six months whatever it is. You can only expedite the hearing of the injunction application but you cannot decide it because it is beyond the scope of Article 226 and Article 227 of the Constitution of India. The plea was right but then the court took into consideration various aspects of the matter and number one is what are the pleadings in

the plaint whether it make out. This is very important. Whenever you deal with the matter of temporary injunction application you have to see the plaint carefully. What are the pleadings in the plaint establishing right of the plaintiff over the property in question. This is in every matter. Whatever may be the case or over the contract in question. Then it was revealed that the gentleman who was saying that he was in possession since 1980 and this possession was taken by him thorough one of his relatives, the name of the relative was not shown in the plaint. The manner in which his so called relative entered into possession of that house was not disclosed. One can take possession of a property, that too, immovable only either by deed of conveyance or by inheritance or of course by will or number four by adverse possession and you can say only three – adverse possession, deed of conveyance or inheritance. Either you purchase or get it by gift or by inheritance or you occupy it for the prescribed period against the will of the owner to his knowledge then of course adverse possession. So the court repeatedly put the question to disclose the mode in which your so-called relative who is not named in the plaint, entered into possession over this property and there was silence. Number two, the thing was that in 1980 the person who says that he entered into possession was only of 16 years of age and he was residing in any other area in District Deoria where he studies and obtained the graduation and LL.B. Degrees also. Apart from that there were many more factors. So the court took the view that this was a case where the learned revisional court has abused his power of discretion. As a matter of fact, the plaint should have been rejected under Order 7 Rule 11 C.P.C. instead of granting injunction. Apart from that, in various litigations he has filed affidavits in which he has given his address wherever he was residing actually but at no point of time the address of that house was given. So, if a person is residing in his own house he will not reside in Nishatganj, Mahanagar and Niralanagar every time, when you were in possession of your house in 1980. All these constituted and the court was convinced that this is a cooked up matter and he has entered into possession after obtaining the order of status quo by manipulating the things and therefore the Court passed an order that now we direct you to restore the possession within 7 days or 3 days and every thing was settled. The matter went to the Supreme Court and the Supreme Court also dismissed the matter and directed to handover the possession.

...Of a usurper or a forcible entrant into a property of some one else on the society itself. The people's faith in judiciary whether it is protective or not because a judge in his court room may not know what has happened outside because we are not present every where and even if we are present us cannot apply our personal knowledge. The orders are to be guided by the facts and law and the evidence but the public at large, litigant who has faced the difficulty or who is victim, they know actually what has

happened. The neighbours knew what has happened. Every body knew that this person is a forcible entrant and if, in that situation the courts have failed to discharge their duty in the right way, they would not have caused injustice only to the proprietor of the house but it would have shaken the faith of the people in the judiciary and they would say, look here, what is this, occupied a house and court says nothing can be done. This is the responsibility that sets upon you. When you are talking of discretion you have to see the facts, the values and its influence. You cannot pass an order, of course in an individual dispute you can do so, but individual disputes also sometimes have very far reaching affects and the court cannot shut its eyes in looking towards that. Like in criminal cases, bails are to be granted. Punishments are to be awarded. I am not in favour of medial trial and will also not say that the judges should be guided by the news reports and whatever assessments are being made by persons or bodies who are not judicial. But there are certain areas where you know that great injustice is being done to the society. Law and order has gone to the dogs. There is no security and there is no safety of common man. Heavy burden lies upon the courts to see that the law and order is maintained and I am sure that if offenders who are involved in criminal activities, if they are punished and if they are suitably punished every thing can improve and common person who is the victim of such things would find himself protected and will have more faith in you. What happens if you are sitting in writ jurisdiction. Whenever a big person is involved or whenever a known person is involved there is a lot of pressures. The first kind of pressure is that there would be a section of lawyers who will come and pressurize the court for either granting of bail or for not granting of bail. Both things happen. If the accused is a lawyer or some great person or a big man then there is pressure for granting the bail. If the victim is a lawyer or some known person then the pressure is that not to grant bail. Your wisdom says that you would remain unbiased by either of the pressures. You have to exercise your discretion in the manner it should be exercised and if you do so, irrespective of the out come of your order, you would always remain protected and would always remain satisfied. So that, is also one of the main reasons where how discretion is to be exercised, must always be kept in mind. In the grant of punishments/sentences I just name one or two Supreme Court cases for your reading. There are instances where punishment has been prescribed/ sentence has been prescribed, but you can grant lesser punishment/ sentence also but how you will do that, you have to take into consideration various things and particularly in criminal cases, the nature of the crime and its impact on the society then the person who is involved or accused or convicted, his antecedents and, of course, the gravity of the offence. Because every punishment has to be commensurate with the gravity of the offence. Now, in one case, you will find a very good description or discussion of this i.e. **Union of India v. Kuldeep Singh**. It

was a case of NDPS where sentence was reduced by the High Court, in respect of contraband article, on the ground of age of the accused, his father, his family problems and the accused being not a habitual offender but the Supreme Court said, "no, the contraband article which he was having was capable of producing 300 kilograms of heroin and therefore all these considerations were bad in law and the exercise of discretion by the court was not justified and then, I just say, it says that based on meaningless consideration this discretion was bad and not justified. Discretion in determination of quantum of punishment is required to be exercised judiciously and judicially. Court must also keep in view the right of the victim of the crime and society at large. There is a very important aspect of the dispensation of justice particularly in criminal law. Because, we all sit in drawing room we all meet with our friends and we talk "भई जिसको देखिये छूट जाता है offence का कुछ वही नही है। मुकदमा ही नहीं होता है" As a judge when you hear it, it will pinch you. A nonjudicial person it makes a topic of gossip, a time for entertainment but as a judge it is very hurting. When some body says even in a lighter mood "अरे साहब फलां छूट गया" Or this person has been acquitted and everybody knows that he is a criminal and he has committed the offence. You will feel that greater responsibility lies upon your shoulder. To remove this myth that the courts are acquitting criminals or granting bails which should not be granted or their acquittal should not be made, now, in this case the Supreme Court further said "sentence should be proportionate to the gravity of the offence and nature of sentence should depend upon the facts and circumstances of each case having regard to facts such as nature of the offence, manner in which it was committed or executed, motive of the crime, conduct of the accused and all other relevant circumstances. Aggravating and mitigating facts should be properly balanced. Object of sentence being to protect the society and the social order and to deter the criminals, social impact of the crime and effect of the sentence are the relevant circumstances. Court must keep in view rights of the victim of the crime and society at large. Sentence should reflect conscience of the society that reformatory and preventive theories of punishment can result in injustice, was also pointed out in this judgment. Another judgment is of **State of Rajasthan v. Sohanlal and others, 2004 Vol.5 SCC 573**. This was a case of leave to appeal in a criminal matter. There also the Supreme Court said "any judicial power has to be judicially exercised and the mere fact discretion is vested with the Court/ forum, the exercise of the same either way does not constitute any licence to exercise it at whims or fancies or arbitrary." Arbitrariness has always been held to be anathema of judicially exercise of any power. All the more so, when such orders are appealable and can be challenged in the higher courts. Now, in a very descriptive case of the Supreme Court i.e. **Jagmohan Singh v. State of U.P., 1973(1) SCC 20**. This was a case where the description with respect to the grant of sentence as death sentence or life imprisonment was

conceded. The Judgment is long. It says that whether the discretion of the court either to award capital sentence or to award life imprisonment, if reasonable in public interest, the Criminal Procedure Code lays down a detailed procedure for determining, whether the sentence of death or some thing less is appropriate in the case. The accused who is charged for murder knows that he is liable to sentence of death in committing court itself. He knows what the evidence is. He further knows that if after trial in Sessions Court he is found guilty of murder, he is liable to be sentenced to the extreme penalty. Apart form the cross-examination of the witnesses, the Criminal Procedure Code requires that the accused must be questioned with regard to the circumstances appearing against him in the evidence. He is also questioned generally on the case and there is an opportunity for him to say whatever he wants to say. He has a right to examine himself as a witness, thereafter, give evidence on the material facts. He and his counsel are at liberty to address the court not merely on the question of guilt but also on the question of sentence, and so on and so forth. After the prosecution and the accused have had their full say, the court is principally concerned with the facts and circumstances, of the enquiry. Unless it can be shown that all the aforesaid provisions of law are invalid, they must be regarded as valid and death sentence imposed after trial in accordance with the procedure established by the law cannot be said to be unconstitutional under Article 21. Now, the policy of the law in giving a very wide discretion in the matter of punishment, to the judges has its origin in the impossibility of laying down standards because discretion comes where the framers of law cannot imagine all future circumstances or conditions which may arise. Unforeseen circumstances are to be dealt with by the exercise of discretion. This is one aspect. But I say that even if there is law, all laws and all facts are of no value. It is like you put all material in a pressure cooker for cooking may be Rice, Daal whatever it is but you do not ignite the gas or do not put the pressure nothing would be cooked. You know the facts, you know the law but unless you apply it in a right way, unless you appreciate the facts correctly, unless you apply the law, then you exercise your discretion as to what should be the come out of these things, you cannot write a judgment. You cannot pass any order. So, it says that impossibility of laying down standard is at the very core of the Criminal Law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the matter of punishment as already pointed out, is liable to be corrected by the Supreme Court. Laying down standards to a limited extent possible as was done in the Model Judicial Code would not serve the purpose.

Now, there is another aspect of service matter although you are not concerned with the service manner any more for the simple reason that the matters are to go to the State Administrative Tribunal but even then I just give you for reading a very good case. It is a matter where a constable was

removed from service because he had taken surety of a criminal who granted bail later on and under the given circumstances he was removed from service. A plea was raised before the Supreme Court that this punishment is excessive and not commensurate with the gravity of charge. High Court had upheld the enquiry findings and then reduced the sentence because no clear charge of corruption or fraud was leveled against him. But the Supreme Court said, "No, it was a case where removal was the proper punishment. The constable was duty bound to see that the criminal are convicted, instead of that he went on giving surety and then he was granted bail because a police constable was taken surety on his bail application and then he jumped bail and thereafter, of course, his previous conduct was also taken into consideration. In this case also, it is a very good judgment for you where arbitrariness, discretionary powers, how it is to be exercised in these matters and what the court has to see, has been considered. This is **Commissioner of Police and others v. Syed Hussain, 2006 3 SCC 173**. Now one more case I would like to give you for your reading rather two cases. One is the **Consumer Action Group v. State of Tamil Nadu, 2000 Vol. 7 SCC 425**. In short, I just tell you, in this case the provisions of Tamilnadu Town and Country Planning Act, 1971 were challenged under Section 13 and 13A on the ground that there were wide discretion to the authority to regularize illegal constructions. Matter went ultimately to the Supreme Court. The Supreme Court said no the wide discretion given under this provision is limited and explained by the statement of object and reasons and the policy and therefore whatever can be legalized regarding unauthorized constructions has to be done in accordance with the provisions of the Act itself and beyond that all the orders are illegal. 62 orders were issued in the mean time by the authorities regularizing illegal construction of individuals and other parties. So, all those 62 orders were quashed. The Supreme Court has very clearly and elaborately held as to what is discretion, what is the power and what is the exercise of power. You may have a power, you may be vested with the discretion to exercise your power. That is one aspect of the matter but how it has been exercised, is always open and is a question of judicial review; on that ground this was decided. Then another case is, it is rather an old case, **Rakesh Kumar v. Sunil Kumar, 1999 Vol. 2 SCC 489**. This was a matter arising out of an election matter where during the course of scrutiny of nomination papers an objection was raised against a person who has filed his nomination and he wanted to meet the objection and asked for time. One day's time or two days' time be granted whatever the permissible limit, was to be granted but the returning officer refused to grant time. The Supreme Court said no, this is not the valid exercise of discretion and therefore that order was set aside. You will again see that so far as this exercise of discretion is concerned it virtually encompasses every case and every order. In substitution application, there is a delay of

three years or five years setting aside of the abatement application. Now what is to be done? There is no law. No law says whether you condone the delay or not. The law says you can condone the delay. The Indian Limitation Act Section 5 and Sec. 14, sec. 14 is for those who filed cases diligently in a wrong forum. They can get the benefit of pendency of the case in that forum. Now Sec. 5 is a very common thing which you will generally face every day in appeals and revisions or in applications. There is no law which says that you condone or do not condone the delay. You have to exercise your discretion whether delay should be condoned or not. Therefore, I would only suggest that if you want to make people know that you are honest as a judge your orders which certainly involved your discretion, exercise of discretion must be very clearly, they should be reasoned orders, they should be speaking orders because a judge is known by his judgments and orders. No body would ask you Sir why you have convicted this person and why have you acquitted this person. No body asks you. You are not supposed to give your interview, you are not supposed to go in public, and you are not supposed to interact with the politicians. You are not supposed to interact with the people in general. You are not supposed to interact with the media persons. So, you can be condemned without being heard. All these principles of natural justice available to all persons in the society may not be able to you to discharge your legal duties. Your action can become a subject matter of debate in electronic media and in papers. You may hear big fight but you will not be heard. I caution to you that while exercising the discretion you must be fair to yourself. If you are fair to yourself and if you are honest to yourself, your orders can never be put to any scrutiny which may bring any bad name to you. Why I say so because in a judgment the Supreme Court said that the independence of a judge is more than recall of faith, independence of a judge is more than a price of virtue, the independence of a judiciary is an element of role of law and security under the established legal order and while exercising discretion you have to keep all these things into consideration, as Prof. Pannick has very rightly said and I quote, *"Judges do not have an easy job. They repeatedly do what rests of us seek to avoid i.e. making decision"* It is a very difficult task to make decision because the destiny and fate of those lies in your hands who come to you for justice. These are all the practical aspects of discretion and I expect and hope that it would be of some assistance to you in practical dispensation of justice when you sit in the court as a judge.

My good wishes to you and a very prosperous future.

Thank you.

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THE ANXIETY – TO DO RIGHT – REMAINS

- **By Hon'ble Mr. Justice Yatindra Singh**
Judge,
Allahabad High Court,
Chairman, Computer Committee Allahabad-211001
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Themis is goddess of justice; she is generally—though not always—shown blindfolded; she has a pair of scales in one hand and a double edged sword in the other. The blindfold indicates that justice is impartial and is administered without fear or favour. The pair of scales explains that justice is done after weighing the strength of the competing claims. The sword symbolises the power to enforce it.

Our task is to find out the side, where justice lies. In this process, we 'must not spin a coin or consult an astrologer[1]; we must do it openly, under public scrutiny and provide reasons. Ours is a difficult job: we take decisions that others avoid, procrastinate.

How should our performance be judged? What qualities should we have? Jeremy Bentham said 'that he [Judge] be a good one and that he be thought to be so (Draft for the Organisation of judicial Establishments in *the Works of Jeremy Bentham* ed. Bowring, 1843 Vol. 4 p 359). We are good if we make just decisions. Our decisions will be just, if we have good reasons for them. But this is not sufficient: we should be thought to be good too. This requires good court management (this is to be distinguished from judicial administration of a judgeship) and ability to communicate reasons for the decisions.

COURT MANAGEMENT

(i) *Be fair*

Mistakes may be excused but not unfairness can not be excused. After all, as Lord Diplock said, 'the fundamental human right is not to a legal system that is infallible but to one that is fair'[2].

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1 [Lord Diplock in R.V. Deputy Industrial Injuries Commissioner ex parte Moore (1965) 1QB 450, 488]

2 (Mahara vs. Attorney General of Trinidad and Tobago 1978(2), All England Law Reports 670)

(ii) Don't Delay Your Judgement

Delay in resolving a dispute is bad but delay in delivering a judgement is worse. It creates doubts in the minds of the litigants. While reserving a complicated case, it is good idea to dictate in open court:

- The case of the parties;
- The points of determination;
- Admitted facts; and
- Submissions of the parties.

The draft judgement preferably be completed overnight or over the weekend.

(iii) *Stick to the Court Timings*

Court timings are important. It is no comfort to say that you also rise late if your sitting is delayed. Court timings are important and are to be adhered to: advocates and litigants adjust their schedule according to it.

(iv) *Avoid Social Gathering, Parties*

If you accept the job of a judge, then accept secluded lifestyle also—aloofness is our job requirement. As far back as 1981, HM Seervai pointed out:

> The extreme impropriety of judges in accepting lunches and dinners from members of the Bar practising before them and even from private citizens.
>
> ... Judges are not detached but the public should feel that they are detached' (The Seevrai Legacy page 10 & 34).'

The only exception may be condolence or a marriage or an activity connected with law.

(v) *Be Consistent with your Orders and Courtroom Procedure*

This does not mean that even a wrong order/ practice should be followed but it means that your orders and procedure should not change from advocate to advocate, or litigant to litigant, or day to day basis.

(vi) *Control the Court Proceedings*

It is good to be patient but often arguments have to be curtailed. You have,

'to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he [Judge] follows the points that the advocates are making and assess their worth; and at the end to make up mind where the truth lies.' (Jones Vs. National Coal Board 1957 (2) Law Report 55 at 64)

You can not do it unless you have sound knowledge of law. Seervai points out,

'unless the judge on the bench is equal or superior to the top counsel appearing before him, it is impossible to control court arguments'.(The Seervai Legacy page 20)

The advocates should know that you have understood their submissions. This may be achieved:

- By listening to the advocates attentively don't fiddle, read, shuffle the papers/ books when advocates are making submissions. If you have to do it, request the advocate to wait.
- Ask relevant questions. Lord Atkin was 'patient, he asked few questions but those ... were the most incisive' (Lord Atkin by Geoffrey Lewis Page 17). This shows that you understand the case.
- By summarising the points submitted by the advocates. You can always say, 'You mean to say ....' or 'Your submission is ....' or ' Your point is...' It does not mean that you have accepted their arguments but reassures them that their arguments have been understood.

JUDGEMENT WRITING

Judgement should be concise, lucid and clear. To me, the worst judgement is the one in which neither the result is just nor can it be understood by anyone. A better one, is the one, which atleast can be understood by others. Of course the best judgement is, when the result is just and everyone can easily understand it.

JUDGEMENT: PROVISIONS OF LAW

CPC as well as CrPC provide as to what should a judgement contain. Order 20 and Order 41 Rule 31 of the CPC provide for the judgement in

the civil cases. Chapter 27 of the CrPC deals with the judgements in the criminal cases. Apart from the other things, these provisions provide that the judgement should indicate:

- The case of the parties;
- The points for determination;
- The decision on the points for determination; and
- The reasons for the decision.

All are important but the most important one is—the last one—the reasons for the decision.

WHO READS THE JUDGEMENT

One should not avoid to decide a case that it might be upset by the higher court, or not liked by anyone, or may be overruled. It is an old saying: 'Let justice be done, though the heavens should fall' (see: Endnote-1). Decisions should be taken, as you understand the law; they should satisfy your conscience: you should never decide the case, as others understand it.

However, exactly opposite is applicable as far as judgement writing or communication is concerned. It is always for the others; it is for their benefit; and you should always have them in mind. This brings up the question, who reads the judgement? For whose benefit, the judgements are written? Today, as you will see, it is read by everyone.

(i) *Persons Connected with Law*

The judgements are always read by the Judges, advocates, law commentators, law professors, and law students.

(ii) *The Litigants*

It is often said that the litigants never read the judgement. The winner has no interest for he never doubted his case. The loser in any case, is going to condemn it. However, they are entitled to know the reasons so as to confirm the correctness of their case or to find fault with the same.

(iii) *The Media*

Many cases raise public interest issues; decisions are publicly discussed. This brings up the media, and not so conversant with law, into picture.

Mostly, advocates read our judgement and form opinion about us. And their opinion is important. It is said that the bar is the best Judge of all judges.

PREPARATION AND WRITING

(i) *Plan, Be Clear— Don't go in Circle*

We often write long judgements and go in circles. It happens, when the concept or the reason for the decision is not clear. This is true about articles and reports too. You should, first clear your doubts; be sure what you wish to write— then write. Note down the points for determination; your decision on them; the sequence of writing reasons on the different points - then write. Sometimes the heading/ sub-heading or the sequence changes, but this is immaterial.

(ii) *Write, revise, and revise*

One must plan, write, revise and revise again—preferably over night. If the text is revised at the same time, the mind tends to overlook the mistakes. Remember—the text improves with the number of revisions.

What You Should Not Do

(i) *Avoid Quoting, Pleading and Evidence*

A judgement—consisting of excessive quotations from the pleadings and evidence and with little reasoning—is bad one. The pleadings and evidence (oral or documentary) should be summarised in your own words. Apart from other benefits, it enables you to understand the case better.

A judgement is also bad if it merely summarises evidence of the parties and then relies upon some evidence without reasons. You should point out the reasons for relying on particular evidence. Don't forget—reason is the key to a good judgement and is its soul.

(ii) *Avoid Long Quotation from the Citations*

What is true for the pleadings and evidence, is also true for the citations. Long and unnecessary quotations from the citations show lack of understanding.

(iii) *Simple points do not require long and complicated discussion*

It is often said, 'The legal mind consists of illustrating the obvious, explaining the self evident, and expatiating on the self evident'. Don't do it.

STYLE

(i) *Write the way you Talk*

This advice is often misunderstood. It does not mean that you should write as you talk because we often,

- Don't speak in complete sentences;
- Use words like 'oh', 'I mean';
- Express through our gestures, and by tone of our voice.

It means that:

- Use complete, grammatically correct sentences;
- Don't use unnecessary words like 'oh', 'I mean'
- Write in spoken language;
- Write as if you are talking to your reader.

In order to inculcate it, read good books; listen to the moving speeches. Appendix-1 is the list of the books that you may profitably read.

(ii) *Quotations*

Quotations can be within single or double quote. However if the quotation begins with single quote, then a quotation within that quotation will be under double quote. Reverse it, if the quotation begins with double quote. The texts within quotations are often shown by increasing the indent or by keeping the text in italics.

(iii) *Lists – Bullets and Numbers*

They are used:

- To state a series of facts or conclusion;
- To signal the essentials;
- To encourage the writers to be brief;
- To avoid boredom of reading continued text.

It is common to see a paragraph in the appellate court judgment stating:

> The trial court framed necessary issues and held that "A" was the owner of the property in dispute and after his death the plaintiff became the owner of the same. The Trial court further held that the defendant has nothing to do with the property in dispute and is a trespasser. The Trial court has also recorded finding that the suit is neither barred by limitation nor resjudicata. On the basis of these findings, the suit was decreed.'

It can always be written as follows:

'After framing necessary issues, the trial court decreed the suit on the following findings:

(i) A was the owner of the property in dispute;
(ii) After his death, the plaintiff became owner;
(iii) The defendant has nothing to do with the property in dispute and is merely a trespasser.
(iv) The suit is neither barred by limitation nor by resjudicata.'

(iv) *Heading and Sub-heading*

Headings and sub-headings are useful. They not only break the monotonous continuous text, but also provide sufficient indications to the readers to reach the part of the desired discussion.

Another advantage of using heading and sub-heading is that it makes the writing logical and avoids repetition. You should write everything related to a point under one heading or sub-heading.

A heading or sub heading starts a new topic. In order to show it, put more space above the 'heading and sub heading' than below it. A sub-heading should be subordinate to the heading and should also so appear. The principles regarding this priority are as follows:

- Upper case has priority over lower case;
- Bold has priority over regular as well as italics;
- A large type size has priority over a small type size;
- Centred heading has priority over left aligned;
- An underlined heading has priority over one that is not underlined;
- San serif has priority over serif.

(v) *Number the paragraphs in the judgement*

Numbering paragraphs of the judgement makes it easier to refer. Many courts have adopted practice of issuing judgements only after they are numbered. {Practice Direction (Judgement: Form and neutral citation) handed by Lord Woolf CJ on 11.1.2001. House of Lords also opted the practice of issuing judgements with numbered paragraphs in 2001}.

LANGUAGE AND PUNCTUATION

(i) *Think About Others*

Whenever you write, think about the person for whom you are writing.

Today our judgements are read not only by experts but also by persons, not so conversant with law (see discussion under the sub-title 'who reads the judgement). We have to make their task, easy—write in a language that they can understand.

(ii) *Don't use Latin, Foreign or Difficult Words - Write to express and not to Impress*

It is often that advocates and judges use, 'a peculiar cant and jargon of their own that no mortal can understand'[3]. We don't have to use this language.

Use English or language of your court: it is easy to understand. There is no point using Latin or foreign words. Consider which one is better:

NEMO DEBET ESSE JUDEX IN PROPRIA SUA CAUSA
No man can be a judge in his own cause.

The first one is in Latin; the second one is its English version.

Simple writing is the hallmark of a superior mind; it is not easy. Always try to use plain and familiar words to catch the readers' attention. You may understand the difficult words, but they may be difficult for the readers. Your reader may neither have patience nor time to consult the dictionary: your readers might consider you to be an able person but in case they have not understood the text then the entire exercise is pointless.

Two years ago I had come to NJA to give a talk on, how information technology can improve the judicial administration. I had titled my talk as 'Information Technology: Panacea for Soured Justice'. On my wife's suggestion, it was changed to 'Information Technology: the Road to Speedier Justice'. I am glad that I have accepted her advice. Sometime ago, Dataquest, an IT magazine, published this article. They titled it 'Justice without Speed Breakers'—it is even better.

The first three books of Appendix-1 provide plainer and better words for difficult words and expressions.

(iii) *Avoid unparliamentary language*

The language should always be plain and courteous: use parliamentary language. Erskine May (Parliamentary Practice 20th ed. Page 432) says:

> 'Good temper and moderation are the characteristics of

3 Jonathan Swift Gulliver's Travels: A Voyage to Honyhnhnhous.

parliamentary language. Parliamentary language is never more desirable than when a member is canvassing the opinion and conduct of his opponent in debate.'

So is true, when you are disagreeing with any judgement or submission of an advocate.

(iv) *Avoid negatives*

Positive statement is better than the negative one. Consider the following two sentences that are saying the same thing.

'Not more than one peon may be posted in the court'.
'Only one peon can be posted in the court.'

The second one, the positive one is better.
Consider the following confusing sentence,

'A member who has no fewer than 25 years of credited service but has not yet attained the age of 60 years and is not eligible for retirement may not voluntarily retire early without first getting approval from with the board after filing a written application.'

In case the negatives are removed and it is split, the same can be written as follows:

'The members, ineligible for retirement, may voluntarily retire if they are,

- under the age of 60 years, and
- have at least 25 years of credited service.

This can only be done after getting approval from the board by filing a written application.'

I need not say, which one is better.

(v) *Use Active Voice*

Passive voice is often not clear. It is because it leaves out the information. Active voice makes the text clearer. Consider, the following sentence,

'The policy has been approved.'

It does not explain as to who has approved the policy. Readers may or may not be able to guess the person approving the policy.

Passive voice is, often used,

- As it is natural to the writer;
- To leave out the doer (actor) intentionally or unintentionally;

or

- To avoid using personal pronouns like 'I', 'we', or 'you'.

The aforementioned reasons are not sufficient to use passive voice; it may be used if there are reasons to use it. For example:

- When the actor is not known or his name is not to be disclosed (A was killed); or
- When the actor is not important and emphasis is on the one acted upon (what happened to the drowning boy? He was rescued); or
- When things are put mildly to avoid or defuse hostility.

(vi) *Brackets*

Supplementary, or additional, or an explanation may be kept inside round brackets.

Brace brackets are used in a text if some matter within them is to be kept inside round brackets otherwise brace bracket { } as well as angled brackets < > are generally used in mathematics, specialised texts, tabulation and technical works.

Square brackets, are used in a quotation. Words kept inside the square brackets, are not part of the original quotation but are used as an editorial content to clarify the meaning.

(vii) *Break the Page with Paragraphs*

Split the text in a page with paragraphs and a paragraph with small sentences, but how long should a paragraph be?

The broad rule is that a paragraph should not have two thoughts—one is sufficient. 'COLLINS WORD POWER: Punctuation (page 16) offers some practical tips:

> 'Think of the end of a paragraph as a sort of breathing space for both writer and listener. The writer needs to gather his thoughts afresh, and the reader needs a momentary rest from concentration'.

(viii) *Use Short Sentences*

Readers do not concentrate as much as the writer. If you use a long sentence - you might lose your readers before it ends. They will be confused and get irritated. It is useless to write a sentence, if the readers have to read it again—use only as many words as are necessary. For example, consider the following sentence,

'The letter that was received from the High Court was received on 21st July.'

This could be written as,

'The letter from the High Court was received on 21st July.'

Or it could be simply written as,

'The letter from the High Court arrived on 21st July.'

Here is another example from COLLINS WORD POWER: Punctuation (page 15). Consider the following sentence.

'A person shall be treated as suffering from physical disablement such that he is either unable to walk or virtually unable to do so if he is not unable or virtually unable to walk with a prosthesis or an artificial aid which he habitually wears or uses or if he would not be unable or virtually unable to walk if he habitually wore or used a prosthesis or an artificial aid which is suitable in his case.'

Can you understand it? However it is saying something very simple,

Persons are regarded as physically disabled if they always 'need an artificial aid to walk'.

(ix) *Comma, Semi-colon, Dash, and Colon*

In case a long sentence can not be avoided then it should be broken with suitable punctuation, such as a comma, or a semi-colon, or a dash, or a colon. They make the text clearer:

- A comma acts a separator between parts of a sentence;
- Semi colon is used for two closely related sentences within a sentence;
- Dash is used to indicate start of an explanation or addition—they are added for emphasis too;
- Colon is used before an explanation, description, or conclusion and is generally used to introduce a vertical list.

FORMAT OF THE JUDGEMENT

(i) *Introduction/ Opening words*

It has been traditional to start the judgement stating that:' it is plaintiff's appeal...; or It is a suit for'....However this has changed.

Now the introduction or the opening words generally contain the key issues that are being decided. It is a kind of headline to the judgement. Its purpose is to invoke interest in the readers by capturing their attention at the outset. This is also recommended practice in the US. (Judicial Opinion

writing Handbook by JS George 2nd ed. Hein & Co. Buff lo 1986).

(ii) *The Facts*

It should contain the case of the parties, admitted or undisputed facts; and the evidence filed by them.

(iii) *Points for Determination/ Issues*

Formulate the points for determination and state them under this heading.

(iv) *Reasons for the Decision on a Point for Determination*

Reasons for the decision on different points for determinations may be indicated under the heading meant for it. In dealing with any point for determination, conclusion on that point may be included in the heading itself instead of only writing point/ issue number.

(v) *Conclusions*

Indicate your decisions on different points in the case.

(vi) *Order*

Indicate operative portion of the order on the basis of the conclusions. The matter under this heading and the previous heading 'conclusion' may be combined together.

(vii) *Footnotes, endnotes, and Appendices*

This may include,

- Case law; or
- Details of the books referred; or
- Provisions of law; or
- Related points not relevant for discussion at present but those that may be involved in future; or
- Any interesting point connected with the case but not relevant for the decision or relevant for further reference.

The main text should be capable of being read and understood without reference to the footnotes, endnotes or appendices. However, they should not be excessive as it distracts the readers.

Use of footnotes is common in US Judgements, and often had important bearing in the later cases.

CONCLUSION

Nature does not endow everyone with ability to write clearly: only some are lucky. Nevertheless, if the anxiety for clarity is there; if *the anxiety— to do right— remains* (see Endnote-2) then there is no reason why it can not be acquired.

We may be wrong in deciding a case; our decisions can always be corrected in appeal. And no one can bind the posterity. But let no one fault our judgement merely for not understanding it.

Endnote - 1: The original Latin maxim for the saying 'Let justice be done though the heavens should fall' is, 'Fiat Justitia, ruat Coelum'. It does not have respectable origin (For details 'The Family Story by Lord Denning page 172). In the same book on the next page, Lord Denning says,

> 'For myself I prefer to take the first part – *'Fiat justitia'* – and discard the *'ruat coelum'*. If justice is done, the heavens should not fall. They should rejoice.

Endnote - 2: Lord Denning's writings are simple and example to emulate; it can be profitably used in all languages. The title of this article has been taken from the following last paragraph of the first chapter 'Command of language' of the book 'The Discipline of Law:

> 'One thing you will not be able to avoid — the nervousness before the case starts. Every advocate knows it. In a way it helps, so long as it is not too much. That is where I used sometimes to fail. My clerk — as good clerk should — told me of it. I was anxious to win — and so tense — that my voice became too high pitched. I never quite got over it, even as King's Counsel. No longer now that I am a Judge. *The tension is gone. The anxiety — to do right — remains.* (Italics mine)

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JUSTICE ADMINISTRATION: 'CASE AND COURT MANAGEMENT'

- **By Hon'ble Mr. Justice Sunil Ambwani**
Judge,
Allahabad High Court,
Allahabad

1. Indian judiciary is doing a commendable job. It is still enjoying the public faith and confidence, much to the envy of other organs of states. The pendency of 3.5 million cases in the High Courts and 32.2 million in subordinate Courts has not deterred the person from filing more and more cases, which proves their faith in the system. The administration of justice, however, in the words of Justice V.R. Krishna Iyer is still, *"the judicial process wrapped in a mystery inside an enigma what with its baffling legalese, lottery techniques, habitual somnolencies, extensive proclivities, multi-decked inconsistencies, tyranny of technicalities and interference in everything with a touch of authoritarian incompetency."*

2. Within the system the judiciary has realised and it is frankly admitted in the successive speeches delivered by the Chief Justices of India on Law Day Celebrations that Indian judiciary is in a management crisis. It is with great resilience and untiring efforts of the Judges and Court staffs, that the system is holding itself in its place, and managing the affairs.

3. The Constitution of India vests extraordinary powers in the High Courts in the matters of the rules of the court and conditions of service of its employees. The High Courts have administrative powers of superintendence over all the Courts in the State. The appointment of officers and servants of the High Court are made by the Chief Justice or the designated Judge or officer of the Court. The administrative expenses are charged upon consolidated fund of the State. The Chief Justice of the High Court along with his brother Judges sitting in Full Court or such Committees as may be constituted by him, exercise complete administrative control over High Court and Subordinate Courts. The Judges, however, do not have expertise in the Court management.

4. 'Management' is a science of judicious use of means to accomplish an end. Experience is not a substitute for good managerial practices. The Courts should not be run by hit and trial methods or experiments to be made in a crucible, with the mixture of experience and traditions and borrowed ideas. In order to secure efficient justice delivery system, to meet the challenges in Court administration, and to reduce arrears while maintaining quality of work to the satisfaction of the litigants, which are

the most important stake holders of justice, expert managerial intervention is indispensable.

5. In the past even after realisation of the challenge, the efforts have focussed only on the amendments in procedural laws, ADR's, lok adalats, legal aid and use of computers as type writers and for collection of datas. Very little work has been done to analyse the issues and to bring changes in court and case management in the High Courts and Subordinate courts, for effective solutions, and to focus on risk management.

6. The 'First Advance Course on Management, Judicial Planning and Judicial Administration' made an attempt to diagnose administrative and management deficiencies. The participants formulated reform strategies, and measures to revamp the system. The judicial administration, and its performance assessment, indicating priorities, assets accountability and internal reforms were called into motion, and new methods of case management and case flow management were deliberated. The second advance course on Court Management and Judicial Administration (24th to 28th February, 2006), focused on essentials of change management with specific reference to Court and Case Management, case studies in the methods adopted in change management in Courts and case flow management, and increasing efficiency by use of ICT and removing corruption. We should now focus on formulation of methods and strategies, to resolve the issues. This paper attempts to deal with the Court Management and Case Management separately.

COURT MANAGEMENT

(A) HIGH COURT

Modernising and Streamlining the Rules and Procedures:-

7. Most of the High Courts have out-dated and much amended but still tangled and knotted rules and procedures applicable to both the Court Management and Case Management. These rules require to be updated to be in tune with amendments in procedural laws and uniformity in its application to all the High Courts. This will not only simplify the system but will also make it conducive for 'e-governance'. It can be achieved by a common effort to be made by the representatives of each High Court under the umbrella of Supreme Court.

8. Mr. Justice Jeevan Reddy in his farewell speech as Chief Justice of the Allahabad High Court remarked that the rules of the court are all tied at wrong places. In order to bring efficiency in the court procedures, the rules must be reframed and simplified. The Rules Committee, however, did not do much for next ten years and that Court continues to function under adhoc changes. The attempt to revise the General Rules (Civil) and

General Rules (Criminal), applicable to subordinate Courts in U.P. to bring them in tune with the latest amendments in CPC and Cr.P.C. is still under deliberations. The efforts in this direction should be expedited in all the High Court.

Financial Autonomy and Accountability

9. The judiciary is one of the strongest pillars of Indian democracy. The financial needs for its sustained and targeted growth require special attention. It is absolutely necessary that the judiciary with its growing needs of infrastructure must be made a planned subject. It is unfortunate and painful to witness the Chief Justice repeatedly requesting the State Government for minimum financial allocations to meet the exigencies. A planned and assured outlay will not only make it comfortable to go through its requirement but will also put it on guard for its optimum utilisation and accountability for expenditure.

