BROCHURE
ON

SKILLS OF JUDGMENT WRITING

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SKILLS OF JUDGMENT WRITING

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"Four things belong to a Judge;

to hear courteously,

to proceed wisely,

to consider soberly and

to decide impartially."

- Socrates

A JUDGE'S DUTY IS TO RENDER JUSTICE. RENDERING JUSTICE, IN A LARGER SENSE, MEANS GIVING EVERY PERSON, HIS OR HER DUE. ALL THOSE ENTRUSTED WITH POWER—POWER TO GOVERN, POWER TO LEGISLATE, POWER TO ADJUDICATE AND POWER TO PUNISH OR REWARD—IN A SENSE, RENDER JUSTICE. IN THE CONTEXT OF JUDGES, RENDERING JUSTICE, MEANS SPEEDY, EFFECTIVE AND COMPETENT ADJUDICATION OF DISPUTES AND COMPLAINTS IN A FAIR AND IMPARTIAL MANNER, IN ACCORDANCE WITH LAW, TEMPERED BY EQUITY, EQUALITY AND COMPASSION WHEREVER REQUIRED AND PERMISSIBLE, AFTER DUE HEARING.

A JUDGE, BY HIS CONDUCT, BY HIS FAIRNESS IN HEARING AND BY HIS JUST AND EQUITABLE DECISIONS, SHOULD EARN FOR HIMSELF AND THE JUDICIARY, THE TRUST AND RESPECT OF THE PUBLIC AND THE MEMBERS OF THE BAR.

WHAT IS A JUDGMENT?

A Judgment may be defined as a reasoned pronouncement by a judge on a disputed legal question which has been argued before him. It is a literary composition, but a composition subject to certain conventions. It possesses its own characteristics and its own standards of merit. The art of composing judgments is not taught; it is acquired by

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* Judge, Allahabad High Court, Lucknow-Bench. Based on lecture delivered by His Lordship on 13th May 2015 at Judicial Training and Research Institute, U.P. during Induction Training Program for Civil Judges (Junior Division)

practice and by study of the models provided in the innumerable volumes of the law reports in which are recorded the achievements of past masters of the art.

In *Halsbury's Laws of England*, (4th Edition, Volume 26 P. 260), it has been *said*,

> *"A judgment or order in its final shape usually contains in addition to formal parts:— (i) A preliminary or introductory part, showing the form of the application upon which it was made, the manner in which and the place at which, the writ or other originating process was served, the parties appearing any consent, waivers, undertakings or admissions given or made, so placed as to indicate whether they relate to the whole judgment or order or only part of it, and a reference to the evidence upon which the judgment or order is based and (ii) a substantive or mandatory part, containing the order made by the court."*

A judgment pronounced on the bench, regarded as an intellectual product, stands in a class by itself. The judge speaks with authority and what he says should therefore, be spoken with befitting dignity. He should not affect grandiloquence but he should be impressive. The strength of a judgment lies in its reasoning and it should therefore be convincing. Clarity of exposition is always essential. Dignity, convincingness and clarity are exacting requirements but they are subservient to what, after all, is the main object of a judgment, which is not only to do but to seem to do justice. In addition to these cardinal qualities of a good judgment there are the attributes of style, elegance and happy phrasing which are its embellishments.[1]

In framing a judgment attention to its structure is of high importance. The theme should be developed in logical sequence from the opening to the conclusion, so that the mind of the reader can follow the progress of the argument, with ease. The normal course is first to set out the facts which have given rise to the question at issue. The selection and arrangement of the facts is a matter requiring no little skill. Unessential details have to be discarded and prominence should be given to the material circumstances. It is often a good plan to preface the statement of the facts by posing broadly at the outset the nature of the problem to be solved and so to give the reader a clue to what is to follow. The facts having been duly set out, the next step is to formulate and apply the law to them. This generally involves a critical examination of principle and precedents and is the core of the judgment. The conclusion follows.

To any of the judges sitting in judgment on others, whether as judge or magistrate, judgment writing often feels like the bane of their existence but it is, of course, the ultimate reason for their existence. In The Eumenides, the Greek playwright Aeschylus wrote in 458 B.C.

[1] The RT. Hon. Lord Macmillan P.C.,K.C.V.O., '*The Writing of Judgments'*

"Fair trial, fair judgment …
Evidence which issued clear as day … …

[Q]uench your anger; let not indignation reign

Pestilence on our soil, corroding every seed

'Till the whole land is sterile desert… …

[C]alm this black and swelling wrath."

It is said that this play is the oldest surviving courtroom drama in world literature.[2]

A judgment therefore has a significant social and civic function. But what a Judge is concerned with today is the everyday task of judgment writing: something they do day in, day out. Some judgments almost write themselves. They are purely mechanical and can be dealt with quickly. Others are more complex and require deeper thought. A Judge constantly strives to write better, clearer judgments. But how to do it? The first matter to consider is the purpose of the judgment. There are four purposes for any judgment that is written: (1) to clarify own thoughts; (2) to explain decision to the parties; (3) to communicate the reasons for the decision to the public; and (4) to provide reasons for an appeal court to consider.

A judgment forms the concluding part of the civil suit and it determines the rights and liabilities of the parties. Basically judgment is followed by a decree which is its operating part. Historically, there was distinction between judgment and decree. Common Law adheres to the judgment while the Equity Court of Law deals with the decree. But in U.K. the distinction between judgment and decree merged. In U.S. also, distinction between judgment and decree has lost its relevance but in India, the distinction between judgment and decree has still maintained its position from the initiation of the old Code of Civil Procedure, 1859. The present Code of Civil Procedure, 1908 also recognizes this distinction.

Judgment as defined in Section 2(9) C.P.C means the statement given by the judge of the grounds for a decree or order. A judgment is an affirmation of a relation between a particular predicate and a particular subject. The pre-requisite for a 'good' Judgment/ Order is a good hearing. The process of reasoning by which the court comes to the ultimate conclusion and decrees the suit should be reflected clearly in the judgment. Judgment is the most important document for the parties as well as the Judge and more important for the Judge are the reasons in support of his/ her judgment. Clear thinking

[2] R.E. Messick, "*The Origins and Development of Courts*" (2002) 85 Judicature at 175.

is the key to clear writing. A clearly expressed judgment demonstrates the interest of the subject and the exposition of legal reasoning. Reasons given by a judge in a judgment indicate the working of his/ her mind, approach, his/ her grasp of the question of fact and law involved in the case and the depth of his knowledge of law. In short, a judgment reflects the personality of the judge and, therefore, it is necessary that it should be written with care and after mature reflection. In the words of Chief Justice Sabyasachi Mukharji,

> "*The supreme requirement of a good judgment is reason. Judgment is of value on the strength of its reasons. The weight of a judgment, its binding character or its persuasive character depends on the presentation and articulation of reasons. Reason, therefore, is the soul and spirit of a good judgment."*

Equity, justice and good conscience are the hallmark of judging. One who seeks to rely only on principles of law, and looks only for the decided cases to support the reasons to be given in a case or acts with bias or emotions, loses rationality in deciding the cases. The blind or strict adherence to the principles of law sometimes carries away a judge and deviates from the objectivity of judging issues brought before him.

The traditional theory of adjudication is that a judge must search for the relevant rule of law derived from settled legal principles found in precedents and then apply it to the facts of the case. The approach basically assumes that the answer to any legal problem is to be found by searching in the reports and locating the relevant case. Benjamin Cardzo likens the process of identifying a precedent to matching 'the colors of the case at hand against the colors of many sample cases.[3] The sample nearest in shade supplies the applicable rule. Thus, the decision should be the same regardless of the practice of law'. It places 'emphasis on uniformity, consistency and predictability, on the legal form of transactions and relationships' and, sometimes, on literal, rather than purposive interpretation.

There may be cases where there are lengthy pleadings, scores of witnesses, voluminous documents and elaborate arguments. A judge is therefore, not only expected to remember the facts but also the law on the subject and the precedents which are placed before the Court. To make the task easy for rendering a judgment, a judge should maintain a minute note book or a note pad to jot down points during the course of hearing. These notes could be written down in whatever manner comfortable with the judge.

There are differences in the manner in which judgments are written by courts exercising different jurisdictions. There is a marked variation in the manner in which judgments

[3]Benjamin N. Cardozo, '*The Nature of the Judicial Process'* Yale University Press, 1949.

are written in civil cases, criminal cases, writ proceedings and summary proceeding. Similarly, there are differences in the manner in which judgments are written in original, appellate and revisional proceedings. There are also differences in the manner of writing final judgments and interlocutory orders.

One pre-requisite before commencing the hearing of a Court case is to frame the issues. It is advisable for the judge to frame the issues, though draft issues are circulated by the counsels. If the predecessor of a judge had framed the issues, the judge would have to go through the pleadings to satisfy himself as regards the matter to be decided in a particular case.

As the beginning of the judgment introduces the facts of the case and subject matter, the conclusion should resolve each of the issues identified at the start. The ending should contain no new material, whether factual or legal, which has not been previously discussed.

Thus, a judge has gone through the pleadings, framed the issues, recorded the depositions, made notes on the arguments, and is now ready to prepare the judgment. A judge has to speak through his judgment therefore there should be clarity in his delivery and decisions to be supported by reasons. Lengthy judgments invite criticism and are boring.

Hon'ble Mr. Justice M.M. Corbett, Former Chief Justice of the Supreme Court of South Africa, recommended a basic structural form for judgment writing:

(i) Introduction section:

(ii) Setting out of the facts:

(iii) The law and the issues:

(iv) Applying the law to the facts:

(v) Determining the relief; including costs;

(vi) Finally, the order of the Court.

A Judge should only deal with the subject matter of the case in hand and issues involved therein. A Judge should desist from issuing directions affecting executive or legislative policy, or general directions unconnected with the subject matter of the case. A Judge may express his/ her view on a particular issue in appropriate cases only where it is relevant to the subject matter of the case.[4]

[4] *Som Mittal v. Government of Karnataka*, (2008) 3 SCC 574.

Each judge has a different way of writing judgments, and there may be wide variation in style. Each judge has an individual manner of expression. A Judge while writing the judgment should express in a language and style which suits him. What is more important is lucidity rather than style. Lucidity should be the prime aim in Judgment writing. Eminent jurists recommend using short sentences, without packing too many ideas in a single sentence. While setting out facts, a judge should try to maintain a simple straight forward flow. Repetition of words or phrases should be avoided and normal rules of grammar should be observed. Flowery language and literary allusion should be avoided as such over indulgence may detract from the seriousness of the judgment. The criterion of good syntax is that it should never be necessary to read a sentence twice in order to make out its meaning. For easier reading, active rather than passive voices should be used. While writing a judgment, it is often necessary to refer to the judgments of superior courts which would contribute in reasoning. While it is quite fitting to mitigate the austerity of a judgment by employing the arts and graces of literary composition, restraint should be exercised in doing so. Elegance of expression, aptness of illustration, well-chosen metaphors and an occasional happy literary quotation are both legitimate and desirable. But a judgment is not the appropriate vehicle for wit and pleasantry at large. To the parties concerned, litigation is not a laughing matter and they may well complain if the Judge gives the impression of treating their case too light-heartedly. He must not allow himself to yield to the temptation of playing to the gallery and the press by comments which may distress the suitors who have come to his court not for entertainment but for justice.

The Supreme Court in the case of *Joint Commissioner of Income Tax Surat v. Saheli Leasing and Industries Ltd.*[5] laid out the guidelines for writing judgments in the following terms;

> *"**7.** These guidelines are only illustrative in nature, not exhaustive and can further be elaborated looking to the need and requirement of a given case:-*
>
> *a) It should always be kept in mind that nothing should be written in the judgment/order, which may not be germane to the facts of the case; It should have a co-relation with the applicable law and facts. The ratio decidendi should be clearly spelt out from the judgment / order.*
>
> *b) After preparing the draft, it is necessary to go through the same to find out, if anything, essential to be mentioned, has escaped discussion.*

[5] (2010) 6 SCC384.

c) The ultimate finished judgment/order should have sustained chronology, regard being had to the concept that it has readable, continued interest and one does not feel like parting or leaving it in the midway. To elaborate, it should have flow and perfect sequence of events, which would continue to generate interest in the reader.

d) Appropriate care should be taken not to load it with all legal knowledge on the subject as citation of too many judgments creates more confusion rather than clarity. The foremost requirement is that leading judgments should be mentioned and the evolution that has taken place ever since the same were pronounced and thereafter, latest judgment, in which all previous judgments have been considered, should be mentioned. While writing judgment, psychology of the reader has also to be borne in mind, for the perception on that score is imperative.

e) Language should not be rhetoric and should not reflect a contrived effort on the part of the author.

f) After arguments are concluded, an endeavor should be made to pronounce the judgment at the earliest and in any case not beyond a period of three months. Keeping it pending for long time, sends a wrong signal to the litigants and the society.

g) It should be avoided to give instances, which are likely to cause public agitation or to a particular society. Nothing should be reflected in the same which may hurt the feelings or emotions of any individual or society."

The duty of a Judge is thus, to render justice and not to win popularity. The temptation to gain easy popularity by being liberal in granting admission and interim orders will ultimately damage the credibility of the judiciary as an institution, apart from causing undue hardship and loss to those who are unnecessarily drawn into the litigation or unjustly subjected to the interim order.[6]

The best judgments are those which clearly state the legal principles on which they are based. In the process of reaching a decision precedents are very properly read and studied as evidence of the law, but they should be used for the purpose of extracting the law from them. It is undesirable to cumber a judgment with all the apparatus of research which Bench and Bar have utilized in ascertaining the principle of law to be applied.

JUDGMENTS IN CRIMINAL CASES

[6] Justice R.V. Raveendran, '*Rendering Judgments- Some Basics'*, (2009) 10 SCC (J)

While rending judgments in criminal cases, the following are to be observed as required under Section 354 Cr.PC. The judgment should contain the point(s) for determination, the decision and the reasons for the decision, the Section of IPC or other law under which the accused is to be convicted or acquitted, and punishments to which he/ she is sentenced (on conviction). The judgment should also indicate: (1) whether the sentence is to run concurrently or consecutively; (2) whether the accused is entitled for set-off or not; the period of detention, if any, undergone by him/ her as under trial (Sec. 427 and 428 Cr.PC). In case of acquittal, the Judge should state the offence of which the accused is acquitted and direct that he/ she be set at liberty.

In a criminal case the framing of the charge is most important. The Magistrate or the Judge should see that a proper charge is framed. In the matter of offences under other Acts, it should be seen that all the ingredients of the offence are specified in the charge with all material particulars.

