MESSAGE

I am happy to learn that the Judicial Training & Research Institute, Uttar Pradesh, Lucknow is publishing the XXXIVth issue of its journal containing articles of judges, academicians and judicial officers on law. I am sure that these articles will be of benefit to each stakeholder of the judicial system.

The State of Uttar Pradesh tops the country in terms of population as well as in terms of pendency of cases in the district judiciary. The Institute is aimed at providing, amongst other things, training to judicial officers of the state, to conduct research in the field of law, to make the legal system more effective and to find out modalities for speedy disposal of cases, thereby reducing the pendency of cases in the District Courts of Uttar Pradesh. I earnestly appeal to the judicial officers of the district judiciary and other stakeholders of the judicial fraternity to work with sincerity and integrity with the objective to reduce the pendency of cases.

I am sure that the publication of the Journal will be beneficial to the judicial officers of the state and others related with the judiciary. I wish the publication of the journal success.

(Dr. D.Y. Chandrachud)
Hon’ble Mr. Justice S.K. Singh
Senior Judge
Allahabad High Court
It gives me immense pleasure to know that like previous years this year also Judicial Training & Research Institute, U.P., Lucknow is going to publish its journal. I am happy to state that the Institute is achieving its goal to upgrade the skills and appropriate attitudinal reorientation by organising induction training programme for the newly appointed judicial and prosecution officers, refresher courses for judicial officers, research work in the field of law to make legal system more effective and to find out ways and means of expeditious disposal of cases.

I hope the journal will be proved as a platform to encourage Judicial Officers to share knowledge and experience in the field of Law and interdisciplinary areas.

Congratulations and best wishes to all,

(S.K. Singh)
Hon’ble Mr. Justice Uma Nath Singh
Judge, Allahabad High Court
Message

It is a matter of great pleasure that Judicial Training & Research Institute, U.P. is publishing its 34th issue of JTRI Journal which, inter alia, contains its detailed report on efforts made by the Institute in organizing various programmes and events during the last one year. I am informed that the Judges, academicians and law students have contributed informative articles on the subjects related to law and interdisciplinary issues.

Judicial Training Institute is an important platform for shaping and sharpening of the professional skills of Judicial Officers for right application and interpretation of law. The Institute can play an effective role by imparting right kind of training and ethical indoctrination of Judicial officers to meet new challenges emerging from the fast growing technologies and ever changing socio-economic scenario of the society.

The Journal provides a good medium to express, share and communicate empirical knowledge on various subjects of law and contemporary issues. I am sure that this latest issue of JTRI Journal will also serve as a valuable and useful handbook for the judicial fraternity.

I extend my heartiest congratulations and best wishes to the Institute and its Journal for all the success.

(Uma Nath Singh)
Hon’ble Mr. Justice Arun Tandon
Judge, Allahabad High Court, Allahabad
Administrative Judge, Lucknow
Message

I am pleased to know that the Judicial Training & Research Institute U.P., Lucknow has been publishing its annual Journal since 1995. The Journals so published do reflect the vision and progress of the Institute. It includes the articles of Hon’ble Judges, Academicians and Judicial Officers. Such Journals do help to improve the knowledge of the persons involved in the field of law and also helps in developing a stronger judicial system for the welfare of the society.

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

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

With best wishes.

(Arun Tandon)
Hon’ble Mr. Justice Sudhir Kumar Saxena
Judge, Allahabad High Court, Lucknow-Bench
Hon’ble Member, Committee, Judicial Education, JTRI, U.P.
MESSAGE

I am delighted to learn that the Judicial Training & Research Institute, U.P. is publishing its 34th issue of J TRI Journal containing annual report about the activities and achievements of the institute and various articles on legal topics written by Judges, eminent Jurist, academician.

It is appreciable that the institute has started the 3rd round of refresher training to the Judicial Officers under the 13th finance commission and has also organized Induction training programme for newly appointed Judges. The Institute has also collaborated with IIM Lucknow for providing Management related training programme to the Judicial Officers of District Courts of U.P. It is also learnt that the Institute is also publishing informative brochures, reading materials and digest to the Judicial Officers for updation of knowledge.

Emphasis of Institute is to sensitize the judges of District Judiciary towards the problems of litigants having regard to socio-economic condition and justice as envisioned by framers of Constitution of India. They are exposed to new techniques of stress management, court management and case management. Endeavour of Institute is to shape the officers in an ambience which is congenial and aimed at dispensing justice at the earliest opportunity.

The Journal is a platform of learning by sharing by way of exchange of new ideas, lateral thinking, developing sensitivity on various social, burning issues. Sharing the eminent researches made in field of law and latest judgments delivered by superior courts are important for development of law and competence.

I congratulate the institute for regular publication of the Journal.

( Justice Sudhir Kumar Saxena )
Hon’ble Mr. Justice Bhanwar Singh
Chairman, JTRI, UP, Lucknow
The role of the judiciary is highly important in any democracy. The Judiciary is known for delivering many landmark and prominent judgments that has improved the conditions of life for a number of groups and individuals. At the same time, it is constantly exposed to new challenges and new dimensions. Indian Judiciary today faces many impediments like huge amount of delay and pendency of cases, inappropriate Judge-Population ratio, lack of infrastructure, lack of funds, faith in the system, accessibility, impact of legislations, procedural pitfalls etc. It is fighting to keep the faith of the people in the institution alive by dealing with various obstacles in the way of quick and qualitative dispensation of justice.

Many highly specialized areas of law like Intellectual property, Corporate law, Cyber law, Human rights, Alternative dispute resolution, International business transactions, are emerging and we have to be updated with new laws and amendment to provide timely and qualitative Justice.

With the increasing challenges, the role of Judicial Training institutions have also increased many folds. The concept of Judicial education has tremendously changed and the stake holders of Justice delivery system have also increased. The Judicial Training Institutions have to align its role of imparting Judicial education with the Judicial functioning. The Institution has to contribute as a change agent to assist judges in Managing change. As per Charles Darwin “It is not the strongest of the species that survive, nor the most intelligent, but the one most responsive to change.”

The most important function of Judge is adjudication of disputes which not only impacts the parties involved, but also the society at large. Judicial reasoning is said to be both an art and a science to be developed by judges by his knowledge, skills and attitude. The factual positions with the important legal position have to be analyzed before passing any Judgement. In criminal proceedings, the judge has to perform another important function of awarding an appropriate sentence to the guilty and awarding of compensation to the victim. The sentencing has assumed a critical role in criminal justice administration. Similarly, the adjudication of rights of parties and calculation of damages in a civil court is a challenging function of a Judge. With the emergence of Jurisprudence in various dimensions in substantive and procedural laws makes the assignment of a judge in criminal trials, Civil adjudication, family dispute settlements, juvenile justice etc, a very challenging task.
The judge cannot afford to be obsolete in Justice Dispensation System. In addition to above, he has to manage the docket and the Court staff for effective results. He has to maintain cordial relations with the bar along with a message of impartiality and competence.

The Improvement of Justice delivery cannot be confined to the Judicial Officers. The stake holders of the legal system have to be developed for working towards a better legal system. The effective administration of justice is based on the competent Lawyers, Government pleaders, Ministerial staff of courts, Prosecution Officers, Members of Juvenile Justice Boards, Mediators etc. It has now become essential that these stake holders are trained to have positive synergetic development of legal system for fulfillment of constitutional goal. They need to be trained at the one centre like the JTRI so as to implement better coordination amongst all the functionaries.

The 13th Finance Commission has recommended for judicial reforms under which, funds have been allocated for enhancing quality of adjudication through training programmes and also for infrastructural improvements. The recommendation includes the development of judicial academies/institutes. Apart from this, allocations for enhancing support to Lokadalats, promoting Alternative Dispute Resolution, training for Public Prosecutors, creation of posts of Court Managers in every judicial district etc. have also been carried out. In my opinion, five years period is slightly short to improve the long drawn maladies which have emerged out during last several decades. It may therefore be suggested that under the 14th Finance Commission also, all the existing measures for improvement must be extended.

The JTRI is the first in the country to commence training programmes for the Judicial Officers and other stake holders of state under the 13th Finance Commission Scheme. We have completed two rounds of training to all the Judicial Officers of the state, across the cadre. Methodology of training in the Refresher Courses has been changed from the Traditional Classroom teaching with lecturing and coaching to participative, interactive and group discussion style. During the Training, apart from faculty, experts such as judges, academicians, social activists etc. are also invited with a view to broaden the understanding and approach with concern towards the needy litigants. Emphasis is laid on improving quality of justice and also sensitizing the judicial officers towards speedy justice delivery and marginalised section of the society.

