



# J.T.R.I. JOURNAL

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**Hon'ble Mr. Justice Govind Mathur**  
The Chief Justice of High Court of Judicature at Allahabad

## JUDGE-INCHARGE-J.T.R.I., U.P.

**Hon'ble Mr. Justice Pankaj Kumar Jaiswal**  
Senior Judge, Allahabad High Court, Lucknow Bench

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**Judicial Training & Research Institute, Uttar Pradesh,**  
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**JTRI JOURNAL**  
**Issue No. XXXVI (2018-19)**

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**Messages**  
**of**  
**Hon'ble the Chief Justice**  
**&**  
**Hon'ble Judges**



**Hon'ble Mr. Justice Govind Mathur**  
**Chief Justice**  
**Allahabad High Court**



## MESSAGE

I am delighted to know that the Judicial Training & Research Institute, Uttar Pradesh, Lucknow is publishing its Journal regularly and the next issue of that would be in hand quite soon.

I have visited the Judicial Training & Research Institute campus at several occasions. The Institute is making its best efforts to have best hands in justice delivery system. The Institute is catering need of the system by inculcating the values necessary for a Judicial Officer like honesty, commitment and absolute integrity.

The Journal of the Institute reflects the efforts made by it to train new recruits to Judicial Service and also updating the existing Officers. I am sure that the forthcoming edition of the Journal would be very useful in achieving objects of the Institute. The entire system of judicial governance in our State would be highly benefited by this Journal.

Let publication of the Journal be a great success.

  
(Govind Mathur)



**Hon'ble Mr. Justice Vikram Nath**  
**Senior Judge**  
**Allahabad High Court**

Justice Vikram Nath  
Senior Judge  
Lucknow Bench



## **MESSAGE**

I am extremely happy to know that the Institute of Judicial Training and Research, U.P., is going to publish XXXVI Issue of JTRI Journal, the first part of which contains various articles on subjects of contemporary relevance contributed by my esteemed brother Judges and learned academicians etc. The second part contains Annual Report of 2017-18 to ensure the dissemination of authentic information regarding composition, functioning, achievements and future plans of the Institute.

I record my appreciation that the Institute has conducted induction training of probationers of Civil Judge (Junior Division) successfully during the year 2017-18 besides organizing refresher courses, special trainings, workshops, seminars, conferences, symposium, publication of digest etc.

I hope and trust that the Institute, which has a glorious past will keep on adding new pages and march ahead day by day to attain greater heights. I extend my heartiest congratulations and wish the Institute and its Journal all success.

A handwritten signature in blue ink, appearing to read "Vikram Nath".

[Vikram Nath]



**Hon'ble Mr. Justice Pankaj Kumar Jaiswal**  
**Senior Judge**  
**Allahabad High Court, Lucknow-Bench**

Justice Pankaj Kumar Jaiswal  
Senior Judge



April 2, 2019.

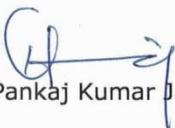
**MESSAGE**

I am happy to know that the Judicial Training & Research Institute (JTRI), Uttar Pradesh, ever since its inception in the year 1987 has been providing relentless service to improve the quality of Judicial Officers, Public Prosecutors, Court Officials and other stakeholders including the Advocates in the pursuit of administration of justice.

The JTRI as part of its broader objective of also carrying out research work, within the broader dynamics of legal development in India, also publishes its in-house Journal on an annual basis. This not only gives the opportunity to the Judges, Academicians and Law Students to showcase their understanding of law but more importantly provides an opportunity to the avid readers to broaden their horizon of legal knowledge, through the well-researched articles as are published in the Journal.

I have full faith and confidence that the Editorial Board would have taken the pain to select and publish relevant Articles on varied subjects which will be found to be satisfaction for all. This would assist the readers to improvise their understanding of law for the cause of justice.

My best wishes are extended for the success of the Journal.

  
[Pankaj Kumar Jaiswal]



**Hon'ble Mr. Justice Munishwar Nath Bhandari**  
**Judge**  
**Allahabad High Court, Lucknow-Bench**



**JUSTICE MUNISHWAR NATH BHANDARI**

**LUCKNOW BENCH  
LUCKNOW.  
Dt. : 2.4.2019.**

**MESSAGE**

I am indeed overwhelmed to know that the Judicial Training and Research Institute, in its long enduring process of disseminating knowledge, *inter alia*, through its well researched publications has covered a long distance and is publishing the XXVI Issue of its journal.

Shared learning as an effective process of transferring and acquiring of knowledge is an age-old recognized tradition in our country. The journals, provides the opportunity to the contributors, not only to provide a different perspective with the critical angle, but at the same time, assists in giving a contemporary approach to the different legal subjects.

I have the conviction that the journal with its well researched contemporary legal subjects will broaden the horizon of knowledge and understanding of the readers. I extend my best wishes for the success of the journal.

*Munish Bhandari*

**(MUNISHWAR NATH BHANDARI)**



**Hon'ble Mr. Justice D.K. Upadhyaya**  
**Judge**  
**Allahabad High Court, Lucknow Bench**

Justice D.K.Upadhyaya



Lucknow Bench,  
Lucknow

**MESSAGE**

This is a matter of immense pleasure for me to learn that the Judicial Training & Research Institute, Uttar Pradesh, Lucknow is going to publish its XXXVI Issue of JTRI Journal very soon. I have been told that the Institute has been extremely busy in imparting judicial training to the Judges of the State in last year under the 14<sup>th</sup> Finance Commission. It goes to credit of the Institute that it has been able to bring out its journal which is a good source of sharing the judicial knowledge among judges. The Journal contains some very good articles contributed by Judges, Academicians and Law Students and I believe that good legal articles and information about new developments in the Institute will certainly increase the academic appetite of the judicial fraternity in the State.

I convey my best wishes for the success of the Journal.

A handwritten signature in blue ink, which appears to read "Devendra Kumar Upadhyaya". The signature is written in a cursive style with a long horizontal line extending to the right.

**(Devendra Kumar Upadhyaya)**



**Hon'ble Mr. Justice Rajan Roy**  
**Judge**  
**Allahabad High Court, Lucknow Bench**

Justice Rajan Roy



**MESSAGE**

I am happy to know that the Institute is publishing a Journal which will inspire more Judicial Officers to contribute articles based on their work and research that they may do. The Journal will give to our Judges a forum to express themselves on various subjects of law and humanities.

I hope and trust that the Institute, which has a high and steady reputation of being one of the best Judicial Training Centers in the country, will keep on adding new pages to its glorious past.

I congratulate the Institute for publishing the journal, which has well researched articles contributed by my colleagues, academicians and students of law. I convey my best wishes to the Judicial Officers of the State and the Institute for all success in future.

*Rajan Roy*  
(Rajan Roy, J)  
Judge,  
Allahabd High Court,  
Lucknow Bench, Lucknow



**Hon'ble Mr. Justice Vivek Chaudhary**  
**Judge**  
**Allahabad High Court, Lucknow Bench**

Justice Vivek Chaudhary



High Court  
Lucknow Bench  
Lucknow

**MESSAGE**

I am delighted to learn that the Judicial Training and Research Institute, Uttar Pradesh is going to bring out XXXVI Issue of JTRI Journal which *inter alia* contains its Annual Report of the year 2017-2018 containing information regarding achievements and future plans of the Institute. I am also informed that the Article Section of the Journal contains articles contributed by my brother Judges, lawyers and academicians.

The effort of publication of Journal by the Institute is proved in itself a very commendable step of reflexion of judicial vision to all who go through it. The Journal is enlightening and brightening the Judicial Officers across the State of Uttar Pradesh from its useful articles on various subjects and new topics thereby giving and sharing much knowledge in related field. Certainly, this is very helpful and beneficial, brightening the knowledge of Judicial Officers across the State of Uttar Pradesh. This stepping up step of JTRI, Lucknow, is much appreciable.

I present my heartily appreciation and best wishes for JTRI, Lucknow.

  
Justice Vivek Chaudhary  
Judge,  
Allahabad High Court,  
Lucknow Bench



**Hon'ble Mr. Justice Jayant Banerji**  
**Judge**  
**Allahabad High Court**

**Justice Jayant Banerji**



**MESSAGE**

I am happy to know that the Judicial Training & Research Institute, U.P. Lucknow, this year too, is publishing its Journal.

The Institute is working towards its vision of ceaseless up-gradation of skills and appropriate attitudinal reorientation through induction level training programmes of judicial officers and prosecution officers as well as in-service training in consonance with the imperatives of national and global environment.

I am sure that the publication of the Journal will be beneficial to all stakeholders. I congratulate the Institute and everyone involved in the publication of the Journal and convey my best wishes.

A handwritten signature in blue ink, appearing to read "Jayant".

**(Jayant Banerji)  
Judge,  
High Court of Judicature at Allahabad**



**Hon'ble Mr. Justice Abdul Moin**  
**Judge**  
**Allahabad High Court, Lucknow Bench**

**Justice Abdul Moin**



**MESSAGE**

The Judicial Training & Research Institute, U.P., Lucknow has been publishing its Journal since long. The Journals so published reflect the vision and progress of the Institute. It includes the articles of Hon'ble Judges, Academicians and Judicial Officers. Such Journals help to improve the vision & knowledge of the persons involved in the field of law and also helps in developing a stronger judicial system for the welfare and advancement of the society.

The Journal to be published this year will also achieve the said goal and would definitely reflect upon the progress made for the judicial training of officers at the Institute.

I wish all success to the Judicial Training & Research Institute, U.P., Lucknow in all its endeavours.

With best wishes.

*A. Moin*  
**(Justice Abdul Moin)**



## From the Director's Desk

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

We are deeply Indebted to Hon'ble the Chief Justice, Hon'ble Mr. Justice Govind Mathur 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 the Chief Justice, Hon'ble Mr. Justice Govind Mathur and Hon'ble Mr. Justice Pankaj Kumar Jaiswal, Senior Judge, Lucknow Bench and Judge in-charge J.T.R.I. for His Lordship's guidance and motivation.

We are extremely grateful to all the Hon'ble Judges, Judicial Officers and other esteemed contributors, who, have enriched this issue by their contribution.

The preceding year has been full of activities and hectic for the Institute. During this period the Institute has conducted various Induction Training Programmes for newly appointed Civil Judges (Junior Division) and Officers in the cadre of Direct Higher Judicial Service, Refresher Training Programmes for officers of all cadres, Training Programmes on 'Ubuntu 16.04 & CIS 2.0' and '18.04-CUM-CIS 3.0'. In addition the Institute has also conducted or has facilitated the organization of large number of national, regional and state level Seminars, Conferences, Colloquiums, Workshop etc. on various topics of Social, Legal, Economic and Contemporary importance. In this process, the Institute has organized the following training programmes:-

*Induction Training Programme (Phase-II, Institutional Training) for Newly Appointed Civil Judges-2015 Batch (Group-II), Induction Training Programme (Phase-I, Institutional Training) for Newly Appointed Civil Judges-2016 Batch (Group-I), Induction Training Programme (Phase-I, Institutional Training) for Newly Appointed Civil Judges-2016 Batch (Group-II), 40hrs. Mediation Training Programme for officers of Induction Training Programme (Phase-I, Institutional Training) for Newly Appointed Civil Judges-2016 Batch (Group-I), One Day Seminar / Workshop on PCPNDT Act for Newly Appointed Civil Judges (JD), During Foundation Training (26.11.2018 to 25.02.2019), Induction Training Programme for Newly Appointed Addl. District & Sessions Judges (Direct Recruits), Special Training Programmes for Newly Promoted Addl. District & Sessions Judges. (Round-1), Refresher Training Programmes for Addl. District & Sessions Judges. (Round-1), Training Programmes on 'Ubuntu 16.04 & CIS 2.0' for Judicial Officers, Refresher Training Programme on Ubuntu 18.04-CUM-CIS 3.0 for Master Trainers (Judicial Officers), Special Training Programmes on Financial & Personal Management and other Designated Courts (Money*

*Laundering, Commercial Courts & Land Acquisition & Management Tribunal) for District & Sessions Judges of U.P., Management Development Programmes for Judicial Officers at Indian Institute of Public Administration (IIPA), New Delhi, Special Legal Training Programme for Newly Promoted Income Tax Officers, Special Training Programmes for Chief Administrative Officers / Administrative Officers under the direction of Hon'ble State Court Management Systems Committee, High Court, Allahabad, Training Programme for Dy. Superintendent of Police (Probationers), Advance Capsule Course on Mediation for Advocate Mediators (SLSA Programme), One Day Seminar / Workshop on PCPNDT Act for Chief Judicial Magistrates, Prosecuting Officers and District Nodal Officers of 25 districts of U.P., at JTRI, UP, Lucknow in Association with Department of Medical, Health & Family Welfare, Govt. of U.P., Civil Judge (Junior Division) 2016 Batch (Group-II), Assistant Prosecuting Officers- Special Recruitment 2007 Batch, Assistant Prosecuting Officers 2011 & 2015 Batch.*

The Institute also in compliance of the directions of the Hon'ble Apex Court has been organizing various training related exercises on different topics. In this process a Special Training Programme, pertaining to the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection Act), 1994 has been/is being organized in terms of the directions of the Hon'ble Supreme Court passed in the matter of *Voluntary Health Association of Punjab v. Union of India & others [Writ Petition (Civil) no. 349/206 with SLP (Crl.) no. 5800/2013 and W.P. (C) no. 575/2014]*.

There is a strong transformation happening in Judiciary with adoption of technology. The Institute is involved in organizing mandatory courses in Induction and Refresher programmes on 'Ubuntu 16.04 & CIS 2.0' for Judicial Officers and Refresher Training Programme on 'Ubuntu 18.04-CUM-CIS 3.0' for Master Trainers (Judicial Officers) under the guidance and directions of Hon'ble e-Committee, Supreme Court of India and Hon'ble Steering Committee, Allahabad High Court of Uttar Pradesh.

The Institute has been making its level best to provide quality training to the judicial officers and in this process has been able to conduct various training related exercises, under the able guidance and encouragement provided by the Hon'ble Judge In-charge and with the unflinching cooperation of Faculty Members and staff of the Institute. In this regard, Training Officers- Mr. Anurag Singh, Mrs. Archana Sharma and Ms. Sabiha Akhtar deserve appreciation for successful accomplishment of different training and other programmes organised and conducted by the Institute.

We hope that we would be able to accomplish the future tasks successfully and to develop appreciable professional skills in the participants of different training programmes. 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. 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 emphasizing on practical aspects with multi-disciplinary approach in training curriculum.

Hon'ble Mr. Justice Govind Mathur, the Chief Justice, Allahabad High Court has been kind enough to visit & interact with trainee officers in many sessions and bless the trainees with new vista of legal understanding and knowledge with respect to the provisions under the Constitution of India.

The Institute is continuously trying to up-grade judicial skills and bring

appropriate attitudinal changes in Judicial Officers for their capacity building by organizing induction, refresher and specialized training programmes, workshops and conferences.

It is a constant endeavour to bring about improvements in the Library. The Institute is subscribing more than 26 Journals which includes multiple copies of AIR, SCC Weekly, SCALE, Allahabad Rent Cases, Allahabad Law Reports, Allahabad Criminal Cases, Allahabad Weekly Cases and Revenue Decisions.

The Institute has been consistently bringing out publications of varied nature. The Institute has so far published and updated many books and brochures on different Law topics and other topics of general importance. Revision and updation work of brochures is going on in the Institute; many old brochures have been revised and replaced by the new ones putting in place the current legal provisions and rules with latest case laws.

Boarding and lodging facilities have been improved considerably. Trees and plants in big numbers have been planted to provide a better ambience to the campus and also in the process fulfilling our obligations towards environmental enrichment and protection.

We trust that with the continued patronage and encouragement of Hon'ble Govind Mathur, the Chief Justice of Allahabad High Court and Patron-in-Chief of this Institute and other Hon'ble Judges of Allahabad High Court, we will be able to take the Institute to new heights in near future. I express my sincere thanks to all who have contributed their articles/papers for the Journal.

We are grateful and express our gratitude to the Hon'ble Judges who took pains to come over here and deliver talks to the Trainees.

Faculty Members of the Institute extended their full cooperation in bringing out this publication. Thus, the Institute appreciates the efforts made in this direction, by Mr. Anoop Kumar Goel, Additional Director, Mr. Santosh Rai, Additional Director (Research), Mr. Ram Nagina Yadav, Additional Director (Training), Mr. Rajiv Maheshwaram, Additional Director (Administration), Smt. Sunita Aditya, Additional Director (Finance), Mohinder Kumar, Deputy Director, Mr. Avanish Kumar, Deputy Director, Smt. Neelanjana, Deputy Director & Mr. Shrikrishna Chandra Singh, Deputy Director. I would also like to acknowledge the efforts of staff of the Institute particularly those of Mr. D.C. Kapri, Personal Assistant, Mr. Waqur Hasan, Personal Assistant and Mr. G.K. Singh, Cataloguer.

The process of publication of the 'JTRI Journal' shall continue with greater commitment in the future, and 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.

(Smt. Saroj Yadav)  
**Director**

## A BRIEF REPORT OF THE INSTITUTE



**A View of Administrative Block of the Institute**

of all people. The Judicial Training and Research Institute, U. P., one of the oldest judicial academies in India has been established with the vision of improving the quality of justice dispensation in the District Judiciary, with the broad

The training of judicial Officers is essential to ensure high standards of competence and performance. Judicial training is fundamental for judicial independence, the rule of law, and the protection of the rights



**A View of Auditorium of the Institute**



**A View of Training Block of the Institute**

and sensitization; making the legal system more effective through regular research work in various fields of social and legal significance; publication of digests and journals; holding of seminars, workshops and conferences etc.

objective of providing induction training to the newly appointed judicial and prosecution officers; conducting continuous refresher trainings for the judicial officers, with the purpose of capacity building



**A View of Library of the Institute**



**A View of Gymnasium of the Institute**

Judges (JD), in 2 Programmes of 3 Phases i.e. Phase-I Institutional Training for the duration of 3 months, Phase-II Field Training at place of posting for the duration of 6 months and Phase-III Institutional Training for the duration of 3 months. The Curriculum of the programme includes, Procedural Laws i.e.

To achieve these objectives, the Judicial Training and Research Institute, Uttar Pradesh, has organized the following training programmes for judicial officers of the State during the financial year 2017-18;

Foundation Training Programme for 187 Newly Appointed Civil



**A View of Officers' Hostel of the Institute**



**A View of Dining Hall of the Institute**

Civil Procedure Code, Criminal Procedure Code, Indian Evidence Act, along with General Rules (Civil and Criminal), Substantive Laws, UP Local Laws, knowledge of Court Management & Case Management, Behavioural Sciences, Forensic Science and Medico Legal Jurisprudence etc.

01 Foundation Training Programme for 28 Newly Appointed Addl. District Judges (Direct Recruit), in 3 Phases i.e. Phase-I Institutional Training for the duration of 1 month. Phase-II Field Training at selective districts for the duration of 1 month and Phase-III



**Hon'ble Mr. Justice Shabihul Hasnain Inaugurating the Foundation Training Programme of 2015 Batch**



**Hon'ble Mr. Justice Shabihul Hasnain, Judge, High Court, Lucknow, Sri P. K. Srivastava, Former Director, JTRI & Sri R. M. N. Mishra, Former Addl. Director, JTRI on dais in Inaugural Session**

Institutional Training for the duration of 1 month. The Curriculum for induction training programme of Addl. District Judges (Direct Recruits) includes Capacity Building , Speedy Disposal and Backlog Clearance, Appreciation of evidences in criminal trial with special

reference to leading and recent judicial pronouncements, Practice and procedure with special reference to special Acts; NDPS Act, SC/ST Act, POCSO Act, PCPNDT Act, Prevention of Corruption Act, Procedural aspects of Bail, Sessions Trial, Appeal (Civil & Criminal), Revision(Civil & Criminal), Injunction, MACP etc.



**A view of Conference Hall during Inaugural of**

## Foundation Training Programme of 2015 Batch



**Seminar / Workshop on “Seminars on Constitutional Vision of Justice with a special reference to Human Trafficking and Modern Days Slavery” on 08.06.2017**

14 Refresher Training Programmes / In-service Training Programmes for 767 Civil Judges (JD/SD) have also been organized at JTRI, UP, Lucknow.

The training programmes are mainly focused on the practical problems faced by

the officers in their day- to - day working. In the training programmes, activities based training methodologies are lectures, group discussions, exercises and case studies. To make the training more fruitful, background materials are provided before discussions, which help the trainees to develop analytical skills and decision



**Lighting of Lamp in One Day Orientation Workshop on Decline Child Sex Ratio, Implementation of PC & PNDT Act & Related Issues on 23.06.2017**



**Hon'ble Mr. Justice D. K. Upadhyaya, addressing the participants**

making power with proficiency in writing orders/judgements. The emphasis is also on experiential learning for sensitization on various social and burning issues.

Apart from the above trainings of judicial officers, the Institute has been actively involved in

providing Induction Training as well as In-service training to the judicial officers of the State, alongwith, training to other stakeholders i.e.; Senior Police Officers, Prosecuting Officers, Officers of Medical Department and other senior officers of Government



**Dr. Neelam Singh ,MD, Chief Functionary, Vatsalya (NGO), Lucknow, addressing the participants**



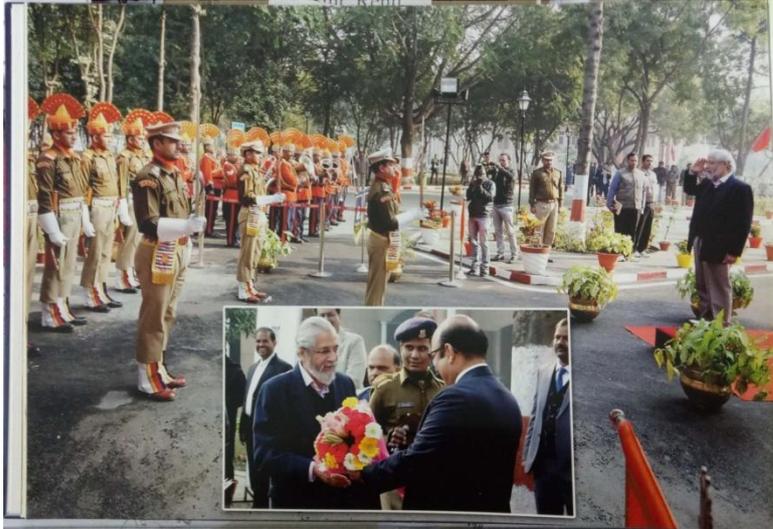
**Prof. Balraj Chauhan, Former Vice Chancellor, Dr. R.M.L. National Law University, Lucknow, Sri P.K. Srivastava, the then Director, JTRI & Sri Babbu Sarang Addl Director(Research), JTRI, UP, Lucknow**

To clear backlog and reduce the pendency, the judiciary is also adopting the latest tools and technique like use of computers in courts, Alternative Disputes Redressal etc. To strengthen these mechanisms the institute is also making its efforts.

Department. During the Financial year 2017-18 we have organized a special training programme for 14 Dy. Superintendent of Police (Probationers) of U.P. and a Foundation Training Programmes 63 Newly Appointed Assistant Prosecuting Officers of U.P.



**Seminar/Sensitization Programme on "Prevention of Cruelty to Animals" on 03.07.2017**



**Hon'ble Mr, Justice Madan B. Lokur, Judge Supreme Court of India & Chief Justice of 'First National Conference of Computer Committees' on 20 & 21 Jan.,18 having guard of Honour & Hon'ble Chief Justice Presenting the bouquets**

organized one day Awareness Programme on Mediation for 389 officers of all cadres. In addition, 40 hours mediation training, as per the module approved by the Hon'ble Mediation and Conciliation Committee, Supreme Court of India has also been organized for 81 judicial

During the year 862 Judicial Officers were imparted training on Ubuntu Linux and CIS software under the direction of Hon'ble e-Committee Supreme Court of India.

In compliance of the directions of the Hon'ble Allahabad High Court, the Institute has successfully



**Hon'ble Mr. Justice D. B. Bhosle, Former Chief Justice, of Allahabad High Court presenting bouquet to Hon'ble Mr. Justice Madan B. Lokur during 'First National Conference of Computer Committees' on 20th and 21st January, 2018**



**Hon'ble Mr. Justice Madan B. Lokur Inaugurating Session of 'First National Conference of Computer Committees' on 20th and 21st January, 2018**

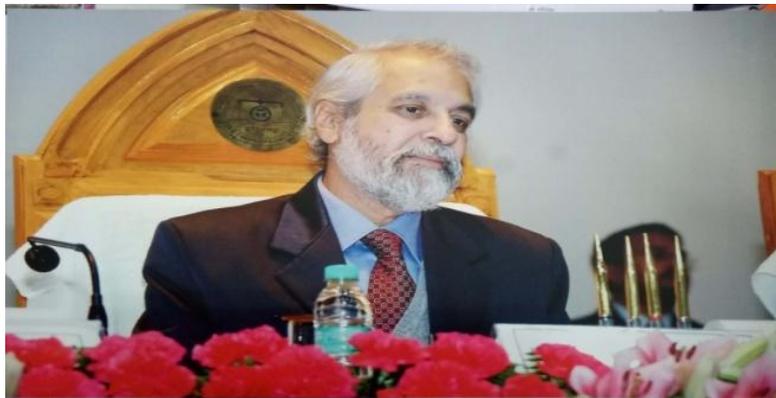
officers of the Civil Judges (Junior Division) cadre.

The JTRI under the patronage of the Hon'ble Allahabad High Court, got the opportunity under the aegis of the NJA to the organize the North Zone

Conference on 25th and 26th November, 2017 at the High Court, Lucknow Bench, Lucknow. Under the aegis of the Hon'ble e-Committee, Supreme Court of India, the Hon'ble Allahabad High Court organized the 'First National Conference of Computer Committees' on 20<sup>th</sup> and 21<sup>st</sup> January, 2018 at the JTRI. The conference inaugurated by



**Glory of Dais during Inaugural Session of 'First National Conference of Computer Committees' on 20th and 21st January, 2018**



**Hon'ble Mr, Justice Madan B. Lokur, Judge Supreme Court of India & Chief Guest of 'First National Conference of Computer Committees' on 20 & 21 Jan.,18**

Hon'ble Mr. Justice Madan B. Lokur, Judge, and Chairman, e-Committee, Supreme Court India, saw the participation of Hon'ble Judges of the Computers committee of all the 24 High Courts, along with the CPCs

and Nodal Officers Computers. The conference presided over by Hon'ble Mr. Justice Dilip B. Bhosale, Chief Justice, Allahabad High Court, concluded with the valedictory session, chaired by Hon'ble Mr. Justice A.M. Khanwilkar, Judge and member e-Committee, Supreme



**Hon'ble Mr. Justice Madan B. Lokur Inaugurating Session of 'First National Conference of Computer Committees' on 20th and 21st January, 2018**



**Hon'ble Mr, Justice Madan B. Lokur, Judge Supreme Court of India, Hon'ble Mr. Justice D. B. Bhosle, Former Chief Justice, of Allahabad High Court, Hon'ble Mr. Justice Taun Agarwal and Hon'ble Mr. Justice Dilip Gupta on the occasion of Foundation Stone Laying Ceremony of Guest House & New block of officers Hostel of JTRI**

courts. During the year 246 officials of subordinate courts were trained on Ubuntu & CIS at JTRI.

The Research wing also actively shared its responsibility during the year. More than 14 workshops, seminars and Sensitization programmes on



**Hon'ble Mr. Justice D. B. Bhosle, Former Chief Justice, of Allahabad High Court presenting memento to Hon'ble Mr. Justice A.M. Khanwilkar during 'First National Conference of Computer Committees' on 20th and 21st January, 2018**



**Inauguration of AIR Cafe at JTRI on 22nd January, 2018**

Court of India.

Any organization cannot achieve its objective without assistance and support of competent supporting staff. Keeping this view in mind Hon'ble court has assigned the task to Judicial Training and Research Institute to organize trainings for staff of district

various legal issues were organized in the institute. In recent past, workshops, seminars and sensitization programmes to instill pro-active and empathetic approach in family disputes, Adoption cases, Societies Registration Act,

Cooperative Societies Act, Lok Adalat, PC & PNDT Act with special emphasis on Save the Girl Child, Human Trafficking and Modern Days Slavery - Constitutional Vision of Justice, Juvenile Justice, Prevention of Cruelty against Animals, etc. were organized in the Institute.



**Glory of the programme**



**Hon'ble Mr. Justice D. B. Bhosle, Former Chief Justice, of Allahabad High Court Hon'ble Mr. Justice Vikram Nath, Senior Judge, Inaugurating the training Programme Newly Appointed Civil Judges(JD) by lighting the lamp.**

During the current Financial Year i.e. 2018-2019 the JTRI proposes to conduct 02 separate Induction Training Programmes for about 220 Civil Judges (JD); one of them for 116 newly appointed Judges is in progress from 01.08.2018 till 31.10.2018.

The next group of Induction Training is proposed to be organised from 26.11.2018 to 25.02.2019. 03 Special Training Programmes for 135 Newly promoted ADJs; 04 Refresher Training Programmes for 191 ADJs; 02 Special



**Hon'ble Mr. Justice D. B. Bhosle, Former Chief Justice, of Allahabad High Court Addressing the Newly Appointed Civil Judges(JD) During Inaugural Session**



**Hon'ble Mr. Justice Vikram Nath, Senior Judge, of Allahabad High Court, Lucknow- Bench Addressing the Newly Appointed Civil Judges(JD) During Inaugural Session**

Training Programmes on Financial & Personnel Management and other Designated Courts (Money Laundering, Commercial Courts & Land Acquisition & Management Tribunal)for 78 District and Sessions Judges / Senior Addl. District and Sessions Judges;

07 Ubuntu-cum-CIS training programmes for 206 officers; have also been organised by the institute during the current financial year. The Institute has also organised 08 Workshops / Seminar / Sensitization programmes for Judicial Officers and other stakeholders during this financial year 2018-2019 on Juvenile Justice;



**Hon'ble Mr. Justice D. B. Bhosle, Former Chief Justice, of Allahabad High Court, Hon'ble Mr. Justice D. K. Upadhyaya & Mr. Justice Rajan Roy with Newly Appointed Civil Judges(JD)**



**Hon'ble Mr. Justice D. K. Upadhyaya, Smt. Saroj Yadav, Director, JTRI UP & Sri Anoop Kumar Goel on dais in the Inaugural Session of Special Training Programme of District Judges on 10.09.2018**

Gender Justice; Torts and Protection of Consumer; Suits Valuation and Court Fees; Legal Aid and Speedy Justice, Effective and efficacious Justice; Land Laws & Revenue Laws; Aspects of Judicial Reforms - How to

Strengthen the Mechanism of ADR with focus on Mediation and Lok-Adalat; Criminal Justice Administration- Challenges & way-out; Workshop on PCPNDT Act.

In September a special sensitization cum awareness program on the various aspects of PCPNDT Act was organised on



**Smt. Saroj Yadav, Director, JTRI UP, Proposing Welcome Address in the Inaugural Session of Special Training Programme of District Judges on 10.09.2018**



**Hon'ble Mr. Justice D. K. Upadhyaya, Addressing the Participants in the Inaugural Session of Special Training Programme of District Judges on 10.09.2018**

10th September 2018 with the financial support of State Appropriate Authority PCPNDT Act / D.G. Medical Health (Family Welfare). The program was organised in the light of the directions of the Hon'ble Apex Court

in Voluntary Health Association Vs. State of Punjab, saw the participation of Chief Judicial Magistrate, Prosecution Officers and district nodal officers under PCPNDT Act of 25 selected districts of the state.



**Director General(Family Welfare), UP, Addressing in the Inaugural Session of Seminar/Workshop on PCPNDT Act on 10.09.2018**



**Hon'ble Mr. Justice S. U. Khan, Former Judge, Allahabad High Court and Smt. Saroj Yadav on the dais during Valedictory Session of Special Training Programme for District & Sessions Judges on 14.09.2018**

Use of an independent, impartial, and respected third party, called the conciliator or mediator for settlement of a dispute, instead of opting for arbitration or litigation. Unlike an arbitrator, a mediator has no legal power to force acceptance of his or her decision but relies on persuasion to reach an agreement. In this process the



**Smt. Saroj Yadav receiving the Training Certificate from Hon'ble Mr. Justice S. U. Khan, Former Judge, Allahabad High Court during Valedictory Session on 14.09.2018**



**Observers & Potential Trainers Meeting with Director, JTRI and Member Secretary, UPSLSA (24-28 Sept. 2018)**

Apart from above the Institute has also organised 02 Legal Capsule Programmes for 82 recently promoted Income Tax Officers. Mediation is one of an important modes to settle the disputes with mutual consent of both the parties.

role of mediator is very important. He has to facilitate the parties to reach on amicable settlement with their own assent. On the initiation of Hon'ble of Mediation Committee, High Court, Lucknow Bench,

02 Mediation Training Programmes of 20hrs. were organised at JTRI by SLSA, UP. A programme of 40hrs. Mediation Training for 116 newly appointed Civil Judges (JD) was also organised by JTRI with the financial support from UPSLSA. In this programme 24 potential trainers and 06



**Observers & Potential Trainers Meeting with Director, JTRI and Member Secretary, UPSLSA (24-28 Sept. 2018)**



**Director, JTRI and Member Secretary, UPSLSA making discussions with participants 40hrs. Mediation Programme (24-28 Sept. 2018)**

Observers have been nominated by Hon'ble MCPC, Supreme Court of India from various states for conducting this programme in 06 groups. Two Programmes of Chief Administrative Officers have also been conducted

in the Institute for 68 officers in compliance of Hon'ble State Court Management Committee, Allahabad High Court. After Training they are supposed to impart training to the newly appointed class-III employees of their respective districts. For the remaining period



**Potential Trainers addressing the participants 40hrs. Mediation Programme (24-28 Sept. 2018)**



**The participants 40hrs. Mediation Programme (24-28 Sept. 2018)**

Advocates and 08 Mediation Training Programmes of 40hrs. for Judicial Officers under the directions of Hon'ble AHCMCC of Allahabad High Court; 02 Programmes for the duration of one month each for 160 Newly appointed Assistant Prosecution Officers of Uttar Pradesh.

of the financial year 2018-2019 the JTRI proposes to conduct 10 Refresher Training Programmes for about 500 Addl. District & Sessions Judges; 08 Mediation Training Programmes of 40hrs. for



**Smt. Saroj Yadav, Director JTRI, presenting bouquet to Hon'ble Mr. Justice Abdul Moin, Judge, Allahabad High Court, Lucknow-Bench, during the Inaugural Session of Special Training Programme of District Judges/ Sr. ADJs on 24.09.2018**



**Hon'ble Mr. Justice Rajesh Singh Chauhan, Judge, Allahabad High Court, Lucknow-Bench and Smt. Saroj Yadav, Director JTRI, on dais during the Valedictory Session of Special Training Programme of District Judges/ Sr. ADJs on 28.09.2018**

Workshops and Seminars on specific topics of social and legal significance for judicial and officers of departments will also be organised by the JTRI during the year.

A Judicial helpline is also functional in the Institute to assist and resolve the legal queries of the judicial officers.

The Institute is regularly publishing quarterly digest of recent important decisions of Hon'ble Supreme Court of India and Hon'ble High Court, Allahabad and JTRI Journal to enhance the legal acumen of judicial officers of the State. The vision of the Institute is incessant up-gradation of skills and appropriate attitudinal reorientation through induction level and in-service training in consonance with the imperatives of national and global environment.



**Smt. Saroj Yadav, Director JTRI, presenting bouquet to Hon'ble Mr. Justice Rajesh Singh Chauhan, Judge, Allahabad High Court, Lucknow-Bench during the Valedictory Session of Special Training Programme of District Judges/ Sr. ADJs on 28.09.2018**



**Presentation of memento to His Lordship Hon'ble Shri Justice Govind Mathur, the Chief Justice, Allahabad High Court visit at JTRI on 3<sup>rd</sup> November, 2018 by Smt. Saroj Yadav, Director, JTRI, UP**



**Chief Guest Hon'ble Shri Justice Govind Mathur, the Chief Justice, Allahabad High Court tree planted at JTRI, UP campus at the completion of Refresher Training of Additional District Judges on 21 December, 2018 at JTRI, UP**



**Judicial Training & Research Institute, U.P., Lucknow**  
*Induction Training Programme for Newly Appointed Civil Judges (J.D.) of U. P.*  
26. 11.2018 To 25.02.2019



**Group Photograph of trainees- Civil Judges (Junior Division) on the occasion of visit of Hon'ble Shri Justice Govind Mathur, the Chief Justice, Allahabad High Court**



**JTRI Journal**

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## PER INCURIUM AND SUB SILENTIO

Justice Satya Poot Mehrotra\*

### ***The Doctrine of Stare Decisis or the Doctrine of Binding Force of Precedents:***

The Doctrine of *Stare Decisis* or the Doctrine of Binding Force of Precedents is well settled. *Stare Decisis* means "Let it stand as decided". Like cases must be decided alike. The courts are bound to follow the law as established by judicial precedent.

Having regard to the hierarchical system of courts prevailing in our country, it follows that the decisions of a superior court are binding on the courts subordinate to it. Thus, Article 141 of the Constitution of India lays down that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Again, keeping in view the principles underlying Article 227 of the Constitution of India, the decisions of a High Court are binding on all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

Even in the same Court (such as, in the Supreme Court or in a High Court), the decision of a Bench consisting of larger number of Judges is binding on a Bench consisting of smaller number of Judges.

Further, in the same Court, the decisions of Coordinate Benches of the same Court are binding on each other. In *U.P. Gram Panchayat Adhikari v. Daya Ram Saroj and Others*, (2007) 2 see 138, at page 149, their Lordships of the Supreme Court laid down that "Judicial discipline is self discipline. It is an inbuilt mechanism in the system itself. Judicial discipline demands that when the decision of a co-ordinate Bench of the same High Court is brought to the notice of the Bench, it is to be respected and is binding, subject of course, to the right to take a different view or to doubt the correctness of the decision and the permissible course then often is to refer the question or the case to a larger Bench. This is the minimum discipline and decorum to be maintained by judicial fraternity.

### ***Dilution of Binding Force of Precedent: The Doctrine of per Incuriam and the Doctrine of sub-silentio:***

Binding force of a Decision as Judicial Precedent is affected and diluted by the Doctrine of per incurium and the Doctrine of sub-silentio. These two Doctrines deal with the situations when a Decision will not be binding as precedent.

In order to appreciate as to how these two Doctrines affect and dilute the binding force of a Decision as precedent, it is necessary to understand the meanings of the two Doctrines and the difference between the two Doctrines.

In *Jurisprudence by R.W.M. Dias (Fifth Edition; page 130)*, the meaning of per incurium has been explained, and it has been pointed out that a previous decision would be per incurium if it is given "in ignorance of a statutory

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\* Former Judge, Allahabad High Court and Former Presiding Officer, National Industrial Tribunal, Mumbai.

provision or binding authority."

The doctrine of *sub-silentio* has been explained in *Salmond on Jurisprudence (Twelfth Edition; page 153-154)* as follows: "A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon, It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

*In order to appreciate the submissions made by the learned counsel for the Respondent-Company, it is necessary to notice certain decisions, which explain the doctrine of per incuriam and the doctrine of sub-silentio.*

In *A.R. Antulay Vs. R.S. Nayak and another*, A.I.R. 1988 Supreme Court 1531, (1988) 2 SCC 602, their Lordships of the Supreme Court (majority view) opined as follows (paragraphs 44,45,49,50 and 57 of the said AIR) :

"44. *It appears that when this Court gave the aforesaid directions on 16<sup>th</sup> February, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in Anwar AU Sarkar's case (AIR 1952 SC75)(supra). See Halsbury's Laws of England, 4<sup>th</sup> Edn., Vol. 26 page 297, para 578 and page 300, the relevant notes 8, 11 and 15; Dias on Jurisprudence, 5<sup>th</sup> Edn., pages 128 and 130; Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All ER 293 at P. 300. Also see the observations of Lord Goddard in Moore v. Hewitt (1947) 2 All ER 270 at p. 272-A) and Penny V. Nicholas, (1950) 2 All ER 89, 92A. "Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or o(some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account to be demonstrably wrong. See Morelle v. Wakeling, (1955) 1 All ER 708, 718F. Also see State of Orissa v. Titaghur Paper Mills Co. Ltd.; (1985) 3 SCR 26. (AIR 1985 SC 1293). We are of the opinion that in view of the clear*

*provisions of section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong.*

45. *The principle that the size of the Bench - whether it is comprised of two or three or more Judges - does not matter, was enunciated in Young v. Bristol Aeroplane Co. Ltd. (supra) and followed by Justice Chinnappa Reddy in Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra, (1985) 2 SCR 8:(AIR 1985 SC 231) where it has been held that a Division Bench of three Judges should not overrule a Division Bench of three Judges, has not been followed by our Courts. According to well-settled law and various decisions of this Court, it is also well-settled that a Full Bench or a Constitution Bench decision as in Anwar Ali Sarkar's case(AIR 1952*

- SC 75) (*supra*) was binding on the Constitution Bench because it was a Bench of 7 Judges.
46. The principle in England that the size of the Bench does not matter, is clearly brought out in the decision of Evershed MR. in the case of **Morelle v. Wakeling**, (1955 (1) All ER 708) (*supra*). The law laid down by this Court is somewhat different. There is a hierarchy within the Court itself here, where larger Benches overrule smaller Benches. See the observations of this Court in **Mattulal v. Radhe Lal**, (1975) 1 SCR 127 " (AIR 1974 SC 1596), **Union of India V. K.S. Subramanian** (1977) 1 SCR 87 at p. 92: (AIR 1976 SC 2433 at p. 2437) and **State of U.P. v. Ram Chandra Trivedi**, (1977) 1 SCR 462 at p. 473: (AIR 1976 SC 2547 at p. 2555). This is the practice followed by this Court and now it is a crystallized rule of law. See in this connection, as mentioned hereinbefore, the observations of the **State of Orissa v. Titaghur Paper Mills** (AIR 1985 SC 1293) (*supra*) and also **Union of India V. Godfrey Philips India Ltd.**, 1985 Suppl (3) SCR 123 at p. 145: (AIR 1986 SC 806 at p. 815).
49. ....It is true that Shri Jethmalani has shown us the prayers made before the High Court which are at page 121 of the paper-book. He argued that since the transfers have been made under Section 407, the procedure would be that given in Section 407 (8) of the Code. These directions, Shri Jethmalani sought to urge before us, have been given in the presence of the parties and the clarificatory order of April 5, 1985 which was made in the presence of the appellant and his Counsel as well as the Counsel of the appellant and his Counsel as well as the Counsel of the state Government of Maharashtra, expressly recorded that no such submission was made in connection with the prayer for grant of clarification.....
50. According to Shri Jethmalani, the doctrine of per incuriam has no application in the same proceedings. We are unable to accept this connection....."
57. Sri Jethmalani urged that the directions given on 16<sup>th</sup> February, 1984, were not per incuriam. We are unable to accept this submission. It was manifest to the Bench that exclusive jurisdiction created under Section 7(1) of the 1952 Act read with section 6 of the said Act, when brought to the notice of this Court, precluded the exercise of the power under Section 407 of the Code. There was no argument, no submission and no decision this aspect at all. There was no prayer in the appeal which was pending before this Court for such directions. Furthermore, in giving such directions, this Court did not advert to or consider the effect of **Anwar Ali Sarkar's** case (AIR 1952 SC 75) (*supra*) which was binding precedent. A mistake on the part of this Court shall not cause prejudice to anyone. ...."

(Emphasis supplied)

In **Municipal Corporation of Delhi V. Gurnam Kaur**, AIR 1989 SC 38, their Lordships of the Supreme Court explained the meaning of **per incuriam** and sub-silentio follows (paragraphs 11 & 12) of the said AIR):

*"II. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the*

learned Judge who passed the order in JamnaDas's case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P. J Fitzgerald, editor of the Salmond on Jurisprudence, 11<sup>th</sup> edn., explains the concept of sub silentio at p. 153 in these words:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour or one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

12. In Gerard V. Worth of Paris Ltd. (K), (1936) 2 All ER 905 the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the Court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in **Lancaster Motor Co. (London) Ltd. v. Bremith, Ltd.**, (1941) 1 KB 675, the Court held itself not bound by its previous decision. Sir Wilfrid Greene, MR., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier Court before it could make the order which it did,' nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents subsilentio and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded

*to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority. "*

(Emphasis supplied)

In **State of V.P. and another Vs. Synthetics and Chemicals Ltd.** and another, (1991) 4 see 139 (supra), their Lordships of the Supreme Court held as under (paras 40 and 41 of the said SCC) :

"40. 'Incuria' literally means 'carelessness'. In practice per incurium appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. [Young v. Bristol Aeroplane Co. Ltd., (1944) 1 K.B. 718 :(1944) 2 All ER 293]. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In JalsriSahu v. Rajdewanrubey, (1962) 2 SCR558 : AIR 1962 SC 83), this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has 'come to be attached to that phrase, when the particular point of law involved in the decision is not perceived' by the court or present to its mind. " (Salmond on jurisprudence 12<sup>th</sup>Edn., p. 153). In **Lancaster Motor Company (London) Ltd. v. Bremith Ltd., (1941) 1 KB 675, 677 : (1941) 2 All ER 11,**the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in **Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 SCC 101.** The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In **B. Shama Rao v. Union Territory of Pondicherry, AIR 1967 SC 1480: (1967) 2 SCR 650,** it

*was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein '. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law. "*

(Emphasis supplied)

In Government of Andhra Pradesh and another Vs. B. Satyanarayan Rao (dead) by L. Rs. and others, A.I.R. 2000 Supreme Court 1729, their Lordships of the Supreme Court held as under (paragraph 8 of the said AIR):

*"8. Learned counsel for the respondent attempted to convince us that the decision in the case of **State of A.P. Vs. V. Sadanandam**, (AIR 1989 SC 2060: 1989 Lab IC 2024) (*supra*) has to be ignored on the principle of *per incuriam* as certain relevant provisions of the Rules were not considered in the said case, and in any case this case requires to be referred to a larger Bench of three Judges. Rule of *per incuriam* can be applied where a Court omits to consider a binding precedent of the same Court or the superior (ourt rendered on the same issue or where a Court omits to consider any statute while deciding that issue. This is not the case here. In *State of A. P. Vs. V. Sadanandam* (*supra*) the controversy was exactly the same as it is here and this Court after considering paragraph 5 of the Presidential Order of 1975 held that the Government has power to fill a vacancy in a zone by transfer. We, therefore, find that rule of *per incuriam* cannot be invoked in the present case. Moreover, a case cannot be referred to a larger Bench on mere asking of a party. A decision by two Judges has a binding effect on another co-ordinate Bench of two Judges, unless it is demonstrated that the said decision by any subsequent change in law or decision ceases to laying down a correct law. We, therefore, reject the arguments of learned counsel for the respondents. "*

(Emphasis supplied)

In Arnit Das Vs. State of Bihar, AIR 2000 SC 2264, their Lordships of the Supreme Court held as under (paragraph 20 of the said AIR) :

*"20. A decision not expressed, not accompanied by reasons and not proceeding on conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not ratio decidendi. This is the rule of sub-silentio, in the technical sense when a particular point onaw was not consciously determined. (See *State of U.P. v. Synthetics and Chemicals Ltd.*, (1991) 4 sec 139, Para 41). "*

(Emphasis supplied)

In *M/s A-One Granites vs. State of V.P. and others*, AIR 2001 Supreme Court 1203, their Lordships of the Supreme Court laid down as under

{paragraphs 10, 11 and 12 of the said AIR) :

"10. *The first question which falls for consideration of this Court is as to whether the question regarding applicability of Rule 72 of the Rules in relation to the present lease is concluded by the earlier decision of this Court rendered in Prem Nath Sharma v. State of UP. , (1997) 4 SCC 552 : (1997 AIR SCW 2121 : AIR 1997 SC 2252 1997 All LJ 1201). From a bare perusal of the said judgment of this Court it would be clear that the question as to whether Rule 72 was applicable or not was never canvassed before this Court and the only question 'which was considered was whether there was violation of the said rule.*

11. *This question was considered by the Court of Appeal in **Lancaster Motor Co. (London) Ltd. v. Bremith Ltd.**, (1941) 1 KB 675, and it was laid down that when no consideration was given to the question, the decision cannot be said to be binding and precedents sub silentio and without arguments are of no moment. Following the said decision, this Court in the case of **Municipal Corporation of Delhi v. Gurnam J(aur)**, (1989) 1 SCC 101 : (AIR 1989 SC 38) observed thus (at p. 43 of AIR) :*

*"In Gerardv. Worth of Paris Ltd.(K), (1936) 2 All ER 905 (C A), the only point argued was on the question of priority of the claimant's debt, and on this argument being heard, the Court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in Lancaster Motor Co. (London) Ltd. v. Bremith Ltd., (1941) 1 KB 675, the Court held itself not bound by its previous decision. Sir Wilfrid Greene, MR., said that he could not held thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier Court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents sub silentio and without argument are of no moment. This rule has ever since been followed."*

*In **State of U.P. v. Synthetics and Chemicals Ltd.**, (1991) 4 SCC 139, reiterating the same view, this Court laid down that such a decision cannot be deemed to be a law declared to have binding effect as is contemplated by Article 141 of the Constitution of India and observed thus:*

*"A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141."* *In the case of **Arnit Das v. State of Bihar**, 2000 (5) see 488 : (2000 AIR SCW 2037 : AIR 2000 SC 2264 : 2000 Cri LJ 2971), while examining the binding effect of such a decision, this Court observed*

thus (para 20):

"A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined."

12. Thus we have no difficulty in holding that as the question regarding applicability of Rule 72 o(the Rules having not been even referred to, much less considered by this Court in the earlier appeals, it cannot be said that the point is concluded by the same and no longer res integra and accordingly this Court is called upon to decide the same."

*(Emphasis supplied)*

In **Nirmal Jeet Kaur v. State of M.P. and another**, (2004) 7 see 558, their Lordships of the Supreme Court opined as under (paragraphs 20 and 21 of the said Sec) :

*"20. In **Salauddin** case (AIR 1996 SC 1042) also this Court observed that the regular court has to be moved for bail. Obviously, an application under Section 439 of the Code must be in a manner in accordance with law and the accused seeking remedy under Section 439 must ensure that it would be lawful for the court to deal with the application. Unless the applicant is in custody his making application only under Section 439 of the Code will not confer jurisdiction on the court to which the application is made. The view regarding extension of time to "move" the higher court as culled out from the decision in **K.L. Verma** case [(1998) 9 see 348] shall have to be treated as having been rendered per incuriam, as no reference was made to the prescription in Section 439 requiring the accused to be in custody. In *State v. Ratanlal Arora* [(2004) 4 sec 590J it was held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedential value and shall have to be treated as having been rendered per incuriam. The present case stands at par, if not, on a better footing. The provisions of Section 439 do not appear to have been taken note of 21. "Incuria" literally means "carelessness", In practice per incuriam is taken to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in *Young v. Bristol Aeroplane Co. Ltd.* [(1944) 2 All E R 293] is avoided and ignored if it is rendered per ignoratium of a statute or other binding authority ".Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India (in short "the Constitution") which embodies the doctrine of precedents as a matter of law. The above position was highlighted in *State of U.P. v. Synthetics and Chemicals Ltd.* [(1991) 4 sec 139). To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial*

conscience.

(Emphasis supplied)

In **Babu Parasu Kaikadi (dead) by L.Rs. Vs. Babu (dead) by L.Rs.**, AIR 2004 Supreme Court 754, their Lordships of the Supreme Court held as under (paragraphs 15, 16, 17 and 18 of the said AIR) :

*"15. Having given our anxious thought, we are of the opinion that for the reasons stated hereinbefore, the decision of this Court in Dhondiram Tatobti Kadam (supra); having not noticed the earlier binding precedent of the co-ordinate Bench and having not considered the mandatory provisions as contained in Sections 15 and 29 of the Act had been rendered per incuriam. It, therefore, does not constitute a binding precedent."*

16. In Halsbury Laws of England, 41st Edition Volume 26 it is stated:

*"A decision is given per incuriam when the Court has acted in ignorance of a previous decision of its OW?1 or of a Court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."*

*In State of U.P, and another v. Synthetics and Chemicals Ltd. and another, reported in 1991 (4) SCC 139, this Court observed,'*

*"Incuria" literally means 'carelessness '. In practice **per incuriam** appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered. 'in ignoratium of a statute or other binding authority'. (**Young v. Bristol Aeroplane Co. Ltd.**) Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."*

17. In **Govt. of Andhra Pradesh and another v. B. Satyanarayana Rao (Dead) by L. Rs.** (2000(4) SCC 262), it has been held as follows

*:"Rule of per incuriam can be applied where a Court omits to consider a binding precedent of the same Court or the superior Court rendered on the same issue or where a Court omits to consider any statute while deciding that issue."*

18. Furthermore, this Court, while rendering judgment in **Dhondiram Tatobaliadam (supra)**, was bound by its earlier decision of Co-ordinate Bench in **Ramchandra Keshav Adke (supra)**. We are bound to follow the earlier judgment which is precisely on the point in preference to the later judgment which has been rendered without adequate argument at the bar and also without reference to the mandatory provisions of the Act."

(Emphasis supplied)

In **N. Bhargavan Pillai (dead) by L. Rs. and another Vs. State of**

Kerala, AIR 2004 Supreme Court 2317, their Lordships of the Supreme Court held as under (paragraph 14 of the said AIR) :

*"14 Coming to the plea relating to benefits under the Probation Act,' it is to be noted that Section 18 of the said Act clearly rules out application of the Probation Act to a case covered under Section 5(2) of the Act. Therefore, there is no substance in the accused-appellant's plea relating to grant of benefit under the Probation Act. The decision in Bore Gowda's case (supra) does not even indicate that Section 18 of the Probation Act was taken note of in view of the specific statutory bar the view, if any, expressed without analyzing the statutory provision cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. Looked at from any angle, the appeal is sans merit and deserves dismissal which we direct. "*

(Emphasis supplied)

In **Central Board of Dawoodi Bohra Community and another Vs. State of Maharashtra and another**, AIR 2005 Supreme Court 752, their Lordships of the Supreme Court laid down as under (paragraph 7 of the said AIR) :

*"7 The Constitution Bench in the case of **Chandra Prakash and Ors. Vs. State of U.P. &Anr.**-(2002) 4 SCC 234. took into consideration the law laid down in Parija's case and also referred to the decision in **Union of India and Anr'. V. Raghbir Singh (dead) by L. Rs. etc.** relied on by Ms. Indra Jaising, the learned Senior Counsel and then reiterated the view taken in Parija's case. Per incuriam means of decision rendered by ignorance of a previous binding decision such as a decision of its own or of a Court of co-ordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law. A ruling making a specific reference to an earlier binding precedent may or may not be correct but cannot be said to be per incuriam. It is true that Raghbir Singh's casewas not referred to in any case other than Chandra Prakash & Ors. ' case but in Chandra Prakash &Ors. case. Raghbir Singh's case and Parija's case both have been referred to and considered and then Parija's case followed. So the view of the law taken in series of cases to which Parija's case belongs cannot be said to be per incuriam. "*

(Emphasis supplied)

In **Sunita Devi Vs. State of Bihar and another**, AIR 2005 Supreme Court 498, their Lordships of the Supreme Court laid down as under (paragraph 20 of the said AIR) :

*"20. "Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All ER 293, is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India, 1950 (in short the*

*'Constitution') which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. and another v. Synthetics and Chemicals Ltd. and another (1991) 4 SCC 139. To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience. "*

(Emphasis supplied)

From a perusal of the above decisions of the Supreme Court, it is evident that the *doctrine of per incurium* applies where the point involved in a case is decided but the decision on the point is given in ignorance of a binding decision to the contrary or a relevant statutory provision to the contrary. In such circumstances, the decision is treated as per incurium.

The *doctrine of sub-silentio* applies where the case involves various points, and the decision is given on one or some of the points while the remaining points are not considered and are not decided. Therefore, the decision is silent on such remaining points. In such circumstances, the decision is said to pass sub-silentio on such remaining points.

In short, the doctrine of per incurium applies where the point in question is decided by the Court in ignorance of a binding decision to the contrary or a relevant statutory provision to the contrary. On the other hand, the doctrine of sub-silentio applies where the point in question is not considered and decided by the Court.

In either of the two situations, the decision on the point in question is not binding.

From the above discussion, it follows that the *doctrine of sub-silentio* does not apply to a decision of the Court where the said decision of the Court is not silent on the points involved in the case before the Court. Therefore, in such a situation, the said decision cannot be said to pass sub-silentio on the said points.

From a perusal of the decisions of the Supreme Court referred to above, it will also be noticed that for the applicability of the *doctrine of per incurium*, i.e., for a decision to be rendered per incuriam, it is necessary that the following requirements should be fulfilled :

- 1- The decision has been given in "ignorance or forget-fulness" of some authority binding on the Court concerned or of some relevant statutory provision.
- 2- The said binding authority or the said statutory provision is contrary to or inconsistent with the decision of the Court concerned.

Therefore, merely because some binding authority or some statutory provision has been ignored in the decision of the Court concerned, will not render the decision **per incuriam**.

It is further necessary that the binding authority or the statutory provision should be inconsistent with or contrary to the decision of the Court concerned.

Further, the doctrine of per incuriam applies where the decision has been given in "ignorance or forget-fulness" of some binding authority or a relevant statutory provision. Merely because a binding authority or a relevant statutory provision has not been referred to in the decision, it will not render the decision per incuriam provided that such binding authority or statutory provision is not inconsistent with or contrary to the decision of the Court concerned.

Reference in this regard may be made to the following decisions.