10. New legislations, continue to put extra load of work on the existing Courts. The spate of public welfare legislations, demand establishment of new Courts, for example Courts dealing with human rights, juvenile justice, family Courts, IPR and IT Act violations etc. The extra work created by these legislations have put extra burden on the Courts. There is no study of legislative impact assessment of these new legislations on the existing infrastructure. Provisions must be made in the budget, along with the enactment, for establishing new Courts or increasing the strength of Judges at the time when these legislations are passed.

11. The judiciary must adopt a more dynamic and progressive attitude in preparing budgets and in spending of allocations.

Accounts and Audit

12. Uniform accounting practices and regular audits will provide much needed financial discipline. The demand of financial autonomy should be made with an offer of greater transparency and open policy for audit. The judiciary must prepare itself to audit through CAG to bring in more discipline in accounting practices and policy.

Human Resource Management

(a) Re-defining Staffing Pattern

13. With common judicial system, we have different staffing patterns in different High Courts. The staff structure training and its optimum use, for a proper court management needs to be standardised. Uniform service conditions will be beneficial to avoid dissatisfaction and will achieve better performance.

In most of the states the judiciary does not have rules regulating service condition of the judicial officers and staff, and borrow them from the respective State Governments bringing in state government culture in

judicial services. The judiciary needs uniform service conditions applicable to all judicial officers and staff in the country, to be adopted by the High Courts, with suitable amendments.

(b) Uniform Pay Structure

14. The pay structure in parity with the Central Government to be applied uniformly to all High Courts will invite more talent and will result into better performance. At present a lot of litigation with regard to parity in pay is pending in the High Courts, breeding dissatisfaction and inefficiency, which can be easily avoided by adopting a uniform pay structure in parity with the Central Government.

Record keeping

15. A scientific approach of record keeping, using micro filming techniques, digitalisation of records and maintaining hard copy with standardised indexing will help reducing problem of space in the High Courts which are courts of records, as well as subordinate courts. It will be conducive for connectivity for e-governance, and will also help in systematic weeding in a time frame to achieve optimum utilisation of space and staff. A special training in record keeping may help in achieving the desired targets. Apart from this a consistent policy of weeding of administrative records will also result in optimising using of staff and space.

E-Governance

16. The use of computers in record keeping, maintenance of datas and its optimum utilisation in court management and case management has now become a reality. So far we have used computers only for preparing pay bills, generating daily cause list or at best for creating datas of filing of cases. The technology is now being put to use for case tracking system, case management, case flow management, information of case laws and statutes laws, automating the formal part of court work, and summons tracking system. It will also help in maintaining accuracy minimise discretion and will avoid outside interference and corruption in court system.

Annual Reports

17. The publication of datas of filing, disposal, utilisation of funds, achievements of management targets, brings in transparency and confidence in the system.

18. The Supreme Court has taken the lead of publishing annual reports, and a 'Handbook of procedure in the Supreme Court'. The official hand book provides useful information of institution, pendency of disposal of cases, filing, court fees, limitations, review, accountability and the facilities available in Court including legal aid procedures. The High

Court and subordinate Courts have been asked to undertake similar measures to bring transparency in procedures.

Bar Reforms

19. The lawyers are important stake holders in the administration of justice. The court management hardly takes their opinions and associate Bar in taking decisions in court and case management. This not only causes dissatisfaction but also suspicion in the motives of the court administrators. The Bar must be taken into confidence in all decisions. In reciprocity, the Bar must also allow the court management to implement reforms in its functioning namely maintenance of libraries, chambers, and the use of I.C.T. for more efficient and knowledge based lawyers.

(B) SUBORDINATE COURTS

Increase in Judges Strength/Judicial Manpower planning.

20. With the back breaking case loads, it is not practical to expect the Judges of Subordinate judiciary to perform well and to reduce the arrears. In Uttar Pradesh, out of total Judge Strength of 2172, we are short of almost 432 judicial officers. Instead of doubling the Judge strength the Courts are forced to work with about 20% vacant Courts. The Court had to make serious efforts to persuade the State Public Service Commission to undertake selection procedure. Thereafter it took long innings of litigation on many issues of procedural errors before appointments could be made at the entry level and at the level of Higher Judicial Service. The self inflicted wound of staying the appointments took a long time to heal.

21. There is an urgent need for judicial manpower planning for next two decades with the legislative impact assessment. The arrears in Court, call for increasing strength of Judges and Court staff by atleast four times along with infrastructure, to meet the growing demands of judicial intervention.

Enforcement of all India Judicial Service

22. The Central Government has avoided framing rules for All India Judicial Service for too long. Several directions of Supreme Court in this regard have been ignored. A positive step to enforce the Forty Second Constitutional Amendment in Art. 312, will attract best talent to be trained and fostered for manning the High Courts in future. It will go in a long way to improve administration and management in both High Courts and Subordinate Courts.

Planning Court Rooms, Infrastructure, Record Rooms, Libraries:

23. There is need for standardization of the infrastructure, the size and design of Courts, Court rooms, Judicial Officer's chamber, staff room, office record rooms and libraries. There should be no compromise with such standard size and design. Although the Central Government has committed 50% of the cost of infrastructure, the corresponding cost is either not paid by the State Government or delayed unreasonably. There should be deductions made from the budget allocation to the State Government, and the matching grant, to be met by the State Government must be directly paid by the Central Government to judiciary.

Basic facilities for litigants:

24. The Courts are required to deliver justice to the litigants, but nobody cares about the consumers of justice. The litigant pays court fees, lawyers fees and for various other ancillary services attached to the Court. He is, however, denied of the basic facilities, such as waiting rooms, clean water, toilets, notice boards and enquiry counters. The adjudication is a time consuming task. The litigants have to wait for days, months and often years to reach to the logical end of the expensive litigation. The concerned court managers cannot avoid to deliver these basic facilities to its consumers.

Uniformity in Court hours:

25. In many States like in U.P. the court hours are changed with changing seasons to avoid extreme heat or winter. It is not in tune with the timing of the other offices and causes serious inconvenience to litigants and lawyers. The courts must maintain uniform court hours and holidays, to maintain discipline, certainty and punctuality in its functions.

Certified Copies:

25-A. The litigant is interested in the outcome of his case. He requires a certified copy of the order or judgment as soon as it is pronounced. The Law Commission in its 77th Report suggested that where a carbon copy of the judgment is not available, certified copy by mechanical or electronic process should be supplied within 15 days. Carbon copies, if ready should be immediately supplied. Order 20 Rule 68 CPC provides for immediate issuance of copies for preferring appeals on payment of specified charges. Now with ICT judgments will be uploaded on servers instantly for issuing copies without delay.

Increase of working days:

26. With millions of pending cases, there is no justification for only 210 working days in High Courts and 240 working days in subordinate Courts. It is a luxury, which the system can no longer afford. An increase by one hour in a day and 15 days in a year for both High Courts and

Subordinate Courts, will result into clearing lacs of cases in a year. The judiciary must respond to the call and show its genuine concern for the delays.

Containing Strikes by Advocates and Court staff:

27. The lawyers are integral part of the justice delivery system. The Advocates Act, 1961 entrusted the enrolment, conduct and disciplinary matters of lawyers to the State Bar Councils and Bar Council of India. The Bar, however, has not responded to the challenges faced by the system and has rather complicated the possible solutions. The lawyers should never be allowed to stop judicial functioning. The right to strike judicial work has never been recognized. Inspite of repeated pronouncements by the Supreme Court, the last of which is made by Constitution Bench in Harish Uppal (Ex.-Capt.) Vs. Union of India (2003) 2 SCC 45, where the Supreme Court authoritatively held that lawyers and their Associations have no right to strike or give a call for boycott, not even a token strike, the strikes have not abated. The loss of working days has reached intolerable proportions. The statistics in Uttar Pradesh for the years 2003-04 demonstrated that in 26 districts out of 70 districts, the strikes paralyzed the functioning of the Court for about 60 to 80 days in a year. In Pratapgarh (a small district adjoining Allahabad) the Court could function only for 96 days in that year.

28. The Court has to change its policy of observing tact in such situations. The judiciary exercises sovereign powers. It must adopt a policy of no tolerance towards strikes by lawyers or Court staff. The police stations must be established in the Judgeships under the direct control and supervision of the Judges and that any attempt to disturb Court work must be punished with severity. An attempt should be made to meet the reasonable demands of lawyers and Court staff but not under a threat of strike. Wherever lawyers or Court staff resort to strike, without making a proper representation or complaint or going through the grievance redressal procedure, the resolutions of the Bar Association and Staff Association must be rejected. The judicial officers must continue to sit on dais and perform judicial work. They should not, under any circumstances be allowed to do work in chambers, however, urgent the cause may be.

Training of Judicial Officers and Court staff:

29. The Courts have started looking for specialized judicial work. The Family Courts, Juvenile Courts, Accident Claims Tribunals, Land Acquisition, Arbitration, Essential Commodity, Anti Corruption and CBI Courts, NDPS, SC/ST matters and with Environmental and IPR matters coming up, special training for both Judicial Officers and the Court staff has become necessary. Regular seminars, workshops for sharing experiences, and regular amendment of procedures to suit the needs of specialised judicial work, are the need of the day. A judicial officer in

future will have to go for specialization, to achieve optimum results. Similarly the Court staff, will require training in IT techniques, case management, case flow management, and record keeping. Regular training sessions by deputing Judicial Training and Research Institute Officers to subordinate Courts in these areas will be very useful.

Case Management

30. The most neglected area, in the management of delays in justice delivery system is case management both at the level of High Court as well as subordinate Courts. With increasing case load and back breaking schedule, it is not possible for a judge or registry to keep track of the case after it is filed. In most of the High Courts including Allahabad High Court, the registry have no system in place for keeping track of the case. No dates are fixed between filing and dates of hearing except on the request of the counsels. All miscellaneous matters are taken up on urgent motions filed by counsels or on some occasions when the dates are fixed by the Court. No records are maintained about the pendency of applications, and the stages at which the cases are pending. This leaves the case management virtually in the hands of lawyers, who are interested parties. When the applicant is denied interim relief, he applies for early hearing. The other side, enjoying the benefits of possession, money or occupation then adopts all means to delay the matter indefinitely. This leaves the system under a great strain.

Control over management of cases and case flow management:-

31. There has to be a system of case management and case flow management, in place, controlled by the registry for efficient performance of judicial functions. For this purpose we require generation of datas, and automation by adopting Information and Communication Techniques. The progress of each case must be entered in the data base and the judge sitting in jurisdiction, should be given supervisory powers to have control over the case management. The Court must stick to the various time schedules fixed by CPC, in progress of the case. A brief summary of the time schedules fixed by the CPC as amended in 1999 and 2000 w.e.f. 01.7.2002 is given in a chart appended to this presentation.

Generation of data for effective case management and case flow management:-

32. Every Judge sitting in the jurisdiction must be regularly provided with data of the pendency of total number of cases, the stages on which such cases are pending, the listing of the cases before him for the next three months. This will give the Judge a clear picture, to plan the targets.

Specialization and equitable allocation of work:-

33. The determination of jurisdiction by the Chief Justice/ designated Judge is not always correlated with the pendency of the cases. Large number of vacancies, which are existing in the High Courts, and the lack of specialization, some times leads to small number of Judges being assigned in an area where there is larger pendency. As an illustration, in the District Court at Allahabad, at present there are only 45 judicial officers as against the sanctioned strength of 68 and with 33764 civil cases with an average of 1986 cases per judge, 4117 session trials with an average of 242 sessions cases per judge and with 116006 criminal cases with an average of 7250 cases per officer. If a Juvenile Judge or a Family Judge goes on leave, the situation worsens. A regular and careful monitoring over the determination of jurisdiction and allocation of judicial work to the judges, should be undertaken to reduce overloading and achieving better results in disposal of cases.

Managing Adjournments:-

34. The misuse of the discretion for adjournments must be avoided. A Judge grants adjournments for following reasons:

1. There are too many cases on board on that day, and the Judge wants to reschedule his work.
2. The lawyer is either on leave or is too busy.
3. When a lawyer wants to delay the matter and is eluding appearance.
4. When the witness has not come or the client has not provided details, documents or instructions to his counsel.

35. Inspite of successive recommendations of Law Commission, and consequential amendments in CPC restricting adjournments to only three during the life of the case, the practical experience shows that adjournments are given for asking. This totally puts the case management into disarray. The judiciary has to adopt a strict attitude towards adjournments. Every judge should monitor his diary/ list to a reasonable limit and should not adopt appeasement policy towards lawyers. The Judge should understand the difference between accommodating a busy lawyer, and granting adjournments to delay the proceedings. It is not possible to manage work until the case load on a Judge is put to a reasonable limit. The adjournment must be given only for the purposes of facilitating the progress and disposal of the case. There has to be an attitudinal change in the judiciary for granting adjournments.

36. Where a counsel is ill or is unable to attend the Court due to his pre-occupation, a Court should not grant more than one adjournment. Where a counsel is unable to attend on the second occasion, instructions must be given to the client to engage another counsel. A counsel is not a beneficiary or a consumer of justice. He is a part of the system, who must

cooperate and be made accountable in case management. The entire system exists for dispensation of justice and not for commercial benefit of counsels. A responsible and accountable Bar strengthens the entire system both from within and outside.

Attitudinal Changes:-

37. The expedition of cases, at all stages namely pre-hearing, hearing, and post-hearing, is necessary. The amendments in the procedures have not been followed strictly. A lawyer is slow to change and the judges easily give way to their demands. In case the procedures of service of summons, time for filing written statement/counter claims and adjournments as provided in the amended CPC are strictly monitored, the disposal will be quicker and effective.

The clearance of backlogs will not check filing of more cases in future. The study made by Dr. Justice G.S. Bharuka in his book "Redefining Judicial System through E-Governance and Attitudinal Change" shows that we in India are not as litigious as some other developed countries. In case we achieve a quick disposal rate, the litigants will be encouraged to bring more litigation to Courts. Those waiting in the wings with undetermined issues, are dissuaded to come to Court on account of delays. They will then be encouraged to bring more actions in Courts. The confidence in adjudicatory process will again fill up the dockets. We have not seen abatement of criminal cases wherever the trials have been made quicker. I find that apart from an effective case management, we must bring in more reforms in both civil and criminal law, to bring only those cases on trial, which really require specialized adjudicatory mechanism.

Simplifying procedures:-

38. The legal procedures must be simplified, for better understanding and with the sole object of facilitating the progress of the case, observing principles of natural justice. The procedures of committal, conditional bails, arranging video conferences to avoid presence of under trial prisoners on every date, plea bargaining in petty cases, use of ADR mechanism including negotiation, mediation and conciliation, reduce load on the Courts. These methods must be institutionalised with special training to Judges and lawyers for quicker, effective and qualitative disposal of justice. The Court must impose cost for containing adjournments and penalising those, who file frivolous cases.

39. The judiciary must stop fire fighting methods and start looking ahead for effective court management and case management to redeem the reputation of justice delivery system. A strong and effective judiciary, helps in maintaining rule of law, which brings peace and happiness in the society.

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HUMAN RIGHT JURISPRUDENCE IN INDIA

- By Pradeep Kumar Srivastava, LL.M.*

Section 2 (1) (d) of the Protection of Human Rights Act 1993 defines human rights as under:

> *"Human Rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodies in the International Covenants and enforceable by Courts in India."*

Human Rights are mainly human concern and they cannot be defined precisely. But they can be understood with reference to International Covenant and Declaration and the constitutional provisions. These rights are available to every human person by birth even though there are no legal or constitutional provisions. They are basic rights and as old as the human race. Laws and Constitutions simply recognize them and do not provide them. The right is available from birth to death of individual. It includes basic necessities of life necessary to lead a healthy and dignified life. Every State instrumentality is under an obligation to preserve, protect and enforce the human rights of individual and to create a social environment where such rights may be enjoyed in fullest.

The Constitution of India is a distilled product of three major aspirations of the people that is liberty, equality and justice. It is a unique document and not a mere 'pedantic legal text' which embodies certain human values and cherished principles and which recognizes and upholds the worth and dignity of individual. It envisages a liberal democratic order and guarantees certain essential freedoms to every person as fundamental rights, which are necessary for individual development and fulfillment. These freedoms weave a pattern of guarantees on the basic structure of human rights and impose negative obligation on the state not to encroach on individual liberty in its various dimensions. They represent ancient vedic values of this country and they are calculated to secure such conditions in the society in which every human being can develop his personality to the fullest extent. These freedoms attempt to help the individual to find his own viability, enable him to give expression to his creativity and make him to enjoy and develop his human capacity. One of these freedoms finds expression in Article 21, which guarantees to every person 'protection of life and personal liberty'.

Protection to life and personal liberty is the most precious human right which forms all other rights and which is inherent in the very nature of human existence in a political society. The incorporation of Article 21 was found necessary because the framers of the Constitution had faith in

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the sanctity of life and liberty of people which represent a facet of higher values in a human society and also because it was deemed necessary of the preservation of individual liberty, for the development of human personality and for effective promotion of social and democratic life in the country. It is this guarantee that makes our constitution sublime and gives it the character of great charter of liberty. It's importance heavily increases because, unlike the Magna Carta, it has not been forced out of unwilling hands of a sovereign, but it has been given to themselves by the people of this country through the Constituent Assembly.

Sources of Human Rights

There is no single exhaustive code of Human Rights and they have been developed from more than one source. The Universal Declaration of Human Rights 1948 and International Covenant on Civil and Political Rights 1966 are most important international source of Human Rights, to which India is also a party. It has been common understanding between the member nations to promote universal respect for, and observance of, human rights and fundamental freedoms. The human rights recognized by these international declarations find place in Part III and Part IV of the Indian Constitution. Part III of the Constitution guaranties fundamental rights to individual in the form of life, liberty, equality and freedom and they are enforceable by the Supreme Court and High Courts. Part IV of the Constitution incorporates directive principles for the State and they are in the form of social rights. According to Article 37 of the Constitution, these directive principles are fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws. The Supreme Court has always emphasized to strike a balance between the fundamental rights and the directive principles. This has paved the way for judicial activism and the expansion of the basic human rights. Thus, the judiciary has spelt out many more rights in Article 21 of the Constitution by reading and accommodating directive principles in it. This has rendered Article 21 as the main source of human rights.

Judicial Behavior

Article 21 of the Constitution protects two things namely- Life and Personal Liberty of individual. These two expressions, life and personal liberty, however, are enough wide and cannot be subjected to a precise definition and it is why the approach of the courts while defining them has been enumerative and not exhaustive. Therefore, the jurisprudence of Article 21, which has emerged from various judicial pronouncements contains different shades and is multi-dimensional. While interpreting life and personal liberty in Article 21, the Judiciary in India has not only attempted to formulate physical definition of these two terms, but it has

also tried to precisely link Article 21 with the freedoms protected under Article 19(1).

In **A.K. Gopalan vs. State of Madras**[1], the Supreme Court gave a very restricted meaning to expression 'personal liberty' and interpreted it as relating to body and as 'the antithesis of physical restraint'. Thus *Kania, C. J.*, remarked-

> *"Personal liberty would primarily mean liberty of the physical body*[2]."

Fazl Ali, J., in his dissent, tried to understand personal liberty in wider sense and laid down that it includes not only freedom from arrest and detention but also freedom of movement and all other freedom which have been specifically mentioned in Art.19 (1) of the Constitution[3].

Gopalan holding worked as a strong precedent for a long time and even sensitive judges like Justice Hidayatullah and Justice Gajendragadkar did not try to disturb it. For the first time Justice **Subba Rao in Kochunni vs. State of Madras**[4] and in **Kharak Singh vs. State of U.P.**[5], in his dissenting opinion, reading right of privacy in Art. 21 remarked that 'personal liberty' is a comprehensive term, which includes freedom from psychological restraints also and the freedoms contained in Art. 19 are an attribute to it. This view was adopted by the Supreme Court in **Satwant Singh vs. A.P.O., New Delhi**[6] where *Subba Rao. C.J.*, read right to go abroad in Article 21 and took the view that Kharak Singh holding was:

> *".... a clear authority for the position that liberty in our constitution bears the same comprehensive meaning as is given to the expression 'liberty' by the 5th and 14th. Amendment to the U.S. Constitution and the expression 'personal liberty' in Article 21 only excludes the ingredients of liberty enshrined in Article 19 of the constitution. In other words, the expression 'personal liberty' in Article 21 takes in the right of locomotion and to travel abroad, but the right to move through out the territory of India is not covered by it in as such as it is specifically provided in Article 19"*[7]

In **R.C Cooper vs. Union of India**[8], a case on right to property, the court preferred the view of Subba Rao, J., and pointed out that his view in *Satwant Singh* must be regarded as correct. A similar view was taken in

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[1] AIR 1950 SC 27
[2] Id. at 37.
[3] Id. at 53.
[4] AIR 1960 SC 1080.
[5] AIR 1963 SC 1295.
[6] AIR 1967 SC 1836.
[7] Id at 1844.
[8] A.I.R. 1970 SC 564

Shambhu Nath Sarkar vs State of W.B.[9] and **Haradhan Saha vs. State of W.B.**[10] In **A.D.M. Jabalpur vs. Shivakant Shukla**[11], the Supreme Court endorsed the same view. *Khanna, J.*, who delivered dissenting view, declaring Art. 21 as the sole repository of the right to life and personal liberty, remarked:

> *"The right to life and personal liberty is the most precious right of human beings in civilized societies governed by the rule of law. Even in the absence of Article 21 in the Constitution, the state has got no power to deprive a parson of his life of liberty without the authority of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force."*[12]

Maneka Gandhi vs. Union of India[13]

The liberal attitude of the judiciary reached to its maximum in Maneka Gandhi where the court, by a majority of 6 to 1 judges emphasized on the liberal construction of Article 21 and made it clear that Article 21 and 19 are not exclusive of each other. Bhagwati, J., who delivered the leading judgment, after a brief survey of personal liberty cases, found that *Kharak Singh* and *Satwant Singh* had disapproved the narrow construction of personal liberty in Article 21 and that Cooper had preferred the dissent of Subba Rao, J., in *Kharak Singh* over the majority opinion in *Gopalan* on the relationship between personal liberty in Article 21 and freedom of movement in Article 19 (1) (d), *Sarkar* and *Saha* affirmed Cooper and *Khudiram,14* pointedly held that a preventive detention law will have to satisfy the requirement of Article 19 (1) (d). *Bhagawati, J.*, emphasized that 'the attempt of the court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and contents by a process of judicial construction', and laid down:

> *"The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19"*[15]

In *Gopalan*, 'law' under Article 21 was interpreted to mean state made law and if such law for deprivation of life and personal liberty has

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[9] AIR 1973 SC 1225
[10] AIR 1974 SC 2154
[11] AIR 1976 SC 1207.
[12] Id. at 1253 to 1256 (see dissenting view of Khanna J.)
[13] AIR 1978 SC 587
[14] Khudiram Das vs. State of W.B., AIR 1975 SC 550
[15] Id. at 622.

prescribed a 'procedure' the same is valid for the purpose of Article 21. In *Maneka Gandhi*, the Supreme Court overruled *Gopalan* view on this point and laid down that procedure in Article 21 must be 'just, fair and reasonable'. Reading principles of natural justice in Article 21, the court said that in order to be a valid procedure, it would have to pass the test of equal protection clause under Article 14 and test of reasonableness under Article 19.

After *Maneka*, the scope of the right of life and personal liberty has been enlarged tremendously and by giving wide sweep to the protection of Article 21 the court has started reading positive rights therein. With Maneka the authority of *Gopalan* on the concept of life and personal liberty and the relationship between Article 21 and 19 has ended and the further story of the judicial behavior moves around the efforts for making Article 21 as a real protector of life and liberty. The judicial activism, which has incidentally emerged after *Maneka* has brought 'human right jurisprudence' and 'poverty jurisprudence' in Article 21 and it has become a Magna Carta and main source of human rights for the deprived persons.

Expansion of Article 21: Post Maneka development

In **Munn vs. Illinois**[16], the term 'life' and 'liberty' has been very vividly explained by Justice Field who pointed out:

> *"By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits and faculties by which life is enjoyed. The provision equally prohibits the mutilation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world .... By the term liberty, as used mere freedom from physical restraint or the bonds of a prison."* [17]

Right to live with Human dignity

The Supreme Court of India in several cases has variously approved the above opinion.[18] The question, which often arises in relation to interpretation of Article 21 is whether right to life is limited only to protection of limb of faculties, or does it go further and embrace something more. This issue was given a detail consideration in **Francies Coralie vs. Union of Territory of Delhi**[19], and the court insisted on a very liberal construction of the right. The view of the court was:

> *"The fundamental right to life which is the most precious human right and which forms the arc of all other rights must, therefore, be*

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[16] (1976) 94 U.S. 115.
[17] Id. at 142.
[18] Kharak Singh vs. State of U.P., AIR 1965 SC 1295 (1302), also D.B. Pathaik vs. State of A.P. AIR 1974 SC 2092, Sunil Batra vs. Delhi Administration AIR 1978 SC 1675.
[19] AIR 1981 SC 746

interpreted in a broad and expensive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person"[20].

Viewing from this angle, the court gave a broader interpretation to the right to life and extended it to include the right to live with human dignity along with bare necessaries and freedom of every limb or faculty through which life is enjoyed including the faculties of thinking and feeling[21]. *Bhagwati, J.*, who delivered the judgment, was of the view that the magnitude and content of the components of the right to life would depend upon the extent of the economic development of the country, but, in any view of the matter, this right would include the right of basic necessities such as adequate nutrition, clothing and shelter over head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about the mixing and mingling with fellow human beings. The learned justice considered the right to life as guarantee of something more than 'mere animal existence' and 'physical survival' and held it to mean right to live with human dignity and to include:

> *"... the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self"*[22].

The *Francis* holding thus tried to understand 'life' not only in relation to body, but also in relation to the mind of individual, his feelings, thinking and even his bare necessaries of life. It read the right of live with human dignity in Article 21 and extended the protection to every limb or faculty through which life is enjoyed. It, however, did not forget to make it clear that the contents and components of the right to life would very much depend upon the economic development of the country. Thus, the *Francis* holding, significantly, did not leave the reality of the earth.

Right to Livelihood

In re *Santram*[23] popularly known as tout's case, the Supreme Court held that 'life' in Article 21 does not include livelihood. But in Nadkarni case[24] wherein the context of service jurisprudence Desai, J., laid down that the word 'life' in Article 21 includes livelihood and that where the outcome of departmental inquiry is likely to adversely effect reputation or livelihood of a person 'some of the final graces of human civilization

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[20] Id. at 752.
[21] Id. at 753.
[22] Ibid.
[23] AIR 1960 SC 952.
[24] Board of Trustee of the Port of Bombay vs. Dilip Kumar Raghyendranath Nadharni (1985) I S.C.C. 124.

which make life worth living would be jeopardized and the same can be put in jeopardy only by law which entails fair procedure'[25].

In **Olga Tellis Case**[26] a five judges bench of the Supreme Court clearly laid down that right to livelihood is implicit in Article 21.

The learned Chief Justice tried to distinguish *Olga Tellis* from *Santram* on facts and rightly pointed out that in *Santram,* toutism was pleaded to be means of livelihood and under the constitution no person can claim the right of livelihood by the pursuit of an immoral occupation or a nefarious trade or business, like toutism, gambling or living on the gains of prostitution[27]. In *Olga Tellis*, however the petitioners did not claim the right to dwell on pavements or in slums for the purpose of pursuing any illegal or immoral activity[28].

Olga Tellis was developed further by the decision in *Umed Ram Sharma*[29], where the court laid down that right to life in Article 21 not only includes right of livelihood but also the right to means of livelihood. The view of the court was that the right to life embraces not only physical existence but also the quality of life, and for the residents of hilly areas, access to road is access to life itself. The court highlighted the important fact of utter deprivation of life opportunities for the hill people.

Maneka proposition that procedure in Article 21 must be fair, just and reasonable and its validity might be tested on the touchstone of Article 14 and even of Article 19 if the challenged measures contravenes any of the freedoms contained therein, has given a wide scope for judicial activism. Various personal liberties have merged out of Article 21 and the judiciary has started reading several fundamental rights to make a procedure just, fair and reasonable. The post *Maneka* judicial dynamics has rendered Article 21 as containing virtually all those rights which are necessary for the maintenance of human worth and dignity and it has become a key safeguard for the deprived, poor and victims of police tortures, either inside or outside the jail. The Supreme Court has frequently invoked Article 21 to ensure governmental accountability for human sorrow, suffering and deprivation.

Protection to workmen and Bonded Labourers

Francis holding was applied in the **Asiad case**[30] for protecting workmen employed in various construction work for Asiad from unfair

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[25] Ibid.
[26] Olga Tellis vs. Bombay Municipal Corpn. (1985) 3 SCC 545.
[27] Id. at 575; see also State of Bombay vs. R.M.D.C. AIR 1957 SC 699 where a similar argument was sued to deny gambling the status of trade under Art. 19(i)(g).
[28] Idid.
[29] State of Himachal Pradesh vs. Umed Ram Sharm, 1986 (1) Scales 182.
[30] Peoples Union for Democratic Rights vs. Union of India, AIR 1982 SC 1475.

exploitation by Thakedars who were charging one rupee commission form their per day wages. Several welfare labour laws were being violated and the workmen were not provided with proper living condition, medical and other facilities. The Court referring to *Maneka* and *Francis* holdings pointed out Article 21 has acquired new dimensions and the right to live with human dignity has become part of that Article. Linking Article 21 with various labour laws, *Bhagwati, J.*, pointed out that these labour legislations have been enacted with a view to benefit the workmen in their contract of service and they are clearly intended to ensure basic human dignity to them. He, therefore, held that if workmen are deprived of their rights and benefits to which they are entitled under these social welfare laws, there would be clear violation of Article 21. He held that the government was statutorily responsible for securing such rights and benefits to workmen.

The Asiad holding was applied in **Bandhua Mukti Morcha vs. Union of India**[31] to ensure release of bonded labourers who were working under inhuman and intolerable conditions in stone Durries situated in Faridabad Distrrict of Haryana. *Bhagwati, J.*, took the view that any form of 'forced labour' of 'bonded labour' was voilative of human dignity and contrary to basic human values. He remarked that Article 21 guarantees right to live with human dignity free from any type of exploitation and which derives its life breath from Article 23, 39(e) and (f), Article 41 and 42 of the Constitution. He, therefore, laid down:

> *"(I)t (the right to live with human dignity) must include protection of the health and strengths of workers, man, women and against abuse of the children of tender age, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities just and human conditions of work and maternity relief*[32]*."*

Bhagawati, C.J., affirmed this view in **Neerja Choudhary vs. State of M.P.**[33], and invoked Article 21 to ensure identification, release and rehabilitation of the bonded labourers. He held:

> *"It is the plainest requirement of Article 21 and 23 of the Constitution that the bonded labourers must be identified and released and on release, must be suitably rehabilitated. The Bonded Labour system (Abolition) Act 1976 has been enacted pursuant to the Directive Principles of State policy with a view to ensure basic human dignity to the bonded labourers and any failure of action on the part of state government in implementing the provisions of the legislation would be*

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[31] AIR 1984 SC 802.
[32] Id. at 811-812.
[33] AIR 1984 SC 1099.

the clearest violation of Article 21 apart from Article 23 of the Constitution"[34].

Extension of protection of Article 21 to safeguard the rights and interests of working class and enlarging it to ensure the identification, release and rehabilitation of bonded labourers witness the increasing importance of the right to life and personal liberty. It is clear from the above discussion that Article 21 has been used to provide to the workers several legislative benefits and in the process, Article 23, which was lying as a dead letter in part III of the Constitution, has been made a living reality. Linking welfare condition of working class with the human dignity has made Article 21 a potent tool to provide socio-economic justice to the weaker sections of society and to ensure state accountability for human pains and sufferings. Article 21 has become a reminder to the state of its responsibility to see that the labour-welfare haws are being implemented and observed.

Detention in civil prison for realization of debt

Section 51 of the Civil Procedure Code authorizes detention in civil prison of judgment-debter in execution of a decree for payment of debt. In **Jolly George Varghese vs. Bank of Cochin**[35] the issue was whether such a procedure for deprivation of personal liberty was fair and reasonable procedure within the meaning of Article 21.

Speaking for the Court, *Krishna Iyer, J.*, pointed out that the high value of human dignity and the worth of the human person enshrined in Article 21 did not permit state to cost to person in prison because of his inability to meet contractual obligation or for his failure to repay debt. He was of the view that such a procedure could only be adopted on willful failure to pay despite sufficient means. This conclusion he reached with the help of Article 11 of the International Covenant on Civil and Political Rights[36] to which India is also a party. Introducing poverty jurisprudence in article 21, the learned justice remarked:

> *"to be poor in this land of Daridra Narayana (Lord of poverty) is no crime and to recover debts by the procedure of putting one in prison is too flagrantly voilative of Article 21 unless there is proof of his willful failure to pay in spite of his sufficient means"*[37].

Jolly Varghese holding is remarkable for its humanistic approach and for its emphasis that the dignity of individual is paramount and it cannot be violated because of one's poverty and disability.

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[34] Id. at 1106.
[35] AIR 1980 SC 470.
[36] Art. 11 of the Covenant reads, "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."
[37] See supra note 35 at 475.

In **D.B. Patnaik vs. Sate of A.P.**[38] Chandrachud, J., clearly laid down:

> *"Convicts are not ... by mere reasons of the conviction, denuded of all the fundamental rights which they otherwise possess ... a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law"*[39].

D.B. Patnaik was quoted with approval and applied in subsequent cases and it was laid down that a prisoner was not skipped of his fundamental rights, save those, which were inconsistent with his incarceration[40]. In United States, the judiciary has taken a very liberal stand and emphasizing on 'civilized standards of human decency' inside and outside the jail, it has pointed out that-

> *"Prisoners are still persons entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process"*[41].

It was therefore emphasized that conviction of a person did not render him a non-person and his right are subjected to the prison administration and imposition of any serious punishment within the prison, otherwise than which were specified in the sentence, would require procedural safeguards[42].

After *Maneka*, the Supreme Court has tired to humanize the prison conditions and inject constitutional consciousness into the jail system with the help of Article 21. In the zeal of ensuring justice to the prisoner and for saving him from inhuman cruel and degrading treatment, the court has laid down that Article 21 would give same protection to prisoner as has been given in America with the help of due process clause. Thus, in **Sunil Batra**[43], *Krishna Iyer, J.*, expressed the view:

> *"True our constitution has to "due process" clause or the VIII Amendment, but in this branch of law, after Cooper (Supra) and Maneka (Supra) the consequence is the same"*[44].

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[38] (1975) 2 SCR 24.
[39] Ibid.
[40] See Francis Coralie vs. Delhi Administration, AIR 1981 SC 746, See also Sunil Batra vs. Delhi Administration, AIR 1978 SC 1675, also AIR 1980 SC 1579.
[41] See Eve Pell (174) 417 US 817.
[42] Ibid.
[43] See Air 12978 SC 1675.
[44] Id. at 1690.

Therefore, he held that for a prisoner all fundamental rights are an enforceable reality, though restricted by the fact of imprisonment, and be shall not be deprived of them save by methods right, just and fair[45].

Rights Against Torture and Solitary Confinement:

'Life and personal liberty' has been given wide construction after *Maneka* and Article 21 has become and main protector of human dignity. Article 21 has been, therefore invoked to defend the prisoner against the mal-practices of prison administration, which are very much common in the country. Thus, it has been held that right to live with human dignity is necessary component of right to life in Article 21 and any form of torture or cruel, inhuman or degrading treatment would be offensive of human dignity and would constitute an inroad into the right to life. The court has held that any such treatment will have to satisfy the test of just, fair and reasonable procedure contained in Article 21[46].

Solitary Confinement:

Similarly, the court has taken the view that solitary confinement is physically and mentally injurious for a prisoner and has a degrading and de-humanizing effect on him. The life in solitary confinement is even worse than in imprisonment, for life and the limited personal liberty of the prisoner is rudely and unreasonably curtailed. The view of the court has been that the right to move, mingle, talk and share company with other co-prisoners is implicit in Article 21 and that cannot be taken away except by fair, just and reasonable procedure established by law[47].

Bar Fetters and Confinement in Chains

The jail laws and Manuals normally permit bar fetters and confinement in Chains. This was challenged by Charles Sobraj. The Court took the view that putting bar fetters for an unusually long period without due regard for the prisoner and the security of the prison would certainly not be justified. It is voilative of human dignity and should not be applied unless the convict or under trial has a tendency of violence or escape[48].