In imparting training, emphasis is upon the attitudinal change particularly for women, children, weaker section and senior citizens etc. The training focuses on the object of the provisions and updation with latest pronouncements. The pedagogy of training includes discussions, interactions, sharing experiences, addressing practical difficulties being faced by
officers. The institute also provides updated reading material containing the latest case laws on various topics of relevance.

For inculcating and developing management skills, we have also tied up with Indian Institute of management (IIM), Lucknow for providing 5 days training programme. to the Judicial Officers, which is undergoing successfully.

During the last one year, the institute has been actively involved in providing induction and in-service training to the Judicial Officers of the state. Apart from above, the institute has been providing training to the members of Prosecuting Officers, DGCs, Members of Juvenile Justice Boards, Court Managers, Deputy Registrars of Hon’ble Allahabad High Courts, Officers of other Government Department such as IFS (Probationers), Senior Forest Officers etc.

A lot of Infrastructural development work is being carried on in the Institute. The Women’s Hostel has been completed and has become functional. Construction of auditorium, renovation of Officers hostel, training rooms etc. have been undertaken during the award period which is to end on 31st March, 2015. In order to improve the ambience and environment in the campus, massive plantation, seasonal flower plants, gardens have been developed which is continuing on regular basis.

The Institute is regularly publishing its Journal containing the periodic events/programme undertaken by the institute and articles on legal subjects of contemporary importance, written by the Hon’ble Judges of Supreme Court of India and Allahabad High Court, Academicians, faculty members, judicial officers and students of law. We hope that the articles will be very informative/educative and stimulate the thought process of readers. The Journal has been a good platform to express the views and share experience for benefit of all.

The Institute is functioning under the patronage of and with the guidance and support of Hon’ble Allahabad High Court, especially Hon’ble Dr. Justice Dhananjaya Y. Chandrachud, the Chief Justice, Allahabad High Court. We hope that with the cooperation of the faculty members and Judicial Officers, we can fulfill the vision of the Institute and the constitutional goal in broader perspective.
I have faith that the Institute will strive for excellence in achieving the objective of providing Judicial education to the Stake Holders of Justice delivery system to take up the emerging challenges effectively. I conclude by quoting Avlin Toffler “The illiterate of the 21st century will not be those who cannot read and write, but those who cannot learn, unlearn, and relearn.”

(Justice Bhanwar Singh)

Chairman, JTRI
Editor’s Page

I feel delighted to present the XXXIVth issue of JTRI Journal to its readers.

The vision of the Institute is to empower the judges with knowledge so that the constitutional vision of Justice is accomplished. The challenge of Judicial Education today is to develop humane judges.

Judicial Education relates to the shaping of Judges, building up of judicial qualities, attitudes and Skills. The Institute adopts all possible modern aids and techniques of imparting Judicial Education. The Institute also focuses on experiential learning for better sensitization on social issues. Another way of learning by way of sharing is considered one of the important tools of Judicial Education. We provide such platform and opportunity on regular basis for effective learning. Benjamin Franklin has said that “Tell me and I forget, teach me and I may remember, involve me and I learn.”

The Judicial Training & Research Institute, UP is constantly involved in providing Judicial Education and Training to the Judicial Officers and other stakeholders of Justice delivery with a view to improve capacity building and Justice Delivery. For the last three years we are constantly busy in providing the Induction training and in-service/refresher training programme under the 13th finance commission.

In pursuit of excellence, the institute is constantly engaged in research activity along with the training programmes and have been providing reading material to the trainee officers for assisting them in smooth functioning. Apart from above, we have been publishing quarterly digest containing the latest pronouncements/directions of Hon’ble Court, for benefit of all.

The Institute is regularly publishing its Journal containing the periodic events/programme undertaken by the institute and articles on legal subjects of contemporary importance, written by the Hon’ble Judges of Supreme Court of India and Allahabad High Court, Academicians, faculty members, judicial officers and students of law.

The present issue of Journal contains 23 articles/Speeches, starting with the Article of Hon’ble Mr. Justice F.M. Ibrahim Kalifulla on the topic Professional Ethics: Issues and Challenges & The Art of Advocacy. His Lordship has beautifully focused on the issue of Professional Ethics of the Bar and Bench simultaneously. The article on ‘International and National Initiatives for Conservation of Biodiversity’ focuses on the Evolutionary concept of Biological Diversity at the international level and the present
Governance of the Biodiversity at national level; Article on ‘Access to Justice: International Environmental Law’ discusses the Environmental Law at International level in totality and also prescribes the future pathway to this new and challenging stream of law; Article on “Role of Ethics in Dispensation of Justice” discusses the Ethical Principles and relevance in Dispensation of Justice; ‘Women and Law in All Times’ discusses protection available to Women in India since ages either in the form of legal protection or in other modes; ‘Harnessing Youth Power in National Building’ is a critical appraisal of the National Youth Policy of India comparing the Policy at International Level and thus suggests the future road for capturing India’s Demographic Dividend in the right and meaningful direction; Article on ‘Section 169 Criminal Procedure Code’ deals with the issues & concept involving remand of accused in different matters; Article on ‘Inclusion of Deemed Dividend in the Income Tax Act—A Need’ is discussing the most pertinent issue of Dividend per se Income Tax Policy in India; ‘Global Warming – Industry and Environment’ which discusses the issue of Global Warming as an impact of Industrial pollution and the remedial measures available to control it legally at International and National Levels; Article on ‘Development of Environment Laws in India’ sees the evolution of Environmental laws at International and National level, and how Judiciary has helped in this evolutionary principle in the country through Judicial Activism. In addition to it the it discusses the laws present in the country to protect the environment; Article on Climate change and Environmental Law—Reduction of Emissions Due to Deforestations and Environmental Degradation in India: Issues and Concerns’ seeks to explain the REDD Agenda, its implications and the issues regarding its effective implementation in India; Article on ‘Dynamic Rule of Interpretation’ involves a study of leading cases decided in India and other countries in which technique of updating/creative interpretation was applied in order to give effect to purposes of the law in view of the scientific, technological, social developments and declarative theory of Judicial Decision; Lily Thomas: A Milestone in the way of Political Reforms is a very timely and significant discussion for future of democracy and political reforms through Judicial Intervention; Article on ‘Conservation of Biological Diversity with reference to Intellectual Property Rights’ is discussing the burning
issue of Intellectual Property in the area of Biodiversity, with specifically inquiring into how developed countries are the seeing the issue and what is the present scenario in our country to tackle the infringement cases; Article on ‘Criticism of Judicial Pronouncements vis-a-vis Freedom of Speech’, is again taking up one of the most emerging issues in Judicial Reforms by seeing the issue of freedom of expression against the Judicial Precedents and their implication on the society. Article on ‘Human Rights Violations and Remedy For: An Analysis of Indian Judicial System’ discusses the role of Judiciary in curbing the menace of Human Rights Violations. The Article also discusses the challenges in pathway of their implementation and simultaneously suggestions are given for better enforcement of Human Rights; Article on ‘Codified Laws versus Personal Laws: Why Uniform Civil Code Imperative for India discusses the Uniform Civil Code with respect to women’s right and challenges and issues with respect to personal Law; Article on ‘Imprisonment of Life: A trend towards Limiting Powers of Remission’ is discussing the latest judicial trend which is likely to create greater conflict between the legislative Penal Policy and in execution. Article on ‘Legal Aid for Capital Offenders: A critical Analysis’ seeks to critically analyze the provisions for legal aid for capital offenders and the gap therein, in theory and practice; Article on ‘Role of Judiciary as a Vector for Social Engineering In India’ discusses the concept of social engineering through various case laws and their impact on the Societal Changes seen by. Article on ‘Facebook and the Law Nothing Private about it’, is also very relevant in emerging scenario of greater use of Social Media in everyday and every ones life. Article on ‘Administrative Tribunals: A grievance Redressal Machinery’ is seeing the emergence and importance of tribunals in totality. ‘Article on Human Trafficking: Issues & Challenges’ deals with the magnitude of problem in the country the statutory provisions to address the challenges.