DICTIONARY MEANING

Judgment.[7] 1. A court's final determination of the rights and obligations of the parties in a case. The term *judgment* includes an equitable decree and any order from which an appeal lies.

2. *English law.* An opinion delivered by a member of the appellate committee of the House of Lords; a Law Lord's judicial opinion.

"An action is instituted for the enforcement of a right or the redress of an injury. Hence a judgment, as the culmination of the action declares the existence of the right, recognizes the commission of the injury, or negatives the allegation of one or the other. But as no right can exist without a correlative duty, nor any invasion of it without a corresponding obligation to make amends, the judgment necessarily affirms, or else denies, that such a duty or such a liability rests upon the person against whom the aid of law is invoked."

Final judgment. A court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes attorney's fees) and enforcement of the judgment.- Also termed *final appealable judgment; final decision; final decree; definitive judgment; determinative judgment; final appealable order.*

[7] *Black's Law Dictionary, 9th Ed.* West Publishing Company. 2009

Interlocutory judgment. An intermediate judgment that determines a preliminary or subordinate point or plea but does not finally decide the case. A judgment or order given on a provisional or accessory claim or contention is generally interlocutory.

RATIO DECIDENDI

(Latin plural *rationes decidendi*) is a Latin phrase meaning "the reason" or "the rationale for the decision". The *ratio decidendi* is "the point in a case which determines the judgment"[8]or "the principle which the case establishes".[9]

In other words, *ratio decidendi* is a legal rule derived from, and consistent with, those parts of legal reasoning within a judgment on which the outcome of the case depends.

It is a legal phrase which refers to the legal, moral, political, and social principles used by a court to compose the rationale of a particular judgment. Unlike *obiter dicta*, the *ratio decidendi* is, as a general rule, binding on courts of lower and later jurisdiction—through the doctrine of *stare decisis*. Certain courts are able to overrule decisions of a court of coordinate jurisdiction—however, out of interests of judicial comity, they generally try to follow coordinate rationes.

The process of determining the *ratio decidendi* is a correctly thought analysis of what the court actually decided—essentially, based on the legal points about which the parties in the case actually fought. All other statements about the law in the text of a court opinion—all pronouncements that do not form a part of the court's rulings on the issues actually decided in that particular case (whether they are correct statements of law or not)—are *obiter dicta*, and are not rules for which that particular case stands.

The Hon'ble Supreme Court in the case of *Krishena Kumar & another v. Union of India & Others*[10] held that, *ratio decidendi* has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the case of *State of Orissa v. Sudhanshu Shekhar Mishra*[11], it was held that a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. In *Fazlunbi v. K. Khader Vali & Another*[12] the Court held that, precedents of the Supreme Court are not to be left on the shelves.

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[8] Black's Law Dictionary, page 1135 (5th ed. 1979).
[9] Barron's Law Dictionary, page 385 (2d ed. 1984).
[10] AIR 1990 SC 1782: (1990) 4 SCC 207 (Para 20.)
[11] AIR 1968 SC 647 (Para. 12)
[12] AIR 1980 SC 1730: (1980) 4 SCC 125 (Para. 10)

Neither could they be brushed aside saying that precedent is an authority only "on its actual facts". Such devices were not permissible for the High Courts when decisions of the Supreme Court are cited before them not merely because of the jurisprudence of precedents, but because of the imperatives of Article 141, further in the case of *Arnit Das v. State of Bihar*[13] it was observed by the Hon'ble Supreme Court that,

> "*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 in the technical sense when a particular point of law was not consciously determined (this is the rule of sub-silentio).*"

REASONING

Reasons are the rational explanation to the conclusion. Reasoning is the process by which we reach to the conclusion. Reasoning is the mental process of looking for reasons for beliefs, conclusions, actions or feelings.

After issues are framed, points for determination come into picture and for determining those points, need for extra force is required. It is not possible to cruise through the disputed facts in the absence of any peaceful land. In order to satisfactorily reach on a judicial determination of a disputed claim where substantial questions of law or fact arise, it has to be supported by the most cogent reasons; a mere order deciding the matter in dispute without any reasoning is no judgment at all. Power of reasoning is needed to back up the decision on each issue given by the court under Rule 5 of Order 20 of the CPC.

Rule 2 of Order 14 of C.P.C. provides judgment to be given on all the issues that has arisen in the given case. Rule 1 of the same Order provides for framing of issues with the object of keeping the various points arising for decision separate and distinct and to avoid the confusion later on.

As per Rule 5 of Order 20 of C.P.C. court has to state its decision with reasons on each issue separately unless the finding upon any one or more of the issues is sufficient for the decision of the suit. But Rule 2 of Order 14 of C.P.C. requires that a court should decide on all issues even if the case can be decided by settling few issues only except where a pure question of law relating to jurisdiction or bar to suit is involved. Further with the addition of an explanation to Rule 22 of Order 41 of C.P.C. which empowers a respondent in appeal to file cross objection in respect of findings against him in a decree notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit the decree is wholly or in part in favor of

[13] AIR 2000 SC 2264: (2000) 5 SCC 488 (Para. 20)

the respondent, the intention of the legislature is clear that the court will now have to decide and state its findings on all the issues even if it considers that finding for one or only few issues is sufficient for the disposal of the case. Moreover, principle of *res-judicata* operates after the determination of the case; so in case if judgment is not given by deciding all the issues then problem can erupt in future whether the rule of *res-judicata* will operate or not for that particular issue.

There is though ambiguity whether recording of reasons for each issue is one of the principle of natural justice or not but it is inevitable for providing safeguard against possible injustice and arbitrariness as it provides protection to the person adversely affected. A judgment to contain reasons is the third facet of principle of natural justice as evolved by our Supreme Court in various cases.[14] The Hon'ble Supreme Court in its decision, *in M/S Kranti Asso. Pvt. Ltd. & Anr. v. Masood Ahmed Khan & Ors.*[15] has highlighted the importance of giving reasons while passing a judgment / order by any judicial or quasi judicial body. The Supreme Court has extensively examined the law and various precedents on the subject. Holding that reasons are the heart-beat of any judgment, the Supreme Court in a recent decision[16] has set to terms the procedure required to be observed by all courts in the country, the Hon'ble Court held,

> "***9.*** *The increasing institution of cases in all Courts in India and its resultant burden upon the Courts has invited attention of all concerned in the justice administration system. Despite heavy quantum of cases in Courts, in our view, it would neither be permissible nor possible to state as a principle of law, that while exercising power of judicial review on administrative action and more particularly judgment of courts in appeal before the higher Court, providing of reasons can never be*

[14] *Rajasthan State TTP Corpn. and Anr. v. Bajrang Lal,* (2014) 4 SCC 693; *Mangat Ram v. State of Haryana,* AIR 2014 SC 1782, (2014) (4) SCALE 153.

[15] (2010) 9 SCC 496; See also: *A.K. Kraipak and others v. Union of India and others* AIR 1970 SC 150; *Kesava Mills Co. Ltd. and another v. Union of India and others* AIR 1973 SC 389; *Siemens Engineering and Manufacturing Co. of India Ltd. v. The Union of India and another,* AIR 1976 SC 1785*; Smt. Maneka Gandhi v. Union of India and Anr.,* AIR 1978 SC 597.

[16] *Asst. Commissioner Commercial Tax v. M/s Shukla and brothers* (2010) 4 SCC 785; See Also: *S.N. Mukherjee v. Union of India* (1990) 4 SCC 594; *Mc Dermott International Inc. v. Burn Standard Co. Ltd. and Ors.* (2006) SLT 345; *Gurdial Singh Fijji v. State of Punjab* (1979) 2 SCC 368; *Chabungbambohal Singh v. Union of India and Ors.* 1995 (Suppl.) 2 SCC 83; *Jawahar Lal Singh v. Naresh Singh and Ors.* (1987) 2 SCC 222; *State of Punjab and Ors. v. Surinder Kumar and Ors.* (1992) 1 SCC 489; *State of Uttaranchal v. Sunil Kumar Singh Negi* (2008) 11 SCC 205.

dispensed with. The doctrine of audi alteram partem has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the concerned authority should provide a fair and transparent procedure and lastly, the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. This has been uniformly applied by courts in India and abroad."

Setting aside a decision of the High Court for want of reasoning, in the above case, the Court referred to its various earlier decisions and the consistent reiteration of the principles relating to assigning of reasons while disposing of a particular matter.

It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on September 13, 2002 in relation to Judgment Writing. While speaking about purpose of the judgment, his Lordship said,

"*The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written: - (1) to clarify your own thoughts; (2) to explain your decision to the parties; (3) to communicate the reasons for the decision to the public; and (4) to provide reasons for an appeal Court to consider." Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision*."

H.W.R. Wade in the book "*Administrative Law, 7th Edition*, stated that the flavour of said reasons is violative of a statutory duty to waive reasons which are normally mandatory. Supporting a view that reasons for decision are essential, it was stated:-

".....A right to reasons is, therefore, an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice... .....Reasoned decisions are not only vital for the purposes of showing the citizen that he is receiving justice: they are also a valuable discipline for the tribunal itself....."

The Judge must decide all the issues of fact, which arise between the parties as if the appellate Court takes a different view the parties are saved from further harassment. The Judge has to refer in his judgment all the submissions made before him and have to deal with it even if the Judge is of the opinion that there is no substance in any of the submission; in those extreme situations the Judge may just refer to the same and say that there is no substance.

OBJECT OF REASONING

The main functions of a reasoned judgment are: (i) to inform the parties(litigants) the reasons for the decision; (ii) to demonstrate fairness and correctness of the decision; (iii) to exclude arbitrariness and bias; (iv) to ensure that justice is not only done but also seen to be done[17]; and (v) to facilitate the higher forums of appeal to appreciate/ examine the issues involved in any case more appropriately. The very fact that a judge has to give reasons that will have to stand scrutiny by the Bar and the public as also by the higher courts, brings in certain amount of care and caution on the part of the judge and transparency in decision making. Judgment writing requires skills of narration and storytelling. After giving facts and discussing admissible and relevant evidence a judge is required to give reasons for deciding the issues framed by him. The reasons convey the judicial ideas in words and sentences. The reasons convey the thoughts of a judge and are part of judicial exposition, explanation and persuasion. There is a difference between giving reasons and reasoning, which may ultimately lead to a decision by a judge on the issue or the issues raised before him. The process adopted by a judge in arriving at a decision through proper reasoning, tests a judge of his ability and integrity. A judge may adopt a syllogistic process, inferential process or intuitive process. 'Syllogism' means, a deductive scheme of a formal argument consisting of a major and a minor premise and a conclusion. A judge accepts an argument on a major premise, which overweighs the minor premise to draw his own conclusion. In case of inferential process a judge simply relies upon the evidence, and reaches to a conclusion. In the intuitive process, the judge adopts a psychological process, which may or may not be based by his subjective preference or biases. In this process the judge arrives at a conclusion more by intuition or emotion rather than reason. The judge may believe a witness in part (which is permissible in India) or whole and then draw a conclusion by justifying it from the reasoning supplied by him either by his own belief or experience. In all these methods the object is to arrive at the truth. If the judge succeeds in finding out the truth, the method may be justified.

The ingredients of a judgment need to be 'a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.'[18] It should be a self-contained document from which it should appear as to what the facts of the case were and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment. [19] Dr.

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[17] Justice R.V. Raveendran, '*Rendering Judgments- Some Basics'*, (2009) 10 SCC (J)
[18] Order 20 Rule 4(2) The Code of Civil Procedure 1908
[19] *Balraj Taneja v. Sunil Madan*, AIR 1999 SC 3381; *Cellular Operators Association of India v. Union of India*, AIR 2003 SC 899

Pasayat, J. speaking for the Supreme Court Bench, expressed it in the following way in the case of *K.V. Rami Reddy v. Prema*[20]

*"**11**. The declaration by a Judge of his intentions of what his judgment is going to be, or a declaration of his intention of what the final result it is going to embody, is not a judgment until he had crystallized his intentions into a formal shape and pronounced it in open court as the final expression of his mind.*

***12.** The CPC does not envisage the writing of a judgment after deciding the case by an oral judgment and it must not be resorted to and it would be against public policy to ascertain by evidence alone what the 'judgment' of the Court was, where the final result was announced orally but the judgment as defined in the CPC embodying a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision, was finalized later on."*

CONCLUSION

Justice Oliver Wendell Holmes told us, "*the life of the law has not been logic, it has been experience."*

A judge renders justice through his decisions. The decision-making culminating in the judgment is the heart and soul of the judicial process. Good judgments enhance the prestige of the Judge and eventually the prestige of the judiciary. Bad judgments, obviously, have the opposite effect. Therefore, there is a need for the judges to make a constant and continuous effort to render good judgments. [21]

Decision making is not about writing a judgment. Nor does it begin when a judge starts hearing final arguments. It pervades every stage of the case-in making interim orders, in framing issues or charges, in allowing or disallowing questions in oral evidence, in admitting or rejecting documents, in hearing arguments, in analyzing the material and reaching a decision, and even in granting or refusing adjournments. In short, it is the way judge hears, behaves, conducts and decides a case.

In the midst of swelling litigation, backlog and insufficient research facilities, writing a good quality judgment is an ongoing challenge. Art of writing a judgment depends on the knowledge, proficiency, and aptitude of the judge. Judicial officers, seldom have the occasion to reflect on their approaches to writing judgments. Their experience prior to appointment often does not train them how to write judgments. As a rule, many blindly pursue the usual method followed by their forerunners, their assumptions about what must go in a judgment. Judges spend most of their time reading judgments written

[20] (2009) 17 SCC 308
[21] *Ibid.* 17, p. 11.

by others. Some of it good, some barely readable and a few to a certain extent of poor quality. What is the most important component of good judgment writing? To my mind, it is clarity. If a Judge's ideas are clear then he/she will be able to express them clearly. Unclear judgments are likely to be long-winded, indistinct, pretentious, and boring. Clear thinking is the key to clear writing.

The work of writing judgments is in a sense the work of the miniaturist in law. He works with limited and definite facts and with limited and definite authorities and legal rules. Everything is directed to the particular result and everything not directly relevant should be excluded. The theory of economy forbids digressions into cognate rules of law or the enunciation of wider principles than are necessary for the particular case, or the attempt to reconcile and synthesize rules and achieve a more abstract and over-riding principle. There is a further difficulty that the Judge speaks with authority. He is a magistrate. He must look into the future and consider how the words he uses are susceptible of being applied to other facts and conditions and he must guard against tying the hands of a future court which may have to determine what extensions are proper and what distinctions should be drawn. Thus the judge must neither speculate nor theorize. [22]

It is worthwhile to keep the following basic rules in mind while writing a judgment:

(a) Reasoning should be intelligible and logical.