The view of the Court has been that solitary confinement and confinement in chains are measures of jail punishment and they are imposed as an additional punishment on the sentences and such additional punishment should not be imposed unless there are some weighty reasons for the same. Applying *Maneka*, the Court has expressed the view that minimal hearing must be given to the victim before or after the imposition

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[45] Id. at 1691 also see Sunil Batra vs. Delhi Administration AIR 1978 SC 1675.
[46] See Francis, Supra note 19.
[47] See Sunil Batra vs. Delhi Administration AIR 1978 SC 1675.
[48] Ibid.

of such punishment. The court rightly pointed out that bar fetters are absolutely unnecessary when the prisoner has been kept in secure cells[49].

Sunil Batra has been invoked and affirmed in subsequent cases[50] and the crux of the matter has been that any cruel, inhuman or degrading treatment will violate the worth and dignity of the human person and it will have to be tested on the touchstone of just, fair and reasonable procedure. Solitary confinement and confinement in chains are jail punishment in addition to the actual sentence and the jail authorities cannot impose additional punishment unless it is necessary for the security of jail and unless a minimum opportunity of hearing is given to the victim. For ensuring justice to the prisoner, the court has read Article 5 of the Universal Declaration of Human Rights 1948[51] and Article 10 of the International Covenant on civil and political Rights[52] and has pointed out that treating the prisoners as a non-prisoner would result in constitutional dehumanization and repudiation of world legal order[53]. Insisting on the need of prison reform and awaking human right consciousness in the jail system, the court has given 'functional plurality' to habeas corpus writ and enlarging its scope in terms of constitutional objectives and regard for human decency and dignity it has directed for the release of victims of jail torture[54].

The *Batra opinion* is based on the assumption that the jails are "laboratories of torture or warehouses where human commodities are sadistically kept[55]" and the court has 'distinctive duty to reform prison practices and to inject constitutional consciousness into the system[56]". By according the protection of fundamental rights to the convicts and evincing and activist interest in prison reform the court, wants to force the state to humanize the prison process as soon as possible. The focus of Batra is, thus, on revival of prison justice through "judicial mid-wifery" and to 'alert the nation' to the need "to bridge the human gap between prison praxis and prison justice[57]."

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[49] Ibid.

[50] See, Sunil Batra vs. Delhi Administration, AIR 1980 SC 1579; Mantoo Majumdar vs. State of Bihar, AIR 1980 SC 847; Prem Shanker vs. Delhi Administration, AIR 1980 SC 847; Charles Sobraj vs. Central jail, AIR 1978 SC 1514.

[51] Art. 5 runs "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[52] Art. 10 runs, "all person deprived to their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

[53] See Sunil Batra II, Supra note 42 at 1590.

[54] Ibid.

[55] See Sunil Batra I, Supra note 39 at 1726.

[56] Id. at 1710.

[57] Ibid, see also Prof. Gouse, XIV A.S.I.L. (1978) at 432.

In the submission of this writer, lawful imprisonment necessarily takes away many rights and privileges of the ordinary citizen. But, he is not wholly stripped of constitutional protection given to him under Article 14, 19 and 21 of the Constitution. There is no iron curtain drawn between the constitution and the prisons of the country. Torture and cruel treatment stand against the constitutional norms and violate the guarantee of life and personal liberty of the prisoners, which assure them of fair process capable of emancipating them from the fearful injustice heaped on them by the prison process. No doubt that certain restrictive measure may be applied on the freedom and liberty of the prisoner in order to maintain security of jail. Some coercive method may also be adopted to ensure that a prisoner may not escape or may not create violence in jail. Therefore, administration of prison justice must involve mutual accommodation of institutional needs of jail and liberty and dignity of individual.

Right of Free Leal Aid:

In **Hoscot vs. State of Maharashtra**[58], perhaps for the first time, the court read free legal aid as fundamental right contained in Article 21. There, *Krishna Iyer, J.*, took an integrated view of the rights in Article 19 and 21, the directive on legal aid in Article 39-A, the procedural safeguard contained in criminal procedure code of the country and the procedural fairness and concept of natural justice enshrined in Article 21, and held that it was state's duty and not charity to serve copy of the judgment to the convict in time to enable him to file and appeal against it and to provide free legal service to a prisoner who was indigent or otherwise disabled to secure legal assistance.

The concept of free legal aid has been formulated by *Bhagwati, J.*, in **Hussainara Khatoon vs. State of Bihar**[59] in following words:

> *"This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the state is under a mandate to provide a lawyer to an accused person it the circumstances of the case and the needs of justice so required, provided of course the accused does not object to the provision of such lawyer"*[60].

The Parliament has passed the Legal Services Authority Act 1987 to give effect to the provisions of Art. 39-A of the Constitution. The District Legal Services Authority constituted under the aforesaid Act have been specially required to provide assistance to the poor litigants,

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[58] Ibid.

[59] AIR 1979 SC 1369.

[60] Id. at 1374, see also Francis case supra note 19, Khatri vs. State of Bihar AIR 1981 SC 928, State of Gujarat vs. Shailesh Bhai Mansukhalal Shah (2007) 7 SCC 71.

convicts, under trials and the litigants belonging to the poor sections of the society in the form of court fees, expenses of the litigations and the Advocates fee etc.

Right of Speedy Trial

A very unfortunate state of affairs is visible at present in the country due to long pre-trial confinement of the accused persons in jail. Thousands of accused person may be found languishing in prisons awaiting trial for various offences[61]. The Supreme Court has, therefore, tried to rectify this deplorable situation in several ways. Firstly, the court has read right of speedy trial as a fundamental right contained in Article 21. Secondly, it has expressed it's anxiety on this alarmingly unfortunate state of affairs and has emphasized that such law and procedure should be radically changed[62]. In case the under trials have been found to have already undergone detention in jail for a period longer than the prescribed sentence for the offence, the court has directed for their release. The view of the court has been that in such cases further confinement of the under trial would be illegal and would violate Article 21 of the Constitution. The court has remarked that it is the constitutional obligation of the state to devise such a procedure as would ensure speedy trial to the accused and the state cannot escape from the responsibility by pleading financial or administrative inability. The state is bound to ensure speedy trial and whatever is necessary for this purpose has to be done by it[63].

A Constitutional Bench of seven judges of the Supreme Court in **A.R. Antulay vs. R.S. Nayak**[64] and **P. Ramachandra Rao vs. State of Karnataka**[65] has made it clear that although speedy trial is a fundamental right of an accused, the courts cannot prescribe any specific time limit for the conclusion of a criminal trial.

Unnecessary adjournment on the ground of lawyer's boycott and strike[66], delay in pronouncing judgment[67] and delay in framing charges[68] have been held to be voilative of right of speedy trial.

The Supreme Court has spelt out many more rights with the help of the Preamble of the constitution, Human Right Declarations, Directive Principles of the Constitution and the liberal construction given to the guarantee contained in Art.21 of the Constitution. Article 21 has been

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[61] See 78th Report of Law Commission on Under Trail Prisoners in Jail (1979)
[62] Hussainara Khatoon vs. State of Bihar, AIR 1979, SC 1360.
[63] See Hussainara Khatoon vs. State of Bihar, AIR 1979 SC 1569, also AIR 1979 SC 1377 see also Kadra Pahadiya vs. State of Bihar, AIR 1982 SC 1167.
[64] AIR 1992, SC 1701
[65] (2002)4 SCC 578 also see Moti Lal Saraf v. State of J & K, AIR 2007 SC 56.
[66] Koluttumottil Razak vs. State of Kerla (2000) 4 SCC 565
[67] Anil Rai vs. State of Bihar AIR 2001 SC 3173.
[68] Balkrishan Pandey vs. State of U.P. (2003) 12 SCC 186.

interpreted to include a variety of rights: right to go abroad[69], right to privacy[70], right against solitary confinement[71], right against bar fetters[72], right to legal aid[73], right to speedy trial[74], right against handcuffing[75], right against delayed execution of death sentence[76], right against custodial violence[77], right against public hanging[78], right to medical assistance[79], right to shelter[80], right to health[81], right to free education[82], right to fresh water and air and right of healthy and good environment [83]. In **P.T. Munichikkanna Reddy and ors. Vs. Ravamma and ors**[84] the Supreme Court held that right to property is now considered to be not only constitutional or statutory right but also a human right. Right of economic well-being and development in terms of road dam and mega project is a human right which includes right of education also[85]. Presumption of innocence has been held to be a human right[86]. In **Peoples Union for Civil Liberties vs. Union of India**[87], the Supreme Court has remarked that gender injustice; pollution, environmental degradation, malnutrition and social ostracism are various forms of human rights violations.

In **Chandrika Prasad Yadav vs. State of Bihar**[88], a minor girl aged about 14 years was kidnapped and was allegedly married by her uncle. On being recovered she was sent to a Protection Home wherefrom she was reportedly missing. The Supreme Court directed to the Bihar State Human Rights Commission to probe in to the alleged laps, in action and mismanagement of the Protection Home. In **Prajawala vs. Union of India**[89], the Supreme Court directed the Union to implement the

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[69] Satwant Singh vs. A.P.O. New Delhi, AIR 1967 SC 1836
[70] Gobind vs. State of M.P., AIR 1975 SC 1397.
[71] Sunil Batra vs. Dehil Administration, AIR 1978 SC 1675
[72] Ibid.
[73] Supra note 51.
[74] Supra note 55.
[75] Prem Shankar Shukla vs. Delhi Administration, AIR 1980 SC 1535.
[76] T.V. Vathieeswaran vs. State of T.N., AIR 1983 SC 361.
[77] Sheela Barse vs. State of Maharashtra, AIR 1983 SC 387
[78] Attorney-General vs. Lachmi Devi, AIR 1986 SC 467.
[79] Pt. Parmanand Katara vs. Union of India, AIR 1989 SC 2039.
[80] Shantistar Builders vs. N.K. Totame, AIR 1990 SC 616.
[81] Consumer Education & Research Center vs. UOI; AIR 1995 SC 922.
[82] J.P. Unikirishan vs. State of A.P., AIR 1993 SC 2178.
[83] M.C. Mehta vs. Union of India, AIR 1999 SC 812 also see T.N. Godavaraman Tirumulpad vs. Union of India: AIR 2005 SC 4256, (2008) 2 SCC 222.
[84] AIR 2007 SC 1753 also see Chairman, Indore Vikas Pradhikaran vs. M/s Pure Industrial Cock and Chemical Ltd. And others: AIR 2007 SC 4387.
[85] N.D. Jayal vs. Union of India AIR 2004 SC 867 also see Election commission of India vs. St. Mary's School (2008) 2 SCC 390.
[86] Naradra Singh vs. State of M.P. AIR 2004 SC 3249 also see Ranjeet Singh Bhramjeet Singh Sharma vs. State of Maharastra AIR 2005 SC 2277.
[87] (2005) 2 SCC 436.
[88] (2009) 4 SCC 415.
[89] (2009) 4 SCC 798.

provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 and make preferential allotment of land for housing and business purposes. The Supreme Court reiterated its earlier view in **State vs. M. Krishna Mohan**[90] and said that presumption of innocence is a human right and it becomes much stronger when accused of a crime is acquitted. The Court further held that giving finger impression or signature or specimen handwriting to investigator is not included within the expression "to be witness" and it does not violate Art. 20 of the Constitution. In **Jayendra Vishnu Thakur vs. State of Maharastra**[91], speedy, open and fair trial has been made part of Art. 21 and it was held that right to cross-examination is a valuable right of the accused and for proceeding under section 299, Criminal Procedure Code, it must be established that the accused has absconded and there is no prospect of arresting the accused. Holding that fair trial, fair procedure and fair investigation is fundamental right under Art. 21, the Supreme Court left this issue open where the right to confront a witness by an accused is fundamental right or not.

Gender Justice - A Human Right Issue

Supreme Court of India has been, for the last two decades, making many bold innovations in administering what may be called "substantive justice" to women. Every gender discrimination has been linked with human right issue and the court has tried to fill the gap in the personal laws with the help of international instruments and Constitutional provisions. Thus in **Bodhisattawa Gautam vs. Subhra Chakraborty**[92], the Supreme Court has laid down that rape is crime not only against the person of a woman, it is crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. 'It is a crime against basic human right and is voilative of the victim's most cherished right, a right to live with human dignity under article 21[93]'. In **Vishakha vs. State of Rajasthan**[94] the issue raised was prevention of sexual harassment of workingwomen in place of work. The Supreme Court issued certain guidelines to be followed for the prevention of sexual harassment at work place pointing out that it is the responsibility of the state to ensure safe environment at the place of work to ensure that women can live and work with dignity, the court said,

> *"It is now an accepted rule of judicial construction that regard must be had to international conventions and norms when construing domestic*

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[90] (2009) 1 SCC (Cri) 922.
[91] (2009) 7 SCC 104.
[92] AIR 1996 SC 922.
[93] See also Chairman, Railway Board vs. Chandrima Das AIR 2000 SC 988.(The right was extended to a foreign national(Bangladesh) and compensation was awarded)
[94] (1997) 6 SCC 241

laws when there is no inconsistency between them and there is a void in the domestic law. Therefore, in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment at workplaces, the Court should lay down the guidelines and norms to be duly observed at all workplaces or other institutions, until legislation is enacted for the purpose"[95].

In **Apparel Export Promotion Council vs. A.K. Chopara**[96] termination of respondent form service on the ground of sexual advances to words as stenographer was upheld.

In **Danial Latifi vs. Union of India**[97] making fair provision for the maintenance of a Muslim divorced wife and relating it with 'basic human right to secure gender and social justice', the Supreme Court observed:

"Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariable left to be decided on considerations other than religion or religious faith or beliefs or sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question"[98].

The female prisoner has been allowed to keep her child in jail till it attains the age of 6 years and in such cases the court must direct for proper medication, feeding and over all well being of the child[99].

Right of compensation for violation of Fundamental Rights

In **Veena Sethi vs. State of Bihar**[100], the *Bhagwati*, J., court had promised to consider the question of compensation in Article 21 for the violation of constitutional right. In this case, some insane prisoners had to remain in jail for a period of 20 37 years because of lethargic attitude of authorities. The court simply ordered their immediate release and directed the state to pay journey allowance and maintenance for a week.

Rudal Shah vs. State of Bihar[101] is a case of far reaching importance in this area. There, it was held that the court has power to award monetary compensation in appropriate cases where there has been violation of the constitutional right of citizens. In this case, the court ordered the state for the payment of thirty thousand rupees by way of compensation to Rudal Shah who had to remain in jail for 14 years even

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[95] Ibid.
[96] (1999) 1 SCC 759
[97] (2001) 7 SCC 740
[98] Ibid.
[99] R.D. Upadhaya vs. State of A.P. AIR 2006 SC 1946
[100] AIR 1983 SC 339
[101] AIR 1983 SC 1086, see also Sebastian M. Hongray vs. Union of India, AIR 1984 SC 1026.

after his acquittal from the jail. A similar order of compensation has been made for the cases involving malicious arrest[102] and state violence causing death of and injury to certain innocent persons[103]. The Court has emphasized that the state officials must have good deal of respect for personal liberty of citizen and should not flout the laws by stooping such bizarre acts of lawlessness[104].

In **Neelawati Behra vs. State of Orrisa**[105], the Supreme Court made it clear that the state cannot escape from liability to pay compensation on the basis of 'Sovereign-immunity, if it has been established that fundamental right of an individual has been violated by the act of an official.

Thus the Supreme Court has awarded compensation for handcuffing[106], for illegal custody and torture[107], for death of innocent persons in police firing[108], death in police custody[109], for death due to police atrocity[110], killing of a prisoner by a prisoner in jail[111] and for fake police encounter[112].

In 1997 the Supreme Court clarified the compensatory jurisprudence for violation of fundamental rights in **D.K. Basu v. State of W.B.**[113] and laid down that liability to pay compensation in such cases is absolute and defence of sovereign-immunity is not available to state. The court also issued guidelines for arrest of accused persons[114].

Again the Supreme Court extended the right of compensation for the violation of right of health in Art. 21[115].

For violation of rights due to hazardous and dangerous employment the compensation has been also awarded[116].

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[102] Bhim Singh vs. State of J & K, AIR 1986 SC 494.
[103] Peoples Union for Democratic Rights vs. State of Bihar, AIR 1987 SC 355.
[104] See supra note 79 also see Peoples Union for Democratic Rights vs. State of Bihar (1987) 1 SCC 265.
[105] AIR 1993 SC 1960
[106] State of Maharastra vs. Ravi Kant (1991) 2 SCC 373
[107] T.C. Pathak vs. U.P. State (1995) 6 SCC 357 see also Arvind Singh Bagga vs. U.P. State AIR 1995 SC 117, Sube Singh vs. State of Haryana 2006 (54) ACC 873(SC)
[108] Peoples Union for Democratic Rights vs. State of Bihar AIR 1987 SC 355
[109] Chella Ram Konda Reddy vs. State of A.P. AIR 1989 A.P. 235
[110] Saheli, A Women Resources Center vs. Commissioner of Police, Delhi AIR 1990 SC 573
[111] Kawalpati vs. State of U.P. (1995) 3 SCC 600
[112] Inder Singh vs. State of Punjab AIR 1995 SC 1949
[113] AIR 1997 SC 610
[114] See also Joginder Kumar vs. State of U.P. (1994) SCC (Criminal) 1172, Ajit Singh vs. State of U.P. 2006 (6) ALJ 110(All.)(F.B.)
[115] Parmanada Katara vs. Union of India AIR 1989 SC 2039 also P.B. Khet Majdoor Samaj vs. State of W.B. AIR 1996 SC 2426
[116] M.C. Mehta vs. Union of India AIR 1987 SC 1086, also Union Carbide Corp. vs. Union of India AIR 1992 SC 248, Consumer Education and Research Center vs. Union of India AIR

These developments are significant because they attempt to ensure state accountability for governmental wrongs and inaction in protecting personal liberty and dignity of individual. The court has laid stress upon the duty of the State to maintain just and human condition in jail, to provide free legal aid and speedy trial to the prisoners and to see that injustice is not being done because of one's poverty and disability. The public-spirited persons and social action groups have been encouraged to agitate the cause of poor and deprived persons. For the enforcements of constitutional rights, the procedural bras and technicalities have been removed and the litigative process has been very much liberalized. The 'locus standi' conceptualism has been converted into public interest litigation to humanize the judicial process. The post *Maneka* judicial behavior is witness of the fact that the emphasis of the court has been on the procedural aspect thereof. The processual justice enshrined in Article 21 has developed a sensitized and human approach in the system and the court is trying to ensure state accountability for constitutional violations by creating a right of access to justice in favour of common man.

In every society, the human rights have to face acid test when they are confronted with a crime situation. No doubt that every individual enjoys his rights whether he is free or is confined to detention. Accused persons, whether convict or not, have been guaranteed equal rights and protections against mal-treatment, cruelty, torture and police excess. If his right is violated, he has been awarded compensation. It is seen with great dissatisfaction by a large section of society who believe that this liberal approach is a big cause for increase in crime. It is pleaded by them that the human right of a criminal has to be redefined from the angle of victim, particularly when the crime is of such nature as it may adversely affect not only the society but also the whole nation. This plea assumes more strength when the criminal is involved in terrorist activity. In the submission of this writer, a balancing view considering the perspective of victim has to be evolved which can serve the purpose of protection to human rights and at the same time the peace of society and security of nation may not be affected. It is also submitted that it is yet to be accepted by the society that the purpose of punishing a crime is to reform the criminal. It is always a great test for a civilized modern democratic society how it behaves with unfortunate persons who have marched on a wrong path.

The contents and components of Article 21 are still in the process of evolution. The human right value and social significance of Article 21 has largely enhanced in view of the importance attached to it through the

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1996 SC 922, M.C. Mehta vs. Union of India (1999) 6 SCC 9, 12, M.C. Mehta vs. Kamel Nath AIR 2000 SC 1997

process of attributing more and more positive meaning to the right, by linking it with human worth and dignity and by supplying it additional strength with the help of relevant directives contained in Part IV of the Constitution. The judicial process for the enforcement of constitutional rights has shown great creativity and force. The juristic efforts for ensuring state accountability for constitutional violations and inaction in providing welfare benefits to the weaker section are remarkable and they show the social significance of Article 21. The emphasis of the court on 'quality life' and on state obligation to secure the same to the people who are living in deprivation and suffering has rendered Article 21 as a real guarantee of human value, worth and dignity. These developments mark one step forward towards the constitutionally proclaimed objectives of liberty, equality and justice. And the journey is going on.

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LAW ON DNA, NARCO-ANALYSIS, POLYGRAPH & BRAIN MAPPING TESTS ETC.

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1. Scientific tests generally applied for investigation of crimes etc.- Scientific tests which are generally applied for the detection of crimes and criminals and determination of paternity etc. are as under---

(i) DNA (Deoxy Nucleic Acid)
(ii) RNA (Ribo Nucleic Acid)
(iii) Lie-Detector Test
(iv) Polygraph Test
(v) Brain-Mapping Test (P300)
(vi) Narco Analysis Test (Also known as Truth Serum Test)
(vii) Voice Analysis Test
(viii) Finger Print Test
(ix) Handwriting Test

2. Pre-conditions for the admissibility of scientific evidence--The admissibility of the result of a scientific test will depend upon its authenticity. Whether the brain mapping test is so developed that the report will have a probative value so as to enable a court to place reliance thereupon, is a matter which would require further consideration, if and when the materials in support thereof are placed before the court. Referring to the **US Supreme Court decisions in the cases of Frye vs. United States, (293F1013 DCcir 1923) and Daubart vs. Merryll Dow Pharmaceuticals Inc., 113SCt. 2786 (1993)**, it has been ruled by the Supreme Court of India that the pre-conditions for the admissibility of the scientific evidence (u/s. 45 of the Evidence Act) are as under---

(i) Whether the principle or technique has been or can be reliably tested?
(ii) Whether it has been subject to peer review or publication?
(iii) It's known for potential rate of error?
(iv) Whether there are recognized standards that control the procedure of implementation of the technique?
(v) Whether it is generally accepted by the Community?
(vi) Whether the technique has been introduced or conducted independently of the litigation? See--- **Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra, 2005 Cr.L.J. 2533 (SC—Three Judge Bench)**

3. Magistrate competent to order taking of Specimen Finger Prints or Handwritings etc. from Accused---- U/s. 5 & 6 of the Identification of Prisoners Act, 1920, a first class Magistrate is competent to order taking of specimen fingerprint, handwriting, thumb

impression, impressions of foot, impression of palm or fingers, showing parts of the body by way of identification for an investigation or proceedings under the Cr.P.C. and the same would not be hit by Art. 20(3) of the Constitution as "being witness against himself". See---

1. **State through SPE & CBI vs. M. Krishna Mohan, AIR 2008 SC 368**
2. **State of Bombay vs. Kathi Kalu, AIR 1961 SC 1808 (Eleven Judge Bench)**

4. DNA & other scientific tests when can be ordered by courts?--- DNA Test is not to be directed as a matter of routine and only in deserving cases such direction can be given. See---

1. **Goutam Kundu vs. State of W.B., (1993) 3 SCC 418**
2. **Banarsi Dass vs. Teeku Dutta (Mrs.), (2005) 4 SCC 449**

5. DNA profiling test of the person of victim of rape (Sec. 164-A (2) (iii) Cr.P.C. w.e.f. 2006)--- An investigating officer, u/s. 164-A(2)(iii) Cr.P.C., can get a victim of rape not only medically examined by a registered medical practitioner but can also get the material taken from the person of the woman (victim of rape) through a registered medical practitioner for DNA profiling. But according to the provisions under sub sections (4) & (7) to Sec. 164-A Cr.P.C. the woman (victim of rape) cannot be subjected to DNA test without her consent and in case of the woman being minor or otherwise incompetent to give consent then with the consent of some person competent to give consent on her behalf.

6. Evidentiary value of DNA test report--- Referring to the U.S. Supreme Court decision rendered in the case of R. vs. Watters, (2000) All.E.R. (D) 1469, the Supreme Court of India has ruled that the DNA evidence may have a great significance where there is supporting evidence, dependent, of course, on the strength of that evidence. In every case one has to put the DNA evidence in the context of the rest of the evidence and decide whether taken as a whole, it does amount to a prima facie case. See--- **Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra, 2005 Cr.L.J. 2533 (SC—Three Judge Bench)**

7. DNA Test to decide paternity when can be ordered by court?--- As regards the scientific tests of blood or DNA Test for determining the paternity or legitimacy of a child, the Supreme Court has laid down following guidelines for the purpose---

(1) That courts in India cannot order blood test as a matter of course;

(2) Wherever applications are made with such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising u/s. 112 of the Evidence Act.

(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis. See—**Goutam Kundu vs. State of W.B., (1993) 3 SCC 418**

8. Determination of paternity by blood grouping test--- The blood grouping test is a perfect test to determine questions of disputed paternity of a child and can be relied upon by courts as circumstantial evidence. But no person can be compelled to give a sample of blood for blood grouping test against his will and no adverse inference can be drawn against him for his refusal. See--- **Hargovind Soni vs. Ramdulari, AIR 1986 MP 57**

In the case of **Raghunath Eknath Hivale vs. Shardabai Karbharikale, AIR 1986 Bom. 386,** it has been held by the Bombay High Court that blood grouping tests have their limitation. They cannot possibly establish paternity as they can only indicate its possibilities.

9. Legitimacy of child--- Section 112 of the Evidence Act lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. This rule of law based on the dictates of justice has always made the courts inclined towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman. See---

1. **Dukhtar Jahan (Smt.) vs. Mohammed Farooq, AIR 1987 SC 1049**
2. **Amarjit Kaur vs. Harbhajan Singh, (2003) 10 SCC 228**

which make life worth living would be jeopardized and the same can be put in jeopardy only by law which entails fair procedure'[25].

In **Olga Tellis Case**[26] a five judges bench of the Supreme Court clearly laid down that right to livelihood is implicit in Article 21.

The learned Chief Justice tried to distinguish *Olga Tellis* from *Santram* on facts and rightly pointed out that in *Santram*, toutism was pleaded to be means of livelihood and under the constitution no person can claim the right of livelihood by the pursuit of an immoral occupation or a nefarious trade or business, like toutism, gambling or living on the gains of prostitution[27]. In *Olga Tellis*, however the petitioners did not claim the right to dwell on pavements or in slums for the purpose of pursuing any illegal or immoral activity[28].

Olga Tellis was developed further by the decision in *Umed Ram Sharma*[29], where the court laid down that right to life in Article 21 not only includes right of livelihood but also the right to means of livelihood. The view of the court was that the right to life embraces not only physical existence but also the quality of life, and for the residents of hilly areas, access to road is access to life itself. The court highlighted the important fact of utter deprivation of life opportunities for the hill people.

Maneka proposition that procedure in Article 21 must be fair, just and reasonable and its validity might be tested on the touchstone of Article 14 and even of Article 19 if the challenged measures contravenes any of the freedoms contained therein, has given a wide scope for judicial activism. Various personal liberties have merged out of Article 21 and the judiciary has started reading several fundamental rights to make a procedure just, fair and reasonable. The post *Maneka* judicial dynamics has rendered Article 21 as containing virtually all those rights which are necessary for the maintenance of human worth and dignity and it has become a key safeguard for the deprived, poor and victims of police tortures, either inside or outside the jail. The Supreme Court has frequently invoked Article 21 to ensure governmental accountability for human sorrow, suffering and deprivation.

Protection to workmen and Bonded Labourers

Francis holding was applied in the **Asiad case**[30] for protecting workmen employed in various construction work for Asiad from unfair

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[25] Ibid.
[26] Olga Tellis vs. Bombay Municipal Corpn. (1985) 3 SCC 545.
[27] Id. at 575; see also State of Bombay vs. R.M.D.C. AIR 1957 SC 699 where a similar argument was sued to deny gambling the status of trade under Art. 19(i)(g).
[28] Idid.
[29] State of Himachal Pradesh vs. Umed Ram Sharm, 1986 (1) Scales 182.
[30] Peoples Union for Democratic Rights vs. Union of India, AIR 1982 SC 1475.

exploitation by Thakedars who were charging one rupee commission form their per day wages. Several welfare labour laws were being violated and the workmen were not provided with proper living condition, medical and other facilities. The Court referring to *Maneka* and *Francis* holdings pointed out Article 21 has acquired new dimensions and the right to live with human dignity has become part of that Article. Linking Article 21 with various labour laws, *Bhagwati, J.*, pointed out that these labour legislations have been enacted with a view to benefit the workmen in their contract of service and they are clearly intended to ensure basic human dignity to them. He, therefore, held that if workmen are deprived of their rights and benefits to which they are entitled under these social welfare laws, there would be clear violation of Article 21. He held that the government was statutorily responsible for securing such rights and benefits to workmen.

The Asiad holding was applied in **Bandhua Mukti Morcha vs. Union of India**[31] to ensure release of bonded labourers who were working under inhuman and intolerable conditions in stone Durries situated in Faridabad Distrrict of Haryana. *Bhagwati, J.*, took the view that any form of 'forced labour' of 'bonded labour' was voilative of human dignity and contrary to basic human values. He remarked that Article 21 guarantees right to live with human dignity free from any type of exploitation and which derives its life breath from Article 23, 39(e) and (f), Article 41 and 42 of the Constitution. He, therefore, laid down:

> *"(I)t (the right to live with human dignity) must include protection of the health and strengths of workers, man, women and against abuse of the children of tender age, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities just and human conditions of work and maternity relief*[32]*."*

Bhagawati, C.J., affirmed this view in **Neerja Choudhary vs. State of M.P.**[33], and invoked Article 21 to ensure identification, release and rehabilitation of the bonded labourers. He held:

> *"It is the plainest requirement of Article 21 and 23 of the Constitution that the bonded labourers must be identified and released and on release, must be suitably rehabilitated. The Bonded Labour system (Abolition) Act 1976 has been enacted pursuant to the Directive Principles of State policy with a view to ensure basic human dignity to the bonded labourers and any failure of action on the part of state government in implementing the provisions of the legislation would be*

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[31] AIR 1984 SC 802.
[32] Id. at 811-812.
[33] AIR 1984 SC 1099.

the clearest violation of Article 21 apart from Article 23 of the Constitution"[34].

Extension of protection of Article 21 to safeguard the rights and interests of working class and enlarging it to ensure the identification, release and rehabilitation of bonded labourers witness the increasing importance of the right to life and personal liberty. It is clear from the above discussion that Article 21 has been used to provide to the workers several legislative benefits and in the process, Article 23, which was lying as a dead letter in part III of the Constitution, has been made a living reality. Linking welfare condition of working class with the human dignity has made Article 21 a potent tool to provide socio-economic justice to the weaker sections of society and to ensure state accountability for human pains and sufferings. Article 21 has become a reminder to the state of its responsibility to see that the labour-welfare haws are being implemented and observed.

Detention in civil prison for realization of debt

Section 51 of the Civil Procedure Code authorizes detention in civil prison of judgment-debter in execution of a decree for payment of debt. In **Jolly George Varghese vs. Bank of Cochin**[35] the issue was whether such a procedure for deprivation of personal liberty was fair and reasonable procedure within the meaning of Article 21.

Speaking for the Court, *Krishna Iyer, J.*, pointed out that the high value of human dignity and the worth of the human person enshrined in Article 21 did not permit state to cost to person in prison because of his inability to meet contractual obligation or for his failure to repay debt. He was of the view that such a procedure could only be adopted on willful failure to pay despite sufficient means. This conclusion he reached with the help of Article 11 of the International Covenant on Civil and Political Rights[36] to which India is also a party. Introducing poverty jurisprudence in article 21, the learned justice remarked:

> *"to be poor in this land of Daridra Narayana (Lord of poverty) is no crime and to recover debts by the procedure of putting one in prison is too flagrantly voilative of Article 21 unless there is proof of his willful failure to pay in spite of his sufficient means"*[37].

Jolly Varghese holding is remarkable for its humanistic approach and for its emphasis that the dignity of individual is paramount and it cannot be violated because of one's poverty and disability.

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[34] Id. at 1106.
[35] AIR 1980 SC 470.
[36] Art. 11 of the Covenant reads, "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."
[37] See supra note 35 at 475.

In **D.B. Patnaik vs. Sate of A.P.**[38] Chandrachud, J., clearly laid down:

> *"Convicts are not ... by mere reasons of the conviction, denuded of all the fundamental rights which they otherwise possess ... a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law"*[39].

D.B. Patnaik was quoted with approval and applied in subsequent cases and it was laid down that a prisoner was not skipped of his fundamental rights, save those, which were inconsistent with his incarceration[40]. In United States, the judiciary has taken a very liberal stand and emphasizing on 'civilized standards of human decency' inside and outside the jail, it has pointed out that-

> *"Prisoners are still persons entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process"*[41].

It was therefore emphasized that conviction of a person did not render him a non-person and his right are subjected to the prison administration and imposition of any serious punishment within the prison, otherwise than which were specified in the sentence, would require procedural safeguards[42].

After *Maneka*, the Supreme Court has tired to humanize the prison conditions and inject constitutional consciousness into the jail system with the help of Article 21. In the zeal of ensuring justice to the prisoner and for saving him from inhuman cruel and degrading treatment, the court has laid down that Article 21 would give same protection to prisoner as has been given in America with the help of due process clause. Thus, in **Sunil Batra**[43], *Krishna Iyer, J.*, expressed the view:

> *"True our constitution has to "due process" clause or the VIII Amendment, but in this branch of law, after Cooper (Supra) and Maneka (Supra) the consequence is the same"*[44].

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[38] (1975) 2 SCR 24.
[39] Ibid.
[40] See Francis Coralie vs. Delhi Administration, AIR 1981 SC 746, See also Sunil Batra vs. Delhi Administration, AIR 1978 SC 1675, also AIR 1980 SC 1579.
[41] See Eve Pell (174) 417 US 817.
[42] Ibid.
[43] See Air 12978 SC 1675.
[44] Id. at 1690.

Therefore, he held that for a prisoner all fundamental rights are an enforceable reality, though restricted by the fact of imprisonment, and be shall not be deprived of them save by methods right, just and fair[45].

Rights Against Torture and Solitary Confinement:

'Life and personal liberty' has been given wide construction after *Maneka* and Article 21 has become and main protector of human dignity. Article 21 has been, therefore invoked to defend the prisoner against the mal-practices of prison administration, which are very much common in the country. Thus, it has been held that right to live with human dignity is necessary component of right to life in Article 21 and any form of torture or cruel, inhuman or degrading treatment would be offensive of human dignity and would constitute an inroad into the right to life. The court has held that any such treatment will have to satisfy the test of just, fair and reasonable procedure contained in Article 21[46].

Solitary Confinement:

Similarly, the court has taken the view that solitary confinement is physically and mentally injurious for a prisoner and has a degrading and de-humanizing effect on him. The life in solitary confinement is even worse than in imprisonment, for life and the limited personal liberty of the prisoner is rudely and unreasonably curtailed. The view of the court has been that the right to move, mingle, talk and share company with other co-prisoners is implicit in Article 21 and that cannot be taken away except by fair, just and reasonable procedure established by law[47].

Bar Fetters and Confinement in Chains

The jail laws and Manuals normally permit bar fetters and confinement in Chains. This was challenged by Charles Sobraj. The Court took the view that putting bar fetters for an unusually long period without due regard for the prisoner and the security of the prison would certainly not be justified. It is voilative of human dignity and should not be applied unless the convict or under trial has a tendency of violence or escape[48].

The view of the Court has been that solitary confinement and confinement in chains are measures of jail punishment and they are imposed as an additional punishment on the sentences and such additional punishment should not be imposed unless there are some weighty reasons for the same. Applying *Maneka*, the Court has expressed the view that minimal hearing must be given to the victim before or after the imposition

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[45] Id. at 1691 also see Sunil Batra vs. Delhi Administration AIR 1978 SC 1675.
[46] See Francis, Supra note 19.
[47] See Sunil Batra vs. Delhi Administration AIR 1978 SC 1675.
[48] Ibid.

of such punishment. The court rightly pointed out that bar fetters are absolutely unnecessary when the prisoner has been kept in secure cells[49].

Sunil Batra has been invoked and affirmed in subsequent cases[50] and the crux of the matter has been that any cruel, inhuman or degrading treatment will violate the worth and dignity of the human person and it will have to be tested on the touchstone of just, fair and reasonable procedure. Solitary confinement and confinement in chains are jail punishment in addition to the actual sentence and the jail authorities cannot impose additional punishment unless it is necessary for the security of jail and unless a minimum opportunity of hearing is given to the victim. For ensuring justice to the prisoner, the court has read Article 5 of the Universal Declaration of Human Rights 1948[51] and Article 10 of the International Covenant on civil and political Rights[52] and has pointed out that treating the prisoners as a non-prisoner would result in constitutional dehumanization and repudiation of world legal order[53]. Insisting on the need of prison reform and awaking human right consciousness in the jail system, the court has given 'functional plurality' to habeas corpus writ and enlarging its scope in terms of constitutional objectives and regard for human decency and dignity it has directed for the release of victims of jail torture[54].