We are highly obliged to Hon’ble Mr. Justice F.M. Ibrahim Kalifulla, Judge, Supreme Court of India, Hon’ble Mr. Justice Sunil Ambwani, Judge, Allahabad High Court, Hon’ble Mr. Justice Ashok Bhushan, Judge, Allahabad High Court, Hon’ble Mr. Justice Pankaj Mithal Judge, Allahabad High Court, Hon’ble Dr. Justice Satish Chandra, Judge, Allahabad High Court and Hon’ble Mr. Justice Satya Poot Mehrotra, Former Judge, Allahabad High
Court, for their valuable contribution in terms of articles to enrich the Journal. We also express our gratitude to all the authors who have contributed articles in this Journal.

The Institute is extremely grateful to the Hon’ble Judges of the High Court, Especially Hon’ble the Chief Justice, Hon’ble Dr. Justice D.Y.Chandrachud, the Patron- in- Chief of this Institute. The Institute also express gratitude to Hon’ble Mr. Justice Uma Nath Singh, Judge, Allahabad High Court. We are also grateful to the members of Hon’ble Committee, Judicial Education, i.e. Mr. Justice Intiyaz Murtaza, Judge, Allahabad High Court, Lucknow-Bench, Hon’ble Mr. Justice Devi Prasad Singh, Judge, Allahabad High Court, Lucknow-Bench & Hon’ble Mr. Justice Sudhir Kumar Saxena, Judge, Allahabad High Court, Lucknow-Bench for Their Lordships’ patronage, guidance and blessing which have been a constant source of inspiration to this Institute. We are also thankful to Hon’ble Mr. Justice Bhanwar Singh, Chairman, JTRI, UP, Lucknow for his valuable advice and guidance.

The Institute appreciates the efforts of all the faculty members namely, Dr. Anupam Goyal, Additional Director (Research), Dr. Ajay Kumar-II, Additional Director(Administration), Sri Rajeev Bharti, Additional Director (Training), Sri Ram Manohar Narayan Mishra, Additional Director, Sri A.K. Awasthi, Additional Director (Under 13th Finance Commission), Sri O.P. Srivastava, Additional Director (Finance), Sri Mahendra Singh, Deputy Director, Sri Pushpender Singh, Deputy Director, Sri Akhileshwar Prasad Mishra, Deputy Director, Sri Ravindra Kumar Dwivedi, Deputy Director, for giving full cooperation in the work. I express my thanks to the staff of JTRI particularly Sri Anurag Singh, Training Officer, who remained the main instrument in successfully completing the task of training, more particularly to Mr. D.C. Kapri, Personal Assistant, who undertook the task of bringing the Journal in proper shape.

Inspite of our meticulous care, it is possible that some errors and omissions may have escaped unattended. Any discrepancies or mistake if found by our readers, may be immediately brought to the notice of this institute. Views expressed in the articles published in the Journal are solely that of Author of the article.

In the last we invite your views and request contribution in the next JTRI Journal.

( U.S. Awasthi )

Director
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HIGHLIGHTS OF TRAINING PROGRAMME & EVENTS

TRAINING PROGRAMMES

The Judicial Training and Research Institute, U.P., was established by the Government of Uttar Pradesh in collaboration with the High Court of Judicature at Allahabad in pursuance of a decision taken at All India Conference of the Chief Justices held in the month of August/September, 1985 in New Delhi. The Institute became functional on 25th April, 1987. Hon’ble Mr. Justice K.N.Goyal, Former Lokayukta, Uttar Pradesh and Former Chairman, State Law Commission, U.P. was the first Honorary Director of the Institute.

Presently, Hon’ble Mr. Justice Bhanwar Singh, Former Judge of Allahabad High Court is the Chairman and Sri U. S. Awasthi, HJS, who is amongst the senior District Judges of U.P., is the Director of the Institute.

The vision of the Institute is ceaseless up-gradation of skills and appropriate attitudinal reorientation through induction level and in-service training in consonance with the imperatives of national and global environment.

During the last one year, the institute has been actively involved in providing induction and in-service training to the Judicial Officers of the state. Apart from above, the institute has been providing training to the members of Prosecuting Officers, DGCs, Members of Juvenile Justice Boards, Court Managers, Deputy Registrars of Hon’ble Allahabad High Courts, and Officers of other Government Departments such as IFS (Probationers), Senior Forest Officers etc.

At JTRI we focus on Training as a tool of performance with inclination on development of right skills and attitudes. In the training programmes, case studies, incident methods, discussion sessions, exercises and activity based studies are used extensively. To make the discussion effective, background material is given before discussion. This helps the trainees to develop analytical skills and decision-making power in addition to enable them in writing orders/judgments. The emphasis is also on experiential learning for sensitization on various social and burning issues.

INDUCTION TRAINING PROGRAMME

The Institute regularly conducts Judicial Training to the newly appointed officers as per the approved syllabus. Special care is taken so that the officer adapts to culture and environment of Judiciary. The development of right attitude focused towards constitutional vision is also one of the aspects being addressed by us. During the training, practical aspects of Courts working is also covered with the development of Order Writing & Judgement Writing Skills.
Hon’ble Dr. Justice Dhananjaya Y. Chandrachud, Chief Justice of Allahabad High Court being welcomed by Sri U. S. Awasthi, Director, J.T.R.I. by presenting a bouquet.

The Institute is regularly conducting induction training programmes for newly appointed Judges in Civil Judge(J.D) Cadre and Additional District Judges (Direct recruits of HJS Cadre).

The training methodology adopted, while imparting training to the new entrants has been a combination of lectures, Group Discussions, Demonstration/ Visit to different Organisations/Institutions, Case Studies, extensive exercise on Order Writing & Judgment Writing, Workshops/Seminars and paper presentations.

The Institute is fortunate that it has a rich intellectual capital/ Resource Persons. Hon’ble Judges of Supreme Court & High Court, Professors & Eminent Jurists, Social Activists, Experts of Forensic Science & Medico Legal Jurisprudence, IAS Officers, Senior Police Officers are on the panel of resource persons, who have been guiding and enlightening the trainee officers. Apart from the Chairman and the Director, the regular faculty of the Institute are Officers of Higher Judicial Services and Civil Judge (S.D.) cadre.

INDUCTION PROGRAMME OF NEWLY APPOINTED CIVIL JUDGES (JUNIOR DIVISION)

The Institute started Induction programme for 67 Newly Appointed Civil Judges of 2012 Batch, which was inaugurated by Hon’ble Mr. Justice Shiva Kirti Singh, the then Chief Justice, Allahabad High Court (Presently Judge Hon’ble Supreme Court of India), on 09.09.2013.

The Institute is conducting the induction training programme since 1987 and this was the 12th Batch of newly appointed Civil Judges (Junior Division). The Training programme includes Six Months Institutional Training in Two Phases of 3 months and Six Months Field Training at District Court. The curriculum of Induction Training is also approved by Hon’ble High Court in Consultation with the National Judicial Academy.

INDUCTION TRAINING PROGRAMME FOR ADDITIONAL DISTRICT JUDGES

The Induction Training Programme of 40 Newly Appointed Addl. District Judges of 2012 Batch was inaugurated by the “Chief Guest” Hon’ble Mr. Justice Uma Nath Singh, Senior Judge, Allahabad High Court, Lucknow Bench and In-charge Judicial Education, in the august presence of “Guest of Honour” Hon’ble Mr. Justice Sudhir Kumar Saxena, Judge, Allahabad High Court, Lucknow Bench and Member Training Committee on 07.11.2013 at JTRI.

The duration of Induction Training Programme for Addl. District & Sessions Judges was for three Months. The First phase of Institutional Training at JTRI was held from 07.11.2013 to 06.12.2013. The Field Training took place at different District courts of Uttar
Hon’ble Dr. Justice Dhananjaya Y. Chandrachud, Chief Justice, Allahabad High Court, Addressing the Trainees of Direct Recruits of H.J.S., newly appointed Civil Judges (J.D.), Deputy Registrars of Allahabad High Court & Court Managers of U.P.

Trainee officers of direct recruits of HJS, Deputy Registrars of High Court and Court Managers of U.P. attending the august gathering on the occasion of visit of Hon’ble Dr. Justice Dhananjaya Y. Chandrachud Chief Justice of Allahabad High Court.
Pradesh from 07.12.2013 to 06.01.2014. The Third phase of Institutional Training was held at JTRI from 07.01.2014 to 06.02.2014.

The Syllabus Includes Procedural Laws, Substantive Laws, UP Local Laws, Appreciation of Evidence in Civil & Criminal Matters, Civil/Criminal Revision/Appeals, Special Laws, Knowledge of Court Management & Case Management, Docket Management, Behavioural Sciences, Forensic Science and Medico Legal Jurisprudence, Sensitization on Social Issues, ADRs, Speedy Justice, Access to Justice for Marginalised persons, Attitudinal Development etc. Special focus was also on writing Orders & Judgements.