In *M/S Gupta Sugar Works Vs. State of U.P. and others*, AIR 1987 Supreme Court 2351, their Lordships of the Supreme Court opined as follows (paragraph 12 of the said AIR) :

*"12. It is true that there is no express reference to Panipat(AIR 1973 SC 537) and Anakapalle (AIR 1973 SC 734) in the judgment in New India Sugar Works. But the judgment need not be a digest of cases. It need not be written like a thesis. The decision in New India Sugar Works (AIR 1981 SC 998) may be brief: but not less predictable on the principles of Panipat and Anakapalle. There this Court found the levy price reasonable even from the point of view of the industry. This Court took into consideration the liberty reserved to manufacturers to sell freely 50 % of the sugar manufactured and also 100% of the produce by 2<sup>nd</sup> and 3<sup>rd</sup> processes. This Court was of opinion that by such a free sale the industry could get reasonable return. We agree with this conclusion and see no reason for reconsideration. "*

(Emphasis supplied)

In *V. Sudeer, etc. Vs. Bar Council of India and another*, AIR 1999 Supreme Court 1167, their Lordships of the Supreme Court held as under (paragraph 26 of the said AIR) :

*"26... .. However, the question is whether Section 49 (1) (ah) confers such a power on the Bar Council of India. So far as this question is concerned, it has stood answered against the respondent Bar Council of India by a three Judge Bench Judgment of this Court reported in **Indian Council of Legal Aid & Advice** case (1995 AIR SCW 473 (supra). A. M Ahmadi, CJI, speaking for the three Judge Bench, had to consider in the said decision, the question whether the Bar Council of India could frame a rule restricting the enrolment of advocates to the State roll to only those who had not completed 45 years of age. Holding such rule to be ultra vires the powers of the Bar Council of India under the Act, it was held that such a rule could not be sustained under Section 49 (1)(ah) as the said provision dealt with a situation after enrolment of advocates and could not take in its sweep any situation prior to their enrolment. Shri Rao, learned senior counsel for the respondent Bar Council of India, tried to salvage the situation by submitting that the said decision was **pariincllriam** on the ground that Section 24(3)(b) was not noticed. We have already held that Section 24 (3)(d) is the provision which permits the Bar Council of India by exercise of rule making power to make otherwise ineligible person eligible for enrolment and does not act in the reverse direction to make otherwise eligible persons ineligible. Once that conclusion is reached. Section 24(3) (d) becomes totally irrelevant for deciding the question whether the rule impugned before the three JudgeBench in that case could have been sustained by the Bar Council of India by taking resort to Section 24(3) (d). Non-*

*consideration of such irrelevant provision, therefore, cannot make the ratio of the decision in the aforesaid case pariincurium. The second ground on which Shri Rao tried to submit that the said decision was pariincurium was by inviting our attention to a Constitution Bench Judgment of this Court in In re : Lily Isabel Thomas case (AIR 1964 SC 855) (supra). Now it must be kept in view that the said decision was rendered in connection with an entirely different statutory scheme. Section 52 of the Act, as noted earlier, saves power of the Supreme Court to make Rules under Article 145 of the Constitution of India for determining persons who are eligible to practise before the Supreme Court. Thus, the constitutional power of the Supreme Court for regulating the working of advocates in the Supreme Court who were otherwise entitled to practise in any Court in India under the Act could be validly exercised. When we turn to the constitutional power of the Supreme Court under Article 145, we find clearly mentioned therein that subject to the provisions of any law made by the Parliament, the Supreme Court may from time to time, with the approval, of the President, make rules for regulating generally the practice and procedure of the Court including rules as to the persons practising before the Court. As Section 52 of the Act has expressly saved the powers of the Supreme Court under Article 145 for determining the persons who shall be entitled to practise and plead before the Supreme Court, Article 145 could operate on its own without any fetter being imposed by any statutory law enacted by the Parliament. Accordingly, in the light of Article 145, a question arose before the Constitution Bench in the aforesaid case, whether the Supreme Court was competent to enact a rule in connection with advocates practicing before it, who could act as an advocate on record subject to their passing examination as laid down under the rules. The term 'persons practicing before the Court' as laid down by Article 145 (1)(a) in connection with such rule making power was interpreted to take in its sweep not only persons actually practising but even entitled to practise before the Supreme Court. In this connection, the phraseology found in the Union List in the ill Schedule of the Constitution in Entry 77, namely persons entitled to practise before the Supreme Court was held to be in parimateria with the phrase 'persons practicing before the Court' as found in Article 145 (1)(a). In the light of the aforesaid wide sweep of Article 145 (1)(a), expressly saved by Section 52 of the Act it was held that the rule laying down examination to be undergone by practicing advocates before the Supreme Court before they could act as advocates on record was within the rule making power of the Supreme Court. It is difficult to appreciate how the aforesaid decision of the Constitution Bench rendered in the light of an entirely different constitutional scheme can be of any assistance to the Bar Council of India in the present case. For sustaining the rule making power of the Bar Council of India, the express provisions of Section*

*7 and Section 24 (3)(d) read with Section 49 (1)(ah) would be the only relevant provisions which were considered by this Court in a three Judge Bench judgment Indian Council of Legal Aid & Advice case (1995 AIR SCW 473) (supra). The ratio of the Constitution Bench judgment rendered in connection with an entirely different question posed for decision In the light of the relevant provisions of the constitutional scheme dealing with the rule making power of the Supreme Court under Article 145, therefore, cannot be said to be laying down anything contrary to what the three Judge Bench Judgment laid down in connection with this very statutory scheme which squarely arises for consideration in the present case. Hence, even the second ground canvassed by learned senior counsel, Shri Rao for the Bar Council of India, for whittling down the binding effect of the aforesaid three Judge Bench judgment of this Court, cannot be sustained".*

(Emphasis supplied)

In **Director of Settlements, A.P. and others Vs. M.R. Apparao and another**, AIR 2002 Supreme Court 1598, their Lordships of the Supreme Court laid down as under (paragraph 7 of the said AIR) :

*"7. So far as the first question is concerned. Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than Law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has 'declared law' it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle under-lying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An 'obiter dictum' as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be dented that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant*

provisions were not brought to the notice of the Court (See AIR 1970 SC 1002 and AIR 1973 SC 794). When Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court to follow the decision of the Supreme Court. A judgment of the High Court, which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity. (See 1984 (2) SCC 402 and 1984 (2) SCC 324). We have to answer the first question bearing in mind the aforesaid guiding principles. We may refer to some of the decisions cited by Mr. Rao in elaborating his arguments contending that the judgment of this Court dated 6<sup>th</sup> February, 1986 cannot be held to be a law declared by the Court within the ambit of Article 141 of the Constitution. Mr. Rao relied upon the judgment of this Court in the case of Pandit MS. M Sharma v. Shri Sri Krishna Sinha and others, 1959 Suppl (1) SCR 806, wherein the power and privilege of the State Legislature and the fundamental right of freedom of speech and expression including the freedom of the press was the subject matter of consideration. In the aforesaid judgment it has been observed by the Court that the decision in Gunupati Keshavram Reddy v. Najisul Hasan, AIR 1954 SC 636, relied upon by the counsel for the petitioner which entirely proceeded on a concession of the counsel cannot be regarded as a considered opinion on the subject, There is no dispute with the aforesaid proposition of law”

(Emphasis supplied)

In **State of Bihar Vs. Kalika Kuer @ Kalika Singh** and others, AIR 2003 Supreme Court 2443: JT 2003 (4) SC 489 (supra), their Lordships of the Supreme Court held as under (paragraph 9 of the said AIR) :

"9. In **Fuerst Day Lawson Ltd. v. Shivaraj V. Patil**(2001) 6 SCC 356, this Court observed:

“A prior decision of the Supreme Court on identical facts and law binds the Court on the same points of law in a latter case. In exceptional instances, where obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principles of **per incurium** may apply. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment “**per incurium**”. It has to be shown that some part of the decision was based on a reasoning which was demonstrably wrong, for applying the principle of **per incurium**.”

(Emphasis Supplied)

### **Conclusion:**

Keeping in view the above legal position, one may conclude that the normal rule is that the **doctrine of stare decisis** should be followed, and the binding force of a judicial precedent must be honoured. It is only in exceptional cases where a decision falls within the ambit of the **doctrine of per incurium** or the **doctrine of sub silentio**, that the binding force of such a decision is affected and lost.

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## LENIENT VIEW OF PROCEDURAL LAWS INTEREST OF JUSTICE OR TORTURE<sup>1</sup>

Justice S.U. Khan \*

What is law? It is not easy to define (The Concept of law by H.L.A. Hart)<sup>2</sup>. What is justice? It is much more difficult to define. Any such attempt is like trying to enclose fragrance in a net. (Simile borrowed from 'Far from the Madding Crowd' by Thomas Hardy.) Justice is to a great extent subjective in nature and not objective. Dependence of a judge on his subjective sense of justice is like following red herring. Plato propounded that after appointing learned persons of impeccable character and integrity as judges, decision of cases must be left solely on their wisdom and judgment which must not be hindered by pre set laws, rules, procedures and precedents<sup>3</sup>. We cannot go back to that stage.

The observations, particularly the clause that 'procedure should be hand maid not the mistress' of Justice Krishna Iyer in *Sushil Kumar Sen v. State of Bihar AIR 1975 SC 1185 (para 586): 1975 (1) SCC 774*<sup>4</sup> have been quoted with approval and followed in innumerable cases.

Justice Krishna Iyer, himself a champion of rights and dignity of labour, became oblivious of that momentarily. In post industrialization period, with lot of

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<sup>1</sup> See also my article "Arrears as Barometer" published in 2010 (2) SCC Journal Section page 1 dealing with several provisions of law responsible for filing of unduly large number of cases and causing huge pendency in courts.

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<sup>2</sup> Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?' (First sentence of first chapter 'Persistent Questions')

<sup>3</sup> 'Plato realized that even in his ideal commonwealth disputes will arise which must be decided by the public authorities. It is the theory of The Republic that in deciding such controversies, the judges of the state should have a large amount of discretion. Plato does not wish them to be bound by fixed and rigid rules embodied in a code of law. The state of The Republic is an executive state, governed by the free intelligence of the best men rather than by the rule of law. Justice is to be administered "without law".

8. See Roscoe Pound, "Justice According to Law," 13 Columbia Law Review 696 – 713 (1913); 14 Col. L. Rev. 1-26, 103-121 (1914). Karl R. Popper, in *The Open Society and Its Enemies* (Princeton, 1950), chs. 6-8, depicts Plato as the philosopher of racialist totalitarianism. A different view is taken by John Wild, *Plato's Modern Enemies and the Theory of Natural Law* (Chicago, 1953). See also Jerome Hall, "Plato's Legal Philosophy," in *Studies in Jurisprudence and Criminal Theory* (New York, 1958), pp. 48-82; Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1963), pp. 13-19; Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore, 1949), pp. 29-76. (Jurisprudence by Edgar Bodenheimer chapter I 'Greck and Roman Legal Theory' Section 2 'Plato's view of the Law')

<sup>4</sup> "The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. .... Justice is the goal of jurisprudence - processual, as much as substantive." (*Sushil Kumar Sen v. State of Bihar, AIR 1975 SC 1185, para 586*)

labour reforms laws, even hand maids can neither be maltreated nor required to perform such functions which are not part of their duties.<sup>5</sup>

What is the aim and purpose of law, substantive as well as procedural? One answer may be, perfect or near perfect justice to all or almost all the persons concerned. This is utopia. It is simply not possible. (See also my article 'search of Near Perfect Social Order' published in 2011 (3) SCC Journal Section page 1) If law attempts to lift this mountain, it will at once crumble and get totally crushed leaving no law, justice or order in the Society.

The only possible, pragmatic object of law can be maximum possible justice to maximum possible number of people concerned. Law and its enforcement is a strong medicine. Some strong medicines have side effects also. If in order to do justice to large number of affected persons injustice to few is inevitable, the bargain is worthwhile. There is nothing like absolute justice. Imprisonment of a murderer, who is bread earner of his family, is injustice to the dependant family members, who have done nothing wrong.

Granting repeated adjournments, permitting filing of written statement at a highly belated stage, entertaining amendment application liberally, granting blanket ad interim / temporary injunction order (or status quo order) readily or refusing to grant, as a rule, even conditional ad-interim / temporary injunction order may be justice to one party but it will also be injustice to the other.

Justice and injustice are comparative terms. Both have to be weighed against each other and on the basis of experience balance sheet is to be prepared to see whether there is debit balance or credit balance. (It has not been logic but experience which has been life of law – Oliver Wendell Holmes.)

Few harsh cases do not make good law. Rather hard cases make bad law.<sup>6</sup> Accordingly they cannot be a ground to dilute the law. There is nothing like 100% either in law or life. There is no medicine of a particular ailment which can 100% cure all the patients suffering there from.

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<sup>5</sup> It is interesting to note that in seventies and eighties the concept of handmaid was in vogue. Shorter Oxford English Dictionary 1973 edition (reprinted in 1985) gives one of the meanings of hand maid as female servant or attendant and says nothing further. However tenth edition of 2005 of Pocket Oxford English Dictionary before giving the meaning of the word handmaid as a female servant states that it is old use. Twelfth edition of 2011 of Concise Oxford English Dictionary describes the meaning as archaic. Accordingly it may be said that the concept 'procedure should be handmaid' developed by Justice Krishna Iyer in 1975 was quite relevant then, but by 2002 when the relevant amendments of C.P.C. were enforced, the concept became outdated and now it is archaic.

<sup>6</sup> Hard cases make bad law From Wikipedia, the free encyclopedia. "The maxim dates at least to 1837, when a judge, ruling in favor of a parent against the maintenance of her children, said, "We have heard that hard cases make bad law." [3] The judge's wording suggests that the phrase was not new then. It was used in 1904 by US Supreme Court Justice Oliver Wendell Holmes, Jr.. Its validity has since been questioned and dissenting variations include the phrase "Bad law makes hard cases", and even its opposite, "Hard cases make good law". Oliver Wendell Holmes, Jr. made a utilitarian argument for this in his judgment of Northern Securities Co. v. United States (1904): [4] Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance... but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."

It is a principle of physics that all the energy cannot be converted into work done. (The second law of Thermodynamics states that heat energy cannot be converted into an equivalent amount of work). Some waste is inevitable.

However balanced diet and exertion / exercise one may take, the body is bound to discharge some refuse, otherwise it will mean that the body system is faulty endangering survival itself.

When there is huge traffic on roads fast track high ways and express ways are constructed, accidents are inevitable which may be minimized but not completely ruled out. (For roads, fast track high ways and express ways read courts). Only when all the vehicles on road move slowly, accident free scenario may be guaranteed. (For vehicles read cases.)

Similarly best possible just laws are bound to yield some waste / injustice.

To grant liberty to a party in order to serve the ends of justice, is, more often than not end of justice to the other side.

If the harsh, but reasonable, restrictions (e.g. Order 8 Rule 1, Order 17 and Section 148 C.P.C.) are strictly adhered to, they may initially be harmful to a small number of litigants. However after sometime this number will drastically reduce as everyone would be alert realizing that there is no chance of any sympathy or concession by Court. This is how discipline is imposed and works.

Suppose a professor of a university who takes first period of a class in quite lenient and liberally permits late comers to attend the class with only occasional mild advisories. Several students will be coming late. One day he declares that from tomorrow he will not be permitting any late comer to enter the class. Students are not likely to take him seriously and on the next day there will hardly be any decrease in the number of late comers. However, the professor does not allow any student to enter the class after the scheduled time. From the next day situation would improve a lot. After few days if some student is not in a position to reach in time, he will not come at all. One day after few weeks a student comes late, gives an excellent reason for delay and pleads for entry in the class which is granted. From the next day number of students coming late and giving excuses/ explanations will increase. The professor will be listening to their tales and permitting those whose explanations are found reasonable. Such decisions will also eat into the precious time of lecture. After some time the position will be back to square one.

### **Time Schedule:**

Experience taught us (particularly the Law Commission) that one of the major causes of delay in decision of suit was the practice of seeking and granting time, innumerable times, to file written statement (W.S.). On the recommendation of Law Commission, Order 8 Rule 1 C.P.C. was amended w.e.f. 01.07.2002 and it was provided that normally w.s. shall be filed within 30 days from service of summons but on genuine grounds court could grant a maximum further time of 60 days (total 90 days from date of service). This could be great check on delay in suits. However in one or two percent cases it could also cause injustice to defendants where they might be having very genuine grounds for not filing w.s. in 90 days. In one of such cases, *Kailash v. Nanhku AIR 2005 SC 2441* the Supreme Court declared the provision to be directory, placing reliance upon the above quoted observation (procedure should be handmaid) in *Sushil Kumar*. The result

was that permitting filing of w.s. even after 90 days became norm and refusal an exception<sup>7</sup>. (Now Supreme Court in *New India Assurance co. v. Hilli Multipurpose Cold Storage Pvt. Ltd.* AIR 2016 SC 86 has held the authority of *Kailash v. Nankhu* to be per incuriam as it sought to disagree with an earlier authority of same strength i.e. three judges.)

The other provision made through Amendment of 1999 (w.e.f. 01.07.2002) for checking delay was restricting the power to enlarge time under Section 148 CPC infra to one month.

*“S. 148 Enlargement of Time: Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period \*[not exceeding thirty days in total], even though the period originally fixed or granted may have expired.”*

(Portion in brackets added w.e.f. 01.07.2002)

*Salem Advocate Bar Association v. Union of India*, AIR 2005 SC 3353(para 45) has declared this restriction also to be directory. (See also *Nashik Municipal Corporation v. M/s R.M. Bhandari* AIR 2016 SC 1090 para 15)

Fixing strict time schedule is neither unjust nor shocking to judicial conscience otherwise Section 5 Limitation Act (power to condone delay in filing appeal or application, other than Execution application) will have to be applied to suits, as well as Execution application, also. In some cases an aggrieved person or his legal representative may have a very genuine rather fool proof, reason for not filing suit within the time prescribed by the Limitation Act. A suit can very well be filed on the last day of limitation. Suppose 3 or 4 days or a week before expiry of period of limitation for a suit, the aggrieved person is seriously injured in an accident and becomes unconscious or critically ill which state continues till the expiry of limitation for suit. Even in such situation the Court has absolutely no power to entertain suit after expiry of period of limitation.

#### **Heavy cost, payable before the next date:**

If a party is trying to delay the proceeding of a suit, imposition of heavy cost for adjournment, in any form, payable before the next date failing which defaulter party shall not be permitted to participate in the proceedings of the suit will go a long way in curbing the tendency of delay.

Obviously the party which stands to benefit by delay, will adopt delaying tactics i.e. plaintiff if he has got effective ad hoc / temporary injunction order otherwise defendant. This aspect must play an important role in deciding adjournment application or such application which is likely to delay the proceedings e.g. application for amendment of pleading. Quantum of cost must also be dependent on this consideration.

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<sup>7</sup> In an article ‘what causes Judicial Delay’ by Brajesh Ranjan, a teacher of Procedural Law, on Editorial page of Times of India dated 25.8.2016 (Lucknow Edition) it has been observed about the impact of this judgment that “This case has been applied as a virtual carte blanche by lawyers to file written statements beyond 90 days as a matter of course. Thus the exceptional has become new normal.”

Often petitions are filed in the High Court seeking a direction for expeditious, time bound, disposal of suit/ proceeding pending before subordinate Civil Judge (or appeal / revision pending before subordinate District Judge / Additional District Judge). Normally time bound directions are given which are not possible to be complied with, in most of the cases. I as Allahabad High Court Judge passed following order in almost all such petitions (except when suit had been filed only few months before seeking direction; in which eventuality the petition was dismissed).

‘Petition is disposed of with the direction to the Court below to make efforts to decide the suit/ case expeditiously. Absolutely no unnecessary adjournment shall be granted to any of the parties. If any adjournment in any form is granted it shall be on heavy cost which shall not be less than Rs. 500/- per adjournment payable before the next date failing which defaulter party shall not be permitted to participate in the proceedings.’

In such orders passed after 2010 the amount of Rs. 500/- was substituted by Rs. 1000/-.

The orders proved to be quite fruitful.

If the Supreme Court is not inclined to relook into its judgments making time schedule prescribed by 1999/2002 C.P.C. Amendments directory (discussed under previous sub-heading) then the other effective check may be imposition of very heavy cost (minimum Rs. 25000/-) for taking on record the w.s. beyond 90 days, extending the time beyond 30 days under Section 148 C.P.C. etc. with the additional rider of payment of cost before the next date with the default clause, supra. The cost may be enhanced depending upon the delay and the stakes involved.

In *Shibu Chandra v. Pasupati Nath Auddya AIR 2002 SC 1252* (3 Judges Bench) dealing with striking off the defence of tenant for depositing monthly rent late, it was held that High Court wrongly condoned the delay in making deposit. However in spite of this categorical finding it was directed in para 16 as follows:-

*“16. On the facts of this case, it does appear to us that the Respondent did not have sufficient cause for not depositing the amount of rent for such a long period of time. However, as the High Court has exercised its discretion, we do not propose to interfere. However, in our opinion, on the facts of this case, the leniency which has been shown to the Respondent should be on heavy costs. Considering the cost of litigation today, in our view, the Respondent should pay in both these Appeals cost fixed at Rs. 50,000/- (i.e. Rs. 25,000/- in each Appeal). The same should be paid within a period of 6 weeks from today. If such cost is paid his Appeal shall stand dismissed with no further Order as to costs. If, however, the said sum of Rs. 50,000/- or any part thereof is not paid within the period aforesaid, then the Appeal shall stand allowed and the impugned Judgment dated 2nd June, 1998 shall stand set aside and the Order of the trial Court dated 4th September, 1997 shall stand revived.”*

Same principle of heavy cost can very well be applied to late filing of w.s. and in relation to other delaying tactics.

After reversal of my judgment by the Supreme Court in *Kailash v. Nanku*, supra, I started issuing directions ( in the writ petitions filed against orders of the courts below taking or refusing to take on record written statement after 90 days) to take on record written statement on payment of cost ranging from Rs. 15000/- to Rs. 25000/- payable within short, fixed period.

Cost for adjournment after commencement of evidence:

Relevant portion of Order 17 Rule 1 C.P.C. as amended by 1999 Amendment (w.e.f. 01.07.2002) is quoted below:

*“1. Court may grant time and adjourn hearing.- (1) The court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the Suit for reasons to be recorded in writing:*

*Provided that no such adjournment shall be granted more than three times to a party during hearing of the suit.*

*(2) Costs of adjournment—in every such case the court shall fix a day for the further hearing of the suit, and shall make such orders as to costs occasioned by the adjournment or such higher costs as the court deems fits:*

*Provided that,—*

*(a) when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary.”*

The Supreme Court in *Salem Bar Association v. Union of India AIR 2005 SC 3353* supra has also diluted the above restriction and held that the Court has got ample power to grant adjournments even after three adjournments. Here also imposition of heavy cost say minimum Rs. 2000/- payable before next date may prove to be great check. The cost shall increase with every adjournment. In suitable cases depending upon the stakes, or number of witnesses returning unexamined, cost may be much higher. This is also the mandate of above quoted Rule 1(2) and its proviso (a). Nowadays (in 2016) normally amount of Rs. 100/-, 200/- or 300/- is being awarded as cost. It is virtually no cost. The cost is received and kept by the learned counsel for the other side. Cost may be directed to be deposited by the party on whom it has been imposed, in the Bank Account of the other side.

**Changes Introduced in procedure of taking oral evidence:**

Examination – in – chief on Affidavit:

According to order 18 Rule 4(1) C.P.C. as substituted by Amendment of 2002, ‘In every case the examination – in – chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.’

On the date on which such affidavit is filed, witness has to be presented for cross examination. However as a rule the other side seeks adjournment to study the affidavit. Requirement of supply of the copy of the affidavit two or three days before the date fixed for its filing may avoid the need of adjournment.

In some informed quarters it is being mooted that this provision is proving counterproductive and by saving small time spent in recording examination – in – chief in Court, much more time is being added to the time taken in cross examination. The reason is that the affidavit containing examination – in – chief is prepared by the advocate at his leisure and is bound to be quite lengthy, three or four times more than such examination in court. This necessarily makes the cross examination correspondingly lengthier. The matter requires serious thought and analysis.

Taking evidence by commissioner:

The provision of taking evidence (cross examination and re examination) by commissioner introduced by Amendment of 2002 (we.f. 1.7.2002) in Order 18 Rule 4 C.P.C. is seldom used by Courts. Lot of time of court is consumed in taking evidence and in order to save that for hearing arguments utilization of this provision is highly desirable. Even in the most complicated, sensational and delicate four consolidated suits (Ram Janam Bhumi, Babri Masjid dispute, which was heard and decided on 30.9.2010 by a Full Bench of Lucknow Bench of Allahabad High Court) evidence was directed to be taken by Commissioner after 1.7.2002. More than half oral evidence of 86 witnesses running into more than 14,000 pages was recorded by Commissioner. Without this provision and recourse to it probably the suit would not have been decided even by now (2016). The evidence was recorded by O.S.D. who was of A.D.J. level.

Normally advocates are to be appointed as Commissioners to record evidence. However for this purpose, services of those retired judges who are agreeable for the same may also be taken. If a room or two in the Court premises is reserved for this purpose, it will be more effective. Retired judges who are appointed as Chairmen of permanent Lok Adalats may also be given this additional duty, which will be cost effective.

**Temporary Injunction/ Stay**

Temporary Injunction:

In most of the suits application for temporary injunction is filed along with the plaint. The litigants and their advocates (even judges) virtually exhaust their time and energy on temporary injunction matter, ignoring the suit. In many such cases the only purpose of the suit is getting ad interim/ temporary injunction. If ad interim injunction is granted plaintiff invariably delays the disposal of temporary injunction application, otherwise the defendant. (Same thing happens with the suit after final decision of temporary injunction application) Granting ad interim injunction only till the next date is absolutely no solution as the extension of such order till the next date is the easiest thing in the courts. About 10 such extensions are routine. (In *Ram Sagar Tiwari v. Ram Lakhan Yadav 2013 (98)ALR 578* it was noticed that ad interim injunction in a suit of 2010 had been extended at least 20 times, in *Santosh Kumar v. Addl. Civil Judge 2013 (98) ALR 599*, in a suit of 2009, more than 20 times and in *Manju v. Badri Prasad 2013 (98) ALR 658*, in a suit of 2011, 31 times.) In several cases where ad interim ex parte injunction is not granted and only notice is issued, plaintiff rushes to the High Court under Article 227 of the Constitution. Granting ad interim ex parte injunction liberally or being too strict in this regard, both are equally bad.

The best, most effective way of controlling ad interim / temporary injunction part of the suit proceedings and of checking misuse of such order is what has been evolved by the Supreme Court in *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria* AIR 2012 SC 1727 (three judges) (hereinafter referred to as Maria's case). The whole authority deserves to be prescribed as compulsory reading material for all the trial Courts. Paras 86, 87, 90, 91 and 92 are quoted below:

*“86. Grant or refusal of an injunction in a civil suit is the most important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the defendant. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness.*

*87. The safe and better course is to give short notice on injunction application and pass an appropriate order after hearing both the sides. In case of grave urgency, if it becomes imperative to grant an ex-parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the plaintiff will have no inherent interest in delaying disposal of injunction application after obtaining an ex-parte ad interim injunction. The Court, in order to avoid abuse of the process of law may also record in the injunction order that if the suit is eventually dismissed, the plaintiff undertakes to pay restitution, actual or realistic costs. While passing the order, the Court must take into consideration the pragmatic realities and pass proper order for mesne profits. The Court must make serious endeavour to ensure that even-handed justice is given to both the parties.*

*90. Experience has shown that all kinds of pleadings are introduced and even false and fabricated documents are filed in civil cases because there is an inherent profit in continuation of possession. In a large number of cases, honest litigants suffer and dishonest litigants get undue benefit by grant or refusal of an injunction because the Courts do not critically examine pleadings and documents on record. In case while granting or refusing injunction, the Court properly considers pleadings and documents and takes the pragmatic view and grants appropriate mesne profit, then the inherent interest to continue frivolous litigation by unscrupulous litigants would be reduced to a large extent.*

*91. The Court while granting injunction should broadly take into consideration the prevailing market rentals in the locality for similar premises. Based on that, the Court should fix adhoc amount which the person continuing in possession must pay and on such payment, the plaintiff may withdraw after furnishing an undertaking and also making*

it clear that should the Court pass any order for reimbursement, it will be a charge upon the property.

92. *The Court can also direct payment of a particular amount and for a differential, direct furnishing of a security by the person who wishes to continue in possession. If such amount, as may be fixed by the Court, is not paid as security, the Court may remove the person and appoint a receiver of the property or strike out the claim or defence. This is a very important exercise for balancing equities. Courts must carry out this exercise with extreme care and caution while keeping pragmatic realities in mind and make a proper order of granting mesne profit. This is the requirement of equity and justice.*”

(underlining in all the paragraphs supplied)

If ad interim/ temporary injunction is granted on deposit of a reasonable lump sum amount and/ or regular deposit (every month, three months etc.) of reasonable amount it will greatly check both delay and misuse.

It is extremely unfortunate that not even in one percent of suits condition is attached with ad interim / temporary injunction order.

If ex parte ad interim injunction is not granted and after institution of the suit the defendant changes the position of the property (or other matter) in dispute, the Court shall consider to restore status quo ante. This can very well be done as any party is also entitled to temporary mandatory injunction in certain circumstances. It will be more appropriate if while issuing notice without granting ad interim injunction order it is indicated that in case the position prevailing on the said date is disturbed by the defendant and the court while hearing temporary injunction matter finally comes to the conclusion that in case change had not been affected, plaintiff would have been entitled to temporary injunction, the defendant would be directed to restore the position through interim order itself.

In *Maria's case*, supra, the view taken by Delhi High Court in *Thomas Cook v. Hotel Imperial AIR 2007 (NOC) 169* was quoted in para 82 and approved in para 83. The Delhi High Court had held that even a person in wrongful possession cannot be evicted except through due process of law. However it was further held that decision on temporary injunction application satisfies this requirement. Part of portion of Delhi High Court's judgment, quoted in para 82 of *Maria's case*, is quoted below:

82.....“*In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e., for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event, the 'recourse to law' stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action. Thus, in the present case, the plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law.*”

The safeguard of **heavy cost** discussed under previous sub- heading can also be applied to temporary injunction proceedings. If after obtaining ex parte ad interim injunction plaintiff delays disposal of temporary injunction application, by seeking adjournment on any ground or for any purpose, very heavy cost (normally Rs. 2000/- or more depending upon the valuation of property) must be imposed which must be payable before the next date and short date say after a week must be fixed. For further adjournments, cost must gradually increase. In this regard another expedient may also be followed as was done in the aforesaid authorities of *Ram Sagar*, para 3, *Santosh Kumar*, para 2 and *Manju*, para 2 (2013 (98) ALR) all decided by me wherein it was directed as follows:

*‘It is directed that if on a single date plaintiff seeks adjournment or advocates are on strike ad interim injunction shall not be extended. This practice shall be followed in every suit’* (para 2 of *Santosh Kumar*)

Similarly if ex parte interim injunction is not granted and the defendant seeks adjournment, similar cost must be imposed upon him and after one or two adjournments court may grant ad interim injunction order. In *Ram Sagar*, supra it was observed in para 3 ‘Similarly if ad interim injunction is not granted ex parte and on the next date defendant seeks adjournment or does not appear, desirability of granting ad interim injunction shall be considered by the Court’.

Status quo order is extremely risky rather slippery. It shall be avoided as far as possible:

In Misc.Appeal (or FAFO) against grant of temporary injunction or rejection of application for the same, **file of the trial Court is summoned** invariably delaying the disposal of suit unnecessarily. In *Anil Kumar Jain v. Kamla Devi* 2013 (97) ALR 389 I directed as follows in paras 4 and 5:

*“4. Learned counsel for the petitioner states that during last 12 years no progress in the suit could be made as file of the suit had been summoned in the misc. appeal filed by the plaintiff. This is horrible state of affairs. In misc. civil appeals or civil revisions under Section 115, C.P.C. there is absolutely no occasion for summoning the record of the trial court which unnecessarily delays the proceedings of the suit even though no stay order is passed in misc. appeal/ revision directing stay of proceedings of the suits. In normal course, in misc. appeals against orders passed on temporary injunction applications proceedings of the suits are not stayed. However, due to summoning of the file of the trial court practically no progress can be made in the suit. Accordingly, it is directed that in no misc. civil appeal or civil revision under Section 115, C.P.C. file of the trial court shall be summoned. The party filing the misc. appeal or revision shall file all such documents, which are available on the file of the trial court and on which he wants to place reliance through affidavit. Similarly respondent may also file copies of all such documents which are available on the file of the trial court and on which they want to place reliance through affidavit.*

*5. Office is directed to circulate copy of this order to all the District Judges of U.P. for further circulation to all the A.D.Js. subject to approval of Hon'ble the Chief Justice/ Administrative Committee.”*

The Administrative Committee directed the judgment to be circulated. It is since being followed strictly in U.P.

Supreme Court also in *G.N. Verma v. State of Jharkhand AIR 2014 SC 3549* (paras 4 and 5) expressed concern on routine summoning of files of trial Courts in appeals, revisions etc. just for the reason that Rules required that. However in this regard it is important to note that O. 41 R. 13 C.P.C. which necessarily required sending of the file by trial Court to appellate court has been deleted w.e.f. 1.7.2002.

Another reason of delay in disposal of temporary injunction application in suit and consequently delay in disposal of suit is holding a **mini trial** at that stage and writing **very long judgments** while deciding temporary injunction application. In this regard in paras 5 and 6 of *Rajesh Kumar v. Rajendra Kumar saxena 2013 (97) ALR 597*, I held as follows:

*“5. Before parting with the case it is essential to note a disturbing feature of the case. Trial Court rejected the temporary injunction application in 15 closely typed pages discussing several authorities also. If the learned Civil Judge (Junior Division) consumed 15 pages in writing the judgment of temporary injunction application probably he would consume 40-50 pages in deciding the suit. Writing lengthy judgments particularly while deciding interim matters is the main cause of delay in disposal of the cases.*

*6. At the stage of deciding temporary injunction application sort of mini trial is not required. Such judgment shall not consume more than 2 or 3 pages. The Court is only required to look into the three classical aspects of the matter while deciding temporary injunction i.e., prima facie case, balance of convenience and irreparable loss and injury.”*

Stay:

Order staying execution of decree in appeal (or Revision against decree or final order e.g. under Section 25 Provincial Small Causes Courts Act or Revision under various Rent Control Acts) shall be conditional which will also avoid delay in disposal of appeal / revision. After the judgment of the Supreme Court in *M/s Atma Ram Properties v. M/s Motors 2005 (1) SCC 705* conditional stay orders in Appeals / Revisions directed against orders of eviction of tenants are being passed. According to the above authority condition may be of payment of current market rent. Following the said authority Allahabad High Court in *Ganga Prasad v. M/s Hanif Opticians 2005 (2) ARC 723* (decided by me) issued general directions in para 5 as follows:

*“5. Accordingly it is directed that in revisions under Section 25 Provincial Small Causes Court Act or appeals under Section 22 of U.P.Act No. 13 of 1972 District Judge or Addl. District Judge while*

*granting stay order shall impose condition of payment of reasonable amount which may be about 50% of the current rent (i.e. rent on which building in dispute may be let out at the time of grant of stay order. In this regard no detailed inquiry need be made. Mere guess work based on common sense may do). The tenants enjoying the tenanted property on highly inadequate rent tend to prolong the disposal of the appeal or revision for continuing their possession without payment of proper rent/damages for use and occupation. If the stay against eviction is granted on the condition of monthly payment of reasonable amount, this practice can sufficiently be checked.”*

### **Amendment of pleadings:**

As observed in *Revajeetu Builders and developers v. Narayanaswamy & Sons 2009 (10) SCC 84*, 80% of amendment applications under Order 6 Rule 17 C.P.C. are filed only to delay the proceedings of the suit. (Para 33, quoting from the book *Justice, Courts and delays* by Arun Mohan, Senior Advocate.) Here also obviously the party which benefits by delay will adopt the device for the same.

Just as under the new Cr.P.C. of 1973/74 emphasis shifted from death penalty to life imprisonment similarly by insertion of the proviso to order 6 rule 17 C.P.C. w.e.f. 1.7.2002 emphasis shifted from allowing the amendment to rejecting the same. It can be allowed only in exceptional cases which satisfy the test of ‘due diligence’. It is submitted with respect that somewhat contrary/liberal approach taken in some cases (e.g. *Pradeep Singhvi v. Heero Dhankani, 2004 (13) SCC 432*) requires reconsideration.

Imposition of heavy cost while allowing or rejecting (particularly rejecting) amendment applications will also serve as effective check on the use of this device as delaying tactics. In *Revajeetu, supra*, cost of Rs. 1 lac was imposed while upholding rejection of amendment application.

### **Lengthy Judgments:**

In the *Times of India*, Lucknow edition dated 30.11.2014 there was a news item with the heading *SC Judges bat for succinct judgments*. It was mentioned therein that the Supreme Court judges after nearly forty thousand judgments since 1950, many of which run into hundreds of pages had informally come together to accept a hitherto un-admitted yet serious problem-verbose verdicts often create confusion both for law and litigants. It is further reported that the Hon’ble Judges of the Supreme Court feel that adding pages to the judgment is neither desirable nor it serve any purpose and the time has come for ‘lean to the point judgment delivered in quick time’. It was further mentioned that Supreme Court was also of the view that for the advocates particularly senior advocates, time limit for arguments must be fixed.

One of the main reasons for delay in disposal is lengthy judgments (as well as lengthy arguments). Unless judges seriously consider to shorten their judgments by pruning unnecessary repetitive material, problem of pendency cannot be solved.

However lead has to come from Supreme Court.

### **Strike**

Advocates' strike is one of the major causes of delay in disposal of cases in courts. There are several judgments of the Supreme Court condemning it but with little effect. In November 2013 when I was Administrative Judge of Allahabad District Court an untoward incident related with strike took place. The President of Bar Association misbehaved with a lady judge as she was sitting in Court on a strike day. I passed a detailed administrative order on 14.11.2013 containing several directions including the following:

*“In future on a date, when advocates are on strike, neither any bail application nor any temporary injunction or stay application in a civil matter shall be entertained nor any temporary injunction or stay order expiring on the said date shall be extended under any circumstances.*

*If Bar Association sends a request that no adverse order shall be passed on a particular date then on the said date no temporary injunction or stay order shall be extended if the advocate appearing for the party in whose favour the temporary injunction order or stay order has been granted refuses to argue the matter.”*

The order proved successful beyond my imagination. After my retirement in January 2014, the subsequent Administrative Judge continued the order. For a year or so, the Allahabad District Court which was at the top of the districts of U.P. in advocates' strike remained at the bottom.

Non grant and non-extension of interim orders in suits on strike days is quite efficient check on strikes.

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# NATURE AND SCOPE OF THE POWER OF THE MAGISTRATE UNDER SECTION 156(3) OF THE CRIMINAL PROCEDURE CODE

Justice Shrikant Tripathi\*

## 1. Statutory provisions for initiating actions against Crimes:

When a cognizable offence is committed by any known or unknown person, the complainant or any other person may give the first information report, in short FIR, which may be written or oral, to the officer in charge of the police station, who shall record or cause to be recorded it in accordance with section 154(1) of the Code Criminal Procedure, 1973, hereinafter referred to as the Code, in the book kept at the police station for the purpose. After registering the FIR, the officer in charge of the police station has power under section 156 (1) of the Code to undertake the investigation on his own without any order of the Magistrate or his Superior officer.

There may be a situation where the officer in charge of the police station refuses to record the FIR, in that eventuality, the person aggrieved by such refusal may, in accordance with section 154(3) of the Code, send the FIR, in writing and by post, to the Superintendent of Police who, on being satisfied that the FIR discloses commission of a cognizable offence, shall either himself investigate the case, or direct any police officer subordinate to him to carry out the investigation, in the manner provided by the Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

In substance, the FIR is intended to set the criminal law in motion. Section 154 of the Code, as held by the Constitution Bench of the Supreme Court in *Lalita Kumari vs. State of U.P. (2014) 2 SCC 1*, is mandatory and the officer in charge of the police station is duty-bound to record the FIR and register the case, subject, of course, to certain exceptions enumerated by the Constitution Bench, which will be dealt with little later. It is also to be kept in mind that locus standi of the Complainant has no relevance in Criminal jurisprudence. Another Constitution Bench of the Supreme Court in *Sheonandan Paswan vs. State of Bihar (1987) 1 SCC 288*, opined that any person can lodge FIR or file a complaint and set the machinery of the criminal law in motion and his locus standi to do so cannot be questioned. This principle is based on the premise that an offence is committed against the society. It is not merely an individual wrong.

The Code takes care of another situation where the officer in charge of the police station as also the Superintendent of Police refuses to entertain any FIR, or after entertaining and recording the FIR omits to undertake the investigation. In that eventuality, the complainant has another option to file a complaint before the

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\* Former Judge, High Court, Allahabad.

Magistrate having jurisdiction to take cognizance of the offence. **‘Complaint’**, according to **section 2(d)** of the Code, means any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. However a police report which discloses commission of a non-cognizable offence, is deemed as a complaint and the police officer by whom such report is given is treated as the complainant. The explanation appended to section 2(d) of the Code specifically speaks so.

It is also well settled that the Complaint, like FIR, can be written or oral. When any oral complaint is made, the Magistrate shall, before proceeding further in the matter, record the oral complaint in writing, obtain signature of the Complainant on such record and then treat the record as the Complaint for the purposes of the Code.

## **2. Recourses available to the Magistrate on Complaint:**

On receiving a complaint involving commission of a cognizable offence, the Magistrate is to apply his mind to the facts stated in the complaint. After doing so, if the Magistrate finds that the allegations therein disclose a cognizable offence, he has two options. *Firstly*, the Magistrate may take cognizance of the offence under section 190(1) (a) and embarks upon the procedure embodied in Chapter XV of the Code. *Secondly*, he may invoke the jurisdiction under section 156(3) by directing the officer-in-charge of the police station to carry out the investigation. But it is to be kept in mind that the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). However, if he once takes such cognizance, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3). This concept of law has been propounded consistently by the Supreme Court in its various decisions. Some of the decisions, which are usually relied upon as judicial precedents, are referred to as follows:

- 1 R.R.Chari vs. State of U.P. AIR 1951 S C 207;
- 2 Gopal Das Sindhi and others vs. State of Assam and another A.I.R. 1961 S C 986;
- 3 Devarapalli Lakshminarayana Reddy and others vs. V. Narayana Reddy and others (1976) 3 SCC 252 ;
- 4 Tula Ram and others vs. Kishore Singh AIR 1977 S C 2401;  
Madhubala vs. Suresh Kumar and others 1997 JIC 979;
- 5 Suresh Chand Jain vs State of Madhya Pradesh J.T. 2001 (2) S.C. 81;
- 6 CREF Finance Ltd. vs. Shree Shanthi Homes (P) Ltd. (2005) 7 SCC 467;
- 7 Mohd. Yusuf vs. Smt. Afaq Jahan and another 2006 (54) ACC 530;
- 8 Dilawar Singh vs. State of Delhi (2007) 12 SCC 496;
- 9 Sakiri Vasu vs. State of U.P. (2008) 2 SCC 409;
- 10 Anil Kumar vs. M.K. Aiyappa (2013) 10 SCC 705;
- 11 Mrs. Priyanka Srivastava and another vs. State of U.P. and Others (2015) 6 SCC 287;
- 12 Ramdev Food Products Private Limited vs. State of Gujarat, (2015) 6 SCC 439;
- 13 Hamant Yashwant Dhage vs. State Of Maharashtra 2016(4) ACC 494

In *Madhubala vs. Suresh Kumar and others 1997 JIC 979*, the Supreme Court, in addition to propounding the aforesaid principles, proceeded further to hold that the proper course for the Magistrate would be to pass the order "register a case treating the complaint as first information report and investigate into the same".

In *Suresh Chand Jain vs State of Madhya Pradesh J.T. 2001 (2) S.C. 81*, the Supreme Court, while reiterating the twin powers of the Magistrate viz, to take cognizance of the offence on the complaint, or to direct the police under section 156(3) of the Code to investigate the complaint, proceeded a head to evolve the concept of registration of FIR by the Police on receiving the order of the Magistrate under section 156(3) of the Code and settled the legal position in this behalf as follows:

***“It is also open to the Magistrate to direct the police to register an F.I.R. and even where a Magistrate does not do so in explicit words but directs for investigation under Section 156(3) of the Code, the police should register an F.I.R. because Section 156 falls within chapter XII of the Code which deals with powers of the police officers to investigate cognizable offences.”***

The verdict of registration of FIR propounded in *Suresh Chandra Jain (supra)* has been followed with approval in *Dilawar Singh vs. State of Delhi (2007) 12 SCC 496* and so many other decisions.

In *Gopal Das Sindhi and others vs. State of Assam and another A.I.R. 1961 S C 986*, the three Judge Bench of the Supreme Court, while following the dictum laid down in *R.R.Chari vs. State of U.P. (supra)* and upholding the availability of the aforesaid two options to the Magistrate on receiving a complaint involving commission of a cognizable offence, ruled that the time of the Magistrate should not be wasted when primarily the duty to investigate cases involving cognizable offences is with the police.

In *Anil Kumar vs. M.K. Aiyappa (2013) 10 SCC 705*, the Supreme Court ruled that the application of mind by the Magistrate should be reflected in the order and the mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient and further ruled that no direction can be issued under section 156(3) against a public servant without a valid sanction order. The following passage of the decision being relevant, is reproduced:

***“The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed (2008) 5 SCC 668 examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The***

*mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.”*

**Note:** Normal rule is that a sanction is required as a condition precedent at the stage of taking cognizance of an offence and not at the stage of ordering registration of a case for investigation under section 156(3). But the Supreme Court extended the scope of sanction at the stage of order under section 156(3) against a public servant without there being any express provision in this behalf in the Code. One may contend that the direction in this respect is *per incurium*. But the Magistrates should not indulge in such controversy and it is appropriate for them to obey the dictum.

In *Ramdev Food Products Private Limited vs. State of Gujarat, (2015) 6 SCC 439*, while explaining the power exercisable by the Magistrate under Section 156(3) of the Code, a three-Judge Bench of the Apex Court ruled that the direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine “existence of sufficient ground to proceed.

In *Mrs. Priyanka Srivastava and another vs. State of U.P. and Others (2015) 6 SCC 287*, the Supreme Court again insisted upon the application of mind by the Magistrates while exercising jurisdiction under Section 156(3) of the Code.

### **3. Power of the Magistrate to treat the application under 156(3) as the complaint:**

The Full Bench in *Ram Babu Gupta vs State of U.P. 2001 (43) A.C.C. 50*, had examined certain legal issues referred for its opinion and one of the questions referred to the Full Bench was with regard to the power of the Magistrate to treat the application moved under section 156(3) of the Code as the Complaint. The Full Bench held that where in an application, the complainant states facts which constitute cognizable offence but makes a defective prayer, such an application will not cease to be a complaint nor can the Magistrate refuse to treat it as a complaint even though there be no prayer seeking trial of the known or unknown accused. The Magistrate has to deal with such facts as constitute cognizable offence and for all practical purposes even such an application would be a complaint. The relevant observations of the Full Bench are reproduced as follows:

*"18 Coming to the second question noted above it is to be at once stated that a provision empowering a court to act in a particular manner and a provision creating a right for an aggrieved person to approach a Court or authority, must be understood distinctively and should not be mixed up. While sections 154,155, sub-sections (1) and (2) of Section 156, Cr. P.C., confer right on an aggrieved person to reach the police. Section 156 (3) empowers a Magistrate to act in a particular manner in a given situation. Therefore, it is not possible to hold that where a bare application is moved before court only praying for exercise of powers under section 156 (3) Cr. P.C., it will remain an application only and would not be in the nature of a complaint. It has been noted above that the Magistrate has to always apply his mind on the allegations in the complaint where he may use his powers under section 156(3) Cr. P.C. In this connection it may be immediately added that where in an application, a complainant states facts which constitute cognizable offence but makes a defective prayer, such an application will not cease to be a complaint nor can the Magistrate refuse to treat it as a complaint even though there be no prayer seeking trial of the known or unknown accused. The Magistrate has to deal with such facts as constitute cognizable offence and for all practical purposes even such an application would be a complaint. This court can do no better than refer to the following observations in Suresh Chand Jain(supra):*

*"The position is thus clear. Any Judicial Magistrate, before taking cognizance of the offence, can order investigation under section 156(3) of the Code could take further steps contemplated in Chapter XII of the Code only thereafter"*

19. In view of the aforesaid discussion, the observations in the two paragraph noted above in *Suraj Mal (supra)*, cannot be said to be laying down correct law, therefore, those observations shall remain confined to the decision in *Suraj Mal*. The second point formulated above stands also answered thus. "

In *Joshef Madhuri and another vs. Sachchidanand Hari Sakshi and another 2001(3) Crimes 354* the Supreme Court has upheld the power of the Magistrate to treat an application under section 156(3) of the Code as a complaint. The Supreme Court observed:

*" ..... The High Court held that the application under section 156(3) of the Criminal Procedure Code moved by respondent no.1 before the Judicial Magistrate, Dehradun for directing appellants to register the case against the appellants cannot be treated as a complaint. The impugned order, on the face of it, is totally erroneous and cannot be sustained in law as the said order ignores section 190 and section 200 of the Criminal Procedure Code. .... "*

Despite the aforesaid Full Bench decision, a single Judge Bench formed the view that no application under section 156 (3) could be treated as the complaint. Some of the single Judges followed the Full Bench. In order to resolve the controversy the matter was again referred to a larger Bench (D.B.). On such reference, the Division Bench, in *Sukhwasi vs. State of U.P. 2008 Cr.L.J. 472*, followed the Full Bench decision in *Ram Babu Gupta's Case(supra)* and held that the application moved under section 156(3) of the Code can be treated as the Complaint.

The aforesaid view finds support even from the Supreme Court decision in *Mohd. Yusuf vs. Smt. Afaq Jahan and another 2006 (54) ACC 530*. In that case, the Supreme Court took a note of the expression "complaint" as defined in section 2(d) of the Code and clarified the legal position that the nomenclature of a petition is inconsequential. There is no particular format of a complaint. A petition addressed to the Magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprits be suitably dealt with is a complaint.

It can, therefore, be safely concluded that an application, which discloses commission of a cognizable offence and moved under section 156(3) of the Code for the police investigation, does not possess any other character than the 'complaint' as defined in section 2(d) of the Code, especially when section 2(d) of the Code clearly provides that the complaint is given to the Magistrate for his taking action under the Code, which action cannot be so construed as to exclude the action under section 156 (3) of the Code.

On the basis of foregoing discussions, it is crystal clear that the Magistrates do possess powers to treat an application moved under section 156(3) of the Code as a complaint for proceeding under Chapter XV of the Code.

#### **4. No order for the investigation to be carried out by CBI, Superior Police Officer or other Special Investigating Agency can be passed under section 156(3).**

In Central Bureau of Investigation through *S.P. Jaipur Vs. State of Rajasthan and another (2001) 3 SCC 333* the Supreme Court propounded the following principles:

- When a magistrate orders investigation under [Section 156\(3\)](#), he can only direct an officer in charge of a police station to conduct such investigation and not a superior police officer, though such officer can exercise such powers by virtue of Section 36 of the Code. Nonetheless when such an order is passed, any police officer, superior in rank of such officer, can as well exercise the power to conduct investigation, and all such investigations would then be deemed to be the investigation conducted by the officer in charge of a police station. Section 36 of the Code is not meant to substitute the Magisterial power envisaged in Section 156(3) of

the Code, though it could supplement the powers of an officer in charge of a police station.

- Magisterial power cannot be stretched under the said provision beyond directing the officer in charge of a police station to conduct the investigation. No such direction can be given to the CBI.

The above view has been reiterated in *CBI vs. State of Gujarat (2007) 6 SCC 156*.

In *CBI and another vs. Rajesh Gandhi and another 1997 Cr.L.J. 63*, in para 8, the Supreme Court ruled that no one can insist that an offence be investigated by a particular agency. This view was followed in *Sakiri Vasu vs. State of U.P. (2008) 2 SCC 409* wherein the Apex Court observed that an aggrieved person can only claim that the offence he alleges be investigated properly, but he has no right to claim that it be investigated by any particular agency of his choice.

#### **5. Power to Monitor the Investigation:**

In *Sakiri Vasu vs. State of U.P. (Supra)* the Apex Court proceeded further to hold that “the power under section 156(3) is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in [Section 156\(3\)](#) Cr.P.C., we are of the opinion that they are implied in the above provision.

Relying on *Sakiri Basu (supra)*, the Allahabad High Court, in *Dr. Kuldeep Kaushik vs. State Of U.P. and another* (APPLICATION U/S 482 No. 22243 of 2016) held:

***“It can be inferred that there is no express power to the magistrate regarding the monitoring of the investigation but under [section 156](#) of the Cr.P.C., that implied power is there and magistrate is having whole sole authority to monitor the investigation and in case investigation is not going on proper or in fair manner in that case, magistrate is even having authority to interfere in the investigation.”***

In my view, monitoring of investigation by the Magistrates appears to be quite essential in the interest of a fair and impartial investigation which is carried out in pursuance of an order under section 156(3) of the Code. But this power does not extend to empower the Magistrate to,-

- (a) undertake the investigation himself ;
- (b) direct the investigating agency to hold the investigation in a particular manner;
- (c) file a particular type of police report after the investigation;
- (d) direct any special investigating agency to carry out the investigation.

#### **6. Heavy duty lies on Magistrates to Check false and frivolous complaints and abuse of section 156(3) of the Code:**

*In Lalita Kumari (Supra), the Constitution Bench evolved the concept of preliminary inquiry in certain matters before registration of FIR with a view to curbing false implications in criminal cases, while holding that Section 154 of the Code postulates the mandatory registration of FIRs. The Constitution Bench proceeded to clarify that there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. After so stating, the Constitution Bench elaborated certain circumstances in Para 120.6, where a preliminary enquiry is necessary before registration of FIRs. The Bench proceeded a head to explain as to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The categories of cases in which preliminary inquiry may be made are as under:*

- (a) Matrimonial disputes/family disputes;
- (b) Commercial offences;
- (c) Medical negligence cases;
- (d) Corruption cases;
- (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The Constitution Bench further ruled that the aforesaid illustrations are not exhaustive of all conditions which may warrant preliminary inquiry.

Relying on *Lalita Kumari*, a two Judge Bench of the Supreme Court in, *Mrs. Priyanka Srivastava and another vs. State of U.P. and Others (supra)*, while expressing serious concern over abuse of the provisions of section 156(3) of the Code, observed that we are compelled to say that such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. The Supreme Court proceeded further to observe that we are compelled to say so, as a number of cases pertaining to fiscal sphere, matrimonial dispute ,family disputes, commercial offences, medical negligence, corruption and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in *Lalita Kumari (supra)* are being filed. After making such observations, the Supreme Court has laid down certain guide lines for Magistrates, which are summarized as follows:

- a. The Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind ;
- b. The Magistrate has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order;
- c. Issuing a direction stating “as per the application” to lodge an FIR creates a very unhealthy situation in the society and also reflects the erroneous approach of the Magistrate. The direction also encourages the unscrupulous and unprincipled litigants to take adventurous steps with

courts to bring his opponent (the financial institutions in the said case) on their knees;

- d. There has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3) of the Code. Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed;
- e. The power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same;
- f. Applications under Section 156(3) of the Code are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible;
- g. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed;
- h. The direction that an application under Section 156(3) be supported by an affidavit is being issued so that the person making the application should be conscious and should also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law;
- i. The necessity of filing affidavit will deter the Complainant to casually invoke the authority of the Magistrate under Section 156(3);
- j. That apart, the veracity of the complaint can also be verified by the Magistrate, regard being had to the nature of allegations of the case;
- k. The Magistrate would also be aware of the delay in lodging of the FIR.

After propounding the aforesaid guidelines, the Supreme Court directed that a copy of the order be sent to the learned Chief Justices of all the High Courts by the Registry of the Supreme Court so that the High Courts would circulate the same amongst the learned Sessions Judges who, in turn, shall circulate it among the Magistrates so that they can remain more vigilant and diligent while exercising the power under Section 156(3) of the Code.

Besides, I would suggest the following other legal and reasonable steps for exercising effective checks on the abuse of section 156 (3).

(1) While considering an application under section 156(3) of the Code the Magistrates should also keep in mind the guidelines of the Supreme Court in *State of Haryana vs. Bhajan Lal AIR 1992 SC 604*, wherein the Supreme Court illustrated certain categories of cases for quashment of FIRs so as to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Some of such illustrations viz. illustrations (a), (e), (f) and (g), which can appropriately

be followed by the Magistrates while passing an order under section 156 (3) of the Code on the premise that when an FIR cannot be sustained in law due to any of the illustrations given in ***Bhajan Lal's*** case, how an application containing the same facts can be maintained under section 156 (3) of the Code, are being reproduced as follows:

(a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

(e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(f) where there is an express legal bar engrafted in any of the provisions [of the Code](#) or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in [the Code](#) or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

(2) If it appears to the Magistrate that the application under section 156(3) of the Code is false and frivolous based on concocted facts or the allegations made therein are patently absurd and inherently improbable and has been moved with a view to abuse the process of law for harassing the accused, he may invoke any of the aforesaid guidelines of ***Bhajan Lal's*** case and dismiss the application summarily. But when looking to the facts and circumstance of a case, such summary dismissal is considered as inappropriate without any inquiry despite the fact that the application or the complaint is apparently bogus or frivolous, it would be just and proper for the Magistrate to treat the application as a Complaint under Section 200 of the Code and proceed therewith under Chapter XV of the Code instead of directing the police to hold the investigation. The concept of Preliminary inquiry introduced in ***Lalita Kumari's*** case (supra) cannot be applied at the stage of passing orders under section Section 156 (3) in view of the fact that no such inquiry is contemplated under the Code. If at all any such inquiry is considered necessary the proper course would be to treat the application as the complaint as aforesaid.

(3) If in any case the Magistrate considers it proper to direct for the police investigation, in that eventuality, the Complainant must be required to file an affidavit and make compliance of other mandates of the Supreme Court in Priyanka Srivastava's case (supra).

Before parting with the matter, I would like to add that a very heavy responsibility lies on the soldiers of the Magistrates, while exercising jurisdiction under section 156(3) of the Code, to ensure that no one should use the process of the Court as a tool to harass any person with a view to satisfy his personal grudge. At any cost, Magistrates must not only be fair and just in discharging their duties

but also be temperamentally pragmatic and judicious in their legal approaches so that the rule of law may be sustained and the valuable rights of personal liberty of citizens may not be infringed.

## EFFORTS TO PROTECT AND IMPROVE ENVIRONMENT BY PARLIAMENT AND JUDICIARY OF THE COUNTRY

Justice V.C.Gupta\*

Environmental pollution now constitutes one of the biggest hazards; it is the biggest hazard not only to human existence but also to the existence of all the gifts that nature has so kindly bestowed on mankind. Heavy industrialization and ever-increasing urbanization have resulted in the problem assuming staggering proportions.

The 'First International Conference on Human Environment' held at Stockholm was addressed by the then Prime Minister of India in 1972. She was the first premier to address the Conference. The Parliament resolved the spirit of the Conference by introducing two vital Articles in Constitution of India by the Constitution (Forty-second Amendment) Act, 1976. These two Articles of Constitution of India are 48-A and 51-A (g) and are extracted herein below:-

**“ARTICLE 48A. Protection and improvement of environment and safeguarding of forests and wild life.--** *The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the Country”*

**“ARTICLE 51A. Fundamental Duties.--** *It shall be the duty of every citizen of India-*

- (a) -----
- (b) -----
- (c) -----
- (d) -----
- (e) -----
- (f) -----

*(g) to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to compassion for living creatures. One casts duty on State, the other on ourselves, the citizens of this country.*

India has been a signatory to almost all the international declarations, most of conventions and environmental protocols. India also signed Convention on Biological Diversity and Convention on Climate Change. As a result of participation in these international Conferences and Conventions lot of laws and Rules have been introduced and came into force to implement the intention behind these international events. Few of them are as under:-

- The Water (Prevention and Control of Pollution) Act, 1974
- The Biological Diversity Act, 2002
- The Air (Prevention and Control of Pollution) Act, 1981
- The Forest (Conservation) Act, 1980

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- The Environment (protection) Rules, 1986
- The Bio-medical (Management and Handling) Rules, 1998
- The Ozone Depleting Substances (Regulation and Control) Rules, 2000
- The Batteries (management and Handling) Rules, 2001
- The Hazardous Waste (Management, Handling and Transboundary Movements) Rules, 2008

In *Virendra Gaur Vs. State of Haryana*, (1995) Supreme Court Cases 577, *State of Himanchal Pradesh Vs. Ganesh Wood Products*, (1995) 2 Supreme Court Cases 363, *M.C.Mehta Vs. Union Of India*, (1997) 2 Supreme Court Cases 653 [known as *Taj Tripezium Case*], *Narmada Bacho Andolan Vs. Union of India*, (2002) 10 Supreme Court Cases 664, *Intellectual Forum Vs. State of A.P.*, All India Reporter 2006 Supreme Court 1350 and few others, the Apex Court of this country ruled and explained '**Principle of Sustainable development**' by **striking a balance in between economic developments and environment protection**.

Hon'ble Justice A. R. Lakshmanan in **Intellectual Forum Case** held as under:-

*“This Court has often faced situations where the needs of environmental protection have been pitched against the demands of economic development. In response to this difficulty, policy makers and judicial bodies across the world have produced the concept of “sustainable development”. This concept as defined in the 1987 report of the **World Commission on Environment and Development (Burndtland Report)** it as “Development that meets the needs of the present without compromising the ability of the future generation to meet their own needs. Returning to the Stockholm Convention, a support of such a notion can be founded in paragraph 13.”*

It was further observed that subsequently to the Rio declaration on Environment and Development, passed during the Earth Summit in 1992, adopted the notion of sustainable development. In this summit India was also one of the parties. The Court further held that *“what this court should follow is a principle of sustainable development and finds a balance between the developmental needs which the respondents assert; and the environment degradation”*.

In *Subhash Kumar Vs. State of Bihar*, (1991) 1 Supreme Court Cases 598, the Apex Court include right to good health and pollution free environment within the ambit of Article 21 of Constitution of India and held that this Article protects the right to life as a fundamental right enjoyment of life and its attainment including their **right to life with human dignity**. The protection and preservation of environment, ecological balance free from pollution of air and water, sanitation, etc without which the life cannot be enjoyed.

The Apex Court banned and ordered to demolish the constructions, industries causing pollution to water and air. The cases affecting environment in State of Uttar Pradesh are also of great significance. The

reference of some of them may be looked into.

In this Historic City Agra, to protect the Historic Monument- **TAJ MAHAL**, in **Taj Trapezium Case** the Supreme Court directed to either close the industries or shift outside the Taj Trapezium area or to shift to gas units.

In **M.C.Mehta Vs. Union of India (1998) 1 Supreme Court Cases 471(Known as Ganga Pollution Case)**, the Supreme Court directed to close all ternaries operating without treatment plants and discharging their untreated effluent in river Ganga in Kanpur and nearby places.

In **Rural Litigation and Entitlement Kendra Vs. State of U.P., (1985) 3 Supreme Court Cases 431** the Apex Court held that development cannot be permitted at the cost of environment. Reiterating the principle of sustainable development the Court expressed concern over unregulated exploitation of natural resources. The Court not only prohibited but also regulated the quarrying of lime mines though the same is required in several purifying and manufacturing units.

In T.N.Godaverman's case (**T.N.Godaverman Thirumulkpad Vs. Union Of India, All India Reporter[A.I.R] 1997 Supreme Court 1233**) the Supreme Court defined 'Forest' in absence of any definition of forest in statute book relating to forest and restrained the non-forest activities in forest area unless permission of Central Government is taken. The directions were issued to State Governments to ensure total cessation of any such unapproved activity. The Apex Court from time to time issued directions to regulate the use of forest produce.