(b) Clarity and precision should be the goal. Prolixity and verbosity should be avoided. At the same time, brevity to an extent where reasoning is the casualty should be avoided.

(c) Use of strange and difficult words and complex sentences should be avoided. The purpose of a judgment is not to showcase the Judge's knowledge of language, or legal erudition, but to decide disputes in a competent manner, and state the law in clear terms.

(d) A judge cannot use his personal knowledge of facts in a judgment.

(e) If a judge wants to rely on precedents or decisions unearthed by the Judge by his own research, he has to give an opportunity to the parties to comment upon or distinguish the same.

(f) In civil matters, the judgment should not travel beyond the pleadings or the issues. Recording findings on issues or matters which are unnecessary for disposal of the matter should be resisted.

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[22] The Right Hon. Lord Wright of Durley, '*Legal Essays and Addresses.'* (1939) Cambridge University Press. xxxv and 442 pp. (15*s*. net.)

(g) Findings of fact should be based upon legal testimony. The decision should rest upon legal grounds. Neither findings of fact nor the decision should be based upon suspicion, surmises or conjectures.

(h) All conclusions should be supported by reasons duly recorded. The exceptions are where an action is undefended or where the parties are not at issue, or where proceedings are summary or interlocutory or formal in nature.

(i) The findings and directions should be precise and specific.

(j) A judge should avoid use of disparaging and derogatory remarks against any person or authority whose conduct arises for consideration. Even when commenting on the conduct of the parties or witnesses, a judge should be careful to use sober and restrained language. It should be remembered that the judge making the remark is also fallible.

(k) While exercising appellate or revisional jurisdiction, unnecessary criticism of the trial courts' conduct, judgment or reasoning should be avoided.

(l) Before making any adverse remarks, court should consider: (i) whether the party or the person whose conduct is being discussed has an opportunity of explaining or defending himself against such remarks; (ii) whether there is evidence on record bearing on the conduct justifying the remark; (iii) whether it is necessary to comment or criticize or censure the conduct or action of the person, for decision of the case.[23]

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5. Hon'ble Mr. Justice T.S. Sivagnanam, 'The Salient Features of the Art of Writing orders and Judgments' < *http://www.tnsja.tn.nic.in/article/Judgment%20Wrt%20TSSJ.pdf*> (last accessed: 27.04.2015)
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[23] *Ibid.* 17, p. 11.

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THE ART OF WRITING JUDGMENT

- By Justice Sunil Ambwani*

1. A judgment is the statement given by the Judge, on the grounds of a decree or order. It is the end product of the proceedings in the Court. The writing of a judgment is one of the most important and time consuming task performed by a Judge. The making and the writing of a judgment and the style in which it is written, varies from Judge to Judge and reflects the characteristic of a Judge. Every Judge, of every rank has his own distinct style of writing.

2. A judgment is distinct from a formal order as it gives reasons for arriving at a conclusion. In United States it is called the 'opinion'; the explanation given by a Judge for the order finally proposed or made. The backlog of cases has put a great pressure on the Judges. It is no longer prudent to write a long and verbose judgment, with uncontrolled expressions and citations. The pressure of work and stress on most of the Judges today, demands improving skills in writing judgment, which are brief, simple, and clear without compromising with the quality.

3. In civil matters, the judgments as the requirement of law goes, may be broadly classified into two categories, namely, long and short judgments. In original suits, the final decision of a case requires writing of a long and reasoned judgment. These includes suits for permanent or prohibitory injunction; possession and mesne profit; specific performance of contract; cancellation of documents; partition and possession; dissolution of firm and accounting; redemption or foreclosure of mortgage etc. As compared to it a Judge is required to write short judgments, in the matter of interlocutory orders; summary suits; preliminary issues; review; restoration; accepting compromise etc.

The Code of Civil Procedure, 1908 (the Code) "Judgment" in Section 2(9) as the statement given by the Judge, on the grounds of a decree or order. The "order" under Section 2(14) is defined as formal expression of any decision of a Civil Court, which is not a decree. The "decree" in section 2(2) means formal expression of an adjudication, which, so far as regards the Court expressing it, conclusively determination the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. The rejection of a plaint and determination of any question under Section 144 is also a decree.

4. Order XX of the Code, deals with "Judgment and Decree", Rule 4 (1) provides that judgment of Court of Small Causes need not contain more than the points for determination and the decision thereon. Sub-Rule (2), provides for a judgment of other Courts to contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decisions. Rule 5 mandates that in suits in

* Former Chief Justice, Hon'ble High Court of Rajasthan.

which issues have been framed, the Court shall state its finding or decision, with the reasons there of, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

5. In criminal matters, Chapter XXVII of the Code of Criminal Procedure, 1973 provides for 'the Judgment'. Section 353 requires the judgment in every trial to be pronounced in open Court immediately after the termination of the trial, or at some subsequent time of which notice shall be given to the parties or their pleaders. The judgment as provided in Section 354, is to be written in the language of the Court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision. The section further provides that the judgment shall specify the offence (if any) of which, and the section of IPC, or other law under it, accused is convicted and punishment to which he is sentenced. If the judgment is of acquittal it shall state the offence of which the accused is acquitted and direct that he be set at liberty. In case of conviction for an offence punishable with death or in the alternative with imprisonment for life, the judgment has to state the reasons for sentence awarded and special reasons for death sentence. In case of conviction with imprisonment for a term of one year or more, a shorter term of less than three months, also requires the Court to record reasons for awarding such sentence unless the sentence is one of imprisonment, till the rising of the Court or unless the case was tried summarily under the provisions of the Code.

6. For orders under Section 117 (for keeping peace and for good behaviour), Section 138(2) (confirming order for removal of nuisance), Section 125 (for maintenance) and Section 145 or 147 (disputes as to immovable properties), the Code provides in sub-section (6) that order shall contain the point or points for determination, the decision thereon and the reasons for the decision. Section 355 provides for a summary method of writing judgment by Metropolitan Magistrate, giving only particulars regarding the case, name, parentage and residence of the accused and complainant, the offence complained of or proved; plea of the accused and his examination (if any); the final order and the date of order, and where appeal lies, a brief statement of the reasons for the decision. The order to pay compensation where the Court imposes sentence or fine; order of compensation for groundless arrest and the order to pay cost in non-cognizable cases, may be made with the judgment under Sections 357, 358 and 359 of the Code. Section 360 provides for order to release on probation and special reasons in certain cases where the Court deals with accused person under Section 360 or Probation of Offenders Act, 1958.

7. The Code of Civil Procedure, 1908 and Code of Criminal Procedure, 1973 have provided sufficient guidelines for writing judgment. These, however, are not exhaustive. There is a wide discretion left with the Judges to choose their style of writing, language, manner of statement of facts, discussion of evidence and reasons for the decision.

8. The judgment writing consumes the major part of Judge's work. Taking into account the mounting arrears, and the number of cases in the daily cause list, the burden in judgment writing sometimes becomes intolerable. The Judges by their experience, find methods to reduce this burden, by writing brief opinions. The judgment, however should serve the requirement of law without compromising with the quality.

9. A judgment is not written only for the benefit of the parties. It is also written for benefit of legal profession, other judges and appellate Courts. The losing party is the primary focus of concern. The winner is not much interested in the reasons for success, as he is convinced of the righteousness of the cause. The looser, however, in the expensive litigation is entitled to have a candid explanation of the reasons for the decision. It is not only for exercise of any appellate right but also to uphold the intellectual integrity of the system of law, impartiality and logical reasoning. The lawyer is interested in the judgment as he understands the analysis and expositions of legal precedents and principles. The lawyers also examine the judgments for learning they provide, and for the reassurance of the quality of judiciary. They can easily distinguish, the lazy Judge, the Judge prone to errors in fact finding, the Judge having difficulty in understanding of laws of evidence, or the Judge, who has difficulties with complex propositions of law.

10. The other Judges lower in hierarchy, facing common legal problems or in the same Court are also interested in the decisions. The judge is also aware that his decision may be reported and that it may establish a legal principle, binding, until it is set aside by the appellate Court. The best Judges perform their reasoning opinion honestly to the best of their ability without undue concern that the appellate Court may find error or reach a different conclusion.

11. The Judge must state the facts explicitly and consciously as they are found and the reasons for the decision.

12. The judgment is also a reflection of the conscience of a Judge, who writes it, and evidences his impartiality, integrity and intellectual honesty. The judgment writing provides opportunities for judicial officers to demonstrate his own ability and his worthiness to be a participant in the high tradition of moral integrity and social utility.

13. According to Lord Templeton as spoken by him in a BBC interview in 1979, the Judges and their judgments can be broadly divided into three categories; philosophers, scientists and advocates[1]. Mr. Justice V. Krishna Ayer falls in the category of philosopher, and Mr. Justice P.N. Bhagwati, Mr. Justice D.A. Desai and Mr. Justice Kuldeep Singh as social scientists. A Judge falling in the category of Advocate, leave traces of eloquences, in their judgments.

14. Before writing a judgment a Judge must remember that he is performing a public act of communicating his opinion on the issues brought before him and after the trial by observing fair procedures. He is required to tell the parties of the decision, on the facts brought before him, with application of sound principles of law, his decision, and what the parties are supposed to do as a necessary consequent to the judgment or to appeal against it. It is basically a communication to the parties coming before him for a decision.

15. A judgment must begin with clear recital of facts of the case, cause of action and the manner in which the case has been brought to the Court. A Judge must have essential facts in mind, and its narration should be without any mistake. The facts must come from the record and not from the abstract and briefs without any partisanship or

[1] Hon. Justice Michael Kirby: 'On the Writing of Judgments' based on a lecture to the First Australian conference on literature and the law, University of Sydney

colour to its narration. The importance of first paragraph of the judgment cannot be overemphasized. It must answer the questions as to how, when, where, what and why, which is an advise given to judicial cubs. The readability of the opinion improves if the opening paragraph answers three questions namely what kind of case is this, what roles plaintiffs and defendants had in the trial, and what are the issues, which the Court has to decide and answer, giving sufficient information to the reader to proceed with reading the judgment.

16. Ordinarily a brief statement of fact is sufficient if it indicates the context of the dispute so that legal principle chosen for decision can be understood. At times, however, it may be necessary for judgment to record substance of factual context and the details of evidence placed before the Court. If the complexity of the case requires, the Judge may choose to state the facts chronologically, to understand what is decided. In such case the Judge may ask the respective counsel a chronological statement of facts to focus the attention of the parties to shorten the argument and make it casier to write the judgment. It is easier to write short judgment where legal issues are involved. Where the facts are in dispute, the Judge may prefer to narrate the facts in greater detail. The facts, which are part of the essential reasoning process of the Judge's decision should be indicated and recorded.

17. The issues are settled between the parties before taking evidence. In criminal cases, charges framed by the Court lead to the trial. The judgment must quote the issues/or charges as the case may be immediately after the narration of facts. It is always feasible to decide preliminary issues like jurisdiction of Court before going into the merits of the case.

18. The formulation of issues, should be initiated as early in the proceedings as possible. Once the parties are clear in their mind about the essential questions, they may shorten the proceedings. It also helps to focus the mind of the judge on the precise matters to be determined. When the essential questions of law are clear, the procedure becomes simplier. It is always helpful to quote the statute and the settled law, if it can be found in authority, to proceed further with discussing the evidence. The Hon'ble Dennis Mahoney. AO. QC. In 'Judgment Writing; Form and Function', has opined, with some wisdom:-

"*In formulating the question, the judge will no doubt employ the assistance, which can be derived from the counsel. It is, I think, dangerous to attempt to impose the judge's formulation of the determinative question upon counsel. The form of that question must be drawn out by dialogue with counsel for each side. Unless counsels are involved in formulating the question, they are not committed to form of it. And dialogue with counsel is important. There is practical wisdom in the aphorism: "How do I know what I think until I hear what I say."*

19. The judge must give the details of the evidence led before it. However, only the relevant evidence must be narrated and that too very briefly giving the purpose for such evidence was led. The documents admitted in evidence after they are proved on record must find their mention along with oral evidence by which they were proved. A brief narration, however, will suffice if it is precise and is clearly stated.

20. A Judgment must briefly state the contentions of the counsels on the points of determination. So far as possible all the contentions raised by the counsels except those,

which are wholly frivolous must be mentioned on the record. After the Judge has met with all the contentions he must record, that no other point was pressed. This statement recorded in the judgment, will take care of challenge to judgment on the points, which were not raised before the Judge. The Supreme Court has given sanctity to the statements given in the judgment and insist that where the lawyer challenges any incorrect statement, he should to first file a review petition, to remind the Judge of any error, which may have crept in the judgment.

21. Before deciding a issue or recording finding on a charge, the relevant evidence must be discussed. Every Judge has his own style of discussing the evidence. It is, however, always better to discuss the evidence before giving an opinion to rely upon it.

22. The soul of a judgment are the reasons for arriving at the findings. These are also called 'the opinion' of a Judge. There is no rigid rule, as to how a finding may be recorded. The Judge, however, should give his reasons. It is not sufficient to say that he believes the evidence or agrees with the argument. The Judge must give his reasons for such belief and agreement. An elaborate argument does not always require elaborate answer.

23. A Judge is a human being. He possesses the same strength and weakness in character as a common man. Like all human being a Judge possesses personal preferences and pre-dispositions. It is advisable for a Judge to follow settled norms and practice for writing judgment, in the beginning of his career. With experience he may take liberties of adopting new methods and innovate. The logical reasoning, however, must follow in reaching to a conclusion. A Judge is not free from partiality and bias. There may be a lurking or sub-conscious bias, which may not be known to the Judge himself. The bias may have arisen on account of any factor, which ordinarily affect the life of the human being. The Judge may be influenced by the subjective preferences or biases in an unacceptable way[2]. With experience a Judge may identify such bias and may win over it. The best way to overcome the judgment to be affected by such outside and unknown factor is to follow logical reasoning.