**IN-SERVICE/ REFRESHER TRAINING**

The Institute imparts professional training to serving officers to enable them update their knowledge of law and to acquaint themselves with latest amendments in statutes, rules and regulations and with the pronouncements of the Apex Court and the High Courts, particularly Allahabad High Court. Regular 5 days Refresher Training programmes for all the Judicial Officers of Uttar Pradesh are being organized in the Institute. All the In-service refresher training programmes are organized under the 13th Finance Commission Scheme for Capacity Building of the Judicial Officers. The Judicial officers of the State are being provided training in three rounds which is to end in March, 2015. The Institute has commenced third round of refresher training programme for the Judicial Officers from January 2014 Onwards.

Broadly, the following areas were focussed to enhance Knowledge, Attitude and Skills of Judicial Officers.

a) Sectoral/social & emerging areas of Jurisprudence such as gender justice, juvenile justice, ADRs, etc.

b) Topics relating to Organisational Behaviour such as Conflict Management, Motivation, Leadership, Stress Management, Morality & Ethics, Management of Change emphasising on Attitudinal Development.

c) Sensitisation programme including Access to Justice to marginalized: women, child, downtrodden etc.

d) Topics relating to the latest laws & Amendments such as Cyber Crimes, Intellectual Property Laws, Economic Laws and the latest amendments in existing laws are also taken up in the refresher training.

e) Special Sessions/Group discussions focussing Speedy & Qualitative Justice: Sessions on Time Management, Alternative Dispute Resolution Mechanisms, Judgement writing Skills, Case Exercises on disposal of cases under 258 Cr.PC, Plea Bargains, Final reports etc are also being organised in the Institute.

Subjects relating to day to day functioning in Courts with latest Case Laws/Trends such as Bail, Remand, Procedural Laws, Sentencing, Appreciation of Evidence etc. in
Hon’ble Mr. Justice Sunil Ambwani, Judge, Allahabad High Court giving certificate of training at IIM, Lucknow to the Court Managers.

Hon’ble Mr. Justice Sunil Ambwani, Judge, Allahabad High Court giving certificate of training at IIM, Lucknow to the Court Managers.

Hon’ble Mr. Justice Sunil Ambwani, Judge, Allahabad High Court & Other faculty members during valedictory session of Management Development Programme for Court Managers.

Trainee Court Managers attending Management Development Programme on “Managerial effectiveness” at IIM, Lucknow.

Trainee Judges attending programme on “Managerial Effectiveness for Judicial Officers” at IIM, Lucknow.

Trainee Judges attending programme on “Managerial Effectiveness for Judicial Officers” at IIM, Lucknow.

Trainee Judges attending programme on “Managerial Effectiveness for Judicial Officers” at IIM, Lucknow.
a) Criminal Side and Injunction matters, Procedural Laws, appreciation of evidence, Specific relief Act etc. are covered on Civil Side.

b) Duties performed by Judicial Officers other than Judicial Work: For developing competence in other areas such as conducting enquiries, Financial matters etc, regular sessions were organized in the institution.

c) Training on the UBUNTU 12.04 LTS Operating System and the application Software are being regularly imparted by the Institute to the Judicial Officers.

Since January 2013, 22 numbers of refresher training programmes have been organized for Civil Judges covering 1198 numbers of Officers and 13 Training programmes of Additional District Judges covering 703 numbers of Officers.

SPECIAL PROGRAMMES FOR OFFICERS IN THE ZONE OF CONSIDERATION FOR PROMOTION TO THE CADRE OF ADDITIONAL DISTRICT JUDGE.

Special Programmes were organized for Officers who were likely to be promoted to Additional District Judge Cadre. During the year, 2 Nos. of Programmes of one week duration were conducted covering 103 numbers of Officers. Topics relating to reversion, Appeal in Civil/Criminal Matters, Session Trials, Appreciation of Evidence, Special Laws Such as NDPS Act, SC/ST Act etc. were also covered with the objective that they are imparted training to take up the challenges of new assignments.

MANAGEMENT TRAINING AT IIM, LUCKNOW

We have conducted Management Training programme in collaboration with Army Institute of Management & Training (AIMT) covering around 900 officers. The Judicial Training & Research Institute has now tied up with IIM, Lucknow for providing training to the remaining 1200 officers. The programme being organized at IIM, Lucknow is of 5 days duration. So far, 14 numbers of training programme were conducted at IIM covering 365 Numbers of Judicial Officers. The Topics covered include Governance in Judiciary, Managing Mediation and Counseling, Values & Ethics, Court management, Leadership & Motivation, Management of Change, Performance Management, Attitude and Perception, Interpersonal Relation skills, Advance Communication skills, Stress & Time Management, Creative Nudge for Effective Management.

BASIC AND MASTER TRAINERS’ PROGRAMME ON UBUNTU OPERATING SYSTEM/APPLICATION SOFTWARE.

The Institute organised Basic and Master Training Programme on UBUNTU 12.04 LTS under the guidance of e committee, Supreme Court of India and Hon’ble Steering
3rd REGIONAL CONFERENCE OF
DISTRICT JUDGES/NODAL OFFICERS

Sri U.S. Awasthi, Director, JTRI, UP Welcoming
Hon’ble Judges of Allahabad High Court.

Hon’ble Mr. Justice Sunil Ambwani, Judge, Allahabad
High Court addressing the participants

Hon’ble Mr. Justice Dilip Gupta, Judge, Allahabad
High Court addressing the participants

Hon’ble Mr. Justice S.K. Saxena, Judge, Lucknow-
Bench & Member, Training Committee JTRI
addressing the participants

Participants interacting in the 3rd Regional Conference,
at JTRI, UP
Committee, Allahabad High Court for Judicial Officers of Uttar Pradesh. The Basic Training Programme of 2 days duration was organised for Judicial Officers of Uttar Pradesh covering 167 Officers. The Specialized Master Trainer Course for State of Uttar Pradesh and Rajasthan was also conducted at JTRI which was attended by 22 Judicial Officers. Overall 6 Such Course were conducted in the Institute. Apart from above, in the refresher training programmes for Judicial Officer, regular Sessions were conducted on the above topics.

3rd Regional Conference of District Judges/Nodal Officers of U.P.

The 3rd Regional Conference of District Judges & Nodal Officers of Uttar Pradesh was organized in JTRI by the Hon’ble Steering Committee, E court Project, Allahabad High Court. The Programme was inaugurated by Hon’ble Mr. Justice Sunil Ambwani, Judge, Hon’ble Allahabad High Court & Chairman E committee & Hon’ble Mr. Justice. Dileep Gupta, Judge, Hon’ble Allahabad High Court & Member E committee.

In the above Conference, status of computerization, data feeding and initiation of services of participating Districts was discussed and a road map was chalked out for effective compliance of the Computerisation/e court project.

Training Programme for Other Stake Holders

1. Specialised Programme for Prosecuting Officers.

Total 3 Programmes of 5 days duration was organized in JTRI under 13th Finance Commission covering 153 prosecuting Officers. Subjects included Role & Challenges before Prosecutors in Criminal Justice Administration, Appreciation of Evidence in Criminal Matters, Law of Probation, Sentencing and Victimology, Recent amendments in CrPC, Hostility & Compounding of Offence, Art of Prosecution, Protecting dignity of women appearing in courts, Law of Bails, Gender Justice, Speedy Justice, Access to Justice to marginalized, Effective legal writing, Computer Training etc.

2. Special Training Programme for Members of Juvenile Justice Board

Special Training programme for Members of Juvenile Justice Board on “Child Psychology and Child Welfare” for Members of Juvenile Justice Board was conducted covering 33 numbers of members of Juvenile Justice Board. The Duration of Programme was 3 days. The Broad topics included Concept Objective & Scheme of Juvenile Justice (Care & Protection of Children) Act., 2000, Determination
Hon’ble Mr. Justice Shiva Kirti Singh of Allahabad High Court & other Hon’ble Judges inaugurating Inducting Training Programme of Civil Judges (J.D.)

Hon’ble Mr. Justice Uma Nath Singh, Senior Judge, Lucknow Bench addressing the trainee officers

Hon’ble Mr. Justice Rakesh Tiwari, Judge, Allahabad High Court addressing the trainee judges

Hon’ble Mr. Justice S.K. Saxena, Judge, Lucknow Bench & Member, Training Committee, JTRI, U.P. addressing the trainee Judges.