The time has come when we the citizen of this country along with the people around the globe should come together and work together to protect and improve the natural environment and natural resources. We all shall also require peaceful and meaningful movement to stop unregulated exploitation of our natural resources and to preserve for next generation.

Unless immediate and urgent steps are taken to put a stop to the environmental pollution, a very bleak and terrible future awaits the humanity.

## BASIC PRINCIPLES OF JUDICIAL ETHICS

Santosh Rai\*

### Meaning and Concepts:-

Ethics: ‘The basic principles of right action’. “Ethics of a Profession” means the general body of rules, written or unwritten relative to the conduct of the members of the profession intended to guide them in maintaining certain basic standards of behaviour. Justice in the courtroom cannot be attained solely by providing standards in a code of judicial conduct. Achieving justice depends significantly upon not only the discretion and abilities of each judge, but upon what that judge does to assure that *every* proceeding is fairly heard and decided and to assure that litigants and the public have confidence in the impartiality and independence of the judiciary.

Judicial ethics is an expression which defies definition. In the literature, wherever there is a reference to judicial ethics, mostly it is not defined but attempted to be conceptualized. According to Mr. Justice Thomas of the Supreme Court of Queensland, there are two key issues that must be addressed: (i) the identification of standard to which members of the judiciary must be held; and (ii) a mechanism, formal or informal, to ensure that these standards are adhered to. A reference to various dictionaries would enable framing of a definition, if it must be framed. Simply put, it can be said that judicial ethics are the basic principles of right action of the judges. It consists of or relates to moral action, conduct, motive or character of judges; what is right or befitting for them. It can also be said that judicial ethics consist of such values as belong to the realm of judiciary without regard to the time or place and are referable to justice dispensation.

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

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every action and their every word-spoken or written- must show and reflect correctly that they hold the office as a public trust and they are determined to strive continuously to enhance and the people's confidence in the judicial system.

Alexander Hamilton once said – “The Judiciary.... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor Will but merely judgment....”<sup>1</sup>. The greatest strength of the judiciary is the faith of the people in it. Faith, confidence and acceptability cannot be commanded; they have to be earned. And that can be done only by developing the inner strength of morality and ethics.

### **Independence and Impartiality:-**

‘Independence’ and ‘impartiality’ are most crucial concepts. The two concepts are separate and distinct. ‘Impartiality’ refers to a state of mind and attitude of the court or tribunal in relation to the issues and the parties in a particular case, while ‘independence’ refers not only to the state of mind or attitude, but also to a status or relationship to others particularly to the executive branch of Government - that rests on objective conditions or guarantees.<sup>2</sup>

According to Chief Justice Lamer: "The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means to an end. If judges could be perceived as "impartial" without judicial independence", the requirement of independence would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone a necessary prerequisite for judicial impartiality."

The concept of judicial independence has been described in golden letters in one of the judgments of the Supreme Court India. To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy the rule of law and the working of the Constitution itself. The Judges of higher echelons, therefore, should not be mere men of clay with all the frailties and foibles, human failings and weak character which may be found in those in other walks of life. They should be men of fighting faith with tough fibre not susceptible to any pressure, economic, political or of any sort. The actual as well as the apparent independence of judiciary would be transparent only when the office- holders endow those qualities which would operate as impregnable fortress against surreptitious attempts to undermine the independence of the judiciary. In short, the behaviour of the Judge is the bastion for the people to reap the fruits of the democracy, liberty and justice and the antithesis rocks the bottom of the rule of law.”<sup>3</sup> Unless the judges function without fear and favour, the question of their being impartial or independent does not arise. "Judges owe their appointment to the Constitution and hold a position of privilege under it.

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<sup>1</sup> E.C. Ferhart, Quote it, p. 300

<sup>2</sup> University of New Brunswick Law Journal, Vol. 45, 1999 P. 81

<sup>3</sup> C. Ravichandran V. Justice A.M. Bhattacharjee & ors (1995) 5 SCC 457

They are required to 'uphold the Constitution and the laws', 'without fear' that is without fear of the executive; and 'without favour' that is without expecting a favour from the executive. There is thus a fundamental distinction between the master and servant relationship between the government and the Judges of High Courts and the Supreme Court." <sup>4</sup>

Independence and impartiality and objectivity would be tall claims hollow from within, unless the judges are honest - honest to their Office, honest to the society and honest to themselves. "... the society's demand for honesty in a judge is exacting and absolute. The standards of judicial behaviour, both on and off the Bench, are normally extremely high. For a judge, to deviate from such standards of honesty and impartiality is to betray the trust reposed in him. No excuse or no legal relativity can condone such betrayal. From the standpoint of justice, the size of the bribe or scope of corruption cannot be the scale for measuring a Judge's dishonour. A single dishonest Judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system. A judicial scandal has always been regarded as far more deplorable than a scandal involving either the executive or a member of the legislature. The slightest hint of irregularity or impropriety in the court is a cause for great anxiety and alarm. 'A legislator or an administrator may be found guilty of corruption without apparently endangering the foundation of the State. But a Judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof.'" <sup>5</sup>

To perform the duties of judicial office without fear or favour, affection or ill-will is the same thing as performing the duties with independence, impartiality and objectivity. In order to achieve this a certain degree of aloofness is required to be maintained by the judges. According to Justice P.B. Gajendragadkar - Judges ordinarily must observe certain rules of decorum in their social behaviour. A little isolation and aloofness are the price which one has to pay for being a judge, because a judge can never know which case will come before him and who may be concerned in it. No hard and fast rule can be laid down in this matter, but some discretion must be exercised." The concept is best demonstrated in a real life anecdote which I would like to reproduce in the words of Justice Gajendragadkar himself. He records-

"Another feature which I did not very much appreciate was that judges used to accept invitations for dinners from lawyers far too frequently. I consistently refused to join such dinners. When S.R. Das was due to retire, there were a number of dinners and S.R. Das found that I was not accepting anyone of these invitations. He came to me and said: "Brother, accept at least one so that the Chief may not misunderstand you." So I did accept one and, when we met to dine in a hotel, I was amazed to see that we were not dining in an exclusive room but in the general hotel itself, which was otherwise crowded by other diners and it was a lawyer who was entertaining us as a host to the large number of visitors present in the hotel. With my Bombay background, I did not relish this prospect at all; and

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<sup>4</sup> K. Veeraswami V. Union of India & ors (1991) 3 SCC 655

<sup>5</sup> (1991) 3 SCC 655

not feeling happy about such dinners I conveyed my views to S.R. Das. With his characteristic tact, he said, "Yes, I see your point."

However, it is interesting to note that R.A. Jahagirdar (who has contributed a beautiful preface to the autobiography and, in fact, he is the one who was successful in persuading Justice Gajendragadkar to write his memoirs) has put an asterisk on the words 'Bombay background' and inserted a footnote which reads-"The Bombay background has considerably changed. Cases of judges being entertained in luxury hotels are not infrequent and have been discussed in the Press".

**Justice Gajendragadkar** goes on to record-

"The undesirable and perhaps intended motivation for such invitation for dinners became patent in another case. That was a dinner arranged ostensibly by a lawyer who was a benamidar of the proprietor of a hotel chain. So far as I know, I and K.C. Das Gupta did not attend. Most of others did. The dinner was held on a Saturday at a hotel. On Monday next, before the Bench over which B.P. Sinha presided and I and K.C. Das Gupta were his colleagues, we found that there was a matter pending admission between the management of the hotel chain and its workmen. I turned to Sinha and said: "Sinha, how can we take this case? The whole lot of supervisors and workmen in the hotel is sitting in front and they know that we have been fed in the hotel ostensibly by the lawyer but in truth at the cost of the hotel, because the very lawyer who invited the judges to the dinner is arguing in the hotel's appeal." Sinha, the great gentleman that he was, immediately saw the point and said: "This case would go before another Bench."<sup>6</sup>

A sad incident is quoted by Justice V.R. Krishna Iyer while describing how he refused to budge an inch though tremendous pressure was sought to be built upon him, by none else than the then Law Minister Late Shri. Gokhale who himself has had a brief stint as a judge in Bombay, to pass an absolute order of stay on the judgment of Allahabad High Court in the case of **Indira Gandhi vs. Raj Narain**. The narrated incident has a lesson to learn. I may quote-

. "By way of a distressing deviation, I may mention an anecdote of a few years ago. A vacation judge was telephoned by an advocate from a five star hotel in Delhi. He mentioned that he was the son of the then Chief Justice and wished to call on the vacation judge. Naturally, since the caller was an advocate, and on top of it, the son of the Chief Justice, the vacation judge allowed him to call on him. The 'gentleman' turned up with another person and unblushingly told the vacation judge that his companion had a case that day on the list of the vacation judge. He wanted a 'small' favour of an 'Interim stay'. The judge was stunned and politely told the two men to leave the house. Later, when the Chief justice came back to Delhi after the vacation, the victim judge reported to him about the visit of his son with a client and his 'prayer' for a stay in a pending case made at the home of the Judge. The Chief Justice was not disturbed but dismissed the matter as of little consequence. 'After all, he only wanted an interim stay', said the Chief justice,

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<sup>6</sup> Ibid PP. 137- 138

'and not a final decision'. This incident reveals the grave dangers of personal visits to judges' residences under innocent pretexts. This is the way functional felony creeps into the judiciary. A swallow does not make a summer may be, but deviances once condoned become inundations resulting in credibility collapse of the institution."<sup>7</sup>

He says - "Judgeship has diamond-hard parameters".

A complete seclusion from society might result in judges becoming too removed from society and the realities of social life. Common knowledge of events and robust commonsense need knowledge of human behaviour but for which the judge may be incapacitated from doing complete justice or exercising discretion in the given facts of a case before him. An isolated judge runs the risk of viewing facts in a vacuum which in its turn may lead to an unjust decision.

To strike an equitable balance between the need for maintaining certain degree of aloofness and the necessity for moving in society to understand it so as to be a practical judge, he shall have to conscientiously keep a vigil of his own movements

and decide thoughtfully where to go and where not to go. Experience and caution would be the best guide of a judge in this regard. He ought to remember that what he thinks of himself is not so material as how people would perceive and interpret his movements and presence at a given place.

#### **Four Qualities in a Judge:-**

A judge has to be possessed of excellence not only from within but he should also visibly display the functional excellence which is necessary to fulfil the constitutional promise of justice by the judiciary as a whole. Four qualities are needed in a judge which are symptomatic of functional excellence. They are: (i) Punctuality (ii) Probity (iii) Promptness; and (iv) Patience.

**Justice Hidayatullah** has placed observance by judges of the punctuality of time on a very high pedestal. According to him a judge who does not observe punctuality of time does not believe in rule of law.

Probity is uprightness; moral integrity; honesty.

According to **Justice V.R. Krishna Iyer** the judges who do not pronounce judgment in time commit turpitude. He notes with a sense of sorrow-

"It has become these days, for the highest to the lowest courts' judges, after the arguments are closed, take months and years to pronounce judgments even in interlocutory matters - a sin which cannot be forgiven, a practice which must be forbidden, a wrong which calls for censure or worse."<sup>8</sup>

**Lord Denning** puts it mildly by way of tendering good advice for a new judge. He says that when judgment was clear and obvious it was for the benefit of the parties and the judge himself that judgment should be delivered forthwith and

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<sup>7</sup> V.R. Krishna Iyer, A Living Legend, P. 130

<sup>8</sup> Ibid P. 138

without more *ado*. Though, the art is difficult and requires great skills but practice can enable perfection." However, not all judgments can be delivered *ex tempore*; there are cases in which doubts are to be cleared, law has to be settled and conflicts are to be resolved either by performing the difficult task of reconciling or the unpleasant task of overruling. Such judgments need calm and cool thinking and deep deliberations. Such judgments must be reserved but not for an unreasonable length of time.

### **Conduct of Judge in private:-**

When a judge sits on trial, he himself is on trial. The trust and confidence of 'we the people' in judiciary stands on the bedrock of its ability to dispense fearless and impartial justice. Any action which may shake that foundation is just not permitted. Once having assumed the judicial office, the judge is a judge for 24 hours. It is a mistaken assumption for any holder of judicial office to say that I am a judge from 10 to 5 and from 5 to 10 it is my private life. A judge is constantly under public gaze. "Judicial office is essentially a public trust. Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself. It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than that expected of a layman and also higher than that expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society."

### **Patience and Tolerance:-**

The greatest quality of a Judge is to have patience which is sister virtue of calmness. Calmness is as essential as fearlessness and honesty to the exercise of good judgment in times of aroused feelings and excited passion.

Patience implies the quietness or self-possession of one's own spirit under sufferance and provocation. Since it has a tranquillizing effect, patience is the best remedy for every affliction. The Bible says that if patience or silence be good for the wise, how much the better for others - unwise or not so wise. Sometimes we turn our anger upon the person responsible for hurting us; we are also likely to blame someone for any kind of mishap. By learning to be patient, one can cultivate the art of reigning in bad temper and hasty decision-making. Patience

yields many good things. It is also a necessary ingredient of genius. Patience can solve problems, avert wars and disasters, and lead us to the path of truth.

The power of patience leads us to self-inspection, to the admission of errors and the capacity for forgiveness. A learned man tells us that misfortune can be turned into fortune through wisdom. The acquisition of wisdom needs five steps. The first is patience, the second is listening, the third is understanding, the fourth is pondering and the fifth is practice - all qualities needed in a judge. To be patient one has to be humble. To cultivate patience, anger management plays a crucial role. "He who is slow to anger is better than the mighty and he that rules his spirit than he who takes a city." The world exists only because of self-restraint exercised by the mighty. Power coupled with impatience can be very dangerous. Leaders and Judges who are impulsive are greatly feared and are considered impractical. Anger begets violence and cannot be easily repressed. At times anger is provoked by misunderstanding and may actually have no basis in reason. Anger can be subverted with forgiveness.

One of the ways to be patient is through tolerance. Tolerance recognizes individuality and diversity; it removes divisiveness and diffuses tension created by ignorance. Tolerance is an inner strength, which enables the individual to face and overcome misunderstandings and difficulties. A tolerant person is like a tree with an abundance of fruits; even when pelted with sticks and stones, the tree gives its fruit in return. Without tolerance, patience is not possible. Tolerance is integral and essential to the realization of patience.

## **Conclusion:-**

The professional ethical principles that define both the general direction of justice and the actions of persons involved in its administration include *justice, impartiality, independence*. They have an important educational and regulatory value, as well as contribute to the formation of a professional worldview of a lawyer. However, the content and the forms of their manifestation can vary significantly depending on the specific functions performed by certain representatives of the legal community. In legal and philosophical literature, *justice* is reasonably regarded as a fundamental principle that determines the very purpose and role of justice in people's lives. In the regulatory aspect, one can speak of it as one of the most important elements, the values of individual and social moral consciousness, in which *reflects the idea of the proper distribution among people of rights and duties, deeds and rewards for them, merits and rewards*. The position under which a certain harmony is achieved, we call fair; if there is a discrepancy between these parameters, it is customary to talk about injustice. Throughout the whole period of the history of social thought, the notion of justice has always been associated with the notion of the ethical status of a person's value and his life among other basic values of morality.

The principle *independence* in its pure form is used only in the field of legal proceedings. In the literal sense of the word, it means that justice is carried out freely from somebody or someone else's influence from outside. This applies equally to both the ethical and purely legal aspects of the problem. It is significant

that in countries with an established judicial system, exceptional importance is attached to ensuring independence in the activities of any representative of the legal profession. Independence is the quintessence of legal activity. Independence should be viewed as a universal principle, extended both to the activities of any representative of the legal profession, and to the field of jurisprudence in general. At the same time, the independence of the judiciary is specifically stipulated in the Constitution of India.

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 bUVjusV izksVksdkWy irs nks rjg ds  
 gksrs gS & izkbosV ,oa ifCyd  
 bUVjusV izksVksdkWy dh rhu JsF.k;kj  
 izkbosV usVodZ ds fy, lqjf{kr j[kh x;h

gSaA ;s ifCyd usVofdzax esa ugha ns[kh  
tkrh A ;s gSa&

10.0.0.0. to 10.255.255.255

172.16.0.0. to 172.31.255.255

192.168.0.0. to 192.168.255.255

dqN bUVjusV izksVksdkWy irs fLFkj gksrs  
gSa rks dqN vLFkjA fLFkj irs LFkk;h :i  
ls fdlh ,sls midj.k ds fy, fn;s tkrs  
gSa] tks bl rjg ls dkWufQxj gksrh gS fd  
mldk irk ges'kk ogh jgsA lkekU;r;k ,sls  
O;olkf;d ;k vU; laxBu tks ges'kk  
mifLFkfr bUVjusV ij j[krs gSa] mudh  
osclkbV dks LFkk;h irs vkcafVr fd;s  
tkrs gSaA

vLFkk;h irs iwy ¼pool½ ls fn;s tkrs gS]  
tks bUVjusV l= rd gh jgrs gSaA ,sls esa  
fdlh midj.k dk irk ,d ykWx vkWu l= ls  
nwljs vkWx vkWu l= esa cny tkrk gSaA  
bUVjusV lsok iznkrk ¼ISP½ ,sls irksa dk  
,sfrgkfld ykWx j[krk gS rkfd ;g irk py  
lds fd fdlh le; fo'ks"k esa mDr irk fdl  
lCldzkbcj ;k mi;ksxdrkZ dks vkcafVr  
fd;k x;k Fkka

fofHkUu usVoDlZ ds chp lwpuk dk  
vknku&iznku bUgha irksa ls gksrk gSA  
dzkbe buosfLVxs'ku esa mn~xe bUVjusV  
izksVksdkWy irk ls mlds lkslZ dk irk  
yxk;k tkrk gSA bl ;qfDr ls foospd dks  
vfrfjDr lk{; bdëk djus ,oa vfHk;qDr dks  
fpfàr djus esa enn feyrh gSA  
lkbcj mijk/kksa dh JsF.k;k;&

- 1- **Lkbcj LVkWfdax ;k lkbcj cqfybax** &  
tc dksbZ jktnkj bUVjusV ek;/eksa  
ls dksbZ jkt [kksyus dh /kedh  
nsrk gS ;k jkt [kksyrk gS ;k

cnuke djrk gSA dHkh&dHkh fujk'k  
izseh viuh iwoZ izsfdek ds esckby  
ucj ;k bZ&esy dks v'yhy lkbVksa  
dks lCldzkbc dj nsrk gS vkSj  
ihfM+rk dks vokafNr Qksudky ;k  
esy vkus yxrs gSaA ,sls vijk/k  
Hkkjrh; n.M lafdrk fd /kkjk & 500]  
504 ,oa 509 esa n.Muh; gSaA

2- **igpku pksjh &** bZ&okysV ls  
lEcFU/kr O;fDrxr lwpuk dh  
pksjh&lwpuk izkSn~;ksfxdh  
vf/kfu;e dh /kkjk&66c ds vUrxZr  
n.Muh; gSA

3- **pksjh ds dEI;wVj fjlkslZ ;k lapkj  
ek/k;e dks csbZekuh ls izkIr djuk  
&** lwpuk izkSn~;ksfxdh vf/kfu;e  
dh /kkjk & 66Besa n.Muh; gSA

4- **dpjs <sup>1</sup>/<sub>4</sub>Trash<sup>1</sup>/<sub>2</sub> esa iM+s buoksbl]  
vkfFkZd nLrkostksa ;k vU; O;fDrxr  
lwpukvksa dks csbZekuh ls ysuk&  
lwpuk izkSn~;ksfxdh vf/kfu;e dh  
/kkjk&66 es n.Muh; gSA**

5- **fdlh dk O;fDrxr essy vius irs ij  
ysus ds mn~ns'; ls mldk irk  
/kks[ks ls cnyuk &** lwpuk  
izkSn~;ksfxdh vf/kfu;e dh /kkjk  
&66 esa n.Muh; gSA

6- **QkfeZx <sup>1</sup>/<sub>4</sub>Pharming<sup>1</sup>/<sub>2</sub> &** tkyh osclkbV  
cukdj miHkksDrkvksa dh O;fDrxr  
lwpuk izkIr djuk o /kks[kk  
nsuk&lwpuk izkSn~;ksfxdh vf/kfu;e  
dh /kkjk & 66Desa n.Muh; gSA

7- **fQf'kax <sup>1</sup>/<sub>4</sub>Phishing<sup>1</sup>/<sub>2</sub> &** bZ&esy ls tqM+s  
QkeksZa ;k ikWi&vIl <sup>1</sup>/<sub>4</sub>Pop-ups<sup>1</sup>/<sub>2</sub> ds }kkjk

fdlh dh O;fDrxr lwpuk xyr <ax ls  
izkIr djuk o /kks[kk nsuk & lwpuk  
izkSn~;ksfxdh vf/kfu;e dh /kkjk  
& 66desa n.Muh; gSA

8- **LdhfEeax** <sup>¼</sup>Skimming<sup>½</sup> & ,oVho,eo ;k  
dzsfMV@MsfcV dkMZ izkWlsl djus  
okyh e'khuksa esa fo'ks"k  
bysDV<sup>a</sup>kfud midj.k yxkdj mDr  
,oVho,eo;k dzsfMV@MsfcV dkMZ ls  
lEcfU/kr egRoiw.kZ lwpuk pqjkuk &  
lwpuk izkSn~;ksfxdh vf/kfu;e dh  
/kkjk & 66cesa n.Muh; gSA

9- **fOgflax** <sup>¼</sup>avishing<sup>½</sup> & bZ&esy ;k Qksu  
dky ds ek;/e ls ykWVjh vkfn dh  
lwpuk crkdj /kks[ks ls ihfM+r ds  
cSad [kkrk ;k dzsfMV@MsfcV dkMZ  
ls lEcfU/kr egRoiw.kZ lwpuk izkIr  
djuk & lwpuk izkSn~;ksfxdh  
vf/kfu;e dh /kkjk & 66desa n.Muh;  
gSA

10- **QthZ VSDl fjVuZ Hkjus ;k yDtjh**  
**dkj [kjhnus ds mn~ns' ; ls nwljs**  
**ds PAN dkMZ ds fooj.k dh pksjh**  
**djuk & lwpuk izkSn~;ksfxdh**  
vf/kfu;e dh /kkjk & 66cesa n.Muh;  
gSA

11- **Qt+hZ esfMDyse ikus ds mn~ns' ; ls**  
**esfMdy igpku dh pksjh & lwpuk**  
izkSn~;ksfxdh vf/kfu;e dh /kkjk  
&66cesa n.Muh; gSA

12- **dEI;wVj ek;/e ds }kjk ukSdjh dk**  
**>kalk nsdj Bxuk & lwpuk**  
izkSn~;ksfxdh vf/kfu;e dh /kkjk  
&66desa n.Muh; gSA

- 13- **bS&esu gsMj dh tkylkth <sup>1</sup>/<sub>4</sub>Spooing<sup>1</sup>/<sub>2</sub> &**  
tkylkt+h ls 'kh"kZd cny fn;k tkrk  
gS rkfd esy vlyh mn~xe ds ctk;  
nwljh txg ls vkuk izrhr gks &  
lwpuk izkSn~;ksfxdh vf/kfu;e dh  
/kkjk &66cesa n.Muh; gSA
- 14- **bZ&esy ls nwHkkZoukiw.kZ dksM**  
**tSls** trojan, virus ;k vU; nwf"kr lkexzh  
**csbZekuh iw.k uh;r ls Hkstuk &**  
lwpuk izkSn~;ksfxdh vf/kfu;e dh  
/kkjk &66esa n.Muh; gSA
- 15- **bZ&esy ckWfEcax &** dkQh la[;k esa  
bZ&esy Hkstdj loZj dks csbZekuh  
iw.kZ uh;r ls dzS'k djuk & lwpuk  
izkSn~;ksfxdh vf/kfu;e dh /kkjk  
&66esa n.Muh; gSA
- 16- **Likfeax <sup>1</sup>/<sub>4</sub>Spamming<sup>1</sup>/<sub>2</sub> &** vkokafNr esy dh  
vusdkusd izfr;k; csbZekuh iw.k  
uh;r ls Hkstuk & lwpuk  
izkSn~;ksfxdh vf/kfu;e dh /kkjk  
&66esa n.Muh; gSA
- 17- **bUVjusV ds ek/;e ls v'yhy lkexzh**  
**ckaVuk &** lwpuk izkSn~;ksfxdh  
vf/kfu;e dh /kkjk&67 esa n.Muh;  
gSA
- 18- **;kSu lEcU/kksa dks bysDV<sup>a</sup>kWfud :i**  
**esa izdkf'kr djuk &** lwpuk  
izkSn~;ksfxdh vf/kfu;e dh /kkjk  
&67Aesa n.Muh; gSA
- 19- **cPpksa dks ;kSu lEcU/kksa esa**  
**'kkfey fn[kkus okyh lkexzh**  
**bysDV<sup>a</sup>Wkfud :i esa izdkf'kr djuk**  
**&** lwpuk izkSn~;ksfxdh vf/kfu;e  
dh /kkjk & 67Besa n.Muh; gSA

- 20- **lapkj ek/;eksa ls viekutud lans'k Hkstuk & lwpuk izkSn~;ksfxdh vf/kfu;e dh /kkjk &66A esa n.Muh; gSA ysfdu (2013) 12 SCC 73 Js;k fla?ky cuke ;wfuvu vkWQ bf.M;k** ds ekeys esa ekuuh; mPpre U;k;ky; us bls vlaoS/kkfud ?kksf"kr dj fn;k gSA ekuuh; mPpre U;k;ky; us bls lafo/kku dh /kkjk 19 (1) (a) ds fo:ð ekuk gS, tks fd /kkjk &19 (2) dh lhekvsaka esa Hkh 'kkfey ugha gSA
- 21- **fdlh dEI;wVj flLve ;k usVodZ esa vukf/kd`r n[ky <sup>¼</sup>Hacking<sup>½</sup> & gSdj ;k rks [k+qn izksxzke fy[kdj ;k jsfMesM dEI;wVj izksxzke dh enn ls y{; ij fu'kkuk lk/krs gSa vkSj bl izdkj egRoiw.kZ lwpuk pqjkdj mls izdkf'kr djus dh /kedh nsdj fdlh fnXxt dEiuh ;k laxBu ls iSlk ekaxrs gSaA ljdkjh osclkbVsabudk xje f'kdkj gksrh gSaA ;g d`R; lwpuk izkSn~;ksfxdh vf/kfu;e dh /kkjk &66 esa n.Muh; gSA**
- 22- **lkslZ dksM <sup>¼</sup>source code<sup>½</sup> dh pksjh & lkslZ dksM lkW¶Vosvj dEifu;ksa dh iw;th gSA bfDt+D;wVscy Qkbyksa esa ladfyr djkdj os bls cspdj iS;k dekrh gSaA csbZekuh iw.k uh;r ls lkslZ dksM dh pksjh lwpuk izkSn~;ksfxdh vf/kfu;e dh /kkjk &66 esa n.Muh; gSA**
- 23- **lkbcj vkradokn& jktuhfrd ykHk ds fy, ;k ns'k dh ,drk] v[k.Mrk] lqj{kk ,oa lEizHkqrk dks [krjs**

esa Mkyus ds mn~ns'; ls bUVjusV  
dk iz;ksx djds fgald dk;Zdze  
pyk;s tkrs gSa] ftlls tu /ku dh  
{kfr gksrh gS rFkk yksxksa dks  
Mjk;k /kedk;k tkrk gSA ;g d`r  
lwpuk izkSn~;ksfxdh vf/kfu;e dh  
/kkjk &66F esa n.Muh; gSA

24- **bUVjusV ds ek;/e ls fofHkUu  
osclkbVksa ij voS/k lkeku o M<sup>a</sup>x  
cspuk & NDPS Act ds vUrxZr n.Muh; gSA**

25- **dEI;wVj lkslZ nLrkost+ksa esa  
NsM+NkM+ <sup>1/4</sup>Tampering<sup>1/2</sup>& lwpuk  
izkSn~;ksfxdh vf/kfu;e dh /kkjk  
&65 esa n.Muh; gSA**

**bysDV<sup>a</sup>Wkfud ;k fMftVy lk{;**

bysDV<sup>a</sup>Wkfud ;k fMftVy lk{; D;k gksrk  
gS\

bZ&esy] ,lo ,e0 ,lo] osclkbV MkVk] lks'ky  
usVodZ dE;qfuds'ku] dEI;wVj ls rS;kj  
fd;s x;s bLrkost] lhlh Vhoh QwVst] , Vh  
,e e'khuksa ds fizUV vkmV] loZj ij  
miyC/k MkVk] ;w ,l ch M<sup>a</sup>kbo] gkMZ  
M<sup>a</sup>kbo] eseksjh fpIl] th ih ,l lfoZl  
fizUV vkmV rFkk og lc dqN tks dEI;wVj  
;k bysDV<sup>a</sup>Wkfud midj.kksa <sup>1/4</sup>mobile & tablet<sup>1/2</sup> ls  
mRiUu gksrk gS] mls bysDV<sup>a</sup>Wkfud ;k  
fMftVy lk{; dgrs gSaA

mijksDr lk{;ksa dks xzkg; cukus ds fy;s  
Hkjrh; lk{; vf/kfu;e dh /kkjk&3,22A,45,59 & 79A  
esa la'kks/ku fd;k x;k gS rFkk nks u;h  
/kkjk;sa 56A o 65B tksM+h x;h gSaA

/kkjk 65A ds vuqlkj bysDV<sup>a</sup>Wkfud fjdkMZ  
dh lkexzh dks /kkjk 65 B izko/kkuksa ds  
vuqlkj gh lkfcr dj;k;k tk ldrk gSA

/kkjk 65B(1) ds vuqlkj dksbZ Hkh  
bysDV<sup>a</sup>Wkfud fjdkMZ tks dEI;wVj }kjk  
mRiUu fizUV vkmV gS ;k fdlh vkWfIVdy  
vFkok eSXusfVd fefM;k ij dkWih fd;k x;k  
gS] ewy lk{; dh lkexzh ok rF; ds ckcr  
rHkh nLrkost+ ekuk tk;sxk vkSj fcuk ewy  
bysDV<sup>a</sup>kWfud nLrkost dks U;k;ky; esa  
is'k fd;s o lkfcr fd;s lk{; esa xzg;  
gksxk tc fd og iz'uxr lwpuk o dEI;wVj  
ls lEcfU/kr bl /kjk dh 'krksaZ dks iwjh  
djrK gksA

/kkjk 65B(2) ds vuqlkj ewy bysDVW<sup>a</sup>kfud  
fjdkMZ dk fizUV vkmV ;k dkWih ftl  
lEI;wVj ls mRiUu fd;k x;k og fu;fer  
mi;ksx esa jgk gks rFkk mlls izkIr  
lwpuk mlesa fu;fer :i ls Mkyh x;h gksA  
lwpuk [kf.Mr ugha gksuh pkfg,A  
dEI;wVj lgh <ax ls dke dj jgk gksA  
M~;wfiydsV dkWih ewy fjdkMZ ls gh cuk;h  
x;h gksA dkWih ls dkWih ;k fizUV vkmV u  
fy;k x;k gksA

/kkjk 65B(3) ds vuqlkj ,d vof/k fo'ks"k  
esa dEI;wVj ds ;qXeksa ;k esy dks ,d gh  
dEI;wVj ekuk tk;sxk] Hkys gh mDr vof/k  
esa os ,d lkFk pys gksa ;k ,d ds ckn ,d  
pys gksaA

/kkjk 65B(4) ds vuqlkj bysDV<sup>a</sup>kWfud  
bLrkost+ dh dkWih ;k fizUV ds lk{; esa  
xzkg; gksus ds fy, izek.k&i= nsuk  
gksxk] ftlesa fuEufyf[kr ckrsa gksxh&

- ewy bysDV<sup>a</sup>Wkfud fjdkMZ tgk;i  
LVsVes.V gS vkSj tgk;i ls dkWih cuk;h  
x;h gS] mldh igpku crkuh gksxhA
- mDr midj.k dk fooj.k nsuk gksxkA

➤ mDr midj.k dks pykus ;k mldh lwlaxr  
 xfrfof/k;ksa dk O;ofLFkr j[kus ds  
 fy, ft+Eesnkj O;fDr dks mDr ckrksa  
 dk izek.k&i= nsuk gksxkA  
 pwWafd ewy bysDV<sup>a</sup>kWfud ehfM;k dks  
 ges'kk lk{; esa is'kk djuk lEHko ugha  
 gksrk gS] ,sls esa mldh dkWih ;k fizUV  
 vkmV dks U;k;ky; esa is'k djuk ,d ek=  
 fodYi gS] ftlds fy, /kkjk 65B ds vUrxZr  
 izek.k&i= vkKkid gSA ;g izek.k&i=  
 lkekU;r;k 'kiFk&i= ds :i esa gksxk tks  
 ml O;fDr }kjk fn;k tk;sxk tks mDr  
 dEI;wVj dks pykus ds fy, ftEesnkj gSA  
 'kiFk&i= eq[; :Ik ls bl ckr dk dFku  
 gskrk gS fd iz'kuxr dEI;wVj dks  
 ftEesnkj O;fDr us bLrseky fd;k Fkk rFkk  
 lwpuk esa dksbZ NsM+NkM+ ;k tkM+&rksM+  
 ugha fd;k x;k Fkk vkSj fizUV vkmV ;k  
 dkWih gwcgw mlh bysDV<sup>a</sup>Wkfud fjdkMZ dh  
 gSA  
 bysDV<sup>a</sup>Wkfud lk{; dh xzkg;rk ds lEcU/k  
 esa ekuuh; mppre U;k;ky; ds dq  
 fu.kZ;ksa dk ;gkW mYys[k vko';d gSA

**LVsV cuke uotksr la/kw mQZ vQlku xq:**

**(2005)11 SCC 600**

Ekuuh; mPpre U;k;ky; us dgk gS fd  
 /kkjk 65B ds izko/kuksa ds i`Fkd /kkjk 63  
 o 65 ds vUrxZr n~forh;d lk{; nsus ij  
 dksbZ jksd ugha gSA ;fn bysDV<sup>a</sup>Wkfud  
 fjdkMZ ,slk gS tks vklkuh ls U;k;ky;  
 esa izLrqr ugha fd;k tk ldrk rks ,sls  
 esa mldh lkexzh dks n~forh;d lk{; ls  
 lkfcr fd;k tk ldrk gSA ysfdu vuoj ih oh  
 ds ekeys esa ekuuh; mPpre U;k;ky; us

uotksr la/kw ds ekeys esa bysDV<sup>a</sup>Wkfud  
lk{; ds lEcU/k esa fn;s x;s vius iwoZ  
fu.kZ; dks vekU; dj fn;kA

**vuoj ih oh cuke ih ds c'khj 119 (2015) CLT 177**  
ekuuh; mPpre U;k;ky; us dgk gS fd /kkjk  
65B bysDV<sup>a</sup>Wkfud lk{; ds lEcU/k esa  
fo'ks" k izko/kku gSA fo'ks" k izko/kku  
lkekU; izko/kkuksa ij izcy gksrk gSA  
ekuuh; mPpre U;k;ky; ds vuqlkj uotksr  
la/kw ds ekeys esa /kkjk 59 o 65A Hkjr;  
lk{; vf/kfu;e ds izko/kku ut+jUnkt+ gks  
x;s gSa] tdk; bl ckr dk Li"V mYys[k gS  
fd bysDV<sup>a</sup>Wkfud fjdkMZ /kkjk 65B ds  
izko/kkuksa ds vuqlkj gh lkfcr gks  
ldsaxs vkSj /kkjk 59 ds vUrxZr ekSf[kd  
lk{; xzkg; ugha gksxkA bysDV<sup>a</sup>Wkfud lk{;  
ds ekeys esa /kkjk 63 o 65 ds izko/kku  
ykw ugha gksaxsA /kkjk 65B dks dksbZ  
fodYi ugha gSA

vc iz'u ;g mBrk gS fd ;fn bysDV<sup>a</sup>Wkfud  
midj.k ftlls ewy lk{; dk fizUV vkmV ;k  
dkWih cuk;k x;k gS] ml O;fDr ds d+Ct+s  
esa ugha g tks lk{; nsuk pkgark gS] rks  
og vius egRoiw.kZ lk{; dks dSls lkfcr  
djsxkA ekuuh; mPpre U;k;ky; us 'kQh  
eksgEen ds ekeys esa bl viokn Lo:i  
ifjLFkfr dk laKku fy;k gSA

**'kQh eksgEen cuke LVsV vkWQ fgekpy**

**izns'k 2018 AIR SC 714**

Ekuuh; mPpre U;k;ky; ds vuqlkj /kkjk 65B  
ds vUrxZr izek.k&i= dh izfdz;kRed  
vko';drk rHkh gksxh tcfd lEcU/k  
bysDV<sup>a</sup>Wkfud midj.k ml O;fDr ds dCt+s o

fu;U=.k esa gS] tks bysDV<sup>a</sup>Wkfud lk{;  
U;k;ky; esa is'k dj jgk gSA foi{kh  
ftlds dCts+ es ,slk midj.k ugha gS]  
mlls /kkjk 65B ds vUrxZr izek.k&i= ugha  
ekaxuk pkfg,A n~forh;d lk{; ls vius  
egRoiw.kZ nLrkost+ dks lkfcr djus dk  
mls volj u nsus ls vkSj mlds lk{; dks  
vkekU; djus ls vU;k; gksxkA ,sls  
ekeyksa esa /kkjk 63 o 65 ds izo/kku ykxw  
fd;s tk ldrs gSaA /kkjk 65B ds izo/kku  
ges'kk vkKkid ugha gSaA U;k;fgr esa  
izek.k&i= izLrqr djus ls <hy fn;k tk  
ldrk gSA

**lh lh Vh oh QwVst <sup>1</sup>/<sub>4</sub>CCTV Footage<sup>1</sup>/<sub>2</sub>**

rkseklks czwuks ds ekeys esa ekuuh;  
mPpre U;k;ky; us lh lh Vh oh QwVst dks  
egRoiw.kZ lk{; ekuk gSA ,sls egRoiw.kZ  
lk{; dks is'k u djus ij U;k;ky; us  
vfHk;kstu dsl dks lansgkLin ekuk gSA  
**rkseklks czwuks cuke LVsV vkWQ ;w0ih0**  
(2015) 3 SCC(Criminal)54

**fofM;ks dkWUQzsfUlax }kjk lk{; vadu**  
fofM;ks dkWuQzsfUlax ds ek;/e ls lk{;  
vafdr djus dks ekuuh; mPpre U;k;ky; us  
fof/kd ekU;rk ns fn;k gSaA **LVsV vkWQ**  
**egkjk"V<sup>a</sup> cuke izQqYy ch nslkbZ <sup>1</sup>/<sub>4</sub>AIR 2003 SC**  
**2053<sup>1</sup>/<sub>2</sub>** ds ekeys esa ekuuh; mPpre U;k;ky;  
us dgk gS fd oSKkfud rduhdksa dh izxfr  
ls vc ,sls o;fDr dks Hkh ns[kuk] lquuk  
vkSj mlls ckrsa djuk vklku gks x;k gS]  
Tks HkkSfrd mifLFkr ugha gSA ,sls esa  
lk{kh dh mifLFkfr ds fod/kd vko';drk ds  
fy, HkkSfrd mifLFkfr dh fof/kd vko';d

ds fy, HkkSfrd mifLFkfr vko';d ughssa  
gSA ekuuh; U;k;ky; us fofMvks  
dkWuQzsfU lax ls lk{; vafdr djus dh  
vuqefr fn;k gS rFkk ,sls lk{; dks  
bysDV<sup>a</sup>Wkfud lk{; ekkuk gSA ekuuh;  
dydRrk mPp U;k;ky; us Hkh **vferkHk ckxph**  
**cuke bZuk ckxph** <sup>1</sup>/<sub>4</sub>AIR 2005 Cal 11<sup>1</sup>/<sub>2</sub> ds ekeys esa  
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bysDV<sup>a</sup>Wkfud lk{; ls lEcfU/kr fof/k  
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vkmViqV gS] mls /kkjk <sup>65</sup>B Hkkjrh; lk{;  
vf/kfu;e dh 'krksZa ds v/khu xzká ekuk  
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# VIDEO-CONFERENCING : CONCEPT AND PERMISSIBILITY UNDER THE LAW

Rajiv Maheshwaram \*

## Introduction

The formal Court based justice administration as is in operation in India presently, is a continuation of the system as had been introduced by the colonial regime of Great Britain in our country. It needs no repeatation that the ingredients of the substantive laws – which have the effect of extending the rights and liabilities are proved in the Court of law through the mechanism provided under the procedural laws. It is a matter of common knowledge, that the legal system in our country is based on the adversarial system, where the judge except for certain notable exceptions, plays a neutral role and it is for the parties in litigation to prove before the court, their rival legal positions.

The procedural laws, with certain subtle changes have been a law in continuation. This has been on account of the fact, that the legal provisions enacted in the pre-Independence period, have been found to be largely relevant. While continuing the concerned legal provisions, the legislature i.e. the Parliament, has kept on introducing new laws or has introduced necessary amendments within the broad parameters of the existing laws.

In the context of administration of justice, the criminal justice administration holds a place of prominence. It is regulated on the basic jurisprudential premise, that 'no person accused of an offence is to be taken to be guilty unless proved so beyond reasonable doubt in a court of law'. This principle of law finds its reflection and assertion under the code of Criminal Procedure and the Indian Evidence Act.

## Existing Legal Provisions

The provisions of the above two laws, (where the Cr.P.C. has been re-enacted in 1973) have undergone major changes, with the revolutionary infusion of information technology based changes. Starting with the Information Technology Act, 2000, which is a new law, as a follow-up, the provisions of the Cr.P.C. and the Evidence Act have also undergone changes.

Under the Indian Evidence Act, Section 3 now *inter alia* includes within the definition of 'evidence' - “all documents including electronic records produced for the inspection of the Court”. Accordingly, in the context of inclusion of 'electronic records', within the definition of documents, other ancillary provisions have been introduced.

But the present discussion is confined to 'video conferencing', therefore it is pertinent to look into matters related thereto. The Hon'ble Supreme Court in *State of Maharashtra v. Dr. Praful B. Desai, (2003) 4 SCC 601* has laid down -

*“Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place. ....Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away,*

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*with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video-conferencing both parties are in the presence of each other.....Thus, it is clear that so long as the accused and/or his pleader are present when evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of Section 273 of the Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law".*

*In **Santhini v. Vijai Venkatesh, (2018) 1 SCC 1** it has been observed - "Appropriate deployment of technology facilitates access to justice ..... video conferencing is a technology which allows users in different locations to hold face to face meetings. Video-conferencing is being used intensively the world over (India being no exception) in on line teaching, administration ..... and the like".*

The Code of Criminal procedure, 1973 under the proviso to Section 167, sub-section (2) makes the following provision -

*167 (2) (b) no Magistrate shall authorize detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage".*

Likewise Section 161 of the code as a proviso to sub-section (3) makes the following provision -

*"Provided that statement made under this sub-section may also be recorded by audio-video electronic means".*

It is pertinent to mention the two distinct phraseologies used under the relevant provisions of Section 167 and 161.

While under one of the provisos mentioned under Section 167 the phrase 'medium of electronic video-linkage' has been used, whereas, under the relevant proviso to Section 161, 'may also be recorded by audio-video electronic means', has been used.

In the opinion of this writer, Section 167 refers to use of the technology of video-conferencing' for the purpose of remand. Whereas, in the context of Section 161, taking note of the broad purpose of the said section, in my opinion, 'audio-video electronic means' refers to recording the statement by the police in the physical presence of the person, whose statement is being recorded, through audio recording or video recording or both simultaneously has been mentioned. Thus, it is only for the purpose of remand that the technique of video conferencing can be used. Under Section 161 VC is not the permissible mode of recording statement by the police.

With respect to the recording of evidence, by the 'child' under the Protection of Children from Sexual Offences Act, 2012, Section 36 (2), provides that "the Special Court may record the statement of a child through video-conferencing or by utilizing single visibility mirrors or curtains or any other device".

## **The Initiation of Acceptability of the Technology**

The Hon'ble Supreme Court in *State of Maharashtra v. Dr. Praful B. Desai*, (2003) 4 SCC 601 dealing with the question of legality of recording evidence through video-conferencing has observed as under –

“12. Considering the question on the basis of Criminal Procedure Code, we are of the view that the High Court has failed to read Section 273 properly. One does not have to consider dictionary meanings when a plain reading of the provision brings out what was intended. Section 273 reads as follows:

“273 : Evidence to be taken in presence of accused.- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Explanation: In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

Thus Section 273 provides for dispensation from personal attendance. In such cases evidence can be recorded in the presence of the pleader. The presence of the pleader is thus deemed to be presence of the Accused. Thus Section 273 contemplates constructive presence. This shows that actual physical presence is not a must. This indicates that the term "presence", as used in this Section, is not used in the sense of actual physical presence. A plain reading of Section 273 does not support the restrictive meaning sought to be placed by the Respondent on the word "presence". One must also take note of the definition of the term 'Evidence' as defined in the Indian Evidence Act. Section 3 of the Indian Evidence Act reads as follows:

" 'Evidence.- 'Evidence' means and includes -

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence .

(2) all documents including electronic records produced for the inspection of the Court;

such documents are called documentary evidence."

Thus evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video- conferencing.

20. Recording of evidence by video conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the Accused. The Accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the Accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded Court room. They can observe his or her demeanour. In fact the facility to play back would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The Accused would be able to instruct his pleader immediately and thus cross- examination of the witness is as effective, if not better. The facility of play back would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or

*other material or statement in the same manner as if he/she was in Court. All these objects would be fully met when evidence is recorded by video conferencing. Thus no prejudice, of whatsoever nature, is caused to the Accused. Of course, as set out hereinafter, evidence by video conferencing has to be on some conditions.*

21. *Reliance was then placed on Section 274 and 275 of the Criminal Procedure Code which require that evidence be taken down in writing by the Magistrate himself or by his dictation in open Court. It was submitted that video conferencing would have to take place in the studio of VSNL. It was submitted that that this would violate the right of the Accused to have the evidence recorded by the Magistrate or under his dictation in open Court. The advancement of science and technology is such that now it is possible to set up video conferencing equipment in the Court itself. In that case evidence would be recorded by the Magistrate or under his dictation in open Court. If that is done then the requirements of these Sections would be fully met. To this method there is however a draw back.*

22. *However even if the equipment cannot be set up in Court the Criminal Procedural Code contains provisions for examination of witnesses on commissions. Sections 284 to 289 deal with examination of witnesses on commissions. For our purposes Sections 284 and 285 are relevant. They read as under:*

*"284. When attendance of witness may be dispensed with and commission issued.- (1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter :*

*Provided that where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union Territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.*

*(2) The Court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution.*

*285. Commission to whom to be issued.- (1) If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to, be found.*

*(2) If the witness is in India, but in a State or an area to which this Code does not extend, the commission shall be directed to such Court or officer as the Central Government may, by notification, specify in this behalf.*

*(3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country*

*or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission, as the Central Government may, by notification, prescribe in this behalf. "*

Thus in cases where the witness is necessary for the ends of justice and the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable, the Court may dispense with such attendance and issue a commission for examination of the witness.

### **Permissibility of Video Conferencing in Criminal Matters**

The Hon'ble Supreme Court, taking note of the need of bringing the true facts without any element of fear in a free atmosphere without any embarrassment by rape victims, in reference to Section 273 Cr.P.C., has permitted the recording of evidence by way of video-conferencing in *Sakshi v. Union of India, (2004) 5 SCC 518*.

Again in *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 Cr.L.J. 1441*, the Supreme Court has held that the fundamental right available to an under trial prisoner under Article 21 of the Constitution is not an absolute one, which is circumscribed by the rules and regulations in the Prison Manual of respective States. Even though the provisions for personal appearance of the accused is incorporated in the statutes, the right of the accused, being not absolute, using video-conferencing system could not be held to be a violation of the provisions. (In this matter the trial of the accused was going on before the Sessions Court in Patna, but the accused for various reasons had been transferred to Tihar Jail, Delhi).

Applying the principle of law laid down by the Hon'ble Apex Court in the 03 decisions mentioned earlier, the Madras High Court in *Abdul Karim Telgi @ Lala @ Karim v. State, (Crim. Original Petition No. 25880/2007, date of judgment 17.02.2007)* laid down further cogent reasons for permitting video-conferencing in the following words -

“21 ..... the peculiar facts and circumstances of this case warrant for adopting the services of video-conferencing system, in order to render justice to the parties. Such procedure would avoid strain of the accused persons in undergoing the ordeal of travel to appear before the court; reduce manpower, energy and monetary loss to the Government; safeguard the safety of the prisoners and ensure proper conduct of the Court proceedings.

22. .... the trial of the case at Chennai shall continue without the presence of the petitioners by the Court, dispensing such presence, and, to the extent possible, shall be conducted with the aid of video-conferencing”.

(Here the accused was lodged in Yerwada Central Prison, Pune, while the trial was going before the Additional Special Judge for CBI cases, Chennai).

The Hon'ble Supreme Court in *Asha Ranjan v. State of Bihar, (2017) 4 SCC 397*, by referring with approval, the earlier judgment in *Kalyan Chandra Sarkar case (supra)* held that “the right to fair trial is not singularly absolute, as is perceived, from the perspective of the accused. It takes in its ambit and sweep

*right of the victim(s) and the society at large. The fair trial which is constitutionally protected as a substantial right under Article 21 and also the statutory protection, does not invite for consideration a sense of conflict with the interest of victim(s) or the collective/interest of the society”.*

*In light of the nature of allegations, criminal antecedents of the accused, who has been convicted in 10 cases and around 75 other cases being pending (M. Shahabuddin) and the need of fair trial, directed for the transfer of the accused from Siwan Jail to Tihar Jail, Delhi and directed “the trial in respect of pending trials shall be conducted by video-conferencing by the trial court concerned. The competent authority in Tihar Jail and the competent authority of the State of Bihar shall make all essential arrangements so that the accused and the witnesses would be available for the purpose of trial through video-conferencing”.*

The Hon'ble Supreme Court in **Anwar Khan vs. The State of Madhya Pradesh (SLP (Cr.) No. 3928/2018, order dated 17.05.2018)** taking note of the fact, that the court where the trial was in progress (Indore) and the Court at the place (Udaipur) where the witness was living had video-conferencing facilities, has directed the deposition of the eye-witness to be recorded through video-conferencing. Here the witness to an alleged murder, fearing his life was not willing to depose in the court and had therefore made a prayer so that he be examined on commission. The Hon'ble Court, considering the fact that even if a commission is issued, it would still require the examination/cross-examination of the witness in the presence of the accused, therefore the objective of deposition and safety of the witness would be best served by recording the evidence through video-conferencing.

### **Matrimonial Matters and Cases of Similar Nature**

In the context of of **matrimonial or custody matters**, the Hon'ble Supreme Court in **Krishna Veni Nagam v. Harish Nagam, (2017) 4 SCC 150** (plea made for transfer of the case from Family Court, Jabalpur, M.P. to the Family Court, Hyderabad) it has been held as under :

*“14 ..... Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of video-conferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country video-conferencing is now available. In any case, wherever such facility is available, it ought to be fully utilized and all the High Courts ought to issue appropriate administrative instructions to regulate the use of video-conferencing for certain category of cases. Matrimonial cases where one of the parties resides outside Court's jurisdiction is one of such categories. Wherever one or both the parties make a request for use of video-conferencing, proceedings may be conducted on video-conferencing, obviating the needs of the party to appear in person”.*

The proposition of law as laid down in **Krishna Veni Nagam case (supra)** was reconsidered by a 3 Judges Bench in **Santhini v. Vijay Venketesh, (2018) 1 SCC 1**.

Taking note of the facts that the physical presence of both parties in matrimonial proceedings held in camera is essential as it creates environment of trust, confidentiality, privacy and emotional bond. The 1984 Act (Family Court Act, 1984), to achieve its purpose, conceives of involvement of certain categories so that, if required, the Family Court can take their assistance to exercise its jurisdiction in an effective manner. The reconciliation requires presence of both the parties at the same place and the same time so as to be effectively conducted. The spatial distance will distant the possibility of reconciliation because the Family Court Judge would not be in position to interact with the parties in the manner as the law commands. However, the expression of desire by the wife or husband that the proceedings shall be conducted through the use of VC in a case where the wife does not give consent for VC, it would be contrary to Section 11 of the 1984 Act.

Based on the above legal impediments, the 3 Judges Bench by a majority (2:1, with Hon'ble Dr. Justice D.Y. Chandrachud dissenting) held as below :

1. In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.
2. After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum, for hearing of the case through video-conferencing before the Family Court concerned, it may exercise the discretion to allow the said prayer.
3. After the settlement fails, if the family court feels it appropriate having regard to the facts and circumstances of the case that video-conferencing will sub-serve the cause of justice, it may so direct.
4. In a transfer application (before the Supreme Court), VC cannot be directed.
5. Directions to apply prospectively.
6. The decision in Krishna Veni Nigam (supra) overruled to the aforesaid extent.

Further, the Hon'ble Supreme Court in **Amardeep Singh vs. Harveen Kaur, Civil Appeal No. 11158/2017, dated of judgment 12.09.2017**, holding that the period mentioned in section 13-B(2) of the Hindu Marriage Act, 1955 is not mandatory but directory, and, it will be open to the court to exercise its discretion in the facts and circumstances of each case, also has laid down, that, in conducting such proceedings, the Court can also use the medium of video-conferencing.

#### **Permissibility of VC in Road Accident matters**

The Hon'ble Supreme Court in *Savelife Foundation & anr. v. Union of India & anr., 2016 (3) SCALE 522*, with respect to the need for development of supportive legal framework to protect Samaritans i.e. by standers and passers by who render help to victims of road accidents, has approved the guidelines (with modifications) issued by the Central Government (till such time as the legislature steps in to substitute them by proper legislation). Amongst the various guidelines (issued by the Ministry of Road Transport and Highways dated 12.05.2015), as approved by the Hon'ble Supreme Court the guidelines at point No. 9 states -

- “9. *Video-conferencing may be used extensively during examination of bystander or good Samaritan including the persons referred to in*

*guideline(1) above who are eye witnesses in order to prevent harassment and inconvenience to good Samaritans.”*

**Permissibility of VC in hearing of Review Petitions in the High Court having circuit Benches or Benches.**

Laying down the proposition that even if there are Circuit Benches or Benches outside the main seat requiring Judges to move from Bench to Bench, effort should always be made for review petition to be heard by the same Judges. Or if one of them is not available, at least by a Bench consisting of the other Judge, the Hon'ble Supreme Court in *Malthesh G. Pooja v. State of Karnataka and ors.*, (2011) 15 SCC 330 has held as under:

*“22. With the technological innovations available now, we do not see why the review petitions should not be heard by using the medium of video-conferencing.”*

Dealing with the issue of misuse of the provisions under Section 498-A. IPC, the Hon'ble Apex Court in *Rajesh Sharma and ors v. State of U.P. and anr. (Criminal Appeal No. 1265/2017, date of judgment 27.07. 2017)* has laid down broad guidelines, which, *inter alia* includes the constitution of a Family Welfare Committee in every district. With respect to the modus operandi to be adopted by such committee, one of the guidelines as laid down under para 19 of the judgment, is as under:

*“(d) Every complaint under Section 498-A received by the police or by the magistrate be referred to and looked into by such committee. Such committee may have interaction with the parties personally or by means of telephone or any other mode of communication including electronic communication.*

*(k) (vii) Personal appearance of all family members and particularly outstation members may not be required and the trial court ought to grant exemption from personal appearance or permit appearance by video-conferencing without adversely effecting progress of the trial”.(The judgment is presently under review)*

Reference can also be made to large number of judgments rendered by various High Courts including the Hon'ble Allahabad High Court. A list of few of such cases is mentioned below -

- (1) The Commissioner, Trade Tax v. Durga Form Product Ltd. (Date of judgment 23.09.2005)*
- (2) Atique Ahmed v. State of U.P. (Crim. Misc. W.P. No. 5505/2017, Date of Judgment 13.04.2017)*
- (3) State of Rajasthan v. Manjeet Singh (Cri. Writs (CRLW) No. 31. 2016, Date of Judgment 06.10.2016, Rajasthan High Court)*
- (4) Smt. Geetashree Goswami v. Jadavananda Goswami, (Gauhati High Court along with Tr. P. © No. 14/2017, Date of judgment 12.09.2017)*
- (5) V. Rama Naidu & anr. v. Smt. V. Ramadevi (Andhra High Court in Civil Revision Petition No. 1089/2016, Date of judgment 31.01.2018)*
- (6) Haseen Siddiqui @ Jahangir v. State of U.P. through Principal Secretary Law (Allahabad High Court in Misc. Single No. 7035/2013, date of judgment 01.12.2013)*

## **Conclusion:**

The emergence of technology and the infusion of the same in the professional and personal space has changed the way in which human activities have been carried down the years. Today, with more than 3 crore cases pending before the courts, with 2/3 of those being criminal cases, there is a major challenge before the judiciary to ensure timely and effective determination of the same. Many reasons for the delay in the timely disposal of cases have been identified. To name a few, the causes of delay are non-turning up of witnesses; accused not being produced, while in custody on account of shortage of police personnel and non-availability of transportation facilities; transfer of formal witnesses or witnesses of the government departments, like doctors, IOs, other police personnel, the government officials, who are the complainant of a case etc.

Video-Conferencing, undoubtedly presents a solution to many of the problems. While, through this technology, we can ensure the deposition of a witness from her/his present location, and, at the same time the presence of the accused can also be ensured. Through Video-Conferencing, the safety of the accused or the witnesses can also be ensured. It would in the long run be also beneficial in economic terms, in that the need of police personnel escorting the accused to the court and making necessary transportation arrangements, can also be done away with. The accused can also be saved from the ordeal of travelling from Jail to the Court. This becomes all the more important, where the accused has to travel from a Jail in one city to the Court in another district of the same State or sometimes to a court in another State. Thus, with certain precautions, the technology can be of great use in criminal, as also in some civil matters - where matrimonial matters can be particularly pointed out. Perhaps, the Judge would also be in a better position to observe the demeanour of a witness.

But like any tool, to facilitate the easy conduct of any task, Video Conferencing also has some issues of concern. While availability of funds in the short-run is certainly an issue, but in the larger perspective, certain questions touching upon the question of fair trial has to be considered. For example, if the number of accused in a particular case are more than one and if for security reasons, they are lodged in different jails and now if the trial is undertaken through Video Conferencing, the natural question would be, how do we ensure fair trial, where, a common strategy by the accused at every stage is an important component? How do we ensure, the common discussion of the accused with their lawyers, in such case situations where the accused are lodged in different jails at different locations?

If the accused, are also permitted, to discuss their strategy either amongst themselves or with their lawyers, though Video Conferencing, how are we going to ensure the protection of their privacy and the sanctity of the privileged communication.

A 'Standard Operating Procedure' (SOP) with respect to the use of the technology coupled with the creation of the necessary physical and human infrastructure is also necessary.

Despite all odds, one of the keys of speedy trials, coupled with security of accused and witnesses, along with, smooth and perhaps inexpensive functioning

of the justice delivery system, perhaps lies with Video Conferencing. We may be able to delay it, but in all, we cannot avoid the technology.

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# **DYNAMICS OF CORRUPTION : EXPANDING THE FOCUS ON CORRUPTION**

Dr. Avanish Kumar\*  
Dr. Aditi Srivastava\*

## **Introduction**

*Power tends to corrupt, and absolute power corrupts absolutely. There is no worse heresy than that the office sanctifies the holder of it.*

**Lord Acton<sup>1</sup>**

Corruption is a global phenomenon which every society faces though its degree of severity varies from country to country. Despite its long history, there is no single universally agreed upon definition of corruption. Moreover, its causes, forms and impacts are diverse and multi-faceted. Understanding corruption by itself is a complex undertaking. However, it is agreed that corruption is inimical to public administration, undermines democracy, degrades the moral fabrics of the society and violates human rights. The pain of corruption touches all the human family but it disproportionately affects the vulnerable sections of the society. It reinforces discrimination, exclusion and arbitrariness. Corruption is a universal problem undermining universal value- human rights. However, on the contrary, guarantying human rights in general and ensuring non-discrimination and participation in particular are useful preventive tools for corruption as they ultimately empower the society and create social accountability<sup>2</sup>.

Corruption is more readily condemned than defined and explained. Scholars approach corruption from anthropological and sociological to moral and economic point of view. Depending upon their perspectives, they attribute different meanings, causes, forms and consequences for corruption<sup>3</sup>. Although the general public sees corruption as a problem of social justice, the scholarly literature has discussed it as a problem of economic development. The question arises 'Is corruption a problem because it is unjust or because it is harmful for development' ? Most people seem to condemn corruption because they think it is unfair. Most of the academic literature on corruption, however, has seen it as a problem for economic development rather than as a problem of social justice. Philosophical literature on justice has shunned the topic of corruption, and only a few recent studies have discussed corruption as a moral or philosophical issue<sup>4</sup>.