24. The method of arriving at a conclusion is the most important part of judgment writing. The process by which the conclusion is arrived, and the statement in the judgment of that process, tests a Judge of his ability and integrity. It may either be by **syllogistic process, inferential process** or **intuitive process**. 'Syllogism' means, a deductive scheme of a formal argument consisting of a major and a minor premise and a conclusion. In syllogistic process the Judge adopts a deductive process in which he accepts an argument on a major premise, which over weighs the minor premise to draw his own conclusion. In case of inferential process the Judge relies upon the evidence and reaches to a conclusion. In the intuitive process, the Judge adopts psychological process by which the conclusion is arrived at more by intuition rather than reasons[3]. In such a method the Judge may believe a witness in part or whole and then draw the conclusion by justifying it from the reasoning supplied by him either by belief or experience. In both the methods, in case what is being done is to arrive at a truth, the method may be justified.

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[2] Hon. Beverley Melachlin PC, Chief Justice of Canada: A Judicial Impartiality: impossible quest?

[3] The Hon, Dennis Mahooney AO. OC: Judgment Writing: 'Form and Function'.

25. There is a difference between **neutrality** and **impartiality**. Impartiality requires cool reason uncontaminated thinking without being influenced by personal commitments, biases and preconceptions. The neutrality on the other hand means the Judge is non-aligned. A Judge may begin being neutral and continue to be so in the process of the trial, but at the end he has to decide the case in favour of either of the parties without any partiality. Impartiality requires a Judge to rise above all values and perspectives.

26. A Judge must clearly write the operative portion of the judgment, which pronounces his conclusion over the issues brought before him. He must give clear and precise direction and the manner in which the directions have to be obeyed in conformity with the prayers made in the plaint. The object of good judgment is to conclude the dispute and not to leave the matter undecided. The judgment should leaving nothing to be brought back to the Court. The operative portion of the order should as far as possible self-executing and self-contained.

27. In criminal matters after recording conviction, the Judge has an important task of giving sentence, fine or compensation. The law requires the accused to be heard before awarding sentence. The Judge must give reasons for giving sentence, fine and apportion the compensation to the victim for the sufferance, commensurate with severity of the offence.

28. Plain and simple language has always been appreciated in writing judgments. Brevity, simplicity and clarity are the hallmarks of the good judgment. The greatest of these is clarity. It is better to avoid invidious examples, unnecessary quotations, and lecture. A controlled judgment without any legalese, sharp criticism, pinching comments, and sarcasm invokes respect to the court. Short sentences and para phrasing, head notes and subheading, wherever it is necessary, is a recommended style of writing a judgment.

29. The chief guidelines for using plain language are:

(1) Achieve a reasonable average sentence length.

(2) Prefer short words to long ones, simple to fancy. Minimise jargon and technical terms.

(3) Avoid double or triple negatives. No reader wants to wrestle with sentences.

The document need not be checked unless it is desired by a party.

The document may be checked, if it is desired by party.

He could not have created the trust, except for the benefit of the defendant.

He could have created trust only for the benefit of the defendant.

(4) Prefer the active voice; single very-object-sentence. Notice must be given compares poorly with *the landlord must give notice.*

Passive Voice: He was acquitted *by the Court.*

Active Voice: The Court acquitted him.

Passive Voice: It was reported by the Court Commissioner that the disputed land was covered by water.

Active Voice: The Court Commissioner reported that the land was covered by water.

(5) Keep related words together, specially subject and very, verb and object.

(6) Break up the text with headings and subheadings.
(7) Use parallel structures for enumerations.
(8) Avoid excessive cross references, which create linguistic mazes.
(9) Avoid over defining.
(10) Use recitals and purpose clauses[4].
(11) Avoid legalism to make your judgment reader friendly.

30. Brevity is the virtue of a wise man and is familiarized by those, who have clarity in mind. No one likes to read long judgments. Brief opinions are comfortable in reading. Shri Gurcharan Das in his article published on 03.10.2003 in "Times of India" said:-

> "Soon after he became prime minister, Winston Churchill wrote to the First Lord of the Admiralty to ask, 'Pray Sir, tell me on one side of the sheet of paper, how the Royal Navy is preparing for the war,' Churchill knew that if he did not qualify his request, he would have received a unreadable 400 page report. Brevity is a great virtue, and nowhere more needed than in India. Our judges write judgements that are too long; our lawyers ramble on; our executives try to impress with lengthy memos; our politicians well try to get in a word.
>
> That less can be more is especially true in good writings. I discovered this at Proctor and Gamble, a company as famous for its legendary one page memos as for its products. Its wondrous one page memo was created out of the same confidence in reason and technology that built America, and is as elegant as Paninis grammer or Euclids geometry. Based on the reasonable assumption that all managers suffer from an overload of paperwork and files, it is simple factual and logical. The reader can scan it in minutes and grasp its contents it has just enough data that a manager needs to make decision and no more. It is clear, precise, eschews hyperbole, and it actually improves the speed and quality of decisions, and hence it can be a source of uncompetitive advantage.
>
> We Indians are verbose, and need to be reminded that humans were born with two ears and two eyes, and one tongue, so that we should see and hear twice as much as we say. Shakespeare too, I, think, must have had us Indians in mind, when he wrote in Richard III; 'Talkers are no good doers.' Hence he offers us this advice in Henry V 'Men of few words are best of men'.

31. The judgment must be designed and structured so that readers find their way through it easily and quickly. There is no such thing as good writing. There is only good rewriting[5]. It is absolutely necessary to revise the judgment. A revised judgment takes care of errors and reassures the Judge of the correctness of his opinion. It also ensures to avoid silly mistakes. It is advisable to the Judges, to read their judgments after a few years, to ensure that same mistakes are not repeated. There is always a room for improvement.

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[4] Byran A. Garner: "A Dictionary of Modern Legal Usage", P. 661

[5] E.N. Brandis, J., U.S. Supreme Court.

32. The judgments are either given extempore or reserved to be pronounced later. The practical experience shows that extempore judgments given at the close of the arguments, are addressed to the counsels and the parties. The extempore judgments rarely attempt to decide important questions of fact or law. The reserved judgments, on the other hand, survive longer in deciding the issues and in the memory of those for whom it is written.

33. The Privy Council adopted the style of tendering the advice of the Board to Her Majesty in which only one judgment was given. The form is no longer rigidly applied. However, the style of writing judgment namely using simple language with clarity of mind both in writing legal principles and conclusions, adds quality to the judgment.

34. The language employed by a Judge speaks of his character. A humble Judge with human personality avoids using intemperate and unparliamentary language. It is always better to avoid using words 'I', 'can' and 'must' in the judgments. Some examples of temperate language are:

'He is *wrong* in saying ……..
He is *not correct* in saying ……'
"The plaintiff's case is *full of falsehood……..*
Between the two I prefer the evidence of defendants…….'
'I do not *believe* him……
He is *not worthy of belief……..'*
"The witness is *not telling the truth…....*
The witness is *one step removed from being a honest man……'*

35. The primary purpose of pronouncing a verdict is to dispose of the matter in controversy between the parties before it. A judge, however, is not expected to drift away from pronouncing upon a controversy, and to sit in judgment over the conduct of the judicial or quasi judicial authority, or the parties before him and indulge in criticism and commenting thereon unless such conduct comes, of necessity under review and the expression becomes part of reasoning to arrive at a conclusion necessary to decide the main controversy. So far as possible a judge should avoid derogatory and disparaging remarks. Nonetheless, suble irony, detectable only by the cognoscenti, is a useful in conveying a key point in the reasoning of a judge.

"A Judge entrusted with the task of administering justice should be bold and feel fearless while acting judicially and giving expression to his views and constructing his judgment or order. It should be no deterrent to formation and expression of an honest opinion and acting thereon so long as it is within four corners of law that any action taken by a subordinate judicial officer is open to scrutiny in judicial review before a superior forum with which its opinion may not meet approval and the superior court may upset his action or opinion. The availability of such fearlessness is essential for the maintenance of judicial independence. However, sobriety, cool, calm and poise should be reflected in every action and expression of a Judge[6]"

36. The style of judicial writing is constantly changing. The Latinism and legal clichés are the days of past. It may not be wise to use metaphors and idioms, to prove a

[6] In the matter of: 'K' a Judicial officer, In re (2001) 3 SCC 54, by Hon'ble Justice R.C. Lahoti.

point. The judges avoid using words or expression showing gender-bias. There is some difference of opinion regarding use of foot notes, appendices, and other adds to communication. The judges in America use foot notes, whereas Judges in Canada and Australia find them offending. Brevity, simplicity and clarity have always been the watch words for effective judicial writing.

37. Diversity of opinion in judgment writing is the strength of the common law judicial tradition. It provides never ending stream of ideas and ways of communicating them. The experimental variety helps to develop the law. It is the privilege of each succeeding generation of judges to nurture the proud heritage and advance this precious legacy.

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THE AUSTRALIAN LAW JOURNAL ON THE WRITING OF JUDGMENTS

The Ron Justice Michael Kirby CMG

AN EMPIRE OF INDIVIDUALISTS

Who would be so bold as to write on the writing of judgments? As many lawyers as there are, so many opinions and more exist about what makes a good judgment. No primer on the way to do it, this essay is, instead, a reflection on some of the features of judgment writing in Australia today. It begins with a few practical considerations to be kept in mind in assessing particular judgments. It proceeds to a consideration of the old controversy about whom a judgment is written for. It acknowledges the different characteristics of judges and their writing, before embarking on the illustration of some of the stable and some of the changing features of judgment writing in that empire of individualists. It closes with a reflection on brevity, simplicity and clarity the blessed trinity of good judgment style. Where I refer to 'judges' I mean, of course, judicial officers of every rank. Doubtless many others who labour away in the numberless tribunals which are now such a feature of the modern administration of justice are equally involved. And where I use **II** judgment" I mean not the formal order which is the judgment properly so called, but the reasons for judgment - what united states lawyers call the "opinion": the explanations given by the judge for the order finally proposed or made.

The daily experience of the courts demonstrates the differing skills of advocates and judges in oral communication. It also demonstrates that on some days the most brilliant advocate is tongue-tied and the sharpest judicial mind, listless or distracted. It should therefore not surprise the reader of judgments that some who write them are better than others, or that the quality of the same pen varies over time and even changes from day to day.

The second practical consideration with which I preface these remarks is pressure. Pressure upon modern judges - at first instance and on appeal - is, in most instances, much greater than it was in the case of their forebears. True, the High Court of Australia can now, by the requirement of special leave, control its workload. But for most judges, there is much less control. The backlog increases. Community and

institutional pressure for speedier justice is relentless. The time for reflection, for careful planning, thoughtful research and for polishing prose, is strictly limited. And diminishing. It is in this world of unprecedented stress and pressure that most judges, today, complete their judgments.

A third practical consideration is the change in the mode of trial and in the modern understanding of the judicial obligation to give reasons. Even when I was young in the law, jury trial was far the commonest means of resolving factual disputes at common law. The skill of the advocate, and of most trial judges, lay in communicating with juries: in addressing or instructing them. Juries were then abolished in motor vehicle accident cases, and, later in a wider range of cases. NOW, there are proposals for an even more radical reduction in the role of the jury. These changes have imposed upon judges at first instance an increasing obligation of fact-finding. Combined with the growing insistence upon the giving of reasons by judicial officers,3 the burden of judgment writing for trial judges has increased. What could once be left safely to the sphinx-like jury must now be attempted by the first instance judge. He or she must find facts, record any relevant findings on credibility and provide at least sufficient exposition of the applicable law to permit a disappointed litigant to consider and if so advised, exercise litigant to consider and if so advised, exercise any rights of appeal for which the law provides.

The functions of judgment writing at first instance and on appeal differ. There are, of course, common elements. Furthermore, appellate courts sometimes sit in a trial function, as when the Court of Appeal hears proceedings for contempt the removal of the name of a legal practitioner from the roll of practitioners. Some appeals are limited to points of law. Some, substantially to points of law or rulings on evidence. But increasingly appeals are by way of rehearing, requiring the appellate court to review not only findings of law, but findings of fact as well. Appellate courts today are rarely confined to consideration of short questions of law. They must typically sift the facts. Proper sifting may add to the length of judgments and to their complexity. That is the price of providing a second look at the facts.

Judgments, at least of judges of superior courts, can establish binding precedents of legal authority. Even in courts lower in the hierarchy, the specialized nature of the jurisdiction and conventions of judicial comity may make it useful to study earlier decisions, to guide judges and legal practitioners or other repeat players towards the proper resolution of like cases. This said, an important distinction between judgments of an appellate court and of a trial judge lies in the fact that it is more likely that the holding of an appellate court will not only dispose of the appeal before it but

establish a binding legal principle. This is not necessarily so. Many decisions of the Court of Appeal involve no question of principle (eg damages appeals) or no novel application of legal rules (eg disputes over motor vehicle negligence). Yet many do. These are more likely time novel to be reported than judgments at first instance. In a time of rapid change in both statute and common law, many novel points arise for judgment. The reasons given by the judge must therefore serve many purposes.

THE READERS OF THE JUDGMENT

The litigants: It is interesting to reflect upon the fact that, despite the seven century tradition of the common law, there is no agreement upon the audience for whom a judge writes his or her judgment. The losing party is frequently said to be a primary focus of concern. The winner will often have little interest in the reason for success, usually being convinced of the rightness of the cause anyway. But in closely fought and expensive litigation, the loser is entitled to have from the judge a candid explanation of the reasons for the decision. This is not only for the exercise of any appeal rights that may exist. It is also to uphold the intellectual integrity of our system of law which must daily demonstrate, by its performance in particular cases, its adherence to the law, attentiveness to argument, impartiality and logical reasoning. True, some disappointed litigants will not bother to read the laboured reasons of the judge. Moreover, successful appellants have their own entitlement to the judge's candid reasons, for these may immure the judgment against unwarranted appeal or even reversal on grounds abandoned at first instance. Clearly, then, the parties, as the principal players in the drama of litigation, are entitled to the judge's reasons. This affects the way in which a judgment at first instance, or at the first level of appeal, should be written.

Legal profession: The judgment is also written for the legal representatives of the parties and for the profession generally. Even if the parties themselves do not persist and read the lengthy exposition of the facts, their lawyers will usually do so; if only to test the judgment for the accuracy and fairness of its fact-finding. Even if the litigants do not fully understand the analysis of legal precedent and the exposition of legal principles, their lawyers are entitled to have it demonstrated that the judge had the correct principles in mind and properly applied them. The legal profession is entitled to examine the body of judgments for the learning and precedents that they provide and for the reassurance of the quality of the judiciary which is still the

centrepiece of our administration of justice. It does not take long for the profession to come to know, including through the written pages of published judgments, the lazy judge, the judge prone to errors of fact-finding, the judge without understanding of the laws of evidence or the judge who has difficulties with complex propositions of law. These reputational considerations are important for the exercise of appellate rights, for the judge's own self-discipline, for attempts at improvement and for the maintenance of the integrity and quality of our judiciary. It is principally through the pages of written judgments that that quality may be assessed.