The *Batra opinion* is based on the assumption that the jails are "laboratories of torture or warehouses where human commodities are sadistically kept[55]" and the court has 'distinctive duty to reform prison practices and to inject constitutional consciousness into the system[56]". By according the protection of fundamental rights to the convicts and evincing and activist interest in prison reform the court, wants to force the state to humanize the prison process as soon as possible. The focus of Batra is, thus, on revival of prison justice through "judicial mid-wifery" and to 'alert the nation' to the need "to bridge the human gap between prison praxis and prison justice[57]."

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[49] Ibid.

[50] See, Sunil Batra vs. Delhi Administration, AIR 1980 SC 1579; Mantoo Majumdar vs. State of Bihar, AIR 1980 SC 847; Prem Shanker vs. Delhi Administration, AIR 1980 SC 847; Charles Sobraj vs. Central jail, AIR 1978 SC 1514.

[51] Art. 5 runs "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[52] Art. 10 runs, "all person deprived to their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

[53] See Sunil Batra II, Supra note 42 at 1590.

[54] Ibid.

[55] See Sunil Batra I, Supra note 39 at 1726.

[56] Id. at 1710.

[57] Ibid, see also Prof. Gouse, XIV A.S.I.L. (1978) at 432.

In the submission of this writer, lawful imprisonment necessarily takes away many rights and privileges of the ordinary citizen. But, he is not wholly stripped of constitutional protection given to him under Article 14, 19 and 21 of the Constitution. There is no iron curtain drawn between the constitution and the prisons of the country. Torture and cruel treatment stand against the constitutional norms and violate the guarantee of life and personal liberty of the prisoners, which assure them of fair process capable of emancipating them from the fearful injustice heaped on them by the prison process. No doubt that certain restrictive measure may be applied on the freedom and liberty of the prisoner in order to maintain security of jail. Some coercive method may also be adopted to ensure that a prisoner may not escape or may not create violence in jail. Therefore, administration of prison justice must involve mutual accommodation of institutional needs of jail and liberty and dignity of individual.

Right of Free Leal Aid:

In **Hoscot vs. State of Maharashtra**[58], perhaps for the first time, the court read free legal aid as fundamental right contained in Article 21. There, *Krishna Iyer, J.*, took an integrated view of the rights in Article 19 and 21, the directive on legal aid in Article 39-A, the procedural safeguard contained in criminal procedure code of the country and the procedural fairness and concept of natural justice enshrined in Article 21, and held that it was state's duty and not charity to serve copy of the judgment to the convict in time to enable him to file and appeal against it and to provide free legal service to a prisoner who was indigent or otherwise disabled to secure legal assistance.

The concept of free legal aid has been formulated by *Bhagwati, J.*, in **Hussainara Khatoon vs. State of Bihar**[59] in following words:

> *"This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the state is under a mandate to provide a lawyer to an accused person it the circumstances of the case and the needs of justice so required, provided of course the accused does not object to the provision of such lawyer"*[60].

The Parliament has passed the Legal Services Authority Act 1987 to give effect to the provisions of Art. 39-A of the Constitution. The District Legal Services Authority constituted under the aforesaid Act have been specially required to provide assistance to the poor litigants,

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[58] Ibid.

[59] AIR 1979 SC 1369.

[60] Id. at 1374, see also Francis case supra note 19, Khatri vs. State of Bihar AIR 1981 SC 928, State of Gujarat vs. Shailesh Bhai Mansukhalal Shah (2007) 7 SCC 71.

convicts, under trials and the litigants belonging to the poor sections of the society in the form of court fees, expenses of the litigations and the Advocates fee etc.

Right of Speedy Trial

A very unfortunate state of affairs is visible at present in the country due to long pre-trial confinement of the accused persons in jail. Thousands of accused person may be found languishing in prisons awaiting trial for various offences[61]. The Supreme Court has, therefore, tried to rectify this deplorable situation in several ways. Firstly, the court fundamental right contained in Article 21. Secondly, it has expressed it's anxiety on this alarmingly unfortunate state of affairs and has emphasized that such law and procedure should be radically changed[62]. In case the under trials have been found to have already undergone detention in jail for a period longer than the prescribed sentence for the offence, the court has directed for their release. The view of the court has been that in such cases further confinement of the under trial would be illegal and would violate Article 21 of the Constitution. The court has remarked that it is the constitutional obligation of the state to devise such a procedure as would ensure speedy trial to the accused and the state cannot escape from the responsibility by pleading financial or administrative inability. The state is bound to ensure speedy trial and whatever is necessary for this purpose has to be done by it[63].

A Constitutional Bench of seven judges of the Supreme Court in A.R. **Antulay vs. R.S. Nayak**[64] and **P. Ramachandra Rao vs. State of Karnataka**[65] has made it clear that although speedy trial is a fundamental right of an accused, the courts cannot prescribe any specific time limit for the conclusion of a criminal trial.

Unnecessary adjournment on the ground of lawyer's boycott and strike[66], delay in pronouncing judgment[67] and delay in framing charges[68] have been held to be voilative of right of speedy trial.

The Supreme Court has spelt out many more rights with the help of the Preamble of the constitution, Human Right Declarations, Directive Principles of the Constitution and the liberal construction given to the guarantee contained in Art.21 of the Constitution. Article 21 has been

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[61] See 78th Report of Law Commission on Under Trail Prisoners in Jail (1979)
[62] Hussainara Khatoon vs. State of Bihar, AIR 1979, SC 1360.
[63] See Hussainara Khatoon vs. State of Bihar, AIR 1979 SC 1569, also AIR 1979 SC 1377 see also Kadra Pahadiya vs. State of Bihar, AIR 1982 SC 1167.
[64] AIR 1992, SC 1701
[65] (2002)4 SCC 578 also see Moti Lal Saraf v. State of J & K, AIR 2007 SC 56.
[66] Koluttumottil Razak vs. State of Kerla (2000) 4 SCC 565
[67] Anil Rai vs. State of Bihar AIR 2001 SC 3173.
[68] Balkrishan Pandey vs. State of U.P. (2003) 12 SCC 186.

COMPENSATION TO VICTIM

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Introduction:

Victimology, as a separate discipline deals with the study of the problems of victims of crimes and their right to claim compensation which, includes rehabilitation and restitution, from the offender or the authorities of the State. The traditional concept of criminal justice administration which connotes, legislation of penal law, enforcement of the law and detection of crime, trial of offenders and execution of sentence passed by a Court of law does not comprehend the duty of the State to alleviate the suffering of the innocent victims and/or their families for the loss of life, liberty, property and reputation and for bodily or mental injury in consequence of a crime.

In a large number of cases untold misery to the victims and their family members ensues in the event of murder of a sole earning member of the family and destruction of dwelling house and property by arson and loot, permanent disability resulting from injury social stigma and personal trauma on account of sexual assault, loss of property due to the offences of cheating, robbery, dacoity and theft. In many cases the victims are left in the lurch.

Compensation to victims is a new subject for Indian Judicial System and it has a number of aspects historical, philosophical, legal, procedural and comparative. It is the one of justified complaint against the Penal law that in the criminal proceedings the injured party is generally neglected the conviction and sentence past on offender may satisfy the State which is generally responsible for initiating the prosecution but it is poor consolation to the innocent victim of the crime.

Expert's belief that the idea of compensation was long neglected because of vide spirit feeling that crime victims were some how to blame for what happened to them.

India has a democracy and sovereignty rests with the people who govern themselves. The people of India have given unto themselves the Constitution which light on the basic structure of political system under which the country is be govern. Since the Don of civilization the maintenance of law and order has been the prime concern of every organized society towards this ends India to have to establish a system of criminal justice administration which draws inspiration and sustenance from the constitution.

However, in current scenario the entire demographic landscape of the country is in a State of flux. The burgeoning population has given rise

to a spate of new crimes previously unheard of. Our morning newspapers carry scores of harrowing accounts of crimes that raise questions on the state and health of the society, erosion of our morals and ethics, and the deterioration of values in our actions. It also questions the efficacy of the criminal justice system in India, and its effectiveness in fulfilling the objectives of ensuring harmony in the society.

In Indian Judicial System there are many provisions to secure the rights of accused. The Human Rights is one of the main rights about this. But for the victim there are some few provisions in laws which are not going to apply seriously and not fruitful. So it is needed that there may be some serious efforts for giving compensation to the victims of crime.

It is imperative for the State to incur expenditure to manage the various departments of law enforcing agencies in order to maintain peace and tranquility in the Society, and to prevent the unlawful activities of anti-social elements. At the same time, the duty of a welfare State to devise ways and means to bring solace to the hapless victim by way of payment of compensation on humanitarian grounds is no less important. It will give some consolation to the distressed victim.

The necessity of paying compensation to the victims of crime has also engaged the attention of the United Nations. The 7th United Nations Congress on Preventionof Crime and Treatment of Offenders came out with a declaration of basic principles of Justice of Victims of crime and abuse of power, which was later adopted by the U.N. General Assembly. In the declaration, the U.N. defined the "Victims of Crime" as follows:-

"1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless or the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability."

The U.N. Social Council's draft "Guidelines for Measures on behalf of Victims of Crime and Abuses of Power" laid down the types of harm, injury, loss or damage caused by wrongful conduct. It is as follows:-

"the loss of life or of support, impairment of health, including physical or psychological injury, paid and suffering both physical and mental, loss of liberty, loss of income or livelihood, loss of property, or damage to it which is not subject to restitution and deprivation of the use of property. Due account must also be taken of the special damages or expenses and costs reasonably incurred by the victim or, where appropriate, by the victim's family, dependants or heirs, which resulted from the victimization, including medical costs, transportation costs, funeral and burial costs, legal costs, treatment and rehabilitation costs, and similar and related costs and expenses."

The victims in general may be broadly classified into twelve categories. They are:-

1. Victims of war.
2. Victims of accidents that occur.

   (a) on Road, (b) on Railways, (c) on the Aircraft, (d) on Sea and (e) in the workplace.
3. Victims of abuse of power by lawful authority:-

   (a) Custodial death, (b) Death due to firing; (c) Groundless arrest and detention; (d) Unnecessary harassment.
4. Victims of rape.
5. Victims of criminal conspiracy, offences of giving or fabricating false evidence, fabricating false documents or forgery of records, valuable documents, certificates or causing disappearance of evidence by way of destruction or concealment of the documents, fraudulent acts with the intention of causing bodily or mental harm to a person, murder, miscarriage, hurt, wrongful restraint and wrongful confinement, assault, use of criminal force, kidnapping, abduction, forced labour, unnatural offence, theft, extortion, robbery and dacoity, cheating, mischief, arson, criminal trespass, adultery, bigamy, fraudulent marriage, dowry torture and death, defamation, criminal intimidation, insult and annoyance.
6. Victims of offences relating to manufacture and sale of adulterated, substandard and prohibited drugs, liquor and food.
7. Victims of offences of smuggling, black-marketing, unfair trade practice and evasion of tax.

8. Victims of offences committed by public servants, such as negligence and inefficiency in discharging their duties, corruption, bribery and misappropriation of public funds.

9. Victims of environmental pollution and wanton destruction of flora and fauna, and public nuisance.

10. Victims of offense committed in the election.

11. Victims who are also offenders as perpetrators of crimes such as drunkenness, consumption of narcotic drugs, gambling, attempt to commit suicide and prostitution, which are otherwise known as victimless crimes.

12. Victims who create a compelling situation in which the offender reacts violently by committing a criminal act. Sometimes the victim provokes the offender to commit the crime. Victims of affray, free fight and rioting may also be included in this category.

The necessity of compensating the victims of war was declared in the draft guidelines for Measures on behalf of Victims of C5rime and Abuse of Power by the United Nations Economic and Social Council. The treaties following both the First and Second World Wars obliged the defeated powers to pay full compensation with respect to war crimes and crimes against humanity committed by their armed forces on the territories of the Allied and Associated powers.

The Personal Injuries (emergency Provisions) Act, 1962 and the Personal Injuries (Compensation Insurance) Act, 1963 envisage that the Central Government has the power to make schemes for the grant of relief in respect of personal injuries sustained during the periods of emergency that were declared on 26.10.1962 and 3.12.1971. Payment by way of allowance, shall be payable only where the injury or disease causes serious and prolonged or permanent disablement or death as a result of war.

Victims of accidents are those who sustain bodily injuries causing either permanent or temporary disability and the legal representatives of the deceased who dies as a result of it. It may arise out of the use of a motor vehicle. Railway train, Aircraft, a Ship or while operating a machine in a factory.

Section 140, 161 and 166 of the Motor Vehicles Act, 1988 entitle a victim of motor accident to prefer a claim for compensation before a duly constituted Motor Accident Claims Tribunal. Provision has also been made empowering the Government to establish and administer a solatium fund out of which compensation can be paid incases of death or grievous injury resulting in hit and run cases where the persons guilty of causing the accident remain untraced.

Section 124 and the rules framed under Section 129 of the Indian Railways Act, 1989 provide for payment of compensation to the Railway accident victims.

Under Section 5 of the Carriage By Air Act, 1972, persons who are carried by aircraft are entitled to claim compensation in the even of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board aircraft or in the course of any of the operations of embarking or disembarking. Under Regulation No. 5 of the Indian Airlines Non-International Carriage (Passenger and Baggage) Regulations, 1980, the Indian Airlines Corporation is liable for damage sustained in such event. Under Section 346 of the Merchant Shipping Act, 1958 the owners of the ship shall be liable to pay compensation whenever loss of life or personal injuries are suffered by any person on board a ship owing to the fault of that ship and of any other ship. Under Sections 3 and 10A of the Workmen's Compensation Act, 1923 a workman is entitled to claim compensation in the event of death or bodily injury caused to a workman in the course of his employment or while discharging his duties as a workman.

The Government of India enacted Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 to settle the claim of compensation for those who suffered due to leakage of lethal gas from the Union Carbide Corporation at Bhopal. On the night of December 2, 1984 there was massive escape of lethal gas from the MIC storage tank at Bhopal plant of the Union Carbide (I) Ltd. (UCIL) as a result of which 4000 human lives were lost and tens of thousands of citizens of Bhopal were physically affected. Action was brought up by the Union of India as parent's patriae before the District Court, Bhopal pursuant to the statutory enablement in that behalf claiming 3.3 billion dollars as compensation against the company. When an interlocutory matter pertaining to the interim compensation came up for hearing there was a Court assisted settlement between the Union of India and the Union Carbide Corporation (UCC – owing 50.99 per cent. Shareholders of UCIL). Under this settlement a sum of US Dollars 470 million was agreed to be paid by the UCC to the Union of India in full settlement of all the claims of all victims of the gas leak against the UCC.

In a number of cases, the Supreme Court has laid down sound guidelines with regard to assessment of just compensation to be paid to the victims of accidents. Though in some hard cases, either no compensation was paid or inadequate compensation was paid, yet it is generally found that the Courts and tribunals have been liberally granting compensation to such victims in accordance with the observations made by the Supreme Court.

Thus, the victims of war and accidents have the right to claim compensation under the statute. But there is no such right of other victims, though compensation has been awarded in a few cases, at the discretion of the Court.

In Kasturi Lal v. State of U.P., (AIR 1965 SC 1039): 1965 (2) Cri.L.J. 144, it was held that the State is immune from liability to pay damages to an injured, if a tortuous act committed by public servants in course of employment and in exercise of statutory functions delegated to them by the Government. It is observed that there is a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants, which are not referable to the delegation of any sovereign powers. If the tortuous act is committed in discharge of statutory functions based on the delegation of sovereign powers of the State, then the action for damages will not lie.

But later the Supreme Court in Nilabati Behera v. State of Orissa, (AIR 1993 SC 1960): 1993 Cri.L.J. 2899 held that the concept of sovereign immunity is not applicable to the cases of violation of fundamental rights. It is observed as follows:

"A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution."

In Sebastian M. Hongray v. Union of India, (AIR 1984 SC 1026: 1984 Cri.L.J. 830), two persons were taken to the Phungrei Camp by the jawans of 21st Sikh Regiment on March 10, 1982. In a writ of habeas corpus, the Court directed the concerned authorities to produce those two persons, who were reported to be missing since then. The Government finally failed to do so. This was considered to be a case of death of persons while in custody of the lawful authority. The Supreme Court, in

the circumstances, keeping in view the torture, the agony and the mental obsession through which the wives of the persons directed to be produced had to pass, instead of imposing a fine, directed that as a measure of exemplary costs as is permissible in such cases, the respondents shall pay Rs. 1 lakh to each of the aforementioned two women.

In Nilabati's case a person was taken to custody by a police officer on 1.12.1987 at 8 a.m. for interrogation in connection with a crime and he was found dead the next day on the railway track near the Police Outpost without being released from custody. His death was unnatural, caused by multiple injuries sustained by him. In the absence of a plausible explanation by the police authorities and the State, consistent with their innocence, it was held that the obvious inference is that the fatal injuries were in inflicted to him in police custody resulting in his death, for which the respondents are responsible and liable. The Court, accordingly, directed the State of pay a sum of Rs. 1,50,000/- to the mother of the deceased and a further sum of Rs. 10,000/- as costs within three months, by holding that it is a clear case for award of compensation to the petitioner for the custodial death of her son.

The Supreme Court, in State of M.P. v. Shyam Sunder Trivedi, 1995 AIR SCW 2793, found that the victim died in police custody as a result of extensive beating given to him. The Sub Inspector of Police was sentenced to pay a fine of Rs. 50,000/- and other accused sentenced to pay Rs. 20,000/- each and the entire amount of fine on realization was directed to be paid to the biers of the deceased. It was observed that torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity.

ON 19th April, 1986, the police personnel surrounded a gathering of 600 to 700 poor peasants and landless people mostly belonging to the backward classes, while holding a peaceful meeting within the compound of Gandhi Library in Arwal. Without any previous warning or any provocation on the part of the people who had so collected, the police opened fire as a result of which several people were injured and at least 21 persons including children died. The court, on a consideration of the facts and circumstances of the case, directed the State Government to pay a sum of Rs. 20,000/- to the dependants of the deceased and Rs. 5,000/- to every injured person. (See – Peoples' Union for Democratic Rights v. State of Bihar – AIR 1987 SC 355:1987 Cri.L.J. 528).

In Rudul Sah v. State of Bihar, AIR 1983 SC 1086: 1983 Cri.L.J. 1644, the Supreme Court found that the petitioner's prolonged detention in prison after his acquittal was wholly unjustified and illegal. It is said that Article 21 will be denuded of its significant content if the power of the Supreme Court were limited to passing orders of release from illegal detention. The only effective method open to the judiciary to prevent

violation of that right and secure due compliance with the mandate of Article 21, is to mulct its violators in the payment of monetary compensation. The right to compensation is thus some palliative for the unlawful acts of instrumentalities of the State which act in the name of public interest and which present for their protection the powers of the State as shield. Therefore, the State must repair the damage done by the officers to the petitioner's rights. The State was therefore directed to pay a sum of Rs. 30,000/- to the petitioner in addition to the sum of Rs. 5,000/- already paid by it.

In Bhim Singh v. State of J. & K. (AIR 1986 SC 494:1986 Cri.L.J. 192), a member of the Legislative Assembly was arrested while en route of seat of Assembly and in consequence, the number was deprived of his constitutional rights to attend the Assembly Session and responsibility for arrest lay with higher echelons of the Government. The person was not produced before the Magistrate within the requisite period. Arrest was made with mischievous and malicious intent. There was, therefore, gross violation of his rights under Articles 21 and 22(2) of the Constitution. It was held that it is a fit case for compensating the victim by awarding a compensation of Rs. 50,000/-

In Saheli v. Commissioner of Police, Delhi (AIR 1990 SC 513), a boy about 9 year old beaten by the police in course of some investigation into a crime. He died as a result of the assault by a police officer. It was held that the State is liable to pay compensation, if death of a person occurs due to police atrocities. The State Government was directed to pay Rs. 75,000/- as compensation the mother of the victim.

In Inder Singh v. State of Punjab, (AIR 1995 SC 1949: 1995 Cri LJ3235), seven persons were abducted and eliminated by police authorities by misusing official machinery to wreak private vengeance. State as token of its failure to enforce law and order to protect its citizens, was directed to pay Rs. 1.50 Lakhs to the legal representatives of each of the seven victims.

In Central Co-operative Consumers' Store Ltd. V. Labour Court, (AIR 1994 SC 23), it was found that apart from insult, humiliation and harassment thrust on a sales girl of a Co-operative Store, the manager removed her from service without giving a notice to her. Her removal from serve was held to be illegal by all the courts. She had to fight the litigation for a period of nearly 20 years. As a result, the Co-operative Society had to pay about Rupees three lakhs to her for the thoughtless acts of its officers. The Supreme Court while asking the society to pay the amount directed to replenish itself and recover the amount from the personal salary of the officers of the Society.

In Radha Bai v. Union Territory of Pondicherry, AIR 1965 SC 1476, it was found that a woman officer of the Pondicherry Administration was harassed by the authorities. She was fighting for her cause for 17 years. The Supreme Court ordered the government to pay her Rs. 3 lacks as compensation for lass of reputation and honour and the agony suffered in the long battle. The amount of compensation was directed to be paid jointly by the Union Territory of Pondicherry and the then Home Minister of the State.

In Lucknow Development Authority v. M.K. Gupta, (AIR 1994 SC 787), it was found that an allottee of a flat by the housing authority was entitled to get compensation for deficient service under the Consumer Protection Act, 1986 (as it stood prior to the amendment), Apart from awarding compensation, the supreme Court held that the compensation should be recovered from the personnel of the concerned department or authority of the State.

In Delhi Domestic working women's Forum v. Union of India, (1965 SCC (Crl) 7), some jawans raped six women while traveling in the train. Appropriate action was not taken against the culprits. In that context, the Supreme Court observed as follows;

"It is necessary to indicate the broad parameters in assisting the victims of rape.

(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well- acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to haw she might obtain help of a different nature from other agencies, for example mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represents her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocated willing to act in these cases should be kept at the police station for victims who did not have particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the Court upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorized to act at the police station before leave of the Court was sought or obtained.

(6) In all rape trial anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the directive Principles contained under Article 38 (1) of the Constitution of India to set up Criminal injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatized to continue in employment.

(8) Compensation for victims shall be awarded by the Court on conviction of the offender and by the Criminal Injuries Compensation Board whether of not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of rape."

In Gudalure M.J. Cherian v. Union of India, (1995 SCC (Crl) 925), some miscreant broke open the widow of the house where the Sister of a Missionary Society were staying. The miscreants committed rape Society was staying. The miscreants' committee rape on two Sisters and other were assaulted. The Supreme Court directed the State to pay a sum of Supreme Court directed the State to pay a sum of Rs. 2,25,000/- as compensation to each of the two Sisters on whom rape was committed by the assailants and sum of Rs. One lakh each to others who were assaulted.

Compensation to the victims of abuse of power by lawful authorities and victims of rape was awarded in exercise of the jurisdiction under Article 32 of the constitution of India, for violation of the fundamental rights. Though damages could be claimed in a civil suit, yet it was found that there was violation of fundamental Rights of the victims and as such they are entitled to the compensation. A civil suit for compensation entails heavy expenses besides the delay in getting the relief.

Section 250, 357, 358, 359 of the Code of Criminal Procedure, 1973 and Section 5 of the Probation of Offenders Act 1958 are some of the provisions relating to the power of the Court to award compensation to the victims. Section 250 empowers the court to award compensation for accusation without reasonable cause. Section 357 empowers the court to

direct the whole or any part of the fine amount of if no sentence of fine is imposed, then specified amount as compensation to the victim on conviction of the accused person. Section 358 lays down that maximum amount of rupees on hundred as compensation may be ordered to be paid by the Magistrate to persons who have been groundlessly arrested. Under Section 359, the Court can order the accused to pay costs of the proceeding in a non-cognizable case, if the accused is convicted. Under Section 456, the Court has the power to restore possession of immovable property on conviction of the accused for criminal trespass. Under Section 5 of the Probation of offenders Act, the Court has the power the direct the offenders who have been released under the Act to pay compensation to the victims.

Under Section 357 and 359 of the Code of Criminal Procedure and under Section 5 of the Probation of Offenders Act, the victim is entitled to get compensation only in the event of the conviction of the offender. That apart, it is entirely at the discretion of the Court that a victim is given compensation. These provisions of the code of Criminal Procedure and the Probation of Offenders Act are practically circumscribed by the conditions that the accused person must have been convicted and the fine amount, if imposed is recoverable or the accused commits a probationable offence. These provisions do not create any right to claim compensation in favour of the victim. Moreover if the convict is incapable of paying the fine or the compensation as ordered by the Court on grounds of poverty, the Victim is deprived of getting it from any other source. Award of one hundred rupees under Section 358 of the Code of Criminal Procedure can be hardly said to by any compensation.

In Hari Kishan & State of Haryana v. Shukhbir Singh (AIR 1988SC 2127: 1989 Cri LJ 116) the Supreme Court while considering the significance of Section 357 of the Code of Criminal Procedure, Said:

> " ..... It is an important provision, by courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that his power of court to award compensation is not ancillary to other sentences, but it is in addition thereto. This power was intended to do something to re-assure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender... We there for recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way."

There are hundreds of cases in which the accused persons are not convicted although offences are found to have been committed against some innocent persons. In such case, the victims of crime are left without any remedy.

The prosecution must prove the complicity of the accused in the crime beyond any reasonable doubt. If the court finds that no offence is made out, according to law, there is no question of having a victim. Although the Court finds that an offence has been committed against the aggrieved complainant, yet it may acquit or discharge the accused on one or more of these grounds, namely, (a) even though the case is true, yet no clue was found to implicate the accused in the crime during the investigation; (b) no sufficient legal evidence was available against the accused at the trial for holding him guilty; (c) the alleged criminal conduct of the accused could get protected under any of the exception provided in the Indian Penal Code, such as right of private defence of property and person, incapacity, insanity of the accused or lack of mens rea (guilty intention) etc., (d) in some cases, prior sanction for prosecution of certain authorities is required to prosecute an offender and for want of such sanction, the accused is entitled to acquittal, and (e) there may be a case of mistake of fact or mistaken identity of the accused person as the culprit. In such circumstances, it will be unjust to deny compensation to the victims who deserve to get the same, merely on the ground of acquittal of the accused even though a crime has been committed.

So far as the victims falling under categories 6 to 12 are concerned, they are the general public. So far as the persons who suffered on account of their own illegal conduct, such as victimless crimes are concerned, steps are usually taken by the State to reform and rehabilitate them. If compensation is paid to the victims of this category, it would amount to rewarding the offender.

It is found that some of the victims are in a real sense instigators. Their attitudes, wishes and personalities seem to provoke action by the doer. The actual affinity between the doer and the victim was found to range from complete indifference to conscious impulsion. There are some discernible attitudes which determine the affinity of victim and the doer. They are the attitudes of 'submitting, conniving, passively submitting, cooperative, contributory, provocative, instigative and soliciting. A person, who is equally responsible for the commission of a crime, is also a perpetrator of the crime. Offences like affray, free fight and rioting between some groups or people which result in the disturbance of public peace and tranquility are indeed the crimes against the entire community of a locality. Almost all the offenders sustain injuries in such cases. If such acts cause tension and disharmony in the lives of the people of the society, compensation to such injured persons is inappropriate.

The U.N.O. in its declaration of 'Basic Principles of Justice for Victims of Crime and Abuse of Power' laid down the method of tackling the problems of victims of crime and victims of abuse of power. They are as follows:-

"Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

Informal mechanisms of the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Offenders or third parties responsible for their behaviour should where appropriate, make fair 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, provision of services and the restoration of rights.

Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of 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 a community.

Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. Incases where the Government under whose authority the victimizing act or omission occurred is no longer inexistence, the State or Government successor in title should provide restitution to the victims.

- accused-oriented system; the present system is more concerned with the rights and interests of the accused rather than those of victims;
- faulty and slipshod investigation;
- time consuming legal process;
- lack of coordination between police and prosecution.

The Victims History and Recent Development:

With the evolution of victimology, it has come to be understood that not only can the victim of a crime suffer substantial physical, moral and material damage, but society also can suffer, in that its ethical principles have been violated and one or several of its members has suffered an injustice. This realization has prompted several countries to devise compensation schemes to ensure that private citizens who become the victims of certain offences are paid compensation by the State for the physical consequences of the offence.

Schemes for compensation by the State are based not so much on the liability of the State for such crimes, as on a sense of solidarity. Resistance to such view in positive law has not yet been completely overcome, but is gradually being accepted that a person who is the innocent victim of violence (be it passively or in the act of helping to prevent or control such crime) should not be left to cope with substantial damage because the offender cannot be apprehended or is insolvent, or because the victim does not have the means to start legal proceedings in order to obtain compensation. Moreover, high fines and other financial

obligations often prevent adequate and rapid re-socialization of the offender. This last mentioned consideration has induced certain countries to adopt compensation by the State in preference to reparation by the offender.

In ancient judicial system there was a provision to pay compensation to the victim. Kane in the History of Dharamshastra – 387 (1972) has written that in India for crimes as theft, assault, adultery, rape and mans slaughter the Smiriti texts prescribes money compensation to the person wrong as well as corporeal punishments. In the first instance a monetary compensation in addition.

Manu thus provides the direct reparation to the victim of crime apart from the payment of fine to the King. In one of his versus on the subject **Brihaspati** says –

> "He who injures a limb, or divides it, or cuts it off, shall be compelled to pay the expenses of curing it; and (who forcibly took an article in a quarrel restore) his plunder." – **Brihaspati, op.cit.supra Note 4(c).**

Gautam deals with compensation by the State in cases of theft. The King, he says, must secure the restitution of the stolen object; otherwise, the King is liable to pay the value out of his coffers. – **Gautama, X, 46.7; ibid.**

Aspects to be considered:

For a meaningful study of the subject, it would be desirable to examine a number of aspects concerning the subject.

First is the question of scope of the study. There are two senses in which the word "compensation" is used in relation to victims of crime. The word could mean compensation by the offender sometimes called 'restitution' or 'reparation'. Or, it could mean compensation by the State. There are certain important theoretical and practical differences between reparation and compensation. For example, restitution by the offender does not involve public expenditure; compensation by the State does. The values that could conceivably justify an emphasis on restitution may not necessarily be the same as the values that may justify compensation by the State.

Where there is agreement that compensation should be made to victims of crime, there is great uncertainty and even confusion as to the basis on which compensation should be made, as to the specific objectives to be attained, and as to the extent of the loss or damage caused by crime which must be compensated.

These questions are mainly of a substantive nature. Then, there will also arise important procedural questions. In particular, which agency should decide the claim for compensation? Should it be-

(a) A special tribunal?

(b) The court convicting the offender?

Purpose of Compensation:

According to one view, reparation has been stated to have an intrinsic moral value of its own. On another view reparation finds its greatest justification in ensuring that the offender does not enjoy the fruits of crime. This is one of the considerations that have led the superior courts to pass exceptionally long custodial sentences in some very serious cases; and an effective method of extracting ill-gotten gains from 'large scale', criminals would not only be a valuable deterrent, but might also, in some cases, relieve the courts of the need they now feel to impose very long sentences.

There are several alternatives that could be adopted. Reference has been made above to compensation and reparation. First, "restitution, the responsibility of the offender to the victim to make good the harm done- could be made a basic principle in criminal law, and supplemented by a scheme for 'compensation'-assistance by the State where the offender is not detected or where he is unable to assume responsibility for restitution. Secondly, under existing law, much can be done to extend the practice of imposing restitution as a condition of a probation order or of conditional discharge. Or, thirdly, restitution could be made a central consideration in sentencing.

Conditions for Restitution:

Another important legal question concerns the conditions for restitution. Some laws of compensation already enacted or seriously under consideration, have instructed the courts (or compensation boards) to exclude victims who are found not to have been altogether innocent in relation to the crime. In Massachusetts and Maryland **[De Wolf, Crime and Justice in America 194 (1975)]**, there is a more flexible requirement to the effect that decisions regarding awards of the compensation to victims should be made after considering the conduct of the victim. The award of compensation may be reduced or denied altogether, if the conduct of the victim contributed to the inflicting of the injury. The reduction or denial is not to be made, however, when the victim was aiding another victim, trying to prevent a crime, or attempting to apprehend a criminal.

News York excludes compensation if the victim was "criminally responsible for the crime". – Ibid.

Nevada simply requires that the board should "consider the provocation, consent or any other behaviour of the victim." California, Maryland and New York provide no compensation if the victim is not in serious financial need. Massachusetts does not take into account the financial needs of the victim. – Supra note 23 at 16.

Then there is the question of the relationship between the award of compensation and the imposition of other punishment. In the new Hawaii Penal Code enacted in 1972, there are explicit provisions for compensation by offenders. According to that Code, probation and other penalties not involving incarceration are regarded as the normal sentences, with "sentence of imprisonment withheld unless imprisonment is necessary" for definite reasons specified in the Code. – Sections 620-624, Hawaii, Penal Code (1972)

The State of New York has a provision for compensation as a condition of probation. – Gerhard O.W. Mueller in (1965) Vol. 50 Minnesota Law Review, 249-250, cited in De Wolf, Crime & Justice in America (1975)

There is also the question of reparation by juvenile offenders. Some of the juvenile courts (Canada, Journal of Crimes Corrected (1975), Vol. 17, No. 2, Pages 3-25; Law Reform Commission of Canada, Working paper No. 5) in New York have required delinquent youths to clean up the graffiti with which the youths had massively defaced sub-way cars and public buildings. In many a sub-urban or rural neighbourhood, a juvenile case has been continued while youthful offenders have done repair work, made financial compensation from their own earnings, or "worked off" the obligations incurred by vandalism, pilfering, or other delinquent acts.

Procedure for Paying Compensation:

Certain procedural points also offer interesting material for study. The question, for example, has been raised whether the criminal courts should be concerned with reparation at all. There is admittedly some incongruity about the concept of attaching, to criminal proceedings to which only the prosecutor and the accused are parties, a procedure for compensating the victim, who has no general right to a hearing; and it is arguable that reparation would be better dealt with outside the criminal courts altogether. But, then, one is driven to civil courts and to their traditional procedure in suits on tort.

Some people think that the victim may have a grievance if there is no means of making his wishes known to the court, but it is not realistic to require that the ordering of compensation should be dependent on the presence of the victim or his representative in court, or upon his written application.

In many countries on the continent and South America, the victim is permitted to request the prosecution to include his claim in the criminal case against the accused. This is provided [Note 'Crime and Punishment-Reparation to the Victim' 227 Law times 117 (1959)], for example, in Austria, Italy, Norway, Spain, Sweden and Colombia (South America). In France, as already stated [See Supra], a special action known as "action civile" can be started by the injured person, which is heard along with the criminal cash against the accused. (Articles 2 to 4, 85 to 91, 371, 418, 426 and 497, French Code of Criminal Procedure.)

Provision of Compensation to Victim in Some Countries:

In 1975, the council of Europe published a report on compensation for victims of crime in Europe [Note, "victims of Crime" New Journal, 926 and 927 (1975)]. It begins with a review of the various methods whereby such compensation has been, or might be, provided (i) through the criminal process itself, (ii) through parallel civil proceedings, (iii) through special compensation schemes financed out of general public funds or out of contributions levied specifically from the members of the public as potential victims of crime. (iv) or even as an extension of commercial insurance (on the lines of compulsory motor vehicle insurance in England). The arguments for and against the available alternatives are examined, with particular emphasis on the operation and administration of special compensation schemes.

From a survey conducted by the Council of Europe in 1975, it appears that schemes similar in essentials to the U.K. Criminal Injuries Compensation Scheme are already in operation in Austria, Ireland and Sweden, or under consideration or active preparation in Denmark, France, the Federal Republic of Germany, Italy, the Netherlands and Norway. Even though many other European countries are thus now following where England led, their compensation schemes (or proposed schemes) contain particular features which might, with advantage, be considered grafting on to any other scheme. In Germany, (Draft Compensation (West Germany), for example, the draft compensation law adopted by the Bundestag provides for compensation for damage to property as well as personal injury. In Italy, a fund for the compensation of victims of crime will be partially financed out of the proceeds from prison, industries.

Another proposal considered in the Report of the Council of Europe is that compensation for victims of crime might be provided out of fines imposed on offenders. In a number of European countries, reform of the penal system seems to have acted as a catalyst for the formulation of schemes for compensating the victims of violent crime and for the greater involvement of offenders in the process of aiding victims.

There has come into existence a positive plethora of scheme designed to compensate the victims of crimes of violence **New Zealand** was the first country to legislate for such a programme in 1963. – Criminal Injuries Compensation Act, 1963 (No. 134 as amended by 1966, No. 22, 1967 and No. 67 and 1969 No. 55) (New Zealand).