### **I. Definition & Concept of Corruption**

Much of the academic debate on corruption has been devoted to the function and dysfunction of corruption in terms of efficiency or economic development. Those who argue for the dysfunctionality of corruption implicitly argue that corruption is bad. Those who argue for the functionality of corruption implicitly argue that corruption can be good or morally neutral. Although the

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<sup>1</sup> Berihun Adugna Gebeye, "*Corruption & Human Rights : Exploring The Relationship*". Available at- <http://www.du.edu/korbel/hrhw/workingpapers/2012/70-gebeye-2012.pdf> (Accessed on- 03-02-18) at 3.

<sup>2</sup> *Ibidem* at 2.

<sup>3</sup> *Ibid* at 4.

<sup>4</sup> Jong-Sung You, "*Corruption As Injustice*". Available at- <http://irps.ucsd.edu/assets/001/503060.pdf> (Accessed on- 03-02-18) at 1-2.

former group has been frequently labelled as “moralists” and the latter as “revisionists” or “functionalists,” even those labelled as moralists have relied less on moral arguments than on pragmatic arguments that corruption produces harmful effect on development<sup>5</sup>.

The term “Corruption” comes from the Latin word '*Corruptio*' which means “moral decay, wicked behavior, putridity or rottenness”. Defining the concept of corruption is not as easy as one recognizes its occurrence. It varies from region to region and remains largely contextual. Literature unanimously recognizes that corruption is an ancient, wide and pervasive problem, that continues to be a factor in everyday life around the world, in both developed and underdeveloped countries. As the causes and effects of corruption are different depending on the context of the country, it is perhaps not surprising that it is difficult to formulate a single comprehensive definition that covers all the manifestations of corruption. It can be said that corruption is a universal problem without universal definition<sup>6</sup>. Corruption is a complex and multifaceted phenomenon and takes on various forms in different contexts. Consequently various definitions of corruption have been used from “moral decay” to “misuse of public power for private profit”, or some strict legal definitions of corruption as an “act of bribery” involving a public servant and a transfer of tangible resources<sup>7</sup>. Joseph Nye defined corruption as “behavior which deviates from the formal duties of a public role because of private-regarding pecuniary or status gains<sup>8</sup>.” Michael Johnston defined corruption as “abuse of public roles and resources for private benefit<sup>9</sup>.” Other definitions like “betrayal of public trust” and “violation of established rules for personal gain” have also been used<sup>10</sup>. The various definitions used in the literature, however, are either too broad or too narrow and there is still much confusion about what is corruption and what is not corruption.

It must be noted that the word corruption has a moral implication. The Oxford English Dictionary gives corruption nine meanings and categorizes them as follows: “(1) Physical: the destruction or spoiling of anything, especially by disintegration or by decomposition with its attendant unwholesomeness and loathsomeness, (2) Moral: moral deterioration or decay; perversion or destruction of integrity in the discharge of public duties by bribery or favor, (3) The perversion of anything from an original state of purity<sup>11</sup>.” Miller, Roberts and Spencer argue that corruption is “a species of moral wrongdoing”<sup>12</sup>. Not all

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<sup>5</sup> *Ibidem* at 2.

<sup>6</sup> *Supra* n. 1 at 5.

J. Andvig, O. Fjeldstad, I. Amundsen, T. Sissener, T. Soreide, "Research on Corruption: A Policy Oriented Survey" (Chr. Michelsen Institute and Norwegian Institute of International Affairs, 2000) at 9-14. Referred in: *Supra* n. 4 at 3.

<sup>8</sup> Joseph S. Nye, "Corruption and Political Development: A Cost-Benefit Analysis". (1967)*LXI American Political Science Review*, 417-427. Referred in: *Ibidem*.

<sup>9</sup> Michael Johnston, "The Political Consequences of Corruption : A Reassessment". (1986)*18 Comparative Politics*, 459-477. Referred in: *Ibid* at 4.

<sup>10</sup> Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999) at 275. Referred in: *Id.*

<sup>11</sup> A.J. Heidenheimer, M. Johnston, V.T. Le Vine (ed.), *Political Corruption: A Handbook* (New Brunswick: Transaction Publishers, 1989) at 3-14. Referred in: *Id.*

<sup>12</sup> Seumas Miller, Peter Roberts, Edward Spence, *Corruption and Anti-Corruption: An Applied Philosophical Approach*. (Upper Saddle River, NJ: Pearson Prentice Hall, 2005). Referred in: *Id.*

immoral actions are corrupt actions, but they do not propose criteria on what distinguishes corruption from other kinds of moral wrongdoing.

The definition of corruption as “abuse” (or misuse) of “public power” (public office, public role or public duties and resources) for “private gain” (personal gain, private profit or private interest) has been most frequently used among scholars. Although this succinct definition reveals much of the key characteristics of corruption, each of the three core elements of the definition causes confusion and misunderstanding<sup>13</sup>.

The first important confusion arises because abuse (or misuse) of public power for private gain is too broad a term. There are many kinds of abuse of public power for private gain that cannot be called corruption. Unjust war and oppression of basic human rights that are for the benefit of the dictator are such examples. What kinds of misuse of power for private gain, then, can be defined as corruption? Bribery is too narrow. Embezzlement, extortion, fraud, favoritism and nepotism can be other forms of corruption. What are the common characteristics among these various forms of corruption? Abuse or misuse of power means unjust use of power. Although corruption is an injustice, not all injustices are corruption. Corruption is a subset of injustice. How, then, is corruption distinguished from other kinds of injustice and what relationships exist between corruption and other kinds of injustice? In this regard, Oskar Kurer’s definition of corruption as a violation of the “impartiality principle” is illuminating<sup>14</sup>. “Corrupt acts are characterized by a holder of public office violating non-discriminating norms in order to gain a private advantage,” according to Kurer. Bo Rothstein and Jan Teorell also argue, drawing on Brian Barry’s concept of “justice as impartiality,”<sup>15</sup> that quality of government, which includes absence of corruption as well as clientelism, patronage, and capture means “impartiality in the exercise of governmental power”<sup>16</sup>. Brian Barry did not discuss corruption at all in his *Justice as Impartiality*, and his use of the term “impartiality” is much broader than the mere absence of corruption. By impartiality he meant the fundamental equality of human beings or the principle of equal concern and respect. However, violation of impartiality seems to be at the core of corrupt transactions. Impartiality is to treat people equally irrespective of personal relationships and personal likes and dislikes. Corruption occurs typically when a public official favors her client because of bribery or personal connection, violating the impartiality principle. The impartiality definition of corruption suffers from two problems, however. First, there are corrupt actions that have nothing to do with the impartiality principle. Embezzlement is clearly a corrupt act, but it does not require partial treatment of clients. Another problem comes from the controversy over the interpretation of impartiality. It may be perfectly justified for certain public officials to impartially favor the disadvantaged in

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<sup>13</sup> *Id.*

<sup>14</sup> Oskar Kurer, "Corruption: An Alternative Approach to Its Definition and Measurement" (2005)53 *Political Studies*, 222-239. Referred in: *Id.* at 5.

<sup>15</sup> Brian Barry, *Justice as Impartiality* (Oxford: Oxford University Press, 1995). Referred in: *Id.*

<sup>16</sup> Bo Rothstein and Jan Teorell, "What is Quality of Government? A Theory of Impartial Political Institution" (Paper presented at the Annual Meeting of the American Political Science Association, Washington D.C., 2005). Referred in: *Id.*

exercising power. A public elementary school teacher may justly give more attention and time to those students who are behind in learning. This kind of partial treatment should not be judged as corrupt<sup>17</sup>.

Another point of contention regarding the definition of corruption is whether to include some kinds of misbehaviors from the private actors. Abuse of “private power” has been often excluded from the definition of corruption. This interpretation can be misleading, because, for a corrupt transaction between a public official and a client, only the public official is regarded as corrupt, while the client who has used private resources like money is not regarded as corrupt. Bukovansky’s definition of political corruption as the “use of public office for private gain or the illegitimate purchase by private actors of political consideration” is an attempt to prevent this misunderstanding<sup>18</sup>. Frequently, corruption has been understood as a phenomenon in the public sector or at the intersection of the public sector and the private sector. Most social scientists have excluded corruption in the private sector from their definition of corruption. Indeed, corruption in the private sector has been rarely studied by social scientists. Although ordinary people as well as mass media commonly use words like “corporate corruption,” scholars have used terms like “business ethics,” thus avoiding the word “corruption” in the private sector. The exclusion of corruption in the private sector from a definition of corruption is not consistent with the common sense understanding of the word corruption. We call certain kinds of misbehaviors corrupt not only in the public sector but also in the private and non-profit sectors. There is corruption in the corporation, the labour union, the media, the university and the church. When an academic definition of a term is different from the common usage of the term, there should be clear reason. Those definitions that excluded corruption in the private sector, however, were usually taken for granted or assumed without providing any reasons for the exclusion. What are the similarities and differences between private sector corruption and public sector corruption? Are there any fundamental differences between them? Does corruption have some public characteristics? These are some of the questions that are important but have not been addressed by the literature<sup>19</sup>.

Another important element in the definition of corruption is “for private gain (profit, or benefit).” Abuse of public power that is not for private gain but for public interest will not be regarded as corruption. The problem of “dirty hands” concerns the political leader who, for the sake of public purposes and not out of greed, the desire for power or loyalty to family and friends, violates moral principles<sup>20</sup>. Thus, the problem of “dirty hands” is quite different from the problem of corruption and the leader who committed the former could be honored and at the same time punished. An alternative term for this kind of act is “noble

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<sup>17</sup>

*Id.* at 5-6

Mlada Bukovansky, "Corruption is Bad: Normative Dimensions of the Anti-Corruption Movement" ANU Department of International Relations Working Papers, WP2002/5 (2002). Referred in: *Id.* at 6.

<sup>19</sup>

*Id.* at 7.

<sup>20</sup>

Dennis Thompson, *Political Ethics and Public Office* (Cambridge: Harvard University Press, 1987) at 11-39. Referred in: *Id.*

cause corruption”<sup>21</sup>. What are the criteria for “private gain” as a core element of corruption? There has been general consensus about the need to interpret the term “private” broadly so that it may include one’s family, relatives, friends, political party and those with some connections (such as a friend of a relative) as well as the need to interpret the term “gain” broadly so that it may include not only monetary gain but also power, prestige and any kind of favor or benefit. Thus, favoritism and nepotism can be regarded as part of corruption.

Thus we find that there is no single universally agreed definition of corruption, it is defined in various ways. Usually corruption is defined as ‘an illegal act that involves the abuse of a public trust or office for some private benefit’, or ‘the misuse of public office for private gain’.<sup>22</sup> Such definition has two limitations in the current understanding of corruption. It only deals with corruption in the public sector while excluding corruption in the private sector and only covers the recipients of proceeds of corruption while it also covers the act of giving. Transparency International (TI) defines corruption as ‘misuse of entrusted power for private gain’<sup>23</sup>. The TI’s definition is similar with the usual definition except it includes private sector corruption. The World Bank (WB) defined corruption as ‘an abuse of public authority for the purpose of acquiring personal gain’. Mc Mullan holds that a public official is corrupt: If he accepts money or money’s worth for doing something that he is under a duty to do anyway, that he is under a duty not to do, or to exercise a legitimate discretion for improper reasons<sup>24</sup>. There is also a definition of corruption in the economics field; for example, Robert Klitgaard has defined corruption in terms of an equation: Corruption = Monopoly Power + Discretion – Accountability<sup>25</sup>. While United Nations Development Program (UNDP) equated as corruption = (Monopoly Power + Discretion) – (Accountability + Integrity + Transparency)<sup>26</sup>. In the legal field, the term corruption is usually used to group certain criminal acts which correspond to the general notion of an abuse of entrusted power. International conventions against corruption reflect this, since they do not define corruption but instead enumerate criminal acts that amount to corruption<sup>27</sup>. Defining corruption

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<sup>21</sup> *Supra* n. 12 at 83-90. Referred in: *Id.*

<sup>22</sup> D. Fantaye, "Fighting Corruption and Embezzlement in Third World Countries" (2004) 68 *Journals of Criminal Law*, 171. Referred in : *Supra* n. 1 at 5.

<sup>23</sup> *The Anti-Corruption Plain Language Guide* (Transparency International, 2009). Available at- [http://www.transparency.org/whatwedo/publication/the\\_anti\\_corruption\\_plain\\_language\\_guide](http://www.transparency.org/whatwedo/publication/the_anti_corruption_plain_language_guide) (Accessed on- 03-02-18).

<sup>24</sup> M. Mc Mullan, "A Theory of Corruption: Based on a Consideration of Corruption in the Public Services and Governments of British Colonies and Ex Colonies in West Africa"(1961) 9 *No. 2 Sociological Review*, 181-201. Referred in: *Supra* n. 1 at 6

<sup>25</sup> Kanokkan Anukansai, "Corruption: The Catalyst for the Violation of Human Rights." Available at-<https://www.nacc.go.th/images/journal/kanokkan.pdf> (Accessed on- 03-02-18) at 2.

<sup>26</sup> *Anti-Corruption Practice Note* (UNDP, 2004). Available at- <http://www.pogar.org/publications/finances/anticor/undp-ati04e.pdf> (Accessed on- 03-02-18).

<sup>27</sup> *UN Convention Against Corruption*. Available at- [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) (Accessed on- 03-02-18). *Inter-American Convention Against Corruption*. Available at- [www.oas.org/juridico/english/treaties/b-58.html](http://www.oas.org/juridico/english/treaties/b-58.html) (Accessed on- 03-02-18). *African Union Convention on Preventing and Combating Corruption*. Available at- <http://www.au.int/en/treaties/african-union-convention-preventing-and-combating-corruption> (Accessed on- 03-02-18). *Council of Europe's Anti-Corruption Instruments*. Available at-

is notoriously difficult to do. But for the purpose of this article, corruption is defined as a misuse of entrusted power for private gain against the rights of others and giving officials undeserved benefit or advantage.

## **II. Kinds of Corruption**

One could seek to identify corruption with economic crimes, such as bribery, fraud and insider trading. To some extent this kind of view reflects the dominance of economically focused material in the corpus of academic literature on corruption. It also reflects the preponderance of proposed economic solutions to the problem of corruption. After all, if corruption is essentially an economic phenomenon, is it not plausible that the remedies for corruption will be economic ones. But many acts of corruption are not unlawful. Prior to 1977 it was not unlawful for US companies to offer bribes to secure foreign contracts; indeed, elsewhere such bribery was not unlawful until much later. So corruption is not necessarily unlawful. This is because corruption is not at bottom simply a matter of law; rather it is fundamentally a matter of morality<sup>28</sup>. As there are numerous examples of wrongful acts not considered corruption, although abhorrent on moral or ethical grounds, a clear distinction between a corrupt act and other immoral acts is essential. It is therefore necessary to explore those characteristics of corruption that can be considered as uniquely typifying it in order to arrive at the essence of corruption<sup>29</sup>. We have identified corruption as fundamentally a moral, as opposed to legal, phenomenon. Acts can be corrupt even though they are, and even ought to be, legal. Moreover, it is evident that not all acts of immorality are acts of corruption; corruption is only one species of immorality<sup>30</sup>.

Corruption manifests itself in different ways in different circumstances. But there are some forms of corruption which recur in every system. These are grand corruption, petty corruption, active corruption, passive corruption, political corruption and systematic corruption. Grand corruption occurs when a high level government official committed acts that distort policies or the central functioning of the State, enabling him/her to benefit at the expense of the public good<sup>31</sup>. It is a form of corruption which pervades the highest levels of a national government, leading to a broad erosion of confidence in good governance, rule of law and economic stability. Petty corruption is an everyday abuse of entrusted power by low and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies. It distorts the functioning of the central government. It is a situation where a public official demands or expects money for doing an act which he or she is ordinarily required by law to do, or when a bribe is paid to obtain services which the official is prohibited from

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[http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/default_en.asp) (Accessed on- 03-02-18).

<sup>28</sup> Stanford Encyclopedia, 'Concept of Corruption'. Available at- <http://plato.stanford.edu/entries/corruption/> (Accessed on- 03-02-18).

<sup>29</sup> Schalk W. Vorster, "Fighting Corruption: A Philosophical Approach". Available at- <http://www.indieskriflig.org.za/index.php/skriflig/article/view/651/2046> (Accessed on- 03-02-18) at 2

<sup>30</sup> *Supra* n. 28.

<sup>31</sup> *Supra* n. 23.

providing<sup>32</sup>. Bribery, embezzlement, theft, fraud, extortion, nepotism, favoritism, and Clientelism are the classifications of corruption by the United Nations Office on Drug and Crime (UNODC),<sup>33</sup> which can be grouped under either grand corruption or petty corruption depending upon the amount of money lost and the sector where it occurs<sup>34</sup>.

Economic corruption is an important form of corruption; however, it is not the only form of corruption. There are non-economic forms of corruption, including many types of police corruption, judicial corruption, political corruption, academic corruption, and so on. Indeed, there are at least as many forms of corruption as there are human institutions that might become corrupted. Further, economic gain is not the only motivation for corruption. There are a variety of different kinds of attractions that motivate corruption. These include status, power, addiction to drugs or gambling and sexual gratification, as well as economic gain<sup>35</sup>. In discussions of transactional offences such as bribery; ‘active bribery’ usually refers to the offering or paying of the bribe, while ‘passive bribery’ refers to the receiving of the bribe<sup>36</sup>. This form of corruption describes the demand and supply side of corruption. Political corruption on the other hand is the manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth<sup>37</sup>. Political corruption is typically defined as the use of political office for private gain. But this definition is deficient, especially in countries where the norms of public office include personal gain. Where societal norms do not include the concept of public servants working in the public interest, strong institutions in the democratic model cannot be built. The second difficulty with the conventional definition of corruption is that elected officials face a paradox of advocating the interests of their constituents, while governance norms would have them be impartial. Third, the common definition is rule-based. It does not incorporate the flexibility needed in political spheres nor the different manifestations of integrity that an official may display, such as living up to campaign promises even though the promise may be induced by special interests<sup>38</sup>.

Systematic corruption occurs where corruption permeates the entire society to the point of being accepted as a means of conducting everyday transactions. It is a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups and in which many people have few practical alternatives to dealing with corrupt officials. It affects institutions and influences individual behavior at all levels of a

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<sup>32</sup> *Supra* n. 1 at 8.

<sup>33</sup> The Global Program Against Corruption: UN Anti-Corruption Toolkit (UNODC-2004), Available at- [http://www.unodc.org/pdf/crime/corruption/toolkit/corruption\\_un\\_anti\\_corruption\\_toolkit\\_sep04.pdf](http://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf) (Accessed on- 03-02-18)

<sup>34</sup> [Supra n. 23](#)

<sup>35</sup> *Supra* n. 28.

<sup>36</sup> *Supra* n. 33.

<sup>37</sup> *Supra* n. 1 at 8-9

<sup>38</sup> Moana M. Erickson, Roderick M. Hills (ed.), *Research on Corruption and its Control: The State of the Art* (Washington DC: The IBRD/ World Bank, 2007) at 25-26. Available at- [http://csis.org/files/media/csis/pubs/060303\\_whartonworkshop.pdf](http://csis.org/files/media/csis/pubs/060303_whartonworkshop.pdf) (Accessed on- 26-12-16).

political and socio-economic system. Such form of corruption is embodied in specific socio-cultural environments and tends to be monopolistic, organized and difficult to avoid<sup>39</sup>.

### **III. Causes of Corruption**

Available research reveals that the causes of corruption are diverse and depend on the different contextual environments. TI held that corruption is rearing its ugly head in more and more severe ways due to the weakening of social values, with the broader public interest and social responsibility being subordinated to the enhancement of material status in the personal ethics of many. Besides, lack of transparency and accountability in the public integrity systems are contributing factors for corruption<sup>40</sup>. As Human nature is imperfect, corruption will exist in all human endeavors. Selfishness and greed are the constituting elements of human imperfection which leads to corruption. As noted by Ringera in a speech delivered at the Commonwealth lawyer's conference, the causes of corruption are economic, institutional, political or societal<sup>41</sup>. The economic causes of corruption are related to pecuniary considerations, representing corruption that is need-driven as opposed to greed driven. This assertion is further confirmed by TI in attributing poverty and low salary as causes of corruption<sup>42</sup>. Increase of wants and inability to maintain one's family lives forces officials to compromise public trust and honesty for some fringe benefits. Institutional causes of corruption include monopoly and wide discretionary powers for public officers, poor accountability, lack of effective and efficient enforcement of the law, absence of institutional mechanisms to deal with corruption, existence of a weak civil society and the absence of press freedom<sup>43</sup>. Klitgaard shares the same view with Ringera by holding that corruption is prevalent when 'someone has monopoly power over a good or service, has the discretion to decide whether you receive it and how much you get, and is not accountable'<sup>44</sup>. The political causes of corruption arise from the structure and functions of political institutions and the acquisition and exercise of political power. While societal causes refer to the attitudes and practices of the community. As the problem of corruption is multi-faceted, its causes are also diverse.

### **IV. Corruption and it's Complexities**

*Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least a bit of the King's revenue. Just as fish under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out taking money.*

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<sup>39</sup> C. Heymans, B. Lipietz, "Corruption and Development: Some Perspectives" (1999) 40 *Institute of Security Studies Monograph Series*, 8. Referred in: *Supra* n. 1 at 9.

<sup>40</sup> J. Pope, *Confronting Corruption: The Element of National Integrity System*. (TI Source Book). Referred in: *Supra* n. 1 at 6

<sup>41</sup> A. Ringera, Speech Delivered at the Commonwealth Lawyers Conference, Nairobi. Referred in: *Supra* n. 1 at 6

<sup>42</sup> *Supra* n. 40.

<sup>43</sup> *Supra* n. 41

<sup>44</sup> K. Anukansai, *Corruption: The Catalyst for the Violation of Human Rights*. Referred in: *Supra* n. 1 at 6.

**a) The Impacts of Corruption :**

The Durban Commitment to Effective Action Against Corruption (1999) describes that "Corruption deepens poverty, it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world's major faiths"<sup>46</sup>. Corruption is damaging for the simple reason that important decisions are determined by ulterior motives, with no concern for the consequences for the wider community. As Balogun<sup>47</sup> describes it, "depending on its form and gravity, corruption is capable of rewarding indolence and penalizing hard work, undermining morale and compromising a nation's external security, threatening internal order and stability, and generally slowing down the pace of economic growth and sustainable development". Corruption lowers investment, which in turn adversely affects overall economic performance. Perhaps more importantly, corruption undermines social welfare by redistributing a nation's wealth in a manner that generates tensions or exasperates existing ones<sup>48</sup>. While corruption violates the rights of all those affected by it, it has a disproportionate impact on people that belong to groups that are exposed to particular risks; such as women, children, minorities, indigenous peoples, migrant workers, persons with disabilities, those with HIV/AIDS, refugees, prisoners and those who are poor. Above all, corruption affects the integrity of the political system and neither allows for the protection of human rights and the promotion of human freedoms nor for the development of democracy. It implies discrimination and injustice and disrespect for human dignity<sup>49</sup>.

**b) Corruption as a Breach of 'Formal Justice':**

Corruption is more readily condemned than defined and explained. It is a subject of research by many scholars from various disciplines. Nevertheless, disagreements persist not only about how to curbe it, but even about its definition, causes, forms and consequences. Such a lack of consensus reflects the complexity of the problem. Defeated by the problems of defining corruption, Justice Potter Stewart asserted that 'I know it when I see it'<sup>50</sup>. Scholars approach corruption from anthropological and sociological to moral and economic point of

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<sup>45</sup> *Ibidem* at 4

<sup>46</sup> IX International Anti-Corruption Conference, on the theme 'Global Integrity: 2000 and Beyond' held in Durban, South Africa, 10-15 October 1999, resolved "The Durban Commitment to Effective Action Against Corruption". Referred in: *Ibid* at 9.

<sup>47</sup> M. Balogun, "Causative and Enabling Factors in Public Integrity: A Focus on Leadership, Institutions and Character Formation". (2003) 5 No. 2 (Spring) *Public Integrity*, 127-147. Referred in: *Id.* at 9.

<sup>48</sup> R. Sinder, W. Kidane, "Combating Corruption Through International Law in Africa: A Comparative Analysis". (2007) 40 *Cornell International Law Journal*, 691. Referred in: *Id.* at 10.

<sup>49</sup> CR. Kumar, "Corruption, Human Rights and Development: Sovereignty and State Capacity to Promote Good Governance", (2005) 99 *American Society of International Law Proceedings*, 416. Referred in: *Id.*

<sup>50</sup> W. Robert, *Political Corruption in Africa*. (Hampshire/England: Dartmouth Publishing Co., 1991) at 11. Referred in: *Id.* at 4.

view. Depending upon their perspectives, they attribute different meanings, causes, forms and consequences of corruption<sup>51</sup>. John Rawls's concept of "formal justice" is useful in defining and understanding corruption more precisely, although he did not discuss the problem of corruption in his 'A Theory of Justice' or in his subsequent works. Rawls's 'Theory of Justice' is mostly about "substantive justice" and presents "equal liberties", "fair equality of opportunity" and the "difference principle" as its basic principles. He defines "formal justice" as "impartial and consistent administration of laws and institutions," whatever their substantive principles are. An institution is a public system of rules that define offices and positions with their rights and duties, powers and immunities, and the like. Substantive justice is about the rules of an institution, while formal justice is about the actions of the individuals who are taking the offices of the institution. Formal justice, or justice as regularity, limits discretion and arbitrary decision-making to ensure equality before the law. It requires that laws and institutions should apply equally to everyone. Thus, the conception of formal justice becomes the rule of law when applied to the legal system. If an institution is reasonably just, then it is of great importance that the authorities should be impartial and not influenced by personal, monetary, or other irrelevant considerations in their handling of particular case<sup>52</sup>. The concept of formal justice can be applied not only to law-implementing processes but also to law-making processes. We know that the process of enacting laws and rules can be unfair and irregular too. An unjust law can be enacted through fair process and a just law can also be enacted through unfair process. If a law prohibiting discrimination against some minority group, which is presumably just, were enacted because the minority group bribed lawmakers, we would call the process corrupt while the legislative outcome is substantively just. Legislative process is part of the political process governed by the constitution. Thus, formal justice in legislative process means impartial and consistent application of the Constitution<sup>53</sup>.

There are four kinds of corruption, depending on where in political process formal justice is violated. Formal justice can be violated in electoral, legislative, administrative or judicial process. Thus, we see electoral corruption, legislative corruption, bureaucratic corruption and judicial corruption. Political corruption includes both electoral corruption and legislative corruption. Substantive justice consists of "procedural justice" and "distributive justice." For Rawls, the key principles of procedural justice are equal liberties and fair equality of opportunity. The highest levels of procedural rules are contained in the Constitution. The core principle of distributive justice is the difference principle, which advocates equal distribution of economic and social resources unless the inequalities are for the benefit of the least advantaged. There are procedural laws such as election laws and distributive laws such as tax laws, and many laws contain both procedural and distributive rules. Formal justice should not be confused with procedural

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<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Supra* n. 4 at 8.

<sup>53</sup> *Ibidem.* at 10.

justice<sup>54</sup>. Formal justice requires impartial, consistent administration of both procedural rules and distributive rules. Formal justice, as the rule of law, requires that like cases must be treated alike, that rules should be general, clear, consistent, public, and prospective, and that there is no crime without a law. Since formal justice is about the actions of the individuals, we need to consider moral principles for individuals. Rawls presented three principles for individuals: 1) obligations of fairness and fidelity, 2) natural duties to uphold justice, mutual aid, mutual respect, not to injure and not to harm the innocent, and 3) supererogatory virtues such as beneficence, courage and mercy. The principle of fairness accounts for all requirements that are obligations as distinct from natural duties. A person is required to do his or her part as defined by the rules of an institution (1) if the institution is just, and (2) one has voluntarily accepted the benefits of the arrangement. Obligations of fairness and fidelity arise as a result of our voluntary acts, whereas natural duties apply to us without regard to our voluntary acts. The most important natural duty is to support and to further just institutions. Thus, we have a natural duty to comply with the constitution or with the basic laws regulating property (assuming them to be just), whereas we have an obligation to carry out the duties of an office that we have succeeded in winning or to follow the rules of associations or activities that we have joined<sup>55</sup>. Formal justice is violated when the relevant individuals such as politicians, bureaucrats and judges do not follow the principle of fairness. Rawls's idea of political obligation needs to be expanded. While he thought that political obligation applies only to those who hold office and that there is no political obligation for citizens generally, the citizens who voluntarily participate in the process of electing officials (through voting and campaigning), lawmaking (say through petitioning and lobbying) as well as in the administering of the laws and regulations (through active participation in various administrative procedures) must have political obligations too. The citizens who seek special favor through bribery or connection would be equally as unjust and corrupt as the officials who corruptly favor their clients. The citizens who sell their votes as well as the candidates who buy their votes are both violating the obligations of fairness. Citizens have political obligations of fairness whenever they exert political influence by voluntarily participating in the political processes as well as natural duties to follow the laws as far as they are reasonably just. George Klosko argues that the strong political duties of citizens to follow the laws cannot be explained as natural duties and that citizens' political obligations arise from the benefits of essential public goods provided by the State regardless of voluntary acceptance of the schemes<sup>56</sup>. Hence, citizens also have political obligations based on the principle of fairness.

Although the literature on corruption has focused mainly on the abuse of public power rather than private power, most corrupt transactions occur between

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<sup>54</sup> Bo Rothstein, *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State* (Cambridge/UK: Cambridge University Press, 1998) and E. Allan Lind, Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York/London: Plenum Press, 1988). Referred in: *Ibid.*

<sup>55</sup> *Id.* at 11.

<sup>56</sup> George Klosko, "Political Obligation and the Natural Duties of Justice"(1994) *23 Philosophy and Public Affairs*, 251-270. Referred in: *Id.* at 12

public officials and private actors. Corruption is typically the exchange of public power such as legislative or discretionary power and private power such as monetary resources. Frequently, corrupt transactions are initiated by private actors. Private actors are supposed to pursue their private interests with just means and not with unjust means such as bribing. The obligations of fairness apply to the private actors as well when they exert influence on any public decision-making process or implementation process.

Another question is whether any private actions that do not affect the exercise of public power can be called corruption. As some corruption takes place purely within the public sector without the involvement of the private sector, such as embezzlement and corrupt deals between high-level officials and low-level officials surrounding promotion, some corporate corruption takes place purely within the private sector without the involvement of public officials such as false accounting reports made by a corporate CEO that aims to maximize the compensation for the CEO at the expense of shareholders.

Formal justice can be extended to private relations, where the principle of fidelity applies to the individual. We assume obligations when we marry as well as when we accept positions of authority. We acquire obligations by making promises and by tacit understandings, and even when we join a game, namely, the obligation to play by the rules and to be a good sport. The principle of fidelity is a special case of the principle of fairness applied to the social practice of promising or entering into covenants. A promise, or contract between private individuals, if it is reasonably just, should be kept faithfully. Breach of formal justice can occur in private relations as well<sup>57</sup>.

Some scholars define corruption as “betrayal of public trust.” This definition is too broad. When the government, a politician or someone, who is expected to keep his or her promise, has failed to keep an earlier promise, it can be “betrayal of trust,” but not necessarily corruption. However, it does tell about a crucially important aspect of corruption. The principle of fairness is based on the expectations founded in good faith on current institutions; the obligation of fairness is nothing but the honoring of legitimate expectations or trust of others. Public officials are expected to correctly implement the laws and to treat people equally and fairly. Even if an official does not violate laws literally, his or her use of discretion can be arbitrary or unfair, against the reasonable expectations and confidence of citizens. Suppliers are expected to honestly and correctly inform consumers about the quality and quantity of their products. Markets cannot work without basic trust among market participants. The violations of the principle of fidelity between private individuals such as spouses and friends, violations which involve betrayal of mutual trust, are not called corruption even if they are committed by public officials. When the individuals who are taking the offices of the private institutions act against the reasonable expectations and trust of the public for their private gain, we usually call them corrupt. The private citizens who attempt to influence the officials of the private institutions with unjust means are also regarded as corrupt<sup>58</sup>.

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<sup>57</sup> *Id.* at 13

<sup>58</sup> *Id.*

Thus, corruption has some public characteristics. Too narrow an interpretation of corruption as abuse of “public power,” however, can be misleading. The power of private institutions can affect the public and purely private power such as monetary resources owned by private actors can be used to buy power that affects the public. We can define corruption as abuse of power for private gain that is a breach of formal justice by public officials and private actors and that involves the violation of obligations of fairness and the betrayal of public trust<sup>59</sup>.

### **V. Corruption & Human Rights**

There is a linkage between corruption and human rights. But a large part of the prevailing discourse on corruption tends to emphasize on its economic consequences, ignoring one of its most negative effects—the impact it has on human rights. However, a number of authors mention the serious economic, social and political adversity it causes to a nation and its population, which directly results in violation of fundamental rights and freedoms. International anti-corruption laws further emphasizes on the economic and political impact of corruption than the human rights impact. Under the human rights jurisprudence, it is the State, which is the principal duty bearer for human rights. Human rights obligations apply to all branches of government (executive, legislative and judicial) at all levels (national, regional and local). According to human rights jurisprudence, an act (or omission) is attributable to the State when committed, instigated, incited, encouraged or acquiesced in by any public authority or any other person acting in an official capacity<sup>60</sup>. Corruption is committed by persons who work on either the public sector or the private sector. The existence of corruption in a State per se shows the failure of the State towards its human rights obligations. It means that the State is not willing or unable to enforce its human rights obligations to persons living in its jurisdiction. Both are violations of State obligations towards human rights. Corruption affects the very nature of equality, human dignity and the quest for free personhood. It affects the very foundations of human rights. The violations of various human rights are the natural consequence of the attack of the foundation of human rights by the acts of corruption<sup>61</sup>.

Strengthening the enforcement of the international human rights law regime will have a supportive role for reducing corruption. Whenever human rights are guaranteed, there will be social empowerment and social accountability<sup>62</sup>. Whenever there is widespread corruption, it can be said that, there will be a violation of human rights. There are three causal links between corruption and violation of human rights. These are, when corruption is a direct, indirect or remote cause for the violations of human rights<sup>63</sup>. Corruption may be

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<sup>59</sup> *Id.* at 14.

<sup>60</sup> *Supra* n. 1 at 17.

<sup>61</sup> *Ibidem.*, at 18.

<sup>62</sup> M. Johnston, ‘The Search for Definitions: The Vitality of Politics and the Issue of Corruption’, (1996) 149 *International Social Science Journal*, 321–325. Quoted in M. Robinson(ed.), *Corruption and Development* (London: Frank Cass, 1998) at 89. Referred in: *Ibid.* At 19.

<sup>63</sup> K. Anukansai, ‘Corruption: The Catalyst for the Violation of Human Rights’. Available at <http://www.nacc.go.th/images/journal/kanokkan.pdf>. Referred in: *Id.*

directly linked to the violation of human rights when a corrupt act is deliberately used as a means to violate a right. For example, a bribe offered to a judge directly affects the independence and impartiality of that judge and hence violate the right to a fair trial. Corruption may also directly violate a human right when a State (or somebody acting in an official capacity) acts or fails to act in a way that prevents individuals from having access to that right<sup>64</sup>. Corruption can be an indirect cause for the violation of human rights when it is a necessary condition for the violation of the right. This situation will arise, for example, if public officials allow the illegal importation of toxic waste from other countries in return for a bribe and that waste is placed, or close to a residential area. If the toxic waste affects the health of persons living in that area, the right to life and health of the residents would be violated indirectly as a result of the bribery. There are times when corruption plays a remote role for the violation of human rights. When corruption during an electoral process raises concerns about the accuracy of the final result, social unrest and protests may occur. In such a case, the right to political participation may be violated directly, and repression of the social protests may also cause serious violation of human rights<sup>65</sup>.

**i) Civil & Political Rights:**

Corruption *per se* is a violation of human rights. It violates different sets of human rights as recognized by international and regional human rights instruments. The equality and non-discrimination are the fundamental principles in human rights. The principle that every individual is equal before the law and has the right to be protected by law on an equal basis is affirmed in all the main human rights treaties. Every individual is entitled to be treated equally by public officials; and if a person bribes a public official, that person acquires a privileged status in relation to other similarly placed individuals who have not partaken in bribery<sup>66</sup>. Similarly, when a person is asked for a bribe in order to obtain a service to which that person is entitled without payment, that person suffers discrimination in relation to other individuals in the same situation. There is a violation of the right in both examples because similar cases are treated in a different manner and the difference in treatment results in corruption which is not an objective or reasonable justification for discrimination<sup>67</sup>.

The right to fair trial is found in many human rights treaties<sup>68</sup>. It is composed of a broad range of standards that provide for the fair, effective and efficient administration of justice. In the context of the judicial system, corruption may be defined as acts or omissions that constitute the use of public authority for the private benefit of court personnel, and result in the improper and unfair delivery of judicial decisions. Such acts and omissions include bribery, extortion, intimidation, influence and the abuse of court procedures for personal gain<sup>69</sup>. This

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<sup>64</sup> Id. at 20.

<sup>65</sup> Id.

<sup>66</sup> P. Eigen, "Corruption is a Human Rights Issue". Available at- [http://www.bhrseminar.org/2004%20Documents/Peter\\_Eigen\\_09.12.04.doc](http://www.bhrseminar.org/2004%20Documents/Peter_Eigen_09.12.04.doc). Referred in: Id. at 21.

<sup>67</sup> Id.

<sup>68</sup> For Example, Art.14 of the ICCPR; Art.6 & 7 of the EHCR; Art.8 & 9 of ACHR and Art.7 of the ACHPR.

<sup>69</sup> See Transparency International, *Global Corruption Report 2007- Corruption in Judicial Systems*. (Cambridge: Cambridge University press, 2007). Referred in: Supra n. 1 at 22

covers a wide range of acts carried out by actors at different points in the judicial system (the judiciary, the police and prosecutors).

The right to an effective remedy is guaranteed by most of the international human rights instruments<sup>70</sup>. It asserts that, when a human rights violation occurs, a State has a duty to provide victims with an effective remedy. Failure to do so can create a climate of impunity, particularly when States intentionally or regularly deny remedies<sup>71</sup>. States are under an obligation to provide accessible, effective and enforceable remedies to uphold civil and political rights. A person claiming a remedy is entitled to have his or her claim determined and enforced by a competent domestic authority, and States must ensure that this can occur. If there is corruption in the justice system, it is probable that some of these standards will not be respected. This may create the situation of impunity in addition to the violation of the right to an effective remedy.

The right to participation affirms that all citizens should be entitled to engage in decision-making processes that affect them. The major political expressions of the right to participation are the freedom to vote and stand for elections, the right of equal access to public services, and the freedoms of association and assembly. These rights are enshrined in several human rights treaties<sup>72</sup>. It is a plain fact that bribing voters to persuade them to vote or refrain from voting interferes with the integrity of an election and therefore violates the right to vote. In other cases, people may engage in acts, such as bribery, that are recognized to be corrupt, to obtain public service employment. This violates the right to equal access to public services which is one of the expressions of the right to participation.

## **ii) Economic, Social & Cultural Rights:**

Under the International Covenant on Economic, Social and Cultural Rights (ICESCR) States are obligated to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures<sup>73</sup>. States are under obligation to allocate the ever increasing resource to the progressive realization of rights recognized under the Covenant, prohibited from taking deliberately retrogressive measures and provide public service such as food, education, health, water and house by taking into account the principles of availability, accessibility, acceptability and adoptability.

Corruption implies that the State is not taking steps in the right direction. When funds are stolen by corrupt officials, or when access to healthcare,

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<sup>70</sup> For Example, Art.2(3) of ICCPR; Art.2 & 3 of CEDAW; Art.6 of CERD; Art.2 & 3 of ICESCR; Art.12, 13 & 37(d) of CRC

<sup>71</sup> J. Bacio Terracino, "Corruption and Human Rights : Corruption as a Violation of Human Rights". Working Paper, International Council on Human Rights Policy. Available at [http://www.ichrp.org/files/papers/150/131\\_terracino\\_en\\_2008.pdf](http://www.ichrp.org/files/papers/150/131_terracino_en_2008.pdf). Referred in: *Supra n. 1* at 22

<sup>72</sup> For Example, Art.25 of ICCPR; Art.7 of CEDAW; Art.3 of the First Protocol of ECHR; Art.23 of ACHR; and Art.13 of ACHPR

<sup>73</sup> Art.2(1) of ICESCR

education and housing is dependent on bribes, a State's resources are clearly not being used properly to realize economic, social and cultural rights.

The right to food, also referred to as the right of everyone to be free from hunger, is a component of the more general right to an adequate standard of living<sup>74</sup>. Corruption can compromise the realization of this right. Corruption is identified as one of the seven major economic obstacles that hinder the realization of the right. Hence, when resources allocated for food are diverted to private uses, the right to food will be violated by the acts of corruption.

The right to adequate housing like that of the right to food is one of the component elements of the right to an adequate standard of living<sup>75</sup>. It focuses on the obligation to ensure that every one has housing that is safe, healthy and adequate<sup>76</sup>. Corruption may violate this right by restricting one or more of its elements. Besides, as discrimination is inherent in acts of corruption, it will violate the right to adequate housing. Article 12 of the ICESCR is allotted for the right to the highest attainable physical and mental health. It is explained as the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health<sup>77</sup>. Corruption affects the enjoyment of this right. Corruption in the health sector occurs in three main forms<sup>78</sup>: in management of financial resources (budget allocation); in the distribution of medical supplies (purchasing and marketing); and in the relationships of health workers with patients. In all its faces, corruption will violate the right to the highest attainable physical and mental health as it diverts the budget to individual accounts and discriminates between individuals.

### **iii) Environmental & Developmental Rights:**

All peoples have the right of self-determination, the right to freely dispose of their natural wealth and resources and thereby freely pursue their economic, social and cultural development<sup>79</sup>. At the same time they have a right to live in a clean environment<sup>80</sup>. A government that tolerates or actively engages in the corrupt transfer of ownership of national wealth to the benefit of some nationals, who occupy positions of power or influence in the society operates to deny the people, individually and collectively, their right to freely use, exploit and dispose of their natural wealth in a manner that advances their development.

## **VI. Approaches to Combat Corruption**

### **A) Legal Approach:**

Recent anticorruption efforts in India are taking place at a time of increasing global attention to combatting corruption. The ways in which the political, economic and business costs of corruption have played out in India

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<sup>74</sup> Art.11(2) of ICESCR.

<sup>75</sup> Art.11(1) of ICESCR.

<sup>76</sup> Supra n. 1 at 24.

<sup>77</sup> United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000)*, Article 12 of the ICESCR. Referred in: Ibidem at 24.

<sup>78</sup> Supra n. 71.

<sup>79</sup> Common Art.1 of the ICCPR and ICESCR, Art.20-22 of the ACHPR and the Declaration on the Right to Development adopted by the United Nations General Assembly Res. 41/128(1986).

<sup>80</sup> Art.24 of ACHPR

indicate the importance of effective anticorruption legislation in the country. Transparency International ranked India 79th out of 176 countries in the organization's 2016 Corruption Perceptions Index<sup>81</sup>. According to a KPMG survey of British enterprises and investors operating in India, concerns over corruption and weak governance have hindered investment in India<sup>82</sup>. There are indications that U.S. investors view India as a "high risk business" environment where corruption "is a major concern"<sup>83</sup>. Corruption in India has created substantial uncertainty in the business environment. Given India's interests in attracting foreign investment, albeit while balancing other national objectives, policy-makers may find corruption's destabilizing effect on businesses particularly troubling. Indian domestic investors have expressed similar concerns about a corrupt business environment in India. Domestic investors looking for a more stable business environment may direct their investments elsewhere as corruption undermines their confidence in the Indian economy<sup>84</sup>.

#### **i) Corruption Laws in India:**

India's legislation relating to corruption and corrupt practices includes a web of legislations and Government regulations. Public servants in India can be penalized for corruption under the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988. The Benami Transactions (Prohibition) Act, 1988 prohibits benami transactions. The Prevention of Money Laundering Act, 2002 penalises public servants for the offence of money laundering<sup>85</sup>.

The IPC defines "public servant" as a government employee, officers in the military, navy or air force; police, judges, officers of Court of Justice, and any local authority established by a Central or State Act. Section 169 pertains to a public servant unlawfully buying or bidding for property. Section 409 pertains to criminal breach of trust by a public servant.

Under The Prevention of Corruption Act, 1988 in addition to the categories included in the IPC, the definition of "public servant" includes office bearers of cooperative societies receiving financial aid from the government, employees of universities, Public Service Commission and banks. If a public servant takes gratification other than his legal remuneration in respect of an official act or to influence public servants, is liable to minimum punishment of six months and maximum punishment of five years of imprisonment and fine. The Act also penalizes a public servant for taking gratification to influence the public by illegal means and for exercising his personal influence with a public servant. If a public servant accepts a valuable thing without paying for it or paying inadequately from

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<sup>81</sup> Corruption Perception Index 2016, Transparency International, Available at- <http://www.transparency.org/country/IND> (Accessed on- 03-02-18).

<sup>82</sup> KPMG, Challenges Faced by British Business in India. Referred in: Elisa Solomon, "Targetting Corruption in India: How India Can Bolster It's Domestic Anti-Corruption Efforts Using Principles of The FCPA and The UK Bribery Act", at 911. Available at- <http://scholarship.law.upenn.edu/jil/vol34/iss4/11>(Accessed on-03-02-18).

<sup>83</sup> Toral Patel, "Corrupt Practices in India: No Payoff", (1998) *No.121 Loyola Los Angeles International & Comparative Law Journal*, 389-403. (Quoting statements by a senior commercial officer with the U.S. Commercial Service, American Investors Wary of India, Says U.S. Diplomat, *INDIA J.*, Sept. 13, 1996, at C4). Referred in: Elisa Solomon, *Supra* n. 82.

<sup>84</sup> *Ibidem* at 913

<sup>85</sup> Corruption Laws in India. Available at- [http://www.prsindia.org/administrator/uploads/general/1302844978\\_PRS%20Note%20on%20corruption%20laws.pdf](http://www.prsindia.org/administrator/uploads/general/1302844978_PRS%20Note%20on%20corruption%20laws.pdf) (Accessed on 03-02-18)

a person with whom he is involved in a business transaction in his official capacity, he shall be penalized with minimum punishment of six months and maximum punishment of five years of imprisonment and fine. It is necessary to obtain prior sanction from the Central or State government in order to prosecute a public servant<sup>86</sup>.

The Benami Transactions (Prohibition) Act, 1988 prohibits any benami transaction (purchase of property in false name of another person who does not pay for the property) except when a person purchases property in his wife's or unmarried daughter's name. All properties, that are held to be benami, can be acquired by a prescribed authority and no money shall be paid for such acquisition.

The Prevention of Money Laundering Act, 2002 states that an offence of money laundering has been committed if a person is a party to any process connected with the proceeds of crime and projects such proceeds as untainted property. "Proceeds of crime" means any property obtained by a person as a result of criminal activity related to certain offences listed in the schedule to the Act. A person can be charged with the offence of money laundering only if he has been charged with committing a scheduled offence. The Adjudicating Authority, appointed by the central government, shall decide whether any of the property attached or seized is involved in money laundering. An Appellate Tribunal shall hear appeals against the orders of the Adjudicating Authority and any other authority under the Act. Every banking company, financial institution and intermediary shall maintain a record of all transactions of a specified nature and value, and verify and maintain records of all its customers, and furnish such information to the specified authorities. The penalty for committing the offence of money laundering is rigorous imprisonment for three to seven years and a fine of upto Rs 5 lakh. If a person is convicted of an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985 the term of imprisonment can extend upto 10 years<sup>87</sup>.

The three main authorities involved in inquiring, investigating and prosecuting corruption cases are the Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI) and the State Anti-Corruption Bureau (ACB). Cases related to money laundering by public servants are investigated and prosecuted by the Directorate of Enforcement and the Financial Intelligence Unit, which are under the Ministry of Finance. The CBI and State ACBs investigate cases related to corruption under the Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860. The CBI's jurisdiction is the Central government and Union Territories while the State ACBs investigates cases within the States. States can refer cases to the CBI. The CVC is a statutory body that supervises corruption cases in government departments. The CBI is under its supervision. The CVC can refer cases either to the Central Vigilance Officer (CVO) in each department or to the CBI. The CVC or the CVO recommends the action to be taken against a public servant but the decision to take any disciplinary action against a civil servant rests on the department authority. Prosecution can be

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<sup>86</sup> *Ibidem*

<sup>87</sup> *Ibid*

initiated by an investigating agency only after it has the prior sanction of the central or state government. Government appointed prosecutors undertake the prosecution proceeding in the courts. All cases under the Prevention of Corruption Act, 1988 are tried by Special Judges who are appointed by the Central or State government<sup>88</sup>.

## **ii) Prevention of Corruption (Amendment) Bills and Law Commission Reports:**

After India ratified the UNCAC<sup>89</sup>, the Government of India initiated measures to amend POCA to bring it in line with international standards. Materially, these included –

- a. Prosecuting private persons as well for offences,
- b. Providing time-limits for completing trials,
- c. Attachment of tainted property,
- d. Prosecuting the act of offering a bribe.

In 2013 the Amendment Bill was introduced in Parliament. The Amendment Bill was referred to the Standing Committee. The Standing Committee submitted its report in February 2014. Thereafter, based on the recommendations of the Standing Committee, the Amendment Bill was referred to the Law Commission of India (LCI). LCI submitted its report (Law Commission Report No. 254) in February 2015<sup>90</sup>. LCI has recommended substantial changes to the Amendment Bill including dropping certain amendments.

The Amendment Bill has sought to adapt certain provisions of the UK Bribery Act, 2010 (UK Act) and has also incorporated provisions to criminalise bribe giving and prosecution of companies for offences under POCA. The Amendment Bill uses the expression ‘undue financial or other advantage’ and LCI has recommended that this be deleted and instead, the Amendment Bill use the expression ‘undue advantage’. This is because the expression ‘undue financial or other advantage’ can lead to ambiguity as there are no guidelines on what may be a due financial or other advantage. LCI has also reasoned that sexual gratifications may not be considered an ‘other advantage’ and hence, it is important to give a wider but clearer definition to illegal gratifications obtained under POCA. The proposed Section 7 relates to offences committed by a public servant and provides for obtaining financial or other advantages in relation to a ‘relevant public function’. The proposed Section 8 uses the expression ‘improperly’ in the context of performance of a public duty. The proposed Section 9 provides that a commercial organisation shall be guilty of an offence ‘if any person associated with the commercial organisation offers, promises or gives a financial or other advantage to a public servant...’. However, it shall be a valid defence for the commercial organisation if it is able to prove that it had

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<sup>88</sup> *Id.*

<sup>89</sup> Government of India ratified UN Convention Against Corruption (UNCAC) and UN Convention Against Transnational Organized Crime (UNTOC) and its 3 Protocols on 12<sup>th</sup> May 2011 and it became 4<sup>th</sup> South Asian Country after Afganistan, Pakistan and Sri Lanka to ratify UNTOC.

<sup>90</sup> Nishith Desai Associates, “A Comparative View of Anti-Corruption Laws of India: A Legal, Regulatory, Tax and Strategic Perspective”, at 7. Available at- [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/A\\_Comparative\\_View\\_of\\_Anti\\_Corruption\\_Laws\\_of\\_India.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/A_Comparative_View_of_Anti_Corruption_Laws_of_India.pdf) (Accessed on- 03-02-18).

‘adequate procedures’ in place. The proposed Section 10 (1) provides that if a commercial organisation is found guilty of an offence under Section 9, every ‘person in charge’ of the commercial organisation will also be liable to prosecution. The proposed Section 10 (2) however provides that if an offence can be attributed to the ‘consent or connivance of, or is attributable to, any neglect’ of any director, manager, secretary or other officer, then, notwithstanding Section 10(1), such director, manager, secretary or other officers shall be liable to be prosecuted. LCI has rightly highlighted these concerns and has suggested that the proposed Section 9 and 10 be kept in abeyance pending notification of ‘adequate procedures’. LCI has also made recommendations to amend the provisions relating to attachment proceedings under the Amendment Bill and has recommended that the attachment mechanism presently under the Prevention of Money Laundering Act, 2002 (‘PMLA’), 1944 Ordinance or the Lokpal and Lokayukta Act, 2013 be adopted rather than have new attachment proceedings / mechanism under the Amendment Bill. As rightly pointed out by LCI, it is important to streamline such proceedings and avoid multiple enforcement mechanisms<sup>91</sup>.

### **iii) Comparison of India's Legal & Regulatory Framework with International Standards:**

The UNCAC is a comprehensive convention that provides for domestic rules and treatment of transactions with foreign officials as well. It provides for treatment of transactions of public sector, private sector, preventive action, attachment etc. while the UNCAC has defined certain key expressions, POCA and the Amendment Bill do not. The Amendment Bill also do not provide for prosecution of offences in the private sector even though a specific provision has been made in the UNCAC. UNCAC provides for liability of legal persons. As rightly noted by LCI, the absence of guidelines in respect of prosecution of commercial organisation and its officers under the Amendment Bill is a matter of concern. UNCAC uses the expression ‘undue advantage’, which is also recommended by LCI. An important provision of UNCAC that is missing in India’s corruption laws is preventive anti-corruption policies and practices. Another important provision of UNCAC that is missing in all the laws mentioned above is the right of an aggrieved party to seek compensation/damages for loss caused due to corrupt practices.

OECD Guidelines for Multinationals, 2011 (OECD Guidelines), provides for guidelines for enterprises to combat bribery, bribe solicitation and extortion. The measures provided in the OECD Guidelines relate to substantive provisions in an anti-bribery legislation and preventive measures to be adopted by a multinational enterprise. However it will be seen that while even the OECD Guidelines lay stress on preventive measures, in India there isn’t an unified code of conduct for companies (or commercial organisations) to comply with the best anti-corruption practices<sup>92</sup>.

### **B) Human Rights as a Preventive Tool for Corruption:**

All forms of corruption tend either directly, indirectly or remotely to violate human rights. Conversely, wherever human rights are not protected, corruption is likely to flourish. Protection and promotion of human rights will enhance the effectiveness of anti-corruption measures.

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<sup>91</sup> *Ibidem* at 8.

<sup>92</sup> *Ibid* at 21.

### **i) Guarantying Human Rights:**

Implementation of human rights can contribute for the prevention of corruption because human rights address abuses of power and corruption is essentially an abuse of power<sup>93</sup>. A human rights analysis throws light on the power relations in a society because it pays particular attention to discrimination, equity and the removal of economic, legal and political obstacles that prevent marginalized groups from enjoying their rights. As a result, a human rights analysis can contribute directly to the design and implementation of anti-corruption policies. If basic human rights are guaranteed, especially the rights to the basic necessities of life, then the incidence of corruption and related offences would be reduced<sup>94</sup>.

As the problem of corruption is multi-faceted, there is no one size fit all principle to deal with it. There are preventive and curative approaches for combating corruption as stated by Ofosu-Amaah, Soopramanien and Uprety;

*From a domestic point of view, there are two separate, but complementary, aspects of the fight against corruption. The first consists of upstream rules and norms of good behavior (codes of conduct, manifestos, and declarations) conducive to a corruption free society (preventive approach). The second aspect consists of anti-corruption laws proper (general or specific legislative enactments), whose purpose is to provide appropriate remedies, including criminal sanctions and penalties, procedural rules and institutional mechanisms as needed, to combat acts of corruption that have already occurred (curative approach). The first aspect deals with corruption ex ante while the second aspect deals with corruption ex post<sup>95</sup>.*

Ensuring the effective enforcement of human rights as norms of good behavior will have a preventive role in fighting corruption. For example, the right to freedom of expression, assembly and association are vital to fight corruption<sup>96</sup>. Where governments permit information to flow freely, it should become easier to identify and denounce cases of corruption. Persons will not commit corruption at least with impunity due to fear of public scrutiny.

### **ii) Ensuring Non-Discrimination and Participation:**

Giving due effect to the enforcement of human rights will reduce the problem of corruption. But there are also some norms and principles of human rights which the anti-corruption campaign shares<sup>97</sup>. Guarantying these norms and

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<sup>93</sup> Transparency International, 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Opportunities and Possibilities', (Council on Human Rights Policy- 2010) at 3. Referred in: *Supra* n. 1, at 26.

<sup>94</sup> *Ibidem*.

<sup>95</sup> WP. Ofosu-Amaah, R. Soopramanien and K. Uprety, 'Combating Corruption: A Comparative Review of Selected Legal Aspects of State and Major International Initiatives', in CN. Ojukwu, 'Legal and Institutional Mechanisms Combating Corruption in Nigeria, Paper presented at 15th International Conference of the International Society for the Reform of Criminal Law, Australia, 26-30 August 2001. Referred in: *Ibid*, at 27.

<sup>96</sup> Transparency International, 'Corruption and Human Rights: Making the Connection', (International Council on Human Rights Policy, 2009). Referred in: *Id*.

<sup>97</sup> *Id*.

principles will prevent the incidence of corruption. These norms and principles are non-discrimination and participation. The principle of non-discrimination is fundamental to human rights. States parties are required to implement it without any condition<sup>98</sup>. Corruption is associated with discrimination for two simple reasons<sup>99</sup>. *Firstly*, this is because corruption distorts the allocation of public resources, which causes the administration of public services to become discriminatory and arbitrary. *Second*, corruption is often associated with discrimination based on race, color, sex, language, religion, political opinion, national or social origin or sexual orientation. Corruption has a disproportionate impact on people who are victims of discrimination. However, corruption reinforces exclusion and discrimination and tends to magnify and exacerbate pre-existing human rights problems.

Participation is also at the heart of human rights discourse. It is constructed out of several key rights<sup>100</sup>. To participate effectively, people need to organize themselves freely (freedom of association), to communicate their opinions frankly (freedom of expression) and to inform themselves (right to access to information). Citizen participation additionally empowers vulnerable groups to demand and exercise their rights.

### **iii) Social Empowerment:**

Whenever human rights are guaranteed, the society will be empowered. This is because the ever increasing resources and alternatives are open to ordinary citizens<sup>101</sup>. In its classic postulation, social empowerment entails strengthening civil society in order to enhance its political and economic vitality, providing more orderly paths of access and rules of interaction between State and society and balancing economic and political opportunities<sup>102</sup>. Where it is successful, social empowerment will totally eradicate corruption.

## **VII. Conclusion & Suggestions**

The understanding of corruption as a form of injustice and the recognition of the mutually reinforcing relationship between corruption and other forms of injustice provide some insights for anti-corruption reform. Anti-corruption struggle is not just part of a development strategy but should be placed in the broader struggle for social justice. Each act of corruption contributes to building an 'atmosphere', or social context that becomes progressively more corruption-friendly. It is notable that the universal welfare state has been effective in not only reducing economic inequality but also corruption. There is no silver bullet for fighting corruption, but we

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<sup>98</sup> Art.2 & 3 of the ICESCR; Art.2, 3, 14, 24, 26 & 27 of the ICCPR; CEDAW and CERD. Referred in: *Id.*

<sup>99</sup> *Supra* n. 96

<sup>100</sup> The right to participation in human rights standards is constructed of Art.19 (to hold opinions), Art.21 (peaceful assembly), Art.22 (freedom of association), Art.25 (the right to take part in the conduct of public affairs, the right to elect and be elected) of the ICCPR; Art.15 (the right to take part in cultural life) of the ICESCR; Art.7 & 8 (women participation in politics and public life) of CEDAW; Art.12 (the right to be heard), Art.13 (freedom to seek, receive and impart information), Art.15 (freedom of association and peaceful assembly), Art.31 (guarantying the right to participate in cultural life and the arts) of the CRC and Art.29 & 30 (participation in political, public life, cultural life, leisure, recreation and sports) of the CRPD.

<sup>101</sup> *Supra* n. 62, at 29.

<sup>102</sup> *Ibidem.*

may suggest some ways by which citizens and governments can make progress in the fight against corruption-

1. Main cause of corruption is **lack of values**. We must inculcate with values such as honesty, integrity, selflessness etc. in the minds of children. We should be honest to ourselves. Until and unless we will be honest, we can't control corruption.
2. With the help of **education** we can reduce corruption. It is due to unawareness in the field of law, public rights and procedures thereof that a common and an uneducated suffer out of the corrupt society.
3. Countries successful at curbing corruption have a long tradition of government openness, freedom of the press, transparency and access to information. Access to information increases the responsiveness of government bodies, while simultaneously having a positive effect on the levels of public participation in a country. So promotion of **transparency and access to information** is an important tool to combat corruption.
4. In government jobs, selection procedure involves corrupt practices. So the **selection procedure should be transparent**. Entire recruitment process should be online.
5. Many employees in government positions receive low salary. Hence they expect to make money by bribery. Their **salaries should be raised** periodically. But higher salaries should be combined with exemplary punishment, including dismissal from service and a police case if an employee is caught indulging in corrupt practices.
6. In many offices of the government sector, the work load has gone up drastically but the recruitment of vacancies has declined. So the **number of workers should be increased**.
7. In every ATM there are camera to keep a watch on the public taking their money, then why not government offices have cameras to have a watch on the employee's performance. So **CCTV camera in the government offices** will help to have vigil over the employees.
8. There should be accountability of daily work done in government works and targets to complete the work on time basis, to **speed up the work process in government institutions**.
9. In many countries, reforms focussing on improving financial management and strengthening the role of auditing agencies have achieved greater impact than public sector reforms on curbing corruption. One such reform is the disclosure of budget information, which prevents waste and misappropriation of resources. Thus **reform in public administration and financial management** helps in curbing corruption.
10. **Eligibility of politician** should be fixed. The provision that, if there is any criminal record against a person then he would not be eligible for election. **Political parties should be brought under RTI**, will affect the smooth functioning of political parties.
11. **Effective law enforcement** is essential to combat corruption. Successful enforcement approaches should be supported with a strong legal framework, law enforcement branches and an **independent and effective judicial system**. Establishing fast track courts and giving severe punishment for corruption practice will keep a control on corruption.