Other judges: Then judgments are certainly written for other judicial officers. At first instance they may be written for judicial officers lower in the hierarchy facing common legal problems. They may be written for judges in the same specialized court. An important point may be decided which will not be taken on appeal because of the obvious correctness of the decision or because the parties cannot afford it. No judge of a superior court can approach his or her functions without an awareness that a judgment may be reported and that it may establish a legal principle, binding until set aside by an appellate court. The opportunities of creativity and exposition of legal principle are by no means confined to appellate courts in banc. Knowledge of this fact imposes a discipline and quality control upon all judges, but especially judges of the superior courts. In the appellate courts, judges are writing for other judges. If they are subject to review or the possibility of appeal, a judgment must be written with this possibility in mind. That is not to say that an intellectually dishonest attempt should be made, e.g. by formulae on the credibility of witnesses, to render a judgment "appeal-proof". The best judges perform their reasoning function honestly and to the best of their ability without undue concern that an appellate court may find error or reach a different conclusion. Nevertheless, it is obviously desirable that sufficient should be stated in the judgment to ensure that it does not fall victim on appeal to an issue that was abandoned or otherwise not litigated before the court in question.

That consideration apart, the legal duty of a judge who is subject to appeal, to state his or her reasons in deference the right of appeal is not now in doubt in Australia. The judge must state explicitly and concisely the facts as they are found and the reasons for the decision. The duty is not confined to cases where an appeal lies. It may arise as an incident of the nature of the decision in question. But it takes on a particular force where there is an appeal - whether by right or by leave. There are exceptions to the duty as where a decision *is* "too plain for argument". Or where a procedural decision is made and the reasons for it are clear from the context or from

the preceding exchanges with the parties on their representatives. However, the failure of a trial judge to state findings and reasons, and of any judge to state reasons, amounts to derogation from the right to appeal and in abdication of the judicial function. Such a failure makes it impossible for the appellate court to give effect to the appellate right and so to carry out its functions.

All of this was said in a series of decisions which came together in the New South Wales Court of Appeal in *Pettitt v Dunkley*. Justice Asprey there explained important legal functions which are fulfilled by the reasons which support judicial orders:

> "The rights of appeal are statutory rights granted by the legislature to the parties and the failure of a trial judge in the appropriate case to state his findings and reasons mounts, in my view, to an encroachment upon those rights. The omission of the trial judge makes it impossible for an appellate court to give effect to those rights, either for one party to the appeal or another, and so carry out its own appellate functions. It is unnecessary to stress the prime importance to a party to an appeal, whether he be appellant or respondent, of the findings and reasons at first instance and this is not limited to the acceptance or rejection of evidence on the basis of demeanour for, in arriving at his conclusions, the trial judge may simply have preferred one possible view of the primary facts to another as being in his opinion the more probable, or he may have preferred the evidence of one witness to another for a variety of reasons, although both were considered by him to be telling the truth as they may have observed the facts to be .... Just as it is impossible to confine the grounds upon which an appellate court will order a new trial within rigid categories ... so the ambit of the difficulties confronting parties to an appeal will place the appellate court to which they look for the exercise of their statutory rights in many cases in a position which may prevent the court from giving effect to the paramount consideration of obviating a miscarriage of justice.
>
> In my respectful opinion the authorities to which I have referred and the other decisions which are therein mentioned establish that where in a trial without a jury there are real and

> relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose.

Judges reversed: Appellate courts must also keep in mind the fact that the judges appealed from will usually read their judgments. At least, they will usually do so where the appeal is upheld. The appellate court has, inescapably, an educative function which it performs through its written judgments. The expression of error detected can be frank without that hurtfulness which will cause unnecessary offence. The history of different conclusions upon the same legal point, as famous cases proceed through the judicial hierarchy, offers sufficient proof of the fact that even highly talented lawyers will quite often reach quite different conclusions, and for different reasons, upon the same question. Upon some matters a simple mistake may be detected. A basic error of law may be demonstrated, perhaps a statute overlooked. Most judges will readily acknowledge such mistakes when they are pointed out, however embarrassing they may be. Often, they will be entitled to blame counsel for failing to direct them to the point. However, on many matters of legal principle, minds simply differ. On others, the law is obscure or is expressed in terms of such generality that different results may quite readily be derived from its application to particular facts. The realization of these inescapable features of our legal system provides a balm for the sting of appellate reversal. It also provides to appellate courts a reason for intellectual modesty and the avoidance of arrogance or insensitivity of expression.

Test of conscience: Finally, a judgment is ultimately written for the judge who writes it. It must have integrity and carry with its words the evidence of the

manifest impartiality and intellectual honesty of the writer. Judges, at least in Australia, are members of an independent branch of government. They are uncorrupted and enjoy high public standing. They are protected from removal from office by constitutional and statutory guarantees and by the common law. Out of self regard for the privilege of membership of this elite band with its ancient lineage and high responsibilities, judges of our tradition should always strive to perform their functions with lawfulness, neutrality and dispassion. These are our traditions. Written judgments provide the opportunity for each Judicial officer to demonstrate to his or her own conscience a worthiness to be a participant in such a high tradition of moral integrity and social utility.

CATEGORIES OF JUDGES

Various attempts have been made to classify judges according to their differing approaches to the writing of judgments. In 1979, Lord Justice Templeman, as he then was, in a BBC interview said:

> "Judges and their judgments - I think you can divide into three categories; there are the philosophers, the scientists and the advocates. The present Lord Chancellor, Lord Hailsham, I would put in the category of philosopher; Lord Wilberforce and Lord Diplock I would put into the scientific vein and Lord Denning is one of the advocates. And in common with those other judges whose judgments are feats of advocacy, you can see some traces of the eloquence in the advocacy which they used when they were at the Bar, and these three elements are all there in Lord Denning's judgments."

There are difficulties in this, or any such, classification. Indeed, this is acknowledged in the final comment that Lord Denning's judgments show evidence of all three "categories ". So do those of most judges. A judgment in one case may involve the predominance of one of the qualities identified. Care must be taken to avoid stereotyping judges, any more than other subgroups of the community.

Yet it is probably true that different judges show different proportions of the three qualities which Lord Justice Templeman has selected as criteria. Bringing the classifications closer to home, one might say that Justice Windeyer in the High Court of Australia evidenced a bias to a philosophical approach. Certainly, his profound knowledge of, an interest in, legal history turned his attention to fundamental concepts of the common law where he felt most at home. Chief Justice Dixon was probably our greatest "scientist", espousing as he did "complete legalism" and believing that the law would lose its meaning if it were not the limited function of the judge to find the pre-existing law and to declare it. Amongst the chief

"advocates" one might name Chief Justice Isaacs, Chief Justice Barwick and Justice Murphy. Yet none of them - philosopher, scientist or advocate - could wholly escape his background of training and professional experience in the law. No Australian judge has entered upon office without such training and background. The functions of Australian judges, deprived of a Bill of Rights or the Charter of their Canadian counterparts, are more limited. Their work is less likely to take Australian judges into the byways of philosophy, sociology and economics. Yet all of these disciplines can be relevant, from time to time, to common law reasoning and to the interpretation of statutes.

Judgments of the Supreme Court of the United States have been analyzed according to the recorded influence of great philosophers and writers upon the thinking of the justices. Thus between 1790 and 1986 the 71 members of the Supreme Court referred to the writings of Plato in 9 opinions, to Locke in 11, to Montesquieu in 27 and to the Federalist Papers in no fewer than 317 judgments. Shakespeare was mentioned in 24 opinions. Surprisingly, even Sigmund Freud was referred to in 4. It is mainly in the elaboration of the fundamental rights in the Bill of Rights that references to literature and philosophy appear. Thus in the *United states v Loud Hawk* Justice Powell, citing Homer's Odyssey in a case involving the claim to speedy trial alluded to Penelope's promise that she would not choose a husband until the shroud she was weaving was finished. Her technique involved working on it in the day but then secretly unravelling it at night. Justice Powell suggested that the defendants were up to Penelope's trick:

> "At the same time defendants were making a record of claims in the District Court for speedy trial they consumed 6 months by filing indisputably frivolous petitions for rehearing and for certiorari **...** [and] filled the District court's docket with repetitive and unsuccessful motions."

Only a judge with wide reading, an imaginative research staff or whose experience has taken him or her outside the law will have the intellectual capital to draw upon such philosophical and literary allusions. Even if the judge has such experience, the legal tradition (and concern about the reaction of the profession or of other judges) may still the pen that moves to a literary allusion. Alternatively, such references may fall victim to the blue pencil and disappear into oblivion in the penultimate draft by the miracle of word processing. No Penelopes appeared in the recent expositions in the High Court of Australia about speedy trial. Yet it is not unknown to see literary allusion; though more frequently in the judgments of English than of Australian.

STABLE AND CHANGING FEATURES

The basic format: There are some stable and some changing features of

judgment writing. The stable features derive from the very nature and purpose of a reasoned judgment. Fundamentally, this is to explain an order formally entered by the Court as an enforceable rule between the parties in the litigation before it. For that purpose, a judgment will typically begin with a statement of the relevant facts. It will follow with an exposition of the principles of law perceived to be applicable. In the manner of the logical syllogism, it will then express conclusions derived from the application of the law as expounded to the facts as found.

Literature and humour: within this basic format, here is much room for variation and indeed variety. I have already referred to allusions to literature and learning beyond the law books. Humour is also sometimes evident. There are some authors who suggest that it has no place at all in judgment writing, the issues between the parties being too serious."For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he is down". Others, to the contrary, suggest that humour has a proper place in enlivening the prose and communicating the ideas of a judge. Just as humour can be effective in the ordinary communications of life so, it is urged, it has a place (although necessarily limited) in judicial communication. Justice Wallach of the Supreme Court of New York put it this way:

> "It must immediately be conceded that the place of judicial opinions is rather low in the literary pantheon; as an art form they probably rank slightly -above a political speech and just below a sermon~ ... Despite all this I would urge that a touch of humour, carefully controlled, can properly find a place in judicial writing. At best, it can be useful in deflating the overblown argument; at worst (provided it is not nasty and therefore not humorous at all) it is probably harmless. And at least I can attest that over my fourteen years of judicial opinionating it has relieved the tedium of the writer. Whether it will ever relieve the tedium of the reader can [only] be tested by time."

On the other hand, some United States judges have clearly gone too far in their indulgence in humour. Thus in *Fisher v Lowe* a Judge Gillis dealt with the claim by the owner of a tree who sued the driver and owner of a car who had crashed into it, in the following way:

> "We thought that we would never see
> A suit to compensate a tree

A suit whose claim in tort is pressed
Upon a angled tree's behest;
A tree whose battered trunk was pressed Against a Chevy's crumpled chest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care
Flora lovers though we three,
We must uphold the Court's decree."

There are many other attempts at opinions in verse in the United States. Some of them have resulted in disciplinary action against the judge involved, when deemed to have gone too far even for the tolerant taste of American lawyers.

In Australia humour is definitely confined to the minor key. Doubtless, this is because most Australian judges share Prosser's view that "the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig". Nevertheless, attempts at humour occasionally appear.

Views will doubtless differ about the suitability of judicial humour in the record of a judgment and at the expense of parties or their legal representatives or witnesses. Clearly a judge, tempted by such humour must consider the permanency of the record, the potential harm to reputation of the subject of the humour, the difficulty of affording an adequate answer or correction and the attention thereby given to the comment, precisely because of its pithy humorous expression indeed. Yet judges are supremely individuals. Their expression is, in part, a reflection of their personalities and individual values.

Dangers of irony: Irony is more common in judgment writing of our tradition than other forms of humour.· Perhaps irony, a more restrained form of humour, is thought to be more in keeping with the sober purposes of the judiciary. Perhaps it simply reflects the characteristics of the English personalities who left their indelible mark upon our image of what a good judge *is.* Just the same, irony, being frequently hurtful, can get the Judicial writer into difficulties.

Perhaps the best known instance of this danger is Lord Atkin's allusion to Lewis Carrol in his notable dissent in *Liversidge v Sir John Anderson & Anor*. After

a vigorous but dispassionate dissection of the opinion of the majority, his Lordship's speech reached its stinging point:

> "I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in a rather scornful voice, 'it means just what I choose it to mean, neither more nor less'. 'The question is,' said Alice, 'whether you can make words mean so many different things'. 'The question is,' said Humpty Dumpty, 'which is to be master that's all'" ("Through the Looking Glass", c. VI). After all this long discussion the question is whether the words "if a man has" can mean "if a man thinks he has". I am of the opinion that they cannot, and that the case should be decided accordingly."

It is now known that, as a result of this passage, Lord Atkin was sent to a judicial Coventry by the other Law Lords. They refused to meet him or to eat with him. At one point they even refused to speak to him. Before the speech was delivered, the Lord Chancellor (Lord Simon), who had not participated in the case, put great pressure upon Atkin to change the tone, if not the content of his judgment. Atkin refused. Lord Maugham, who had presided made a bizarre attack upon Atkin in the legislative session of the House of Lords. The opinion has been expressed that Lord Atkin never really recovered from this treatment before his death in 1944. He did not live long enough to see his opinion of the law vindicated. Indeed, it cannot be denied that the vigorous expression of his point of view helped to capture the attention of law commentators and judges. Perhaps it thereby contributed to the ultimate ascendency of the important legal concepts which Atkin was espousing. The power of vivid language to do this should never be underestimated.

Another instance of the use of judicial irony (and of literary allusions) which caused no end of trouble for the judicial officer employing them can be seen in the case of Justice Staples of the Australian Conciliation and Arbitration Commission. Justice Staples, from his days as a barrister, was given to the use of vivid prose unusual in the grey and detailed area of industrial decision-making to which he was appointed. In an important case, a recommendation by him to the Broken Hill Pty Company Limited and a union for the settlement of a long-standing maritime dispute was rejected by the company. Justice Staples wrote:

> "Let them, then, twist slowly, slowly in the wind, dead and despised, as a warning to the Commission of the limits of the persuasion of a public authority upon those who zealously uphold the privileges of property and who exercise the

> prerogatives of the master over those of our citizens whose lot falls to be their employees."

The company regarded this use of language as insulting to it. It was one of the matters which led to the removal of Justice Staples by the President of the Commission from his panel in charge of the maritime industry. His ultimate isolation and final removal from judicial duties, even judicial office, followed a further ironic reference, this time to a novel about the shearing industry in resolving an industrial dispute concerning shearers. Perhaps the fate of Justice Staples stands as a warning of the dangers to judges in Australia of what may happen to those who use excessively florid prose and irony found hurtful by the powerful interests on the receiving end.