In the U.K. the Criminal Injuries Compensation Board consists of a chairman of wide legal experience and seven other legally qualified members appointed by the Home Secretary and the Secretary of State for the Scotland after consultation with the Lord Chancellor. Its function is to entertain applications for ex gratia payments of compensation, in certain circumstances, to victims of crimes of violence in Great Britain or on a British vessel or aircraft. For instance, where the injury has given rise to at least three weeks' loss of earnings or is an injury for which compensation of at least £.50 would be awarded by the courts, where the circumstances of the injury have been reported to the police without delay or have been the subject of criminal proceedings in the courts; and where the applicant is prepared to submit to such medical examination as the board may require. The Board issues a monthly report giving details of the amount of compensation paid and of some of the more important cases.

In a number of jurisdiction in United States scheme for compensation has been introduced.

The response in the USA has been expressed in the form of State laws that compensate victims of violent crimes for medical bills that are not covered by insurance and for loss of salary because of the time lost from work (U.S. News & World Report, (24th July, 1978), P. 67). Also covered are legal fees incurred in settling a claim before a State compensation board.

When the victim is killed, dependants can receive money for funeral expenses plus a payment for loss of support, which usually, is weighed against any life insurance to be collected.

Awards in the USA do not hinge on the attacker's being caught and convicted. But, in order to qualify for compensation, victims must report the crime to police and file a claim within a specified time. They must also cooperate fully with the police in apprehending the criminal and must be willing to testify. Prosecutors say that these requirements are an important aid to crime fighting, which is often hindered by uncooperative witnesses.

Provisions of Compensation in India:

In India while compensation by the State has not been introduced restitution by the offenders has been a part of the Code of Criminal Procedure. There is a provision in Section 357 of the Criminal Procedure Code –

"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, 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 having dishonesty 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.

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.

When a Court imposes a sentence, of which fine does not from 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 sentenced.

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.

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.

A glance through the scheme of S. 357, Cr.P.C. would show that compensation to the victim is way down in the list of priorities of what we

We started with hinting at the paradox, where law thinks more of the rights of the offender than that of relief to the victims. This is also illustrated by S. 361, Cr.P.C. where the court is under a duty to give reasons for having refused to extend the benefit of law relating to release on probation. This is not to be misunderstood as undermining the salutary principle behind the provision. The reference is merely to highlight the point that similar anxiety is not shown in enactment relating to compensation, which too has a social purpose to serve. The matter is left to the whims and personal discretion of the Criminal Courts. This is why the Apex Court only recommended, and not directed, liberal use of the provisions of S. 357, Cr.P.C. There is a great need to amend the law so as to make it obligatory on the courts to give reasons as to why the provisions relating to compensation have not been applied.

Some States like Bihar, Madhya Pradesh and West Bengal by way of amendment of S. 357, Cr.P.C. have made it obligatory on the courts to award compensation in all cases of crime against the members of Scheduled Castes and Scheduled Tribes. This restrictive and discriminatory mandate is also without justification. Why not these provisions extend as of right may be even as a Fundamental Right under the Constitution, to each victim of every crime irrespective of religion, caste, creed etc.

Section 359, Cr.P.C. relating to costs in non-cognizable cases provides for recovery at the pain of imprisonment in default. Hon'ble Supreme Court in the case of Hari Kishan referred to above, has ruled that even the order of compensation is enforceable by imposing sentence in default. But the legislature may well amend S. 357, Cr.P.C. to incorporate this provision, lest it results in confusion.

While concluding one may refer to S. 358, Cr.P.C. which empowers the magistrate to award the compensation to persons groundlessly arrested. The amount is subject to ceiling of Rs.100. One fails to understand, what solace the law desired to provide to a victim of such groundless arrest by such token compensation which cannot even have deterrent effect. The amount needs to be freed from the ceiling.

Provisions of compensation under SC/ST (Prevention of Atrocities) Act, 1989 Act:

The SC & ST (Prevention of atrocities) Act, 1989 has provided some rules for compensation to the victim. The SC and ST (Prevention of atrocities) **Rules, 1995** has provided some provisions for the relief of victims under this Act. See **Rule-12(4)** for this purpose. But the courts are not concerned with these rules because it is a job of Govt. to give relief to the victim under this Act.

call our "Welfare State". The State first wants its own expenditure on prosecution to be reimbursed, even at the cost of innocent citizen who suffered only because the former could not provide sufficient security to him. Should we not call it unjust enrichment? There is no justification for clause (a) of S. 357(1) Cr.P.C. to exist. Also should we not simplify this provision to provide for a power with the court to award suitable compensation without ceiling to the victim from offender in all cases resulting in conviction, whether or not fine forms part of the sentence?

Law contained in Sec. 357(3) Cr.P.C., has, by and large, and thus far, been mostly virgin territory. The reasons include ignorance and lack of proper motivation. The Supreme Court in the case of Hari Kishan v. Sukhbir Singh; AIR 1988 SC 2127: (1989 Cri.L.J. 116), had to issue a mild reprimand while exhorting the courts for liberal use of this provision to meet the ends of justice as a measure of responding appropriately to the crime, and reconciling the victim with the offender..

Section 357, Cr.P.C. as it stands does not provide speedy or sure relief to the needy. It is commonly seen that the accused normally does not deny the injury or loss sustained by the complainant, though he denies his own responsibility for the crime. Any compensation awarded under the cover of Sec. 357, Cr.P.C. at the end of normally protracted trial spanning over an average of 8 to 10 years is not immediately available to the victim, as he must await the appellate round to conclude. There is a case to provide interim/immediate compensation to the victim, on the lines of Motor Accident Claim cases, so as to make provision for immediate needs arising out of loss of earning, medical care, legal counseling etc. Why should the victim be forced to fend for himself, even during the pendency of the trial, when it is not disputed that he has sustained injury or loss. Any innocent hapless citizen who puts his faith in the Law of the Land, by avoiding resort to extra legal means, deserves this much courtesy from the State, as to ensure some immediate succour in the form of mandatory immediate itself of the amount of compensation given, through normal painfully slow process of recovery of fine from the offender, as and when convicted. In the same context, one may refer to the matters of victims in cases which remain un-solved, or which result in acquittal for reasons other than false accusation. Should such unfortunate cases remain without remedy or relief? Can we not apply principle of "no fault liability" and ask the State to repair the damage, from out of a fund governed by a Law specially designed for the purposes. The fund can be at the disposal of the Criminal Courts, or if necessary Special Compensation Boards, connected to the Criminal Justice System. In fact if the State were to take up the basic responsibility in this context, the inability of the offender to pay would cease to be a reason, as it should, for non providing sufficient compensation.

When compensation is not fully available from the offender or other sources 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.

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 the harm.

Victims should receive the necessary material, medical, psychological and social assistance through Governmental, voluntary, community-based and indigenous, means.

Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

State should consider incorporating into the national law norms prescribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

State should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation prescribing acts that constitute serious abuses of political or economic power, as well as promoting polices and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts."

The other option is to create a public fund for the purpose. An appeal may be made to the people and philanthropic societies to generously extend their cooperation in contributing money to organize such a fund, if the State fails to provide it.

However, to start with, payment of compensation may be confined to the victims of crimes of violence. One who causes personal injury on another or death of another by committing unlawful or reckless acts may be said to have committed a crime of violence. They may be grievous hurt (except those, including death, arising out of accidents and war) murder, rape, dowry related torture and dowry death. Amount of the loss of movables or cash cannot be precisely determined objectively. Very often the victims made exaggerated statements on this score. Hence such claims may be excluded from the purview of any scheme relating to the grant of compensation to the victims.

Forums, like the Consumer redressal Forums, may be constituted by an Act of Parliament to adjudicate the claims and award compensation in deserving cases.

Provisions of The Uttar Pradesh Payment of Remuneration to Prisoners and Compensation to Victims Rules, 2005:

1. (1) these rules may be called the Uttar Pradesh Payment of Remuneration to Prisoners and Compensation to Victims Rules, 2005.

   (2) They shall come into force with effect from the date of their publication in official Gazette.

2. In these rules, unless the context otherwise requires:-

   (a) "Remuneration" means the money earned by a prisoner for the labour assigned to him in prison by an officer authorized in this behalf by the Superintendent/ Senior Superintendent of the prison.

   (b) "Common Fund" means the fund created of a prison from the deduction made under section 36-A of the prisons Act, 1894 (Act no. 9). The Prison (Uttar Pradesh Amendment) Act, 2002 (U.P. Act no. 16 of 2002) from the remuneration earned by convicted criminal prisoners for the purpose of giving compensation to the deserving victims.

   (c) "Committee" means the Committee constituted as prescribed under rule 6 of these rules.

   (d) "Victim" means a person against whom the offence was committed by a convicted criminal prisoner for which such prisoner is undergoing imprisonment and includes legal heirs of Victims(s).

3. Every convicted criminal prisoner employed for labour in a prison and working satisfactorily shall be entitled to get remuneration at such rate as may be notified from time to time by the State Government.

4. The amount of remuneration due to the prisoners in any prison, after making deductions, if any as per rule 5, shall be deposited in a nationalized bank account opened for this purpose. This Account shall be jointly operated by the Superintendent/Senior Superintendent of the prison and the Jailor/Senior Jailor. The Superintendent/Senior Superintendent shall maintain account of the remuneration earned by prisoners in the register in Form-An appended to these rules.

5. (1) An amount of 15% shall be deducted out of the remuneration earned by convicted criminal prisoner and be paid to the deserving victims of the offence committed by that prisoner.

(2) If there is no deserving victim of the offence committed by the prisoner or victim is not willing to receive the amount referred to in sub rule (1), it shall be returned to the convicted criminal a prisoner.

(3) The victims of the offences shall be identified by the District Magistrate of the District where the offence was committed.

(4) The amount shall be paid to victims subject to the satisfaction of the Committee by Money Order and expenses of the Money Order shall be beard by the convicted criminal prisoner.

(5) A common fund shall be maintained in each prison.

(6) Details of remuneration earned by each prisoner and the deductions made shall be maintained in a register in Form-B appended to these rules.

6. A Committee consisting of the following shall be constituted to determine the amount of compensation to be paid to any victim.

1. The District Magistrate..... Chairman
2. Senior Superintendent/ Superintendent, Police.....Member
3. Senior Superintendent/Superintendent, Jail to.....Member Secretary

7. The Committee shall meet at least once in a quarter and decide cases for which inquiry report has been received.

8. The Compensation, as decided by the Committee shall be disbursed to the victim by Money Order as given in sub-rule (4) of rule 5 within 30 days from the date of determination of the amount of compensation by the Committee constituted under rule 6 of the concerned prison.

Suggestions for Giving Compensation to Victims:

1. A Compensation Claim Board may be constituted headed by Senior Addl. Distt. & Sessions Judge for this purpose.
2. FIR, Post-mortem Report/Injury Report, Copy of Statement of Witnesses under S. 161 Cr.P.C. may be provided to the Board.
3. Evidence produced in Criminal case should be admissible for the purpose of paying compensation. Extra evidence may be permitted from the both side. Medical Bills and other documentary evidence for the purpose of compensation may be submitted by Victim.
4. If the offender claims Juvenile the compensation matter should be taken very seriously and part of compensation should be paid by the parents/guardians of juvenile offender thinking were the financial and economic position of offender.
5. Such juvenile may pay compensation by his own energies and worked of as some of the juvenile court in New York have required delinquent youths to clean of the graffiti with which they youths had massively defaced sub-way cars and public buildings. In many a sub-urban or rural neighbourhood, a juvenile case has been continued while youthful offenders have done repair work, made financial compensation from their own earnings, or worked of.
6. If offender is taking benefit of probation under provision of 360 Cr.P.C. and Probation of Offenders Act, 1958 with U.P. Probation of Offenders Rules, 1980. The Compensation partly should be provided by offender as per condition and partly by the State.

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Protection of Privacy and Human Dignity under the Constitution of India

(With special reference to Naz Foundation case)

Dr. Shashi Srivastava*

Since the Seventeenth century, human thinking has been rearing around the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the State, in order that human liberty may be preserved, human personality developed and an effective social and democratic life promoted, to recognise those rights and freedoms and allow them a free play.[1] Therefore, all the civilized nations particularly those having written democratic constitutions, have made effective provisions guaranteeing certain basic and fundamental rights to their citizens.

The right to life and personal liberty is the most precious human right which form the arc of all other rights and which is inherent in the very nature of human existence in a political society. Sanctity of life and liberty represents a facet of higher values which mankind began to cherish in its evolution from a State of tooth and claw to a civilized existence. The guarantee of life and liberty, therefore, was a necessary corollary of the concept relating to the sanctity of life and liberty. Article 21 of the Constitution, in this sense, is simply recognition of an existing right, a right, which existed and was in-force before the coming into force of the Constitution.[2]

Article 21 confers certain fundamental rights. These Fundamental Rights had their roots deep in the struggle for Independence and they were included in the Constitution in the hope and expectation that one day the tree of liberty would bloom in India. They were indelibly written in the subconscious memory of the race, which fought for well nigh three hundred years for securing freedom from British rule, and they found expression in the form of fundamental rights when the Constitution was enacted. These Fundamental Rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.[3]

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[1] See, M.P. Jain, Indian Constitutional law, 3rd Ed (1980) at p. 400

[2] A.D.M. Jabalpur vs. Shiv Kant Shukla, AIR 1976 SC 1207

[3] Maneka Gandhi vs. Union of India, AIR 1978 SC 597 at p. 619-620

Earlier, in **Gopalan case**[4] the Supreme Court had adopted a very narrow construction of the expression 'life' and 'personal liberty' and interpreted Article-21 as a protection against physical restraint and coercion. **Gopalan** interpreted 'procedure established by law' in article 21 as any procedure prescribed by enacted law. The rigidity of **Gopalan**, however, was a little liberalized by the Court of **Subba Rao, J**,[5] on the expression 'life and personal liberty' and Article 21 was given the same 'comprehensive meaning' as is given by the Fifth and Fourteenth Amendments to the U.S. Constitution. But, with regard to 'procedure' and 'Law' **Gopalan** remained intact. **Maneka case**[6] brought a significant change in the personal liberty jurisprudence of the Supreme Court and interpreted Article 21 as a guarantee of the 'widest amplitude' including a variety of rights, which go to constitute the personal liberty of man. It further interpreted 'procedure' in Article 21 to mean just, fair and reasonable procedure. It was emphasized that Article 21 which guarantees the most precious human right should be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the person.[7]

After the decision, in **Maneka**, Article 21 has assumed 'a highly activist magnitude' and since then, several positive rights have emerged out of it and the judiciary has used it as a potent instrument to ensure procedural fairness to the people in administrative sphere attempting to deprive one of his various rights contained in Article 21. Following the wide sweep of **Maneka** and with the help of fair, just and reasonable procedure, the Court has expanded and enriched the ambit and scope of Article 21 and now, several Fundamental Right like right to live with dignity, right of privacy, right to travel abroad, right against torture, cruel and inhuman treatment, right of speedy trial, right to livelihood and the like, deemed to be guaranteed in Article 21 reads that 'No one shall be deprived of his life of personal liberty except according to fair, just and reasonable procedural established by valid law.[8]

Right to Life: meaning?

The expression deprived of life should not be construed and understood in relation to death of an individual or with reference to extreme case of death.[9] The term 'life' has been very vividly and

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[4] A.K. Gopalan vs. State of Madras, AIR 1950 SC 27 herein after referred as Gopalan.

[5] See Kharak Singh vs. State of U.P., AIR 1963 SC 1295 hereinafter referred as Kharak Singh and also Satwant Singh vs. A.P.O., Hew Delhi, AIR 1967 SC 1836, hereinafter referred as Satwan Singh.

[6] Maneka Gandhi vs. Union of India, AIR 1978 SC 597, hereinafter referred as Maneka.

[7] Francis Coralie vs. Union Territory of Delhi, AIR 1981 SC 746 at p. 752.

[8] Bachan Singh vs. State of Punjab, AIR 1980 SC 898.

[9] See Basu, commentary on the Constitution of India, 5th Ed., Vol. 2 at p. 77.

brilliantly explained by **Field. J.,** in **Munn v. Illinois.**[10] There, the learned justice took the view that the expression life means something more than 'mere animal existence' and it extends to all those limbs and faculties by which life is enjoyed including every organ through which 'soul communicates with outer world'.[11]

The opinion of Field, J., has been variously approved by the Supreme Court of India in several cases.[12] The question, which often arises in relation to interpretation of Article 21 is whether right to life is limited only to protection of limb or faculties, or does it go further and embrace something more. The expression 'dignity of the individual' finds specific mention in the Preamble to the Constitution of India. In **Prem Shanker Shukla vs. Delhi Administration**[13], **V.R. Krishna Iyer, J.,** observed that the guarantee of human dignity forms part of our constitutional culture. This issue was given a detailed consideration in **Francis Coralie**[14]case and the court insisted on a very liberal construction of the right. The view of the court was:

> **"The fundamental right to life which is the most precious human right and which forms the arc of all other rights must, therefore, be interpreted in a broad and expensive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.**[15]"

Viewing from this angle, the court gave a broader interpretation to the right to life and extended it to include the right to live with human dignity along with bare necessaries and freedom of every limb or faculty through which life is enjoyed including the faculties of thinking and feeling.[16] **Bhagwati, J.,** who delivered the judgment, was of the view that the magnitude and content of the components of the right to life would depend upon the extent of the economic development of the country, but, in any view of the matter, this right would include the right of basic necessities such as adequate nutrition, clothing and shelter over head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The learned justice considered the right to life as guarantee of something more than 'mere animal existence' and 'physical survival' and held it to mean right to live with human dignity and to include:

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[10] (1877) 94 U.S. 113.
[11] Id at 142.
[12] Kharak Singh vs. State of U.P., AIR 1965 SC 1295 (1302), also D.B. Patnaik vs. State of A.P., AIR 1974 SC 2092, Sunil Batra vs. Delhi Administration, AIR 1978 SC 1975.
[13] AIR 1980 SC 1535
[14] Francis Coralie vs. Union Territory of Delhi, AIR 1981 SC 746 at p. 752.
[15] Id at 752.
[16] Id at 753

".... The basis necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self."[17]

The **Francis** holding thus tried to understand 'life' not only in relation to body, but also in relation to the mind of individual, his feelings, thinking and even his bare necessaries of life. It read the right to live with human dignity in Article 21 and extended the protection to every limb or faculty through which life is enjoyed. It, however, did not forget to make it clear that the contents and components of the right to life would very much depend upon the economic development of the country. Thus, the **Francis holding,** significantly, did not leave the reality of the earth.

Similarly, in **Kishore Singh vs. State of Rajasthan,**[18] **Krishna Iyer, J.** held that use of third degree method on prisoners by police is uncivilized, barbarous and violative of human dignity enshrined in Article 21. A similar proposition was made in **Sheela Barse v. State of Maharashtra**[19]to save women suspects from torture and ill treatment by police in police lockups and it was laid down that they should be kept in separate lockups and not in the same where male suspects are kept.

Right of Privacy:

The security of one's privacy against arbitrary intrusion by the police is basis to a free society and is, therefore, implicit in the concept of ordered liberty. In America, right to privacy is enforceable against the state through the due process clause and such invasion into privacy would run counter to the guarantee of the Fourteenth Amendment.[20]

In **Kharak Singh**[21], a constitutional bench of six judges were called upon to decide the validity of clause (b) of regulation 236 of U.P. Police Regulation authorizing domiciliary visits issue was whether right to privacy was included in Article 21. The opinion of the court was divided into four to two judges.

Ayyangar, J. speaking for the majority held that right to privacy was not included in Article 21 because it protected freedom from tangible physical restraint and not freedom from intrusion of privacy or one's personal sensitiveness. He, however, held the impugned regulation unconstitutional on the ground of violation within the meaning of Article 21[22]. On the contrary, **Subba Rao, J.** in his minority view with **Shah, J.**, read right of privacy in Article 21 and held the entire regulation

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[17] Ibid.
[18] AIR 1981 SC 625
[19] AIR 1983 SC 378
[20] Molf v. Colorado, 338 U.S. 25
[21] AIR 1963 SC 1295
[22] Id. At 1300 to 1303

unconstitutional being in violation of Article 21 and 19(1)(d). He remarked:

> **"It is true our constitution does not expressly declare a right to privacy as a fundamental right, but the said right is essential ingredient of personal liberty. If physical restraints on a person's movement effect his personal liberty, physical encroachments on his private life would effect it in a larger degree."**[23]

The majority view of **Kharak Singh** was affirmed in **Govind v. State of M.P.,**[24] and the court upheld a similar regulation because it was having the force of law. As regards an Independent right of privacy, the view of the court was not clear and it was pointed out that the right to privacy would have to go through a process of case-by-case development. Therefore, even if it is assumed that right of privacy is a fundamental right, the right is not absolute and surveillance by domiciliary visits will not always amount to unreasonable restriction upon the right.

In **T. Sareetha v. Venkatasubbiah,**[25] the Andhra Pradesh High court read right to privacy in Article 21 and held that Sec. 9 of the Act violated that right **Choudhary, J.** who delivered the judgment, recalled the dissenting view of **Subba Rao, J.** and the majority of **Govind's** case, and after quoting various American cases[26], he ruled that Article 21 embraced the right to privacy and human dignity. He then explained the contents of the right of privacy. For the purpose he quoted with approval **Govind** holding and several American decisions and concluded:

> **"Right to privacy is bound to take human body as its first and most basic reference for control over personal identity. Such a definition is bound to include body's violability and integrity and intimacy of personal identity including marital privacy."**[27]

T. Sareetha holding was negatived by the Delhi High Court in **Harvinder Kaur v. Harmander Singh**[28]on the basis that the view of **Choudhary, J.** in that case was based on 'disproporbonate emphasis on sex' which is not the whole content of marriage institution and marital life. The court took the view that it was not proper to apply Article 14 to 21 of the Constitution to decide the validity of Section 9 Hindu Marriage Act. Delivering the judgment, **Awadh Bihari Rohtagi, J.** remarked:

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[23] Id. at 1306.
[24] AIR 1975 SC 1397
[25] AIR 1983 SC 358
[26] See Grisworld v. Conneticut (1965) 14th Law Ed. 510; also Jane Rol v. Henery Wade (1975) 35 L Ed. 147.
[27] See Supra note 357 at 368
[28] AIR 1984 Delhi 66

"..... introduction of Constitutional Law in the house is most inappropriate. It is like introducing a bull in china shop. In the privacy of home and the married life, neither Article 21 nor Article 14 have any place[29]."

Harvinder Kaur has been further endorsed by the Supreme Court[30] and the law exists now that Section 9 of the Act is not violative of Article 14 or 21 of the Constitution. But this discussion is relevant for the purpose of this work to show that right to privacy is implicit in Article 21 and that aspect of **T. Sareetha's** proposition was never discredited by the Delhi High Court. On the contrary the privacy of home and matrimonial life was very much recognized by the court. In the submission of this writer the right to privacy and personal security are the very essence of a scheme of ordered liberty and Article 21 should be construed so as to prevent any intrusion on the part of police or state in the sanctity of man's home and in the normal comforts necessary for human existence.

In **State of Maharashtra vs. Madhukar Narain Mandikar**[31], the Supreme Court laid down that right of privacy is available also to women of loose character. In this case a police Inspector attempted rape on a woman who was residing in a slum. The Bombay High Court acquitted the accused on the ground that the woman has a bad reputation and her statement alone could not be relied without any corroboration of independent witness.

In **R. Raja Gopal vs. State of Tamil Nadu**[32], one, **Shanker**, who was awarded capital sentence wrote his autobiography and gave it to his wife. A Tamil weekly announced it to be published in series and publicized that it was a sensational life story exposing the government and the officials and the connections of police force with the criminals **Shanker** was fortuned and was compelled to write a letter that he never wrote such autobiography, nor he has permitted any one to publish it. The issue was with regards to balance between the right to privacy of individual and freedom of press.

Referring to some American cases, **Jeewan Reddy, J.**, held that the privacy right is included in the guarantee of Article 21 and it extends to one's right to live alone. Every person enjoys a right of privacy in respect of his life, family, marriage, procreation, motherhood, child bearing, education and the like and nothing can be published about him without his consent.

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[29] Id. at 75
[30] Smt. Saroj Rani v. Sudarshan K. Chandha, AIR 1984 S.C. 1562
[31] AIR 1991 SC 207
[32] AIR 1995 SC 264

Naz Foundation Case[33]

A.P. Shah, CJ., of the Delhi High Court, in Naz Foundation Case held as follows:

> **"Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is vollative of Articles 21, 14, and 15 of the Constitution. ..... By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act".**

This writ petition was filed by the Naz Foundation, a NGO, as a Public Interest Litigation challenging the validity of section 377 I.P.C. as being voilative of 14, 15 and 21 of the Constitution. It was argued on behalf of the petitioner that section 377, by criminalizing sex relationship between same sex, discriminates and makes unreasonable classification to the prejudice of gay persons and lesbians. Because right to life under Art. 21 includes individual right of privacy and human dignity which covers in its ambit the right to live alone and the right to private life and private relationship, section 377 in its perception restricts and permit the state agency to encroach and interfere in private life and thus it infringes the fundamental right of life and personal liberty. The Petitioner also challenged the impugned section as it hampers the identification and treatment of persons suffering from HIV positive so far as it creates a stigma compelling the gays to conceal their identity. It was also argued that morality by it self cannot be a valid ground for restricting the right under Art. 14 and 21 and public disapproval or disgust for a certain class of persons cannot be upheld on the basis of the constitutionality of statutory provision. The Indian society is vibrant, diverse and democratic and homosexuals have significant support in the population and in various countries similar laws have been struck down or deleted on the grounds of violation of right to privacy, dignity and equality.

The argument of the state was that none of the rights are absolute and there is no fundamental right as such to engage in the same sex activities. Social and sexual mores in foreign countries cannot justify de-criminalisation of homosexuality in India. In the western societies the morality standards are not as high as in India and the spread of AIDS is curtailed by section 377 IPC and same sex act between adults would cause a decline in public health across society and would foster the spread of AIDS. Section 377 IPC prevents HIV by discouraging rampant homosexuality, which is repugnant, immoral and contrary to the cultural norms of the country.

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[33] Naz Foundation vs. Government of N.C.T. of Delhi, W.P. No. 7455/2001, decided by the Delhi High Court on 02.07.2009 (hereinafter referred as Naz Foundation Case.

On the point of dignity, autonomy and privacy, the Delhi High Court revisited **Maneka Gandhi**[34] and **Francis**[35] to spell out the increasing scope of Art. 21, which includes in it the right to live with human dignity and the right of privacy, and referred to several western pronouncements, and concluded that the right to privacy protects a private space in which man may become and remain himself. **Shah, C.J.,** observed:

> **"..... the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as person, irrespective of the utility he can provide to others[36]."**

Shah, C.J., referred to Yogyakarta principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity which was launched on 26th March, 2007. The experts of 25 countries for comprehensive identification of the obligation of states to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity drafted Yogyakarta principles. Accordingly, the "Sexual Orientation" is understood to refer to each person's for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individual of a different gender or the same gender or more than one gender and "Gender Identity" is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. Yogyakarta Principles recognize that human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights. All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity.

Applying the U.N. Human Rights framework to an understanding of sexual orientation and gender identity, the Court has set out three categories of protection available under the part III of the Constitution and they are (a) non-discrimination; (b) protection of private rights; and (c) the ensuring of special general human rights protection to all, regardless of sexual orientation or gender identity. Analyzing from this angle the Delhi

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[34] See supra note 4
[35] See supra note 19
[36] See supra note 43 para 26

High Court took the view that the criminalisation of homosexuality, by condemning in perpetuity an entire class of people, forcing them to "live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery" denies them "moral full citizenship." Because Section 377 is aimed at criminalizing private conduct of consenting adults, the court held that it comes within the meaning of discrimination, which "severely affects the rights and interests of homosexuals and deeply impairs their dignity." It is "unfair and unreasonable and, therefore, in breach of Article 14 of the Constitution of India.

The right to public health is another aspect of human rights that is seriously undermined through the criminalisation of same sex behaviour. There are two parts to this right, both of which lead back to the fundamental right to life under Article 21. The first is the right to be healthy. The second part of the right to health is more expansive and includes the right to control one's health and body, the right to sexual and reproductive freedom, the right against forced medical treatment and the right to system of health that offers equality of opportunity in attaining the highest standard of health. While several documented testimonies of LGBT personals speak of the treatment of their sexual orientation as a psychiatric/mental disorder, the judgment importantly affirms the finding worldwide that sexual orientation is an expression of human sexuality-whether homosexual, heterosexual or bisexual.

Reminding of the situation in countries like Ireland, Tasmania, Australia, New Zealand, Canada, USA, Scotland, England and many more, where sexual acts between adults in private and with consent, have been de-criminalized, either by legislative intervention or in consequence of some judicial pronouncement, **Shah, C.J.**, held:

> **"The sphere of privacy allows persons to develop human relation without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationship of his or her choice and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21. Section 377 IPC denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution[37]."**

Referring to a decision of the Supreme Court of Canada in **Vriend vs. Alberta**[38] where it was held that a distinction, which demeans the

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[37] Id in para 48
[38] (1998) 1 SCR 493

individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals constitutes a cruel form of discrimination, the learned Chief Justice held:

> **"(Even though) these observations were made in the context of discrimination on grounds of sexual orientation in the employment field and would apply with even greater force to the criminalisation of consensual sex in private between adult males. The inevitable conclusion is that the discrimination caused to MSM and gay community is unfair and unreasonable and, therefore, in breach of Article 14 of the Constitution of India[39]".**

The Delhi High Court interestingly invoked Art.15 of the Constitution. Laying down that 'the purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning "normal" or "natural" gender roles' and 'discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex', **Shah, C.J.,** observed:

> **"We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15[40]".**

The Court very brilliantly dealt with the question of public morality and public acceptance and made it clear that popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Art. 21. **Shah C.J.,** quoted Dr. Ambedkar what he said in the Constituent Assembly that 'Constituent morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.[41]'

Therefore, he held:

> **"Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality[42]."**

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[39] See supra, in para 97, 98
[40] Id in para 101
[41] CAD, Official Reports Vol. VII: November 4, 1948, page 38
[42] Id in para 79

In nutshell, the effect of the **Naz Foundation** holding is that criminalisation of sexual act between adult members of same sex in private and with consent is violative of Art.14, 15 and 21 of the Constitution. The judgment has attracted huge repercussions in the country. Views for and against the judgment have been expressed. The judgment hits at the common belief that unnatural sex is an abnormality and sexual perversity. The Delhi High Court has referred to the opinion of medical and psycho-experts to support its conclusion while holding that same sex activity is a normal behaviour and there is nothing new in it.

A deep and critical analysis of the judgment in Naz Foundation case shows that the court though not expressly, yet impliedly, tried to read under Article 21 a right of personal choice in the area of sex relationship. Instead of using a very simple expression like 'right of choice' the court took the help of certain very uncommon concepts and expressions like 'gender identity, 'Sexual orientation' and 'Yogyakarta Principles'. Consequently, while reading the judgment, a reader like this writer may find herself or himself in a state of confusion, whether it is a sociological or psychological text or a judgment of a court. In the respectful submission of this writer, the court could have tried to develop a right in favour of a person under Article 21, namely, a right of choice in the area of sex relationship.

Even if such right of choice is read in favour of person, the issue is whether a person has got unrestricted right of choice. It must be understood that not every choice is left to the discretion of the individual in any society. For example, the State regulates handling and consumption of wine. Prostitution may be a pure consented act but it is designated as crime. Many matrimonial offences like adultery, bigamy and the like may be a consented act. Similar may be situation with regards to sale and show of obscene literature, picture or a film. The state does regulate and restrict such affairs and that too for the larger interest of society, for the maintenance of public order, public health and public morality. Thus, our constitution permits restriction and regulation of pure personal choice of individual for the better interest of society. The Delhi High Court should have given due regards to social and moral life and should not have tried to isolate constitutional morality from social reality. The constitution has to operate in a living society and it should not be interpreted in total contradiction with the social values, standards and morality and cultural heritage of the country.

Further more, along with personal rights and personal freedom every individual has to show a social responsibility and the responsibility is to realize, recognize, respect the cultural heritage and social values for which the country is known and conduct himself in conformity with them. Same sex relationship is not a personal affair of an individual and will

always have a prejudicial and detrimental impact on social institutions like marriage, family and parenthood. It will be a horrifying idea if some body's son or daughter or some body's husband or wife enters into the house joining hand with a person of same sex. What will be the reaction then? The effected person will act in conformity with the constitutional morality as envisaged by the Delhi High Court or he or she will rush to the police station or to the court for the remedy of such grievance? No doubt that Article 21 guarantees right to live with human dignity. But it enjoins a corresponding duty on every individual to live a dignified life. Are we ready to accept that same sex relationship is a sign of dignified life? Then, every father, mother, husband or wife has a corresponding right and that is right to expect a decent and dignified conduct from his or her ward or partner. In the submission of this writer, the issue must be considered from these points of views.

There is an appeal pending against the judgment in **Naz foundation** case before the Supreme Court. The media reports reveal that the Union is also thanking in terms of the judgment. Unlike judiciary, the legislatures in the country, being representatives of the people, represent the will of the people and they owe not only responsibility towards, but are accountable to the people. It will be very, interesting to see what stand is being taken by the Legislatures on a matter pertaining to public health and public morality.

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SOCIAL PARADIGMS OF PUBLIC CONFIDENCE IN JUDICIAL SYSTEM

• **Dr. Harbansh Dixit***

[*Public Confidence is the most important asset for all democratic instructions. It is more precious for Judiciary as this institution, unlike Legislature, do not go to people for seeking the mandate. Judiciary has to be very cautions about its image because it can not answer the allegations made upon it. This paper is an attempt to know the mood of people regarding different factors which affect social perception regarding image of the Judicial System.*]

A. Introduction

The credibility of State, as an institution, is partly dependent upon credibility of Judicial System'. If Judicial System is widely revered by the people, State is the ultimate beneficiary. In ancient times too, the emphasis was always laid upon the credibility and integrity of judicial officers. Be it king or anyone else, if he was working as a presiding officer of the court, he was expected to work with all the integrity so that confidence of people may be retained in the system. At that stage of development, time taken in judicial proceedings was hardly a factor affecting public confidence as the procedure was very simple and number of persons seeking redress from judicial system was very limited. The procedure to evaluate the evidence was simple and presiding officers were having authority and power to evolve new, methods according to requirements of the case.

Apart from these factors, there were some minor differences, which kept the older systems on different footing than the present one. The respect commanded by King was surrounded with typical secrecy, reverence, fear and authority of the Sovereign. Courts being part of the system were also commanding the same kind of authority. The authority and integrity of judicial officer could not be questioned, as it would have been treated as questioning the authority of the King.

The present system poses different types of challenges under different circumstances. Socio-political factors require accountability of individual and transparency of the system in order to make it credible. Secondly, people do not easily take the credibility of any institution for granted and there is an urge to make the institutions under constant scrutiny.

The confidence of people has now become more important for the reason that under democratic system, the fate and sustainability of

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institutions depend upon the fact that how far they are relevant for society. Since relevance of every institution is to be judged and decided by the society, the opinion of the people becomes very important. It is in this context that this study becomes relevant.

The present study is the result of survey conducted in Rohilkhand Region of Uttar Pradesh, regarding public opinion relating to different factors affecting confidence of people in Judicial System.

B. Objectives of the Study

The main objective of the present study is to know about the level of the public confidence in judicial system and different factors affecting the confidence of the people.

Some of the objectives of the present survey may be summed up as follows:

(i) To know about the impact of delay, integrity, conduct and behaviour of presiding officers and that of staff of Dispute Resolution System on the confidence of people.

(ii) To search out reasons responsible for affecting confidence of the people in the Judicial System.

(iii) To throw light on present state of public-confidence in different judicial institutions.

(iv) To analyse as to how the level of the confidence of the people be raised to the benefit of judicial institutions and the democracy.

C. Methodology and Tools

Since one of the purposes of the present study is to gauge the level of public confidence in the Judicial System with special reference to Rohilkhand Region of Uttar Pradesh, the researcher has adopted the descriptive cum survey method. For this purpose interview from cross sections of people was taken.

As it is necessary for credibility of the study that every section of society must be proportionately represented while picking the persons to be interviewed, researcher has taken every care to give proper representation to cross section of society.

C.1 Sampling Procedure

Procedure adopted by Researcher for the purposes of sampling was as follows:

C.1.a Number of Samples

Samples of 500 persons have been taken for interview. Out of 500 samples, 125 persons were interviewed from Bareilly District, 100 from

Moradabad, 70 from Shahjahanpur, 50 from Badayun, 40 each from Pilibhit, Rampur and Bijnor while 35 persons were interviewed from Jyotiba Phule Nagar.

C.1.b Community-Wise Distribution

The researcher has taken care of socio-religious configuration of society in the area of the study i.e. Rohilkhand region. Out of 500 persons on whom the study was conducted 350 were Hindus 135 Muslims and 15 others including Christians and Buddhists.

C.1.c Profession wise distribution of sample

Taking into consideration the fact that socio-economic background of people has an important bearing on formation of opinion about an institution, proper representation was given to different groups of people. The percentage of sample from different walks of life was as follows.