Hon’ble Mr. Justice Bhanwar Singh, Chairma, JTRI, UP, addressing the trainee judges.
of age: Medico-legal aspects, Child psychology, Making of Self Image, Sensitisation of Child Issue, Transactional Analysis, Role & function of Board and responsibility as Member of the Board.

3. SPECIAL TRAINING PROGRAMME FOR COURT MANAGERS

A post of Court Manager has been created for every district of Uttar Pradesh under the recommendations of 13th Finance Commission Scheme. The Basic purpose of creation of the post of Court Managers was that a person with Management skills/experience can inject a scientific approach and managerial skill to assist in improvement of the working of Courts to deal with all the issues relating to dealing/holding with arrears/backlog of cases, effective budget utilization, infrastructural and other issues.

The Court Managers may not have any idea about legal and judicial system and the functioning and work culture of the district courts. Therefore, for effective utilization of services of these Court Managers, they are sufficiently required to be given exposure about the Judicial System and functioning of Courts. Keeping this idea in mind a tentative syllabus was designed by this Institute covering every aspect relating to functioning of Court so that Court Managers may render fruitful services to the litigants and Judicial System.

Total 20 numbers of Court Managers were imparted training in Judicial Training & Research Institute which Started on 18.11.2013. The Duration of the Training Programme of Court Managers was 6 days. **25.11.2013 to 30.11.2013.**

The Broad Topics Covered were: Judicial System - Need of Court Manager, Working: Role and Profile of Court Managers and Challenges before them, Civil Court Organisation & its Functioning, Hierarchy of Criminal Courts and Functioning, GPF & Pension related provisions, Functioning of English Office, Administrative and other Offices in Courts, General Rules (Civil & Criminal), Circular Orders of High Court, Government Servant Conduct Rules, Service Rules, Leave Rules, Functioning of Record rooms, Nazarat, Court Management/Docket Management and Case Flow Management, Legal Aid, ADR and Access to Justice: Scheme and Implementation, Policies and Directions of Hon’ble Courts regarding Monitoring and Reduction of Arrears and backlog, Store Purchase Rules, Tender, Auction etc., Administrative Correspondence, Computers: UBUNTU/Linux Awareness with Open Office/Libre Office etc.
Hon'ble Mr. Justice Bhanwar Singh, Chairman, J.T.R.I., Hon'ble Mr. Justice S.N. Shukla, Judge Allahabad High Court, Lucknow Bench, Sri. U.S. Awasthi, Director, J.T.R.I. Sharing the dais at the inaugural session of Refresher Training Programme for Civil Judges.

Hon'ble Mr. Justice Bhanwar Singh, Chairman, J.T.R.I., Hon'ble Mr. Justice Sudhir Kumar Saxena, Judge, Allahabad High Court, Lucknow Bench, Sri J. S. Asthana, Principal Chief Conservator, Forest, U.P., Lucknow. Sharing the dais at Special Training Programme for Senior Forest Officers. The dais at the inaugural session of Refresher Training Programme for Civil Judges.
4. MANAGEMENT DEVELOPMENT PROGRAMME AT IIM, LUCKNOW FOR COURT MANAGERS

As per the directions of Hon’ble Court, Management Development Programme on “Managerial Effectiveness” for Court Managers was organized from 25.11.2013 to 30.11.2013, in consultation with IIM, Lucknow. The following topics were covered during the programme: Management Information System, Contract Management & Inventory management, Leadership & Motivation, Court Management & Case Management, Management of Change, Attitude & Perception, Budgeting/Financial Management, Manpower Planning, Advance Communication Skills, Time Management & Stress Management, Creative Nudge for Effective Management.

5. PROGRAMME ON COMPUTER AWARENESS/CASE INFORMATION SYSTEM (CIS):

Hon’ble E-Committee, Supreme Court of India has customized a Data Base Management Software, Case Information System (CIS). The Institute has been providing training to the staff of subordinate courts under the guidance of Hon’ble Steering Committee, Hon’ble High Court. Till date 208 nos. of staff (11 programmes) of subordinate courts have been imparted training on CIS/computer awareness.

6. LEGAL TRAINING PROGRAMME FOR DY. REGISTRARS OF HON’BLE ALLAHABAD HIGH COURT.

Under the directions of the Hon’ble High Court, Allahabad Legal Training was organized for Dy. Registrars by JTRI, U.P. The Programme was divided into three phases of one month duration which starting from 26.08.2013 to 25.11.2013. The Programme was attended by 18 Trainees Dy. Registrars.

In the first phase, Institutional training was provided in JTRI for one month. The broad topics such as Constitutional Law, Substantive Laws, Procedural Laws, High Court Rules, GR (Civil & Criminal) & Behavioural aspects were covered. During this phase, the Methodology of training was lecture and group discussion, with a view to enrich them with knowledge of law and procedure. Thereafter in Second Phase, the Participants were sent to Hon’ble High Court to observe the practical working of different departments/Sections with the direction to submit an exhaustive report. In the third phase, Institutional Training was provided to the participants on the topics relating to Financial Management, Personnel Management & Court/Office Management. The Scholars of various fields/Experts Guest Speakers were invited to deliver talks/lectures and to share knowledge and experiences with trainees.
1. SPECIALISED PROGRAMME FOR INDIAN FOREST SERVICE (PROBATIONERS)

Special Training programme for “Law, Procedure and Practice” for Indian Forest Service (Probationers) with 5 days duration was conducted covering 62 IFS Probationers.

The Broad Topics covered during the programme were Constitutional provisions with Special Reference to Wild Life and Forest Conservation, International Conventions, National Wild Life Policy and Plan Relevant Provisions relating to Forest Conservation, Wild Life, Environmental Jurisprudence, Trial & Procedure in criminal cases with special reference to Wild Life, Forest Acts, Hierarchy of courts and powers, Recent trends & Case laws, Provisions of Evidence Act with special reference to Forest Act & Wild Life etc.

2. SPECIAL TRAINING PROGRAMME ON LEGAL ASPECTS OF BIOLOGICAL DIVERSITY FOR SENIOR OFFICERS OF FOREST DEPARTMENT

Special Training Programme was organized on Legal Aspects of Biological Diversity on 23.02.2014. The Programme was attended by Conservators /DFOs posted in different districts/Department of Uttar Pradesh. Total 25 nos. of Senior Officers participated.

The Programme was inaugurated by Hon’ble Mr. Justice S.K Saxena, Judge, Allahabad High Court, Lucknow Bench in the gracious presence of Hon’ble Mr. Justice Bhanwar Singh, the Chairman, JTRI, UP & Shri J.S. Asthana, Principal Chief Conservator of Forest.


In addition to above, the Institute has also been co-ordinating the training programmes organized by UP State Legal Services Authority.
MEMORABLE EVENTS

INAUGURATION OF WOMEN’S HOSTEL IN JTRI CAMPUS

Hon’ble Mr. Justice P. Sathasivam, the then Judge, presently Chief Justice of India, Supreme Court of India inaugurated the Women’s Hostel in JTRI Campus ON 18th May 2013 in the august presence of Hon’ble Dr. Justice B.S. Chauhan, Judge, Supreme Court of India, Hon’ble Mr. Justice Shiva Kirti Singh, the then Chief Justice, Allahabad High Court and Hon’ble Judges of Allahabad High Court.

The Women’s Hostel has been constructed with the funds provided of 13th finance commission, having facilities of 25 air-conditioned rooms, kitchen, Dining hall and recreation room for Lady officers.

INAUGURATION OF SERVER ROOM & INSTALLATION OF HIGH SPEED INTERNET FACILITY IN THE ADMINISTRATIVE & TRAINING WING.

Hon’ble Mr. Justice Bhanwar Singh, The Chairman, JTRI inaugurated the Server Room in JTRI Campus on 08.05.13, which is also equipped with High Speed Internet facility & Wi-fi facility in Administrative Building & Training wing. This Institute has become the first Judicial Training academy in the country to be connected to the National Knowledge Network grid. The facility is being expanded to the entire campus in 2014-15 with integrated online Library facility, catalogue & Video-Conferencing facility & Smart Class Rooms etc.