Nonetheless, subtle irony, detectable only by the cognoscenti can certainly be useful in conveying a key point in the reasoning of a judge. It is a legitimate technique of argumentation if properly used. Thus, Justice Meagher is most faithful to the doctrine of precedent and stare decisis (the principle that earlier judicial decisions of high authority provide a rule binding on later judges who are bound to apply it) . He is probably closer to the "scientific" ideal of Chief Justice Dixon than many modern judges. Yet, in a recent case, he was able to reach a conclusion which appeared to two of his colleagues (Justice Clarke and myself) to fly in the face of a series of settled decisions of the Court of Appeal. It therefore gave me more than a little satisfaction to begin my reasons in the case with reference to the settled procedure by which authority of the Court might later be overruled by it:

> "This motion tests the Court's fidelity to its own earlier holdings and to the procedure which it has laid down for the overruling of earlier determinations of questions of law, when they are subsequently challenged: (see *Proctor v Jetway Aviation Pty Limited [1984] 1 NSWLR 166 at 171, 185.)* It also raises the approach which the Court takes to the construction of legislation. Is it to be strict and literalist, taking words in isolation, out of their context and apart from their clearly intended operation? Or is it to be purposive, so that the meaning is given to the words in order to effect their intended purpose? The latter is the approach now required by Parliament itself ……..It is increasingly that adopted by the courts of common law both in this country

and elsewhere."

Not daunted, Justice Meagher expressed his view succinctly and with force:

> "The result, startling and inconvenient though it may be, in my opinion is that leave is required for an appeal from any decision on a separate issue, whether that decision be final or interlocutory. I am not deterred from this conclusion by the circumstance that in the past the Court of Appeal has stumbled into the opposite conclusion in four cases, in none of which the present point was really argued.

CHANGES IN JUDGMENT STYLE

Opening words: The foregoing passages illustrate some of several changes in judgment writing style which have begun to emerge in Australian judgments in recent years.

It is not now uncommon to see in the opening words of a judgment an expression of the key issues which fall to be decided. In a sense this passage provides a headline to the judgment. Its purpose is to invite readers to an interest in the issues discussed by capturing their attention at the outset. This has long been a common technique in the writing of judicial opinions in the United States. Indeed, it *is* recommended in a standard text on judicial opinion writing in that country. It has not been common in Australia where, as in England, judgments have commonly begun with those tedious words: "This is an appeal ..." or "This is an action….. If only to avoid such cliche expressions, such dull phrases should never be used. The writer who loses the opportunity to state clearly at the outset the issue in hand (as he or she sees it) has lost a vital chance to communicate effectively with the potential audience and to grasp its interest and favour. Today there is so much to read that the effective communicator, bidding for attention to his or her ideas, will work at the task of ensnaring the busy, distracted reader. There is no reason why legal prose should be tedious and boring, whatever the writing style adopted. Judge Learned Hand expressed the ideal:

> "I like to think that the work of a judge is an art…… After all why isn't it in the nature of an art? It's a bit of craftsmanship, isn't it? It is what a poet does, it is what a sculptor does. He has something vague, he has some vague purposes and he has an indefinite number of what you might call frames of preference amongst which he may choose; for choose he has to, and he does."

Sub-headings: A second change that is occurring in Australian judgments is the introduction of headings in reasons both at first instance and on appeal. Once it was rare in Australia to see a heading interrupt an appellate judgment. It is still comparatively rare in England. But in the New South Wales Court of Appeal, a number of judges have introduced headings or clear division of their texts. I did so from the outset, following the conventions brought with me from the Law Reform Commission. Justice Mc Hugh experimented at first with divisional sections of judgments. Later he too introduced headings in his judgments in the Court of Appeal. He has followed the same technique since his appointment to the High Court of Australia.

Subheadings provide an especially useful means of taking the reader efficiently to that section of the judgment which he or she wishes to find. It is a common method of communication in written texts in other disciplines. It would be unthinkable in commercial and economic material today to provide a dense unbroken text without such simple keys to unlocking the meaning and reasoning of the author. Presentation to the reader of unbroken passages of judicial prose, unrelieved by the merest symbol and uninterrupted by headings which provide the guideposts for the journey displays in my opinion a want of real concern about the processes of communication. It may even sometimes hide a lack of structure or plan. Disclosure of headings reveals, even to the most cursory reader, the plan followed by the judicial writer. Headings also provide an opportunity for the writer to convey key ideas. Tedious, elementary headings such as "The facts" and "The law" should certainly be avoided. But the opportunity should be used to display the logical progression of the reasoning of the judgment and to do so, if possible, with words which add to the process of persuasion.

Exit Latin: A third change is the gradual abandonment of Latin and the virtual elimination of Greek in judicial texts. Once it was necessary in Australia (as it still it is in South Africa) to be trained in Latin to secure entrance to the law school. Latin was considered essential for an understanding of Roman Law, usually the sole intruding example of comparative law to disturb the self-contained universe of the common law. But now Roman Law is not compulsory. A diminishing number of law students has studied Latin at school. The proportion in the community at large is smaller still. If the purpose of reasons for judgment is to communicate effectively with the various audiences identified, it is highly desirable that Latin expressions should be dropped - or where still

useful, at least translated. Otherwise a barrier is placed between legal expression and· an important section of the audience for whom the judgment is written. Such barriers serve only to alienate judges and lawyers from the community they serve. The flourish of Latin as an illustration of classical learning is unnecessary. Learning can quite readily be demonstrated, by those anxious to do so, in other ways.

Gender neutrality: The avoidance of gender specific language, unwarranted by the context, is a fourth feature of recent times. In the High Court of Australia sensitivity on this score has followed the appointment to the Court of Justice Mary Gaudron. It is now perfectly normal to find in the text of High Court judgments care in avoiding the single personal pronoun "he". Instead, "he or she" is now typically used. Other expedients are sometimes adopted (such as the use of the plural) to secure a gender neutral expression. As this technique of legal expression has now reached the statute book and reflects a matter keenly felt in some circles in the community, it is desirable that judges should wherever possible avoid discrimination in the language they use. Hidden away in language may be a world of inappropriate attitudes and prejudice. The use of gender neural language tends to evidence a gender neutral attitude to legal tasks.

There is an increasing number of women judges appointed in whether they Australia. Yet there is still confusion as to whether they should be called “Miss Justice”, “Mrs. Justice”, "Madam Justice" or simply "Justice". At least in this country we do not have the problem, as elsewhere throughout the Commonwealth of Nations, of titling a woman judge "My Lord". Nor do we need to approach the eccentricity of the English in the Court of Appeal where Dame Elizabeth Butler-Sloss is styled "Her Ladyship, Lord Justice Butler-Sloss". Nearly a decade ago I proposed that all judges of superior courts in Australia - male and female - should, as in South Australia following the appointment of Justice Roma Mitchell, adopt the simple style "Justice". Sadly, when Dame Roma retired, the Judges of the Supreme Court of South Australia who had given such a worthy lead reverted to "Mr Justice". The High Court, following the appointment of Justice Gaudron, changed the title of the Justices by dropping "Mr" in every case. However, in the Supreme Courts and in the Federal Court confusion reigns. In due course, it may be expected that the solution of the High Court will be adopted throughout the Australian judiciary. Meantime, in their daily expression, individual judges should also follow the High Court's lead and avoid "sexist" pronouns and expressions.

Schedules and footnotes: A fifth recent innovation in Australian

judgment writing is the increasing tendency of judges to use appended schedules of cases or other material relied upon and to use footnotes. Such techniques are commonplace in the opinions of United States judges. They occasionally appear in judgments of the High Court of Australia. Thus, in Barwick CJ's very useful synthesis of case law on the jurisdiction of a court summarily to terminate an action in *General Steel Industries Inc v Commissioner for Railways (NSW) & Ors* his Honour appended a list of the case law which he had "examined on the subject" in coming to his conclusions. The appendix comprises 16 cases, some only of which are referred to in the reasons. In the New South Wales Court of Appeal, the use of appendices and footnotes has so far largely been confined to the reasons of Justice Priestley. Because unusual in this country, the judicial footnote can be a way of making a telling point strictly peripheral to the issues in hand but important in the writer's process of reasoning and perhaps for the future. In the united States, footnotes have sometimes played a very important function in digesting a body of law or in synthesizing an opinion in a way that is highly influential upon later decisions. Many American texts appeal for restraint in the use of footnotes; just as local observers urge that citations should likewise be confined.

Summary and index: Sixthly, another technique of increasing use to be mentioned in this context is the summary and index to help readers through a particularly long judgment. The judgment of the High Court of Australia in the *Tasmanian Dams Case* was a decision of high controversy. It involved consideration of many separate arguments in the seven separate reasons of the judges. In that case, a statement was issued by the Court, at the time judgment was delivered, summarizing the effect of the decision of the court reached in relation to each question by a majority of the judges. That statement is reproduced in the authorized report. So is the table of contents which refers to the subdivisions of each separate judgment. Such subdivisions have also been used in the New South Wales Law Reports, e.g.in the spycatcher litigation.

BREVITY, SIMPLICITY AND CLARITY

Judicial trinity: Brevity, simplicity and clarity. These are the hallmarks of good judgment writing. But the greatest of these is clarity. Of course, some people see the world as exceedingly simple. There are some lawyers and not a few judges of this 'persuasion. They are blind to the complexities that lie hidden in facts or the subtleties of the law and the ambiguities of language in

statutes and other documents. Still others, perfectly aware of such subtleties, have mastered a writing style notable for simplicity of expression. To avoid invidious local examples but to illustrate the point, it is useful to compare the writing styles of Justice Megarry and Lord Denning MR in describing the same facts in *In re Vandervell's Trusts [No 2].*Justice Megarry wrote:

> "An important consideration was that under the articles the VP Company could distribute its profits as dividends among the ordinary shares, the "A" shares or the "B" shares, or to anyone or two of these classes to the exclusion of the others or other, as the Company determined in general meetings; and in practice this meant that Mr. Vandervell had complete control over whether or not any dividends were paid on any of these shares."

Lord Denning expressed the same facts in these words:

> "In 1949, he set up a trust for his children. He did it by forming Vandervell Trustees Limited the trustee company, as I will call it. He put three of his friends and advisers in control of it. They were the sole shareholders and directors of the trustee company. Two were chartered accountants. The other was his solicitor."

The Megarry passage comprises one sentence of approximately 75 words. The Denning passage comprises 6 sentences, 57 words in all.

Writing style: It might be said that the appellate judge, with the benefit of the trial judge's exposition to work on, can reduce the relevant facts to those necessary to illustrate the legal concepts thought to govern the illustrate the legal concepts thought to govern the case. But every lawyer knows that out of the choice of facts will frequently emerge the applicable legal rule. And appellate second sight does not explain so radical a change of style. Lord Denning's is the style of the evangelist, the advocate. Some writers disapprove of the staccato of his short sentences. Others do not find his style to be as effective as the Megarry exposition. They fear that "simple syntax may reflect over-simplification and ... a failure to distinguish the more important [facts) from the less important". Writing, including judicial writing, has been analyzed for indications of a tendency to absolute expression as against recognition that things are usually more complex and thus in need qualification. By this measure, Lord Denning's style places him in the category of absolute writers. Justice Megarry's places him amongst the qualifiers. In Lord Denning's prose, many are the adverbs of

intensification, such as "very", "extremely", "only", "really" and so on. Justice Megarry, on the other hand, is more prone to use qualified determiners ("most" of the facts of the case are undisputed but some are in issue" …… It was Mr Robbins who in many of the matters ... acted almost as Mr. Vandervell's alter ego"). Analysis such as this simply catalogues writing as we tend, in everyday life, to categorize human personalities along a "confident" or "cautious" spectrum.

It should not surprise us that writing, with its tendency to reflect the complex, diverse personalities about us should exhibit features as varied as is human personality itself. Yet there are common features evident. Its very diversity is clearly a strength of the common law judicial system. Judges, with gifts of communication, writing in a simple, straightforward and "magisterial" style tend to have the greatest influence because of their clarity of expression. Yet, on the other hand, rhetoric and the use of vivid phrases play an important part in persuasion. In this way such language may come to have a disproportionate impact on the development of the law. Benjamin Cardozo once pointed out:

> "The (appellate] opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the tenseness and tang of the proverb and the maxim. Neglect the help of these allies, and it may never win its way."

From the legal profession and academic lawyers (and not a few judges) come constant calls for brevity of appellate court reasons. The same appeals usually include, if possible a request for a single reason stating a clear holding. I entirely agree that these are ideals to be pursued wherever possible and appropriate. There are few tasks more unrewarding than searching amongst the wreckage of multiple judicial opinions, offering different reasons, for a binding rule which can be readily applied in the hectic activities of a work-a-day court. A notable illustration of the inconvenience of multiple opinions, where a clear and simple rule is imperative (or at least highly desirable) is the current authority of the High Court of Australia on forum non convenience.

Single opinions: In the united States of America, recognizing the key role in government played by the Supreme Court there has, virtually from the start, been a tradition of a single majority and (where applicable) a single minority opinion. The Australian judicial hierarchy saw an extreme version of this thirst for clarity in the rule followed almost to its dying days by the Judicial

Committee of the Privy Council, in tendering but one opinion to the Crown. This extreme example of the magisterial style, was doubtless influenced by early attitudes in Downing Street to the laws of the colonies, available time of the Law Lords and their legislative function. To this day, privy Council decisions are admirably brief. Yet they can sometimes be expressed in language of power and even emotion. Dissents are still rare. Many Australian lawyers, surveying the increasing length of the opinions of appellate courts, yearn for a return to the certitudes of the Privy Council style and the similar style of the early days of the High Court of Australia. Various expedients have been suggested to produce brevity including writing judgments by longhand (Justice Kitto) whilst standing up (Chief Justice Dixon) and with pen and inkwell (Justice Meagher).

Perhaps in response to these calls, a slight movement can recently be detected towards single or joint judgments in Australia's appellate courts, thereby reversing the trend of the heyday of judicial individualism. The latter probably reached its apogee in the 1980s. Yet against these considerations it is important to bear in mind the pressures which tug in the opposite direction. The growing body of binding authority, including of the High Court of Australia itself , intellectual honesty in response to counsel's arguments and the demonstration of appropriate judicial neutrality may today require a more detailed review of binding decisions than was earlier the case. The facility of reference to a wider range of extrinsic aids to construction also adds to the length of oral hearings, written submissions and judgments. Yet this may be a price willingly paid for the escape from the rigidities of a strictly textual interpretation. Increasing candour in the acknowledgment of judicial choices invites a more candid discussion of questions of principle and policy than would have been common, even a decade ago. This will also have a price for the length of opinions. It may be a price worth paying, in preference to a return to the "fairytale" of completely value-free judicial decision-making.