Out of five hundred samples, 10 per cent were teachers, 2 percent of them were presiding officers of Judiciary (including presiding officers of Family Courts, Consumer Fora and Labour Courts) and 10 per cent of them were advocates. Farmers and businessmen constituted 30 per cent each while 2 per cent of total respondents were staff of the courts. Remaining 6 per cent respondents were from other professions including doctors, engineers and chartered accountants. As no authentic data on population of different professionals was available, the representation given to different professions was based on rough estimate of their population and their role as opinion makers of society.

C.2 Calculation and Assessment of Survey Response

Answers given by respondents on different questions were calculated by simple arithmetical method. All the percentage were worked out in round figures for this purpose, figures up to two digits after decimal were taken into account and for this 0.50 was counted to be 1 while lesser numbers were ignored.

D. Findings of Survey

D.1 Public Opinion Regarding Impact of Different Factors on Public Confidence in Judicial System

After assessing the level of confidence in different qualities in inculcating confidence in the Dispute Resolution System, in this part of the study, qualities like integrity, impartiality, speedy disposal of cases would be tested to see as to how does these factors affect the confidence building process.

In addition to the above-mentioned factors certain basic human qualities like good behaviour and honesty are also put to test whether these qualities affect the confidence of people.

D.1.a. Factors Respondents for Affecting Confidence of People

In order to assess the response of respondents, they were asked to answer as to when their confidence in judiciary increases. Options given to them were (a) Favourable Judgment (b) Speedy Disposal of cases (c) Impartial Disposal of cases, and (d) Good Behaviour. Response of people on these options was as follows:

Table - 01

Factors, Affecting Confidence of the People	Percentage of Response
Favourable judgment	03
Speedy Disposal	10
Impartial Disposal	81
Good Behaviour	06

This table is an indication of the behaviour of the people. In contrast to popular feeling, the lowest number of respondents (3%) were of opinion that their confidence in the system increases when they get favourable judgment from Courts. 81 per cent of them appreciate impartiality while speedy disposal of cases got support from 10 per cent respondents and good behaviour of the staff was popular only in 6 per cent of the total respondents.

On the basis of above-mentioned analysis following conclusions may be drawn:-

(1) Most of the People (81%) expect impartiality from the Dispute Resolution System and their sense of reverence increases when these institution act with transparent impartiality.

(2) People do not care getting judgment in their favour as only 3 per cent respondents were willing to compromise anything for a favourable judgment.

(3) Speedy disposal of cases have its importance for 10 per cent of respondents but it is on distant second place in comparison to impartiality which is preferred by 81 per cent people.

(4) Good behaviour of the presiding officer and staff is treated to be more important factor than favourable judgment for confidence building process.

D.1.b. Most Important Quality of Presiding Officers

Respondents were asked to put their preferences on the most important quality, which they expect from Presiding Officers of the Court. The response was as follows:-

Table-02

Different Qualities	Percentage of Preference
Knowledge of law	23
Honesty	27
Impartiality	49
Good Behaviour	01

As it is evident from the result of the survey that impartiality is treated to be the best quality of a judge and 49 per cent of the respondents wish to see this quality in Presiding Officers while 27 per cent of them feel that honesty is the most important quality which they expect from them. In fact the honesty and impartiality are having overlapping domains and these two qualities are often used interchangeably for each others. Putting together these two qualities, they account 76 per cent of the total respondents which means that for more than three-fourths respondents which means that for more than three-fourths respondents honesty and impartiality are the most important qualities of judges. Only 23 per cent of the respondents feel that knowledge of law is the most important quality of a judge while good behaviour is expected and treated to be the best quality by only one per cent respondents.

On the basis of above-mentioned analysis following inferences may be drawn:

(1) The most popular feeling is that honesty and impartiality are the most respectable qualities of Judges as 76 per cent respondents treat them the most important ones.

(2) Though knowledge of law is essential for deciding cases but this quality is treated to be second important quality as only 23 per cent respondents preferred to think it to be most important quality of judge.

(3) Good behaviour is not treated to be an essential quality of a judge as only 1 per cent of total respondents though it to be important one.

D.2 Public Opinion Regarding Role of Different Individual Qualities of Presiding Officers and Staff of the Court on the Level of Confidence of the People

Specific questions were asked from respondents to know the actual impact of honesty and good behaviour of Presiding Officers and Court Staff. Response of the people may be summed as follows:

D.2(a) Honesty of Presiding Officers

In the last table we have seen as to what is treated to be the most important quality of judge. In this part of the questionnaire, specific question was asked from respondents that how the assurance of honesty

was asked from respondents that how the assurance of honesty about particular presiding officers of a court affect the level of confidence in the institution. Options given to respondents were, (a) The level of confidence increases (b) The confidence remains the same (c) The level of confidence decreases and (d) can not say, the result of the survey is as follows;

Question –

How do you react if you are assured of honesty of presiding officer of Court.

Table-03

Confidence Indicators	Percentage of Respondents
Confidence Increases	95
Confidence Remains the same	03
Confidence Decreases	NIL
Can not say	02

As shown in the table 95 percent of total respondents have clearly indicated that the level of confidence increases when they are confident that that the presiding officers of the court is honest. Only 3 per cent of the total respondents told that there is no impact of honesty of presiding officers on their confidence. The novel feature of this table is that one of the respondents told that their level of confidence decreases when they are assured of the honesty of presiding officers. Only two per cent of the total respondents were undecided.

On basis of above analysis following inferences may be drawn:

(1) People's faith and trust in the Dispute Resolution System increases with increases in honesty of Presiding Officers as 95 percent of total respondents are of opinion that their level of confidence increases when they are assured of the honesty of Presiding Officers of Court.

(2) The importance of the honesty may be assessed from the fact that one of the respondents have told that their faith decreases when they are assured of the honesty of the Presiding Officers.

D.2(b) Good Behaviour of Presiding Officers

Good behaviour is always treated to be a good quality in civic life. It becomes more important in the day to day life when it comes from head of the family. Presiding Officer, being head of the Court, is an important person from whom good behaviour may be expected. It is why this quality was put to test whether it affects the confidence building process about Dispute Resolution System.

Question -

How do you react if you are assured of the good behaviour of a judge. The result of the survey is as follows:

Table-04

Confidence Indicators	Percentage of Respondents
Confidence Increases	52
Confidence Remains the same	41
Confidence Decreases	03
Can't say	04

Role of good behaviour is not limited only to civil life, the result of the survey shows that 52 per cent respondents feel that good behavior of the presiding officer of the Court increases their confidence while 41 per cent of them were of opinion that it does not have any bearing and their confidence and it remains the same. Three per cent of respondents said that their confidence decreases by the good behaviour of the presiding officers while 4 per cent of them could not make up their mind on this question.

On the basis of the analysis of the result of the survey following conclusions may be drawn:-

(1) Role of good behaviour of presiding officers also plays a role in confidence building of people and more than half of them (52 per cent) are impressed by good gestures of the court.

(2) For 41 per cent people good behaviour of the court does not affect their opinion regarding the Court.

D.2(c) Honesty of Staff of the Court

Staff of the Court is part and partial of the Dispute Resolution System and their activities and qualities have its impact on the opinion making process of the people. To analyse the feelings of the people in this regard respondents were asked to give their preferences on the impact of honesty of staff of the Court. The result of the survey is follows;

Question –

What is the impact on your confidence in judiciary if you are assured of the honesty of the staff of the Court.

Table-05

Confidence Indicators	Percentage of Respondents
Confidence Increases	91
Confidence Remains the same	04
Confidence Decreases	03
Can not say	02

Analysis of the result of the survey shows that honesty always plays an important role in confidence building. As much as 91 per cent of the total respondents were of opinion that their confidence increases in the system when they are confident of honesty of the staff of the Court. Only 4 per cent of the respondents were of opinion that their confidence remains the same while 3 per cent of them said that their level of confidence decreases when they are assured of the honesty of staff of the court. Two per cent persons were undecided and did not give any response.

On basis of above mentioned analysis following conclusions may be drawn:

(1) Honesty of the staff members is as much important as those of Presiding Officers of the Court as 91 per cent of the respondents feel that honesty of the staff of the court increases their confidence in courts.

(2) The honesty of staff members of the court increases the level of confidence of the people.

D.2(d) Good Behaviour of the Staff of the Court

The staff of the Dispute Resolution System is bracketed with the Court when an opinion is to be formed regarding performance of the Court. We have been in the last table that the honesty of the staff of the Court increases the level of confidence of the society. In this part of the questionnaire we shall study the role of good behaviour of the staff of the court on confidence building process.

Question –

The respondents were asked to answer whether Good Behaviour of the staff of the court affects their confidence and if yes, to what extent. The result of survey is given in the following table:

Table-06

Confidence Indicators	Percentage of Respondents
Confidence Increases	55
Confidence Remains the same	40
Confidence Decreases	03
Can not say	02

As shown in the table the role of good behaviour of the staff has almost the same importance as that of the Presiding Officers. It plays important role in confidence building process. As much as 55 per cent respondents are of opinion that their level of confidence increases with good behavior of the staff, 40 per cent of them said that their confidence remains the same even when the behaviour of staff is good. It means that even for these 40 per cent respondents good behaviour of the staff retains

their confidence. Only three per cent of the respondents were of the view that their confidence decreases with the good behaviour of staff while 2 per cent of them were not in a position to assess the impact.

On the basis of above-mentioned analysis following conclusions may be drawn:

(1) Staff of the Court is treated to be integral part of the Court by people and their gestures do have their bearings on the mind of the people.

(2) Good behaviour of the staff has its role in confidence building process because pleasant traits of society like good gestures always have their impact on the thinking process of the people.

(3) As much as 55 per cent respondents are of opinion that good behaviour of staff of the court plays definite role in increasing the confidence of people while 40 per cent of them have told that their confidence remains the same.

D.2(e) Quick Disposal of Cases

The Dispute Resolution System in India is blamed for delay in disposal of the case. Delay is not limited only to traditional civil and criminal courts. Institutions like Consumer Fora – which are under statutory duty to dispose cases within prescribed time, are also being accused of delay. The researcher has tested this factor to know as to how the delay in disposal of cases affects the confidence of people.

Question –

How does Quick Disposal of cases affect your confidence in the system? Response to this question is as follows:

Table-07

Confidence Indicators	Percentage of Respondents
Confidence Increases	97
Confidence Remains the same	02
Confidence Decreases	NIL
Can not say	01

As shown in the table, timely disposal of cases plays on important role in confidence building process. It was not clarified as to what should be treated to be an ideal time for disposal of cases and it was left to be decided by the respondents according to their own time frame as object of the researcher was just to know the impact of timely disposal.

As much as 97 per cent respondents were of the opinion that there is definite impact on their confidence in the system when cases are decided within a reasonable time. Only two per cent of them told that

timely disposal of cases do not affect their confidence in the dispute resolution system. None of the respondents told that the level of confidence decreases when there is timely disposal of cases while one per cent of them could not assess the impact and were undecided.

On the basis of above analysis, following inferences may be drawn;

(1) Timely disposal of cases affects the confidence of most of the people as 97 per cent of respondents admitted its good impact.

(2) Timely disposal of cases does not have any negative impact on the confidence process as none of the respondents have told that their confidence decreases with timely disposal of the cases.

D.3 Comparative Analysis of Role of Different Individual Qualities of Presiding Officers and Staff of Judicial Institutions on Confidence Building Process

Individual qualities play an important role in confidence building process. In order to know the comparative impact of individual qualities like honesty and good behaviour of presiding officers and staff of the court, result of the survey has been put together for comparison. The object is to know the relative impact of individual qualities on confidence building process.

In this part of the comparison two qualities namely honesty and good behaviour of Presiding Officers and staff of the court has been made.

D.3(a)Comparative Study of the Impact of Honesty of Presiding Officers and Staff of Judicial Institutions on Confidence Building Process

Honesty is an important factor affecting public confidence in Dispute Resolution System. Table shows that people give almost equal weightage to the honesty of presiding officers and staff of the court.

Table-08

Confidence Indicators	Effect of Honesty of Presiding Officers	Effect of Honesty of Staff
Confidence Increases	95	91
No Change in Confidence	03	04
Confidence Decreases	NIL	03
Can not say	02	02

The table shows that people give almost equal weightage to the honesty of presiding officers and the staff of the court. In comparison to 95 per cent respondents who say that their confidence in the system increases if they are convinced of the honesty of the presiding officers, 91

per cent of them are of opinion that the honesty of the staff of the court raises the level of their confidence in the system.

Uncommon feature of this table is that 3 per cent of total respondents feel that their confidence in the system decrease if they are convinced of honesty of staff. It is difficult for researcher to visualise any reason for the same. On the basis of the above analysis following inferences may be drawn:

(1) The age old saying, "Honesty is the best policy" is equally relevant for the confidence building process of judicial institutions and it always contribute to the credibility of the institution.

(2) So far as its contribution to reputation is concerned. Honesty of the staff of the court has almost equal importance to that of presiding officers and people do not make any noticeable difference in this regard.

D.3(b) Good Behaviour

Good public relations are always treated to be a boon for any institution. It is presumed that public relations always contribute to the acceptability of an organization.

In case of judicial institutions, it seems that it plays secondary role.

Table-09

Confidence Indicators	Effect of Good Behaviour of Presiding Officers	Effect of Good Behaviour of Staff
Confidence Increases	52	55
No Change in Confidence	41	40
Confidence Decreases	03	03
Can not say	04	02

As shown in the table people give almost equal importance to good behaviour of staff as well as presiding officers of the court. There is only slight variation in the response. 52 per cent of the respondents feel that good behaviour of presiding officers increases their confidence in the system while 55 per cent of them have the same expectation from the staff.

On basis of above analysis of the facts following inferences may be drawn;

(1) In order to increase public confidence good behaviour of presiding officers and that of staff of the court is an important factor according to half of the respondents.

(2) Honesty of presiding officers and staff of the court is still treated to be most important factor in confidence building process.

D.4 Comparative Analysis of the Impact of Honesty, Good Behaviour and Timely Disposal of Cases

After analysing response of people separately on the role of honesty, good behaviour and speedy disposal of cases and then making limited comparison of respondents' opinion, now we shall make comparison of the role of different factors in confidence building process.

In the following table all important factors have been put in one table showing how people react on different factors affecting their confidence in the Judicial System.

Table-10

Confidence Indicators	Effect of Honesty		Effect of Good Behaviour		Effect of Speedy Disposal of Cases
	Judges	Staff	Judges	Staff	
Confidence Increases	95	91	52	55	97
Confidence Remains the same	03	04	41	40	02
Confidence Decreases	NIL	03	03	03	NIL
Confidence Decreases	NIL	03	03	03	NIL
Can not say	02	02	04	02	01

As shown in the table, people are more concerned with delay in the dispute resolution process, it is why 97 per cent of respondents say that their confidence in the system increases with speedy disposal of cases.

Urge for speedy disposal of cases is closely followed by urge for honesty. It is interesting to note that people have expectations from presiding officers as well as staff of the court that they should be honest. As it is evident from the table 95 per cent of the respondents say that their confidence in the judicial system increases when they are convinced of the honesty of presiding officers. For them honesty of the staff can not be ignored and 91 per cent of them are of opinion that honesty of the staff plays most important role in inculcating confidence in people.

Importance of good behaviour in inculcating confidence in the mind of people comes next to speedy disposal of cases and honesty of presiding officers and staff of the court. Peculiar feature of this part of the observation is that people's expectation of good behavior is more staff of the court than the presiding officers 55 per cent of respondents are of opinion that their faith in the system increases if they get proper treatment from staff of the court while incase of presiding officers 51 per cent people expect good behaviour for increasing their trust in the system.

Conclusion

Comparative study of the chart enlightens us of many peculiar facts; Speedy disposal of cases is the most important factor for increasing trust in the system being closely followed by honesty of persons at the helm of affairs. Good behaviour comes at distant third place. Faith of people is affected not only by individual qualities of presiding officers but by individual qualities of staff of the court too. In both of the cases i.e. honesty and good behaviour, respondents are of strong opinion that their faith is affected by qualities of presiding officers as well as staff of the court. In case of honesty, people expect more honesty from presiding officers than staff of the court but in case of good behaviour it is just reverse and they expect that behaviour of staff is more important than the presiding officers.

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The Popular measure of Medical Termination of Pregnancy: Problems, Perspectives & Solutions

- Dr. Priyaranjan Kumar Shukla*

The link of humanity should be maintained between the born and the unborn and in specific context of the practices of induced abortion much will depend on the moral conscience of the mother and the abortionist.

It has been estimated that an Indian woman spends on an average of 194 months of her life in pregnancy and lactation, which amounts to her confinement to the course of procreativity and child's aftercare for as many as 16 years of life. Hence, few questions naturally arise in this context is it not too much to bear for a woman forced to live like a vehicle of procreation for such long time, or is a woman, in a democratic society like India, a free human being having right to decide procreation and planned parenthood? Against the above quarries it must be stated that if a woman in any case is a bonded slave of procreative passions, she is bound to fall prey to violence and violation of her self-will, freedom, dignity and personality development through her passivity or activity but in either of the cases of receptibility of the fruits of sexual consummation, Nature has gifted her with a helpless and responsible biological configuration. In modern times every woman is expected and supposed to be a consumeric consummator of sexual life lest she becomes a loser on the index of consumeric consummation of her physico-socio-cultural life in matters-too many-like freedom, education, employment and voluntarism to mother or not. Emancipation of womanfolk from the age-old social and superstitious bondages is, therefore, essential to safeguard womanfolk's individual and class interests of freedom and unless they are provided right to free choice in procreation, the idea of their emancipation is impossible to conceive woman's right to free choice in procreation is material and significant in reference to the temporal socio-economic-cultural values ascribed to the fair sex, the population growth in the country, crimes against woman-dowry deaths, violence, divorce & maintenance, etc.... The evil practices of dowry, mortality-morbidity of pregnant mothers and of infants due to lack of parental care or education and means of support, the strife of unemployment and malnutrition, maladjustment and juvenile delinquency amongst unwanted children of rural and urban societies.

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One of the various legal measures to affect woman's choice of procreation is that of regulating induced abortion. In India, since 1860, the law on the subject prohibited resorting to induced abortion except in cases continuance of pregnancy involved danger to the very life of the host.[1] This law occupied its undefeated seat in the statutory glory for more than a century and the consequential aspect of its enforcement has been millions of illegal abortions involving morbidity and mortality to millions of woman every year in India. The year of 1971 makes a historical breakthrough in the evolution of the law of abortion in India when in cause of woman's emancipation from unwanted pregnancy, the Central Legislature enacted the liberal law[2] of providing for termination of unwanted pregnancies in specific circumstances. The said liberal law since its enforcement in April, 1972 has proved to be an important piece of woman's welfare legislation with its beneficial or benevolent impact on womenfolk, society, humanity, nation and the world at large. The growth of the scourge of septic and fatal abortions has been tremendolously arrested since 1972 and along with this, the horizons of woman's liberty are accorded foundational extension due to the Medical Termination of Pregnancy Act, 1971 (here-in-after referred to as the MPTA). However, the realisation of the real goals of woman's emancipation through the instrumentalities of the MTPA is subject to various impediments which can be broadly classified into following three heads:

(a) Legislative fallacies and inadequacies.

(b) Controversies; and

(c) Implementational problems.

A. LEGISLATIVE FALLACIES AND INADEQUACIES

At the moment, there exist dichotomous legal enterprises to regulate induced abortion in India. They are the provisions of the Indian Penal Code and the MTPA respectively. Apart from the duplicity of their existence which is in itself a major setback against the objective of woman's emancipation through the MTPA, there are phrasal ambiguities and vagueness of different terms used in the penal code and the MPTA which create conceptual controversies, interpretative confusion and implementational problems. Some of the legislative fallacies and inadequacies may be listed as follows:

(i) While in medical sciences the terms, such as, miscarriage, premature labour, termination of pregnancy, menstrual regulation and child destruction have specific distinctive connotations, the same may not be accepted and tenable for

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1 Sections 312-316, Indian Penal Code, 1860 (hereinafter referred to as I.P.C.)

2 The Medical Termination of Pregnancy Act, 1971.

the purposes of the restrictive abortion law – section 312 of the I.P.C. A communitarian or corresponding state in interest would ever lie preservation of woman's pregnancy at every stage of gestation in all times and this marks the value consensus ideal of the foundation of the criminal abortion law in society.

(ii) Section 312 of the I.P.C. (hereinafter referred to as the Penal Code) makes use of the terms woman with child and woman quick with child to signify a 'pregnant woman' and a pregnant woman having felt quickening and of the fetus, respectively. Herewith confusion arises often in construing these terms drawing a distinction between the two which is necessary for the implementation of section 312 of the Penal Code.

(iii) Within the framework of the MTPA, it is generally the unwanted pregnancy that is legally and justifiably terminated. The terms unwanted pregnancy are, however, not defined with MTPA, which creates interpretative and implementational obstacles.

(iv) Within the MTPA, medical termination of pregnancy (hereinafter referred to as MTP) is available in case of failure of contraceptive used by either of the married couples to achieve the objective of planned family.[3] The terms 'planned family' are, however, not defined within the MTPA.

(v) In view of the Penal Code provision in section 312 permitting causing miscarriage only in order to save woman's life, it may be stated that causing miscarriage in order to have woman's health may be treated as an offence in that section. On the other hand, some time a distinction between injury to health and injury to life is not easily possible and the one includes the other.

B. CONTROVERSIES

While interpreting or implementing the MTPA, some following conceptual or implementational controversies do arise which need to be pointed out and resolved:

(i) Emancipating woman from unwanted pregnancy in case of grave injury to woman's life or health on eugenic ground[4] as well as on juridical indication of rape[5], although enclosed by the

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3 Explanation II to Section 3(2), MTPA.
4 Section 3(2)(I), MTPA
5 Section 3(2)(II), MTPA

letters of the MTPA, does not seem to be the exclusive objective of the MTPA. The findings of social surveys have revealed that the anticipated beneficiaries of the MTPA would like to have MTP for there sake of planning family as well.[6]

(ii) At the time, the MTPA has lived for more than 35 springs, there is no scope for any doubt the MTPA would be a living law. It has been revealed by the findings of social researches that the MTPA has received mass approval and the superstitions regarding induced abortion are gone to a great extent.[7] This attitudinal change may, be attributed to the transformation of the mankind's environment into a scientific and industrialized tempered environment wherein mankind could attempt to regulate the destiny the way be liked. The technical development in medical sciences has also been a significant factor, in bringing about this change. Not surprisingly, MTP has become the need and necessity of every married woman in the changing socio-economic environment of the country for realizing the objective of Planned Parenthood.

(iii) The MTPA test of 'grave injury to woman's physical or mental health' is too have, as by this it is expected that the attending doctor would distinguishing from grave injury and unless the letter is diagnosed, he will not terminate pregnancy. Drawing such a distinction, it must be noted, is not without practical difficulties and impossibilities even with all medical tests available and which would often amount to no decision or part of the attending doctor within the framework of the MTPA – he many a time may terminate pregnancy on woman's pretext, extra-legal influence or woman's exploitation.

(iv) The MTPA provision that no pregnancy of a woman below 18 years of age shall be terminated except with written consent of guardian[8] is a hard and fetterous condition for the emancipation of pregnant woman below 18 years of age – who are placed in the burdensome position accidentally or circumstantially – and the stipulation of the age of 18 years of the control of guardian is more than desirable. Some time, the condition of prior written consent of the guardian turns out to be injurious to the health of such woman. A situation may also arise when the woman below 18 years of age wants to get her unwanted pregnancy terminated but the guardian refuses to give consent or is not

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6 Explanation I, Section 3(2), MTPA

7 Priyaranjan Kumar Shukla," Abortion-law in India (Socio-legal Study)", LL.M.Dissertation, Banaras Hindu University, 1985 (Unpublished).

8 Section 3(4)(a), MTPA

traceable. Should the termination of pregnancy be refused for want of fulfillment of statutory requirement of consent of the guardian is a difficult question to answer.

(v) The permission of MTP on eugenic ground within the MTPA implies that a woman should have a right to know about the possibility of the birth of a seriously handicapped child and for this purpose she would like to take up pre-natal diagnostic tests. A problem therewith may arise when in course of the above tests, sex of the foots is determined and the female fetus is usually aborted. Socio-economics-cultural compulsions to abort female fetuses and various demographic-cultural repercussions of such abortions are the embarrassment stocks for the MTPA.

(vi) Section 5 of the MTPA exculpates a medical practitioner from any legal liability from any damage caused or likely to be caused by any thing done or intended to be done in good faith under the Act. On the other hand, owing to the increasing popular reliance over MTP and availability of MTP facilities in maternity homes, post-pattern units and woman welfare hospitals, a hike in the case involving injury to the abortee due to doctor's negligence is likelihood and the matter would attract judicial intervention.

(vii) A major controversy often arises amongst legal academics sociologists, legislators, religious fundamentalists and liberals about permitting MTP on woman's demand. In this context it deserves mention that by no strand of reasons the right to decide about the termination of pregnancy or not may be denied to the pregnant woman as it is very basic and fundamental to her to personal liberty enshrined within Article 21 of the Indian Constitution. However, what reasonable limitations in this regard may be feasible for various social reasons is the debatable subject matter every time liberalization of the abortion law is discussed.

(viii) Advertisements regarding extension of facilities of embryo testing together with of induced abortion may some time/appear to be guided by profit motive. Such advertisements have inductive and educative efforts on consumer which may turn out to be beneficial or harmful to woman and the society as per the use or misuse of the facilities of embryo testing – particularly when after detecting sex of the fetus female fetuses are aborted.

(ix) A burning controversy leading towards incoherence between the MTPA and the Hindu Marriage Act may arise in context of the termination of pregnancy at the instance of woman's will

and without the consent of the husband. Satya v. Sri Ram[9] and Sushil Kumar Verma v. Usha[10] are the examples on this difficult situation when termination without husband's consent may be declared judicially as an act amounting to cruelty within section 13 of the Hindu Marriage Act and consequently entitling the husband concerned to seek divorce against the wife. A suitable match between the MTPA and the Hindu Marriage Act to remove the punishment of divorce within the marriage Act for a legal termination within the MTPA is urgently called for, otherwise the MTPA would lag behind in achieving the objective of woman's emancipation.

(x) The MTPA provides that no termination of pregnancy shall be done without the consent of the woman of or above 18 years of age. A question arises as to what should be the form and nature of woman's consent. Should the woman's consent be like an informed consent – is the out coming thought to be discussed in this context.

C. IMPLEMENTATIONAL PROBLEMS :

The aim and objectives of any legislation cannot be realized without its proper implementation. The problems related to implementing the MTPA are multiple and it is desirable to solve them so that the MTPA may be implemented for the maximum realization of the emancipative objective of the Act. Some of the implementational problems are noted as follows:

(i) The liberal abortion law – the MTPA – was passed an exception to section 312 of the Penal Code and at the moment, the MTPA and the provisions of the Penal Code contained in section 312 – 316 make the whole gamut of the Indian abortion law. However, providing the MTPA a separate existence of its own creates difficulty as the Penal Code law goes into oblivion of the general public or beneficiaries of the MTPA and consequently, the restrictive law embodied by the penal code (which is the paternal law) virtually becomes no law in practice as the MTPA has spread an impression that induced abortion is no more illegal since the enforcement of the MTPA in 1972.

(ii) The MTPA permits by registered medical practitioners of allopathic Medicine only, which is itself a serious handicap in the enforcement of the MTPA, as registered medical practitioners of the above qualification do not abound in proportion to the expected beneficiaries of the MTPA in Indian society specially rural sites.

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9 A.I.R. 1983 P & H 252.

10 A.I.R. 1987 Delhi 86.

(iii) The MTPA's requirement of two registered medical practitioners for the MTP of a woman pregnant for more them 12 weeks and up to 20 weeks creates another difficulty in the course of MTPA's implementation. Referring this pregnant woman of the said description from one registered medical practitioner to the other may be stated to violate the privacy of the concerned woman and to put unnecessary hardship on woman folk even if woman's privacy has been protected in the limited manner of secret record-keeping as regards the identity of the MTP beneficiaries.

(iv) The MTPA's restriction of performance of MTP at government hospitals or at places approved by the government for this purpose for the time being is another serious impediment in the implementations of the MTPA. The rural society especially becomes an untouchable so far the delivery of the MTP services within the Act is concerned.

(v) The MTPA's failure is not providing expressly MTP on demand of raped woman without complying with the provisions of the Code of Criminal Procedure as regards informing the police and registering an F.I.R. etc., further amounts to demean the emancipatory objective of the MTPA.

(vi) The implementation of the M.T.P.A. is adversely affected due to registered medical practitioner's personal belief of conscientious objection to induced abortion. The MTPA lacks any provision in this regard which in such cases may go against the interest of the pregnant woman desirous of MTP.

(vii) The behaviour of married people towards the purpose of procreation – which becomes often fundamental to the decision making as regard resort to MTP – affects the implementation of the MTPA to a great extent.

(viii) The permissibility of MTP in cases of failure of an contraceptive adopted by either of the spouses within the MTPA is based on the presumption of the causation of grave injury to woman's mental health. However, such permissibility is also linked with family planning ground and accordingly the MTPA presents the married populace of India a voluntary choice for adopting MTP as a family – welfare measures. Along with the possibility of the misuse of this privilege by woman's giving false statement, the MTPA – turns into a permissive – law in a very suitable way, providing MTP on married woman's demand. It is fantasy that the government does not regard MTP a family planning measure, on the other hand.

(ix) Last but not the least, the implementation of the MTPA suffers a serious setback due to inadequate popularization amongst common masses, of the objects of the MTPA, obscurity of objects and

reasons of the MTPA, vagueness of the terms in the MTPA, lack of adequate facilities and legislative and administrative pitfalls enumerated earlier.

CONCLUDING OBSERVATIONS AND SUGGESTIONS:

In light of the legislative fallacies and inadequacies, controversies and implementational problems noted earlier, the following suggestions can be put forward to make the MTPA more effective and much more a living law.

(1) In order to remove the ambiguity in course of the interpretation of various terms such as miscarriage, premature labor, MTP menstrual regulation and child destruction, the expression. "Induced abortion' should be defined to include all the above expressions, so far as the purposes of the restrictive penal code are concerned.

(2) Within section 312 of the Indian Penal Code, the term 'woman with child' should be restated as 'woman pregnant for a period below fifteen weeks of gestation' and terms 'woman quick with child' should be restated as 'woman pregnant for fifteen weeks of gestation'. This would be a convenient legal model in coherence with the established medical knowledge regarding quickening of the fetus.

(3) As regard defining the term 'unwanted pregnancy', married couple's desire not to procreate and measures adopted to realize this desire should be the main determining factors for declaring the pregnancy unwanted, excepting other enforceable exigencies.

(4) The terms 'planned family' need be stated to compromise a maximum number of two children without regard to their being of either of sex, and sex pre-selection techniques should be regulated by Central Legislation so that selective abortion of female fetuses could be prevented all over the country.

(5) Woman's right to life includes woman's right to health as well; the woman's right to life should accordingly include woman's right to health for the saving clause of section 312 of the Penal Code. In view of the above, section 312 permitting causing miscarriage to save life of the pregnant woman may be stated to be violative of Article 21 of the Constitution of India as section 312 of the Penal Code does not permit causing miscarriage in order to save woman's health from dangers arising due to continuance of pregnancy.

(6) The preamble of the MTPA should also include, inter alia, the object of family planning and reduction of population growth.

(7) The MTPA should be treated as an important piece of social welfare, woman's welfare or family welfare law and steps should be taken by Central as well as State Government to implement the MTPA most effectively, so that woman could avail of the benefits without undue hardships.

(8) The MTPA's stipulation of 'grave injury to woman's health' should be substituted by 'injury to woman's health.'

(9) In case of the pregnant woman below the age of 18 years, the guardian's consent should not be mandatory; the doctor should perform MTP in her best interest, even if the woman approaches the doctor without guardian. However, while doing away with the mandatory consent requirement, a new provision need to be made by which the doctor performing MTP should be placed under an obligation to inform the guardian of the pregnant woman below the age of 18 years.

(10) In such a case if the guardian is not traceable or the guardian does not turn up after receiving information or refuses to give consent and the doctor performs the MTP in the interest of the woman below the age of 18 years, such woman should be referred to the Juvenile Welfare Board established under Juvenile Justice Act, being a neglected female juvenile – for proper care and protection. In no case, such woman should be allowed to walk away after getting MTP performed.

(11) Suitable provisions need be made in the MTPA making the doctor and others including his associates criminally liable for the injury caused to the abortees due to their negligence in course of conducting MTP. Looking into the environmental conditions prevalent in the society, judicial technicalities and nature of the injury, special courts (in the patterns of family courts) need be established to try complaints against doctors and the proceedings of such courts should always be camera proceedings in order to safeguard woman's privacy.

(12) An altogether new provision is required in the MTPA stating the indications for a justifiable MTP on woman's demand, if the same is not injurious to her life or health.

(13) Urgent legislative and administrative steps should be taken in order to ban advertisements on embryo testing, sex determination and termination of pregnancy following sex determination.

(14) An explanatory provision should be carved into section 3(4)(b) of the M.T.P.A. that no MTP without husband's consent after two children, irrespective of their sex, shall amount to cruelty within the meaning of the concept of cruelty in any of the statues

relating to marriage in India or in any of the religious codes or practice regulating marriage in India.

(15) A provision need be cited to section 3(4)(b) of the MTPA that duty lies on part of the registered medical practitioner to inform the woman of the possible benefits and consequences following MTP, before the woman gives her consent for MTP.

(16) In order to have a comprehensive abortion law, the provisions of the Indian Penal Code and the Medical Termination of Pregnancy Act should be conjoined together with suitable modifications and suggestions pointed out herein.

(17) In order to cope with the growing demand for MTP as well as for the purpose of extending MTP services amongst rural masses, necessary steps need be taken to utilize the services of registered medical practitioners of indigenous systems other then the modern medicine.

(18) To MTPA's provision requiring two registered medical practitioners for MTP of a woman having been pregnant for more than twelve weeks and up to twenty weeks should apply only in exceptionally difficult cases when the attending medical practitioner finds it necessary in the best interest of the beneficiary of the MTP to have a consultative opinion of the second medical practitioner.

(19) In case of MTP of a raped woman, MTP should be provided on woman's demand and the provisions of the Code of Criminal Procedure need not be complied with.

(20) The certificate of conscientious objection to induced abortion may be granted by proper government authorities to such registered medical practitioner who by reason of his religious or humanistic convictions does not like to participate in the operations of MTP. However, in exceptional circumstances every such conscientious objector of the above description should be made duty-bound to terminate pregnancy of a woman to save her life.

(21) The facility of MTP on the ground of contraceptive failure should be made available only in those cases where use of such contraceptive devices is undisputedly proved.

(22) Suitable provisions should be made for printing on the pockets of the contraceptive devices and displaying in the hospitals and nursing homes that MTP is legally permissible in the cases of contraceptive failures. Specific provisions should also be made to provide damages in case of such failure of contraceptive devices which are supplied by government hospitals and agencies; the

manufacturers of such contraceptive devices should also be made liable for damages in case the MTP is done on the ground of contraceptive failure and the contraceptives are found to be of poor quality.

(23) All necessary measures should be taken to make people aware of the whole gamut of the law of abortion, contraception, sex education, planned and responsible parenthood as well as socio-cultural effects of MTP.

At last, it is submitted that with the problem of overpopulation affecting the entire national community, every citizen of the Union of India has a duty to contribute to reduction in population growth but that would not mean that the unborn is killed every time to have a panacea to the problem of over population or others. A woman, moreover, must mind that resort to abortion should be adopted for strong reasons of danger to health or life or for other forcible compulsions of eugenic, social or humanitarian considerations and should never be embraced as a fashionable item to decorate themselves physically or ideationally. After all this massage the unborn must convey to the borne-specially the mothers having undergone MTP and others likely to resort to it in future-after having been treated with the last ritual before they could be born and which the born rarely dare to accept. The link of humanity should be maintained between the born and the unborn and in specific context of the practices of induced abortion as fashion games much will depend on the conscience of the mother and the abortionist. As if the unborn would ask a woman would you not like to mother me; let us wish the Indian mothers to be very conscious of their status of being of purity and sanctity greater than heaven's as the Sanskrit saying depicts; जननी जन्मभूमिश्च स्वर्गादपि गरीयसी।

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GRUNDNORM IN INDIAN CONTEXT – JUSTIFICATION OF BASIC STRUCTURE DOCTRINE

- By Avijit Saxena*

INTRODUCTION:

Before the advent of modern period, legal theory was basically dominated by the natural law ideology which was the touchstone for testing the State law. In the modern period, Hobbes for the first time divorced positive law from natural law and made the State law independent of any external criteria. However, Hobbes did not fulfil the task of positivism fully as he did not distinguish between the actual law ("is law") and the ideal law ("ought law"). His State-made law was not only an existing law but also an "ought" law.[1]

The task was accomplished by John Austin. Austin divorced the State law fully from any external criteria and pretensions of validity on the basis of "ought". His theory of legal system is based on his theory of sovereignty. According to Austin, a legal system exists if

(a) its supreme legislator is habitually obeyed.