INFRASTRUCTURE/ICT EXPANSION PLANS

a) Construction of 500 seating capacity auditorium is in progress which is likely to be completed in 2014.
b) Video Conferencing & Smart Class rooms in training wing.
c) Integrated Networking with Computerisation of entire campus.
d) Modernisation of Class Rooms & Computer Lab.
e) Multipurpose Sports Hall comprising of indoor games such as Badminton courts, Table Tennis, Gymnasium etc.
ARTICLES
PROFESSIONAL ETHICS: ISSUES AND CHALLENGES
&
THE ART OF ADVOCACY

Hon’ble Mr. Justice F.M. Ibrahim Kalifulla¹

1 - Introduction

I am happy that the Judicial Training and Research Institute of the Allahabad High Court, is publishing its journal for the benefit of the members of both the Judiciary and the Bar. It is needless to say that the members of the Judiciary are chosen from the cream of the members of the Bar. Therefore, I feel that the time has now come for us to introspect about the measures to be taken to maintain the standards of the Bar in order to ensure that we get good judges. With that view, I have attempted to highlight imminent necessity to think about the various nuances of professional skill, which the members should know and practice to achieve our goal. My endeavour can be well understood by making reference to what Justice MC Cardie stated²;

“the alternative to reign of law is the chaos of the jungle. Imagine what would be the state of things if every litigant were to plead his own cause. Conceive, if you can, a Court without a Bar. Conceive the situation of a judge set to try causes and administered legal rights between party and party without the aid of professional advocates.”

To me, the Bar is an essential component of our legal system and it is paramount that both the Bench and Bar coexist harmoniously with each other and together they can contribute effectively in achieving greater heights in the field of law. I have been asked to give a speech on the topic “Professional Ethics: Issues and Challenges” to which I have added “The Art of Advocacy”, but before I divulge into the topic, I think I must spare a few words about the legal profession, its place and order in society and its responsibilities.

The profession of law is a great profession, the most brilliant and attractive of the peaceful professions, with responsibilities both inside and outside it, which no person carrying on any other profession has to shoulder. It is a great controlling and unifying institution which places upon each his duties, gives to each his rights and enforces from each obligations. It is

¹ Judge, Supreme Court of India. I would like to appreciate & acknowledge the support & contribution of my Law Clerk cum Research Assistant, Mr. Varun Srinivasan.
² Sir Henry Alfred McCardie, High Court of Justice of England and Wales in one of his lectures
composed of a body of men with a high sense of honour and marked by far less mutual jealousy or ill-will than any other. In the words of Mr. Justice McCardie\(^3\),

“the spirit among counsel is one of generous emulation and not the spirit of embittered and petty rivalry. The brotherhood of the Bar is a notable and felicitous fact.”

Law is a learned profession not merely in the sense that learning is displayed in the practice of it, but that it calls for the high and noble conduct which is a corollary and consequence of all true learning. As Burke\(^4\) has observed,

“Law is a science which does more to quicken and invigorate the understanding than all other kinds of learning put together.”

In the practice of the profession, the lawyer has to deal with the greatest possible variety of human relations and have his mettle constantly tried from every point and it gives him a special opportunity to equip himself with those qualities, which count for pre-eminence in society. The capacity to analyse and sift facts, to penetrate the inmost recess of the human mind and to discover there the sources of men’s actions and their true motives, and to perceive and present them with directness, accuracy and force, are qualities which the practice of the profession both demands and develops. His genius to achieve results and peculiar gift of mastering and disentangling complex situations, have won for him the reputation that a lawyer can achieve anything. His profession is, amongst all the learned professions, the most independent one. Its independence, which can never be lost sight of, is the bed-rock upon which it claims to lead the country are based. No member of the legal profession ever hesitates to condemn injustice and tyranny. These qualities which he possesses by education and by training make him the leader of society as a matter of course.\(^5\)

But it is also stated that the practice of the profession is inconsistent with the stern sense of moral obligation and involves an amount of dishonesty and untruth on the part of the practitioner. This again to me is a misconception. The art of advocacy which is assumed to be the art of ‘making the worse appear the better reason,’ is one to which many lay minds appears incompatible with truth and justice. Whatever the profession, it can be practiced well or ill and the guilt of a few cannot be regarded as the disposition of the many. “As there are spots in the sun so may there be blemishes in the Bar.” Oftentimes there is honest disagreement on facts between parties and the advocate is bound to present his client’s case in the best possible aspect. I am certain that the practice of the profession involves nothing which can be said to be in disregard of truth. Lord Macmilian\(^6\) says;

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\(^3\) Ibid. 2

\(^4\) Full text: “The law is a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together; but it is not apt, except in persons very happily born, to open and to liberalise the mind exactly in the same proportion.” (LAM,15-17)

\(^5\) K.V. Krishnaswamy Aiyer, in his book “Professional Conduct and Advocacy”

\(^6\) Hugh Pattison Macmillan, Judge, House of Lords, in one of his decisions
“Once the vital point is realized that the advocate in court is engaged not in expressing his own views of the case but is presenting and marshaling all that can be said of his client’s view of it, all room for the charge of insincerity disappears.”

A gibe which is also cheaply made by persons, who ought to know better, that the lawyer is a venal person who prostitutes his talents for money, is malicious as it is untrue. Hence, the very profession of law being a noble one, it is up to advocates to ensure that people respect and not despise it. We have been blessed with the likes of Gandhi, Ambedkar, Palkivala, who besides being great Advocates and contributors to the field of law have lived their lives with the highest sense of justice, ethics and the moral obligation to give back to society and are the very embodiment of how a lawyer should be. It is the duty of a ‘Noble’ Advocate to safeguard law, assist justice and help prevail peace in society, even at the cost of his monetary interests. The nobility of his profession calls for settling the disputes and avoiding furtherance of these disputes by every possible means. Thus, the advocate should put before his clients the drawbacks in seeking court’s assistance, namely, expenses, prolonged processes, hardships, etc, which could well be avoided. As far as possible he should use the method of persuasion and compromise for settling disputes. Here Mahatma Gandhi’s views may be enlightening:

“I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter man’s hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so deeply burnt into me that a large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – Not even money. Certainly not my soul.”

Hence, it is an advocate’s duty to instill confidence in the public. Even Rule 46 of the 'Standards of Professional Conduct and Etiquette' prescribed by the Bar Council of India requires that "Every advocate shall in the practice of the profession of law bear in mind that any one genuinely in need of a lawyer is entitled to legal assistance even though he cannot pay for it fully or adequately and that within the limits of an Advocate’s economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an advocate owes to society." I sincerely hope that this is followed by young lawyers of today and provide the much needed assistance to people in genuine need and thereby maintain the dignity and reputation of the profession.

In light of this context, I had the pleasant experience where, I along with our Former Hon’ble CJI, Mr. Altamis Kabir, had the wonderful opportunity to start an initiative to provide for free legal assistance to people deprived of legal support, and thereby started a Legal Aid Clinic in the state of Jammu and Kashmir.9

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7 My experiments with the truth p 100
8 As under the Advocates Act, 1961
9 Scheme for Effective Functioning of Free Legal Aid Clinics in the State of Jammu & Kashmir. Jammu & Kashmir State Legal Services Authority (Legal Aid Clinics) Scheme on 21st December 2010 in terms of Order
2 - Professional Ethics

John Stuart Blackie\textsuperscript{10} says;

“A man may be as brilliant, as clever, as strong and as broad as you please and with all these, if he is not good, he may be a paltry fellow and even the sublime which he seeks to reach in his most splendid achievements, is only a brilliant sort of badness. One thing is needful; money is not needful; power is not needful; even health is not needful; but character alone – a thoroughly cultivated will – is that which can truly save us.”

Character is vital in all professions and walks of life, and in the legal profession particularly, the maintenance of the honesty of the lawyer is a matter of the first importance. The most worthy and effective advertisement possible for a young lawyer, especially with his brother lawyers, is the establishment of a well merited reputation for professional capacity and fidelity to trust. To me an advocate without character is like a ship without a rudder.\textsuperscript{11} As Lord Jeffrey\textsuperscript{12} puts it, “A good name, like good will, is got by many actions and lost by one.”

Also as said by Mahatma Gandhi, “A ‘No’ uttered from deepest conviction is better and greater than a ‘Yes’ merely uttered to please, or what is worse, to avoid trouble.”\textsuperscript{13} Hence, to me character is the most essential component of ethics and is something which every advocate must develop and exercise in their daily lifestyle. As Judge Donovan points out, “the foundation of a lawyer’s fortune is character.......out of sight, yet never out of mind and never out of hearing......character grows from every transaction, little & large.”

2.1 - What is Ethics?