Concurrent opinions: There is another consideration. It is in the variety of judicial opinions that the pool of ideas is provided from which the common law system draws its vitality and strength. The diversity actually symbolizes the independence of the judiciary, and all its members. It permits the light and shade of reasoning, even where a common conclusion is achieved. Justice Kitto revealed that Chief Justice Dixon once told him that he never agreed in the judgment of another judge "without having some cause to regret it afterwards". Even if collectively judges of appellate courts wish to reduce the length and

complexity of their judgments, it is a characteristic of the people appointed to such courts, and of their training, that they will rarely be willing to forsake their own unique opinions in the name of an institutional ideal. They will continue to perform their duties in their own way. Save for the impermissible exclusion of particular judges from the exercise of their commissions or the organization of sitting arrangements to avoid the embarrassing expression of individual opinions, there is nothing much that courts or their presiding judges can do about the individualism of judges; except by persuasion and example.

Dissenting opinions: The most acute form of individual opinion is the dissent. Some famous judges, including Lord Reid, have expressed the view that the writing of dissenting judgments should be conserved to very important points of principle. **I** do not agree. A judge is duty bound to offer his or her reasons for the order that is made by the Court. If, in a collegiate court, those reasons differ in any matter of substance, the judge must identify the difference. The statistics demonstrate that dissenting opinions in Australian courts are much lower in number and proportion than in equivalent courts of the United States. Perhaps this is a reflection of different traditions and different judicial functions of the judiciary in each country. The dissent must be disregarded for extracting from the decision of a court its binding rule. But that does not mean that the dissent has no value for the long term development of the law. In the United States, dissents have played a very important part in the development of constitutional law. Thus, Justice Harlan's dissent in *Plessy v. Ferguson* concerning the doctrine of "separate but equal" treatment of "coloured" people on trains came, in time, to sustain the Court's switch of opinion in *Brown et al v Board of Education of Topeka et al*. Similarly the dissent of Justices Black, Douglas and Murphy in *Betts v Brady, Warden* provided the intellectual foundation for the Court's later holding in *Gideon v.Wainright* that a poor person facing a serious criminal charge had a right to counsel. There have been many similar instances in Australian legal history. The passage of time, changes in the membership of a court and even the ascendency of the dissenter can explain the shift of legal authority.

A dissent expressed within the institutions of the law provides a legitimate means of protest against opinions which are, at the moment, in the minority. They help to reflect the diversity of contemporary society, of which a diverse judiciary *is* but a muted reflection. They appeal to the present generations of lawyers, and to the future. Hence, Chief Justice Hughes' perception that the dissent appeals to the "brooding *spirit"* of the common law; Justice Cardozo expressed the same thought:

> "The dissenter speaks to the future, and his *voice* is pitched to a key that will carry through the years. Read some of the great dissents…… and feel after the cooling time of the better part of a century, the flow and fire of a faith that was content to bide its hour. The prophet and martyr do not see the hooting throng. Their eyes are fixed on the eternities."

Even those who will not accord such high ambitions to the typical dissent in Australian judgments, may be willing to acknowledge their social value as "one of the processes that aids the development as the law meets and solves new situations".

CONCLUSIONS

Courts are public theatres in which many of the human dramas of society are played out in an abbreviated and somewhat stylized fashion. In the necessarily artificial circumstances of a courtroom and judicial technique it is impossible entirely to suppress the human drama. Judgments and legal opinions record some of these performances. They therefore provide opportunities for skilful writing. But it is writing always under the constraint imposed by the purpose at hand, to detail the refinements of fact and law that need to be dealt with for that purpose and form of decision-making. The characteristics of the judicial opinion at first instance and on appeal are different. Yet they enjoy many common features. There are many practical constraints which inhibit creative writing by a judge. Some of these have been identified.

It is important to keep in mind the audience for whom the reasons are written. Yet there is no unanimity of opinion as to who that audience should be. To some extent a basic structure of opinion-writing is stamped on judicial reasons by their fundamental purpose. Yet within that structure there is much room for individual variance: to exhibit skills of communication, a familiarity with the great writings of literature and of philosophy, the deft use of irony and even, occasionally, restrained humour.

Styles of judicial writing are constantly changing. Some of the changes have been collected. The use of headings. The demise of Latinisms and legal cliches. The avoidance of words or expressions showing gender-bias. The occasional use of footnotes, appendices and other aids to communication. Clearly, there are more changes still to come. Yet it is more remarkable to note the familiarity of a judgment two centuries old than to mark the changes that have lately crept in, almost imperceptibly to their expression.

Brevity, simplicity and clarity are the watchwords for effective judicial

writing. However, a number of constraints on brevity have been acknowledged. Brevity at the price of a return to a mechanistic view of the law would be unacceptable to many judges today. The use of extrinsic aids to construction and the candid acknowledgment of policy choices which must be made tend to add to the length of judicial reasons. At a price worth paying, most would say. And on conditions, such as the general availability of the extrinsic "aids", others would add.

Individual opinion-writing and the dissenting judgment are the hallmarks of a system of justice which truly respects the independence of its judges and acknowledges the judge's only masters to be the law and conscience. Diversity of opinion - and one might add of judgment writing style - is a great strength of the common law judicial tradition. It provides a never-ending stream of ideas and of ways to communicate them. Ideas are the most powerful engines for change and progress. Continuity amidst constant change of substantive law and orthodoxy amidst experimental variety in its exposition have helped to develop the law of a rural society of feudal England to the formidable body of the common law today. It is a body of law laid down by the succeeding centuries of judicial opinion-writing. It is this happy mixture of stability and movement which explains why that most lasting institutional legacy of the British Empire the common law continues to flourish in every corner of the world and to serve in these fast changing times the legal needs of a third of humanity. It is the privilege of each succeeding generation of judges of the common law to nurture and advance this precious legacy.

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THE ANXIETY – TO DO RIGHT – REMAINS

(Text of talk delivered by Justice Yatindra Singh, Judge, Allahabad High Court at National Judicial Academy, Bhopal in the National Judicial Seminar of the judges of the higher judicial service on Judicial Method on 21.7.2007.)

Themis is goddess of justice; she is generally—though not always—shown blindfolded; she has a pair of scales in one hand and a double edged sword in the other. The blindfold indicates that justice is impartial and is administered without fear or favour. The pair of scales explains that justice is done after weighing the strength of the competing claims. The sword symbolises the power to enforce it.

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

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

COURT MANAGEMENT

(i) *Be fair*

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

(ii) *Don't Delay Your Judgement*

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

---

[1] .....

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

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

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

(iii) Stick to the Court Timings

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

(iv) Avoid Social Gathering, Parties

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

'The extreme impropriety of judges in accepting lunches and dinners from members of the Bar practising before them and even from private citizens.

... Judges are not detached but the public should feel that they are detached' (The Seevrai Legacy page 10 & 34).'

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

(v) Be Consistent with your Orders and Courtroom Procedure

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

(vi) Control the Court Proceedings

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

You cannot do it unless you have sound knowledge of law. Seervai points out, 'unless the judge on the bench is equal or superior to the top counsel appearing before him, it is impossible to control court arguments'.(The Seervai Legacy page 20)

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

● By listening to the advocates attentively Don't fiddle, read, shuffle the papers/ books when advocates are making submissions. If you have 4 to do it, request the advocate to wait.

● Ask relevant questions. Lord Atkin was 'patient, he asked few questions but those ... were the most incisive' (Lork Atkin by Geoffrey Lewis Page 17). This shows that you understand the case.

● By summarising the points submitted by the advocates. You can always say, 'You mean to say ....' or 'Your submission is ....' or ' Your point is...' It does not mean that you have accepted their arguments but reassures them that their arguments have been understood.

JUDGEMENT WRITING

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

Judgement: Provisions of Law

CPC as well as Cr.P.C. provide as to what should a judgement contain. Order 20 and Order 41 Rule 31 of the C.P.C. provide for the judgement in the civil cases. Chapter 27 of the Cr.P.C. deals with the judgements in the criminal cases. Apart from the other things, these provisions provide that the judgement should indicate:

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

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

Who Reads the Judgement

One should not avoid to decide a case that it might be upset by the higher court, or not liked by anyone, or may be overruled. It is an old saying: 'Let justice be done, 5 though the heavens should fall' (see Endnote-1). Decisions should be taken, as you understand the law; they should satisfy your conscience: you should never decide the case, as others understand it.

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

(i) Persons Connected with Law

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

(ii) The Litigants

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

(iii) The Media

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

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

Preparation and Writing

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

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

(ii) Write, revise, and revise

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

What You Should Not Do

(i) Avoid Quoting, Pleading and Evidence

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

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

(ii) Avoid Long Quotation from the Citations

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

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

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

Style

(i) Write the way you Talk

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

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

It means that:

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

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

(ii) Quotations

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

(iii) Lists – Bullets and Numbers

They are used:

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

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

> 'The trial court framed necessary issues and held that “A” was the owner of the property in dispute and after his death the plaintiff became the owner of the same. The Trial court further held that the defendant has nothing to do with the property in dispute and is a trespasser. The Trial court has also recorded finding that the suit is

neither barred by limitation nor resjudicata . On the basis of these findings, the suit was decreed.'

It can always be written as follows:

'After framing necessary issues, the trial court decreed the suit on the following findings: (i) A was the owner of the property in dispute;

(ii) After his death, the plaintiff became owner;

(iii) The defendant has nothing to do with the property in dispute and is merely a trespasser.

(iv)The suit is neither barred by limitation nor by resjudicata.'

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

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

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

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

(v) Number the paragraphs in the judgement

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

Language and Punctuation

(i)Think About Others

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

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

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

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

NEMO DEBET ESSE JUDEX IN PROPRIA SUA CAUSA

No man can be a judge in his own cause.

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

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

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

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

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

(iii) Avoid unparliamentary language

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

> 'Good temper and moderation are the characteristics of parliamentary language. Parliamentary language is never more desirable than when a member is canvassing the opinion and conduct of his opponent in debate.'

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

(iv) Avoid negatives

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

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

Only one peon can be posted in the court.'

The second one, the positive one is better.

Consider the following confusing sentence,

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

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

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

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

This can only be done after getting approval from the board by filing a written application.' I need not say, which one is better.

(v) Use Active Voice

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

'The policy has been approved.'

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

Passive voice is, often used,

- As it is natural to the writer;
- To leave out the doer (actor) intentionally or unintentionally; or
- To avoid using personal pronouns like 'I', 'we', or 'you'.

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

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

(vi) Brackets

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

Brace brackets are used in a text if some matter within them is to be kept inside round brackets otherwise brace bracket { } as well as angled

brackets < > are generally used in mathematics, specialised texts, tabulation and technical works.

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

(vii) Break the Page with Paragraphs

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

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

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

(viii) Use Short Sentences

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

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

This could be written as, 'The letter from the High Court was received on 21st July.'

Or it could be simply written as,

'The letter from the High Court arrived on 21st July.' 14

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

> 'A person shall be treated as suffering from physical disablement such that he is either unable to walk or virtually unable to do so if he is not unable or virtually unable to walk with a prosthesis or an artificial aid which he habitually wears or uses or if he would not be unable or virtually unable to walk if he habitually wore or used a prosthesis or an artificial aid which is suitable in his case.'
>
> Can you understand it? However it is saying something very simple,
>
> Persons are regarded as physically disabled if they always
>
> `need an artificial aid to walk'.

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

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

● A comma acts a separator between parts of a sentence;

● Semi colon is used for two closely related sentences within a sentence;

● Dash is used to indicate start of an explanation or addition—they are added for emphasis too;

● Colon is used before an explanation, description, or conclusion and is generally used to introduce a vertical list.

Format of the Judgement

(i) Introduction/ Opening words

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

Now the introduction or the opening words generally contain the key issues that are being decided. It is a kind of headline to the judgement. Its purpose is to invoke interest in the readers by capturing their attention at the outset. This is also recommended practice in the US. (Judicial Opinion writing Handbook by JS George 2nd ed. Hein & Co. Buff lo 1986).

(ii) The Facts

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

(iii) Points for Determination/ Issues

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

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

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

(v) Conclusions

Indicate your decisions on different points in the case.

(vi) Order

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

(vii) Footnotes, endnotes, and Appendices

This may include,

● Case law; or

● Details of the books referred; or

● Provisions of law; or

● Related points not relevant for discussion at present but those that may be involved in future; or

● Any interesting point connected with the case but not relevant for the decision or relevant for further reference.

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

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

CONCLUSION

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

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

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

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

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

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

APPENDIX-1

Books to Read

1. COLLINS WORDPOWER : Punctuation by Graham King.

2. Plain English Guide by Martin Cutts , Oxford University Press.

3. The plain English Approach to Business Writing by Edward P. Bailey, Jr.

4. Eats, Shoot & leaves by Lynne Truess

5. A Dictionary of Modern Legal Usage by Bryan A Garner, Oxford University Press.

6. The Judgements and How to Write Them by SD Singh

7. Judgement and books by Justice Oliver Wendell Homes:

(i) Collected Legal Papers

(ii) The Essential Homes

8. Judgements and books by Lord Denning.

(i) The Discipline of Law by Lord Denning.

(ii) The Due Process of Law by Lord Denning.

(iii) What Next in Law by Lord Denning.

(iv)The closing Chapter by Lord Denning.

(v) Landmarks in the Law by Lord Denning.

The first three books also list official, legal, wordy, Latin, French words and phrases with plainer alternatives.

Appendix-2

(Partly modified for the purposes of this talk)

First Appeal No. 582 of 1998

Hemant Kumar Agrahari ... Appellant

Vs

Laxmi Devi ... Respondent

Hon'ble Yatindra Singh, J

Hon'ble Mukteshwar Prasad, J.

(Delivered by Hon'ble Yatindra Singh J.)

INTRODUCTION

1. This case involves diverse emotions—from happiness to disappointment and then determination to start new life. It also involves the interpretation and scope of section 27 of Hindu Marriage Act (the Act) as well as jurisdiction of the matrimonial courts to dispose of exclusive property of the spouses.