(b) its supreme legislator does not habitually obey anyone.

(c) its supreme legislator is superior to the law subjects relative to every law.

For Austin, legal system was set of all the laws enacted directly or indirectly by one sovereign. Thus according to Austin the validity of a law emanates from the validity of the sovereign.

This was contented by Hans Kelsen who in his pure theory of law postulates that all the laws and rules derive their validity from a single basic norm, called the grundnorm. He talks about a hierarchy in legal system indicating that every law or rule is implied or emanates from some other law which is superior to it, which in turn also derives its existence from some other superior law. At the top of this pyramid is the basic norm or the grundnorm which is the supreme rule or law and which is an independent entity and is accepted by the society to be the basic norm, this basic norm binds the entire legal and every law derives its validity from it, whether directly or indirectly. If this basic norm collapses then the entire legal system will collapse. He segregated the grundnorm from affectivity. He said that there exists a hierarchy of norms and in that hierarchy grundnorm is at the top. Kelsen also applied his theory to the system commonly known as 'international law'. His earliest work did not touch

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[1] Sheela Rai, "Hart's concept of law and the Indian Constitution"; (2002) 2 SCC (Jour) 1

on this field, and it was only after Verdross, one of his disciples had started to adapt his approach to international law, that Kelsen himself took an interest in it. When applied in this field his theory does reveal some limitations. The Pure Theory demands that a Grundnorm be discovered. If there are conflicting possibilities, then as Kelsen himself admitted, his theory provides no guidance in choosing between them. All he said was that the grundnorm should command a minimum of support. In the international sphere there are two possible grund norms, the supremacy of each municipal system or the supremacy of international law.

Kelsen argues that; every national legal order cannot ex hypothesis recognize any norm superior to its own Grundnorm. The English legal order does not apply in France or vice versa. Nevertheless the English legal order recognizes the validity of the French legal order in France; and if the only grundnorm known to English Law is its own. Such is the out come of the doctrine of national sovereignty and it tends to a state of anarchy in which each national order recognizes only its own Grundnorm and endure other legal orders as subsidiary to it. Kelsen would have none of this. He argued instead for a monist view of the relationship between international and municipal law, and declared that the Grundnorm of international system postulates the primacy of international law. Nations in practice he argued recognize the equality of each others legal orders, and the doctrine of equality must mean that they recognize the existence of a grundnorm superior to the grundnormen of their own particular legal orders.[2]

This brings us to the question that what should be the basic norm of a country? The answer to it perhaps lies in the kelsenian writings where he postulates that this basic norm gives validity to all the laws of that country. The grundnorm can be traced back until we reach a point where we find a basic and supreme law which is **assumed** to be the ultimate authority. And we make this assumption on the grounds of efficacy. If the laws are efficient and derives their power the assumed basic norm then it becomes the grundnorm of that country. For example Riddall traces the British grundnorm to the year 1066 when William I overthrew the rule of Saxon kings and issued his own decrees.[3] Generally in modern times the basic norm of a nation is its constitution, which is considered the basic law of that nation.

Now comes another important question in this regard: what is the grundnorm of India? The answer to this may be straight forward or vague, depending upon the view of a person. Some scholars argue that the constitution is the basic norm or the grundnorm whereas the others

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[2] Sangeeta Chakravarti, "International norms influencing national legal system", www.lealservice.com

[3] J.G. Riddall, Jurisprudence, pg. 130, Oxford University Press, 2005

contend it by saying that Indian legal is one of the oldest system in the history of mankind, where the basic moral, ethical and legal principles were traced back to Vedas. The second approach appears to be fallacious because assuming that even once the Vedas were the basic norms but then the times changed and the foreign rule, first by the Muslim invaders and then by the Britishers was imposed on Indians. Also Indians are people of mixed ethnicity and religion and thus Vedas as a basic norm will not apply to them. There is only one basic law which all the citizens of India, giving them equal status, making no differentiation on the basis of their religion and that basic law is the Constitution. All the laws derive their validity from it and any law which is in violation of it is struck down as void. This concept was held in force till the famous case of **Kesavananda Bharati v. State of Kerala**[4] which evolved the basic structure doctrine and ushered Indian legal system into a new phase of judicial activism. Basic structure doctrine opined that though the power of Parliament to amend the constitution is unlimited under Article 368 but there are certain basic features of the constitution which cannot be abrogated. Thus any amendment which is in anyway against any of the basic features of the constitution will be null and void. These basic features, it was held, were essential in maintaining the structure of India and reflected its social and ethical values, which gave us such an idealistic constitution. These features included democracy, supremacy of the constitution, secular character of it, separation of power between legislature, executive and judiciary, federal character of constitution. The judges held that all the powers of constitution derives from these basic features and these form the basic structure of the constitution which cannot be amended. Thus now the question arises whether the constitution is the grundnorm or the basic structure doctrine is the grundnorm in India. This will be looked into the main paper.

CHAPTER ONE
THE CONCEPT OF GRUNDNORM

Legal positivism is a very important branch of the subject of jurisprudence and explains concepts like law, morality and justice in very clear and unambiguous terms. This field has given us many brilliant writers and philosophers like Austin, H.L.A. Hart, Hobbes, Bentham etc. But one of the most respected and debatable writer also comes from this field, Hans Kelson. His pure theory of law has changed the way of thinking by scholars and has given law its independent identity away from social sciences like sociology, economics, psychology etc. Hans Kelsen was an Austrian by birth and had been educated in Vienna during the beginning of the twentieth century. He left Europe during the time when Hitler came to Power and settled in America. He spends the last days of

[4] AIR 1973 SC 1461

his great academic year as a philosopher in the University of California.[5] Hans Kelsen has received much praise as well as criticism on his work. He has been regarded by some legal theorist as the leading thinkers of the twentieth century; one American legal theorist Roscoe Pound wrote in 1934 that Hans Kelsen was 'unquestionably the leading jurist of the time'.[6] The great English theorist Hart commented him as 'The most stimulating writer on analytical jurisprudence of our day'[7], another great thinker George Henrik ranked him on the same level with that of Max Weber where he says 'it is these two great thinkers who have most deeply influenced social science in the century'.[8] In spite of the great approvals by these great thinkers some of the American and English thinkers have criticized his work as 'utterly sterile', 'barren', and amounting to an 'exercise in logic and not in life'.[9]

Now let us define the pure theory of law in detail. The object of the pure theory is to identify the very essence of law, the one thing that makes a law, as opposed to the other forms of organizations that can exist in any society. He wanted to give a general understanding of the term law.[10] According to him the Pure Theory is a legal theory which is free of all political ideology and every elements of the natural science and which is autonomous and conscious in its own character.[11] Pure theory seeks to eliminate all those which cannot be precisely termed as law thus the term 'Pure Theory'.[12] This theory tries to answer the fundamental question of what is law and how it came into being? Kelsen in the early part of his research was against the notion of incorporating writings from different discipline such as the elements of psychology, sociology, ethics[13] and political theory without actually knowing what makes each one of them different or without actually knowing the true meaning of these disciplines which he termed as *"legal Syncretism"*.[14]

According to Kelsen law is a norm or a set of norms or more exactly a normative order. These norms are coercive orders which may be in the form of prescription, permission or authority. Unlike Austin who

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[5] S. David 'Modern Positivism; Kelsen's Pure Theory of Law'.
[6] Kelsen. H, 'The Introduction to the Problems of Legal Theory' 1934, Clarendon Press, Oxford.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Kelsen, H, 'The Introduction to the Problems of Legal Theory' 1934, Clarendon Press, Oxford. See pg. 7. By this general under standing of the law he mean that "the pure theory is not an interpretation of particular national or international legal norm" or in other words the pure theory of law tries to point out the law which is applicable in regard to all the all the countries.
[11] Kelsen, H, 'The Introduction to the Problems of Legal Theory', 1934, Clarendon Press, Oxford, See Pg. 1.
[12] Ibid, See pg.7
[13] Refer to Shuchman, P, "Reading in Jurisprudence and legal philosophy", 1979, Little, Brown and Company, Boston and Toronto. Pg. 517-521.
[14] S. David 'Modern Positivism: Kelsen's Pure Theory of Law' pg. 192

claims obedience to arise out of the fear of sanction Kelsen takes a different view point. According to him it is not always because of the fear of the coercive nature of the law that it is obeyed. He agrees, people obey the law because of the fear of the sanction, but he argues that this is not always the reason for the obedience to law. According to him there are other reasons for the obedience to law rather then the fear of sanctions, such as; religious or moral matters or other reasons such as the regard for the social customs which lead to the obedience of the norms. According to the pure theory of law *"Norms functions as the form of measuring the human action"*.

According to Kelson a norm is an "ought" proposition; it expresses not what is, or must be, but what ought to be, given certain conditions. All the norms exist in a network of norms and their existence is a proof of their validity.[15] As all the legal norms are derived from the higher ones, then there must be a basic norm from which all the norms derive their validity from. Kelsen calls this basic norm as the grundnorm. The grundnorm is selected on the principle of efficacy. This means that entire legal system which emanates from the basic norm should be strictly followed by the people and the laws should be effective and efficient. Kelsen places a great deal of importance into validity and efficacy and the ensuing relationship between them. According to him every legal norm has to be in conformity with the basic norm and thus to be valid a norm has to be effective. Thus every law which is created in conformity with the basic norm has to be effective in order to be valid.

Kelson describes the legal process as a hierarchy of norms, the validity of each norm (apart from basic norm) resting upon a higher norm, and each level in this hierarchy represents a movement from complete generality increasing individualization.[16] On top of the hierarchy lies the basic or the grundnorm. The grundnorm need not be the same in every legal system but a grundnorm of some kind will always be there in a legal system. The grundnorm is not the constitution; it is simply the pre supposition, demanded by theory that this constitution ought to be obeyed. Therefore the grundnorm is always adapted to the prevailing state of affairs. The grundnorm only gives validity to the constitution and all the norms derived from it, it does not dictate their content.[17] Now the important question arises is how to find the grundnorm in a legal system. For this Kelsen is of the view that we trace back the earlier laws which

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[15] Validity can have 3-4 meanings in this context to quality a legal norm, it may suggest conformity with a higher norm, or it is a consistent part of a normative field of meaning, or that it has inherent claim to fulfillment. Kelsen mainly used "valid" in the second sense but without distinguishing from the first meaning. – Freeman, Lloyd's Introduction to jurisprudence, 7th edition, Sweet & Maxwell, pg. 258.

[16] Ibid.

[17] R.W.M. Dias, Jurisprudence, Aditya Books Pvt. Ltd., New Delhi, 1994, Pg. 362.

gives validity to the newer laws and ultimately we'll reach a point where we'll have to pre suppose the existence of a basic norm. For example, today's laws can be traced back to the constitution of a country. Now the validity of the present constitution might be traced back to an earlier constitution from which it was born or it might be traced back to a monarch's orders who decreed that laws be made in a legislative assembly. At the end of the road, however, we come to a point beyond which it is not possible to go. Then we have to presume the validity of the original norm in order to give validity to all the norms which descend from it.[18] Also the validity of the grundnorm is dependent on efficacy. We can only assume the validity of a grundnorm if the norms descending from it are observed by everyone in that legal system. Ultimately Kelsen defines law as "a system of coercion imposing norms which are laid down by human acts in accordance with a constitution the validity of which is pre supposed if it is on the whole efficacious".[19] In the event of a revolution when an existing legal regime is ousted and a new one established then the grundnorm also changes as the previous constitution is no longer efficacious and a new constitution is now in its place. Thus the new grundnorm will be the constitution established by the new regime.

Kelsen's theory has often been criticized as being a natural law which he refuses to acknowledge. Kelsen in his writing on the basic norm mentioned "with respect to the fact that the basic norm of the pure theory, which represent the reason of the validity of the positive law, is not in itself a norm of positive law, the pure theory of law has often been misrepresented to be a kind of natural-law doctrine".[20] However in answer to this he states that there is a difference between the Pure theory and Natural law, he states "according to the natural law doctrine, the natural, non-manmade law is not only the reason of the validity of the positivist, man-made law, but also determines the content of the positive law, so that the positive law whose content do not conform to the natural law is to considered as non-valid and non-law at all". He further stated "……..as a matter fact there are many different and contradictory natural laws". Where as the according to the pure theory of law no norm can be valid if it is in conflict with the basic norm and unlike the natural law where the non-man made law determines the contents of the norm, the contents of the norms of the "positivistic legal orders are not determined by the basic norm but by the acts of human beings: by the father of the constitution and the organ directly instituted by the constitution or by law creating-fact".[21]

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[18] J.G. Riddall, Jurisprudence, Oxford University Press, 1999, pg. 129.

[19] Kelsen, H. 'The Introduction to the Problems of Legal Theory', 1934, Clarendon Press, Oxford, pg 11

[20] See: ibid. For the reasoning behind criticizing the Pure Theory of law as a natural law.

[21] Ibid.

Thus he justifies the pure theory as being a positive law and not a natural law.

CHAPTER TWO
EVOLUTION AND JUSTIFICATION OF BASIC STRUCTURE DOCTRINE IN INDIA

From above we have seen that the grundnorm is the basic norm of a legal system from which all the other norms descend and derive their validity form. This being accepted then another question now arises is what will be the grundnorm in India? To answer this question we have to look at the Indian history and determine which regime came first and which regime overthrew the first one and established itself. In the pre historic times Vedas were the main source of authority among people and they used to follow it vigorously. Thus in ancient India the grundnorm was the 4 vedas. Then in the 10^{th} century Muslim invaders came to India and established their own regime here. Now it is very interesting to note that at this time the official regime consisted of Muslim laws but the Hindus and others were allowed to practice their own customs according to their religion. Some laws were applicable to them but not all the laws. Thus we can say at that time there two grundnorms prevailing in India – one the Muslim Ruler's regime and the other one the Vedas, followed by the Hindus. Also it must be kept in mind that the Muslim rule was not over the entire country, some parts being still ruled by Rajputs and other Dravidians kings. This doesn't go against Kelson's theory as he himself has admitted that there may be more than one grundnorm prevailing in a legal system. Then the British came and united the entire country for the first time by bringing it under their rule. Then they imposed their legal system on India and the grundnorm again changed because for the first time all the parts of the country were ruled by a single legal regime. Now the grundnorm became that of British legal system which they were imposing on India. Finally independence came and we adopted our own Constitution and the grundnorm again changed. Now all the laws descend from the constitution and derive their validity from it. No law can exist in contravention to constitution otherwise it will be declared as ultra vires by the courts.

Thus the notion of supremacy of constitution went on till early 1970s when the Supreme Court held that even within constitution there are certain sacred principles which cannot be amended or abrogated. These principles were called as basic structure of constitution. These basic principles were deemed to be the most important part of the constitution without which the entire Indian legal system and society would crash. Through subsequent cases the basic structure doctrine has evolved and strengthened. Now people are debating whether the actual grundnorm of India is its constitution or just the basic structure of it.

Evolution of Basic Structure Doctrine-

The makers of Indian constitution wanted to keep it a flexible document and thus they included a provision in the form of Article 368 which lays down the procedure for amending the constitution. **Article 368** of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. Parliament started using its amending powers right from the starting by bringing in laws which tried to reform the land ownership and tenancy structure. This was in keeping with the socialist policy of Mr. Nehru who was the Prime Minister then. These laws were violative of right to property, which was a fundamental right then, and the courts struck these laws down. Piqued by the unfavourable judgments, Parliament placed these laws in the **Ninth Schedule** of the Constitution through the **First and Fourth Amendments** (1951 and 1952 respectively), thereby effectively removing them from the scope of judicial review. These amendments were challenged on the grounds that they violated Art. 13(2) which provides for the protection of fundamental rights of the citizens. In the early stages the court rejected this argument and held that Parliament has unlimited power to amend the constitution, even those parts which are connected to fundamental rights. This attitude was shown in **Sankari Prasad Singh Deo v. Union of India**[22] and **Sajjan Singh v. Rajasthan**[23]. Thus until now the courts played along with the legislature and there was no confrontation between the two, but this changed with the decision in **I.C. Golaknath v. State of Punjab**[24] in which a 11 judges bench decided that Article 368 merely laid down the procedure for amending the constitution and the real power came from Articles 245, 246 and 248 which gave Parliament the power to make laws. Thus the court held that the amending power and the legislating power of Parliament were the same and thus any amendment will come under the term 'law' mentioned in Article 13(2) and thus no amendment can violate any fundamental right. The majority judgment invoked the concept of **implied limitations on Parliament's power to amend the Constitution.** This view held that the Constitution gives a place of permanence to the fundamental freedoms of the citizen. In giving the Constitution to themselves, the people had reserved the fundamental rights for themselves. **Article 13**, according to the majority view, expressed this limitation on the powers of Parliament. Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the

[22] Sankari Prasad Singh Deo v. Union of India; AIR 1951 SC 458
[23] Sajjan Singh v. Rajasthan; AIR 1965 SC 845
[24] I.C. Golaknath v. State of Punjab; AIR 1967 SC 1643

Constitution and the nature of the freedoms granted under it.[25] The phrase 'basic structure' was introduced for the first time by M.K. Nambiar and other counsels while arguing for the petitioners in the *Golaknath* case, but it was only in 1973 that the concept surfaced in the text of the apex court's verdict.

Through a spate of amendments made between July 1971 and June 1972 Parliament sought to regain lost ground. It restored for itself the absolute power to amend any part of the Constitution including **Part III**, dealing with fundamental rights. Even the President was made duty bound to give his assent to any amendment bill passed by both houses of Parliament. Several curbs on the **right property** were passed into law. The **right to equality before the law and equal protection of the laws (Article 14)** and the fundamental freedoms guaranteed under **Article 1910** were made subordinate to **Article 39(b) & (c)** in the **Directive Principles of State Policy.** 11 Privy purses of erstwhile princes were abolished and an entire category of legislation dealing with land reforms was placed in the **Ninth Schedule** beyond the scope of judicial review.[26] All these amendments came for review before a full bench of Supreme Court in the case of **Kesavananda Bharati Sripadagalavaru v. State of Kerala and Another**[27] where the judges decided that the 24th amendment was valid and that the Parliament had the power to amend any or all provisions of the constitution. Also they declared that Golakhnath case was wrongly decided and Art. 268 contained both the procedure and the power to amend the constitution. The judges also held that there is a difference between the Parliament's legislative power, through which it can enact ordinary laws, and its constituent power, through which it can amend the constitution.

Most importantly seven of the thirteen judges in the *Kesavananda Bharati* case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. Some of the basic features which the judges noted were-

1. Supremacy of the constitution
2. Republican and democratic
3. Secularism

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[25] Venkatesh Nayak, "The Basic Structure of Indian Constitution", http://www.humanrightsinitiative.org/publications/const/the_basic_structure_of_the_indian_constitution.pdf

[26] The Constitution (**Twenty-Sixth amendment**) Act 1971 and The Constitution (**Twenty-ninth amendment**) Act, 1972, respectively.

[27] Kesavananda Bharati Sripadagalavaru v. State of Kerala and Another; (1973) 4 SCC 225

4. Separation of power
5. Federal character of republic
6. Mandate to build a welfare state as given in directive principles of state policy
7. Unity and integrity of country

Kesavananda Bharati recognized the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what appoints to that basic structure. Though the Supreme Court very nearly returned to the position of *Sankari Prasad* (1952) by restoring the supremacy of Parliament's amending power, in effect it strengthened the power of judicial review much more.

The doctrine of basic structure which evolved in this case was reiterated in later cases such as **Indira Gandhi v. Raj Narain**[28] where the election of Ms. Gandhi was in question and to save her the Government had brought in 39th amendment which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice-President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Four out of five judges on the bench upheld the **Thirty-ninth amendment,** but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute. One judge, **Beg. J.** upheld the amendment in its entirety. Mrs. Gandhi's election was declared valid on the basis of the amended election laws. The judges grudgingly accepted Parliament's power to pass laws that have a retrospective effect. The majority upheld the doctrine of basic structure and also held that ordinary laws were not within the scope of basic structure and only the amendments can be reviewed through this doctrine.[29]

Later on in the case of **Minerva Mills Ltd. v. Union of India**[30] court struck down those parts of 42nd amendment which placed unlimited amending power in the hands of Parliament and tried to take away the power of judicial review from the courts. The court declared that a limited amending power is a basic feature of the constitution. In another case **Waman Rao v. Union of India**[31] court struck a balance between its authority to interpret the constitution and the Parliament's power to amend it.

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[28] Indira Gandhi v. Raj Narain; (1975) Supp SCC 1
[29] Raju Ramachandran, "The Supreme Court and the Basic Structure Doctrine", Supreme But Not Infallible, pg 116
[30] Minerva Mills Ltd. v. Union of India; (1980) 3 SCC 625
[31] Waman Rao v. Union of India; (1981) 2 SCC 362

Justification of Basic Structure Doctrine-

A very important fact which must be remembered while talking about the basic structure doctrine is that judiciary developed it as a shield against the attacks of the Parliament on Constitution. It sought to protect the basic ideals of constitution on which it is based and to maintain the unique identity of Indian legal system with which we identify ourselves. Now the question arises that whether constitution is the grundnorm in India or the basic structure doctrine is the basic norm in this country. The supporters of basic structure being the grundnorm argue that as these basic principles like democracy, secularism, federalism etc. forms the skeleton of our constitution and it cannot survive without these essential parts thus this doctrine has to be much more important then the constitution itself. This doctrine gives India its Identity and the entire legal system is based on these principles. Also these basic features cannot be amended or damaged or abrogated by the Legislature by its amending power. Thus there is a streak of permanency which is only present in the basic norm or the grundnorm. Any amendment to constitution is not valid if it is in contravention to the basic structure. Also other parts of the constitution are based on these basic features and thus directly or indirectly derive their validity from the basic structure. Following the same logic, no law can be in violation of constitution, and as the constitution's main theme is the basic structure doctrine thus we can say that no law can be in violation of certain basic features of the constitution.

The concept of basic structure doctrine being the grundnorm in India looks appealing from outside for the sheer simplicity of it but on deeper examination this theory fails. For one thing grundnorm is much more then just a few basic principles. Also Kelson said that the basic norm should be socially accepted by the people. The people of India have accepted the constitution in its entirety and not just the basic features of it. Also applying the validity and the efficacy test we find that not all the parts of constitution are derived from basic structure. For example – the constitution allows existence of parallel legal systems in the shape of personal laws many of which still derive their validity from religious institutions. Article 372 of the Indian Constitution allows continuance of pre-constitutional laws. It includes personal laws also. Article 44 of the Constitution provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. These provisions may be interpreted to mean that the Constitution for the time being recognizes their existence. But it may be relevant to note that the laws which conflict with provisions of the Constitution that are thought to

be part of the basic structure like Article 14 are still tolerated.[32] Some other examples of basic structure theme not being followed is –

(i) Under Article 240(2) the President can override Parliamentary legislation in relation to Union Territories. The President may make regulations for any purpose for which Parliament could make law.

(ii) Under Schedule (5) Part (5) Parliamentary legislation in relation to tribal areas in certain matters can be modified. State's power to legislate on certain specified entries is subject to power of Parliament under the Union List, e.g. Entry 23 of State List subject to Entry 54 of List I, Entry 24 of List II is subject to Entries 7 and 52 of List I.

(iii) Parliament can by its own law effectively alter the distribution of powers. Articles 2 to 4 can be amended by ordinary parliamentary legislation which conflicts with the principle of federalism which the Constitution seeks to protect.[33]

All these provisions are against the basic principles of federalism, separation of power and Parliamentary system of government. If the basic structure is believed to be the grundnorm then all these and many other provisions of the constitution will become invalid whenever tested against it. Thus we have to accept that basic structure, though important, is a part of the constitution and not superior to it. Also as the Supreme Court held in Indira Gandhi election case, ordinary laws are outside the scope of basic structure. It only examines the constitutional amendments from altering the basic ideals of constitution. Thus the ordinary laws do not derive their validity from the basic structure but from the constitution as a whole. On the other hand the constitution passes all the tests required to prove it as the grundnorm in India. If we test it against the validity test then we can all see that every law has to be in conjunction with the constitution and if it is not then it is declared as ultra vires. Thus constitution gives validity to all the laws, even pre constitutional laws also through its retrospective effect. On the test of efficacy we will again see that every law which is constitutionally valid will be followed by the people all across the country because it becomes mandatory for them. Thus applying both the validity and the efficacy tests, we can safely assume that the constitution of India is its grundnorm and not the basic structure theory.

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[32] Sheela Rai, "Hart's concept of law and the Indian Constitution"; (2002) 2 SCC (Jour) 1

[33] Ibid.

CONCLUSION

This paper sought to analyze the concept of grundnorm as evolved by Kelsen and then to apply it in Indian context. Kelsen was a brilliant legal thinker who tried to separate law from external factors like social sciences and morality so that it could be developed as a science. That is why his theory is called the pure theory of law. According to him every law derives its existence from a higher law. This goes on till we reach the basic norm or the grundnorm whose validity is presumed and from which all laws derive their validity. To determine the validity of the grundnorm we have to look at its efficacy. If all the laws descending from it are efficacious then its validity is assumed.

Applying this concept in India, we reached the conclusion that constitution is our basic norm. The doctrine of basic structure forms the framework of the constitution without which it will collapse. But it is also a part of constitution and not superior to it. It can be thought of as a norm within the basic norm. The court developed this doctrine to shield the constitution from the attack of Parliament through the instrument of amendment. But one has to wonder that it has been 34 years since the doctrine was evolved. At that time it was of paramount importance because there a constant power tussle between legislature and the judiciary but now that struggle is not there. Also the basic structure doctrine will hinder important constitutional changes that may be required to be made in near future. For example due to basic structure doctrine we cannot change to presidential form of government because Parliamentary system is a basic feature. There are other instances also in which this doctrine may cause problems. For example if India wants to join some regional economic union which requires submission to the jurisdiction of supranational institutions, "sovereignty" a basic feature, is violated. Therefore its time for the courts to discard this doctrine and pave the way for important constitutional reforms.

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INQUEST – AN INCOMPLETE PROCEEDING LEADING TO FURTHER COMPLICATIONS

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&
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Introduction:

All around the world the police and law enforcement officials are given the powers and the responsibility to examine and investigate crimes and evidence. However the police officers and the other officials cannot possibly be expected to be physically, legally and medically capable of investigating the crime alone. Often the police officers themselves find it impossible to determine and grasp the nuances of the medical language. However, details such as the nature of wounds, the cause of death and time of death afford invaluable evidence to the officials in their investigation. In these circumstances it is imperative that a detailed examination of these questions is done by medically capable and qualified professionals. This detailed examination of the evidence in question is called in inquest.

According to Black's Law Dictionary the term "Inquest" is defined as-

The Inquiry by a coroner or medical examiner, sometimes with the aid of a jury, into the manner of the death of any one who has been killed or has died suddenly under unusual or suspicious circumstances or by violence or while in prison.

A body of men appointed by law to inquire in certain matters. The judicial inquiry made by a jury summoned for the purpose is called an inquest. The findings of such men, upon an investigation are also called an inquest.[1]

In India Section 174 of Cr.P.C. deals with the aspect of inquest. However it has been widely explained in England. According to the Coroner's Act 1988 when someone dies "a violent or unnatural death" or "a sudden death of which the cause is unknown" the death has to be reported to the coroner and there has to be an inquest to identify the person and to answer the questions "how, when and where" the person died and if there are to be no criminal proceedings.

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[1] Black's Law Dictionary, (6th edn., St. Paul Minn West Publishing Co. 1990, US)

The purpose of the inquest is to answer four questions[2]

- Identity of the deceased;
- Place of death;
- Time of death; and
- How the deceased came by his death.

Evidence must be solely for the purpose of answering these questions and no other evidence is admitted. It is not for the inquest to ascertain "how the deceased died" or "in what broad circumstances", but "how the deceased came by his death", a narrower and more limited question. Moreover, it is not the purpose of the inquest to determine, or appear to determine, criminal or civil liability, to apportion guilt or attribute blame.[3]. For example, where a prisoner hanged himself in a cell, he came by his death by hanging and it was held by the law lords that it was not the role of the inquest to enquire into the broader circumstances such as the alleged neglect of the prison authorities that might have contributed to his state of mind or given him the opportunity. An inquest should set out as many of the facts as the public interest requires.[4]

Inquest in England:

In England, the concept of Inquests has been prevalent since the 1200's and as such the law relating to inquests has developed with the development of society and many principles have been created, modified and rejected. Understanding the present position of law, would therefore require a brief study of the basic concept of inquest and the existence of the coroner system in England.

A Brief History:

In England, it was felt that it was in the general interests of the community that any sudden, unnatural or unexplained deaths should be investigated and, to reflect this, the role of the Coroner has adapted over the eight centuries since the office was formally established in 1194, from being a form of medieval tax gatherer to an independent judicial officer charged with the investigation of sudden, violent or unnatural death.

The duties of the early coroners were varied, and included the investigation of almost any aspect of medieval life that had the potential benefit of revenue for the Crown. Suicides were investigated, on the grounds that the goods and chattels of those found guilty of the crime of self murder would then be forfeit to the crown, as were wrecks of the sea, fires, both fatal and non-fatal, and any discovery of buried treasure in the

[2] R. v. HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson; [1995] QB 1 at 23, CA
[3] Coroners Rules; 1984, SI 1984/552, r. 42
[4] [2003] All ER (D) 40 (Dec)

community which, as 'treasure trove', remains one of the coroner's duties today, although it is likely that this particular medieval duty will finally be removed. Sudden death in the community had always been considered important since the early days of the office and was also investigated by coroners, although for reasons far different to those of today.

The Coroner system continued to adapt over the centuries, but in the nineteenth century major changes relating to the investigation of death in the community occurred. In 1836, the first Births and Deaths Registration Act was passed, prompted by the public concern and panic caused by inaccurate parochial recording of the actual numbers of deaths arising from epidemics such as cholera.

There was also growing concern that given the easy and uncontrolled access to numerous poisons, and inadequate medical investigation of the actual cause of death, many homicides were going undetected.

By then, the coroner's fiscal responsibility had diminished and the Coroners Act of 1887 made significant changes here, repealing much of the earlier legislation. Coroners then became more concerned with determining the circumstances and the actual medical causes of sudden, violent and unnatural deaths for the benefit of the community as a whole.

The coronership at present responds to and investigates those deaths which have been referred to it for a wide variety of reasons (just over one third of all deaths in England and Wales at the present time), rather than pro-actively screening all deaths that occur, whether in the community or in hospital, and then determining which ones should be subjected to further scrutiny.

The Office of Coroner has survived for over eight hundred years by evolving to meet the changing needs of the society that it is there to serve, and it continues to welcome any beneficial and positive changes which will enable it to develop and build on the service it provides to the public in general and the bereaved in particular.

Present Situation:

There are approximately 110 different coroners' jurisdictions in England and Wales. Each coroner is expected to be available whenever required and, because of the number of cases dealt with, some 32 coroners are identified and called whole time coroners and are paid an annual salary regardless of their caseload. The remainders are remunerated according to the number of cases referred to them. By the very nature of their duties, coroners must be accessible to the public at all times.

Coroners are independent judicial officers whose appointment and duties are regulated by law. They inquire into certain kinds of death set

out in the Coroners Act 1988, S. 8(1), namely those which the coroner has reasonable cause to suspect are-

1. Violent or unnatural,
2. Sudden, of unknown cause,
3. Occur in prison.

The death may result (for example) from a domestic accident, an incident at work, a homicide or a suicide, or even from a major disaster. For a particular coroner to have jurisdiction, it does not matter where the death occurred (even outside the UK). It matters where the body now is. The Home Office Research Development Statistics Section maintains statistics of the number of deaths reported to coroners.

The inquiry may involve a post-mortem examination (or "autopsy"). Coroners hold public hearings in open court (sometimes with a jury) when evidence concerning the deaths is heard. The inquest into death has a very limited role, as provided by the Coroners Act 1988, S. 11, and the Coroners Rules 1984, rule 36. If the evidence is sufficient, it has to answer four questions, and also to provide the particulars needed to register a death. This is the role of the jury (if there is one in the particular case), or of the coroner (if there is not).

The four questions are (1) who the deceased was, and (2) how, (3) when, and (4) where the deceased came by his or her death. The registration particulars are the date and place of death, the name and surname, the sex and (if it is the case of a woman who has married) the maiden surname, the date and place of birth, and the occupation and usual address of the deceased.

The answers to the four questions set out above, together with the registration particulars, constitute the verdict of the inquest. They are all set out on the written record of the inquest, which is called the inquisition, and is signed by the coroner and the jury.

Inquest in India:

Ss. 174, 175 and 176 of the code of criminal procedure, 1973 deal with inquest proceedings in India. These three provisions have been said to afford a separate code in itself for inquiries in cases of accidental or suspicious deaths. The abovementioned sections dealing with inquest are said to be attracted in cases dealing with either suicide or unnatural deaths. Clause (3) was later added to Section 174 via the Criminal Law (Second Amendment) Act, 1983 so as to deal with increase in the incidents of dowry death and cruelty after marriage. As such provisions dealing with inquest are said to be attracted in cases of-

1. Suicide

2. Death caused by another person, or an animal, machine or accident.
3. Death of a married woman within seven years of marriage caused by suicide, under suspicious circumstances or when a specific request has been made by any relative.
4. Death under suspicious circumstances or
5. For any other substantial reason cited by the police officer.[5]

Under Indian Law, the inquest as to death can be undertaken by two officers of the court, namely the police officer under Section 174 or the magistrate under Section 176 of the Code of Criminal Procedure, 1973. However the powers and the mode of conducting the inquest differ. A police officer under section 174 cannot order the exhumation of the human body whilst a magistrate under section 176 can do so. Similarly an inquest can be undertaken by any District, Sub-divisional or an empowered executive magistrate[6] while only the officer in charge of a case can hold inquest proceedings.

In India, inquest proceedings are said to enjoy only limited power and scope. The object of inquest proceedings has been interpreted so as to only ascertain whether a person has died under suspicious conditions and if that's the case then what was the cause of death. An inquest report cannot deal with questions as to who was the offender or how the death

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[5] Section 174 of the Code of Criminal Procedure, 1973. 1973-
Police to enquire and report on suicide, etc.-(1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any); such marks appear to have been inflicted.
(2) the report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.
(3) When there is any doubt regarding the cause of death, or when for any other reason the police officer considers it expedient so to do, he shall, subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.
(4) the following Magistrates are empowered to hold inquests, namely, any District Magistrate or Sub-divisional Magistrate and any other Executive Magistrate specially empowered in this behalf by the State Government or the District Magistrate.
[6] Section 174 Cl. (4) of the Code of Criminal Procedure, 1973

took place. In the case of *Suresh Rai and Ors. v. State of Bihar*[7] it was held by the Hon'ble Supreme Court that-

"Under Section 174 read with Section 178 of the Code of Criminal Procedure, Inquest Report is prepared by the Investigating Officer to find out prima facie the nature of injuries and the possible weapon used in causing those injuries as also the possible cause of death."

Further in the landmark judgment of *Podda Narayana v. State of A.P.*[8], the esteemed judges of the Supreme Court categorically stated that-

"The proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what the apparent cause of the death is. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report".

In another more recent case of *George vs. State of Kerala*[9] the Supreme Court further reiterating the same held that the Investigating Officer is not obliged to investigate, at the stage of inquest, or to ascertain as to who were the assailants.

In an inquest report only information regarding the gist of the First Information Report (FIR) filed and the written record of the statement of the witness can be given. An inquest report filed herewith cannot even be submitted in court as substantial evidence. This is because of section 162 which forbids the use of statements made in police custody in trials.[10] It has been reasoned by the Supreme Court in the case of *Munshi Prasad v. State of Bihar*[11], that an inquest report is nothing but a doctor's statement to the court which should not be used expect so as to refresh the doctor's

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[7] (2000) RD – SC 162
[8] AIR 1975 SC 1252
[9] AIR 1998 SC 1376
[10] **Section 162.- Statements to police not to be signed: Use of statements in evidence.- (1)** No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872; (1 of 1872) and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
[11] AIR 2001 SC 3031, cited from – Ratanlal and Dhirajlal *"The Code of Criminal Procedure"* 17th Edn. Wadhwa Publications, Nagpur.

memory or to contradict his statements in court. In a similar vein, the inquest report of a police officer is merely a statement of a non-medical man which he makes at the start of a proceeding. All the statements in the inquest report which deal with what were the facts as seen by the investigating officer are admissible. However everything recorded on the basis of what he heard from others or from the suspects cannot be written in the report because of section 162. As such the present situation of law is that inquest reports cannot be used as substantive evidence in a court of law. However these reports can be used in case of witness examination and cross-examination.