12. The police should be separated into two wings- one for investigation and the other for maintaining law and order. The two functions are different and require different skill sets. Thus **Police reforms** in this regard is the need of the hour.

13. Making payments online through bank accounts and provision of bills for every transaction involves money. Public should opt for **cashless transactions** where possible. This will limit the corruption related to money because many businessmen do not pay taxes on such transaction and escape. This will be a better corruption watch.

14. Private businesses caught indulging in corrupt practices or bribing officials should be blacklisted. Thus **blacklisting corrupt businessmen** will also keep a control on corruption.

15. **Citizens should be strengthened** and empowered to demand for anti-corruption and to hold government accountable. It is a sustainable approach that helps in building mutual trust between citizens and government.

Combating corruption can and should go together with combating inequality and oppression. We should struggle to reform unjust rules and institutions that breed institutional corruption and construct a more just society. Anti-corruption reforms should not be narrowly restricted to establish the rule of law, but aim to shape social conditions and institutions so that people behave honestly because they believe the basic structure of their society is just<sup>103</sup>. These actions and anti-corruption strategies will help all countries to introduce the appropriate legislation, institutional change and practical tools to ensure good governance and development.

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<sup>103</sup> Jon Elster, "On the Possibility of Rational Politics", (1987) 28 *Archives Europeennes de Sociologie*, 67-103. Referred in: *Supra* n. 4, at 30.

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gkl&ifjgkl ugha djuk pkfg,] ,slk djus ls jtkk  
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gkl&ifjgkl djus ls jtkk dk frjLdkj gksrk gS]  
lsod u ekxus ;ksX; oLrq,a Hkh jtkk ls ekax cSBrs  
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- 9- **Hkkjrh; fpUrdksa ds erkuqlkj ^^/kesZ.k 'kkflrs  
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^fof/k ds 'kklu\* lEcU/kh mijksDr izkphu Hkkjrh;  
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oLrqr% lokZf/kd izxfr'khy o lqlH; ekus tkrs gSa  
A bl lkoZdkfyd o lkoZHkksSfed vo/kkj.kk ds egRo  
dk vkHkkl Hkkjr esa lkekftd&ekufodh ds fpUrdksa  
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**pyku~ vf/kdkjku~ 'k=q"kg fe=s"kg cU/kqoxsZ"kg]  
ukid`re~ uksid`re~ u lRd`re~ rfgZ rsu fda  
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cU/kq&ckU/koksa dk Hkyk ugha fd;k vkSj vU; vPNs  
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- 10- fof/k dh 'kfDr dk mYys[k mifu"knksa esa bl izdkj  
fd;k x;k gS % "Law is the King of Kings, And more powerful  
than the Kings, Nothing can be mightier than the Law, by whose  
strength the weak may prevail over the King."

11. `ijrU= Hkkjr ds nkSj esa Hkkjr esa xouZj tujy ds in ij fu;qDr jgs ykMZ eSdkys us vesfjdk ds lafo/kku ij dfri; fVIif.k;kWa dh Fkha ftldh lqlaxrrk Hkkjr dh LokrU=~;ksRrj lkafo/kkfud O;oLFkk ds vUrxZr l``ftr yksdrkaf=d laLFkkvksa ds lEcU/k esa dnkfpr~ fopkj.kh; gks ldrh gS %`  
 "Your constitution is all sail and no anchor. As I said before, when a society has entered on this downward progress, either civilization or liberty, must perish. Either some Caesar or Napoleon will seize the reins of Government with a strong hand; or your republic will be as fearfully plundered and laid waste by barbarians in the twentieth century as the Roman Empire was in the fifth; with this difference, that the Huns and Vandals who reavaged the Roman Empire came from without, and that your Huns and Vandals will have been engendered within your own country by your own institutions."
12. `blh izdkj fczfV'k bfrgkldkj vkSj dfo ykMZ csdu }kjk jk"V^&jkT; vkSj mlds ukxfjdksa ds nkf;Rocks/k ds izzfr mnklhu gks tkus ij jk"V^ jkT; ds vo';EHkkoh iru ds ckjs esa bl izdkj dgk gS %`  
 "When the Athenians finally decided not to give to the State, but the State to give to them, the freedom they most wished for was freedom from responsibility, the Athenians ceased to be free and never became free again."

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## LAW OF ARREST

Dr Babbu Sarang\*

The word “arrest” is derived from French meaning to stop or stay.

The word arrest when used in its ordinary and natural sense means the apprehension or restraint or the deprivation of one’s personal liberty. The question whether the person is under arrest or not depends not on the legality of the arrest but on whether he has been deprived of his personal liberty to go wherever he pleases. When used in the legal sense in connection with criminal offences, an ‘arrest’ consists in the taking into custody of another person under authority empowered by law for purpose of holding or detaining him to answer a criminal charge. The essential elements to constitute an arrest are that there must be an intent to arrest under the authority.

### **Prelude**

“When they arrested my neighbours, I did not protest. When they arrested the men and women in the opposite house. I did not protest. And when they finally came to me ..... there was no body left to protest”.

**- V.R. Krishna Iyer, J.**

Arrest means the deprivation of a person of his liberty by legal authority real or apparent. In a free society like ours law is quite jealous of the personal liberty of every individual and does not tolerate the detention of any person without legal sanction. Evidently the power to arrest a person and the right of personal liberty guaranteed to all persons runs contrary to each other. However, the two can and must be reconciled in light of balance that is struck, between community interest and individual liberty. In every democracy the rule of law is prevails.

Arrest can be defined the act of taking the person into custody under the authority of law or by compulsion of another kind and includes that period from the moment he is placed under the restraint up to the time he is got before an authority competent to order his continuous custody or release him.

The Code of Criminal Procedure, 1973, Ch. V relates to arrests of individuals. A police officer u/s 41 Cr.P.C. can arrest the person without warrant in a cognizable case/offence and in certain other circumstances. Thus the police person is equipped with the huge power which can be easily misused in its exercise in a wrong and illegal manners.

The need to arrest is voiced in the following terms:

- (a) As the preventive or precautionary measures: in cases where there is imminent danger as to commission of a cognizable offence, or in case of habitual offender and where it is necessary to arrest the accused to bring his moments under restraint to infuse confidence among the terror – stricken victims or where the accused is likely to abscond and evade the process of law.
- (b) Where the accused is given to violent behaviour and is likely to commit further offences unless his moments are brought under restraint or the

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accused is the habitual offender and unless kept in the custody is likely to commit similar offences again.

- (c) Where the arrest persons is necessary to protect the arrested person himself or
- (d) Where arrest is necessary to secure or preserved evidence or relating to the offence or
- (e) Where such arrest is necessary to obtain evidence from the person concern in an offence punishable with 7 years or more.
- (f) To make the investigation effective and fruitful: Arrest facilitates interrogation and at times leads to confession;
- (g) Securing attendance of accused at the trial.

Arrest consists of actual seizure or touching of a person's body with a view to his detention. The pronouncing of words of arrest is not an arrest unless the person shut to be arrested submits to the process and goes with the arresting officer. There are three modes of the undertaking arrest: Submission to the custody by word or action, touching of the body of the person to be arrested, confining of the body of such person.

#### **Provisions of Arrest in Cr.P.C.**

The term 'Arrest' is not defined either in the court or in various substantive Act. The word 'arrest' is used in its ordinary and natural sense means the apprehension or restraint are the deprivation of one's person liberty. When used in the legal sense in the procedure connected with criminal offence and consists in taking into custody of another person under authority empowered by law.

#### **Niranjan Singh Vs. Prabhakar, A.I.R. 1980 S.C. 785**

It is held by Hon'ble Apex Court that in cases where the accused persons were not arrested by the police but surrendered before the Magistrates the taking into custody of such persons by Magistrates will come within the ambit of term arrest.

#### **Birendra Kumar Rai Vs. Union of India, 1992 Cri.LJ 3806 Allahabad**

The term arrest has not been defined in the Act Sections 41, 42, 43 and 44 say that police officers, private persons and Magistrates can arrest offenders, Section 46 lays down the manner of arrest by touching or by confining the body unless there is submission to custody. From this it can easily be inferred that the term arrest means taking into custody of a person by arresting or by complete submission by the person to be arrested to the custody of the police or of other person. If the person to be arrested submits to the custody as said above his arrest is complete. If 'however' he does not submit, the person executing the warrant of arrest can touch his body or confine him to complete the arrest.

#### **2001 (3)CRR 2247 Sangam Lal Vs. State of U.P. (DB)**

The term 'Arrest' is very specifically described in this case by Allahabad High Court – Person not arrested as a accused and not in custody volunteering to make statement about Gandasa used in murder. It is enough for purpose of S. 27 Evidence Act. For this purpose police custody might when include surveillance introduction before arrest. The law is well settled that in order to attract S. 27 of the Evidence Act it is not necessary that accused should have been under arrest

and it is enough if he comes into the hands of a Police Officer or is under some short of surveillance or vistriction.

Delhi Judicial Service Association Tis Hazari Court Vs. State of Gujarat,  
A.I.R. 1991 S.C. 2176

A Magistrate, Judge or any other Judicial Officer is, liable to criminal prosecution for an offence like any other citizen but in view of the paramount necessity of preserving the independence of judiciary and at the same time ensuring that infractions of law are properly investigated, the following guidelines laid by the Supreme Court in **Delhi Judicial Service Association, Tis Hazari Court Vs. State of Gujarat** should be followed:-

- (A) If a Judicial Officer is to be arrested for some offence, it should be done under intimation to the District Judge or the High Court as the case may be.
- (B) If facts and circumstances necessitate the immediate arrest of a Judicial Officer of the subordinate Judiciary, a technical or formal arrest may be effected.
- (C) The fact of such arrest should be immediately communicated to the District and Sessions Judge of the concerned District and the Chief Justice of the High Court.
- (D) The Judicial Officer so arrested shall not be taken to a police station, without the prior order of directions of the District Judge, if available.
- (E) Immediate facilities shall be provided to the Judicial Officer for Communication with his family members, legal advisers and Judicial Officers, including the District and Sessions Judge.
- (F) No statement of a Judicial Officer, who is under arrest be recorded nor any panchanama be drawn up nor any medical tests be conducted except in the presence of the Legal Adviser or the Judicial Officer of equal or higher rank, if available.
- (G) There should be no handcuffing of a Judicial Officer. If, however, violent resistance to arrest is offered or there is imminent need to effect physical arrest in order to avert danger to life and limb, the person resisting arrest may be over-powered and handcuffed. In such case, immediate report shall be made to the District & Sessions Judge concerned and also to the Chief Justice of the High Court. But the burden would be on the police to establish the necessity for effecting physical arrest and handcuffing the Judicial Officer and if it be established that the physical arrest and handcuffing of the Judicial Officer was unjustified, the Police Officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and, or damages, as may be summarily determined by the High Court.

The above guidelines are not exhaustive but these are minimum safeguards which must be observed in case of arrest of a Judicial Officer.

**State of U.P. Vs. Deoman Upadhyaya, A.I.R. 1960 S.C. 1125**, it is held that when a person not in custody approaches a Police Officer investigating and offence and offer to give information leaving to the discovery of the facts having a bearing on the charge which may be made against him. He may be appropriately

deemed to have surrendered himself to the police. This section does not contemplate any formality before a person can be set taken in custody submission to the custody by word or action by person is sufficient.

***Provisions of Arrest have been given in Section 41 Cr.P.C. upto Section 46.***

According to S. 41 Cr.P.C. –

- (7) No arrest can be made on the ground that the delinquent may commit a cognizable offence in future.
- (8) On mere suspicion, police must not arrest under Section 41, Cr.P.C., unless the suspicious is well founded.
- (9) Arrest of a 7 years old child on the ground of his being concerned in a cognizable case is illegal.

**Arrest in Court Building**

**Niharendu Vs. Porter, AIR 1945 Cal 107**

An arrest can be made in the court building. Person going to and coming from the Court upon the business of the Court in connection with litigation are exempt from arrest under civil process, but there is no exemption in respect of criminal process. If such general exemptions were to be available the Court building would become a sanctuary for criminals. There has been cases where arrests on criminal process have occurred in the Sessions Court when a prisoner has been acquitted or discharged on one charge and re-arrested in the Court, while the Judge is sitting, on another charge.

**Arrest illegal its resistance or defiance no offence**

**Mullasingh Vs. State AIR 1968 All. 132**

No doubt if arrest is not justified in law at the time of the arrest nothing untoward happens and the person arrested is brought to the custody of the Court the trial of the accused will not vitiate on this ground; but if there is resistance to an illegal arrest, the accused is rescued and the arresting party is assaulted no offence is committed.

**Arrest – Mention of time and place necessary**

**Rahimal Vs. State of U.P., 1992 Cri LJ 3819 at 3821 (All) (DB)**

The investigating officer was stated that the appellant was arrested in the night of 8/9-9-1977. The time and place of arrest was not disclosed. The investigating officer ought to have given a full detail, as to in what manner the appellant was arrested. This would enable the Court to assess whether the witnesses of identification were involved in arrest and that they had any opportunity to see the appellant. A single sentence of the investigating officer regarding arrest without mentioning even the time and place was not sufficient to prove the arrest.

**Non-compliance of legal requirement**

**Vikram Vs. State, 1996 Cri LJ 1536 at 1540 (All) (FB)**

An arrestee must be communicated the grounds of his arrest, is a constitutional safeguard, provided under Part III of the Constitution. He will be within his rights to point out that the said provisions have not been complied with as soon as produced before a Magistrate within twenty four hours of his arrest.

**Detention not illegal on non-disclosure of reasons**

**Om Prakash Dwivedi Vs. State, 1996 Cri LJ 603 (All)**

In the present case the applicant was apprehended at the spot at the time of the commission of the crime and handed over to the police. Even a lay-man would understand the reason of his detention in these circumstances. The applicant is an Advocate and as such a person conversant with law. Therefore, it is reasonable to presume that he must have fully known the reasons of his detention.

**The Magistrate to inform the accused about his right**

**Sheela Barse Vs. State of Maharashtra, AIR 1983 SC 378:1983 Cri LJ 642**

The accused has right to get himself medically examined and it is duty of the magistrate to inform him that he has such right of medical examination, if he has complaint of torture mal treatment.

**Natarav Vs. State of Orissa, AIR 1975 SC 1665**

A police officer arresting a person without warrant must produce him before a Magistrate as soon as possible. If he considers that the investigation may be completed within 24 hours he may keep the arrested person in custody till the investigation is completed certainly within 24 hours. If the investigation cannot be completed within 24 hours, he must produce arrested before the Magistrate immediately. Section 57 (old 61) does not entitle a police officer to keep an arrested person in custody a minute longer that is necessary for the purpose of investigation and it does not give him absolute right to keep a person in custody till 24 hours. He can keep an arrested person for 24 hours only if he can complete the investigation within 24 hours.

**State of Hyderabad Vs. Kankadu, AIR 1954 Hyd. 89: 1954 Cri LJ 651**

The limit of 24 hours for keeping the arrested person in police custody for investigation purposes does not include the time of the journey necessary for bringing the accused to the Magistrate. The accused was arrested on 24.6.52 at 11:30 p.m., sent to Magistrate on 25.6.52 at 8 P.M., the next day because there was no conveyance available till 8 a.m., the custody was held legal.

**Harban Singh Vs. State, AIR 1970 Bom 79: 1970 Cri LJ 325: 71 BLR 599**

The arrested person was kept in custody for more than 24 hours but the time spent up was used for preparation of recovery list and taking the statement of the accused held that the arrest was legal.

**Manoj Kumar Agrawal Vs. State of U.P., 1995 Cri LJ 646 (All)**

Held : where investigating officer explained the detention of the accused from time to time till his production before Magistrate, the custody is not illegal.

**State v. Ram Autar, AIR 1955 All 138**

If the police does not produce the person arrested before a Magistrate within 24 hours and confession of the accused is recorded in that period, the confession would be presumed to be involuntary and irrelevant.

**Law of handcuffing**

The Encyclopedia Britannica, Vol. II (1973 End.) at p. 53 states “handcuffs and fetters are instruments of securing the hands or feet of prisoners under arrest or as a means of punishment”. The three components of irons forced on the human person must be distinctly understood. Firstly to handcuff is to hoop harshly. Further, to handcuff is to punish humiliatingly and to vulgarise the viewers also. Iron straps are insult and pain writ large. Animalizing victim and

keeper. Since there are other ways of ensuring security., it can be laid down as a rule that handcuffs of other fetters shall not be forced on the person of the under trial prisoner ordinarily.

**Prem Shankar Shukla Vs. Delhi Administration, AIR 1980 S.C. 1535**, in this case Hon'ble Supreme Court held that handcuffing is prima facie court considered the matter of handcuffing of prisoners under trial as well as convicts in the contest of provision contain in Punjab Police Rule 1974 Lordship observed that handcuffing is prima facie inhuman and therefore unreasonable is over harsh and at the first flush arbitrary.

**Sunil Batra Vs. Delhi Administration 1978 Cri .LJ 1741**, in this case Apex Corut held that accused cannot be confined apart from other prisoners nor he is sentenced so can not be forced to hard labour. He is in the custody because the court has pending confirmation of the sentence commanded the prison authority to keep the sentence in custody.

**M.P. Dwivedi Vs. State 1996 Cri. LJ 1670**, in this court Apex Court found that the contemner was completely insensitive about the serious violations of the human rights of the under trial prisoners in the matter of their handcuffing inasmuch as when the prisoners were produced before him in Court in handcuffs, he did not think in necessary to take any action for the removal of the handcuffs or against the escort party for bringing them to the Court in handcuffs and taking them away in handcuffs without his authorization. This was a serious lapse on the part of the contemner in the discharge of his duties as a Judicial Officer who is expected to ensure that the human rights of the citizens are not violated. Keeping in view that the contemner was a young judicial officer., the Supreme Court recorded its strong disapproval of his conduct and directed that a note of this disapproval be put in the personal file of the contemnror.

**Citizen for Democracy Vs. State of Assam, 1995 BCCR 353 at p. 360 (SC)**

Where a person is arrested by the police without warrant the police officer concerned may if he is satisfied, on the basis of the guidelines given by the Supreme Court above, that it is necessary to handcuff such a person, he may do so till the time he is taken to the police station and thereafter can only be under the orders of the Magistrate as already indicated by the Court.

**Birendra Kumar Vs. State of U.P. (1994) 2 BLJR 975**, in this case the Apex Court described the rights of arrested person as provided in Article 21 & 22 of the Constitution and required to be recognized and scrupulously for effective enforcement of these fundamental rights some guidelines where also issued by Supreme Court

**Amrawati Vs. State of U.P. 1996 Cri LJ 1347 All. Full Bench**

In every case where cognizable offence is disclosed the arrest of accused is not must it is as the discretion of the police officer to arrest or not to arrest but the discretion cannot be arbitrary.

**Person arrested to be informed of grounds of arrest and of right to bail**

- (1) Every police officer of other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

- (2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may, arrange for sureties on his behalf.

**Obligation of person making arrest to inform about the arrest, etc, to a nominated person**

- (1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.
- (2) The police officer shall inform the arrested person of his rights under Sub-section (1) as soon as he is brought to the police station.
- (3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station to such form as may be prescribed in this behalf by the State Government.
- (4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of Sub-section (2) and Sub-section (3) have been complied with in respect of such arrested person.

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## JUDICIAL DISCRETION – WITH SPECIFIC REFERENCE TO SENTENCING

Sunil Kumar Singh-I\*

“Absolute discretion like corruption, marks the beginning of the end of liberty”<sup>1</sup>

### (1) THE MEANING OF JUDICIAL DISCRETION ----

Discretion implies power to make a choice between alternative courses of action.<sup>2</sup> Discretion is the all pervading phenomenon of modern age. Administrative Discretion may be denoted by such words or phrases as “public interest”, “public purpose”, “prejudicial to the public safety or security”, “satisfaction”, “belief”, “efficient”, “reasonable” etc. An American scholar Freaud has also stated the element of discretion in above phrases. In addition he uses the phrases as “Adequate”, “Advisable”, “Expedient”, “Equitable”, “Fair”, “Fit”, “Necessary”, “Practicable”, “Proper”, “Reputable”, “Safe”, “Sufficient”, “Wholesome”, “Appropriate”, “Beneficial”, “Competent”, “Convenient”, “Detrimental” or their opposites. These lack the degree of certainty.

**LATIN MAXIMS** -- (1) “Discretio est discernere per legem quid sit iustum.”<sup>3</sup>

Means -- that exercising discretion is to know through law what is just.

(2) “Judicandum est legibus non exemplis.”<sup>4</sup>

Means -- We must judge by the laws, not by the examples of precedents.

During the process of US constitution making, after declaration of American independence in 1776 till its completion in 1781, ‘Madison’ and ‘Hamilton’, published various federalist papers in the form of pamphlets. The contents of one of such federalist paper number-85, were -

“No happiness without liberty

No liberty without self Government

No self Government without Constitutionalism

No Constitutionalism without Morality

And none of these great goods without stability and order”

The theme of this federalist paper was the establishment of Rule of Law in the United States. This paper also had a great influence on the US people and was equated with the greatest work of----

Aristotle’s --- Politics

Pluto’s --- Republic and

Hobbes’ --- Leviathan

\* O.S.D. (Judicial), High Court, Allahabad

<sup>1</sup> Justice Douglas in New York V U.S. (U.S.,1952).

<sup>2</sup> K.C.Davis

<sup>3</sup> Black’s Law Dictionary, 6<sup>th</sup> edition, 1997, p.466

<sup>4</sup> N.Desai’s manual of Legal Maxims 2<sup>nd</sup> Edn. 2007 p. 250

Like U.S. Constitution, the Rule of Law runs like a golden thread in our Constitution also. Part III of our constitution guarantees certain Fundamental Rights. Art. 14 states that ‘ *The State shall not deny to any person equality before Law or the equal protection of laws within the territory in India.*’ The basic tenet of the Rule of Law adopted by the Courts is ‘ *Be you ever so high the law is above you.*’ The first essential of Rule of Law upon which our whole Constitutional system is based is that discretion, when conferred upon Executive Authorities, must be confined within clearly defined limits.<sup>5</sup> However the statutes are now full of provisions giving discretion of one kind or the other to the government or officials for various purposes. The situation is more or less similar when we speak in the background of Judicial Discretion.

## **2. NEED FOR DISCRETION**

The need for discretion arises because of the necessity to individualize the exercise of discretionary power. When the law is clear, there is no room for discretion. In reverse situation, where discretion has been conferred on an authority, it is expected to exercise the same by applying its mind to the facts and circumstances of the case in hand. Due care and caution is required in exercising discretion. Exercise of discretion should be just and reasonable with fair procedure. There should be judicious use, fairness and reasoned decisions in trial planning, admission of evidence, criminal sentences and disposal of bail applications etc. At one time, under dicey’s influence, it was believed that wide discretionary powers were antithetical to the Rule of Law. K.V. Davis also advocated for the elimination of Discretion. But it was soon realised that discretionary powers are needed.

## **3. PRINCIPLES OF INTERPRETATION TO BE KEPT IN MIND**

The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning. Legislative wisdom can not be replaced by the judge’s views<sup>6</sup>. When a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, judges cannot afford to be wiser<sup>7</sup>.

## **4. EXCEPTION TO THE PLAIN MEANING<sup>8</sup>**

Departure from the literal rule of plain and straight reading can however, be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible or absurd or so impractical as to defeat the very object of the provision. Maxwell on interpretation of statutes (12<sup>th</sup> edn. page 228), under the caption ‘modification of the Language to meet the intention’ in the chapter dealing with; Exceptional Construction’ states the position succinctly:

“Where the Language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent

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<sup>5</sup> S. G. Jaisinghani V Union of India, (1976) 2 SCR 703

<sup>6</sup> Afcons Infrastructure ltd. V Cherian Varkey, 2010(5)AWC 5409 (SC)

<sup>7</sup> Shri Mandir Sita Ramji V Lt. Governor of Delhi, (1975) 4 SCC 298

<sup>8</sup> Cited in Afcons (supra)

purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words or by rejecting them altogether, on the ground that the Legislature could not possibly have intended what its words signify, and that the modification made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of law, except in a case of necessity, or the absolute intractability of the language used.

Justice G. P. Singh extracts four conditions that should be present to justify departure from the plain words of the statute in his treatise "Principles of Statutory Interpretation" ( 12<sup>th</sup> edn- 2010, Lexis Nexis – page144) from the decision of the House of Lords in *Stock V Frank Jones (Tipton) Ltd.*, 1978(1) All ER 948, four conditions are as below.

1. There is clear and gross anomaly.
2. Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective.
3. The anomaly can be obviated without detriment to such a legislative objective.
4. The language of the statute is susceptible of the modification required to obviate the anomaly.

In *Molitor Mal V Kay Iron Works (P) Ltd*<sup>9</sup>, Apex Court held that the Courts will have to follow the rule of literal construction, which enjoins the courts to take the words as used by the legislature and to give it the meaning which naturally implies, held that there is an exception to that rule. Apex Court observed-

“ That exception comes into play when application of literal construction of the words in the statute leads into absurdity, inconsistency or when it is shown that the legal context in which the words are used or by reading the statute as a whole, it requires a different meaning.”

## **5. EXERCISE OF DISCRETION ON SENTENCING - FACTORS TO BE KEPT IN MIND**

It is the duty of every court to award adequate sentence having regard to the nature of the offence and the manner in which it was executed or committed. In *Dennis Council MCG Dautha V State of California*<sup>10</sup>, It has been very aptly indicated that no formula of a fool proof nature is possible, that would provide a reasonable criterion on determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of crime. In the absence of any fool proof formula, which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of

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9 . 2004 (4) SCC 285

10 402 US 183 = 28 LD2d711

gravity of crime, the discretionary judgment in the facts of each case is the only way in which such judgment may be equitably distinguished. In *Shailesh jasant bhai v. State of Gujrat*<sup>11</sup>, Apex Court has held that the Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view, the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

In *Gurmukh Singh V State of Haryana*<sup>12</sup>, Apex Court held that there are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. These illustrative factors are as under ----

- (h) Motive or previous enmity.
- (i) Whether the incident had taken place on the spur of the moment.
- (j) The intention/knowledge of the accused while inflicting the blow or injury.
- (k) Whether the death ensued instantaneously or the victim died after several days.
- (l) The gravity, dimension and nature of injury.
- (m) The age and general health condition of the accused.
- (n) Whether the injury was caused without premeditation in a sudden fight.
- (o) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted.
- (p) The criminal background and adverse history of the accused.
- (q) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was caused of shock.
- (r) Number of other criminal cases pending against the accused.
- (s) Incident occurred within the family members or close relatives.
- (m) The conduct and behaviour of the accused after the incident, whether the accused had taken the injured/deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

The Apex Court further said that the proper and appropriate sentence to the accused is the bounden obligation and duty of the court.

## **6. JUDICIAL DISCRETION FOR INFLICTING CAPITAL PUNISHMENT**

In this regard, Section 354(3) of the code of Criminal procedure, 1973 is relevant which says—“ When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.” It is thus clear that the court’s discretion in awarding death penalty is controlled. The Court can not award death penalty merely on the basis of personal whims, it has to state special reasons guided by the well founded legal principles.

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11 (2006)2 SCC 359

12 JT 2009 (11) SC 122

In *Jagmohan Singh V. State of UP*<sup>13</sup>, A Five Judge Constitution Bench of Supreme court held the capital punishment as constitutional. Supreme court opined that the impossibility of laying down standard (in the matter of sentencing) is at the very core of criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment and that this discretion in the matter of sentence is liable to be corrected by superior courts.... The exercise of judicial discretion on well recognised principles is, in the final analysis, the safest possible safeguard for the accused. that this sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases.

In *Rajendra Prasad V. State of UP*<sup>14</sup>, the majority decision of Apex Court delivered by Justice V.R. Krishna Iyer characterised the above observations in *Jagmohan* (supra) as "incidental observations without concentration on the sentencing criteria", and said that they are not the ratio of the decision, adding "Judgments are not Bible for every line to be venerated. The Apex Court further observed that it is constitutionally permissible to swing a criminal out of corporal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6). The only correct approach is to read into Section 302, I. P. C. and Section 354(3), Criminal Procedure Code., the human rights and human trends in the Constitution. So examined, the right to life and the fundamental freedoms is deprived when he is hanged to death, his dignity is defiled when his neck is noosed and strangled.

The constitution bench of Supreme Court in *Bachan Singh V. State of Punjab*<sup>15</sup>, upheld the constitutional validity of capital punishment and innovated the doctrine of 'rarest of rare' cases, as condition precedent for inflicting death penalty. Apex Court observed that the legislative changes since *Jagmohan* (supra), do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2). Apex Court illustrated certain guidelines as under-

(a) The extreme penalty of death can be inflicted only in gravest cases of extreme culpability:

(b) While imposing death sentence, the circumstances of the offender also requires to be taken into consideration along with circumstances of the crime.

(c) Death sentence be imposed only when life imprisonment appears to be all together inadequate punishment having regard to the relevant circumstances of the crime and

(d) Extreme penalty can be imposed after striking the balance between aggravating and mitigating circumstances found in the case.

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13 AIR 1973 SC 947

14 AIR 1979 SC 916

15 AIR 1980 SC 898

When the aggravating circumstances outweigh the mitigating circumstances, the extreme penalty may be inflicted. Apex Court also illustrated the following as aggravating and mitigating circumstances-

**(I) Aggravating circumstances**

(5) If the murder has been committed after previous planning and involves extreme brutality.

(6) If the murder involves exceptional depravity.

**(II) Mitigating circumstances**

(3) That the offence was committed under the influence of extreme mental or emotional disturbance.

(4) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(5) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(6) The probability that the accused can be reformed and rehabilitated. The state shall by evidence prove that the accused does not satisfy condition (c) and (d) above.

(7) That in the fact and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(8) That the accused acted under the duress or domination of another person and

(9) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

In *Machchi Singh V. State of Punjab*,<sup>16</sup> the supreme court further expanded the doctrine of 'rarest of rare' cases formulated beyond aggravating factors listed in *Bachan Singh's* case to cases where the 'collective conscience' of a community is so shocked that it will expect the holders of the judicial powers to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty and states that in these cases such penalty should be inflicted<sup>17</sup>. Apex Court held that relevant factors may be motive or the manner of commission of crime or the anti-social or abhorrent nature of the crime such as

I. Murder is in extremely brutal manner so as to arouse intense and extreme indignation of the community.

II. Murder of a large number of persons of a particular caste, or locality, is committed.

III. Murder of an innocent child, a helpless woman, is committed

In *Machchi Singh (supra)*, it was further held that, "A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

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16 AIR 1983 SC 957

17 Reiterated in *C. Muniappan and others V State of T.N.*(2010)9 SCC 567

In *Devendra Pal Singh V State (NCT of Delhi)*<sup>18</sup>, after referring *Bachan Singh*(supra) and *Machchi Singh* (supra), Apex Court held that death sentence is warranted when the murder is committed in an extremely brutal manner or for a motive which evinces total depravity and manner e.g.

- a. murder by hired assassin for money or reward or
- b. cold blooded murder for gains etc.,
- c. Multiple Murder, say all or almost all the members of a family or large number of persons of a particular caste, community or locality or
- d. when victim of murder is innocent child or helpless woman or old or infirm person etc.

Apex Court, in *Catena of Judgments*, has continuously been expanding category of “rarest of rare” cases. To sum up in brief, if the murder has been committed in a *Brutal, Grotesque, Diabolical, Dastardly, and in revolting* manner, the extreme penalty of death can be awarded. However, In view of new section 354(3) of Cr.P.C., with effect from 01-04-1973, *life imprisonment is a rule and capital Punishment is an exception*. This has been affirmed by Apex Court in its various judgments.<sup>19</sup>

## **7. DISCRETION FOR HEARING ON THE SENTENCE AFTER CONVICTION.**

According to section 235(2) of Cr.P.C., “If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.” Similarly according to section 248(2) Cr. P.C., “Where, in any case under this Chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 325 or section 360, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law.”

The very purpose of these provisions is to provide an opportunity to the convict of being heard before passing sentence. In *Tarlok Singh V State of Punjab*<sup>20</sup>, a three judge bench of supreme court has held that Failure to give an opportunity under section 235(2) Cr.P.C. will not affect the conviction under any circumstance. In a murder case where the charge is made out, the limited question is as between the two sentences prescribed under the Penal Code.If the minimum sentence is imposed,question of providing an opportunity under Section 235 would not arise. In *Dagdu V. State of maharashtra*<sup>21</sup>, a three Judge bench of Apex court has held that whenever an appeal court finds that the mandate of section 235(2) Cr. P.C. for a hearing on sentence, had not been complied with, it, at once, becomes the duty of the appeal court to offer to the accused an adequate opportunity to produce before it whatever materials he chooses in whatever reasonable way possible. Courts should avoid delay and necessarily inconsequential remands when the accused can secure full benefit of section

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18 AIR2002 SC1661

19 C. Muniappan and others V State of T.N.(2010)9 SCC 567

20 AIR 1977 SC 1747

21 AIR 1979 SC 1579

235(2) Cr.P.C. In B.A.Umesh V. High Court of Karnataka<sup>22</sup>, a three judge bench of supreme court has held that it is true that the convict has a right to be heard before sentence. There is no mandate in section 235(2) CrPC to fix separate date for hearing on sentence. It depends on the facts and circumstances as to whether a separate date is required for hearing on sentence or parties feel convenient to argue on sentence on the same day. Merely for the reason that no separate date is given for hearing on the sentence, the review petition cannot be allowed.

### **8. DO'S AND DON'TS**

There are some do's and don'ts which are required to be observed while exercising judicial discretion at various occasions. The inventory is listed below.

#### **i. DO'S**

- (10) Due Process- Just & Reasonable
- (11) Reason to believe.
- (12) Reason to be recorded.
- (13) Due care and caution.
- (14) Application of mind to the facts & circumstances.
- (15) Fundamental rights to be kept in mind while exercising judicial discretion.
- (16) Observance of fair procedure.
- (17) Substantial justice should be the ultimate aim.
- (18) Equity & good conscience.
- (19) Should be legal & regular
- (20) Rules of reason, law and justice.
- (21) Natural Law -- Audi alteram partem.
  - a.notice
  - b.hearing
- (22) Clearly defined limits within sphere of subject.
- (23) Constitutionalism.
- (24) Morality.
- (25) Rule by law-prefer.
- (26) Predictable decisions.
- (27) Bonafide.
- (28) Positive and constructive interpretation.
- (29) Duty to act fairly.
- (30) Objective approach.

#### **ii. DON'TS**

- (H) Non application of judicial mind.
- (I) Discrimination.
- (J) Arbitrary use of discretion.
- (K) Denial of justice- failure to give reasons.
- (L) Malafide.
- (M) Vague & fanciful.
- (N) Own sweet will or pleasure.
- (O) Private opinion.
- (P) Personal whim.
- (Q) Prejudice.

- (R) Violation of human rights.
- (S) Unfair procedure.
- (T) Unpredictable decisions.
- (U) Subjective approach.
- (V) Improper purpose.
- (W) Irrelevant /extraneous consideration.
- (X) Mechanical order.
- (Y) Non compliance of procedural requirement.
- (Z) Non observance of natural law principles.

## **9.THE REQUIREMENT OF RATIONALITY**

The rule of law implies rule by reason than arbitrary power or whim. In order to comply with the rule of law, decisions must be properly and logically reasoned . The preamble of our constitution should always be kept in mind, which gives ideals of justice, liberty and equality. In the State of H.P v. Mushtaq Ahmad<sup>23</sup>, Hon'ble Supreme court has ruled that even administrative orders should be supported by reasons. Apex Court, in State of Rajasthan v. Rohitas & others.<sup>24</sup> held that an order being supported by reason is a sign of good governance. Failure to give reasons amounts to denial of justice. Where discretion is absolute, man has always suffered. Absolute discretion is more destructive of freedom than any of man's other inventions.<sup>25</sup> Life, liberty and dignity of the individual are the most valuable human rights, which are recognized and protected internationally under the universal declaration of human rights charter 1948. These basic fundamental rights are also guaranteed by our Constitution which is intended to endure for ages to come and be adapted in the various crises of human affairs<sup>26</sup>. The life of law has not been logic, it has been experience.<sup>27</sup> The contemporary needs and values of the society are also to be taken into account while exercising judicial discretion. As the exercise of discretion, very substantially affects the human rights of the subject, hence it has to be exercised with due care and caution and in consonance with legislative intent and authoritative precedents by applying justice oriented approach. The utmost use of rationality in exercise of judicial discretion, therefore ensures fair play in action to the wheel of justice.

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23 2007(58)ACC 382 SC

24 2008(61)ACC 678 SC

25 Justice Douglas in United States V Wunderlick, U.S. 1951

26 John Marshal in the back ground of US constitution, cited in an article written by Henry Steel Commager, Professor of history at Amherst college Massachusetts.

27 Justice Holmes( Former US supreme Court judge)

## INQUEST REPORT

Ahsan Ullah Khan\*

[Object of preparing inquest report under Section 174 Criminal Procedure Code – not a substantive piece of evidence]

Etymologically the word inquest stands for “ a judicial inquiry to ascertain the facts relating to an incident etc.”.This judicial proceeding has been enshrined in the Sec.174 of the Criminal Procedure Code 1973 which reads as under:-

Sec. 174 (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 neighborhood , 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—

(i) the case involves suicide by a woman within seven years of her marriage ; or

(ii) the case relates to the death of a woman within seven years of her marriage in any circumstance raising a reasonable suspicion that some other person committed an offence in relation to such woman ; or

(iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or

(iv) there is any doubt regarding the cause of death ; or

(v) the police officer for any other reason considers it expedient so to do ,

he shall , subject to such rules as the State Government may prescribed 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..

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\* Additional District Judge, Shahjahanpur

(4) The following Magistrate 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 .

As per the scheme of this Section it is evident that it envisages a complete and autonomous code in itself for the purposes of inquiries in case of accidental or suspicious death under this section . It is to be noted here that Section 174 ,175 and 176 of Criminal Procedure Code 1973 carry a complete scheme and provides a complete mechanism to deal with inquiries into sudden ,violent or unnatural death .While Sec.174 provides such inquiries by Police , Section 176 envisages the inquiry by the Magistrate ,but it is to be remembered that former cannot order for exhumation but later can.

Sub –section (3) of Section 174 was inserted to deal with the increasing incidents of dowry death or cases of cruelty against married women by their in-laws . Provision was made for inquest by the Executive Magistrates for post – mortem in all cases where a woman has , within seven years of her marriage committed suicide or died in circumstances raising a reasonable suspicion that some other person has committed an offence . Provision through judicial pronouncements carved that post –mortem is also available in above cases where any relative of such woman has made request in this regard.

Apart from Criminal Procedure Code , Section 129-146 of U.P.Police Regulations provide a mechanism that how and in what manner Inquest ,Post mortem, Examinations and Treatment of wounded persons shall be conducted during investigation by Investigating Officer.

In India ,before the advent of Criminal Procedure Code ,Inquest used to be conducted by Coroner in the presidency towns of Bombay and Calcutta under the Coroner’s Act 1871 which was later abolished in Madras presidency by the Act of 1889. But one thing is worth to mention here that an Executive Magistrate /Metropolitan Magistrate was not ousted of his jurisdiction to perform inquest because the Coroner has held an inquiry into the cause of death of a person and drawn up an inquisition. He was competent to hold a preliminary inquiry even though the accused has been committed to the High Court by the Coroner. Empirical analysis shows that there is no analogy between a Coroner’s inquest and inquiry into the cause of death under the Criminal Procedure Code.

As per the scheme of the Criminal Procedure Code 1973 the scope and purpose of the inquest report is very limited and only confined to ascertainment of apparent cause of death of deceased . It is concerned with discovering whether in a given case the death was accidental , suicidal or homicidal or caused by animal and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted . It is neither necessary nor obligatory on the part of the investigating officer to investigate in to or ascertain who were the persons responsible for the death . Details of overt acts also need not to be recorded in inquest report .Question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who were the witnesses of the assault is foreign to the ambit and scope of proceedings u/s 174Cr.P.C. There is no requirement in law to mention details of FIR, names of accused or the names of eye-witnesses or the gist of their statements in inquest

report, nor the said report is required to be signed by any eye witness. The purpose of preparing the inquest report is not for making a note in regard to identification marks of accused. Honorable Apex Court in [Yogesh Singh VS Mahabeer Singh and others AIR 2016 SC 5160] held that the object of preparing inquest report is merely to ascertain the apparent cause of death namely whether it is suicidal, homicidal, accidental or caused by animals or machinery etc .and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. There is no requirement of law that inquest report or conducting of post-mortem should be describe in detail with regard to the nature of the injuries sustained by the deceased and /or by the type of weapon used ,failure to do so does not give any reason to discard prosecution version. There is no requirement for inquest report to contain names of all witnesses, who have been alleged to have seen the incident.

Indian Criminal Jurisprudence requires the prosecution to prove its case “beyond all reasonable doubts” by adducing substantial and admissible evidences as pondered in Indian Evidence Act 1872. Substantial Piece of evidence are those kinds of evidences which are of real importance, substance and value. It must not be evasive or mysterious which is hard to perceive and grasp. Only those evidences are called substantial which are free from zest and speculations. Law cannot favor anything other than truth. To constitute a “substantial reasonable doubt” it must be free from an over emotional response. It must be substantial arising from the evidence or from the lack of it .It must be opposed to mere apprehension. A reasonable doubt must be free from imaginary, trivial or merely possible doubts.

Substantial Piece of evidence is not something which is based on conjectures or surmises. It must be fair and based on reasons and common sense. It must grow out of the evidence in the case. It cannot be expressed in terms of units to be enumerated in mathematical terms that how many units will constitute a substantial piece of evidence. Uninformed legitimization of trivialities would make a mockery of administration of justice.

Honorable Apex court has in catena of judicial pronouncements have made it clear that evidentiary value of inquest report prepared under Section 174 Cr.P.C is not a substantial piece of evidence and it can be looked in to for testing the veracity of the witnesses of inquest. In any case, if conflict arises between ocular evidence and report of inquest, then only ocular evidence will prevail but at the same time if there is any discrepancy in inquest report and post – mortem report then post – mortem report and its opinion will carry more weight because it is the opinion of an expert and inquest report is not the opinion of an expert.

Honorable High Court Allahabad held in [Baldeo VS State of U.P. 2004 Cr.L.J.2686 (DB)] that an Inquest report is not a substantive piece of evidence .Therefore questions regarding the details , as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted , are beyond the scope of the report submitted by the police under Section 174 Cr.P.C. The report of Inquest is intended to find out the nature of injuries and the apparent cause of death, while the doctor who holds the post – mortem examination examines the body of the deceased from the medico –legal stand point and

accordingly it is the postmortem report that is supposed to contain the details of the injuries through scientific examination.

Honorable Apex court has in catena of judicial pronouncements made it clear that evidentiary value of inquest report prepared under Section 174 Cr.P.C is not a substantial piece of evidence and it can be looked in to for testing the veracity of the witnesses of inquest. In the case if any conflict arises between ocular evidence and report of inquest, then only ocular evidence will prevail.

The purpose of preparing of inquest report is not for corroborating prosecution evidence. Inquest report is prepared only for the purposes mentioned in Section 174 of Cr.P.C. i.e. to ascertain the apparent cause of death, namely whether it is suicidal, homicidal ,accidental or caused by animal or machinery etc. as held in [ Pedda Narayan VS State of Andhra Pradesh AIR 1975 SC 1252 ] .In recent pronouncements Honorable Apex Court has again and again reiterated the same view.

In [Kuldeep Singh VS State of Punjab AIR 1992 SC 1944] , [Amar Singh VS Balvinder Singh AIR 2003SC 1164] , [Satbir Singh VS State of U.P. AIR 2009 SC 2163] , [Sambhu Das VS State of Assam AIR 2010 SC3300] and in [ Yogesh Singh VS Mahabeer Singh AIR 2016 SC 5160] Honorable Supreme Court has categorically held that inquest report is prepared only for the purposes mentioned in Section 174 of the Cr.P.C. and any omissions in inquest report in mentioning date of inquest or nature of wounds and injuries or kind of weapon or name of witnesses, do not provide any reason to discard prosecution version.

In [Rameshwar Dayal VS State of U.P. AIR 1978 SC 1558 ] Honorable Supreme Court has held that the statement made by investigating officer in inquest report is not a statement made by any witness before the police during investigation , but it is a record of what he himself observed and found ,such an evidence is direct or the primary evidence in the case and is in the eye of law is the best evidence .Unless the record is proved to be suspicious and unreliable ,perfunctory or dishonest there is no reason to disbelieve such a statement in inquest report.

In [Radha Mohan Singh VS State of U.P. AIR 2006 SC 951 ] Honorable Supreme Court opined that where wrong date of filing FIR was mentioned in Inquest Report but the attention of the Investigating Officer was not drawn towards that discrepancy for which he would have furnished explanation, then it is not permissible to draw any adverse inference against the prosecution on the ground that date of filing FIR was wrongly mentioned against the prosecution.

In [Rajesh Chandra Gandhi VS State of Gujrat AIR 2002SC 1412] Honorable Supreme Court held that mere omission to mention name of the complainant in the FIR would not lead to the inference that the FIR is ante – timed.

Thus , on the basis of above mentioned reasons and observations , we may say that though Inquest report cannot be termed to be basic or substantive evidence and any discrepancy occurring therein can neither be termed to be fatal not even a suspicious circumstance which would warrant a benefit to the accused and the resultant dismissal of prosecution case but, at the inception of investigation, no one can deny the importance and significance of inquest report,

because it sets and pushes up the case to a wider vista.

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## IDENTIFICATION BY SNIFFER DOGS – A FRAGILE PIECE OF EVIDENCE

Tej Bahadur Singh\*

A police dog is often referred to as a “k-9” which is homophone of canine. A police dog is a dog that is trained specifically to assist police and other law enforcement agencies in their work. The most commonly used breed is the German Shepherd, but now a days Belgian Malinois are also fairly popular for the purpose.

There are mainly following kinds of police dogs:

1. Sniffer dogs
2. Trucker dogs.
3. Patrol dogs
4. Dog squads
5. Search and rescue dogs
6. Arson dogs
7. Cadaver dogs

1&2. **Sniffer gods and Tracker dogs** – Sniffer dog means a dog that is trained to find drugs or explosives by smell. Such dogs are used to detect by smell. Such dogs are used to detect illicit substances such as drugs or explosives, which may be carried on a person in their effects. In many countries Beagles are used in airports to sniff the baggage / luggage for articles that are not permitted.

Tracker dog is also used to help the police find people or explosives. In Belgium tracker dogs are deployed to earthquake areas to locate people trapped in collapsed buildings. Sniffer dog is also known as detection dog or tracker dog.

3. **Patrol dogs**- The term "Patrol" means to go round on beat of watch. In other words, act of patrolling by dog, with a view to ensure that there is no trouble or crime.
4. **Dog Squads**- Police use dog squads as a means of tracking suspects.
5. **Search and rescue dogs** - These dogs are used to locate suspects or find missing people or objects. Bloodhounds are often used for this task.
6. **Arson dogs**- Some dogs are trained to pick up traces of accelerants at sites of suspected burning house.
7. **Cadaver dogs**- Cadaver dogs are such dogs which are trained in detecting the odor of decomposing bodies (dead human bodies). Dogs noses are so sensitive that they are even capable of detecting bodies that are under running water.

**England**: The popularity of the Police dog was being echoed all over the United

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Kingdom with the police forces. In England dog-tracking evidence is admissible. It is often used by the prosecution.

Canada: In Canada dog squads are used as a means of tracking suspects. Evidence of dog tracking is admissible.

Scotland: Like Canada in Scotland also evidence of dog tracking is admitted and relied upon by the Courts.

U.S.A.: In U.S.A. K-9 units are operated on the federal, state, county and local level and they are utilized for a variety of duties. Their duties include drug, bomb and weapon detection etc. But in United States the position is not uniform in the different States. In some cases the courts have placed reliance on such evidence, but have rejected it in others.

India: The question is, whether dog tracking evidence is admissible?

The uncanny smelling power of canine species has been profitably tapped by investigating agencies to track the culprits. Trained dogs can pick up scent from the scene of any object and trace out the routes through which the culprits would have gone to reach their hideouts. Developing countries have utilized such sniffer dogs in a large measure. In India also the utilization of such tracker dogs is on the increase.

In recent times, during investigation of crime, when investigating agencies do not find apparent proof of crime often may avail the services of tracker dogs for detection of crime.

The famous case on the subject *IS Abdul Razak Murtaza Dafadar v. State of Maharashtra*<sup>1</sup> decided by a three Judge Bench S.M.Sikri, R.S.Bachawat And V. Ramaswami, J1. The court held by way of obiter that "the trader Jog's evidence cannot be likened to the type or evidence accepted Iron scientific experts describing chemical reactions, blood tests and the actions of bacilli, because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate hoice. Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever there are thought processes there is always the risk of error, deception and even self-deception. In the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight."

Their Lordships however did not express any concluded opinion or lay down any general rule with regard to tracker dog evidence or its significance or its admissibility as against the accused.<sup>2</sup>

In *Surinder Pal Jain v. Delhi Administration*<sup>3</sup>, A two-judge Bench of the Supreme Court (Dr. A.S. Anand and N.P.Singh, JJ.) while dealing with the criminal appeal against conviction based on the circumstantial evidence, expressed the opinion that the pointing out by

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<sup>1</sup> A.I.R. 1970 S.C. 283 : 1970 Cri.L.J. 273

<sup>2</sup> A.I.R. 1970 S.C. 283 : 1970 Cri.L.J. 273 Para 11, 12

<sup>3</sup> A.I.R. 1993 S.C. 1723 (Para 33)

**Also See:**

P.K. Nadar V. State of Maharashtra, 1993 Cri.L.J. 3883. (Bombay)( D.B.); Ashoka Gavade V. state of Goa : 1995 Cri.L.J. 943 (Bombay) (D.B.)

the dogs of dog squad does not conclusively lead that the accused had committed the crime. In this case the appellant had slept during the night in the verandah near the cot where the dead body of his wife was found and he had locked the collapsible door with the recovered the lock before going to sleep and had himself been close to the dead body before the police came. The dogs had picked up of smell and pointed towards the accused. It was held that the said circumstance could not exclude the possibility of guilt of any person other than that of the appellant or be compatible only with the hypothesis of guilt of the appellant. The pointing out by the dogs could as well lead to a misguided suspicion that the appellant had committed the crime.

Another important case is *Gade Lakshmi Mangaraju alias Ramesh v. State of A.P.*<sup>4</sup> A trust betrayed in a hideous-manner, is the hub of the prosecution story. A son of an old house lady proceeded on a pilgrimage entrusting the care of his old mother to his best friend. But that turned out to be like engaging a wolf to guard the chicken. When the son returned home from the pilgrimage he was welcomed by the dreadful news that his mother was murdered. The investigating officer deployed a sniffer dogs to track down the hide out of the culprits. With the help of sniffer dogs and other circumstantial evidence, both the accused persons were traced. The trial Court and the High Court found them guilty and sentenced them for rigorous imprisonment for life. One of them filed an appeal in Apex Court by special leave.

In appeal, the evidence of sniffer dogs was criticized by the Apex Court. A two judge Bench of the Supreme Court (K.T. Thomas and R.P. Sethi, JJ) held that "there are inherent frailties in the evidence based on sniffer or tracker dogs. The possibility of an error on the part of the dog or its master is the first among them. The possibility of a misunderstanding between the dog and its master is close to its heels. The possibility of a misrepresentation or a wrong inference from the behaviour of the dog could not be ruled out. The last, but not the least, is the fact that from a scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminals. Police dogs engaged in these actions by virtue of instincts and also by the training imparted to them. The Bench further observed that criminal Courts need not bother much about the evidence based on sniffer dogs due to the inherent frailties adumbrated above although the practice of the investigating agency employing such sniffer dogs for helping the investigation to track down criminals cannot be disapproved. One can make attempts or forays with the help of canine faculties but judicial exercise can ill afford them."

With the aforesaid observation the court also held that even barring the evidence pertaining to the sniffer dogs, the circumstances are quite enough to form the complete chain pointing unerringly to the active involvement of the appellant in the murder of the deceased.

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A.I.R. 2001 SC 2677

Accordingly the appeal was dismissed.

In *Dinesh Borthakur v. State of Assam*,<sup>5</sup> A two-judge Bench of the Supreme Court (S.B.Sinha and Dalveer Bhandari, JJ.) observed that the law is settled that while the services of the sniffer dog may be taken for the purpose of investigation, its faculties cannot be taken as evidence for the purpose of establishing the guilt of an accused. While deciding this case, the Supreme Court referred to its previous precedents in *Abdul Razak* and *Gade Lakshmi Mangaraju*. In *Dinesh Borthakur* case the appellant was charged with the murder of his wife and adopted daughter and had been convicted and sentenced to undergo-rigorous imprisonment for life. The case was based on circumstantial evidence. One of the circumstances was that a sniffer dog was brought into service, for the purpose of investigation. The dog was taken near the dead bodies. It allegedly went close to the appellant only and no one else when he was inside the house. The witness handling the dog deposed that after having smelt the dead bodies, the dog did not go out of the room but stayed inside it near and about the appellant. The Supreme Court held that the circumstantial evidence leading to the guilt of the appellant had not been established by the prosecution and the judgment of the conviction and sentence therefore, cannot be sustained. The appellant was accordingly acquitted.

#### **Objections against reception of dog tracking evidence.**

There are certain objections which are usually advanced against the reception of dog tracking or sniffer dog's evidence-

First, since it is manifest that the dog cannot go into the witness box and give evidence on oath and so no question arises for cross examination. The dog's human companion must go into the box.

Second, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences.

Third, it is suggested that even if such evidence is strictly admissible under the rules of evidence, it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value.<sup>6</sup>

Fourth, the possibility of a dog misjudging the smell, or mistaking the track cannot be ruled out.<sup>7</sup>

Fifth, even today the science has not finally pronounced about the accuracy of canine tracking.<sup>8</sup>

The Bombay High Court has laid down the following guidelines regarding dog tracking/tracker dog's evidence.

1. There must be a reliable and complete record of the exact manner 'in which the tracking was done, and in this respect a clear and complete Panchnama should be prepared. It should be properly proved and should be supported by the evidence of the handler.

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<sup>5</sup> AIR 2008 SC 2205

See also: *State of U.P. V. Ram Balak and another*, AIR 2008 SC 1128 : *Mohd. Arif V. State*, (NCT of Delhi), (2011) 13 SCC 621 (Para 177).

<sup>6</sup> *Abdul Razak Murtaza Dafadar v. State of Maharashtra*, A.1.R.1970 S.C.283.

<sup>7</sup> *Gade Lakshmi Mangaraju v. State of A.P.* .. A.I.R.2001 S.C.267.

<sup>8</sup> Ibid

2. There must not be discrepancies between the version as recorded in the panchnama and the evidence of the handler as deposed to before the court.
3. The evidence of the handler must independently pass the test of cross examination.
4. The handler is required to place the material before the court, such as the type of training imparted to the dog, its past performance, achievements, reliability etc. before the court. If possible and available the material should be supported by documents.<sup>9</sup>

To summarize, where there is no eye witness account the dog tracking evidence can play a major role for detection of crime. No doubt the dog tracking evidence is a vital link in the chain of circumstances in a case based on circumstantial evidence. The services of tracker dog/sniffer dog may be taken for the purpose of investigation but its faculties cannot be taken as evidence for the purpose of establishing the guilt of an accused. The dog tracking evidence should never be taken as proof of guilt of the accused unless it is corroborated by some other evidence.

In brief, identification by tracker dog/sniffer dog is not a final proof, it always requires corroboration.

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9 P.M. Shaikh Y. State of Maharashtra, 1993 CrLL.J. 2808 (Bombay)

## **INDIAN CONSTITUTIONAL JURISPRUDENCE:- A SHIFT FROM ANALYTICAL POSITIVISM TO HUMAN RIGHTS JURISPRUDENCE.**

**Kunal Vepa \***

To reduce the concept of law within the confines of a rigid definition would render more injustice to it and impede its evolution and therefore any temptation to bring the term law within the straitjacket of an immutable definition should be resisted. In common parlance, law is a set of rules of conduct instrumental for the governance of the society. The term law and jurisprudence are interrelated and to understand law in its proper perspective and context, we need to understand the latter. The word jurisprudence has been derived from the Latin word *jurisprudentia* which means knowledge of law. The Latin word *Juris* means law and *prudencia* means skill or knowledge. Thus jurisprudence signifies knowledge of law and its application. Therefore etymologically, jurisprudence is that science which imparts to us knowledge about law. The Indian jurisprudence owes its origin to the ancient concept of dharma. "Jaimini" has defined dharma as that which is signified by a command, and leads to man's material and spiritual salvation. Considered from this context, the modern jurisprudence has a much narrower coverage and is confined to upholding the majesty of law and at the same time keeping checks and balances on the vires of the state. According to Kautilya, the monarch was looked upon as an embodiment of virtue and a protector of dharma and had to dispense justice by following the philosophy of dharma. It has been said in the Arthashastra that in the happiness of his subjects lies the happiness of the King and he shall not do that which pleases him but shall follow that which is beneficial to his subjects. This has been reproduced in this article to harp on this fact that the seeds of welfarism and absolute Justice were embedded in our ancient text and Scriptures. With the march of time and progress of our society, the concept of law and jurisprudence has radically changed. The Constitution of India makes India a sovereign, socialist, secular, democratic republic. We are one of the largest democracy in the world and so law has to play a role of paramount importance in sustaining a stable social order and also be an effective instrument of social change in various facets of Indian society. At the same time law should also act as a vanguard against oppression and repression meted out towards the downtrodden, the marginalised and the vulnerable strata of our society. The Constitution of India as per Kelson is the basic grundnorm and the highest norm to which lesser norms should adhere to. All statutory legislation, rules, regulations, customs and usages should be consistent with this highest grundnorm. The Indian Constitution underlines the ideals of supremacy of law, social, economic and political justice, along with secularism and democracy. As every right has a corresponding duty, the Indian Constitution contains fundamental rights and fundamental duties, the former enshrined in part III of the Constitution and the latter under article 51A. Dicey's concept of Rule of law enshrined in our Constitution seeks to balance individual rights with legal responsibility. The Hon'ble Supreme Court in independent India has recognised

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\* Additional District & Sessions Judge, Ghaziabad.

the paramountcy of fundamental rights on several occasions and safeguarded civil liberties against the highhandedness of the legislature and the executive. The imperative theory of law and John Austins analytical positivism which dominated the English legal system for more than a century and based on the trilogy of sovereign, command and sanction was introduced in the subcontinent with the advent of the British rule. Analytical positivism of Austin completely divested the notions of morality and justice from law and laid undue emphasis on the sovereign which was regarded as above the law. Lord Macaulay, the law member of the Governor General- in- Council in British India, was diametrically opposed to our ancient Indian jurisprudence based on Dharma and as a reactionary measure coupled with spirit of legal reforms brought about the codification of laws in India. These codified British laws were akin to the Austinian concept of positive law where the British monarchs were the supreme sovereign authority to make the law and who were above the law and the subjects had no choice but to obey the law. Thus all the features of positive law were present in the legal system introduced by the Imperial British in India and it is in this sense that the analytical positivism found its place in the Indian legal system during the colonial rule. As India got liberated from the colonial yoke and redeemed its freedom, it necessitated a new approach to the existing laws which were hardly suited to the changed social economic and political conditions of the country. With the coming into force of the Constitution of India certain values like pluralism, inclusiveness, Justice based on rule of law which are the bedrock and edifice of our Constitution became paramount and indispensable. However in the initial days, a positivistic approach was adopted at times in adjudicating cases involving constitutional questions. In *A.K Gopalan vs State of Madras* AIR 1950 SC 27 it was held that a person can be divested of his life if there is a procedure established by law and therefore a literal interpretation of Article 21 was made and a positivistic approach was followed. However this approach was eventually discarded in *Maneka Gandhi vs Union of India* AIR 1978 SC 597 when it was held that the procedure established by law should stand the test of justness, fairness and reasonableness as opposed to being oppressive and arbitrary. A similar positivistic stand was taken in the case of *Tilkayat Shri Govindlaji Maharaja vs State of Rajasthan* AIR 1963 SC 1638 wherein it was held that the firman of a ruler is law and the subjects were legally bound to follow the same without any exceptions whatsoever. Finally a wholly positivistic approach was taken in *ADM Jabalpur vs S. Shukla* AIR 1976 SC 1207, also known as the Habeas Corpus case wherein it was held that fundamental rights remain suspended during the proclamation of emergency and therefore the court cannot go into the vires of malafide of the detention order and the writ of habeas corpus is not maintainable so long as the right to life and personal liberty enshrined in article 21 itself remains suspended. Thus analytical positivism of Austin which was infused in the Indian legal system by the colonial rulers was in the post independence era found in bits and parts in our constitutional jurisprudence. However as India matured as a democracy and marched towards progress in all spheres with emphasis on liberty, equality and justice and the human rights movement gaining currency worldwide, the futility of the positivistic approach was apparent and it was realised that the analytical positivism which was a relic of colonial jurisprudence

had no place in our Indian constitutional jurisprudence and consequently the imperative theory of law propounded by Bentham and Austin gradually started withering away paving the way for human rights jurisprudence.