The term Ethics I believe, is something, which all of us inherently possess. We can refer to it using different terminologies, but to me ethics is two things. First, ethics refers to well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues. For example, it refers to those standards that impose the reasonable obligations to refrain from rape, stealing, murder, assault, slander, and fraud. It also includes those that enjoin virtues of honesty, compassion, and loyalty. It comprises of standards relating to rights, such as the right to life, the right to freedom from injury, and the right to privacy. Such standards are adequate standards of ethics because they are supported by consistent and well-founded reasons.

Secondly, ethics refers to the study and development of one's ethical standards. As mentioned above, feelings, laws, and social norms can deviate from what is ethical. So it is necessary to constantly examine one's standards to ensure that they are reasonable and well-founded. Ethics also means, then, the continuous effort of studying our own moral beliefs and our
moral conduct, and striving to ensure that we, and the institutions we help to shape, live up to standards that are reasonable and solidly-based.

When standards of professional conduct are applicable to members of the legal profession, we call them Legal Ethics. In the words of Chief Justice Marshall\(^\text{14}\) “The fundamental aim of legal ethics is to maintain honor and dignity of the Law profession, to secure a spirit of friendly cooperation between the Bench and the Bar in the promotion of higher standards of justice, to establish honorable and fair dealings with the counsel, with his clients, opponent and witnesses”.

2.2 – Ethical Issues & Challenges

Most of you who have joined the Bar recently, must have formed an idea as to the concept and the role played by the profession in the administration of justice. The word ‘ethics’ only means rules of conduct pertaining to a particular class of human action. When we, therefore, talk of ethics of the legal profession, we only refer to the action of members of the Bar in the discharge of their duties and obligations and in the exercise of their rights and privileges. K.V. Krishnaswamy Iyer, a prominent advocate of the then High Court, in the composite State of Madras, said with reference to the members of the Bar;

“In your dealings in and outside Court, you should always bear in mind that every member of the Bar is a trustee for the honour and prestige of the profession as a whole.”\(^\text{15}\)

This is the quintessence of legal ethics and though several years have gone by, even today a member of the Bar continues to be so, vis-à-vis, the profession of law. This is a message, which you have to keep in mind always.

As DRINKER in his ‘Legal Ethics’\(^\text{16}\) observes,

“A lawyer will be constantly confronted with conflicting loyalties which he may have to reconcile……..He is answerable not only to his client whose interests it is his prime duty to serve and promote, but also to the court of which he is an officer and further to his colleagues at the Bar and to the traditions of the profession.”

The issues and challenges pertaining to the ethics of advocates, is such a wide and vast subject that it is not possible to cover it within the compass of a single lecture; I find you will be having a number of lectures on this subject by experienced lawyers and judges. I shall endeavor however to tell you some matters which I consider worth your while to know.

I. Advocates’ duty towards his clients

“To my clients I will be faithful; and in their causes zealous and industrious. Those who can afford to compensate me, must do so; but I shall never close my car or heart because my client’s means are low. Those who have none and who have just causes, are, of all others, the

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\(^\text{14}\) 4th Chief Justice of the Supreme Court of the United States
\(^\text{15}\) Ibid 5
\(^\text{16}\) Henry S. Drinker, 1953 Columbia University Press, New York
best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.”

In my opinion an advocate owes a duty to his client in several ways;

- He must give a patient hearing to the client.
- He must examine all his papers.
- He must after discussing the case with his client, advice him correctly, even if it be that the advice is not palatable to the client.
- He should account for the clients’ money strictly and return the unspent amount to him.
- He must represent his client in court with undivided fidelity and not divulge his secrets or confidences.
- He should not appear for two clients whose interest’s conflict.
- He should not in any way encourage an illegal transaction.
- When a settlement of pending suit or appeal is proposed, he should give his honest opinion according to the best of his ability and leave it to the client to follow it or not. An advocate should be vigilant to discover chances of compromising controversies. But he should not pressurize the client in that behalf. But where the client stands a great risk, in spite of advice, still desires to fight the case to finish, according to me, it is the duty of the advocate to fight it for him and to use every legitimate argument to bring about success.

Besides this, according to me, a client is also entitled to say to his counsel; “I want your advocacy and not your judgement.” In fact Lord Atken says that, “an advocate may urge freely a view with which he does not himself concur, for it often happens that the opinion of the judge differs from our own. An argument that may not convince us may convince the judge before whom we urge it; and after all, it is his business to judge.”

While discussing the relationship between an Advocate and a client, the Supreme Court in *State of U.P. v. U.P. State Law officers’ Association*[^18^], very categorically, sums up the relationship as follows;

“The relationship between the lawyer and his client is one of trust and confidence. The client engages the lawyer for personal reasons and is at liberty to leave him also, for the same reasons. He is under no obligation to give reasons for withdrawing his brief from his lawyer. The lawyer in turn is not an agent of his client but his dignified, responsible spokesman. He is not bound to tell the court every fact or urge every proposition of law, which his client wants him to, however irrelevant they may be. He is essentially an adviser to his client and is rightly called a counsel in some jurisdictions. Once acquainted with the facts of the case, it is the lawyer’s discretion to choose the facts and the points of law which he would advance.

[^17^]: Resolution 18, Hoffman’s 50 Resolutions
[^18^]: AIR 1994 SC 1654: 1994(2) SCC 204
Being a responsible officer of the court and an important adjunct of the administration of justice, the lawyer also owes a duty to the court as well as to the opposite side. He has to be fair to ensure that justice is done. He demeans himself if he acts merely as a mouthpiece of his client. This relationship between the lawyer and the private client is equally valid between him and the public bodies.”

II. Advocates’ Duty towards the Court

i. Advocate is an officer of justice and friend of the Court:

The cardinal principle which determines the privileges and responsibilities of an advocate in relation to the court is that he is an officer to justice and a friend of the court. This is the primary position. A conduct therefore, which is unworthy of him as an officer of justice, cannot be justified by stating that he did it as the agent of his client. His status as an officer of justice does not mean he is subordinate to the judge. It only means that he is an integral part of the machinery for the administration of justice.

ii. Co-operation between the Bench and the Bar is a necessity:

According to me, the first duty which advocates and judges owe to each other is of cooperation. Co-operation between the Bench and the Bar is not a mere conventional statement. It is a fundamental necessity. Without it, there can be no orderly administration of justice. Sir Cecil Walsh in his book called The Advocate 19 says that:

“Nothing is more calculated to promote the smooth and satisfactorily administration of justice than complete confidence and sympathy between Bench and the Bar”.

iii. What the counsel owes to the court:

a) The first duty which the counsel owes to the court is to maintain its honour and dignity—this is the cardinal principle determining the advocates’ relation in court.

The advocate owes courtesy and respect to the court for the following reasons:

- Because he is the like judge himself, an officer of the court and an integral part of the judicial machinery. The legal position consists of the Bar as well as Bench, and both have common aims and ideals.
- In theory, it is the King or Sovereign who presides in the court of justice, and judge is merely the mouthpiece and representative of the Sovereign. Respect shown to the court is, therefore, respect shown to the sovereign whose representative the judge is.
- Because not only litigants and witnesses but the general public will get their inspiration in this respect from the examples of advocates. It is necessary for the administration of justice that judges should have esteem of the people.

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19 The advocate, his aims and aspirations, Walsh, Cecil Henry, Sir, b. 1869, Allahabad: Printed at the Pioneer Press, 1916

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Because it is good manners, and advocates before anything else are “gentleman of the Bar.”

Even from the purely practical standpoint, there is nothing to be gained but there is much too loose by antagonising the Court. Conflict with the judge renders the trial disagreeable to all and generally an injurious effect on the interests of clients.

Because it is necessary for the dignified and honorable administration of justice that the court should be regarded with respect by the suitors and people.