THE FACTS

2. Smt. Laxmi Devi (the wife) was married with Sri Hemant Kumar (the husband) on 30th April 1996. The marriage was not successful. It did not last long; it was not even consummated. According to the wife, her husband was already having physical relationship with one Sushri Sunita Pathak and continued to have it even after the marriage. Few meetings were held for settlement of dispute between the parties but were unsuccessful.

3. The wife filed a petition for divorce under section 13 of the Act on the ground of adultery and cruelty. She also prayed for return of the goods/amount given at the time of marriage and apart from her husband, impleaded her father-in-law and Sunita Pathak in the suit. The defendants denied the case of the wife.

4. The wife examined herself (PW-1) and produced two witnesses namely her brother Sri Ram (PW-2) and one Shri Mool Chand Gupta (PW-3). The defendants examined Hemant Kumar (DW-1), one Juggi Lal (DW-2) real Mausa of the husband and one Shri Shiv Prakash Kushwaha (DW-3) cousin of the husband.

5. The court below decreed the suit, for divorce and for return of Rs. 75,000/- in cash and goods (mentioned at item numbers 4 and 5 of the plaint), on the following findings;

• The husband was having relationship of husband and wife with Sunita Pathak since before the marriage and has continued the same even after it;

• The marriage was not consummated;

• The husband is guilty of cruelty;

• The wife has justifiable reasons to live separately from the husband;

• The goods mentioned in item nos. 4 and 5 of the plaint and Rs. 75,000/- cash were given at the time of the marriage.

6. The husband and his father have filed this appeal against that part of the decree by which the court below has ordered for return of cash and goods mentioned at item nos. 4 and 5 of the plaint. The wife has filed cross-objection against that part of decree by which the court has refused to grant decree for the return of the cash and goods mentioned at item nos. 1 to 3 and 6 of the plaint.

7. The parties have, neither challenged the finding of the court below that the husband has continued husband-wife relationship with Sunita Pathak, nor the decree of divorce granted by the court below.

THE POINTS FOR DETERMINATION

8. We have heard Sri Salil Kumar Rai counsel for the appellants and Sri RN Bhalla, counsel for Laxmi Devi (Plaintiff-respondent). The following points arises for determination in this case:

(i) Whether the wife is entitled to return of cash and goods? Whether the return of cash and the goods (mentioned at item nos. 4 and 5 of the plaint) has been decreed on the basis of inadmissible evidence?

(ii) Whether the goods ordered to be returned are not specific and no decree ought to have been passed?

(iii) Whether the cash/goods were exclusive property of the wife?

(iv)In case answer to the third point is in affirmative then whether the court below had jurisdiction to decree the suit for return of the cash/goods?

POINT NO. 1: THE FINDING REGARDING CASH/ GOODS IS CORRECT

9. The counsel for the appellants submitted that:

● The court below has decreed the return of cash and goods on the basis of photostat copy of minutes of panchayat dated 15.7.1997;

● It is secondary evidence; and

● It cannot be relied upon.

10. The wife had produced photosat copy of minutes of panchayat. It is alleged to be signed by father of the husband, brother of the wife and is attested by the 22 witnesses. Moolchand Gupta PW-3 is one of the witnesses of this document. He has stated that the original4 was given to the father of the husband. He has also deposed as to what was agreed in the panchayat. Neither the husband, nor any of his witnesses have stated anything about this panchayat. They have also not stated whether father of the husband signed this

document or not. Nevertheless the document produced was a photostat copy of the original and secondary evidence. It was not admissible under section 65 of the Evidence Act unless notice to produce as contemplated under the Evidence Act was given to the other side. There is no evidence that any such notice was given. It seems an inadvertent mistake on part of the counsel of the wife. However the photostat copy is inadmissible. But the decree may not be set aside if this finding is supported by other evidence on record.

11. The court can take judicial notice of the fact that in our society parents present gifts to their daughters and son-in-laws. Unfortunately some time it is forced, but often it is voluntary and is for the bright future of the newly weds. There is presumption that gifts must have been given from girl's side during marriage. In this case the wife produced herself and made a statement about the goods gifted to her during marriage. She has also stated that cash of Rs. 75,000 was given at 'tilak'. The witnesses produced on behalf the defendant-appellants accepted having received many items, though the gift of Rs. 75000/- was disputed. According to them only Rs. 5000/- in cash was given. The trial court had the opportunity to watch the demeanor of the witness and found the statement of the wife trustworthy on this aspect. We see no reasons to doubt it. The court below has rightly held that the goods mentioned in item nos. 4 and 5 of the plaint and 4 The father of Hemant Kumar, in whose possession the original is alleged to be, is party to the proceeding. Sub section (2) of section 66 the evidence Act may apply in this case. But we have not considered its effects while recording the aforesaid finding as no arguments on its basis were advanced before us. 23 cash Rs. 75000/- were given and this finding is upheld.

12. The court below has mentioned that no specific thing is mentioned in item nos. 1 to 3 and item no. 6 and has not ordered for the return of the same. We agree with the findings recorded by the trial court in this respect also. There is no justification to decree the suit for the items other than those decreed by the court below.

POINT NO. 2: MONEY DECREE SHOULD BE PASSED

13. The counsel for the appellants submitted that in item nos. 4 and 5 of the plaint, no details of the specific goods have been mentioned and decree cannot be executed.

14. It is correct that specific details of the goods i.e. model, year of manufacturing, size, brand and other specification have not been given in the petition. The wife also did not disclose them in her evidence. The husband disclosed that the TV, which was given to him in the marriage, was black & white. On the other hand, the wife stated that colour TV was given. Dispute

may arise at the time of execution of decree and a number of objections may be raised in the execution proceedings regarding condition of the goods and brand etc. This may further delay the recovery of cash given at the time of the marriage: we assess the value of the goods mentioned in the item nos. 4 and 5 at Rs. 1 lac. The appellants are liable to return Rs. 1 lac (value of goods in item nos. 4 and 5) and Rs. 75,000/- given in cash (total one lac and seventy five thousand) to the wife. As the appellants are using the goods/cash since marriage between the parties; they are liable to pay simple interest at the rate of 6 per cent on this amount from the date 24 of judgment of the court below till the date of actual payment.

15. We would like to clarify that no arguments were advanced before us regarding maintenance to the wife and we have not considered it. It would be open to her to claim the same if permissible under the Act.

POINT NO. 3 & 4: COURT BELOW HAD JURISDICTION

16. The counsel for the appellants brought to our notice section 27 of the Act (see below)[3] and submitted that two conditions are necessary under this section:

(i) The property must have been gifted at or about the time of marriage.

(ii) It must jointly belong to the husband and wife.

According to him, most of the property is exclusive property of the wife and no decree can be passed for their return.

High Court Decisions

17. Section 27 of the Hindu Marriage Act is similar to section 42 of the Parsi Marriage and Divorce Act. Both of them provide that the matrimonial courts have power to deal with the property presented at or about the time of marriage. There is some conflict among the High Courts about the true interpretation and area of operation of these sections.

18. The High Courts disagree whether the courts are entitled to deal with exclusive property of the parties or not. The Delhi High Court, Orissa High Court, Jammu and Kashmir High Court, and Punjab and Haryana High Court (see below for citation of these cases)[4] have held that exclusive property

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[3] 27. Disposal of property: - In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and wife.

[4] These cases are reported in

i. Smt. Shukla vs. Brij Bhushan Kakkar: AIR 1982 Delhi 223,
ii. P. Maharajan alias Nadarajan vs. Chakalayil Kanju Sarojini: AIR 1988 Orissa 175,
iii. Sardar Surinder Singh vs. Manjeet Kaur: AIR 1983 J&K 86,

of the parties can not be dealt by the matrimonial courts under section 27 of the Act and they should seek remedy before regular civil courts.

19. The Allahabad, High Court, Bombay High Court, and MP High Court (see below for citation of these cases)[5] have taken a contrary view and have held that exclusive property of the parties can also be dealt by the matrimonial courts. The Allahabad and MP High Court were concerned with the ornaments (stridhana) given to the wife at the time of marriage. The Bombay High Court was concerned with the ornaments given at the time of marriage and some other property that the wife had purchased from her own earnings during marriage i.e. property not presented at or about the time of marriage and exclusively belonging to the wife. This view has been taken on the basis that section 27 of the Act does not prohibit the disposal of the exclusive property belonging to one of the parties and matrimonial courts can deal with it under inherent powers of the courts.

Supreme Court Decision ─interpretation of section 27.

20. The decision from the Bombay High Court was taken in appeal to the Supreme Court. It was partly overruled in Balkrishna R Kadam vs. Sangeeta B Kadam (AIR 1997 SC 3652=1997 (7) SCC 500) (the Balkrishna case). The Supreme Court held:

> 'It [Section 27 of the Act] includes the property given to the parties before or after marriage also, so long as it is relatable to the marriage. The expression "at or about the time of marriage" has to be properly construed to include such property which is given at the time of marriage as also the property given before or after marriage to the parties to become their "joint property", implying thereby that the property can be traced to have connection with the marriage. All such property is covered by Section 27 of the Act.'

21. In substance the Supreme Court in the Balkrishna case held that property covered under section 27 must be traced to marriage and should be connected with it. In this case cash and goods were presented at the time of 'tilak' or marriage. The ceremony of 'tilak' is normally held at boy's place: sometimes immediately before marriage and sometimes many days before it; however it is part of marriage. The gifts given at 'tilak' are also property given at or about the time of marriage, they are connected with it. Cash or goods in

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iv. Smt. Surinder Kaur vs. Madan Gopal Singh: AIR 1980 Punjab 334.

[5] These cases are reported in

i. Kamta Prasad vs Smt. Om Wati: AIR 1972 All 153,
ii. Sangeeta B. Kadam vs Balkrishna R. Kadam: AIR 1994 Bombay 1,
iii. Ashok Kumar Chopra vs. Smt. Visandi: AIR 1996 MP 226.

dispute are property within meaning of section 27 of the Act as explained in the Balkirshna case.

22. The counsel for the husband submitted that it was not enough that property should have connection with marriage but should jointly belong to the parties. According to him though some of them (sofa, almirah or TV etc.) could be joint property of the parties, but others (jewelery etc.) though presented at the time of marriage were exclusive property of the wife and no decree could be passed in respect of them. With due respect, the Supreme Court did not lay down any such proposition in the Balkrishna case.

23. Matrimonial cases are tried by the District Court and if Family Court has 27 been established then by the Family Court. They are decided by the senior Judges at the district level and civil procedure code is applicable. The entire proceeding is like a regular suit; though court is required to conciliate between the parties. The Judges manning matrimonial courts are senior enough to decide about exclusive property on the regular side. Same procedure is applicable in the matrimonial cases. It is correct that section 13 of the Family Courts Act declares that a party shall not have right to legal representation, but court can always permit legal representation . In case complicated questions are involved, permission for legal representation in the family court is normally granted; more so in a case where complicated questions regarding disposal of property are involved.

24. In case the matter is before matrimonial court, then it is proper that all disputes relating to the parties should be settled by one court at the same time: leaving a part of the dispute to be decided in future in another suit would prolong acrimony and agony. Life should be spent in a fruitful way, rather than wasting it in constant bickering. There seems to be no reason as to why joint property presented at the time of marriage can be disposed of, but exclusive property presented at the time of marriage should be disposed of separately. This will not only result in multiplicity of the proceedings, but will also cause delay in final settlement and start of new life by the parties.

25. Lord Denning in Allen vs. Alfred Mc Alpine; 1968(1) All.E.R. 543 said:

‘Law’s delays have been intolerable. They have lasted so long as to turn the justice sour.’

It is truer in our country. We must adopt such interpretation as to avoid delay and multiplicity of proceedings.

26. Section 27 uses the phrase 'property presented at the time of marriage, which may belong jointly to both the husband and the wife' This section has one prerequisite as laid down in the Balkrishna case: the property

must be connected with the marriage. So far as the question of property being jointly owned by the parties is concerned, suffice to say that the section nowhere uses mandatory word 'must' as being suggested by the counsel of the husband; it uses the word 'may'. The phrase 'which may belong jointly'—because of the use of the word may—also includes within its penumbra [scope] the property which may not belong jointly to the parties. In our opinion, section 27 of the Act does not confine or restrict the jurisdiction of matrimonial courts to deal only with the joint property of the parties, which is presented at or about the time of marriage but also permits disposal of exclusive property of the parties provided they were presented at or about the time of marriage.

AN OBSERVATION

27. Generally wife is a house maker and stays at home and the husband is the earning member. He earns and acquires property in his own name: it is treated as his separate property. There is no decision in our country that separate properties of the spouses may be pooled and divided among them: at least we are not aware. However, in some parts of the world exclusive property of the parties is treated as community property or family asset and is divided between the two at the time of divorce.[6] The reason is that house makers also work but they cannot acquire property as they are not paid in terms of money. It is for this reason that such laws were enacted and upheld in other parts of the world.

28. Should we enact such a provision? Should section 27 be amended to include joint and exclusive property of the parties that are not presented at or about the time of marriage? Should the matrimonial courts have power to deal with entire dispute? Will the courts adopt procedure and interpret the law as done in some other parts of the world under their inherent powers even in absence of such provision? We have to wait for the future to disclose.

CONCLUSIONS/ FINDING ON THE POINT FOR DETERMINATION

29. Our conclusions are as follows:

(a) Under section 27 of the Hindu marriage Act, Matrimonial courts have jurisdiction to dispose exclusive property of the spouses provided it was presented at or about the time of marriage.

[6] Kindly see part seven ‘The Deserted Wife's Equity’ and part eight ‘The Wife’s Share In the Home’ of the book 'The Due Process Of Law' by Lord Denning about history of this struggle in England.

(b) Photostat copy of the minutes of the panchayat was secondary evidence and was not admissible in absence of notice under section 66 of the Evidence Act. However, the finding regarding cash and goods mentioned in item no. 4 and 5 of the plaint is not vitiated as it can be sustained on other evidence.

(c) The court below, instead of return of the goods, ought to have decreed the suit for return of their value in terms of money.

ORDER/ RELIEF GRANTED

30. In view of our conclusions, the appeal filed by the husband and the cross objection filed by the wife are dismissed. However, the decree passed by the Court below is modified that the wife (plaintiff -respondent) shall be entitled to recover a sum of Rs. 1.75 lacs from the appellants (value of the goods mentioned 30 at item nos. 4 & 5 of the plaint and Rs. 75,000/- given in cash) alongwith simple interest at the rate of 6 per cent per annum from 6.10.1998 (date of judgement passed by the court below) till the actual date of payment. Costs on the parties.

Date:14.5.2003