Robertson defined human rights as “those basic rights to which every man, woman and child living on this earth is entitled by virtue of his being born as a human being.” Thus human rights are inherent in our nature and they lay down the standards of general application for all human beings in all times and in all circumstances.

The genesis of human rights in the modern age post Renaissance period lies in the Bill of Rights 1689 adopted in England, the 1776 Declaration of Independence of the United States of America, the French Revolution of 1789 with its emphasis on liberty, equality and fraternity and finally culminated into the codification of human rights by the General assembly of the United Nations adopting the Universal Declaration of Human Rights in 1948 which is a milestone document in the history of human rights prescribing universal standards to be attained by mankind. The universal declaration of human rights is the first segment of the International Bill of Rights which includes International covenant of economic cultural and social rights and international covenant of civil and political rights as its offshoots. In the context of India, part III and part IV of the Indian Constitution along with the preamble embody the concept of human rights. With the strengthening of the Indian democracy and emergence of the idea of welfare state based on good governance, certain fundamental rights which are akin to human rights and are inalienable became indispensable and the judiciary as an important organ of the state was entrusted with the task of preserving, protecting and upholding these rights. Certain rights as enshrined in part III of the Constitution are of universal application to all mankind and departure from the same can be made only at the cost of mankind. The right to life and personal liberty, freedom from slavery or servitude, equality before law and equal protection of law, the right against arbitrary detention, freedom of religion, freedom of speech and expression are basic human rights which are inalienable and available to every individual by virtue of him being born. These rights are of such paramount importance that the Constitution of India also ensures their enforcement by giving the litigant direct access to approach the superior courts under article 32 and article 226. The Hon’ble Apex Court has been a torch bearer in the human rights movement and has opened new vistas by liberally interpreting and expanding the meaning of basic human rights. The right to life and personal liberty as enshrined in article 21 of the Constitution has been so liberally interpreted and expanded by the Hon’ble Supreme Court that now it covers within its ambit the right to speedy trial as held in *Hussainara Khatoon vs State of Bihar* 1980 1 SCC 91, right to clean wholesome environment held in *M.C Mehta vs Union of India* AIR 1987 SC 1086, the right to free legal aid in *M.H Hoskot vs State of Maharashtra* AIR 1978 SC 155, right to livelihood in *Olga Tellis vs State of Maharashtra* AIR 1986 SC 180 (Pavement dwellers case), a right to know, right to compensation and many other rights which have evolved and expanded by the Hon’ble court over a period of time. Likewise other rights like right to freedom of speech and expression under article 19(1)a has been insulated by the Hon’ble Apex Court from intolerant groups and forces of vigilantism as long as it is exercised within the reasonable restrictions. The superior courts have also come to the rescue of the vulnerable and the marginalised section of the society by safeguarding their interests against the excesses of the executive and ensuring that they lead a life of dignity. There are a plethora of cases

on right against arbitrary detention under article 22 starting from Rudal Shah vs Stae of Bihar 1983 4 SCC 141 and other cases of prisoners rights wherein the superior courts have framed guidelines to check the abuses of these rights against the vulnerable by the appendages of the state. In the same breath, it will not be out of context to say that the fabric of secularism runs through article 25 to article 28 of the Constitution and right to profess, practice and propagate any religion envisaged in article 25 is a basic tenet of secularism and the courts have always acted as a knight in defending the secular credentials of our Constitution and safeguarded this basic human right against religious persecution.

This human rights jurisprudence followed by the superior courts in our country has gradually evolved and has gained momentum with the passage of time. In the recent past the Hon'ble Supreme Court has opened a new chapter in the human rights movement by holding that every man's home is his castle and he has the right to inviolable space within the precincts of his premises and therefore by virtue of this judicial pronouncement, it has been explicitly recognised that the right to privacy is a fundamental right within the ambit of Article 21 of the constitution. The hon'ble apex court in its unanimous decision by a nine judge bench in Justice Puttaswamy (Retd) Vs Union of India has upgraded the right to privacy as a fundamental right which is a landmark pronouncement in the annals of constitutional Jurisprudence. On the basis of the above discussion it can be safely said that one cannot understand law and jurisprudence within the confines of a rigid definition as law is an evolving process which grows with the needs of the society and at the same time law can never be divested of elements like morality, justness and fairness which were the prerequisites of law in our ancient Indian jurisprudence. The rigours of analytical positivism of John Austin and the imperative theory of law has been rendered obsolete in view of our constitutional values like liberty, equality, justice (social, economic and political), Rule of law and more importantly the idea of welfarism with a quest to safeguard human rights of the subject makes the positivistic approach to law incompatible with our present constitutional jurisprudence which is attuned to the human rights jurisprudence. In conclusion it can be said that the human rights jurisprudence is in vogue and it keeps a check on the arbitrariness, capriciousness and whims and fancies of the executive and lastly the judiciary led by the Hon'ble Apex Court is the harbinger of this human rights jurisprudence.

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**PROVISIONS AND RELEVANT CASE LAWS REGARDING  
MAINTENANCE UNDER THE CODE OF CRIMINAL  
PROCEDURE, 1973 AND MUSLIM WOMEN (PROTECTION OF  
RIGHTS ON DIVORCE) ACT, 1986**

**Raj Bahadur Singh Maurya\***

The provisions regarding maintenance of wives, Children and parents have been incorporated under the Code of Criminal Procedure, 1973 (hereinafter referred to as Code) from section 125 to S. 128.

Section 125 Cr.P.C., 1973 provides as under---

S.125- order for maintenance of wives, children and parents-

(1) If any person having sufficient means neglects or refuses to maintain--

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a magistrate of First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of minor female child referred to in clause (b) to make such allowances, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for maintenance under the sub-section, order such person to make the monthly allowance for the interim maintenance of his wife or such child, father or mother and the expenses of such proceeding which the Magistrate considers reasonable and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for interim maintenance and expenses or proceeding under the second proviso shall, as far as possible be disposed of within 60 days from the date of service of notice of the application to such person.

Explanation – for the purpose of this chapter -

(a) “minor” means a person who, under the provisions of the Indian Majority Act – 1875, is deemed not to have attained his majority.

(b) “wife” includes a woman who has been divorced by or has obtained a divorce from, her husband and has not remarried.

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\* Special Judge, S.C.& S.T.(P.O.A) Act/A.D.J./FTC., Auraiya

2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of order, or if so ordered, from the date of application for maintenance or interim maintenance or expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or interim maintenance and expense of proceeding as the case may be, remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or until payment if sooner made.

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer if he is satisfied that there is just ground for so doing.

Explanation – If husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery or, if without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

Now, we discuss in detail on the following topics ---

(1) Whether the husband / any person who has not sufficient means is liable to pay maintenance to his wife, children, father or mother ?

Ans.: Yes.

(2) Whether the wife who earns some amount per day, is entitled to get maintenance?

Ans.: Yes.

(3) Whether the father of the children who born during the existence of valid marriage can claim for D.N.A. test ?

Ans.: No.

(4)- Whether second wife is entitled to get maintenance from her husband if first wife has not been divorced?

Ans.: NO.

(5)- Whether the daughter is liable to maintain her parents under section 125(I)(d) of Cr.P.C. 1973 ?

Ans.: Yes.

(6)- Whether the maintenance order should be passed from date of order or date of application?

Ans.: From both the dates (subject to some conditions)

(7)- Whether the proceedings of maintenance under section 125 Cr.P.C. 1973 is of civil nature?

Ans.: Yes

(8)- Whether not legally wedded/married wife (woman) is entitled to get maintenance from her husband?

Ans.: Yes.

(9)- Whether the Muslim Divorced wife is entitled to take maintenance from her husband even after the period of Iddat U/S 3(1)(A) Muslim Women (Protection of Rights on divorce) Act 1986 and under section 125 of the Code?

Ans.: Yes.

(10)- What is the procedure to proceed ex parte and set aside thereof under Muslim Women (Protection of Rights on Divorce) Act, 1986?

Ans.: Rule 4 of the Muslim Women (Protection of Rights on Divorce) Rules, 1987,

(11)- Whether duly/personal service of notice upon the person against whom the maintenance order etc. is proposed to be passed, is necessary in order to proceed ex parte?

Ans.: No.

(1)Whether the husband / any person who has not sufficient means is liable to pay maintenance to his wife, children, father or mother?

Ans.: Yes.

Normally, the husband or any person who has not sufficient means is not liable to maintain his wife, children or father or mother, as the easy may be. The person, who has sufficient means, is liable to pay the maintenance allowance. But, the husband or any person who has not visible means id est movable or immovable property etc. but he is well able bodied person / healthy person, even then he is liable to maintain his wife or children or parents, as the case may be.

It has been held in case law – **Basanta Kumari vs. Sarat Kumar, 1982 Cr.L.J. 485** that a healthy and able bodied person, though not possessed of visible means, must be held to be possessed of means to support his wife, child etc.

The Hon'ble M.P. High Court also has held in case law – **Durga Singh Lodhi vs. Prem Bai, 1990 Cr.L.J. page 2065 (M.P.)** that “means” does not signify only visible means, like real property in the shape of income, revenue or estate or a definite employment, it includes capacity to earn money.

The Hon'ble Allahabad High Court has held in case law **Manoj Kumar vs. State of U.P. and another, 2013(96) A.L.R.854 All.** that under section 125 of the Code “having sufficient means” the meaning includes earning capacity. When a man is healthy and able bodied, he must be taken to have means to support his wife. An able bodied young man has to be presumed to be a capable of earning sufficient money reasonably to maintain his wife and child. He cannot be heard to say that he is not in position to earn to be able to maintain them according to family standard.

**(2) Whether the wife who earns some amount per day, is entitled to get maintenance?**

**Ans.: Yes.**

Although section 125(1) (a) of the code provides as under-

“(1) If any person having sufficient means neglects or refuses to maintain—

1. his wife, unable to maintain herself,”

As per this statutory provision, the wife who is unable to maintain herself is entitled to get maintenance from her husband. But the Hon'ble Supreme Court has held in case law – **Laxmi Bai Patel vs. Shyam Kumar Patel, 2002 (44) ACC Page- 1102 (SC)** that if the wife has gone to the house of her parents voluntarily and she earns Rs. 50/- per day, even then she is entitled to get maintenance under section 125 of the Code. Application U/S 125 Cr.P.C. 173 should not be rejected.

The Hon'ble Allahabad High Court has also held in case law-**Jagdish vs. Judge, Family Court, Varanasi, 2001 (43) A. C. C. page 431 (All)** that if the wife earns Rs. 30/- or 40/- per day, even then she is entitled to get maintenance allowance.

The Hon'ble M.P. High Court has held in case law – **Rewati Bai vs. Jagdishwar, 1991 Cr.L.J. 40 (M.P.)** that merely because the wife has been earning some amount for her survival, she is not disentitled to get maintenance under section 125 Cr.P.C., 1973.

The Hon'ble Allahabad High Court has held in case law **Abdul Salim vs. Najima Begum, 1980 Cr.L.J. 232 (All)** that the expression “Unable to maintain herself” does not mean that she should be absolute destitute. It is enough that if she is not in position to maintain herself with the status she was used to at the place of her husband, without relying on the gratuitous assistance given by her relatives.

The Hon'ble Supreme Court has observed in case law **Minakshi Gaur vs. Chitaranjan Gaur and another, A.I.R. 2009 S.C.1377** that to the extent that even if the wife is earning, but if her earning is insufficient and the husband has substantial salary then he is liable to pay maintenance to his wife.

See the following case also-

1-Sunita Kachwah and others vs.Anil Kachwah,A.I.R.205 SC554

**(3) Whether the father of the children who born during the existence of valid marriage can claim for D.N.A. test ?**

**Ans.: No.**

The Hon'ble Allahabad High Court has held in case law **Brijesh Kumar Srivastava vs. Judge, Family Court, Gorakhpur, 2002 (44) A C C, page 843 (All)** that if the husband disputes to be the father of two children and prays of D.N.A test and accepts valid marriage, if child born after such wedlock, a valid marriage is conclusive presumption, cannot be rebutted by D.N.A test. Hence, application for D.N.A test should be rejected.

The Hon'ble Supreme Court has also held in case law **Smt. Kamla Devi and others vs. Poshi Ram, A.I.R. 2001 S.C. 2226** that the paternity of a child born during subsistence of valid marriage is conclusive presumption which cannot be rebutted by D.N.A.

See the following case also-

(A) **Nandlal Wasuseo Badwaik v. Lata Nandlal Badwaik (2014) 2 SCC 576**

(Contrary view on different facts)

**(4)- Whether second wife is entitled to get maintenance from her husband, if first wife has not been divorced?**

**Ans.: No.**

The Hon'ble Apex Court has held in case law **D. Vilusamy vs. D. Patchaiammal, A.I.R.2011 S.C.479** that under section 125(1) Explanation (b) of the Code word "wife" includes divorced wife. However, if second wife has not even been married, she could not be divorced. Second wife cannot claim to be wife of appellant unless it is established that appellant was not earlier married to another woman.

In the case of **Sayago Bai vs. Cheeru Bajrangi, A.I.R.2011 S.C.1557** the Hon'ble Apex Court has expressed its view on this topic as under-

"Under section 125(3) second proviso- Explanation- of the Code, merely because legally wedded wife (first wife) left house for 4-5 years and did not come back, is no ground to justify second marriage by husband. It will not disentitle legally wedded wife to claim maintenance. Particularly when evidence of wife was very specific that when her husband contracted second marriage she was residing in her matrimonial house and she along with her children were thrown out of the house. Stray admission by her in cross examination that she had abandoned her husband for 4-5 years and it is as a result of her refusal to come to house of her husband that husband took second wife is irrelevant. Non calling of Panchayat by wife is also immaterial.

As per these case laws discussed above if the husband has legally wedded first wife, the second wife is not entitled to get maintenance.

**(5)- Whether the daughter is liable to maintain her parents under section 125(I)(d) of Cr.P.C. 1973 ?**

**Ans.: Yes.**

The very relevant and important case law on the point is **Dr. Vijaya Manohar Arbat vs. Kashi Rao, AIR 1987 SC 553**. It will not be out of place to reproduce the relevant part of the judgment here for the kind perusal of our learned readers-

"The only point that is involved in this appeal by special leave is whether the respondent No. 1 is entitled to claim maintenance from the appellant, his married daughter under [section 125\(1\)\(d\)](#) Cr. P.C.

The appellant Dr. Mrs. Vijaya Arbat, a medical practitioner at Kalyan, District Thane, is the married daughter of the respondent No. 1 Kashirao Rajaram Sawai, by his first wife. Her mother died in 1948. Thereafter, the respondent No. 1 remarried and is living with his second wife. The respondent No. 1 filed an application before the Judicial Magistrate, First Court, Kalyan, claiming maintenance from the appellant, his daughter, at the rate of Rs.500 per month on the ground that he was unable to maintain himself. At the outset, the appellant raised a preliminary objection to the maintainability of the application on the ground that [section 125\(1\)\(d\)](#) Cr.P.C. does not entitle a father to claim maintenance from his daughter. The preliminary objection was overruled by the learned Magistrate, and it was held by him that the application was maintainable.

Being aggrieved by the order of the learned Magistrate, the appellant moved the Bombay High Court in revision. The High Court affirmed the order of the learned Magistrate and held that the application of a father for maintenance who is unable to maintain himself is maintainable against his married daughter having sufficient means. In that view of the matter the High Court dismissed the revisional application of the appellant. Hence, this appeal by special leave.

Sub-section (1) of [Section 125](#) Cr.P.C. provides as under:-

"If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means."

Sub-section (1) of [section 125](#) confers power on the Magistrate of the First Class to order a person to make a monthly allowance for the maintenance of some of his close relations like wife, children, father and mother under certain circumstances. It has been observed by this Court in [Bhagwan Dutt v. Kamla Devi, \[1975\] 2 SCC 386](#) that the object of [section 125](#) Cr.P.C. is to provide a summary remedy to save dependents from destitution and vagrancy and thus to serve a social purpose. There can be no doubt that it is the moral obligation of a son or a daughter to maintain his or her parents. It is not desirable that even though a son or a daughter has sufficient means, his or her parents would starve. Apart from any law, the Indian society casts a duty on the children of a person to maintain their parents if they are not in a position to maintain themselves. It is also their duty to look after their parents when they become old and infirm. The learned Counsel, appearing on behalf of the appellant, has urged that under clause (d) of [section 125\(1\)](#) a father is not entitled to claim maintenance from his daughter whether married or not. to accept this contention. *It is true that clause (d) has Our attention has been drawn to the use of the pronoun 'his' in clause (d) and it is submitted that the pronoun indicates that it is only the son who is burdened with the obligation to maintain his parents. Counsel submits that if the legislature had intended that the maintenance can be claimed by the parents from the daughter as well, it would not have used the pronoun 'his'. We are unable to accept this contention. It is true that clause (d) has used the expression "his father or mother" but, in our opinion, the use of the word 'his' does not exclude the parents claiming maintenance from their daughter. Section 2(y) Cr.P.C. provides that*

words and expressions used herein and not defined but defined in [the Indian Penal Code](#) have the meanings respectively assigned to them in that Code. [Section 8](#) of the Indian Penal Code lays down that the pronoun 'he' and its derivatives are used for any person whether male or female. Thus, in view of [section 8 IPC](#) read with [section 2\(y\) Cr.P.C.](#), the pronoun 'his' in clause (d) of [section 125\(1\) Cr.P.C.](#) also indicates a female. [Section 13\(1\)](#) of the General Clauses Act lays down that in all [Central Acts](#) and Regulations, unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females. Therefore, the pronoun 'his' as used in clause (d) of [section 125\(1\) Cr.P.C.](#) includes both a male and a female. In other words, the parents will be entitled to claim maintenance against their daughter provided, however, the other conditions as mentioned in the section are fulfilled. Before ordering maintenance in favour of a father or a mother against their married daughter, the court must be satisfied that the daughter has sufficient means of her own independently of the means or income of her husband, and that the father or the mother, as the case may be, is unable to maintain himself or herself.

After giving our best consideration to the question, we are of the view that [section 125\(1\)\(d\)](#) has imposed a liability on both the son and the daughter to maintain their father or mother who is unable to maintain himself or herself. [Section 488](#) of the old [Criminal Procedure Code](#) did not contain a provision like clause (d) of [section 125\(1\)](#). The legislature in enacting [Criminal Procedure Code, 1973](#) thought it wise to provide for the maintenance of the parents of a person when such parents are unable to maintain themselves. The purpose of such enactment is to enforce social obligation and we do not think why the daughter should be excluded from such obligation to maintain their parents.”

The Hon'ble Supreme Court has expressed the same view in case law [Bhagvan Dutta vs. Kamla Devi, 1975 \(2\) SCC 386](#).

The Hon'ble Gujrat High Court has held in case law [Beena Ben vs Ranjan Ben \(1991\) 1 Gujrat page 27](#) that mother is bound to maintain her children.

As per above case laws, the daughter is liable to maintain her parents who are unable to maintain themselves.

**(6)- Whether the maintenance order should be passed from date of order or date of application ?**

**Ans.: From both the dates subject to following conditions.**

It will be appropriate to reproduce concerned section here- Sub section(2) of [section 125 Cr.P.C., 1973](#) provides as under-

“Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of order or if so ordered from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be”

As per above provision the court has discretion to pass such type of order either from the date of order or from the date of application. But, generally, this order should be passed from the date of order, because the word “from date of order” has been used first in above sub-section and later on the word “from date of application” has been used. But judicial pronouncements also clear the legal position on this topic.

The Hon'ble Allahabad High Court has held in **Paras Nath Kurmi vs. Sessions Judge, Mau and others 1998 Allahabad Dand Nirnay, Page 91(All)** if it has not been mentioned in order that from which date of allowance of maintenance is payable, the maintenance allowance shall be deemed to have been passed from the date of order. By given reasons, the order for maintenance may be passed from date of application.

The Hon'ble Allahabad High Court has held in case law **Ram Kishna vs.. Judge, Family Court, Moradabad, ACC, 2002(45) Page 582** that order u/s 125(2) of the Code should be passed from date of order, not from date of application.

The Hon'ble Allahabad High Court has held in case law **Samaya Din vs. State of U.P. and another, Crimes, 2001(2) Page 155(All)** that u/s 125(2) of Cr.P.C., 1973 only in extra ordinary circumstances maintenance can be awarded from the date of application, such circumstances should be discussed in judgment.

The Hon'ble Apex Court has held in case law **Shail Kumari Devi & Anr. V. Krishan Bhagwan Pathak @ Kishun B. Pathak 2009 (67) ACC 560 SC that-**

*"It seems that there is a cleavage of opinion on the question. According to one view, since sub-section (2) of [Section 125](#) declares that maintenance shall be payable "from the date of the order", or, "if so ordered, from the date of application for maintenance", normal rule is that a Magistrate should pass an order directing payment of maintenance only from the date of the order. If he decides to deviate that course and makes an order granting maintenance not from the date of the order but from the date of application for maintenance, he must record reasons in support of such order.*

*We, therefore, hold that while deciding an application under [Section 125](#) of the code, a Magistrate is required to record reasons for granting or refusing to grant maintenance to wives, children or parents. Such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary. No special reasons, however, are required to be recorded by the Court. In our Judgment, no such requirement can be read in sub section (1) of [Section 125](#) of the Code in absence of express provision to that effect".*

But, later on the Hon'ble Apex Court has held in case law **Jaiminiben Hirenghai Vyas & Anr. Versus Hirenghai Rameshchandra Vyas & Anr., A.I.R. 2015 SC 300** which is as under-

"4. We have given our anxious consideration to the Order of the High Court but find it difficult to uphold the direction that the maintenance should be paid only from the date of the Order. The High Court has not given any reason why it has not directed maintenance from the date of the application for maintenance.

5. The relevant part of [Section 125](#) reads as follows:

"125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.- For the purposes of this Chapter,-

(a) "minor" means a person who, under the provisions of the [Indian Majority Act, 1875](#) (9 of 1875); is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.”

6. The provision expressly enables the Court to grant maintenance from the date of the order or from the date of the application. However, [Section 125](#) of the Cr.P.C. must be construed with sub-section (6) of [Section 354](#) of the Cr.P.C. which reads thus:

“354 (6) Language and contents of judgment - Every order under [Section 117](#) or sub-section (2) of [Section 138](#) and every final order made under [Section 125](#), [Section 145](#) or [Section 147](#) shall contain the point or points for determination, the decision thereon and the reasons for the decision.” Therefore, every final order under [Section 125](#) of the Cr.P.C. [and other sections referred to in sub-section (c) of [Section 354](#)] must contain points for determination, the decision thereon and the reasons for such decision. In other words, [Section 125](#) and [Section 354](#) (6) must be read together.

7. [Section 125](#) of the Cr.P.C., therefore, impliedly requires the Court to consider making the order for maintenance effective from either of the two dates, having

regard to the relevant facts. For good reason, evident from its order, the Court may choose either date. It is neither appropriate nor desirable that a Court simply states that maintenance should be paid from either the date of the order or the date of the application in matters of maintenance. Thus, as per [Section 354](#) (6) of the [Cr.P.C.](#), the Court should record reasons in support of the order passed by it, in both eventualities. The purpose of the provision is to prevent vagrancy and destitution in society and the Court must apply its mind to the options having regard to the facts of the particular case.

8. [In Shail Kumari Devi v. Krishan Bhagwan Pathak](#), this Court dealt with the question as to from which date a Magistrate may order payment of maintenance to wife, children or parents. In *Shail Kumar Devi*, this Court considered a catena of decisions by the various High Courts, before arriving at the conclusion that it was incorrect to hold that, as a normal rule, the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance. It is, therefore, open to the Magistrate to award maintenance from the date of application. The Court held, and we agree, that if the Magistrate intends to pass such an order, he is required to record reasons in support of such Order. Thus, such maintenance can be awarded from the date of the Order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary.

9. In the case before us, the High Court has not given any reason for not granting maintenance from the date of the application. We are of the view that the circumstances eminently justified grant of maintenance with effect from the date of the application in view of the finding that the Appellant had worked before marriage and had not done so during her marriage. There was no evidence of her income during the period the parties lived as man and wife. We, therefore reverse the Order of the High Court in this regard and direct that the respondent shall pay the amount of maintenance found payable from the date of the application for maintenance. As far as maintenance granted under Section 24 of the H.M. Act by the Courts below is concerned, it shall remain unaltered.

10. Accordingly, the appeal is allowed.’

As per above case laws, the order of maintenance should generally be passed from the date of order, not from the date of application. If the Magistrate or Court, as the case may be, passes an order for maintenance, interim maintenance or expenses of proceedings from date of application, he or it has to record reasons for so doing as per the latter case law (supra) of Hon’ble Supreme Court.

**See the following cases also-**

**1- Smt. Pooja vs.State of U.P. and others,2015(91)A.C.C.498ALL.**

**2-Anara Devi @ Anarkali vs.State of U.P. and another,2016 Cr.L. J.(N.O.C) ALL.**

**(7)- Whether the proceedings of maintenance under section 125 Cr.P.C. 1973 is civil nature?**

**Ans.: Yes**

The Hon'ble Allahabad High Court has held in case law [Shabiul Hassan vs, Jareena Fatma, 2001 A.L.R. \(Allahabad Series\) Page 54 \(All\)](#) that the

proceedings under section 125 Cr.P.C. 1973 and under section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 are of civil nature.

The Hon'ble Punjab and Haryana High Court also held in case law **Kamla Devi and others vs. Mahima Singh, 1989 Cr.L.J. (P&H) 1866** that the proceedings U/S 125 Cr.P.C., 1973 is of civil nature. The Magistrate can invoke inherent power to recall his earlier order, in absence of parties, proceedings can be dismissed, the proceedings can be set aside, recalled or restored,

The Hon'ble Allahabad High Court has held and expressed contrary view in case law – **Gaurav and others vs. S.N. Thakur, 1986 ACC Page 346 (All)** that if the case / application U/S 125 Cr.P.C., 1973 is dismissed in the absence of parties : the Magistrate has no jurisdiction to recall the order and restore the case for fresh hearing.

The Hon'ble Supreme Court has held in case law – **Jagir Kaur vs. Jaswant Singh, A.I.R. 1963 S.C. 1521** that proceedings U/S 125 Cr.P.C., 1973 are of civil nature. The Magistrate can invoke inherent power to recall his earlier order and finally dispose of the proceedings.

The Hon'ble Supreme Court has held in case law - **Bhupendra Singh vs. Daljeet Kaur, (1979) 1 SCC Page 352 (S.C.)** that order U/S 125 Cr.P.C. must be vacated or recalled in terms of the provisions of the code itself.

In case law **Iqbal Bano vs. state of U.P. ,A.I.R.2007 SC 2215** it has been held by the Hon'ble Apex Court that the proceedings under section 125 of the Code are of civil nature, even if court notices that petitioner is divorced woman court can treat it as a petition under the Act(Muslim Women(Protection of Rights on Divorce) Act,1986).

**(8)- Whether not legally wedded/married wife (woman) is entitled to get maintenance from her husband?**

**Ans.: Yes.**

The relevant case on the point is **Dwarika Prasad Satpathy v. Bidyut Prava Dixit AIR 1999 SC 3348**, wherein Supreme Court held:

“In our view, validity of the marriage for the purpose of summary proceeding under [Section 125](#) Cr.P.C. is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceeding is not as strict as is required in a trial of offence under [section 494](#) of the I.P.C. If the claimant in proceedings under [Section 125](#) of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the Court can presume that they are legally wedded spouses, and in such a situation, the party who denies the marital status can rebut the presumption...

...If the Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under [Section 125](#) Cr.P.C. which are of summary nature, strict proof of performance of essential rites is not required. Either of the parties aggrieved by the order of maintenance under [Section 125](#), [Cr.P.C.](#) can approach the civil court for declaration of status as the order passed under [Section 125](#) does not finally determine the rights and obligations of the parties.”

**(9)- Whether the Muslim divorced wife is entitled to take maintenance from her husband even after the period of Iddat u/s 3(1)(A) of Muslim Women (Protection of Rights on Divorce) Act 1986 and under section 125 of the Code?**

**Ans. Yes.**

It will be appropriate to mention the section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986-

3. Mahr or other properties of Muslim woman to be given to her at the time of divorce. —

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to —

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that —

(a) her husband having sufficient means, has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her, make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of

any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

As per provisions of section 3(1) (a) of Muslim Women(Protection of Rights on Divorce) Act, 1986) the Muslim divorced woman is not entitled to get maintenance and fair provisions from her husband after expiry of the period of Iddat. But she is entitled to get maintenance and fair provision from her husband after expiry of the period of Iddat, if she does not remarry as per following case laws-

The Hon'ble Supreme Court has held in case law – **Danial Latifi and others vs. Union of India, A.C.J. 2002 Page 490 (S.C.)(Constitution Bench)** that the liability of Muslim husband to pay maintenance to his wife is not limited till the period of Iddat. A Muslim husband is liable to pay maintenance and fair provisions to his wife even after the period of the Iddat.

While upholding the validity of the Act, the Hon'le Apex Court has summed up its conclusions as under-1- a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the Iddat period must be made by the husband within the Iddat period in terms of Section 3(1)(a) of the Act.

2-Liability of Muslim husband to his divorced wife arising under section 3(1)(a) of the Act to pay maintenance is not confined to Iddat period.

3- A divorced Muslim women who has not remarried and who is not able to maintain herself after Iddat period can proceed as provided under section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim Law from such divorced women including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Waqf Board established under the Act to pay such maintenance.

4-The provisions of the Act do not offend Articles 14,15 and 21 of the Constitution.

The Hon'ble Supreme Court has recently held in case law **Iqbal Bano vs. State of U.P. 2007 (58 ) ACC 824 (SC)** that if the husband raises this contention in written statement U/S 125 Cr.P.C., 1973 to that effect that he had divorced the appellant/wife about 30 years back by thrice uttering the words – Talaq, Talaq, Talaq is not sufficient in law to uphold the alleged divorce as per case law *Shamim Ara vs. State of U.P.* (2002) 7 SCC 518. The object of Muslim Women (Protection of rights on Divorce) Act, 1986 is to ensure that “Fair Provision” is made for the divorced till the women marries for a second time.

The Apex Court has expressed its view in case law **Shabana Bano vs. Imran Kha, 2010 (68) A.C.C. 284 S.C.** that under section 125 of the Code and under section 4+5 of the Muslim Women (Protection of rights on Divorce) Act, 1986 read with section 7(1)(f) and 20 of Family Courts Act, 1984, a Muslim divorced wife's application is maintainable before the family court so long as she does not marry. Amount to be awarded under section 125 of the Code, cannot be

restricted for iddat period only. She is entitled to claim maintenance under section 125 of the Code, even after expiry of the period of Iddat also.

See also-

(1) **Shamima Farooqui vs. Shahid Khan, 2015 Cr. L.J.2551 S.C.**

(2) **Shakeela Banovs. Salimuddin,2016(94)ACC 378**

**(10)-What is the procedure to proceed ex parte and set aside thereof under Muslim Women (Protection of Rights on Divorce) Act, 1986?**

**Ans.: Rule 4 of the Muslim Women (Protection of Rights on Divorce) Rules, 1987**

The complete procedure to proceed ex parte and its setting aside has been provided under Rule 4 of the Muslim Women (Protection of Rights on Divorce) Rules, 1987, which provides as under-

“Rule 4

Evidence: All Evidence in the proceedings under the Act, shall be taken in the presence of the respondent against whom an order for payment of provision and maintenance, mehar or dower or delivery of property is proposed to be made or when his personal attendance has been dispensed with, in the presence of his pleader and shall be recorded in the manner specified for summary trial under the Code.

Provided that if Magistrate is satisfied that the respondent is wilfully avoiding service or wilfully neglecting to attend the Court the Magistrate may proceed to hear and determine the case *ex parte* and any order so made be set aside for good cause shown on application made within seven days from the date thereof subject to such terms as to the payment of cost to the opposite party as the Magistrate may think just and proper.”

As per proviso to this Rule, if the respondent is wilfully avoiding service of notice or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte*. Personal /duly service of notice upon the respondent is not necessary. If the Magistrate has proceeded the case *ex parte* or determined the case *ex parte* and the respondent moves an application to set aside the *ex parte* order within seven days from the date thereof and assigns good cause, *ex parte* order may be set aside subject to such terms as to the payment of cost to the opposite party as the Magistrate may think fit.

**(11)-Whether duly/personal service of notice upon the person against whom the maintenance order etc. is proposed to be passed, is necessary in order to proceed ex parte?**

**Ans.: No.**

In civil cases in order to proceed/adjourn the case *ex parte*, duly/personal service of summons is necessary under Order IX Rule 6 of the Code of Civil Procedure, 1908, but personal/duly service of summons/notice is not necessary.

Sub Section 2 of Section 126 of the Code provides as under-

“(2)- All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons- cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service,

or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.”

The proviso to sub section (2) of section indicates that “ if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* In the same way, Rule-4 of Muslim Women (Protection of Rights on Divorce) Rules, 1987 provides-

“Rule 4-Evidence: All Evidence in the proceedings under the Act, shall be taken in the presence of the respondent against whom an order for payment of provision and maintenance, mehar or dower or delivery of property is proposed to be made or when his personal attendance has been dispensed with, in the presence of his pleader and shall be recorded in the manner specified for summary trial under the Code.

Provided that if Magistrate is satisfied that the respondent is wilfully avoiding service or wilfully neglecting to attend the Court the Magistrate may proceed to hear and determine the case *ex parte* and any order so made be set aside for good cause shown on application made within seven days from the date thereof subject to such terms as to the payment of cost to the opposite party as the Magistrate may think just and proper.

Hence ,as per this statutory provisions i.e. proviso to sub section (2) of section 126 of the Code and proviso to Rule 4 of Muslim Women (Protection of Rights on Divorce)Rules,1987, duly/personal service upon opposite party is not necessary in order to proceed *ex parte*.

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# TRUTH, FALSEHOOD, HOSTILITY OF WITNESSES & THE CHALLENGES BEFORE A TRIAL JUDGE

Dr. Humayun Rasheed Khan\*

## Abstract

*People's quest for justice starts when they approach the courts with pain and anguish in their hearts and minds having faced legal problems and having suffered physically or psychologically, but the practice shows that there are fictitious seekers of justice as well. These fictitious seekers reach after filing a false case and getting investigation in their favour with a motive either to gain monetarily or due to enmity. The most important function of a judge is to conduct the proceedings in a fair, orderly and dignified manner. Finding the truth of contested issues of fact is the first concern of a trial judge. Based on facts ascertained, the judge is to apply the law and give his decision on innocence, guilt or liability. But a trial judge finds himself in a difficult situation when falsehood is openly perpetuated before him during the trial and this situation demands a lot of precaution on the part of trial judge lest the truth will get buried under the shadow of falsehood. This paper is an attempt to highlight the issues associated with perjury as people with lies on their lips have become a common feature before trial courts. It is often said that one can get away in a murder case but none can get away after committing offence of perjury in advanced legal systems which should certainly be our goal in India as well.*

**Key Words:** Contempt, Falsehood, Interest of Justice, Perjury

## Introduction

The last few decades have seen rapid decline in the moral values and moral strength of our society due to increasing commercialisation of society and human mind set. The element of greed has gradually come to occupy the centre-stage of human affairs adversely affecting the inner human conscience. The clash of egos resulting in increasing individual, group, professional and family enmity has further aggravated the situation. This unfortunate situation is giving serious challenges to different institutions.

It is remarkable to note that the institution of justice is treated with same reverence as is a place of worship by people of faith because truth is considered to

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be an omnipresent virtue around it. Each lie in this temple of justice is to be considered an unforgivable sin and in strict legal sense it must be considered a serious crime as these lies could shatter not only characters and confidence of victim or witnesses but may adversely affect institutional strength as well. The Supreme Court of India has held as under

*"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.<sup>1</sup>*

Unfortunately in this extremely materialistic world, perjury has become a way of life in our country. It is essential that justice should not only be done to the parties, their advocates, witnesses but it should also be done to the society at large. The Hon'ble Supreme Court while discussing the role and qualities of the judges observed that a judge should possess the capacity for abstract thought, imagination, learning, a retentive memory, quick thinking, intellectual curiosity and ability to analyse and articulate.<sup>2</sup>

The functions of a trial judge, therefore, demand a variety of skills on the part of a judge besides knowledge of law. A judge's personality and values influence his decisions and atmosphere he creates in the courtroom. His body language and tone of voice, his reactions to witnesses, his interaction with others in the courtroom, his manner of ruling on objections are all important. Moreover, a judge need to be an active participant during trial, particularly when evidence is adduced as the trend of giving false & fabricated evidence is common due to allurements, threat, connivance etc.

The Supreme Court further observed in Himanshu Singh's case that *"If a criminal Court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Court administering criminal justice cannot turn a blind eye*

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<sup>1</sup> Himanshu Singh Sabharwal v. State of M.P. & Others AIR 2008 SC 1943

<sup>2</sup> S.C. Advocates on Record Association v. Union of India, (1993) 4 SCC 441

*to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators."*<sup>3</sup>

A trial judge certainly finds himself in a difficult and disturbing situation when witnesses start turning hostile one after another so much so that the informant most often starts denying the contents of his own F.I.R. There appear to be multifarious reasons behind this usual trend of falsehood in trial courts. One of the most common reasons appears to be human greed which overshadows blood and other relations. Delay in disposal of cases is another reason. Moreover, inability of poor people to stand against the pressures exerted by powerful accused persons or their relations in the absence of witness protection law in our country. It has been held by the Supreme Court that *"Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage managed, tailored and partisan trial. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."*<sup>4</sup>

### **Procedure for Offences against the Administration of Justice**

It was observed by the Hon'ble Supreme Court that as perjury has become a way of life, the court in order to get rid of the evil should resort to the use of provision of law contained in Chapter XXVI of the Code of Criminal Procedure. Section 340 provides the procedure for offences enumerated in S. 195 (1) (b) which is one of the exceptions to the general rule that any person can lodge complaint of an offence. When an offence is committed in relation to a public servant [S. 195(1) (a)] the sanction of the public servant should first be obtained. When the offence is in relation to a court [S. 195 (1)(b)] the sanction of the court should be obtained first. Where the offence is not included in S. 195 Cr.P.C., notice under S. 340 Cr.P.C., for institution of enquiry is not legal. The Court can initiate proceedings under S. 340 Cr.P.C., only for the offences mentioned in Section 195.<sup>5</sup>

The object of Section 340 of Cr.P.C. do not control or circumscribe the power of the police to investigate the offence<sup>6</sup> as it is applicable to all proceedings in all courts irrespective of the fact whether the matter in a court in which allegedly an offence mentioned in S. 195 of the Code was committed, was a

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<sup>3</sup> Supra note.1, para 9

<sup>4</sup> Ibid.

<sup>5</sup> Jose John v. K.C, Kuruvila, 1996 Cr.L.J. 1449 Ker, K.K. Khanna v. Expo Enterprise, 1984 Cr.L.J. 1723; (1984)2 Crimes 81, K.T.M.S. Mohammed v. Union of India, AIR 1992 SC 1831; 1992 Cr.L.J. 2781; (1992) 3 SCC 178 M. Muthuswamy v. Special Police Establishment, 1985 Cr.L.J. 420 (Mad.), B.K. Gupta v. Damodar H. Bajaj, 2002 SCC (Cri) 1103, Syed Asadullah Khan v. Addl. Magistrate, (1988) 3 Crimes 30

<sup>6</sup> M. Narayandas v. State of Karnataka, (2003) 11 SCC 251 : 2004 SCC (Cri) 118

criminal case or civil case.<sup>7</sup> Essential Requirements for application of S. 340 Cr.P.C. are as under;

(1) The person has given false affidavit or evidence in a proceeding before the court and;

(2) In the opinion of the court, it is expedient in the interest of justice to make an enquiry against such a person in relation to the offence committed by him.

The inquiry which is held under S. 340 on a complaint which is lodged by one of the parties to the litigation has to be scrutinized with care and caution in order to ensure that on the basis of false and frivolous complaint action is not taken against the litigant who has a right to pursue the litigation. Section 340 confers discretion on the Trial Court to decide whether complaint should be filed after the inquiry is held under S. 340.<sup>8</sup> It does not apply where there is no allegation that the forgery in the document was committed after it was produced before the court, as mere production of a document which has not been proved as forged cannot be the basis for ordering prosecution under S.340 of Cr.P.C.<sup>9</sup>

### **Deliberate Falsehood**

It is only in glaring cases of deliberate falsehood when the court can direct an enquiry to be made or complaint to be filed but this discretion has to be exercised judicially in the light of all the relevant circumstances, not with a view to satisfy personal feelings or vindictiveness. During the trial of a case, it was noticed that a witness who was also mother of the accused facing trial in her quest to become hostile she even denied accused to be her son. In another case where the parents of a deceased daughter were attempting to falsely implicate her deceased daughter's in-laws in a dowry death case concocted a false story of dowry, harassment and death of their of their daughter due to these reasons though the honest daughter & daughter-in-law in her dying declaration stated the occurrence to be accidental.

The Court has to be satisfied about the deliberate falsehood as a matter of substance and there must be a reasonable foundation for the charge.<sup>10</sup> There may be a case where false affidavit might have been filed or offences under Section 195 (1) (b) might appear to have been committed, but nevertheless, unless it is expedient in the interest of justice that an enquiry should be made or a complaint should be directed to be filed, same cannot be done.<sup>11</sup>

### **Mere Wrong Statement**

The provisions relating to offences against administration of justice takes care of human follies and ordinary forgetfulness as it says that merely a wrong statement will not entail liability for perjury. It is pertinent to note that some

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<sup>7</sup> K. Rajagopala Rao v. P. Radhakrishna Murthy, (2002) 3 Andh LT 513

<sup>8</sup> Jari Mari Co-operative Society Ltd. v. Shamshad Begum Abdul Hamid Khan, 2008 Cr L. J. 668 - 670

<sup>9</sup> Yakub Ismail Bhai Patel v. State of Gujarat, AIR 2004 SC 4209; (2004) 12 SCC 229; 2004 Cr. L. J. 4205), Swaran Singh v. State of Punjab, AIR 2000 SC 2017; (2000) 5 SCC 668; 2000 Cr.L.J. 2780

<sup>10</sup> Syed Asadykkag Jazmi v. Additional Magistrate, 1988 (3) Crimes 330, 333 (All

<sup>11</sup> Ibid, 332

inaccuracy in a statement, which may be innocent or inadvertent or immaterial, may not justify a prosecution as expedient in the interest of justice. There must be prima facie case of deliberate falsehood on a matter of substance and the court must be satisfied that there is reasonable foundation for the charge and that prosecution of the offender is necessary in the interest of justice.

The power under S. 340 should be exercised with great circumspection, and where it is considered necessary 'in the interests of justice.'<sup>12</sup> Where the statement of the witness is based on documentary evidence, the statement would not be without basis, it would not be a fit case for prosecution for perjury under S. 191, IPC.<sup>13</sup>

### **Expediency & Interest of Justice**

It was observed that the implication of the words 'expedient in the interest of justice' means that it is only in glaring cases of deliberate falsehood that the court can direct an enquiry to be made or complaint to be filed. The court cautioned that Section 340 Cr.P.C. cannot be utilized to satisfy personal feelings of vindictiveness. When the order under section 340 Cr.P.C. was passed by the court without expressly recording a finding to the effect that it is expedient in the interest of justice that enquiry should be made into the offence concerned, such an order is illegal.<sup>14</sup>

It was held by the Hon'ble Court that recourse to Section 340 Cr.P.C. is not permissible when the witness deposed contrary to what he had said in a statement recorded under Section 164 Cr.P.C. It is important to mention that Land Acquisition Judge not being subordinate to District Judge, the District Judge cannot hold the enquiry under S 340 Cr.P.C. for an offence committed before Land Acquisition Judge.<sup>15</sup> Moreover, the provision in Section 340 Cr. P. C., is not applicable to an arbitrator as it is not a court.<sup>16</sup>

Any person aggrieved by the order passed under S. 340 Cr.P.C. either refusing to make a complaint or making a complaint may prefer an appeal to the court to which the court passing the order is subordinate.<sup>17</sup> It must be mentioned here that an appeal under S. 341 of Cr.P.C. is not maintainable when the order is passed by the single Judge of the Hon'ble High Court under S. 340, Cr.P.C. The appeal is also not maintainable under Cl. 15 of the Letters Patent, which clearly bars an appeal against the order of the single Judge of the High court made in exercise of the criminal jurisdiction.<sup>18</sup>

So far as the limitation is concerned, Article 115(a) of the Limitation Act is attracted for preferring an appeal under S. 341 Cr. P.C. and the starting point of

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<sup>12</sup> Kuriakose v. State of Kerala, 1995 Cr.LJ 1751 (Ker-DB)

<sup>13</sup> Kamalvasini Agarwal v. R.D. Agarwal, 2002 CrLJ 4370 (4371)(MP)

<sup>14</sup> Amjad Ali v. Marfal Ali Bimas, 1997 Cr.L.J. 4148 (Cal.)

<sup>15</sup> State of A.P. v. V. Sharma, 2007 Cr.L.J. 289 (SC); AIR 2007 SC 137; (2007) 2 SCC 159; (2007) 1 SCC (Cri) 535

<sup>16</sup> Manohar Lal v. Vinesh Anand, AIR 2001 SC 1820

<sup>17</sup> H.S. Aluwalia v. D.C. Jain, 1994 Cr. L.J. (NOC) 448 (P&H)

<sup>18</sup> Abdul Karim Haxi Xaveri v. District Judge, Junagadh, 2005 Cr.L.J. 1651

the limitation is a date on which the court records that there appears to be commission of offence and decides to send the complaint.<sup>19</sup>

### **Quick Disposal & Summary Procedure: Section 344**

The conditions precedent for the exercise of this power are (1) the expression of opinion by the court at the time of delivering judgment or final order that the witness appearing before it has knowingly or wilfully given false evidence or has fabricated false evidence with the intention that such evidence should be used in such proceedings; (2) that the court is satisfied that it is necessary and expedient in the interest of justice to try him summarily for such offence,<sup>20</sup> and (3) before commencing the summary trial for punishment, the witness must be given reasonable opportunity of showing cause why he should not be punished.<sup>21</sup>

The prosecution for adducing false evidence on the basis of mere lodging of FIR is not sustainable. The allegations in FIR are not on oath, S. 344 does not apply. Where a witness after his evidence is over files affidavit stating that whatever he has deposed before the Court earlier as a prosecution witness was not true and it was done at the instance of the police, an action for perjury against such a witness is warranted.

### **Procedure in cases of Contempt: Section 345**

This section enables a court to preserve its decorum and maintain its dignity. It provides a summary remedy to deal with certain kinds of contempt. It gives a special power to a court to deal with a case of insult offered to the court in its presence. Hon'ble Allahabad High Court has held that the court is entitled to postpone passing sentence until some subsequent day if the accused is not thereby prejudiced.<sup>22</sup> A reasonable opportunity to show cause as to why he should not be punished must be given to the accused. Where the person proceeded against was not heard, the order of conviction was held unsustainable.<sup>23</sup>

Five classes of contempt are dealt with in the section:

- (1) Intentional omission to produce a document by a person legally bound to produce it (S. 175 I.P.C.);
- (2) Refusal to take oath when duly required to take one (S. 178);
- (3) Refusal to answer public servant authorised to question (S.228);
- (4) Refusal to sign a statement made to a public servant when legally required to do so (S. 180) and
- (4) Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding (S. 228).

The court may instantly detain the offender in custody and may take cognizance of the offence on the same day before the rising of the court. The offender is liable to pay a fine not exceeding two hundred rupees or in case of non-payment to suffer simple imprisonment for one month. It will be noticed that

<sup>19</sup> Prahllad Mallick v. State of Orissa, 1992 Cr.L.J. 1432

<sup>20</sup> T. Bhagi Patra v. State of Orissa, 1996 CRLJ 2423)

<sup>21</sup> Mahila Vinod Kumar v. State of Madhya Pradesh, 2009 CRLJ 3867

<sup>22</sup> Paiambar Bakshsh, (1889) 11 All 361; Venkatrao, (1992) 46 Bom 973)

<sup>23</sup> Himanshu Shekhar Sharma v. State of Bihar, (2004) 4 Pat LJR : 2002 CrLJ 215 (Pat)

only contempt committed in the view or in the presence of the court comes within the purview of this section.

It needs to be pointed out that taking cognizance of the offence 'before the rising of the court on the same day' does not mean that the proceedings have to be initiated and finalized on the same day. It is the cognizance alone which has to take place on the day when the offence of contempt is committed, and that trials must be disposed of as expeditiously as possible, but not necessarily on the same day.<sup>24</sup> The offence of interruption of public servant sitting in judicial proceedings would fall under Section 228 I.P.C., and not under this section.<sup>25</sup> The remedy improvised by the section being summary, it is provided for the safety of the accused that the record should be in detail. It is necessary that it should show (1) the facts; (2) the statement of the offender; and (3) the finding and sentence. If the offence is one under Section 228 of the Penal Code, then the record must further show, (4) the nature and stage of the proceedings interrupted, and (5) the nature of the interruption or insult. The provisions of this section are mandatory and must be strictly complied with.<sup>26</sup>

### **Conclusion & Suggestions**

The law of perjury as contained in chapter XXVI of the Code of Criminal Procedure needs to be drastically changed and made stringent to deter those people who either lodge false cases or give false & fabricated evidence. It is ironic that offences which, if proved during trial, could lead to death penalty, imprisonment for life or imprisonment for as many as 14 years have just three months imprisonment or a petty fine which may extend to five hundred only under section.344 Cr. P.C. to the one who instituted a false criminal case or gave false evidence or fabricated false evidence before the court. In fact, the quantum of punishment under section 344 is grossly inadequate having little or almost no deterrent effects on the persons perpetuating lies before the court of law for monetary considerations while the procedure under section 340 Cr. P.C. is indirect and cumbersome forcing trial judges to have recourse to the procedure under section 344 Cr. P. C.

Unfortunately, the procedure u/s 340Cr.P.C. is neither straight nor easy to be followed as a certain amount of confusion prevails in practice of referring officer becoming a complainant in the matter. It is this confusion which had led to minimum use of this provision by trial judges. Why it is not provided that after giving detailed finding in the judgement by the trial judge, directions should straight away be issued to police for registering F.I.R. under relevant provisions of I.P.C. indicated by the judge against the person who gave false evidence or fabricated false evidence during trial and the evidence and material on record in that case becoming the base material for F.I.R. and consequent investigation against the person giving false evidence or fabricating false evidence in that case in the open court ? Is it because the judicial acumen of trial judges is not trusted? Is it due to the fact that trial judges will hold enormous powers? Is it not enough

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<sup>24</sup> Jagir Singh v. Gram Panchayat, Raipur Kalan, 1983 (1) Crimes 157 (P&H)

<sup>25</sup> Chinubhai Keshavlal Nanavati v. J.L. Mehta, 1978 (CrLJ 1040 (Guj-DB)

<sup>26</sup> Capt. Gurbaksh Singh v. State, AIR 1960 Punj 211

to motivate registration of false F.I.R. or if it is true, then give false evidence by turning hostile before courts for monetary or other considerations? Is it not a mockery of justice?

This painful present situation needs to be controlled and the law for giving false evidence or fabricated false evidence requires to be made stringent by making at least a minimum punishment for heinous offences which should not be less than 3 years and fine but may extend to 7 years and fine and for other offences, it should not be less than 2 years and fine but may extent to 5 years and fine under what at present constitutes section.344 Cr. P. C.

In fact, enhancing punishment for giving false evidence or fabricating false evidence might control the frequent lies on lips in our country resulting in acquittal of accused persons which shakes the faith of common man in the institution of justice. One of the biggest challenges before our criminal justice system certainly is the issue of hostility of witnesses which needs urgent legislative attention as the judiciary has already introduced required precautions through the interpretation of existing law on the point. We also need a 'Comprehensive Witness Protection Law' at this critical juncture as soon as possible to effectively control those who force poor, hapless and resource less victims and their family members to give false evidence and deny the truth before the court. We must not forget the esoteric words of Michael Foucault that punishment is the life of order in society.

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# **SUCCESSION CERTIFICATE: STATUTORY PROVISION AND JUDICIAL INTERPRETATION THERETO**

**Saurabh Saxena\***

## **I. Introduction**

In a country like India, succession is always a very important and complex issue because of our multi-diverse society and culture. There is no uniform codified law of succession for all the citizens. Taking benefit of this situation, everyone defines law or interprets law as per one's suitability. Consequently, right to access the property through succession is always a matter of dispute. Often a person passes away leaving behind so many debts and securities in the form of shares, insurance policies, Fixed deposits, National Savings Certificate, retiral benefits etc. In ordinary course nominee of a deceased person is capable to withdraw money after the death of deceased. The situation becomes grim when a person dies without leaving a valid will or without assigning a nominee in his debts and securities. In the absence of nomination, debtor or financial institutions face difficulty, when so many claimants resurfaces and claim dues, facing difficulty debtor refuses to pay dues to claimants for want of authentic heir or legal representative. Thereby to recover debts and securities, heirs of a deceased person are required to have a succession certificate. Succession Certificate is obtained by courts in India and it is governed by The Indian Succession Act 1925.

The Courts have no power to decide the rights of the parties in issuing succession certificate neither they can declare any person to be the owner of any debt or securities in question. Succession certificate merely affords full indemnity to the debtor for the payment he makes to the person holding such certificate. Thus, when the debtor pays the debts or the securities as specified in the certificate to the holder of such certificate, then on such payment, he is absolved from his obligation to pay to anyone else, as it conclusively concludes his part of his obligation and such payment is construed to be in good faith. This safeguards such debtor or person liable to pay that he may not be later dragged into any litigation which may arise subsequently between the claimants. The grant of succession certificate is conclusive against the debtor owing such debts or liable on such securities. The proceedings for grant of succession certificate are summary in nature and that no rights are finally decided in such proceedings. In this way the court cannot adjudicate complicated questions of fact in summary proceedings. Succession certificate is issued by a Civil Court to the legal heirs of a deceased person. If a person dies without bearing a will, a succession certificate can be granted by the court to realize the debts and securities of the deceased. It establishes the authority of the heirs and gives them the authority to have securities and other assets transferred in their names as well as inherit debts. Succession certificate is issued as per applicable laws of inheritance on an

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\* Civil Judge (SD) Agra, former Dy. Director, JTRI, U.P., Lucknow

application made by a beneficiary to a court of competent jurisdiction. The certificate shall have effect throughout India.

Chapter X of Indian Succession Act 1925 comprising, Section 370 to 390, incorporate provisions regarding Succession Certificate. The provisions which are primarily concerned with issuance of certificate are Section 371, 372 and 373. Section 371 provides for Court having jurisdiction to grant certificate, Section 372 provides for application for certificate and Section 373 provides for procedure on application for succession certificate. As per provisions of section 370 and 372(1)(f) of Indian Succession Act, **Succession certificate can be prayed for and is granted only in respect of debts and securities.** In Section 372 (1)(f), it is provided that the application is to be made in respect of debts and securities. On the other hand it is also clear that every kind of dues do not fall within the ambit of debt and securities. It does not confer any title to the person in whose favour the grant has been made. Such right can always be established in proper proceeding.

## **II. JURISDICTION**

Section 371 of the Indian Succession Act 1925 provides for jurisdiction, which is as follows-

“The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

Definition of District Judge has been defined under Section 2[(bb) of Indian Succession Act, 1925. As per Section 2[(bb) of Indian Succession Act, 1925, "District Judge" means the Judge of a principal Civil Court of original jurisdiction. Subject to the provisions of Sec.. 370 a district judge has jurisdiction to grant a certificate under the following two cases:

- (a). If the deceased at the time of his death resided within his jurisdiction.
- (b). If the deceased had no fixed place of residence, when he has left property, within his jurisdiction.

As per Section 371 of Indian Succession Act, 1925, Court of District Judge is competent to issue succession certificate. Important question arises, whether the court of Civil judge is also authorised to entertain application for succession certificate? In this regard Sec 388 of the Indian Succession Act confers upon the State Government to invest any court inferior to the grade of District Judge with power to exercise the functions of the District Judge under this part namely part 10 which include Section 372. In pursuance of Sec 388, the State Government has issued a notification dated 11.3.1955 to the following effect:-

1. In suppression of all previous notifications on the subject, and in exercise of the powers conferred by sub-section (1) of section 388 of the Indian Succession Act, 1925 (Act No. XXXIX of 1925) the Governor of Uttar Pradesh is pleased to invest all Civil Judges in the State with power to exercise the functions of a District Judge under Part X of the said Act within the local limits of their respective jurisdiction as Civil Judges.

2. In suppression of all previous notification on the subject and in exercise of powers conferred by sub-section (1) of Section 388 of the Indian Succession Act, 1925 (Act No. XXXIX of 1925) the

Governor of Uttar Pradesh is pleased to invest all Munsifs in the State with power to exercise the functions of a District Judge under Part X of the said Act within the local and pecuniary limits of their respective jurisdiction as Munsifs.

After the issuance of above mentioned notification it is clear that, in State of Uttar Pradesh, Courts of Civil Judges and Munsifs are authorised to entertain application for issuing succession certificate. Hon'ble Allahabad High court has also affirmed this view in Case, *Writ-C No.63679 of 2011, Ashok Mahaur vs. Darshan Singh and Another*, by observing “ it cannot be said that application in question could not have been considered by the Civil Judge and I reject the contention of the learned counsel for the petitioner that Additional Civil Judge has no authority to pass the impugned order”.

For succession certificate an applicant is always required to present application before a court in first instance, in whose jurisdiction death was caused. In, *Rameshwari Devi v. Raj Bali Shah and another AIR 1988 ALL 68*, it was held that “ A reading of Section 371 shows that it is only in those cases in which the deceased at the time of death had no fixed place of residence that recourse to the second part of the section could be taken”.

In *Km. Rakhi Vs. Ist Additional District Judge, Ferozabad*, 2000 AIR(ALL) 166, it has been held that “ the second part of Section 371 of the Act would not be attracted unless first part is exhausted. In ordinary circumstances the jurisdiction falls within which the deceased ordinarily resided at the time of his death. If at that time he had no fixed place of abode then the jurisdiction would fall within which the property is situated. The second branch would not be attracted until and unless the first branch is exhausted. The second branch is an alternative provision which is attracted only in those cases in which the deceased at the time of his death had no fixed place of residence. The permanent residence is necessarily a fixed place of abode. The permanent residence mentioned by a person, on a transferable job, is the fixed place of abode. However, by reason of employment one is transferred from one place to another or he is staying at a different place at the time of his death in that event, it cannot be said that he ordinarily resided at the place where he was staying for his treatment nor it could be said that he was ordinarily residing at the places where he was serving by reason of his transferable service”.

An application for succession certificate can not be put forward before the death of deceased. In *Sunita Roy Choudhary and Ors v. Jageshwar Choudhary and Other*, AIR 2006 Patna 127 it has been held that “In Proceedings for grant of succession certificate, Jurisdiction of Court arises on a death having taken place and ascertained. Death prior to filing of application is an uncertain event. It cannot be adjudicated or declared by District Judge in proceedings under Succession Act. District Judge cannot strike issue as to whether a person is dead or not, if dead when dead.”