As regards the power of a magistrate to conduct inquests under section 176 of the Code of Criminal Procedure, 1973 an additional power bestowed so as to conduct inquest proceedings in matters of custodial rape or custodial disappearances via Code of Criminal Procedure, 1973 Amendment Act, 2005. As such it is obligatory for any magistrate under whose territorial jurisdiction any such act of enforced disappearance or custodial rape has taken place to hold inquest proceeding. This specific amendment to section 176 was brought in so as to counter the growing menace of enforced disappearance and custodial rape.

Comparison between Inquest proceedings in India with those in England:

As has been discussed in the previous sections, the laws and procedures relating to inquest in India are very nascent and rudimentary as compared to those in England. The main points of difference between the inquest proceedings in the two countries can be seen given below:-

1. In India, only three sections in the Code of Criminal Procedure, 1973 deal with inquest proceedings whereas England and Wales have specialized legislations like the Coroners Act, 1988 and the Coroners Rules, 1984 which govern inquests and the like.
2. In India, inquests can be held by two officers namely, the police officer and the magistrate, who have the discretion to garner the help of a civil surgeon. In England, a coroner is appointed by the Local authority and is an officer of the judiciary who is specially required to look into cases of death where the cause may be uncertain.
3. An inquest is held in India if any information is received causing suspicion that the death has been caused by some other person, machine, or animal. Inquests are also held in cases of death of married women within seven years or cases of custodial death or rape. In England, however, in all the cases wherein the doctor cannot accurately ascertain the

cause of death. As such the scope of inquest cases in England are much wider as compared to those in India.

4. the position of law in England and India with respect to the purpose of inquest is identical given rule 36(2) and 42 of the Coroners Rules, 1984 and the plethora of judgments given by the Supreme Court of India such as Podda Narayana[12] and Suresh Rai[13] remains identical, i.e. to look into only the causes of death and not answer any questions as to the criminal parties of the parties involved.

At present, in the entire country, the existing Coroners Act, 1871 applies only in respect of very limited territorial jurisdiction, namely, the ordinary original civil jurisdiction of the High Courts of Calcutta and Bombay and thus the entire territorial boundaries of even these two States have not been covered under the said Act. Suggestions have also been made from many quarters, including by way of judicial decisions that such an Act should be framed for the entire country. In Writ Petition No. © 6179/2007 between Social jurist, a *Civil Rights Group & Anr. Vs. Union of India & Ors.*, a Division of Delhi High Court has recommended to the Law Commission to examine whether Legislation like the Coroners Act, 1988 prevalent in United Kingdom is needed in this country and whether a suitable proposal for his purpose should be made to the Parliament in his regard.

However, the observations of the Hon'ble Delhi High Court in the aforesaid case in paragraph 25 that "there is admittedly no comparable legislation in India nor has our attention been drawn to any by learned counsel for the parties" do not appear to be correct and it is clear that the learned counsel for either of the parties did not draw the attention of the Hon'ble Delhi High Court to the existing Coroners Act, 1871, which was a Central Act and it was already operating in India, although within very narrow territorial limits. With a view to have uniformity of the law applicable throughout India, it may be considered that the extant Coroners Act, 1871 should be repealed in order that the provisions of the Code of Criminal Procedure, viz., sections 174 to 176 govern the field in the aforesaid territorial jurisdiction of Calcutta and Bombay also, besides the rest of India. Further, enactment of a new Coroners Act applicable to the whole of India, in addition to the said provisions of the Code of Criminal Procedure, is felt to be the need of the hour.

Conclusions:

The law relating to inquests in England through the centuries has modified and changed itself and has become quite developed and

[12] Ibid
[13] Ibid

satisfactory. In India, however the concept of inquest through out India has come only in 1973 after the enactment of the Code of Criminal Procedure, 1973. As such due to the vast time gap in the applicability of these laws in both the countries it is bound to be that the English laws be much more developed and their system of conducting proceedings be more efficient and advanced than India's.

However, it is of prime importance in any society that deaths due to non-natural causes be reduced and the perpetrators of such crimes are brought to justice. Inquest proceedings play an invaluable role in gathering evidence and helping the law enforcement officials in catching the criminals. The absence of a sufficiently advanced system of inquests as such is undesirable as has also been said by the Supreme Court. Any development, whether social or economical, requires the existence of a society wherein the crime rate is brought down to a minimum. As such, so as to bring about an environment conducive to growth and development it is essential that the aid of all available means and methods be taken to ensure speedy justice for one and all in the society.

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A STUDY TO UNDERSTAND AND PROPOSE IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS A GROUND FOR DIVORCE

- By Aman*
- By Varsha Nair♣
-By Avi Tandon*
- By Dheeraj Kumar Aseri**

INTRODUCTION:

Marriage is no longer an indissoluble union keeping in mind the changes in the society. In the wake of the changing times the divorce laws are continuously modified and liberalized by the judicial and legislative activity.[1]

However, seeking divorce according to Hindu Laws is till difficult as compared to the other personal codes.[2] The Hindu Marriage Act allows divorce to be sought on the ground of fault, mutual consent or frustration; however "irretrievable breakdown" as a ground for dissolution for marriage has still not been incorporated. Some say that the sections 13 (1-A) and 13 B have given the irretrievable theory the light of the day. However, this cannot be accepted as an acceptance of the theory as divorce in 13 (1-A) is awarded only after there has been a decree of restitution of conjugal rights or separation, hence making fault the precondition of such a divorce; also mutual consent under 13B cannot envisage the entire concept of the "irretrievable breakdown".[3] Keeping this legislative shortcoming in mind, the judiciary in the most activist mode cannot transgress beyond the letters of the law. This in the modern day circumstances has led to various difficulties. Breakdown theory must be accepted as a ground independent of fault.[4]

This study is an attempt to understand the "irreversible breakdown theory" as a ground for divorce, see the judicial opinion regarding the same and discuss why the "breakdown theory" must be accepted as a ground for divorce in the interest of fairness[5] in the changing times.

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[1] Kusum, "Family Law Lectures – Family Law I" (2nd Edition, LexisNexis Butterworths, News Delhi), P. 176; Infra Note 1

[2] "Hindu Marriage Act, 1955 – Irretrievable Breakdown of Marriage as a Ground for Divorce", Law Commission of India, 71st Report

[3] Ibid

[4] Ibid

[5] Ibid

DEFINITION:

The emergence of the irretrievable breakdown theory of marriage which is being debated among jurists and lawmakers alike, very simply it is the breakdown of a marriage beyond all possible reversal. The self-explanatory definition reads that it is "such failure in matrimonial relationship or such circumstances adverse to that relationship that no reasonable probability remains for the spouses to live together as husband and wife".[6]

Facets of the theory and application in other countries:

Before India, this theory had already been recognized as ground for divorce in other countries around the mid 20th Century as new ways of living emerged and the outlook toward marriage became more and more liberal. The theory generally has three interpretations depending upon the degree of liberty, the courts are adopting.

The most open interpretation is the absence of the legislature actively prescribing a criterion and leaving it to the court's understanding of the marital situation.

The next interpretation is the legislature incorporating certain standards for the theory to operate in concrete law such that the courts' role stretches only as far as checking to see if the standards have been fulfilled. This approach has been adopted in several countries like England under Section 1 of the Divorce Law Reforms Act, 1969, Australia through the Matrimonial Causes Act, 1959 and the Family Law Act (Australia), 1975 and Canada under the (Canadian) Divorce Act, 1967.[7]

The third interpretation is a narrowing down of the condition to non-resumption of co-habitation after a decree of judicial separation or non-compliance to a decree of restitution of conjugal rights for certain duration. This was the first theory to emerge in the form of the (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920 which provided that separation for three years or more was a ground for a petition for divorce. This is also what has been incorporated in the Indian scenario in Section 13(1-A) of the Hindu Marriage Act and while it has been explicitly mentioned as the irretrievable breakdown theory, it has been accepted to be a watered-down version of the same. According to the High Court judgment of Madhukar v Saral[8], it is a "legislative recognition of the principle that in the interest of society if there has been

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[6] Mulla, Principles of Hindu Law, Vol. II, 19th ed. (ed SADESAI), LexisNexis Butterworths, News Delhi

[7] "Examining the irretrievable breakdown of marriage as a ground for divorce", Ankit Kejriwal, Prayank Nayak,<www.indlaw.com>

[8] AIR 1973 Bom 55, p.57

a breakdown of the marriage there is no purpose in keeping the parties tied to each other."[9] The Statement of Objects and Reasons of the Amendment Bill[10] also indicates the same in its justification of giving the right to apply for divorce to both the parties acknowledging the fact that forced judicial intervention won't really help in such a situation.

Status in Hindu Law and the Special Marriages Act:

By a 1964 amendment, Section 13(1-A) had been added to the Hindu Marriage Act and a similar provision has been added to Section 27(2) of the Special Marriages Act.

Section 13(1-A) briefly states that either party to the marriage may present a petition for dissolution of marriage by a decree of divorce based on there being no resumption of co-habitation or restitution of conjugal rights between the parties for a period of one year after a passing of a judicial decree for the same. The provision is repeated almost verbatim in the Special Marriages Act.

The reason why this section has been co-related with the breakdown theory is because the perseverance of the intention to separate and the non-compliance of the decree to restitution of conjugal rights is the reflection of the internal deterioration of the marriage. Also, because of the bestowing of the right to petition for divorce to both the parties (in spite of opposition that a person who commits a wrong should not be allowed to use law to separate from a person who may not want to divorce) it is further acknowledged that this ground of divorce is in direct opposition to the fault theory.

Law Commission Report:

The Law Commission has been very supportive of the incorporation of this theory into practice in Indian Divorce Law. It has stated in its 71st Report on Hindu law reforms that once the parties had separated for a considerable length of time and there is intention to divorce through a petition by one of the parties, the court shall, though attempt a reconciliation of the parties, not withhold grant of divorce on mere technicality of existing law. This marks a radical shift in the interpretation of divorce provisions, tending toward acceptance of the more modern approach. In this approach, there is acceptance of the fact that once a marriage has broken down beyond repair, it would be unrealistic for the law not to take parties if the legal bond is sought to be

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[9] Ibid

[10] Kusum, "Family Law Lectures, Family Law I", (New Delhi: LexisNexis Butterworths, 2nd Edn. 2007), p. 177.

maintained notwithstanding the disappearance of the emotional substratum.[11]

They also went into the question of social discrimination, shedding light on the fact that it is easier to get a divorce on such grounds in Christian, Muslim and Parsi Law rather than Hindu Law and that only Hindus have been put under severe restrictions which have Seven prompted conversion in several cases. Thus they said that Hindu law should be liberalized to remove social discrimination in personal life and bring it up-to-date with contemporary living situations.

Conclusive transition from theory to statutory law:

Though many jurists agree that the irretrievable breakdown theory is a part of Section 13(1-A), there is a valid objection in the fact that the essential condition of the application of that sub-section that the proceedings for divorce must have been preceded by either a decree for judicial separation or a decree for restitution of conjugal rights and that such a decree could not have been passed unless there had been proof of a marital offence which is basically the fault theory in practice. Hence, even though there have been recommendations by the Law Commission, the Gujarat Government and other eminent legal experts there have been equally concrete doubts raised by institutions such as the Government of India, Ministry of Education, Department of Social Welfare which say that sufficient grounds granting divorce on the basis of this theory are already present in specific in other grounds of divorce. Hence, until there is a definitive change in the Indian legal theory of divorce as well as society the theory can never survive in its explicit form for implementation.

Judicial Attitude and the Diverse Opinions of these Courts:

Marriages as they say are made in heaven and solemnized on Earth. It is a sacrament for Hindus, a sanctified contract for Muslims and a sacred Knot for Christians.[12] It was this reason that the courts in the initial phase were reluctant to pass a decree of divorce and there was also not much development of law in this regard.[13] Things have however changed and marriage is no longer viewed as an indissoluble union.[14]

As far as Hindu Law is concerned we have moved from divorce under exceptional circumstances to a divorce on demand and are now

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[11] 71st Law Commission Report page 16

[12] Pratim Sarkar, "Envisioning The Concept Of Irretrievable Breakdown Of Marriage", ,http://www.legalserviceindia.com/articles/irrbdom.htm., (Visited on 6th February, 2009).

[13] Rangnath Misra, "Mayne, Hindu Law and Usage", (New Delhi: Bharat Law House, 15th edn., 2003), P. 378

[14] Kusum, "Family Law Lectures, Family Law I", (New Delhi: LexisNexis Butterworths, 2nd edn. 2007), p. 176

heading towards on the basis of irretrievable breakdown of the marriage.[15] Of late courts have adopted a more liberal and realistic approach and several judgments bear testimony to the fact that they no longer cling to the traditional notion of inviolability of the marriage bond.[16]

Irretrievable Breakdown not as a Ground for Divorce itself:

Irretrievable breakdown of marriage cannot be a ground by itself to pass a decree of divorce. In *Asha v. Krishna Lal*[17] the Delhi High Court held that irretrievable breakdown of marriage is not contemplated to be one of the grounds for dissolution of marriage. Thus by itself it cannot be taken to be a ground for decree of dissolution of marriage. Similar view has been taken in *Smita Dilip Rane v. Dilip Dattaram Rane*,[18] wherein it has been laid down that simply because the marriage has broken down and the parties cannot live together, a decree for divorce cannot be granted if the statute does not specifically provide for that. In *Suresh Prasad Sharma v. Rambai Sharma*,[19] also, divorce was refused on the plea of irretrievable breakdown of marriage.

In V. Bhagat v. D. Bhagat,[20] the Apex Court observed that irretrievable breakdown of the marriage is not a ground by itself. But while ascertaining the evidence on record to determine whether the ground alleged are made out and in determining the relief to be granted, the said circumstances can certainly be borne in mind.[21] Similarly in the case of *Swapan Kumar Ganguly v. Smiritikana Ganguly*[22] and *Ajay Desai v. Rajshree Desai*[23] the Calcutta High Court and Bombay High Court respectively had refused from giving relief on the ground of irretrievable breakdown of marriage.

Interpretation of Irretrievable Breakdown Theory under other provisions of law:

In the absence of any specific provision for irretrievable breakdown of marriage in some of the cases the approach of the courts has been to read the irretrievable breakdown clause under the other existing provisions of law.[24] In the case of *Kanchan Devi v. Pramod*

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[15] Himani Sharma & Chetan Bagdi, "Irretrievable Breakdown Of Marriages", http://www.legalserviceindia.com/articles/break_mar.htm., (visited on 7th February, 2009)
[16] Parihar v. Parihar; AIR 1978 Raj 140; Nalini v. Isaac; AIR 1977 MP 267
[17] AIR 1990 Del 1
[18] AIR 1990 Bom 84
[19] 1 (1999) DMC 311 (MP)
[20] AIR 1994 SC 710
[21] Ibid
[22] AIR 2002 Cal 6
[23] AIR 2005 Bom 278
[24] Raj Kumari Agrawala, "Changing Basis of Divorce and the Hindu Law", Journal of Indian Law Institute, New Delhi, Vol. 14, 1972

Kumar[25] when the Court reached the conclusion that there was no possibility of reconciliation between the parties they invoked Article 142 of the Constitution and passed a decree for divorce. Similarly in the case of *Jayachandra v. Aneel Kumar*[26] the Apex Court again with the view to do complete justice pronounced decree of divorce where the clear finding of cruelty by the wife on the husband was made out and the marriage had irretrievably broken down.

In the case of *Amma Khatoon v. Kashim Ansari*[27] the Court applied section 2(ix) of the Dissolution of Muslim Marriages Act, 1939 where such an intolerable situation had reached that the marriage had broken down in reality and it was upto the courts to decide it and dissolve the marriage. Further in the case of *O.P. Mehra v. Saroj*[28] where the petition for divorce was filed by the husband on the grounds of wife's adultery under section 13(1A)(ii) had lead the court to an inevitable conclusion of breakdown of marriage and the wife would get nothing in keeping this empty shell of marriage.

Irretrievable Breakdown theory as a part of Judicial Activism:

In *Sanghmitra Singh v. Kailash Singh*,[29] where the husband sought divorce and the wife informed the court that the husband had already clandestinely married another lady, the court observed that the marriage had irretrievably broken down and none of the parties wanted restoration of marital tie. Similarly in *Krishna Banerjee v. B. Bandopadhay*,[30] where the husband was harassed by the wife by physical and mental cruelty, coupled with the fact that they were living separately for 16 years, the court found that it was a proper case for divorce, as the marriage between the parties had broken down and they could no longer live together as husband and wife. In the case of *Chandralekha Trivedi v. S.P. Trivedi*,[31] the Supreme Court did not use the term irretrievable breakdown of marriage but defined the marriage as 'dead'.

In the case of *Durga Tripathi v. Arundhati Tripathi*,[32] the court while passing a decree for divorce held that even though marriages are made in heaven but the parties had crossed the point of no return such that a workable solution was not possible. In *Dinesh Mandal v. Meena Devi*[33] even though the husband could not prove the alleged ground of adultery

[25] AIR 1996 SC 3192
[26] AIR 2005 SC 534
[27] AIR 2001 Jhar 28
[28] AIR 1984 Del 159
[29] AIR 2001 Ori 151
[30] AIR 2001 Cal 154
[31] (1993) 4 SCC 232
[32] AIR 2005 SC 3297
[33] AIR 2005 Jhar 77

yet divorce was granted because the court found that even if divorce is not allowed the marriage had broken down irretrievably beyond further repair. Similar was the case in *Anita Kachba v. KR Kachba*[34] where again a ground for cruelty by the wife against the husband was not proved but the court again applied the doctrine to reach the conclusion that it was not practical to continue the marriage as it was beyond all repairs. In *Rishikesh Sharma v. Saroj Sharma*[35] where the parties had been living separately for a very long time and litigating the court held that the marriage had broken down irretrievably.

Most importantly in the case of *Naveen Kohli v. Neelu Kohli*[36] the Supreme Court made a strong plea for incorporating irretrievable breakdown of marriage as a ground for divorce under the Hindu Marriage Act, 1955. A copy of the case also sent to the Secretary, Ministry of Law and Justice and Department of Legal Affairs, Government of India with the recommendation that Government should seriously consider bringing an amendment in the law to incorporate irretrievable breakdown of marriage as a ground for divorce.

THE REASONS TO IDENTIFY THE BREAKDOWN THEORY AS A GROUND FOR DIVORCE:

The theory has gained acceptance in Muslim, Christian and Parsi laws. Other countries have also, seeing the changes in the time, have accepted the breakdown theory. The British Parliament in Matrimonial Causes Act has accepted the same theory as a valid ground for divorce.[37]

In the institution of marriage, the parties alone can decide whether their mutual relationship provides the fulfillment they are seeking. A breakdown theory gives them an escape route from the difficult solution.[38] It is infact pointless to drag a marriage legally when it cannot be worked out.[39] The same may result in cruelty to the spouse, abuse of religion and other harms to the society. Hence, on a preventive measure breakdown theory must be accepted. Also, by accepting the theory, the instances bringing the institution of marriage into disagree can be avoided.[40]

A theoretical basis of bringing the breakdown theory is that a marriage that cannot be worked out must be dissolved even if there is no fault that has been attached.[41] In general, it is not in the interests of the

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[34] AIR 2003 Bom 273
[35] (2006) 12 SCALE 282
[36] AIR 2006 SC 1675
[37] Supra note 2
[38] Supra note 2
[39] Ibid
[40] Ibid
[41] Ladder v. Ladder; (1931) New Zealand Law Reports 876, Infra note

parties or in the interest of the public[42] that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous.[43] Hence based on the idea that the misery must not continue, anything that is *de facto* dead must be declared de jure dead too. In the case of *Blunt v. Blunt*,[44] Viscount Simon L.C. said that other than the four considerations on which divorce could be given, another ground must be added which was of primary importance. He said that a marriage must be judged by the interests of the society at large, by the balance between respect for binding the sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which is utterly broken down.

A prevalent view is that human life is of a short span and the misery must not be allowed to be continued indefinitely.[45] A halt has to be there at some stage.[46] By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.[47] The grant of a divorce would act in furtherance of giving a peaceful life to the parties after the divorce[48] and would be a step showing regard to the feelings and emotions of the parties.

The breakdown theory also has a huge social support. In a survey conducted by the Law Commission of India for its 71st report, it found that people were willing to have "irretrievable breakdown" as a ground for marriage. This has to be done keeping in mind the interest of the women and ensuring that it will not create problems it seeks to redress. The Commission in its 71st Report deliberated on the same and came up with a recommendation which saw to the objections as well. This was in furtherance of the public demand for the same being accepted.[49]

The fallibility of the fault theory acts as another reason to accept the theory as an acceptable ground for divorce. The General Assembly of the Church of Scotland in 1921 accepted the Report of their Moral and Social Welfare Board which even suggested the substitution in place of the breakdown saying that matrimonial offences were more a cause of

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[42] Blunt v. Blunt; (1943) 2 All ER 76, 78
[43] Infra note
[44] Supra note 11
[45] Ibid
[46] Supra note 2
[47] Intra note
[48] Supra note 2
[49] Ibid

than reason for the breakdown.[50] Accepting the same logic it appears that the break theory is a larger concept and all cases of matrimonial discord can't be covered under the fault theory. Seeing the shortcomings in the legislations the Supreme Court in *Naveen Kohli v. Neelu Kohli*[51] has even suggested to the Parliament to take actions to statutorily accept the theory. In *Gulabari Sharma v. Pushpa Devi*,[52] Justice Sachar lamented that in a situation where no fault exists and the parties are accusing themselves without having the sensitivity of settling it by mutual consent, the court cannot do it owing to the limitations.[53]

Conclusion:

The academicians, jurists and judges have all been making a plea that the irretrievable theory must be accepted as a ground for divorce.[54] Divorce must be awarded when the incompatibility of mind breaks the flow of the relationship[55], it is evident then that it is best in the interests of private morality and public interest that such marriages be terminated. The outmodel policy of suspending the marriage in limbo must be given away.[56] However this must be done after understanding all the ramifications and providing safeguards to parties against possible misuse.

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[50] Ibid
[51] (2006) 4 SCC 558
[52] (1979) ILR 2 Del 220
[53] Supra note 1, p. 178
[54] Ibid
[55] Abu BakeerHaji v. Manu Koya (1971) ILR Ker 338
[56] "Final Report of Divorce Law Study Commission" No. 6-8 (1970, New Jersey) as read from Supra note 1, p. 184

"PLEA BARGAINING – A UNIQUE REMEDY TO REDUCE BACKLOG IN COURTS"

- By Prateek Shanker Srivastava*
&
- By Pallavi Bhushan**

Introduction

"When one's own legal system flounders, one naturally looks towards practices in other countries, which seem to provide the solution. Statistics as regards the criminal justice system in India are startling in 2008; the number of inmates housed in Indian jails was almost 1, 40,000 more than their capacity. It was estimated that 74.5% of all inmates were under trials and of these 0.9% had been detained in jail for more than 5 years at the end of 2008."[1]

The spectre of the 'process' being the 'punishment' has ailed many criminal justice systems across the world. Trials are prolonged, and cause untold harassment to the accused, victims and witnesses. Various strategies and tools have been used in various jurisdictions to lessen the burden of trials, and ensure speedy disposal of cases and less harassment for parties.

One such strategy is **plea-bargaining**, which is presently in place in a number of countries. Bargaining' can be defined as pre-trial negotiations between the accused and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution. The object of 'Plea Bargaining' is to reduce the risk of undesirable orders for the either side. Another reason for the introducing the concept of 'Plea Bargaining' is the fact that most of the criminal courts are over burdened and hence unable to dispose off the cases on merits. Criminal trial can take day, weeks, months and sometimes years while guilty pleas can be arranged in minutes

In 1975, the Law Reform Commission of Canada defined 'plea bargaining' as 'any agreement by the accused to plead guilty in return for the promise of some benefit'. But over the years, considerable objections grew against designating the practice in any way that implied that justice could be purchased at the bargaining table. Consequently, there was a movement away from the use of the term 'plea bargaining' and toward more neutral expressions such as 'plea discussions', 'resolution

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[1] Data collected from an article " **The plight of Indian prisons**" by Amay Gawde published in the Times of India on 27 Mar 2009

discussions', 'plea negotiations' and 'plea agreements'. The use of such expressions marked an evolution in the practice itself.

Plea-bargaining entails pre-trial negotiation between the accused and the prosecutor, where the accused has the option of admitting guilt and settling for a lesser punishment **("sentencing bargaining")**, or negotiating for the dropping of some of the charges (in case of multiple charges), or settling for a less grave charge than the one put by the prosecution, in return for the plea of guilt **("charge bargaining")**. In some cases, the accused settles for a less incriminating presentation of facts, in return for a plea of guilt **("fact bargaining").**

Plea bargaining may take the form of (i) **explicit bargaining**- where prosecutor makes a specific recommendation on sentence and the judge indicates the sentence (s)he is minded to impose, (ii) **implicit bargaining**- where the accused pleads guilty considering the availability of sentence discounts, (ii) **negotiated diversion**- where the judge warns or reprimands in return for some restitution.

Origin of the Concept

Plea-bargaining is originally an Anglo-American system of bypassing juries to reduce workload of the courts although, today it is probably most actively used in the US. In fact it is being used in the American Judiciary in the 19th century itself. The Bill of Rights makes no mention of the practice when establishing the fair trial principle in the Sixth amendment but the constitutionality of the plea-bargaining had constantly been upheld there. In the year 1969, James Earl Ray pleaded guilty to assassinating Martin Luthar King, Jr. to avoid execution sentence. He finally got an imprisonment of 99 years. More than 90 percent of the criminal cases in America are never tried. The majorities of the individuals who are accused of a crime give up their constitutional rights and plead guilty. Every minute, a criminal case is disposed off in an American Court by way of a guilty plea or **nolo contendere** plea. In 1971 ***Santobello v. New York*** [2] the United States Supreme Court formally accepted that plea-bargaining was essential for the administration of justice and when properly managed, was to be encouraged.

In a landmark judgment ***Bordenkircher v Hayes***, the US Supreme Court held that the constitutional rationale for plea bargaining is that no element of punishment or retaliation so long as the accused is free to accept or reject the prosecutions offer. The Supreme Court in the same case, however in a different context observed that, it is always for the

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[2] 404 US 257 (1971).

interest of the party under duress to choose the lesser of the two evils. This practice is prevalent in western countries, particularly the United States, England, and Australia. In the U.S., plea bargaining has gained very high popularity, whereas it is applied only in a restricted sense in the other two countries.

It was formally introduced in England by the Criminal Procedure and Investigations Act, 1996. The Criminal Justice Act 2003 has laid down the powers of the judge as regards sentence reduction in case of guilty pleas, expressly, in section 144. This is a direct reproduction of the section 152 of the Powers of Criminal Courts (Sentencing) Act, 2000, whereby the judge has the discretion to reduce sentence if a plea of guilt is made early enough in the trial.[3] In ***R. v. Turner*** (F.R.)[4], it was held that any discussion must be between the judge and the counsels on both sides. This freedom of access is important because there may be matters calling for communication or discussion of such a nature that the advocate cannot, in his client's interest, mention them in open court, e.g. the advocate, by way of mitigation, may wish to tell the judge that the accused has not long to live because he is suffering maybe from cancer, of which he is and should remain ignorant.. It is imperative that, so far as possible, justice must be administered in open court. Proponents of plea-bargaining argued that it would remove the risks and uncertainties involved in a trial, thus introducing flexibility into a rigid, often-erratic system of justice

Its Roots in India

Indian criminal courts continuously face the problem of backlogs and poor docket management leading to prolonged trials. Strategies towards reducing the backlog of cases in subordinate as well as the High Courts and facilitating speedy disposal of cases, have been discussed from time to time, in the judicial and academic circles.

The Twelfth Law Commission of India, in their 142nd Report on Concessional Treatment of Offenders who Choose to Plead Guilty, had cited such reasons to recommend the incorporation of plea-bargaining in the Indian criminal justice system. The Commission also said that it would reduce congestion in jails, and result in more convictions. Besides, 75% of criminal cases in the US get decided on plea-bargaining.

The Indian concept of Plea Bargaining is inspired from the Doctrine of Nolo Contendere. The Indian criminal justice system follows the adversarial pattern like the UK and many other common law

[3] Explanatory Note on the Criminal Justice Act 2003, as published in www.opsi.gov.uk.last visited on 16/3/09

[4] [1970] 2 Q.B. 321.

countries. Consequently the criminal justice systems in India and the UK are comparable to a large extent. However, the recent inclusion of a clause incorporating plea- bargaining in the Indian Code of Criminal Procedure, has created a concern about this new procedure, and how it would erode some basic and cherished principles of the common law system.

To reduce the delay in disposing criminal cases, the 154th Report of the Law Commission first recommended the introduction of 'plea bargaining' as an alternative method to deal with huge arrears of criminal cases. This recommendation of the Law Committee finally found a support in Malimath Committee Report

A formal proposal for incorporating plea-bargaining into the Indian criminal justice system was put forth in 2003 through the Criminal Law (Amendment) Bill, 2003 (hereinafter referred to as the Bill). However, those provisions failed to come through and were reintroduced with slight changes through the Criminal Law (Amendment) Bill, 2005, which was passed by the Rajya Sabha on 13-12-2005 and by the Lok Sabha on 22.12.2005. The provisions were thus finally incorporated into the Code of Criminal Procedure, 1973 as Chapter XXI-A through the Criminal Law (Amendment) Act, 2005, notified in the Official Gazette of India as Act 2 of 2006 (hereinafter referred to as the Act). An overwhelmingly large number of accused in India, spent many years in prison even without being convicted, as an undertrial. The 'law and economics' school believes that it gives the accused greater autonomy

The Salient Features Of Plea Bargaining in India

The salient features of the provision are-[5]

1) The plea-bargaining is applicable only in respect of those offences for which punishment of imprisonment is upto a period of 7 years;

2) It does not apply where offences that affect the socio-economic condition of the country or has been committed against a woman or a child below the age of 14 years;

3) The application for plea-bargaining should be filed by the accused voluntarily;

4) A person accused of an offence may file an application for plea-bargaining in the court in which such offence is pending for trial;

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[5] Features as indicated by Prabal Kaushal in his article " **Plea Bargaining- Pros and Cons**" posted on www.indlaw.com last visited on 21/3/09

5) Once the court is convinced that the accused is participating in the plea-bargain voluntarily, it will allow time to both parties to reach mutually satisfactory disposition, which may include giving to the victim by the accused, compensation and other expenses incurred during the case;

6) Where a satisfactory disposition of the case has been worked out, the Court shall dispose of the case by sentencing the accused to one-fourth of the punishment provided or extendable, as the case may be for such offence;

7) The statement or facts stated by an accused in an application for plea-bargaining shall not be used for any other purpose other than for plea bargaining;

8) The judgment delivered by the Court in the case of plea-bargaining shall be final and no appeal shall lie in any court against such judgment apart from a writ petition to the State High Court under Articles 226 and 227 or a special leave petition to the Supreme Court under Article 136 of the Constitution.

If the accused is a first-time offender, the court will have the option of releasing him/her on probation. Alternatively, the court may grant half the minimum punishment for the particular offence. The significant feature of the new system is that it affords protection to the accused who avails himself of the benefits of this facility against any other action. The accused may also avail of the benefit under Section 428 of the Code of Criminal Procedure, 1973 which allows setting off the period of detention undergone by the accused against the sentence of imprisonment in plea-bargained settlements. The scheme allows for no negotiation between the accused and the State or the prosecutor or with the court itself, which is a fundamental difference the scheme maintains from the practice, as it exists in the United States.

Challenges faced before its Implementation

The Law Commission was of the opinion that bargaining with the prosecutor which provides the offender with an attraction to avail of the scheme is hazardous in the Indian context, and that a just, fair, proper and acceptable scheme would be that the competent authority can impose such punishment as may seem appropriate as regards the facts and circumstances of the case subject to a limit of one-half of the maximum term provided by the statute for the offence concerned.

The Supreme Court has also time and again blasted the concept of plea bargaining saying that negotiation in criminal cases is not

permissible. More recently in State of ***Uttar Pradesh V. Chandrika*** [6]. The Apex Court held that "It is settled law that on the basis of plea bargaining court cannot dispose of the criminal cases. The court has to decide it on merits. If the accused confesses its guilt, appropriate sentence is required to be implemented." The court further held in the same case that, "Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty the sentence be reduced." In the case of ***Murlidhar Meghraj Loyat v. State of Maharashtra,***[7] the Supreme Court observed as under:

"These advance arrangements please everyone except the distant victim, the silent society. In civil cases we find compromises actually encouraged as a more satisfactory method of settling disputes between individuals than an actual trial. However, if the dispute... finds itself in the field of criminal law, "Law Enforcement" repudiates the idea of compromise as immoral, or at best a necessary evil. The "State" can never compromise. It must enforce the law." Therefore open methods of compromise are impossible." But to its recourse Gujarat High Court observed in ***State of Gujarat V. Natwar Harchanji Thakor***[8] that, "The very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. It can thus be said that it is really a measure and redressal and it shall add a new dimension in the realm of judicial reforms."

Comparing its provisions with the West

The practice of plea bargaining in the UK is somewhat different. It takes the form of insinuating reduction of sentence on particular occasions by the judge, in discussion with counsel on both sides. It does not involve formal negotiations between the counsels of both parties, where accused decides to plead guilty on the assurance that he will get a lesser punishment. The merit of the UK system lies in that it preserves a balance between the interest of speedy disposal of cases, and the right of accused to silence, and to choose his plea. It keeps minimal scope for intervention and duress by the prosecutor, such that the prosecutor has no powers to offer a lower sentence in return for a plea of guilt. In the United States, the offender is assured as to the extent of the concession

[6] 2000 Cr.L.J. 384(386)
[7] AIR 1976 SC 1929.
[8] (2005) Cr. L.J. 2957

that is likely to be secured in the event of the court agreeing to the bargain. In India, the offender would be facing an unknown hazard, and may prompt him to avoid availing of the scheme.

Kudos vs Critics

One of the merits of the new system is that it helps the court to manage its load of work, and hence it would result in a reduction of the backlog of cases; another is that it relieves the magistrate of the burden to prepare a detailed judgment. This system offers advantage to the Public Prosecutors by relieving them of the burden of examining fragile and feeble witnesses like children and women of the household. Notwithstanding, the Asian Human Rights Commission (AHRC) is deeply concerned about the introduction of plea bargaining to India Several defence lawyers are anguished as they suspect it will eat into their volume of work. Human Rights groups who criticized the Malimath Commission, for seeing lack of enough convictions as the fundamental defect in the functioning of the criminal justice system, see this amendment introducing plea-bargaining as having roots in the Malimath views. The plea bargaining provision may also have dramatic side-effects in cases involving state officers accused of human rights abuse. Take cases of torture. Custodial torture, which is rampant in India, is yet to be made a crime. An Indian police officer accused of torturing a person in his custody may instead only be tried for other offences, such as those punishable under sections 323, 324 or 330 of the Indian Penal Code. The punishments for these offences are well within the limit prescribed for punishment under the new law on plea bargaining. This means that the new law may allow torturers to escape with even lighter penalties, despite the fact that their offences fall into the gravest categories under international law. Plea bargaining may not solve the delays in India's courts, and is instead likely to dramatically increase the number of cases where innocent persons find themselves imprisoned and with criminal records.

Conclusion

The nature and extent of plea-bargaining in England indicates that plea-bargaining cannot simply be transplanted from the United States. There is thus, no reason to believe that the practice will achieve the same scale and magnitude of success in India that it has in the United States

The reasons that are cited for the introduction of plea-bargaining include the tremendous overcrowding of jails, high rates of acquittal, torture undergone by prisoners awaiting trial, etc. can all be traced back to one major factor, and that is delay in the trial process. Since one reason for overburdened dockets in the United States was the nature of jury

trials, the experience of some jurisdictions suggested that shortening the trial period could solve the problem. In India, the reason behind delay in trials can be traced to the operation of the investigative agencies as well as the judiciary. Expanding the list of compoundable offences is not a wise option and what is actually needed is not a substitute for trial but an overhaul of the system, in terms of structure, composition as well as work culture to ensure reasonably swift trials. If then the trial procedure itself proves to be too long drawn out and unmanageable, then one may think of launching an alternative to trial. Therefore reformation of the existing system may be a more prudent approach rather than introducing a parallel arrangement (as recommended by the Law Commission) or supplementing the present arrangement (as suggested by the Act).

Nevertheless, if a system akin to plea-bargaining has to be implemented in India, then the deciding authority must be independent from the trial court and instead of the Public Prosecutor retaining most of the power, the deciding authority must be given a greater role in the process. If the deciding authority is the sole arbiter, the risk of coercion into pleading guilty and of underhand dealings can be eliminated substantially.

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