In an application for granting succession certificate courts can not presume the death of deceased. Date and time must be certain while considering application for issuance of succession certificate. As in *Smt. Kiran Jha v. Baidyanath Jha and Ors. AIR 2016 Patna 45*, it has been held that “As per sub-section (1)(a) of Section 372, the time of the death of the deceased is to be furnished. That means to say, before filing of petition, there should be positive

evidence regarding the persons relating to securities and debt, the Succession Certificate is sought for. And that being so, complicated question of death, is to be found out of consideration as the Court is not found competent enough to adjudicate over the same as, the requirement as seems, keep the controversial point out of adjudication. In a summary proceeding where under succession cases are being dealt with, the presumption of Section 108 of the Evidence Act is not found attractable as, presumption always happens to be rebuttable. Moreover, the Court while dealing with the issue of grant of succession certificate is not competent enough to delve into complicated question of law regarding presumption of death of deceased, unless and until, there happens to be such kind of declaration by a competent Court". In case of *Mathura Prasad v. Shri Kedar Nath*, AIR 1948 All 303, in reference to property of deceased it was observed that "The property referred to in his section means the property belonging to the deceased. If the applicant claims the property as belonging to him, though standing in the name of the deceased, no application will lie under this section."

### **III. Application For Certificate**

Section 372 of the Indian Succession Act prescribes procedure of application for certificate. As per Section 372(1) (f) of Indian Succession Act 1925, *Succession certificate can be prayed for and is granted only in respect of debts and securities*. Procedure prescribed under the Act is for the purpose that only heir can present application, who is entitled to receive benefit. An heir can come forward and make a claim to the debt and securities, to which the deceased was entitled. Any person of sound mind and not a minor can apply for certificate provided he has an interest in the estate of the deceased. The only right for which entitled a person to a succession certificate is the beneficial interest in the debt of security.

The expression "**debt**" has not been defined under the Act. The said expression has not been defined under the General Clauses Act as well. Since the word "debt" is not defined in the Succession Act, then it is important to import the meaning of debt explained by higher courts.

A debt means any pecuniary liability whether payable in present or in future to another in return for money, services, goods or any other obligation. A debt is also property in the form of a chose in action and is heritable and assignable as understood in law<sup>1</sup>. A debt is a sum of money now payable or a sum of money which will become payable in future by reason of a present obligation. *In common parlance it is a sum of money due from one person to another*. The word debt is of large import, including not only that debts of record or judgment, and debts by specialty but also obligations arising under simple contract, to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation of promise. For example, a dividend declared by a company is after its due date a debt from the company to the share holder. A dividend is not a debt until it is declared. The word 'debt' as used in S. 60, C.P.C. must be confined to a debt in ordinary sense of the word, that is to say, an existing debt. It involves (a) an obligation incurred by the debtor, (b) a liability on the part of the debtor to

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<sup>1</sup> Vishalakshi v. Bank of India, AIR 2006 Ker 255.

pay for that obligation at a certain date. Until that obligation has been fully incurred there is no debt. Moneys due from an Insurance Company under a policy of insurance are 'debts' and succession certificate may be granted in respect of such money<sup>2</sup>. The meaning of the word 'debt' came to be considered by the Apex Court, though in a different context, in the case of *Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth Tax (Central) Calcutta*, AIR 1966 SC 1370. It was held that "A debt involves a present obligation incurred by the debtor and a liability to pay a sum of money in present or in future. The liability must however be to pay a sum of money, that is, to pay an amount which is determined or determinable in the light of factors existing at the date, when the nature of the liability has to be ascertained, but the expression does not include liability to pay unliquidated damages nor obligations which are inchoate or contingent." On the basis of these observations it can be said that 'Debt' is ordinarily a liability from one person to another, whether in cash or kind, secured or unsecured, whether ascertained or ascertainable, arising out of any obligation, express or implied. If so, one has to go by the ordinary meaning of the said expression.

In other words the expression 'debt' was defined to mean as "What is ordinarily understood by the word 'debt' is a liability owing from one person to another whether in cash or kind, secured or unsecured, whether ascertained or ascertainable, arising out of any obligation, express or implied."<sup>3</sup> The word debt does not include movable property other than a specific or ascertained sum of money. Gold ornaments pledged with the bank do not fall within the term 'security' or debt.<sup>4</sup>

The liability of the lessor to allow the lessee to the devised property on the termination of the lease in order to enable the lessee to remove his belonging therefrom is obviously not a debt or security by any test within meaning of s. 370.<sup>5</sup> On the death of the applicant for a succession certificate, the proceeding lapses and there can be no substitution of the alleged heirs of the applicant.<sup>6</sup>

Section 370(2) of Indian Succession Act 1925 defines word '**security**'. For the purposes of this Part, "**security**" means--

- (AA) any promissory note, debenture, stock or other security of the Central Government or of a State Government;
- (BB) any bond, debenture, or annuity charged by Act of Parliament [of the United Kingdom] on the revenues of India;
- (CC) any stock or debenture of, or share in, a company or other incorporated institution;
- (DD) any debenture or other security for money issued by, or on behalf of, a local authority;
- (EE) any other security which the [State Government] may, by notification in the Official Gazette, declare to be a security for the purposes of this Part.

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<sup>2</sup> Lalsa v. District IVth Upper District Judge, Basti and other, AIR 1999 Allahabad 342

<sup>3</sup> Dina Nath v. Balkrishna, AIR 1963 All 46

<sup>4</sup> Branch Manager v. Satyabam, AIR 1993 AP 337,338

<sup>5</sup> Rama v. Manager, PNB, AIR 1991 Cal. 128

<sup>6</sup> Deo Kumar Singh v. Kailash Singh, AIR 1961 Pat. 304

To ascertain what kind of dues are included within the ambit of debt and security, there are various propositions which are settled by courts. Such as in *Lalsa v. District IVth Upper District Judge, Basti and other AIR 1999 Allahabad 342*, Hon'ble court held that "The amounts of the Provident Fund, Compulsory Deposit Scheme, Life Insurance, Arrears of Pay, Death-cum-Retirement Gratuity etc., which are held by the employer and become payable as a result of the death of the employee, will undoubtedly fall within the meaning of the expression 'debt'. On this point, in *Smt. Rajjoo Devi v. Nageshwar and other AIR 1965 Allahabad 267*, it was held that "In order to establish the right of persons claiming the Provident Fund money of any subscriber after his death, to receive the money, the Provident funds Act itself envisages that a succession certificate may be issued by the Court in respect of Provident Fund money".

The word debt is not defined in Indian Succession Act. It is also important to understand, whether succession certificate can be issued with reference to movable or immovable property? In this regard to manage movable as well as immovable property only Letter of Administration can be issued under the Act. To make it more clear there are case laws which clearly lays down that succession certificate can not be issued with reference to all kind of properties. It can only be issued regarding debts and securities. As in *Branch Manager v. Satyabam, AIR 1993 AP 337,338*, it was held that "it does not include **movable property** other than a specific or ascertained sum of money. Gold ornaments pledged with the bank do not fall within the term 'security' or debt". In the same way in *Mt. Shyam Sundari Devi and others v. Sarti Devi and other AIR 1962 Patna 220*, it was held that "Provisions of S.370 to 381 of the Succession Act clearly show that a Succession Certificate can be asked for and granted only in respect of debts and securities and not for any other kind of property. It cannot be granted and asked for, in respect of **ornaments pledged** by the deceased with a Bank by way of security for the debt which the Bank had advanced since it is not a debt due from the Bank". With reference to ornaments kept in bank locker, in *Vimala Devi v. Shobha Walia and Ors AIR 2007 Chhattisgarh 36*, it was laid down by hon'ble court that "Security has been enlisted in Section 370 (2) of the Act. Admittedly, access to locker and the ornaments kept inside it, do not fall within the list as enshrined under Section 370 (2) of the Act. It is well established that a sum of money which is certainty and in all events payable is a debt, without regard to the fact whether it is payable now or at future time. Access to locker and ornaments kept inside it do not fall within the definition of debt. Requirement to have a succession certificate for access to the bank lockers or for realizing the ornaments kept inside the locker is not envisaged by Section 370 of the Act, therefore, succession certificate could not be granted for access to bank locker or articles which are lying in the locker of the bank". With reference to articles kept in bank, in the case of *State Bank of India v. Nitai Chandra Porel, AIR 1982 Cal 92*, it was held that "When articles deposited with bank for safe custody, the bank was merely a custodian of the same. Therefore, the bank could not be said to stand in the position of a debtor nor the depositor be called a creditor in respect of the articles deposited with the bank. But is the bank stood in the position of a bailee or trustee to whom though possession was entrusted, there was no intention of transferring the ownership. It is settled law that debt is not trust and any and every

liability irrespective of its true legal character does not become a debt. Succession certificate can be granted only in respect of debts and securities and not for any other kind of property. Therefore, in the case of articles deposited in the bank for safe custody succession certificate is not necessary". Similarly, in *Branch Manager, State Bank Of Hyderabad v. G.R.B. V Raju AIR 1993 AP 337*, it was laid down that "Articles pledged do not come within any of categories mentioned in security. And as such gold, articles pledged with the bank cannot be held as securities and hence question of obtaining a succession certificate does not arise."

It is pertinent to mention here that succession certificate can not be issued for immovable property. With reference to this in *Vishalakshi v. Bank Of India AIR 2006 Kerala 255*, it was laid down that "Succession certificate can be granted in only in respect of debt and securities. It can not be granted in respect of immovable property".

Compensation awarded to deceased does not fall within the ambit of debt and securities. As it was clearly laid down in *Ramkali and Ors v. State AIR 2007 Allahabad 8*, that "The compensation awarded under the Land Acquisition Act is not a debt as contemplated under Section 214 of the Indian Succession Act and therefore, the claimants are not required to furnish a succession certificate". Similarly Apex Court in *Rukhsana v. Nazrunnisa (2000)9 SCC240*, held that "Succession certificate can be granted only in respect of debt and 'securities' to which deceased was entitled, compensation sanctioned on account of death of employee in course of duty, being not asset belonging to deceased, no succession certificate required and his legal representative can claim such amount.

Family pension remains an important consideration for family members after the death of deceased. Family pension does not fall within ambit of debt and securities, thereby succession certificate can not be issued for securing family pension. As in *Mustt. Zubeda Ahmed v. Mustt. Fazlia Begum AIR 2016 GAUHATI 5*, it was laid down that " It is to be held that family pension not being 'debt or security' within the meaning of part-X of the Indian Succession Act, 1925, no succession certificate can be granted under Section 371 of the Act in respect of the benefit of family pension."

No certificate is necessary to claim amount in court deposit. As in *Sunanda Sarma and Ors. V. State of West Bengal, (2008) 1 Cal LT 426(HC)*, it was held that " Succession certificate under Section 370 of the Indian Succession Act, 1925 can only be granted in respect of debts and securities and not for any other kind of property. The properties of a deceased person when sold and the sale proceeds have been deposited in the court of district judge, the court is not, a debtor nor the heirs and legal representatives of the deceased could be termed as creditors in respect of such deposit to be required to apply for succession certificate."

The definition of security under Sec 370(2) is not exhaustive. As per Section 370(2)(e) of Indian Succession Act 1925, State Government is authorized to declare by notification any security to be security for the purpose of issuing certificate under the Succession Act. Courts can not issue succession certificate for a security other than those mention in sec 370(2). As In a case of *Iqbal Singh V. Every One and OR AIR 2013 Rajasthan 1*, a saw mill liscence was not declared as security by State Government. Forest department insisted upon to furnish Succession certificate. It was held that a departmental order cannot amend law and

therefore since a saw mill liscence did not fall within 'security' as defined in sec 370, no succession certificate could be issued for transfer of liscence.

#### **IV. Procedure for granting succession certificate**

Section 373 of Indian Succession Act 1925 provides for procedure on application for succession certificate. Under sub-section (1) of Section 373 if the Court is satisfied that there is ground for entertaining the application, he fixes a date of hearing after notice. Sub-section (2) decides the right of the applicant, whether entitled for a grant of the certificate. Under sub-section (3), if such Judge cannot decide such right, as the question raised both on fact or law are intricate and difficult then in a summarily proceeding it can still grant such certificate, if it appears to the Court, that the person making such application has a prima facie title thereto. This sub-section reveals two things, first adjudication is in a summarily proceedings and secondly if the question of law and fact are intricate or difficult, it could still grant the said certificate based on his prima facie title. This as a necessary corollary confirms that it was not a final decision between the parties. In other words the grant of certificate under it is only a determination of prima facie title. Sub-section (4) provide that where there are more applicants than one for a certificate, the Judge may grant certificate considering the extent of interest and the fitness in other respect of the applicants. Sub-sections (1) and (2) of Section 373 contain the procedure for grant of succession certificate in the cases where there is no contest. On the other hand, sub-section(3) and (4) prescribe the procedure for deciding contested cases and counter claims. The procedure laid down by Section 373 of the Act is summary in nature and it contemplates a summary enquiry into the matter of the application after service of notice to the opposite side. Lengthy and detailed investigation is not contemplated under the section. Of course, the nature, of enquiry must depend upon the circumstances of the case. In the summary enquiry the Court has only to ascertain as to who is entitled to the certificate.

Grant of succession certificate does not depend on the right of any claimant to the debt. The certificate does not recognize or invest in the grantee title to the debt or property in the debt. It only enables him to collect the debt and give valid discharge to the creditor. Grant of a certificate does not strike out or destroy the claims of others. If there be conflicting claims, they have to be settled in appropriate proceedings in accordance with law. In the summary enquiry entrusted by the provisions, the Judge is not expected nor required to decide whether actually the debt belonged to the deceased or not. That is a matter extraneous to the enquiry. That may have to be decided in the proceedings which the grantee of a certificate commences against the creditor for recovery, if such dispute is raised. To determine substantial dispute between the parties, It may have been decided in any other proceedings for such dispute existing among the rival claimants.

On the other hand, if the application is entertained the Court has to confine itself to issue of the right to the certificate in which the Court has to decide the question of title to the certificate asked for and to grant the same to the applicant, if he appears to be the person "having prima pacie the title thereto". The Court can not determine too intricate questions of law or fact, nor the Court can direct the parties to seek declaration in respect of their rights. On the other hands sub-

section (3) of Section 373 was to be read, construed and enforced in the light that succession as the rule which is to be promoted and not to be defeated. So, it cannot be construed that mere grant of such certificate or a decision in such proceedings would constitute to be a decision on an issue finally decided between the parties.

In summary inquiry the Court has only to ascertain as to who is entitled to the certificate. The court does not substantially decide the rights of the parties while issuing succession certificate. Therefore, proceedings for granting succession certificate would not operate as *res judicata* in any other suit or proceeding. This contention was held in case of *Madhavi Amma Bhawani Amma v. Kunjikutty Pillai Meenakshi Pillai*, AIR 2000 SC 2301, as “ Any decision made in proceeding under Section 372, for the grant of Succession Certificate under the Indian Succession Act, would not bar any party to the said proceeding to raise the same issue in a subsequent suit. Thus, even if no appeal is preferred by the appellant against the decision of the trial Court arising out of proceedings for the grant of Succession Certificate, the principle of *res judicata* would not apply”. In one case only one succession certificate can be granted.<sup>7</sup> A nomination does not amount to a transfer, but it merely enables the nominee, in the event of the death of the assured, to get the amount of the insurance policy. Nomination creates no interest in the nominee in respect of the title to the insurance policy’.<sup>8</sup>

In case applicant alone has made the application for issue of succession certificate. However, the opposite parties filed objections and requested that succession certificate be issued in their names. It was not necessary for the opposite parties to move a fresh application for issue of succession certificate. The opposite parties in their objection made a request for issue of certificate and therefore, for the purpose of Sections 372, 373 of the Indian Succession Act, 1925 the opposite parties shall be deemed to be applicants to issue succession certificate. *There is no bar that succession certificate cannot be issued in favour of the objectors*. The multiplicity of the suits should never be encouraged. The matter for issue of succession certificate question could be decided in the application moved by the applicant itself and therefore, there was no necessity for moving of fresh application by the opposite parties.<sup>9</sup>

A direction for DNA test cannot be given in a proceeding for issuance of succession certificate under the Indian Succession Act, 1925. The grant of a certificate does not establish a title of the grantee as the heir of the deceased, but only furnishes him with authority to collect his debts and allows the debtors to make payments to him without incurring any risk. In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application. The respondents, if they so chooses, can also adduce evidence to oppose grant of succession certificate. The trial court erroneously held that the documents produced by the respondents were not

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<sup>7</sup> Ganga Dei V/S Munia, AIR 1966 107 ALL.

<sup>8</sup> Mahadeo Nath v. Meena Devi, 1976 AIR(All) 64

<sup>9</sup> Dulia Devi v. Dulia Devi, 2001 AIR(All) 195

sufficient or relevant for the purpose of adjudication and DNA test was conclusive. DNA test is not to be directed as a matter of routine.<sup>10</sup>

No condition can be imposed by the Court while granting a succession certificate. Admittedly, the petitioners are the legal heirs. They have the right to utilise the money in whatever manner they like. The Court is only required to make a summary enquiry in order to find out as to whether the petitioners are the rightful claimants or not. The Court does not have any jurisdiction to impose a condition such as the amount would be kept in a fixed deposit for a certain period of time. The imposition of such a condition is clearly outside the domain of the jurisdiction of the Court, while issuing a succession certificate under Section 373 of the Indian Succession Act. While issuing succession certificate, courts are not empowered to hold or give direction for the use of claimed dues. The holder of succession certificate is fully empowered to use claimed amount as per his requirement. No condition can be imposed by the court while granting succession certificate.<sup>11</sup>

It is clear that the amount in any head can be received by the nominee, but the amount can be claimed by the heirs of the deceased in accordance with law of succession governing them. In other words, nomination does not confer any beneficial interest on the nominee. Amounts received by the nominee are to be distributed according to the Hindu Succession Act, 1956.<sup>12</sup> A mere nomination does not have the effect of conferring to the nominee any beneficial interest in the amount payable under the life insurance policy, on death of the insurer. The nomination only indicates the hand which is authorized to receive the amount on payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession.<sup>13</sup>

A succession certificate can be granted in favour of any person. It may be granted to an heir or a nominee. By reason of grant of such certificate, a person in whose favour succession certificate is granted becomes a trustee to distribute the amount payable by the deceased to his heirs and legal representative. He does not derive any right there under. The succession certificate merely enabled him to collect the dues of the deceased. No status was conferred on him thereby. It did not prove any relationship between the deceased and the applicant.<sup>14</sup> Succession certificate does not amount to declaration of the relationship of parties to get the service on compassionate appointment.<sup>15</sup>

Indian Succession Act 1925 clearly contemplates about the formalities to be complied with before issuance of succession certificate. Courts may come across with a situation, where a party file an application for issuing succession certificate for those things, for which courts have no jurisdiction to entertain it. If any authority require the party to furnish succession certificate to inherit any claim and if party presents application for issuing succession certificate in

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<sup>10</sup> Banarsi Das V/S Teeku Dutta, 2005(4) SCC 449

<sup>11</sup> Rizwana and Othrs V/S Civil Judge (Senior division) And Othrs, 2008 (1) AWC 551

<sup>12</sup> Shipra Sengupta V/S Mridul Sengupta, 2009(10)SCC 680

<sup>13</sup> Sarbati Devi and another Vs. Smt. Usha Devi, 1984 1 SCC 424

<sup>14</sup> State of Chhattisgarh and others v. Dhirjo kumar Sengar, (2009) 13 SCC 600

<sup>15</sup> U.P. Jal nigam, Banda, Jhansi and another v. Rajendra, (2014) 105 ALR 656

compliance thereto, this itself does not confer any jurisdiction on the courts to issue succession certificate. It is very necessary for courts to strictly adhere to the provisions of Indian Succession Act. "It is not in the power of courts to issue succession certificate to any person for compassionate appointment. By reason of grant of such certificate, a person in whose favour succession certificate is granted becomes a trustee to distribute the amount payable to the deceased to his heirs and legal representative. He does not derive any right thereunder. The succession certificate does not confer any title and neither prove any relationship between the deceased and the applicant".<sup>16</sup>

## V. COURT FEES

*Sec. 379 Mode of collecting Court-fees on certificates.*-(1) Every application for a certificate or for the extension of a certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court-fees Act, 1870, (7 of 1870.) in respect of the certificate or extension applied for.

(t) If the application is allowed, the sum deposited by the applicant shall be expended, under the direction of the Judge, in the purchase of the stamp to be used for denoting the fee payable as aforesaid.

(u) Any sum received under sub-section (1) and not expended under sub-section (2) shall be refunded to the person who deposited it.

A plain reading of S. 379 shows that the purpose and object of the provision was a procedure for collecting Court-fees on the certificate. It was a mode provided to collect the Court-fees payable on the certificate if granted. Sub-section (2) provides that out of deposit made, the Court-fees would be paid. In case the certificate is not granted and the amount is not spent for the purpose of payment of Court-fees in that event, the same would be refundable to be deposited. Sub-section (1) requires deposit of a sum equal to the fee payable under the Court-fees Act in respect of certificate applied for. Such deposit is to accompany the application for certificate. The expression 'shall' used here has to be interpreted on the basis of the purpose and object of the provision as has been incorporated. There is nothing to indicate that an application is required to be stamped with the Court-fees which is payable on the certificate. The application is filed with the Court-fees payable on a miscellaneous application is paid, the application is maintainable. It is not dependent for its maintainability on the question of deposit of the amount equal to the fee payable on the certificate. The Court-fees on the certificate is payable only when the certificate is issued after the certificate is granted. Till the certificate is granted, no Court-fee becomes payable. It was only a mode of collecting Court-fees for the certificate or in other words, it was a procedure for securing the realisation of the Court-fees payable on the certificate. In case a less amount is deposited when the certificate is granted additional Court-fees is to be paid. Similarly, if an excess amount is deposited, the balance is refunded or in case the amount so deposited is not at all spent, then the same also becomes refundable to the depositor. Sub-sections (2) and (3) makes the position clear to the extent that it was not meant that the deposit should be

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<sup>16</sup> State of Chhattigarh and ors. v. Dhirjo kumar Sengar, AIR 2009 SC 2568

mandatory or non-deposit thereof would make the application not maintainable. “As such non-deposit will not take away the jurisdiction of the Court to entertain the application. The grant of certificates is subject to payment of Court-fee. Such Court-fees can be paid even at the time when the certificate is issued after the application is allowed and certificate is granted. Thus, the provision contained in S. 379 of the Succession Act is not mandatory to the extent that non-compliance thereof would hit at the root of the application itself and throw it out in limine. Non-compliance of Sec. 379 of the Succession Act may be an irregularity but not an illegality before the grant of the certificate. Such irregularity is curable and can be cured on the eve of the grant by directing the applicant to deposit the amount before grant is made and certificate.”<sup>17</sup>

It has been observed that the provisions of the Code of Civil Procedure are applicable to proceedings for grant of succession certificate by virtue of the provisions contained in Section 141 of the Code. If provisions of Order XXXIII, regarding declaring an applicant as pauper or an indigent person are applicable to proceedings for grant of probate or letters of administration which are also governed under the Indian Succession Act, there was no rhyme or reason as why the provisions of Order XXXII would not be applicable to proceedings for grant of succession certificate under the Indian Succession Act.<sup>18</sup>

## **VI. Conclusion**

After considering the different connotations of succession certificate, it is established that courts have to consider all the aspects of Chapter X of Indian Succession Act 1925, before issuing succession certificate. The courts are required to be very careful in granting certificate before declaring an asset as debt,

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<sup>17</sup> Km. Rakhi and another v. 1st Additional District Judge, Firozabad and other, AIR 2000 All 166

<sup>18</sup> Ramji Sao v. Jageshwari, AIR 1964 Pat 272

since debt is not defined under the Indian Succession Act. Another requirement is that succession certificate can only be granted in respect of debts and securities. Proceeding for grant of succession certificate is a summary one and it does not confer any title in favour of certificate-holder. At this juncture, one can visualize the attempt of Legislature as well as higher courts in extending the power of the court to issue certificate for debt and securities. Had this provision not been there it becomes very difficult for heirs to recover money left by deceased. The judges need to identify ways which lead to dispose of applications of succession certificate speedily, as large section of people is always dependent on the money left by deceased.

## LATEST CHANGES IN LAW ON SECTION 138, N.I. ACT- AN ANALYSIS

Vishnu Pratap Singh\*

Law is an instrument of social change. A living law must keep changing to fulfill the needs of the society. Section 138, N. I. Act intends to ensure financial discipline in business dealings. The object and purpose of bringing new provision in the N. I. Act was to make the persons dealing in commercial transactions work with a sense of responsibility<sup>1</sup>. Several amendments have been made by the Parliament to ensure this 'sense of responsibility', in matters of cheque. At the same time, precedents of the Hon'ble High Courts and Hon'ble Apex Court have done a lot to ensure that cases of cheque bounce are decided expeditiously and complainant need not suffer for a long period and at the same time rights of the accused are also preserved. Provision of 'compounding' of offence is important provision in favour of the accused. In the recent past, aspect of compounding has got a new interpretation by the Hon'ble Supreme Court in *M/s. Meters and Instruments Private Limited v. Kanchan Mehta*<sup>2</sup>. Provision of **interim compensation** is latest in the matters of S.138, N.I. Act. The right to claim **interim compensation** is the newest right of the complainant in the cases of S.138, N.I. Act. These latest development in the field of cheque dishonour cases are appreciable but at the same time, there are some practical difficulties faced by the trial Courts in enforcing these rights of the complainant and the accused respectively. This article focuses on these latest development, practical difficulties faced by the trial Courts in enforcing these rights and some possible measures to cope up with practical difficulties. Article is divided in three parts. Part I deals with guidelines laid down by the Hon'ble Supreme Court in *M/s. Meters and Instruments case*. Part II deals with legislative amendments regarding interim compensation. Part III deals with practical difficulties faced by the trial Courts in enforcing these rights and some possible measures to resolve practical difficulties.

### PART-I

Hon'ble Supreme Court has laid down several guidelines and principles in *M/s. Meters and Instruments Private Limited case* to ensure the speedy trial of cases u/s. 138, N.I. Act. These are summarized as follows:

D) The principle contained in Section 258 Cr.P.C., has been made applicable to a complaint case u/s. 138, N.I. Act. Principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

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\* Civil Judge (Senior Division) Barabanki

<sup>1</sup> *Sant Lal Bhatia v. City Credit and Leasing Company*, III (2002) BC 210 (P&H)

<sup>2</sup> AIR 2017 SC 4594

II) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption u/s. 139 of N.I. Act but the standard of such proof is **preponderance of probabilities**.

III) The **object of the provision being primarily compensatory**, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

IV) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

V) Procedure for trial of cases u/s. 138 N.I. Act **has normally to be summary**. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction u/s. 357(3) Cr.P.C. to award suitable compensation with default sentence u/s. 64 IPC and with further powers of recovery u/s. 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

VI) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the banks slip being *prima facie* evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation u/s. 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

VII) In every complaint u/s. 138 of the Act, it may be desirable that **the complainant gives his bank account number and if possible e-mail ID of the accused**. If e-mail ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such e-mail ID to the payee of the cheque. **In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need not appear unless required and proceedings may be closed subject to any valid objection of the complainant** . If the accused complies with such summons and informs the Court and the complainant by e-mail, the Court can ascertain the objection, if any, of the complainant and

close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate.

VIII) The accused, who wants to contest the case, must be required to **disclose specific defence** for such contest. **It is open to the Court to ask specific questions to the accused at that stage.** In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the **provisions of plea bargaining.** Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need not be held up in proceedings for long unnecessarily.

## **PART- II**

**Interim Compensation:** Provision of interim compensation has been added *vide* **Negotiable Instruments (Amendment) Act, 2018**, notified on 2<sup>nd</sup> August 2018. Sections 143 A and 148 has been inserted in the N. I. Act. Trial Court has power to grant interim compensation u/s. 143 A where as Appellate Court has power to grant it u/s. 148 of the Act. According to the statement of objects and reasons of the Bill, the amendment is introduced “*with a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money*”.

Main features of the newly added provisions are as under:

- Power of trial Court to grant interim compensation is not regulated by Cr.P.C. Section 143 A of N.I. Act is a overriding provision.
- Power of trial Court to grant interim compensation is ‘discretionary’ power of the Court. It is very evident from the use of word ‘may’ in Section 143 A of N.I. Act.
- Interim compensation may be granted at the stage, where accused pleads not guilty, that is, once the statement of accused is recorded u/s. 251, Cr.P.C.
- Interim compensation shall not exceed 20% of cheque amount. But minimum amount of Interim compensation is not specified.
- Interim compensation shall be paid within **sixty days from the date of order or within such further period not exceeding thirty days.**
- The amount of interim compensation, if not paid by the accused, may be recovered in the same manner as if it were fine.
- Amount of fine imposed or amount of compensation awarded on conviction shall be reduced by the amount of interim compensation paid or recovered under Section 143 A.
- If drawer of cheque (accused) is acquitted, the Court shall direct the complainant to repay the amount of interim compensation with interest at the rate published by the RBI. This amount is to be paid within **sixty days from the date of order or within such further period not exceeding thirty days.** The provision is same where accused is acquitted in appeal.
- In an appeal by the accused against the order of conviction u/s. 138, N.I.Act, the Appellate Court may order the appellant to deposit such sum **which**

**shall be minimum of 20% of fine or compensation awarded by the trial Court. This “sum” shall be in addition to amount of interim compensation paid by the accused. This amount awarded by the appellate Court is to be paid within sixty days from the date of order or within such further period not exceeding thirty days.**

- The Appellate Court may direct the release of the amount deposited by the appellant to the complainant **at any time during the pendency of appeal.**

### **PART- III**

#### **Practical Difficulties faced by trial Court and their possible solutions:**

- Bar is essential and integral part of our justice delivery system. Although, it is well settled principle that ‘everybody knows the law’ but truth is not always so. Sometimes, **officers of the trial Court have to face resistance in enforcing the new laws**, be it legislation or precedent. The better option is to circulate the directions of the Hon’ble Supreme Court in the Local Bar Associations and affix one copy at notice board of the Court.

- In the new scheme of trial laid down by the Hon’ble Supreme Court<sup>3</sup> for trial of offence u/s. 138, N.I. Act, it is desirable that **the complainant gives his bank account number and if possible e-mail ID of the accused**. Experiences of trial Court show that complainant and accused having rural background don’t have **e-mail ID**. Sometimes, litigants are illiterate. On being told by the Court regarding these requirements, they show their inability to provide e-mail ID. For feeding of cases on CIS, as directed by Hon’ble High Court, e-mail ID is required but at trial Court level, this requirement could not be satisfied up to the mark due to above cited reasons of illiteracy and technological backwardness of litigants. This problem can’t be solved out immediately. But every efforts should be made to implement this direction, where parties are literate and technologically advanced.

- **Assessing the specified amount:** Now Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect. In every summons, issued to the accused, this specified amount has to be mentioned. The question is how cost and interest should be assessed? Obviously ‘cost’ is different from ‘compensation’. Reasonably speaking, cost may include- cost of litigation including reasonable expenses of the complainant in traveling to and fro to Court. In this respect, guidelines have been issued by the Hon’ble High Court *vide C. L. No. 9959/ Admin. ‘G-II’ Dated : Allahabad 13-07-2018*. This Circular letter says that Court shall examine the interest rate payable by the accused as well as the cost and other expenses. Determination of cost has been left at the discretion of the Court. So far as interest is concerned, as ruled by Hon’ble Supreme Court, offence under Section 138 of the Act is primarily a civil wrong, guidance may be taken from Section 34, C.P.C.

- At what stage cost and interest should be assessed? In all cases pending in the Court this exercise may be done at any stage. In new cases, this calculation has to be done before issuance of summons.

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<sup>3</sup> *Ibid.*

- The rule of prudence would be that complainant should be asked to furnish the details of costs and interest in a tabulation. It would not only ease the work of the Presiding Officer of the Court but it would provide a sense of participatory justice to the complainant also. If Court unilaterally determines the cost and interest and if accused deposits the same, there may be further chances of litigation. The reason would be non-satisfaction of the complainant. Therefore, if the grievances of the complainant are considered while calculating the costs and interest, it may yield better results.

- **Exploring the possibility of settlement:** In case the trial is to proceed, it is the duty of the Court to explore the possibility of settlement. Matter u/s. 138, N.I. Act being 'compoundable', may be settled through Lok Adalat. Mediation is also permissible in such cases. *In a remarkable judgment passed by the Hon'ble Delhi High Court<sup>4</sup>, the Court has drawn a distinction between traditional criminal cases and offence under Section 138 of Negotiable Instruments Act, 1881 to hold that it is legal to refer a criminal compoundable case as one under Section 138 of NI Act to mediation.*

**Conclusion:** Latest legislative changes in N. I. Act relating to interim compensation and new principles and directions laid down by the Hon'ble Supreme Court regarding speedy trial of cases u/s. 138, N. I. Act and compounding of these cases aim to ensure that commercial transactions work with a sense of responsibility. The duty of the trial Court is to ensure the implementation of these provisions and directions to ensure that complainant and accused both get timely justice with a satisfaction and happiness.

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<sup>4</sup> *Dayawati v. Yogesh Kumar Gosain, CRIMINAL Reference No.1/ 2016, decided on 17<sup>th</sup> October 2017.*

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# FEMALE PRISONERS: THE PATRIARCHAL PREJUDICES WITH SPECIAL REFERENCE TO DEATH OF MANJULA SHETTE

Prof. Bibha Tripathi\*

“...if wars are too important to be left to the generals, surely prisoners rights are too precious to be left to the jailors”<sup>1</sup>.

Being a prisoner is the lowest you can be in life. Being a female prisoner is so much worse. Toni Bunton<sup>2</sup>

## Abstract

Atrocities, excesses and exploitations of prison inmates in the intra-mural confinement is neither new nor surprising but indeed extremely painful, sadistic and absolutely dismaying. So far as the cases of female criminality are concerned, it has been viewed, perceived and interpreted differently by mainstream (malestream) and feminist criminologists. It has been theoretically analysed too<sup>3</sup>. Since no significant change could be brought only through theorising female offending, therefore, the case of Manjula shette has been chosen to discern some of the burning and debatable questions of penological significance ie; crimes like dowry death and role of females, Reformatory dimension of life imprisonment in place of Death Sentence, Custodial death and torture by women in criminal justice system.

## **Key words**

Female criminality, feminist criminology, Reformatory dimension, Custodial death, women in criminal justice system.

## Introduction

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<sup>1</sup> Sunil Batra v. Delhi Administration and Others, 1978

<sup>2</sup> Amy Fetting, Women Prisoners: Altering the Cycle of Abuse, Human Rights, Vol. 36, No. 2 (Spring 2009), pp. 2-5, 23 Published by: American Bar Association  
Stable URL: <http://www.jstor.org/stable/25761992> Accessed: 18-07-2017 09:52 UTC  
JSTOR women in Michigan prisons who claim they were repeatedly sexually assaulted by guards and that prison officials either ignored or dismissed evidence of systemic sexual abuse in the state's women's correctional facilities Bunton is one of over 500. Institutionalized sexual abuse is a commonplace experience for incarcerated women in this country and has been well documented by leading human rights organizations. See, e.g., Amnesty International, USA: "Not Part of My Sentence": Violations of the Human Rights of Women in Custody (1999), available at [www.amnesty.org/en/library/info/AMR51/001/1999](http://www.amnesty.org/en/library/info/AMR51/001/1999); Human Rights Watch, All Too Familiar: Sexual Abuse of Women in U.S. State Prisons (1996), available at [www.aclu.org/hrc/PrisonsStates.pdf](http://www.aclu.org/hrc/PrisonsStates.pdf). Yet it continues largely unabated. This abuse takes the form of rape, but it also includes verbal harassment; improper touching during pat-down searches; improper visual surveillance while women bathe and perform personal hygiene tasks; and "consensual" sex for protection, favors and marital goods.

<sup>3</sup> The theories of Female criminality can mainly be divided into two groups, first, theories propounded by classical or mainstream criminologists like Cesare Lombroso, Otto Pollock, Sigmund Freud etc. and secondly, theories propounded by feminist criminologists as a reaction on mainstream criminology. The theories propounded by feminist criminologists can also be divided into two groups, first, early feminist theories and secondly, late feminist theories.

Understanding the condition of female prisoners has multifaceted dimensions. There can be number of narratives on the third component of feminist criminology. It is an article being written to discern the third dimension of feminist criminology i.e. women in criminal justice system<sup>4</sup>.

Significant researches have been done to protect the fundamental rights of the under trial prisoners and convicted prisoners and to prevent the double victimization and re victimization of the accused persons undergoing and serving their sentence. Judicial and legislative attempts have also been made to achieve the avowed objectives. Alas, the condition is as miserable and abysmal as it was prevalent during British rule. It is a matter of serious concern that number of deaths of men in general and women in particular, in jails are being reported as natural deaths. Torture of prisoners is commonplace in India's jails. The NHRC has recorded 14,841 deaths in judicial custody from 2003-2004 to 2012-2013<sup>5</sup>.

According to the annual report "prison statistics India", 2015 published by National Crime Record Bureau, A total of 1,584 deaths in jails were reported (1,469 natural and 115 un-natural) during the year 2015. Out of 51 deaths of female inmates, 48 such deaths were natural and 3 such deaths were unnatural during the year 2015. There were number of reasons for the unnatural deaths but no percentage was allocated to the unnatural death caused by the atrocities of jail officers/staff/warden etc.

Female criminality: criminological perspective Feminism<sup>6</sup>, as a method of study<sup>7</sup>, when applied in the field of criminology, certainly puts forward something which is hidden, not written in the main text and if at all written, smell gender bias, prejudiced mindset and 'male', 'sexist' and 'gendered'<sup>8</sup> notion.

Though there are different strands of feminism viz; Liberal Feminism, Marxist / Socialist Feminism, Radical Feminism, Legal Feminism, Postmodern Feminism, Black Feminism, Lesbian Feminism, Multiracial Feminism etc. But each version of feminism has some common as well as some contradictory strands.

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<sup>4</sup> *Feminist Criminology deals with three major dimensions i.e. women as criminal, women as victim of crime and women in criminal justice system.* Shashikala and D.Roopa, Manjulla shette, Indrani Mukreja rare few names being captured by print and electronic media. [www.indianjournals.com/ijor.aspx?target=ijor:vidhigya&volume=9&issue=1&article=001](http://www.indianjournals.com/ijor.aspx?target=ijor:vidhigya&volume=9&issue=1&article=001) see also, Amanda Burgess, "Intersections of Race, Class, Gender, and Crime Future Directions for Feminist Criminology" *Feminist Criminology* 2006; 1; 27 <http://fcx.sagepub.com>, see also, Richard A. Wright, "Women as "Victims" and as "Resisters": Depictions of the Oppression of Women in Criminology Textbooks",

*Teaching Sociology*, Vol. 23, No. 2, Teaching about Inequality and Diversity: Age, Class, Gender, and Race/Ethnicity (Apr., 1995), pp. 111-121, American Sociological Association <http://www.jstor.org/stable/1319341> .Accessed: 30/08/2013 04:14

<sup>5</sup> [Manjula Shette custodial death case: Six jail staff arrested ...www.theapolitical.in/human-rights/manjula-shette.](http://www.theapolitical.in/human-rights/manjula-shette)

<sup>6</sup> Ann Acales, *The Emergence Of Feminist Jurisprudence: An Essay*(1986) 95 *Yale L J* 1373, cited in Akhilendra Kr. Pandey, "Feminist Versions And Law", *Ban.L.J.*2004, 87-104

<sup>7</sup> Jane Freedman : *Feminism*, at 2, Viva Books Private Limited, New Delhi, First South Asian Edition, 2002 Caroline Ramazanoglu, *Feminism and the Contradictions of Oppression*, At 6, Routledge, London and New York 1989

<sup>8</sup> Legal feminists derive their strength from social and political feminist thinkers. The entry of feminist thinkers has turned law into a site of struggle rather than being taken as a tool of struggle. Their major submission is that 'law is sexist', 'law is male' and 'law is gendered'.

The contradictions between liberal and radical feminist approach can be discerned in the case of female offending, victimization and role of women being played in criminal justice system. The liberal feminism only demands equality and if in the same manner applied in cases of female offenders, it would demand equal punishment to the female offenders. Whereas, the radical feminist scholars attack upon gendered notion and emphasise upon previous victimization of women offenders as a central issue. They also advocate for replacement of men by women in position of power in general and in criminal justice system in particular. A women police station, woman advocate and a lady judge concept is framed for sensitization and doing justice to women. There seems a contradiction within the radical feminist approach, because on the one hand they submit that women are made not born, and on the other hand, while advocating the replacement of men by women, deadly rely on the very feminine qualities of mercy, compassion and empathy etc.

There are several theories propounded to understand criminality and victimity in criminology and victimology alike. Each theory has its positive and negative dimensions.

Against this backdrop, the heinous murder of Manjula Shette has been taken to deeply analyse the core and key issues of protection vis-à-vis victimization of female offenders.

### **Retribution / heavenly justice vis-a vis manjula's case, a convict of murder of her sister in law.**

Manjula shette was convicted for dowry death of her sister in law Vidya along with her mother and serving her sentence of Life Imprisonment (Death Sentence was not awarded to her ...though the family members of Vidya would have not been convinced with the sentence imposed on her and might have prayed for retribution and perhaps they would have taken a sigh of relief after listening the news of her brutal murder in the jail) in yervada jail. Since she was well behaved, therefore, transferred to byculla jail as reward of her law abiding behavior. She had been assigned warden duties due to paucity of staff, was beaten to death when she confronted a female jail officer about the inadequate number of eggs and bread slices allotted to her barrack inmates. The post mortem report by the government run JJ Hospital doctors said her death was due to injuries and the body bore multiple contusions all over<sup>9</sup>. A fellow inmate's eyewitness account mentioned in the first information report(FIR)filed by the police said that Shette was not only beaten brutally by prison staff but also subjected to sexual torture by three women constables<sup>10</sup>.

### **Patriarchal prejudice against female offenders**

According to the National Crime Record's bureau's data the number of female prisoners has risen from 16,951 of 2014 to of 2015. Maharashtra not only has two prisons exclusively for women but also has the country's first open jail for women. And despite its generally progressive image, on 21<sup>st</sup> March, Union Minister of State for Home Affairs Kiren Rijiju had told the Lok Sabha that

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<sup>9</sup> Freedom behind Bars, Editorial, EPW, June 24, 2017 at 9

<sup>10</sup> Ibid

custodial deaths in Maharashtra were a “little more” in comparison to the other states. It is the atmosphere of non accountability that is responsible.

The data has made it clear that though women are committing almost every type of violent crimes but the patriarchal mindset neither accepts female criminality nor permits any kind of liberal treatment at every stage of criminal justice from prosecution to conviction. Women behind bars have to contend with the worst forms of patriarchal prejudices not only from society at large but also from their own families and the jail staff. This also means that they are unable to report the harassment they undergo and are virtually abandoned at the mercy of jail staff.

### **Harassment by women staff**

Since women staff across jails in the country is less than 25% of the total female inmates’ population, and the Justice Krishna Iyer Committee appointed by the Government of India to study the condition of women prisoners had recommended that more women should be inducted in the police force considering their special role in tackling women and child offenders<sup>11</sup>. The radical feminist criminologists have also opined the same. But the liberal feminist thinkers are of the opinion that women should not be in police force because they don’t have killer instinct.

Shette was in women’s prison where the officials charged with assaulting her were women. Clearly, the sex of the police and jail officials is not as material as the training and sensitization they undergo. Equally important is a system of accountability to which they are held for their actions<sup>12</sup>.

Cases of exploitation and atrocity in prison are neither new nor surprising for the law makers. Because it has been highlighted in number of studies but no positively significant change can be brought in their situation<sup>13</sup>.

The custodial death of Ms. Manjula Shette (32) due to alleged custodial torture in Byculla prison of Mumbai on 24th June and subsequent assault on Ms. Indrani Mukerjea by the jail staff, which has been confirmed by J J Hospital, Mumbai once again highlight that the jails in India are the worst hell-holes<sup>14</sup>.

The fault of Ms. Indrani Mukerjea was to participate in the protest against the custodial death of Ms. Shette on 26th June. Ms. Mukerjea was allegedly assaulted and threatened with rape by the Superintendent of the Jail.

Had it not involved assault on Ms. Mukerjea, a high profile undertrial prisoner, even the protest by prisoners would not have received media attention. Ms. Sushma Hemant Ramteke, an undertrial prisoner at Byculla District Prison,

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<sup>11</sup> Id; at 9

<sup>12</sup> Supra; note 4

<sup>13</sup> Shaila Parveen, A Study of condition of Women Prisoners & Their Children in Eastern U.P. Jails,2006, at 138&139, According to table 56.10% of women accept they get exploited by the jail .The mahila hawaldar strip search them in case they have money they snatch it from them.The are physically tortured by female wardens and verbally by male sipahi. According to table no 4.19(B) 26.81% of women told that they are pushed by male and female staff of prison without any purpose while 15.14% women told about kicking highest number of women 58.05 informed about strip searched done by female staff of prison purposely to snatch their things. See also, report on Condition Of Women in Detention in the State of Punjab

<sup>14</sup> Custodial death of Manjula Shette and assault on Indrani  
[...www.theapolitical.in/editorial/custodial-manjula](http://www.theapolitical.in/editorial/custodial-manjula).

was brutally assaulted by jail staff and officers on 8th November 2013 for merely questioning why three prisoners including a pregnant one were being beaten up. The injury marks on Ms. Ramteke's body were visible even five days after the assault as Advocate Susan Abraham of the Committee for Protection of Democratic Rights (CPDR) reported but none covered in the media.

The response of the prison authorities did not stop there. They further filed cases of rioting against 290 inmates. The most favourite tactic of the law enforcement agencies was to invoke the most stringent provisions available against the maximum number of people to make them collectively suffer. Once the rioting case filed against the inmates takes off, the death of Ms. Shette or torture of Ms. Mukherjea will be irrelevant for the trial. The inmates nonetheless shall have to appear in each hearing, which will continue for decades given the judicial delay in India. The National Human Rights Commission (NHRC) or the Maharashtra State Human Rights Commission may recommend compensation for the custodial death of Ms. Shette while no prosecution of those who tortured her to death will take place because of the inability to identify the torturers. The torture of Indrani Mukerjea too will be dismissed as a minor assault by the police. Torture, unless grievous or life threatening, is often not considered as an offence<sup>15</sup>.

Prisons are almost independent territories of their own without any accountability or supervision. The Prisons Act of 1894 provides for regular visits by the Prison Visitors Board, but these Boards are non-existent, and where they exist, they are non-functional. Prison atmosphere has been criminogenic in India. Despite number of studies and proposals for prison reforms in general and those relating to women inmates have clearly never been a priority for any government. Shette's callous murder demands justice. It is also essential that the media, civil society, and the judiciary hold the law enforces accountable.

### **The Reformation of Female Prisoners**

It was as early as the year 1825 when the fourth annual report of the committee of the British Society for Promoting the Reformation of Female Prisoners was submitted<sup>16</sup>. It was mentioned in the report that sincere efforts made to arouse the dormant conscience of the convicted prisoners and motivating them for moral and spiritual upliftment through religious books had stimulating effects<sup>17</sup>. Such exercises should be adopted in Indian Prison system too.

### **Implications of Feminist Criminology for corrections**

The human rights movement in general and feminist criminology in particular has called attention to several major problems being faced by women in correctional systems for women. Clearly women bring different needs to prison. Women are more family oriented than men, they do most of the child caring, and that women inmates express more anxiety over their children than do male inmates.

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<sup>15</sup> Ibid

<sup>16</sup> British Society for Promoting the Reformation of Female Prisoners, Source: Hume Tracts, 1825 Contributed by: UCL Library Services Stable URL: <http://www.jstor.org/stable/60212883> Accessed: 18-07-2017 09:58 UTC, it is interesting to note that the patroness, the vice patroness, the treasurer, secretaries and all the members of the committee were women.

<sup>17</sup> Id; at 20

In women's prison the staff is predominantly male. Feminists concerned with patriarchy have special reason to be interested in the fact that women placed in prison are under more male control than those outside.

Undoubtedly it has created awareness of a gender angle in offending, victimisation, and the practice of the criminal justice system and emphasised on the victims in criminology. Since a conservative approach is applied in the whole criminal justice system, from trial to sentencing in cases of women offenders. Gender stereotypes prevail in criminal justice system too. Feminist criminology emphatically submits that the violent women should not be cast as cold, callous, calculating, and vicious and bitch as antithesis of the caring, nurturing wife and mother. Its major submission is that female criminals should be considered as "doubly oppressed". Poverty and illiteracy doubly contribute in women criminality. Effective prevention and treatment programs for female offenders must address their unique mental health needs. It should be recognized that female offenders are likely to require continued support. Without such support, these offenders may be unable to avoid passing on their legacy to future generations. Specific needs of female prisoners, which have been thoroughly ignored, should be identified. The inadequate police and criminal justice response to women's victimisation should be reformed.

### **Concluding observation**

The paper concludes with a note that there are several strands and angles of women's rights movement. Advocating one's right may involve the issue of violation of others' rights. Though it is submitted through the paper that cases of female offending should be judged in a holistic and comprehensive manner but it is also emphatically submitted that women should be extremely cautious and should never commit crimes against females because it badly affects the movements launched to curb women sufferings.

Female criminals should be treated with the basic human rights. The Human Rights movement in general and feminist criminology in particular has called attention to several major problems being faced by women in correctional systems for women. Clearly women bring different needs to prison. Since a conservative approach is applied in the whole criminal justice system, from trial to sentencing in cases of women offenders. Gender stereotypes prevail in criminal justice system. Feminist criminology emphatically submits that the violent women should not be cast as cold, callous, calculating, and vicious and bitch as antithesis of the caring, nurturing wife and mother. Its major submission is that female criminals should be considered as "doubly oppressed". Poverty and illiteracy doubly contribute in women criminality. Effective prevention and treatment programs for female offenders must address their unique mental health needs. It should be recognized that female offenders are likely to require continued support. Without such support, these offenders may be unable to avoid passing on their legacy to future generations. Specific needs of female prisoners, which have been thoroughly ignored, should be identified. The inadequate police and criminal justice response to women's victimisation should be reformed.

The sameness approach should be adopted so far as the rights of prisoners are concerned. The atrocity against female prisoners should also be treated as a case of Constitutional tort and should be compensated alike.



## ROLE OF ADVOCATES IN ADMINISTRATION OF JUSTICE

Sachin Upadhyay\*

Legal profession has always been treated as one of the noblest professions of the civilized societies across the globe. No ordained society can exist without regulations or accepted code of conducts by masses for themselves. Societal values and commonly shared Code of Conducts of people are later converted into laws for governance of the people. In a civilized society governed by rule of law, unrests and termoils do hardly take place. In all systems of governance world over, besides the various law enforcing agencies and judicial arbiters like courts, legal professionals do also play equally important role in ensuring maintenance and majesty of law through the adjudicatory fora. Field of law is an ever evolving field with no ultimate goal to be reached. Law is for that reason also called an 'ass'. If one compares the legal profession with those like the medical, architecture, science & technology, management and other branches of learnings like astrology, literature or philosophy of life etc, one finds that there is hardly any frequent or rapid change in these fields as it occurs in the field of law. Law remains ever evolving, non-static and non-stagnant. To keep pace with the latest developments in the field of law, a law practitioner, adjudicator and also the law enforcer has always to keep him updated and familiar with the latest developments in the field of law. In our system of enforcement of law and administration of justice, as is well known, the ultimate law is not what the legislature has enacted but what the courts of record like the Supreme Court of India and the High Courts have interpreted and propounded. This is what Articles 141 & 144 of the Constitution of India mandate. Even the Constitution of India is what the Judges say it is as has been declared by a Nine-Judge Constitution Bench of the Supreme Court of India in Supreme Court Advocates-on-Record Association Vs. Union of India, AIR 1994 SC 268 (para 292). A lawyer, a Judge and a jurist has to remain student of law throughout his life. The day a law practitioner or adjudicator develops a notion that he has reached perfection and there is no further necessity for reading and updating him with the laws, he ceases to grow and evolve. During the last and the current century, no other field as that of the law and the legal profession has seen so much ups and downs. For a new entrant in the legal profession, life is not comfort yielding but akin to struggle to overcome wants and ignorance so as to find a place to stand in the institution of the legal professionals. Many people sitting in comfort zones and ivory castles often question the conduct, caliber and competence of few among the legal practitioners and forget the struggling conditions of career of a lawyer. It is not that the judges and the jurist do not recognize the struggle which a budding lawyer has to face to evolve. In the words of the Hon'ble Judges of the Allahabad High Court in their recent judgment reported in Abhishek Shukla Vs. High Court of Judicature, Allahabad, AIR 2018 Allahabad 32, a lawyer is like a *pujari* in temple, *maulavi* in mosque, *granthi* in gurudwara and *clergyman* in church and performs '*nyaydharmah*' in the temple of justice (court) where the invisible deity

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i.e. the goddess of justice, expresses through Judges (spokespersons) of the deity. Certain important aspects relating to the role and responsibility of legal professionals in the administration of justice are being discussed here as under :

**1. Laws applicable to Advocates:** The main laws applicable to the advocates are as under :

- (1) Advocates Act, 1961
- (2) Advocates' Welfare Fund Act, 2001
- (3) Bar Council of India Rules, 1975
- (4) Advocates (Right to Take up Law Teaching) Rules, 1979
- (5) Model Schemes for Welfare of Advocates Framed by Bar Council of India
- (6) Bar Council of India Advocates Welfare Scheme, 1998
- (7) The Bar Council (Validation of State Laws) Act, 1956
- (8) The Bar Council of India Certificate and Place of Practice (Verification) Rules, 2015
- (9) Special Provisions Relating to the Bar Council and Advocates in the North-Eastern Areas (Reorganization) and Other Related Laws (Amendment) Act, 2012 (26 of 2012 (w.e.f. 23-3-2013))
- (10) Provisions in the CPC
- (11) Provisions in the CrPC
- (12) Provisions in the G.R. Civil
- (13) Provision in the G.R. Criminal
- (14) Circular Orders issued by the High Court
- (15) Allahabad High Court Rules, 1952
- (16) Judicial pronouncements
- (17) Govt. Notifications & G.Os. etc.
- (18) Bar Council of India Training Rules, 1995 (declared ultra vires by the Supreme Court in *V. Sudeer Vs. Bar Council of India*, (1999) 3 SCC 176).

**2. Role of lawyers in administration of justice:** Lawyers play an important part in the administration of justice. The Profession itself requires the safeguarding of high moral standards. As an officer of the Court the overriding duty of a lawyer is to the Court, the standards of his profession and to the public. Since the main job of a lawyer is to assist the Court in dispensing justice, the members of the Bar cannot behave with doubtful scruples or strive to thrive on litigation. Lawyers must remember that they are equal partners with Judges in the administration of justice. If lawyers do not perform their function properly, it would be destructive of democracy and the rule of law. "Law is no trade, briefs no merchandise". An advocate being an officer of the Court has a duty to ensure smooth functioning of the Court. He has to revive the person in distress and cannot exploit the helplessness of innocent litigants. A willful and callous disregard for the interests to the client may in a proper case be characterized as conduct unbefitting an advocate. When we talk of sound and stable system of administration of justice, all the stakeholders in the said legal system need to be taken care of. Legal community and advocates are inseparable and important part of robust legal system and they not only

aid in seeking access to justice but also promote justice. Judges cannot perform their task of dispensing justice effectively without the able support of advocates. In that sense, advocates play an important role in the administration of justice. It is wisely said that for any society governed by rule of law, effective judicial system is a necessary concomitant. The rule of law reflects man's sense of order and justice. There can be no Government without order, there can be no order without law, and there can be no administration of law without lawyers. It is no small service to be called upon to prosecute and enforce the rights of a litigant through the court of law and in that sense the legal profession is treated as service to the justice seekers. It is, therefore, by contributing an essential aid to the process of the administration of justice that the advocate discharges a public duty of the highest utility. See : (i) *In Re : Rameshwar Prasad Goyal, Advocate, AIR 2014 SC 850* and (ii) *Cardamom Marketing Corporation Vs. State of Kerala, (2017) 5 SCC 255*.

3. **Legal Profession and Lawyer-Client Relationship and Duties of Lawyers :** The relationship between the lawyer and his client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave him also for the same reasons. He is under no obligation to give reasons for withdrawing his brief from his lawyer. The lawyer is not an agent of his client but he is dignified and responsible spokesman. He is not bound to tell the court every fact or urge every proposition of law which his client wants him to do, however relevant it may be. He is essentially an advisor to his client and is rightly called a counsel in some jurisdictions. Legal profession is essentially a service-oriented profession. The lawyer of the Govt. or a public body is not its employee but is a professional practitioner to do the specified work, though the lawyers on the full time rolls of the Govt. and the public bodies, are described as their law officers. It is precisely for this reason that in the case of such law officers, the saving clause of rule 49 of the Bar Council of India Rules waives the prohibition imposed by the said rule against the acceptance by a lawyer of a full time employment. The Supreme Court has quite elaborately discussed in this case the role and powers of legal professionals, lawyers-client relationship, position and powers of Legal Remembrancer in the context of U.P. Legal Remembrance Manual. See : *State of U.P. vs. U.P. State Law Officers Association, (1994) 2 SCC 204*
4. **Advocates as officers of courts:** An Advocate being an officer of the Court has a duty to ensure smooth functioning of the Court. See : *In Re : Rameshwar Prasad Goyal, Advocate, AIR 2014 SC 850*
5. **Lawyers are equal partners with the Judges in the administration of justice:** Lawyers are equal partners with the Judges in the administration of justice. See: *In Re : Rameshwar Prasad Goyal, Advocate, AIR 2014 SC 850*.
6. **Pre-conditions for practicing as an advocate before the Allahabad High Court :** Provisions under Rules 3 and 3-A of Chapter XXIV of the Allahabad High Court Rules, 1952 do not permit an advocate who is not enrolled with the Bar Council of State of UP and is not on the roll of

advocates maintained by the Allahabad High Court, to appear, act or plead in the High Court unless he files his Vakalatnama alongwith a local advocate i.e. advocate registered with the Bar Council of UP and on roll of advocates of the Allahabad High Court. *See : Jamshed Ansari Vs. High Court of Judicature at Allahabad & Others, (2016) 10 SCC 554.*

7. **Right to practice as an advocate is not an absolute right :** Right of advocates u/s 30 & 34 of the Advocates Act, 1961 is not an absolute right but is subject to the rule-making power of the High Court u/s 34 of the Advocates Act, 1961 and Article 225 of the Constitution of India. High Court by framing the said rules can regulate appearance of advocates in courts. Right to appear and conduct cases in court is a matter on which court must and does have major supervisory and controlling power. *See: Jamshed Ansari Vs. High Court of Judicature at Allahabad & Others, (2016) 10 SCC 554.*
8. **Lack of proper knowledge of an advocate is bound to adversely affect the rights of litigants and also the administration of justice:** The administration of justice is a sacrosanct function of the judicial institutions or the persons entrusted with that onerous responsibility and principle of judicial review has now been declared as a part of the basic structure of the Constitution. Therefore, if anything has the effect of impairing or hampering the quality of administration of justice either due to lack of knowledge or proper qualification on the part of the persons involved in the process of justice dispensation or they being not properly certified by the Bar Council as provided under the Advocates Act, 1961 and the Rules made thereunder, it will surely affect the administration of justice and thereby affect the rights of litigants who are before the courts seeking justice. *See: Jamshed Ansari Vs. High Court of Judicature at Allahabad & Others, (2016) 10 SCC 554 (para 19).*
9. **A pleader to act for the party/client only on appointment by vakalatnama (Order 3, rule 4 CPC) :** As per Order 3, rule 4 CPC no pleader can act for the party/client unless he has been appointed as such by the party/client by a document in writing which is popularly called as “Vakalatnama”.
10. **Vakalatnama when not required? :** Vakalatnama is not required for performance of legal work such as giving opinion, sending notices, drafting petitions or other documents. There is no need for a lawyer to obtain a signed Vakalatnama from his client for such works. But signed Vakalatnama under Order 3, rule 4 CPC is required to be obtained when it is filed in law courts or tribunals to enable the lawyer to plead cases on behalf of clients. *See : Baru Singh vs. Babu Ram Sharma, AIR 1997 All 185*
11. **No need for fresh Vakalatnama before superior court when one already filed in inferior court:** Filing of fresh Vakalatnama under Order 3, rule 4 CPC before superior court or in special appeal is not required when the same was already filed before the single Judge or inferior court. *See : M/s. Ahmad Bakhsh vs. State of U.P., 1999 (36) ALR 74 (All)(D.B.)*

**12. Fresh Vakalatnama when required?** : The Supreme Court, expressing concern in regard to the manner in which defective vakalatnamas are routinely filed in courts, has clarified the necessity of filing fresh vakalatnamas at different stages of proceedings like original suits, appeals, revisions, executions and misc. proceedings can be insisted upon. See : *Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh, 2006(1) ARC 1 (SC) (Three--Judge Bench)*

**13. Vakalatnama & its contents as required by law:** The Supreme Court, expressing concern in regard to the manner in which defective vakalatnamas are routinely filed in courts, has clarified the necessity of filing fresh vakalatnamas at different stages of proceedings like original suits, appeals, revisions, executions and misc. proceedings and also the manner of filing the vakalatnamas as quoted below :-

“Vakalatnama, a species of power of Attorney, is an important document, which enables and authorizes the pleader appearing for a litigant to do several acts as an agent, which are binding on the litigant who is the principal. It is a document which creates the special relationship between the lawyer and the client. It regulates and governs the extent of delegation of the authority to the pleader and the terms and conditions governing such delegation. It should, therefore, be properly filled, attested, accepted with care and caution. Obtaining the signature of the litigant on blank vakalatnamas and filling them subsequently should be avoided. The Supreme Court took judicial notice of the following defects routinely found in vakalatnamas filed in courts:

- (1) Failure to mention the name/s designation or authority of the person executing the vakalatnama and leaving the relevant column blank.
- (2) Failure to disclose the name, designation or authority of the person executing the vakalatnama on behalf of the grantor (where the vakalatnama is signed on behalf of a company, society or body) either by affixing a seal or by mentioning the name and designation below the signature of the executant (and failure to annex a copy of such authority with the vakalatnama).
- (3) Failure on the part of the pleader in whose favour the vakalatnama is executed to sign it in token of its acceptance.
- (4) Failure to identify the person executing the vakalatnama or failure to certify that the pleader has satisfied himself about the due execution of the vakalatnama.
- (5) Failure to mention the address of the pleader for purpose of service (particularly in cases of outstation counsel).
- (6) Where the vakalatnama is executed by someone for self and on behalf of someone else, failure to mention the fact that it is being so executed. For example, when a father and the minor children are parties, invariably there is a single signature of the father alone in the vakalatnama without any endorsement/statement that the signature is for self and as guardian of his minor children. Similarly, where a firm an it is partner, or a company and its Director, or a Trust and it's trustee, or an organization and its office bearer

execute a vakalatnama, invariably there will be only one signature without even an endorsement that the signature is both in his/her personal capacity and as the person authorized to sign on behalf of the corporate body/firm/society/organization.

- (7) Where the vakalatnama is executed by a power-of-attorney holder of a party, failure to disclose that it is being executed by an attorney holder and failure to annex a copy of the power of attorney.
- (8) Where several persons sign a single vakalatnama, failure to affix the signatures seriatim, without mentioning their serial numbers or names in brackets as many a times it is not possible to know who have signed the vakalatnama where the signature are illegible scrawls.
- (9) Pleaders engaged by a client, in turn, executing vakalatnamas in favour of other pleaders for appearing in the same matter or for filing an appeal or revision. It is not uncommon in some areas for mofussil lawyer to obtain signature of a litigant on a vakalatnama and come to the seat of the High Court and engage a pleader for appearance in a High Court and execute a vakalatnama in favour of such pleader.
- (10) The abovenoted routine defects are found as registries/offices do not verify the vakalatnamas with due care and caution they deserve, such failure many a time leads to avoidable complications at later stages. The need to issue appropriate instructions to the registries/offices to properly check and verify the vakalatnamas filed requires emphasis.
- (11) Filing a fresh vakalatnama with the memorandum of appeal etc. will always be convenient to facilitate the processing of the appeal by the office. See : (i) *Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh, 2006(1) ARC 1 (SC) (Three- Judge Bench and (ii) Ram Kishan Vs. State of U.P., 2008 (61) ACC 838 (All)*

- 14. Change of counsel by party and filing of fresh vakalatnama by newly engaged counsel when permissible? :** In a civil appeal which was dismissed by the court under Order 41, Rule 17 of the CPC and thereafter restoration application under Order 41, rule 19 of the CPC was moved, explaining rule 39 of Chapter II in part VI of the Bar Council of India Rules, 1975, it has been held that so far as the courts are concerned it is not open to a party to determine the appointment of a Counsel without permission of the Court. It is not open to a client to withdraw the file of the case from his Counsel without permission of the Court as required under Order 3, Rule 4 and ordinarily a Counsel cannot withdraw from the case, on his being engaged without leave of the Court so far as the case is concerned, as if a party is deemed to be entitled to change Counsels one after other at his sweet will and take away from the file of the case from one Counsel without determining his appointment according to requirement of the rule and engage other and thereafter engages a third Counsel after taking the file of the second Counsel without consent in writing of the Counsel after taking the file of the second Counsel without

consent in writing of the Counsel already on record of the case and without permission of the Court, disastrous consequences may ensue and follow. As such, it is not open to a party to subterfuge another Counsel before determining the appointment of the earlier one in accordance with law as provided under Order 3, Rule 4, except in the cases or in the circumstances provided by the modifying the rules or immediate appointment of the second Counsel with the consent writing of the Counsel already on record. Rule 39 of Bar Council of India Rules, per se shows as a rule of conduct on the part of Advocate and it imposes an obligation on Advocate that in cases or in any case where there is already an Advocate engaged by a party and vakalatnama has already been filed, no Advocate shall appear for that party except with the consent of the Advocate already on the record of the case and a reading of the rules indicates that as consent has to be produced before the Court, it means the consent should be in writing and if for some reasons or other the consent cannot be produced then the second Counsel put in appearance, in the case, with application for permission in which he shall state the reasons as to why he is unable to produce the consent and will seek the permission of the Court for appearing in that case. The law and spirit of this rule of conduct on the part of Advocate also emphasize and indicates its purposes, which is two-fold, namely, firstly, that keeping pace with the position of an Advocate, it is necessary that in order to maintain certain norms of law and ethics of profession as well as to maintain their status and dignity, it should be provided that they should not themselves to make their own-selves or their colleagues, a subject matter or a tool or a thing in the hands of litigants or touts or like persons to be changed every now and then according to the whims of the litigants or control over them of unwanted touts or like persons on one hand and the rule casts a duty on them that the Counsel should not accept a brief in which an Advocate is already there to represent the party who intends to engage him and should not put in appearance for a party who has already been filed on the record of the case unless and until the Counsel already on record given his consent in writing or in some special circumstances and cases where consents have not been obtained or could not be obtained and produced before the Court, requires the Counsels, narrating those circumstances and reasons why the consent could not be obtained move application for permission and then the Court having the power in such a case to grant permission to the second Counsel to appear grants the permission after considering those circumstances justifying the grant of permission. The second object of the rule is to maintain certainly of representation of a party in the case by a specifically appointed Counsel and, thirdly, as far as possible not to allow the parties litigants to abuse such a situation and to make it (sic) of and cause for obtaining adjournments which might otherwise be refused. See : *Smt. Champa Devi Vs. U.P. State Electricity Board, 1992 (2) ARC 634 (All)*.

- 15. Unilateral change of counsel by party only after permission of the court:** If the counsel's instruction are unilaterally terminated at the initiative of the client, the discharge of counsel can be by leave of court,

but counsel will be entitled to full fees. But, while a client may have the luxury of changing as many counsel as he may desire to chose but everyone of them whose instructions be terminates unilaterally without a cause may be entitled to full fees. Should the fees be not settled the court would determine, it on the principle of *quantum meriat*. If counsel wants to abandon a client, he may seek a discharge from the court but he would not be entitled to fees. No counsel will withdraw from a case except by leave and permission of the court, no matter what that client may say. And, no counsel should enter a case in which a counsel stands engaged except with the prior permission of the lawyer who already appears. A violation of the principle would be unprofessional conduct by Rule 39 of the Standards of Professional conduct and Etiquette framed by the Bar Council of India. Further should there be allegations of misconduct against counsel, the court may examine the content of the allegations for their veracity and truth, and order of the court will rest on the circumstances. See : *Dr. Hari Nandan Singh Vs. U.P. Higher Education Services Commission, Allahabad, 1992 ESC 311 (All)(DB)*.

16. **Advocate bound to return papers to his client even in the event of non-payment of fee:** At any rate if the litigation is pending the party has the right to get the papers from his advocate whom he has changed so that the new counsel can be briefed by him effectively. In either case it is impermissible for the former counsel to retain the case bundle on the premise that fees is yet to be paid. This right of the litigant is to be read as the corresponding counterpart of the professional duty of the advocate. Therefore the refusal to return the file to the client when he demands the same amounts to misconduct of the advocate u/s. 35 of the Advocates Act, 1961. Even if the advocate feels that he has any genuine claim or grievance against his client, the appropriate course is to return the brief with endorsement of no objection and agitate such right in an appropriate forum in accordance with law and not indulge in arm twisting methods by holding on to the brief. See: (i) *R.D. Saxena Vs. Balram Prasad Sharma, AIR 2000 SC 2912* and (ii) *New India Assurance Co. Ltd. Vs. A.K.Saxena, AIR 2004 SC 311*
17. **Change of counsel and payment of fees to former counsel:** After change of counsel by the party, previous counsel cannot insist upon fees till conclusion of proceedings. But where the former counsel had worked till the stage of settlement of issues and leading evidence on behalf of the party partly, the trial of suit had thus partly concluded and therefore one fourth of the scheduled fee was directed by the court to be paid to the counsel by the party and the counsel was directed to give unconditional consent to engage another advocate. See : *C.S. Venkatasu-bramanian Vs. State Bank of India, AIR 1997 SC 2329*.
18. **Writ Petition by the counsel maintainable under Article 226 of the Constitution to recover the remaining fees:** A writ petition by the counsel seeking a claim of his fees may be entertained and considered by the High Court and the request by counsel for directions in the matter

relating to counsel fees ought to be examined by the High Court. Upholding counsel's claim of fees, the Supreme Court also gave directions that the fees due would be paid to counsel with interest at the rate of 12 %. See : (i) *Govt. of Tamil Nadu Vs. R. Thillaibillalan*, AIR 1991 SC 1231 and (ii) *Dr. Hari Nandan Singh Vs. UP Higher Education Services Commission, Allahabad*, 1992 ESC 311 (All)(DB)

19. **Counsel cannot avoid to appear before court on the ground of resolution passed by Bar Association to boycott a particular court:** If any counsel does not want to appear in a particular Court, that too for justifiable reasons, professional decorum and etiquette require him to give up his engagement in that Court so that the party can engage another counsel. But retaining the brief of his client and at the same time abstaining from appearing in that Court, that too not on any particular day on account of some personal inconvenience of the counsel but as a permanent feature, is unprofessional as also unbecoming of the status of an advocate. No court is obliged to adjourn a case because of the strike call given by any Association of Advocates or a decision to boycott the Courts either in general or any particular Court. It is the solemn duty of every Court to proceed with the judicial business during Court hours. No Court should yield to pressure tactics of boycott calls or any kind of browbeating. See: *Mahabir Prasad Singh Vs. M/s. Jacks Aviation Pvt. Ltd.*, AIR 1999 SC 287 (para 10 ).
20. **Statement or concession made by Advocate General should be accepted but not the statements/concession etc. made by the Govt. pleaders:** A statement or concession made by a Government pleader before the courts under Order 27, Rule 2 & 8-B of the Code of Civil Procedure, 1908 cannot bind the Government as it is obviously always unsafe to rely on the wrong or erroneous or wanton concession made by the counsel appearing for the State unless it is in writing on instructions from the responsible officer. Otherwise it would place undue and needless heavy burden on the public exchequer. But the same yard stick cannot be applied when the Advocate General has made a statement across the Bar since the Advocate General makes the statement with all responsibility. See: *Periyar & Pareekanni Rubbers Ltd. Vs. State of Kerala*, AIR 1990 SC 2192 (para 9)
22. **Concession given by counsel to opposite party by "not pressing" the petition should be normally verified by the Court before acting upon it :** Where wife was granted maintenance by the lower court under the Protection of Women from Domestic Violence Act, 2005 and in appeal filed by the husband, the counsel engaged by the wife made an endorsement to the effect "not pressed" and the High Court had then dismissed the appeal but the wife had stated that she had never instructed her counsel not to press her claim for maintenance, the Hon'ble Supreme Court has held that before acting upon the said concession or endorsement of the counsel, the High Court should have got the concession verified and ought not to have accepted the statement of the counsel of the wife without verification. See: *Shalu Ojha Vs. Prashant Ojha*, (2015) 2 SCC 99.

23. **Advocate not to substitute his name for the name of party:** An advocate cannot maintain a petition on behalf of his clients (accused persons). In view of Sec. 30 of the Advocates Act, 1961, an advocate cannot file a writ petition in his own name to pursue the cause of his clients. See: *Vinoy Kumar Vs. State of U.P.*, (2001) 4 SCC 734
24. **Party not to suffer for a bonafide mistake or negligence of his counsel:** If there is a bonafide mistake or negligence on the part of the lawyer, the party should not be made to suffer. But it is equally true that for the negligence of the counsel of one party, the other party should not suffer. See: *Smt. Leela Bhanott Vs. Petrolube India*, (2006) 64 ALR 403 (All)(D.B.)
25. **Advocate has duty to represent an arrested/detained person:** Where the Advocate husband of a selected Civil Judge (Junior Division) was practicing as an Advocate in the courts at Markapur (Andhra Pradesh) and the said Advocate was engaged and representing certain accused persons allegedly belonging to CPI (Maoist) Party, a prohibited organization, and on receiving a verification report from police to that effect, the selected female Civil Judge (Junior Division) was not issued appointment letter on the ground that her Advocate husband was representing the said accused persons belonging to a prohibited organization like CPI (Maoist) Party, setting aside the said decision of the Government of Andhra Pradesh regarding not issuing appointment letter to the said selectee on the ground aforesaid, it has been held by the Hon'ble Supreme Court that in view of the provisions of the Article 22(1) of the Constitution of India, Section 49 of the Advocates Act, 1961 and Rules 11 & 15 of the Bar Council of India Rules, 1975, an Advocate representing an arrested or detained person cannot be criticized and every arrested/detained person has constitutional right to be defended lawfully and an Advocate has corresponding duty to represent him. See: *Smt. K. Vijaya Lakshmi Vs. Govt. of AP*, AIR 2013 SC 3589.
26. **Counsel deemed to represent the party in court unless withdraws from the case under order of court (Order 3, rule 4 CPC) :** According to Order 3, rule 4 CPC a counsel is deemed to continue to represent the party in the court unless he formally withdraws from the case under order of the court. See: *Ashok Kumar Dhiman Vs. Smt. Chandrawati Mehta*, 1996 (27) ALR 6 (All) and *Smt. Champa Devi Vs. U.P. State Electricity Board*, 1992 (2) ARC 634 (All)
27. **Withdrawal from case by counsel without leave from court & its effect:** Where the counsel engaged by the party had recorded an endorsement to the effect "I withdraw" it has been held that such endorsement is to be treated as an action without any leave from the court which cannot be taken as a good ground for setting aside the ex-parte decree by way of an application under Order 9, rule 13 CPC. See: *Smt. Veena Agarwal Vs. M/s. Unjha Ayurvedic Pharmacy*, 2007 (67) ALR 282 (All)(D.B.)
28. **Death of the party and the duty of counsel (Order 22, rule 10-A CPC):** Whenever a pleader appearing for a party to the suit comes to know of the

death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.

29. **Supreme Court advocate entitled to appear and plead in all High Courts:** An advocate of the Supreme Court becomes entitled as of right to appear and plead as well as to act in all the High Courts including the High Court in which he was already enrolled, without any differentiation being made for this purpose between the various jurisdictions exercised by those courts. See: *Aswini Kumar Vs. Arabinda Bose*, AIR 1952 SC 369
30. **Duty of junior counsel appearing with senior advocate:** Ordinarily, when a junior counsel and senior advocate appear in a case, it would be an adventurist act exposing himself to great risk on the part of the junior to report a compromise without consulting his senior, even assuming that the party was not available. It is right to stress that counsel should not rush in with a razi where due care will make them fear to treat, that a junior should rarely consent on his own when there is a senior in the brief, that a party may validly impugn an act of compromise by his pleader if he is available for consultation but is by-passed. The lawyer must be above board, specially if he is to agree to an adverse verdict. See: *Smt. Jamilabai Abdul Kadar Vs. Shankarlal Gulabchand*, AIR 1975 SC 2202
31. **Time limit for arguments:** Order 18, rule 2, sub-rule (3-D) CPC, as amended since 1.7.2002 provides that the court shall fix such time limits for the oral arguments by either of the parties in a case as it thinks fit.
32. **Written arguments:** The counsel for parties may submit their concise written arguments with the permission of the court under Order 18, rule 2, sub-rule (3-A) CPC as amended w.e.f. 1.7.2002.
33. **No lengthy arguments:** The Supreme Court and the Allahabad High Court have held that a counsel should not advance lengthy arguments so that precious time of court may not be wasted. See : (i) *Gauri Shanker Vs. DDC Allahabad*, 2005 (4) AWC 3259 (All) and (ii) *LIC of India Vs. Escorts Ltd.*, AIR 1986 SC 1370
34. **No sentimental arguments:** Sentimental arguments cannot be entertained. See: *Gopal Singh Vs. State Cadre Forest Officers' Association*, AIR 2007 SC 1878.
35. **Role of a private counsel engaged in a criminal case is like a junior advocate conducting the case of his senior in court:** The role which a private counsel in a criminal case can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the public prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the public prosecutor is allowed to shrink to a mere supervisory role, the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 CrPC a dead letter. See: (i) *Anant Prakash Sinha Vs. State of Haryana*, (2016) 6 SCC 105 (paras 21 & 22). and (2) *Shiv Kumar Vs. Hukam Chand*, (1999) 7 SCC 467 (paras 13 & 14).

36. **Private counsel not to lead evidence on behalf of prosecution:** A privately engaged counsel may not have any liberty to lead prosecution evidence or to do the duties entrusted by law to a public prosecutor under Sections 301(1) & 301(2) CrPC or Section 225 CrPC. However, complainant can engage a private counsel but such counsel cannot get the status of a public prosecutor. Public prosecutor cannot abdicate his powers in favour of a person who is not a public prosecutor. See : *Rajesh Kumar Vs. State of UP, 1998 (37) ACC 867 (All)*.
37. **Debarring advocate from practice found having indulged in winning over prosecution witness / role of electronic media / sting operation / power of courts in such matters.** See: *R.K Anand Vs. Registrar Delhi High Court, (2009) 8 SCC 106*.
38. **Refusal by Bar to defend certain accused unethical:** Where the Coimbatore Bar Association, Tamil Nadu had passed a resolution that no lawyer will defend the accused policemen who had allegedly clashed with the lawyers, it has been held by the Supreme Court that the resolution of the Bar Association that they will not defend certain accused persons (policemen) is against constitution, statute and the professional ethics. It is the duty of lawyers to defend irrespective of consequences. See: *A.S. Mohammed Rafi Vs. State of TN, AIR 2011 SC 308*.
39. **Refusal to grant time to engage a new lawyer of choice of accused when proper? :** Where the accused wanted to delay framing of charges against him and his prayer to engage a new lawyer of his choice was refused by the Magistrate on the ground that some advocate had already appeared for him, it has been held by the Hon'ble Supreme Court that it cannot be concluded that the accused was not given chance to engaged counsel of his/her choice. See: *Ashish Chadha Vs. Smt. Asha Kumari & another, AIR 2012 SC 431*.
40. **Punishment of Advocates for misconduct (Section 35):** Section 35 of the Advocates Act, 1961 empowers the State Bar Councils to refer complaint received against an Advocate for misconduct to its Disciplinary Committee. Similar power has also been conferred by Section 36 on the Bar Council of India which is also the appellate authority against the punishment awarded by the State Bar Councils. On being found guilty, the Bar Council may suspend or debar the Advocate from practicing in any court or before any authority or person in India. Important cases on disciplinary proceedings against Advocates are as under: (i) *N.G. Dastane Vs. Shrikant Shivade, AIR 2001 SC 2028* and (ii) *S. Narayanappa Vs. CIT, Bangalore, AIR 1967 SC 523*.

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# RAJBALA AND OTHERS V STATE OF HARYANA AND OTHERS: SHAKING THE FOUNDATIONS OF LOCAL SELF-GOVERNANCE AND DUE PROCESS IN INDIA

Aditya Manubarwala\*

**KEYWORDS:** local self government, due process of law, democratic inclusivity, arbitrariness, right to contest elections.

## 1. INTRODUCTION

On 10<sup>th</sup> December, 2015, the Supreme Court upheld the Haryana Panchayati Raj (Amendment) Act, 2015,<sup>1</sup> effectively rendering five categories of individuals ineligible to contest Panchayat (rural local self-government) elections in Haryana. Consequent to the insertion of Part IX of the Constitution of India, the right to contest Panchayat elections may be said to have become a constitutional right. Although the legislature has been empowered to introduce suitable qualifications or disqualifications for the same, the 2015 Amendment and the judgement upholding it quite possibly compromise this constitutional right irreparably. The judgement was subsequently subjected to widespread criticism from several quarters of the media.<sup>2</sup>

In the subsequent section of this paper, an attempt has been made to briefly elucidate the scheme of the impugned Act, the reasoning of the Supreme Court at arriving at a finding of constitutional validity, and the impact of such a ruling on the inclusiveness of the Panchayat system of governance. However, the implication of this verdict goes beyond the mere factual matrix of the dispute and affects the operation of the doctrine of substantive due process, which though not provided for in the constitutional scheme of things has attained the status of being the law of the land. The latter part of the paper delves into this aspect in greater depth.

## 2. BACKGROUND OF THE CASE

Section 175 of the Haryana Panchayati Raj Act, 1994<sup>3</sup>, hereafter referred to as the Principal Act, stipulates that the persons falling within the ambit of any of the disqualifications therein shall be ineligible to contest Panchayat elections. The impugned Act amends Section 175 of the Principal Act and inserts five more disqualifications, namely, those against whom charges have been framed in criminal cases for offences punishable with imprisonment of 10 years and above,<sup>4</sup> persons who have arrears pending with agricultural societies, agricultural banks and district co-operative banks,<sup>5</sup> persons who have arrears of electricity bills,<sup>6</sup>

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<sup>1</sup> Act 8 of 2015

<sup>2</sup> See, Kumar, 'The Supreme Court Just Delivered A Deadly Blow To The Idea Of Universal Adult Franchise', *The Wire*, 10 December 2015, available at: <https://thewire.in/17078/time-for-indias-poor-to-say-farewell-to-universal-adult-franchise> (last accessed 15 February, 2017)

<sup>3</sup> Act 11 of 1994

<sup>4</sup> Section 175 (1) (aa), Haryana Panchayati Raj Act, 1994 (Act 11 of 1994)

<sup>5</sup> Id, Section 175 (1) (t)

<sup>6</sup> Id, Section 175 (1) (u)

persons who do not possess requisite educational qualifications,<sup>7</sup> and persons who do not have a functional toilet in their residence.<sup>8</sup> Subsequently, three political activists, claiming to be interested in contesting the Panchayat elections and having been disqualified due to their lack of educational qualifications filed a writ petition challenging the constitutionality of the 2015 Amendment.

### 3. CRITIQUE OF THE COURT'S JUDGEMENT

Although it was not specifically pleaded in the writ petition, the Court firstly examined whether the right to vote and the right to contest elections are constitutional rights. While this paper shall not delve into this issue in greater depth, it may suffice to say that the Court held while the aforesaid rights are undoubtedly constitutional rights owing to the insertion of Part IX of the Constitution of India, the appropriate legislature has the right to curtail or regulate the said rights.

Section 175 (1) (w) requires those aspiring to contest Panchayat elections to have passed their matriculation, except in the case of women and scheduled caste men, who may be middle pass; scheduled caste women may contest elections for the post of Panch if they are 5<sup>th</sup> standard pass, but must be middle pass if they wish to become Sarpanchs. This, in effect, has rendered almost 43% of the general population, over 57% women, 41% SC men and at least 68% SC women ineligible to contest Panchayat elections. The Supreme Court in the case of *Bhanumati & Ors v State of U.P.*<sup>9</sup> laid down that the aim of Part IX was to bring an end to rural feudal oligarchy and usher in an era of mass empowerment. However, whilst ruling that the said provision was constitutionally valid, the Court, in *Rajbala* stated –

The proclaimed object of such classification is to ensure that those who seek election to Panchayats have some basic education which enables them to more effectively discharge various duties which befall the elected representatives of the Panchayats. The object sought to be achieved cannot be said to be irrational or illegal or unconnected with the scheme and purpose of The Act or provisions of Part IX of the Constitution. It is only education which gives a human being the power to discriminate between right and wrong, good and bad.

By upholding this provision, the Court has deviated from the principle laid down by itself in *Bhanumati & Ors*. The provision, if anything, only prevents the marginalised & oppressed from becoming a part of the mainstream & defeats the very purpose of the Panchayat System. What makes this provision all the more arbitrary is the fact that the same disqualifications do not extend to the Members of the Legislative Assembly and Members of Parliament from Haryana. Thus, the Supreme Court has endorsed the erroneous view of the Legislature that it is the humble Panchayat member who needs to be better qualified than MLAs, MPs and even the President & Prime Minister, although they are not the ones who actually decide broader public policy.

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<sup>7</sup> Id, Section 175 (1) (v)

<sup>8</sup> Id, Section 175 (1) (w)

<sup>9</sup> (2010) 12 SCC 1

Section 175 (1) (t) disqualifies those who have arrears pending with Agricultural banks, societies and District co-operative societies. Firstly, the Court referred to Articles 101 (2) (c) and 191 (1) (c), which declare that an undischarged insolvent is disqualified from becoming a Member of Parliament or the State Legislature respectively. It also referred to the fact that Articles 58 (1) (c) and 66 (1) (c) impose a similar restriction on those aspiring to the Office of the President and the Vice-President respectively. With respect to Section 175 (1) (t), it was submitted by the petitioners that agrarian distress and consequent debt is an endemic problem that threatens to engulf rural India. Disqualifying indebted farmers would result in only the cream of society contesting Panchayat elections, thereby reinstating the same oligarchy that Panchayati Raj seeks to eliminate. The Supreme Court, however, has emphatically stated that those who are debt-ridden would have little interest in contesting Panchayat elections. The cost of contesting a Panchayat election is not a lot, but if this indeed is the reasoning of the court, then the question emerging is, whether the court, in its judgement, kept in mind, extraneous costs involved. The Court without regard to the crippling debt and poverty that farmers in this country face reiterated that nothing prevents a person from clearing such arrears if he or she wishes to contest elections. Admittedly, neither the respondents nor the petitioners submitted any data to substantiate their respective claims pertaining to agrarian distress or lack thereof in Haryana. The Court itself held that an inquiry into the statistics was irrelevant with regard to determining the constitutionality of the provisions. The Court, despite acknowledging that indebtedness amongst farmers is a genuine issue, did not take the same into account whilst ruling on the validity of clause (t) However, isolating such a pertinent fact whilst determining the validity of the provision is nothing short of perpetuating an oligarchy at the grassroot level of the democracy.

What is all the more shocking is that the Court extended its reasoning regarding undischarged insolvency whilst upholding the validity of Section 175 (1) (v) as well. It is difficult to fathom how the simple non payment of electricity bills by an ordinary aspiring Panch in a village can possibly be equated to undischarged insolvency which in the case of MLAs and MPs must be declared by a competent court. The Court, despite acknowledging the fact that arrears of electricity may exist due to a lapse, overcharging on part of the electricity authorities or non-payment on account of stolen electricity lines, has held that such people always have the option of paying off their arrears prior to contesting elections.

Section 175 (1) (w) disqualifies a person who does not have a functional toilet at his residence from contesting Panchayat elections. The Supreme Court, in agreement with the contentions of the Attorney General, has stated that people do not have functional toilets in their houses due to a lack of requisite will, rather than poverty. It remarks that it is rather unfortunate that this practice, which Gandhi sought to eradicate still continues and that it is reasonable if the legislature stipulates that those who are not following basic norms of hygiene are ineligible to become administrators of the civic body and disqualifies them as a class from seeking election to the civic body, While the Court earlier states earlier in the judgement that it shall not sit in judgement over the wisdom of the legislature, a key component of the doctrine of substantive due process, it does

precisely the same thing by reasoning out this provision. Moreover, functional toilet refers to a toilet with running water. It is pertinent to note that the Haryana Government has failed to provide universal pipe water coverage to the entire state. As such, it is difficult to fathom how the State to enforce something that it itself does not ensure and penalise citizens for what are, at least partially, its own omissions.

Section 175 (1) (aa) disqualifies those against whom criminal charges have been framed for offences having a punishment of ten years or more. The very edifice of criminal jurisprudence is that one is ‘innocent until proven guilty’. Despite this provision being in stark contrast to the same, neither have the Petitioners raised this issue nor has the Court taken cognisance of it.

#### **4. IMPLICATIONS OF THE JUDGEMENT ON THE DOCTRINE OF SUBSTANTIVE DUE PROCESS**

As per the 5<sup>th</sup> Amendment to the U.S. Constitution, no person shall be held to answer for any capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.<sup>10</sup>

The 14<sup>th</sup> Amendment ensures that all persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; no shall State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.<sup>11</sup>

The above two effectively elucidate the doctrine of “Due Process of Law” which has been firmly ensconced in American Constitutional Jurisprudence. Over the years, it has given rise to a number of substantive rights and brought much needed balance between the executive, legislature and the judiciary. The due process clause has given the judges in the United States the scope not only to expand judicial power by creative and expansive interpretation but also curb the majoritarian tendencies of the elected legislature.<sup>12</sup>

##### **A. Historical Development of the Due Process Clause in India**

In India, the very wordings of Article 21 of the Constitution of India exclude the applicability of the due process clause by substituting the words with “procedure established by law”. The original draft clause 12 of the Constituent Assembly Debates provided for the following:

‘No person shall be deprived of his life, liberty or property without due process of law nor shall any person be denied the equal treatment of the laws within the territories of the Union’

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<sup>10</sup> 5<sup>th</sup> Amendment, Constitution of the United States of America.

<sup>11</sup> Section 1, 14<sup>th</sup> Amendment, Constitution of the United States of America.

<sup>12</sup> See, Tribe, American Constitutional Law, 3<sup>rd</sup> edn (2000) at 1334.

The exclusion of the due process clause owes its existence to the meeting Dr B.N Rau, Constitutional Adviser to the Constituent Assembly had with Justice Felix Frankfurter, Judge of the Supreme Court of USA. Justice Frankfurter a proponent of the Due Process Clause regime in the USA surprisingly dissuaded Rao from including the same in India as; in his opinion it would lead to extensive litigation on the validity of laws. The rationale being that due process did not have a precise meaning and would introduce an element of uncertainty and could possibly give the judiciary a power to veto Parliament and State Legislatures which consists of peoples representatives elected by and accountable to the electorates.<sup>13</sup> The Constituent Assembly seemed to have bought this rationale of Rao and Frankfurter, when after an exhaustive debate the ‘Due Process Clause’ was deleted and duly substituted by ‘procedure established by law’. The exclusion was made with the intent to limit judicial power and keep the legislature superior but not supreme.<sup>14</sup>

### **B. Development of the Due Process Clause**

Due process deals with the administration of justice and thus, the due process clause acts as a safeguard from arbitrary denial of life, liberty, or property by the Government outside the sanction of law.<sup>15</sup> In India, the doctrine of Due process of law, though not formally adopted, developed through a plethora of judgements, starting from the year 1970. From the complete rejection of ‘due process’ in *A.K Gopalan v State of Madras*<sup>16</sup> to its acceptance in *Maneka Gandhi v Union of India*,<sup>17</sup> the due process clause has come a long way. The doctrine of due process carries within its fold both procedural and substantive due process. Article 21 provides that a person’s life and personal liberty can be deprived provided there is merely a ‘procedure established by law’. The doctrine of procedural due process requires this procedural law to be fair, just and reasonable. The doctrine of substantive due process empowers the court to question not merely procedural laws but the substantive value choices of the Legislature as well.

In *Rajbala*, the Supreme Court of India strongly rejected the doctrine of substantive due process in India. The petitioners had challenged the impugned provisions on the ground that they were wholly unreasonable and arbitrary and thereby, violative of Article 14 of the Constitution of India. The Court effectively rejected the doctrine of substantive due process by holding that Indian courts “do not examine the wisdom of legislative choices unless the legislation is otherwise violative of some specific provision of the Constitution”, as “to undertake such an examination would amount to virtually importing the doctrine of ‘substantive due process’ employed by the American Supreme Court”, and under the Indian Constitution “the test of due process of law cannot be applied to statutes enacted by Parliament or the State Legislatures”.<sup>18</sup>

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<sup>13</sup> See, Chandrachud, *Due Process Of Law* (2011) at 30

<sup>14</sup> See, *Constitutional Assembly Debates*, Vol. VII at 853.

Madison, P.A., ‘Historical Analysis of the first of the 14th Amendment's First Section’, *The Federalist Blog*, 2 August 2010, available at: [http://www.federalistblog.us/mt/articles/14th\\_dummy\\_guide.htm#due](http://www.federalistblog.us/mt/articles/14th_dummy_guide.htm#due) (last accessed 17 February, 2017)

<sup>16</sup> AIR 1950 SC 27

<sup>17</sup> (1978) 1 SCC 248

<sup>18</sup> Abhinav Chandrachud, ‘A Tale of Two Judgements’, *The Hindu*, 12 May, 2016, available at:

The decision in *Rajbala* becomes pertinent because earlier Benches of the Supreme Court, in several cases such as *Re: Ramlila Maidan Incident Dt.4/5.06.2011 v Home Secretary, Union of India & Ors.*<sup>19</sup>, and *Selvi v State of Karnataka*<sup>20</sup>, have repeatedly held that substantive due process and due process generally are a part of Indian constitutional law under Article 21 of the Constitution.

## 5. CONCLUSION

The Supreme Court in the case of *Mohinder Singh Gill v Chief Election Commissioner*<sup>21</sup> had rightly observed that, ‘the little man’s right to rise to Prime Ministership or Presidentship cannot be wished away’. However, with its current judgement, the Supreme Court has itself destroyed any political aspirations that the humble Haryanvi may have harboured.

The import of the substantive due process doctrine within Indian Constitutional Jurisprudence has been one of the greatest legacies of the Supreme Court of India. The said doctrine has been of immense contribution towards the cause of social justice and has duly taken forward the same. The doctrine has also provided adequate safeguard against Governments attempting to trample upon the rights of citizens. The Supreme Court of India through its judgement in this case, tramples upon this very doctrine, effectively ignoring the inherent benefits this doctrine has provided for years at an end.

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<http://www.thehindu.com/opinion/lead/a-tale-of-two-judgments/article8586369.ece>

(last

accessed 17 February, 2017)

<sup>19</sup> Suo Motu Writ Petition (Crl.) No. 122 Of 2011

<sup>20</sup> AIR 2010 SC 1974

<sup>21</sup> (1978) 1 SCC 405



# **KIDNAPPING OF CHILD A BAILABLE OFFENCE UNDER I PC BECOMES NON-BAILABLE UNDER JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT:**

Rakesh Kumar Singh

1. In the present paper, we will discuss the effect of newly enacted Juvenile Justice (Care and Protection of Children) Act, 2015 vis a vis offences related to kidnapping and abduction as envisaged in I PC, 1860. We know that kidnapping of a child below certain age (different for male & female) from lawful guardian is an offence punishable up to 7 years imprisonment but is a bailable offence. Prime issue herein is whether the enactment of new JJ Act which covers every persons under 18 years of age irrespective of gender affects the nature of offence of kidnapping. A purposive reading of JJ Act will go to show that it really affects the kidnapping provisions of I PC on crucial aspects.
2. There are some provisions of JJ Act such as Section-84, 85, 86 which need consideration. Section-84 deals with kidnapping of child and reads as under:

"For the purposes of this Act, the provisions of sections 359 to 369 of the Indian Penal Code, shall mutatis mutandis apply to a child or a minor who is under the age of eighteen years and all the provisions shall be construed accordingly" .
3. The issue is whether the section only refers to the provisions of I PC related to kidnapping or in reality creates an offence. We have to bear in mind that JJ Act is not an amending law and al so it nowhere claims that it has been enacted with one of the purposes of amending any law. Therefore there cannot be any doubt that Section-84 does not want to amend the kidnapping provisions of I PC. Section-361 and 363A provide for different standards for offences in respect of male and female and apply to male up to 16 years and female up to 18 years. Meaning thereby that if a male of 17 years of age is removed from lawful guardian, the act shall not be treated as kidnapping. On the other hand, Section-84 of JJ Act is gender neutral and removal of 17 years old male from lawful guardian will also fall under Section-84. We have already accepted that Section-84 of JJActdoes not amend the IPC. Therefore, it can be said that by virtue of Section-84, differentiation between male and female as made in I PC does not get obi iterated.
4. In Section-84 of J.J. Act, following expressions need serious consideration:
  - i. For the purposes of this Act;
  - ii. Shall mutatis mutandis apply;
  - iii. All the provisions shall be construed accordingly.
5. No one will doubt that one of the purposes of the JJ Act is to punish a wrongdoer whose activity has in some manner adversely affected a person under 18 years of age. This purpose is easily supported by the fact that JJ Act itself a full chapter for offences and penalties. Kidnapping and abduction of any person either simplicitor or for any other purpose will without any doubt adversely affect that person and therefore it that person is under the age of 18 years, the JJActmay contemplate a punishing provision.
6. Now, for punishing such activities, the JJ Act instead of kidnapping and

abduction or its various form or purpose has chosen to adopt the already defined scenario available in I PC and therefore has referred to Section-359 to 369 I PC indicating that those provisions shall mutatis mutandis apply. What the Section-84 has done is to enact a provision through referential legislation. We know that there are two types of referential legislation i.e. by reference and by incorporation. Section-84 may be of either type but for the present purpose type itself is immaterial. Type becomes material when in a subsequent time period the referential legislation undergoes an amendment and a question arises as to whether the amendment should be read in the law which has adopted the path of referential legislation. Both types give different results in such situation. We are presently not required to deal with any such situation and therefore we will not discuss the differential concept of two types aforesaid and will leave that topic for some other paper.

7. The third expression "all the provisions shall be construed accordingly" may give an impression that it amends the provisions of I PC. But the impression is superficial. This phrase comes only after the fact that the provisions of I PC have been applied to persons under 18 years of age and for the purposes of JJ Act. Once it is done, those provisions of I PC will be construed accordingly. Clearly, only while reading the JJ Act, those provisions need to be construed accordingly and not while reading the I PC independently.
8. The marginal note of the Section-84 says that it relates to Kidnapping and abduction of child. The aforesaid provision falls within the Chapter- IX titled as other offences against children. As such, we have to accept that Section-84 creates specific offence.
9. Once we accept that Section-84 of JJ Act creates new offences relating to kidnapping and abduction of a person under 18 years of age irrespective of gender, we may proceed further to note the nature of offences. Offences are classified in section-86 which reads as under:
 

"86. (1) Where an offence under this Act is punishable with imprisonment for a term more than seven years, then, such offence shall be cognizable, non-bailable and triable by a Children's Court.

(2) Where an offence under this Act is punishable with imprisonment for a term of three years and above, but not more than seven years, then, such offence shall be cognizable, non-bailable and triable by a Magistrate of First CI ass.

(3) Where an offence, under this Act, is punishable with imprisonment for less than three years or with fine only, then, such offence shall be non-cognizable, bailable and triable by any Magistrate" .
10. Apparently, the aforesaid is based upon the part-2 of the first schedule appended to Cr.P.C. It makes classification on the basis of imprisonment and first category is less than 3 years, second category is 3years and up to 7 years and third category is more than 7 years. Now, due to Section-84 and 86, kidnapping and abduction of a person under 18 years of age will be governed as under:

Sl.No.	Section of IPC.	Court which will try		Bailable or not	
		For IPC	For JJ Act	For IPC	For JJ Act

1.	363	Magistrate	Magistrate	Bailable	Non-
2.	363A	Magistrate & Sessions court	Children's court	Non-bailable	Non-bailable
			Children's court	Non-bailable	Non-bailable
3.	364	Sessions court	Children's court	Non-bailable	Non-bailable
4.	364A	Sessions court	Children's court	Non-bailable	Non-bailable
5.	365	Magistrate	Magistrate	Non-bailable	Non-bailable
6.	366	Sessions court	Children's court	Non-bailable	Non-bailable
7.	366A	Sessions court	Children's court	Non-bailable	Non-bailable
8.	366B	Sessions court	Children's court	Non-bailable	Non-bailable
9.	367	Sessions court	Children's court	Non-bailable	Non-bailable
10.	369	Magistrate	Magistrate	Non-bailable	Non-bailable

11. At this stage, another provision of JJ Act needs to be noted. It is Section-85 and it reads as under:

"85. Whoever commits any of the offences referred to in this Chapter on any child who is disabled as so certified by a medical practitioner, then, such person shall be liable to twice the penalty provided for such offence. Explanation.- For the purposes of this Act, the term "disability" shall have the same meaning as assigned to it under clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995".

12. Certainly, in case of a disabled child, punishment is twice the normal quantum. It will definitely create some changes. Be it noted that IPC does not have any prescription. If we see the aforesaid table, we will find that so far the nature of offences is concerned, all the aforesaid offences are non-bailable for the purposes of JJ Act. Therefore, there will be no change in respect of a disabled child. However, there are three offences i.e. 363, 365 & 369 which are triable by a Magistrate. Now, in respect of a disabled child, the offences under Section-363, 365 & 369 will become punishable upto 14 years (twice the general quantum). In terms of Section-86 of JJ Act, all offences punishable for more than 7 years imprisonment are to be tried by a Children's Court. As such, if the offence described under any of the sections i.e. 363, 365 & 369 of IPC is in respect of a disabled person under the age of 18 years, the same will be a non-bailable offence and will be triable by a Children's Court.

13. In the present context, Section-369 IPC would be an interesting read. It goes as under:

"Kidnapping or abducting child under ten years with intent to steal from its person.-Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly any movable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

14. Now, if we apply Section-84 JJ Act to the aforesaid, we will find that Section-369 is to apply to any child or minor under 18 years of age and for the purposes of JJ Act, Section-369 has to be construed accordingly. As such, instead of 10 years, Section-369 has to be construed as if it applies to every person under 18 years of age. The section being already indicated as

non-bailable and triable by Magistrate, the same does not contradict the classification of Section-86.

15. The aforesaid analysis shows that the JJ Act has significantly improved the provisions of IPC related to kidnapping and abduction through referential legislation in following manner:

- i. Irrespective of gender, if any person under 18 years of age is kidnapped from lawful guardian, the act will be punishable whereas for I PC, the act is not punishable if done against a male of more than 16 years of age;
- ii. The kidnapping aforesaid becomes non-bailable whereas it is bailable under I PC;
- iii. Kidnapping of a person under 18 years of age for begging becomes triable by a Children's Court whereas in I PC, the same is triable by a Magistrate;
- iv. If such person is disabled, the act will be punishable with twice the normal quantum;
- v. In case of disabled child under 18 years of age, the act aforesaid becomes triable by a Children's Court whereas in I PC there is no such differentiation on the ground of disability;
- vi. Kidnapping/abduction with intention to steal from person shall be punishable even in respect of a child under 18 years of age whereas the I PC only covers a child up to 10 years.

# REFUGEE LAW FOR INDIA: PROTECTING RIGHTS, BORDERS AND INTEGRITY

Nishant Sirohi\*

**Abstract:** This paper discusses the laws and current administrative practices for the regulation of refugees in India. It also discusses the judicial endeavors to uphold and broaden the Constitutional values for the protection of refugees in the country. Through this discussion, the author articulates an argument as to why it is important for India to have a national refugee law.

**Keywords:** India, Refugees, Non-Refoulement, Human Rights, National Refugee Law.

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## I. PREFACE

A petition filed by two Rohingya immigrants<sup>241</sup> in the Supreme Court of India in September 2017 yet again brought the long-standing debate of India's *ad hoc* nature of refugee law and practices into the wide public discussion. The government in this current case has pleaded that, 'the large-scale illegal migrants, particularly from Myanmar and Bangladesh, have not only threatened the demographic structure of bordering districts but have seriously impaired the security and national integration', the government further pleaded that, "the situation is seriously harming the national security of the country". The Ministry of Home Affairs' stand to deport all Rohingyas from the country in this humanitarian crisis not only runs against the country's history and tradition but also falls foul of the international law and India's constitutional norms<sup>242</sup>.

India's history on refugee is long and dramatic and goes as back as the first millennium when the Hindu rulers of Gujarat granted refuge to *Parsi* settlers from erstwhile Persia<sup>243</sup>. Since then, refugees in India arrived during peak migration crises and conflicts in the region, including partition of India and Pakistan in 1947, the Tibet crisis of 1959, the creation of Bangladesh in 1971, civil war in Sri Lanka in 1983 and wars in Afghanistan in 1979 and 2001. According to Refugee International estimates, India hosts 3,30,000 refugees and its refugee population includes approximately as many as: 1,43,000 Sri Lankans; 1,10,000 Tibetans, 52,000 Chins and other Burmese minorities; 15,000 Nepalese from Bhutan; and 11,400 Afghans.

Article 1 of the United Nations Convention relating to the Status of the Refugee, 1951<sup>244</sup> (Refugee Convention, 1951) defines a 'refugee' as a person who has already been considered a refugee under prior treaty arrangement; or the person who is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country due to a well-founded fear of being persecuted for reason of race, religion, nationality, membership in a particular social group or political opinion. Also, the Cartagena Declaration on Refugees

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<sup>241</sup> Mohammad Salimullah and Mohammad Shaqir had filed the PIL against the Centre's stand to identify and deport the 40, 000 illegal Rohingya Muslim staying in India to Myanmar. The petitioners claimed in the petition that they had taken refuge in India after escaping from Myanmar due to widespread discrimination, violence and bloodshed against the community there.

<sup>242</sup> Saurabh Bhattacharjee, "India needs proper Refugee Legislation" 09(1) *EPW* 71-75 (2008)

<sup>243</sup> Rukmini Das, "When the law gives no refuge" *The Hindu*, July 01, 2016

<sup>244</sup> Convention relating to the Status of Refugees, adopted on July 28, 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-2.en.pdf> (last visited on March 29, 2018)

1984<sup>245</sup> laid down that the definition of refugee not only incorporate the elements contained in Refugee Convention 1951 and the 1967 Protocol but also covers persons who have fled their country because their lives, their safety or their liberty were threatened by a massive violation of human rights.

Also, the refugee communities have been subjected to varying standards of protection by India. For example, the refugees from Sri Lanka and Tibet were given government-issued Identity Cards whereas the vast majority of Afghan and Burmese refugees have only documentation given to them by UNHCR, which is not widely recognized<sup>246</sup>. On the other, the government solely relied on the UNHCR recommendations to deal with the massive flow of refugees from war-torn Bangladesh in 1971<sup>247</sup>. Therefore, India's failure to enact a national refugee law – to define “refugees” as a class of person, their status and basic rights – resulted in a varying and most of the time biased treatment to refugees' influxes through the government administered *ad hoc* committees.

## II. INDIA'S COMMITMENTS UNDER INTERNATIONAL LAW

The Refugee Convention 1951 and the 1967 Protocol are the UNHCR's statute concerning the status of refugees and also the universal treaty law on the refugees. India is not a signatory to either the Refugee Convention 1951 or the 1967 Protocol and it expressly avoided signing it from the beginning. There has been no official response from the government of India on its refusal to ratify the convention except for a statement by the external affairs minister in Parliament which indicated that the government was studying the implications of ratifying<sup>248</sup>.

Now the important question arises whether India's refusal to join the Refugee Convention 1951 does absolve it from basic commitment to humanitarian protection of refugees? The simple retort to this question is that India can not absolve itself from the basic commitment to the humanitarian protection of refugees. B. S. Chimni also writes that the right to refugees to non-refoulement has been recognized as a part of customary international law<sup>249</sup>. Moreover, the directive principles of state policy bind the government to foster respect for international law and treaty obligations.

Besides, India has signed a number of human rights instruments that articulate a commitment to the protection of refugees. These include Universal Declaration on Human Rights (UDHR) 1948, International Covenant on Civil and Political Rights (ICCPR) 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 in 1979 and Convention against Torture and other Cruel, Inhumane and Degrading Treatment or Punishment (Torture Convention) 1984. India is also a signatory to the most recent New York Declaration on Refugees and Migrants which also recognizes the rights of the refugees and asylum seekers. Reading together the provisions given under these Conventions and treaties it indicated that India is bound to respect and follow the international principles for the protection of refugees and asylum seekers<sup>250</sup>.

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<sup>245</sup> Cartagena Declaration on Refugees, Migrants, adopted on 22 November 1984, by the Colloquium on the International Protection on Refugees in Central America, Mexico and Panama, *available at*: [https://www.oas.org/dil/1984\\_cartagena\\_declaration\\_on\\_refugees.pdf](https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf) (last visited on March 29, 2018)

<sup>246</sup> Roshni Shanker and Vasudha Reddy, “It is time for a uniform asylum law” *The Hindu*, Sep. 28, 2016

<sup>247</sup> Nafees Ahmad, “Rohingyas flee Myanmar: India must drop religious criteria in refugee law” *Business Standard*, Sep. 06, 2017

<sup>248</sup> India, Lok Sabha Debates, Vol XVII, May 7, 1986, Col 32

<sup>249</sup> B. S. Chimni, *Development and Migration: Concepts on International Law* (2007)

<sup>250</sup> Op. Cit. 2 (Sarubah)

If India failed to provide the protection as given in the Refugee Convention, or as are available in the human rights treaties and conventions which India is signatory to, then it would directly result in India's failure to oblige and respect not just the international law but also its own Constitution. Adoption of Refugee Convention and its principle in domestic law would be a minor step towards India's obligation but it would lead to drastic alternation in country's human right regime – in the structure of laws and the institutions working towards strengthening human rights – and would set an ideal example in the region.

### III. THE CONSTITUTION OF INDIA AND REFUGEES

Part III of the Constitution of India incorporates all the traditional civil and political rights enumerated in Articles 2 to 21 of the UDHR. Part III of the Constitution contains perhaps one of the most elaborate characters of human beings yet framed by any State, consistent with the aim of the unity of the nation and the interests of the public at large<sup>251</sup>. However, there are few fundamental rights which are meant for all the persons and not just the citizens of India. The Supreme Court of India in *Chairman, Railway Board v. Chandrimadas*<sup>252</sup> observed that,

*“Our Constitution guarantees all the basic and fundamental rights set out in the UDHR to its citizens and other persons. The Chapter dealing with the fundamental rights is contained in Part III of the Constitution. The purpose of this Part is to safeguard the basic human rights from the vicissitudes of political controversies and to place them beyond the reach of political parties, who by virtue of majority, may come to form the Government at the Centre or in the State”*

It was further held that,

*“Wherever in Part III of the Constitution, the term ‘person’ is mentioned (like in Article 14 and 21), it will apply to all person including citizens and non-citizens”*

Hence, the persons who flee their country of origin to seek asylum have come under the protection of these fundamental rights, independent of the prior need for any recognition by the government of India or by any other international body like the UNHCR.

The fundamental rights which provide potential framework for protecting the rights of refugees or migrants or stateless persons include Article 14 which states that, ‘the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India’ and Article 21 which states that, ‘No person shall be deprived of his life or personal liberty except according to procedure established by law’. Besides these two Articles, there are other articles that also guarantee many rights to all persons including refugees and illegal migrants. These include: Article 20 which provides the right against prosecution under retrospective penal law, the right against double jeopardy, the right to silence; Article 22 which provides the rights of an arrestee or detainee; Article 25-28 provide the right to freedom of religion; Article 27 provides the right to freedom from payment of taxes for promotion of any religion; and, Article 28

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<sup>251</sup> Subhas C Kashyap, *Our Constitution: An Introduction to India's Constitution and Constitutional Law* 94-95 (National Book Trust, New Delhi, 5<sup>th</sup> edn. 2017)

<sup>252</sup> 2000(2) SCC 465

(3) provides the right to freedom from attendance in religious worship in state education institutions<sup>253</sup>.

The established principle of rule of law in India is that no person, whether a citizen or an alien shall be deprived of his life, liberty or property without the authority of law.

#### IV. JUDICIAL RESPONSE

The Indian judiciary has all along taken an active role in interpreting different constitutional rights. Equality before law and equal protection of law have formed the bedrock of several human rights decisions delivered by our courts<sup>254</sup>. The judiciary has played a very important role in protecting refugees. Orders given by the Courts have filled the legislative gaps and in many cases have provided humanitarian protection to refugees<sup>255</sup>.

The Supreme Court of India has radically reinterpreted Article 21 of Constitution to include a substantive due process of law to be followed for any state action impinging on life and personal liberty. In *Louis De Raedt v. Union of India*<sup>256</sup>, and *State of Arunachal Pradesh v. Khudiram Chakma*<sup>257</sup>, the Supreme Court has expanded the scope and ambit of Article 21 and has held that foreigners are also entitled to the protection of Article 21 and the state is bound to protect the life and liberty of every human being. In *NHRC v. State of Arunachal Pradesh*<sup>258</sup>, the Supreme Court restrained the forcible expulsion of Chakma refugees from the state. In its interim order on November 2, 1995, it directed the state government to ensure that the Chakmas situated in its territory are not ousted by any coercive action not in accordance with the law<sup>259</sup>. The Supreme Court intervened with a liberal interpretation of the law to suggest that refugees are a class apart from foreigners deserving of the protection of Article 21 of the Constitution. In *Dongh Lian Kham v. Union of India*<sup>260</sup> the Supreme Court has held that the principle of non-refoulement is part of the guarantee under Article 21 of the Constitution irrespective of nationality.

In a number of cases, Indian courts have protected the rights of refugees to non-refoulement<sup>261</sup> and halted their deportations where there are substantial grounds to believe that their life would be in danger and allowed them to apply to UNHCR<sup>262</sup> for protection and to gain refugee status<sup>263</sup>. In *Zothansangpuri v. State of*

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<sup>253</sup> Rajeev Dhavan, *Refugee Law and Policy in India* 227-228 (PILSARC – The Public Interest and Legal Support and Research Centre, New Delhi, 2004)

<sup>254</sup> Soli Sorabjee, *World of all Human Rights* pp. 69 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2010)

<sup>255</sup> Sanjay Parikh, “Refugees in the International and National Framework” *ISIL Year Book of International Humanitarian and Refugee Law* (2001) Also available at: <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/16.html>

<sup>256</sup> (1991) 3 SCC 554

<sup>257</sup> 1994 Sup (1) SCC 615 : Civil Appeal Nos. 2182 and 2181 of 1993

<sup>258</sup> (1996) 1 SCC 742 : AIR 1996 SC 1234

<sup>259</sup> Civil WP No 720 : (1996) 1 SCC 295

<sup>260</sup> 2015 SCC Online Del 14338

<sup>261</sup> P Nendumanran v. Union of India [WP No 12298 and 12313 of 1992], Gurunathan v. Union of India [WP 6708 and 79168 of 1992], A C Mohd Siddique v. Government of India and others [1998 (47) DRJ (DB)], Syed Ata Mohammadi v. Union of India [Cri. W P No 7504/1994], and Maiwand’s Trust of Afghan Human Freedom v. State of Punjab [Cri. W P No. 125 and 126 of 1989]

<sup>262</sup> Veerabhadran Vijayakumar, “Judicial Responses to Refugee Protection in India” 12 *IJRL* 238 (2000)

<sup>263</sup> N D Pancholi v. State of Punjab [W P No 243/88], Khy Htoon v. State of Manipur [W P No 515/90], Dr Malvika Karlekar v. Union of India [WP (Cri) No 583/92], and Ktaer Abbas Habib al Qutaifi [1999 Cri LJ 919]

*Manipur*<sup>264</sup>, the Imphal Bench of the Gauhati High Court ruled that refugees have the right not to be deported if their life was in danger. In *Bogyi v. Union of India*<sup>265</sup>, the Gauhati High Court not only ordered the temporary release of a Burmese man from detention but also approved his stay for two months so that he could apply for UNHCR status. In *U Myat Kayew and Nayzan v. State of Manipur*<sup>266</sup>, the Gauhati High Court held that under Article 21, the asylum seekers who enter India, even if illegally, should be permitted to approach the office of the UNHCR to seek refugee status. In *Nuang Maung Mye Nyant v. Government of India*<sup>267</sup> and *Shar Aung v. Government of India*<sup>268</sup>, the Courts ruled that even those refugees against whom cases were pending for illegal entry should be provided exit permits to enable them to leave the country for third country resettlement.

What is clearly evident from the Courts orders and judgments is that, the Courts recognize the right of non-refoulement, as they prevent the return of refugees home and allow them to seek protection<sup>269</sup>. The Courts through the judicial interventions on the case-specific tried to fill the legislative gaps<sup>270</sup> and also tried to meet the ends of justice as enshrined in the Constitution.

## V. NATIONAL REFUGEE LAW FOR INDIA – THE WAY FORWARD

India is surrounded by countries which are politically volatile and unpredictable, struggling with their economies and democratic systems. Since independence, India has been time and again hit by the exodus of humanity on the move from these neighboring countries.

The government should understand that the solution – for the protection of rights of refugees, aggression at the borders and political turmoil over the refugees – is enacting a national refugee law. The government can either ratify the Refugee Convention, 1951 and incorporate it into domestic law or enact a uniform legislation specifically for refugees without looking at the Refugee Convention, 1951 so that it is not left to the discretion of the executive to decide through its *ad hoc* committees, and to the judiciary to decide the fate of asylum seekers. A domestic legislation on refugees can help India not just to regulate the issues related to refugees but also strengthen its position in the region.

Now, the questions that arise is whether India can refer to the Refugee Convention, 1951 in drafting national legislation, and, whether it is really necessary to ratify the convention to adopt national refugee legislation? Well, the Supreme Court in *Vishaka v. State of Rajasthan*<sup>271</sup> observed that reliance can be placed on international laws while drafting national legislation. It is to be noted that merely ratifying the Refugee Convention, 1951 does not bound India to accept all the refugees coming to it. Also, India's concern over the possible infiltration of illegal immigrants or terrorists on its porous border from the neighboring countries is genuine but this concern cannot override the need of protection of the refugees in a humanitarian crisis. India while drafting its domestic refugee law can make a

<sup>264</sup> Civil Rule No 981 of 1989

<sup>265</sup> Civil Rule No 981 of 1989

<sup>266</sup> Civil Rule No 516 of 1991

<sup>267</sup> CWP No 5120/94

<sup>268</sup> WP No 110 of 1998

<sup>269</sup> Tapan K Bose, *Protection of Refugees in South Asia: Need for Legal Framework* (South Asia Forum for Human Rights, Kathmandu 2000); Omar Chaudhary, "Turning Back – An Assessment of Non – Refoulement under India Law" 39(29) *EPW* 3257-3264, 2004

<sup>270</sup> Rajeev Dhavan, *On the Model Law for Refugees: A Response to the National Human Rights Commission* (PILSARC – The Public Interest and Legal Support and Research Centre, New Delhi, 2003)

<sup>271</sup> (1997) 6 SCC 241; AIR 1997 SC. 3011

certain reservation as per Article 42 of the Refugee Convention, 1951 which permits the states to make certain ‘interpretative declaration’ to protect the national security. Thus, India can actually formulate a national refugee law as per the international human rights standards to balance the humanitarian crisis of refugees without compromising with its national security and can also address the legal issues revolved around the refugees.

The enactment of legislation for refugee protection will help to avoid frictions between India and the country of origin of the refugees. The act of granting asylum being governed by law rather than an *ad hoc* policy will then be better understood by other states as a peaceful, humanitarian and legal action under a judicial system rather than a hostile political gesture. In this case, India’s decisions to accept or reject refugees cannot be spun around to be interpreted as serving political ends by the country of origin or other countries in the region<sup>272</sup>.

India’s past efforts in dealing with mass influxes has been commendable. Even Antonio Guetres, United Nations High Commissioner for Refugees said that, “India’s refugee policy is an example for the rest of the world to follow”<sup>273</sup>. As the de facto leader of the subcontinent, India should foster cooperation in the present day complex political landscape and lead the charge to a solution. But the Constitution rather than politics should frame India’s response to refugees. India’s foreign policy might change with the change in government or global politics but a codified law does not change.

The judicial creativity in the absence of a much-needed legislative framework can serve only a stopgap arrangement and not as a permanent solution<sup>274</sup>. The need for the adoption of a uniform domestic legislative framework has been long overdue and must be enacted to help replace India’s *ad hoc* policy orientations with a clear and coherent refugee law<sup>275</sup>. If any such law is enacted, it would bring India’s refugee practices in line with its own democratic, constitutional and cultural values<sup>276</sup>.

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<sup>272</sup> Arjun Nair, “National Refugee Law for India: Benefits and Roadblocks” *IPCS Research Papers* (Institute of Peace and Conflict Studies, New Delhi, December 2007)

<sup>273</sup> Smriti Kak Ramchandran, “India’s refugee policy is an example for the rest of the world to follow” *The Hindu*, January 03, 2013

<sup>274</sup> Deepak K Singh, “Lost in Transition- A Narrative of Non-Existence” 51(36) *EPW* 46-53 (2016)

<sup>275</sup> Ibid.,

<sup>276</sup> Hamsa Vijayaraghavan, Roshni Shanker and Vashudha Reddy, “It’s time India had a Refugee Law” *The Wire*, December 19, 2015

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