The advocate should not display temper in court. He will not indulge in any kind of insinuation in the court against the judge. He should convince the judge by argument and reason and not by appeal to his sentiments. While the case is going on, the advocate cannot leave the court without the court’s permission, and without putting another man in charge.

b) The advocate must not do anything which lowers public confidence in the administration of justice

c) It is the duty of the Bar to support judges in their independence because in the integrity of judges lies the greatest safeguard of a nation’s laws and liberties. Judicial independence is the only protection against tyranny and whims of the executive.

d) The advocate must not do anything which is calculated to obstruct, divert or corrupt the stream of justice, for instance, he must not advise disobedience to the courts order and decrees.

e) Another duty which the advocate owes to the court is that of fidelity, he must be honest in his representation of the case. He must not deceive the court.

f) The counsel is under an obligation to present everything to the judge openly and in the court and nothing privately. He must not attempt any private influence upon the judge; seek opportunities for the purpose; or take opportunities of social gatherings to make ex parte statements or to endeavour to impress his views upon him.

g) The advocate must not place himself in a position which he cannot effectively discharge his obligations to the Court as minister of justice. He should not have any personal interest in the litigation he is conducting. It will be misconduct on his part to stipulate with his client to share in the results of litigation.

h) He should always remember that precedents are more efficacious than arguments; (Valindoria sunt expla quam verba; el plentus opera docetur quam voce). Even if there is any decision against him, it is the duty of the lawyer to disclose it. He may later on distinguish it on the facts of particular case, or even contend that the decision does not lay down sound law; if he does so, he will win the esteem of the judge.

i) If in case there is a conflict between the duty to the client and duty towards the court, Lord Denning, M.R. in Rondel v. W.20, has rightly observed;

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20 (1966) 3 All ER 657
“…..he (counsel) has time and again to choose between his duty to his client and his duty to the court. This is a conflict often difficult to resolve; and he should not be under pressure to decide it wrongly. When a Barrister or an advocate puts his first duty to court, he has nothing to fear…..it is a mistake to suppose that he is the mouthpiece of his client to say what he wants…..he must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a Barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to indiscipline.”

III. Advocates’ duty towards the Opponent & Opposing Counsel

An advocate shall not in any way communicate or negotiate upon the subject matter of controversy with any party represented by an advocate except through that advocate. The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of the client with a person the lawyer knows to be represented in the matter by lawyer, unless pursuant to law or rule of court or unless the lawyer has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is not represented by a lawyer, except to advise the person to obtain a lawyer.

Justice Raj Kishore Prasad said that it is both morally and professionally wrong to mislead an opponent, or put him on wrong scent, regarding any point in the case.

Similarly it is a duty of an advocate to be fair to an opposing advocate. You should treat the opposing advocate as a gentleman and should never suspect him. He is engaged as much as you are in the search for truth as an officer of the court. Relevant facts should not be concealed or withheld from him nor should he misled by such concealment or withholding. During the arguments interruptions should be avoided as far as possible. As you do not like to be interrupted, equally you should not interrupt your counterpart. You should not denigrate the performance of your counterpart in the presence of his client. All controversies should be avoided and good relations between the counsels should not be affected outside the court. A lawyer should not forget that he is not only fighting the battle of his client but that he is also assisting the court in the administration of justice.

The advice of Sir P.S. Sivaswami Aiyar is worth noting: “there is one thing which budding lawyers should remember and that is that a victory won by foul play is not worthy. If you give your opponent counsel a full and fair chance of himself heard, and then you beat him, you are entitled to credit. But, if you do anything by word or by deed or by suggestion or

21 Rule 34 of BCI Rules
22 CANON 7.18 of New York Bar Association
23 P.D. Gupta v. Ram Murti, 1997 (7) SCC 147
otherwise, to interfere with the fair hearing which your opponent counsel might otherwise obtain, the victory which you may win is tainted and is not worth having. No self-respecting man ought to care for it.”

IV. Advocates’ duty towards Public

Mr. Ram Keshor Ranade has very aptly summarized the same in one of his addresses:

“In every country lawyers have played a vital role in the progress of their nation and they have always been the vanguard in the struggle for freedom. With regard to lawyers in England, Asquith, one of the great Prime Ministers of England, has rightly observed:

‘I absolutely make this claim, that there is no class or profession in our community which has done more. I will go further; I will say that there is none which has done much to define, to develop and to defend, the liberties of England.’

I make bold to say that the aforesaid remark applies with equal force to our country. The lawyers of England and America have recognized that the members of the Indian Bar are second to none among them and Viscount Haldane, twice Lord Chancellor of England, expressed the opinion that Indian Lawyers could compare not only favourably but could excel some of the leading men of the English Bar.”

An advocate according to me, shall uphold the constitution, help in the maintenance of the Rule of Law, promote the advancement of justice and assist on the enforcement of the fundamental rights of the people. An advocate shall not act contrary to the basic principles of morality and at all times, shall act honestly. He shall not render any service or give advice involving breach of the law or implying disrespect to the established. This I feel is the duty and responsibility he owes to the public.

V. Advocate’s Duty towards Self

This according to me is the most important duty, as once a person learns to respect himself; all other aspects will fall in place. The following excellent advice given by an eminent lawyer to young advocates should epitomize the duty to self;

“To my young friends a word of advice; stick to the profession – seek to elevate it. Do not seek by it to make money. Doing that makes it a trade not a profession. Be fair in charges. Help the poor with advice and with professional aid. If it occurs to you, as it should to look out for old age, believing that Webster was right when he said that the fate of a lawyer was to work hard, live well and die poor, use economy and as you acquire something to lay up, buy, in some growing town or city, a building, a business one, if you can, even if it involves a mortgage for part; rent will keep down interest and pay taxes and the property one day will enrich you. You will have hard work to get well off by simply saving and the community will expect you to live comfortably. Do not speculate. Study law and history in all free time and manifest it by your action in the courts. Do not be a politician. But always vote and do the

AIR 1960 Jour. 66
duty of a citizen. Be no member of a party, but independent – a slave to none. Deserve honours and office. If they come, as, if you deserve them, they should, do honour them. If they do not, never mind. There is one who seeth not as man seeth, whose ‘well done, good and faithful’ is worth all the dignities of all the world.”

To conclude, a learned writer in referring to the subject gives the following rules that needs to be followed by advocates, to avoid the challenges, which, by way of Biblical analogy, he calls ‘A Lawyer’s Ten Commandments.’

a) “Duties to Client:
   i. Be loyal to the interests of the client whose cause you have championed and in his cause be guided by high moral principles. Do not let the amount of your fee determine the amount of your industry.
   ii. Neither understate nor overrate the value of your advice and services in your clients behalf.

b) Duties to Court:
   iii. Be honest with and respectful to the Court.
   iv. Do not depend on bluffs or tricks or pulls to win a case, but depend on thorough preparation.

c) Duties to Public:
   v. Give a measure of your best legal service to such public affairs as may best serve your community. Remember also to protect the defenseless and oppressed.
   vi. Never seek an unjustifiable delay. Neither render any service nor give any advice involving disloyalty to the law.

d) Duties to Fellow Attorneys:
   vii. Be friendly with and keep faith with the fellow members of the Bar; publish their good characteristics rather than their shortcomings. Especially, be on friendly terms with the young man starting in the legal profession and if necessary, inconvenience yourself in order to encourage him.
   viii. Do not discuss your cases with the court in the absence of opposing counsel.

e) Duties to Self:
   ix. Avoid the ‘easy-come, easy-go’ method with your finances. Bank on no fee until paid.
   x. Keep up regular habits of systematic study of law.”

These codes of rules epitomize the attributes that a lawyer should possess to overcome any ethical challenges presented to him during the practice of his profession.

26 Similar principles are enshrined and provided in detail under Section 49(1)(c) of the Advocates Act, 1961
2.2.1 – Effect of Non-Compliance; Instances of Professional Misconduct

In In Re: Mr. A an Advocate\textsuperscript{27}, a five judge Bench of the Supreme Court, while questioning whether an advocate on record writing letters and soliciting brief, was guilty of the professional misconduct, held that it was against the etiquette of the Bar and its professional ethics to solicit briefs from clients and an advocate who does so must be guilty of the unprofessional conduct and further, he deserved no sympathy of the Court and must be suspended. Chief Justice Sinha, has very clearly expressed the significance of Professional Ethics;

“In our opinion, the Advocate has mischosen his profession. Apparently he is a man of very weak moral fibre. If he is ignorant of the elementary rules of professional ethics, he has demonstrated the inadequacy of his training and education befitting a member of the profession of law. If he knew that it was highly improper to solicit a brief and even then wrote the post-card in question, he is a very unworthy member of the learned profession. In any view of the matter, he does not appear to be possessed of a high moral calibre, which is essential for a member of the legal profession. If anything, by adopting the attitude of denial which has been demonstrated to be false in the course of the proceedings before the Tribunal, he has not deserved well of the Court even in the matter of amount of punishment to be meted to him for his proved misconduct. In our opinion, he fully deserves the punishment of suspension from practice for five years. This punishment will give him enough time and opportunity for deciding for himself, after deep deliberation and introspection, whether he is fit to continue to be a member of the legal profession. In our view he is not. Let him learn that a lawyer must never be a liar.”

In V.C. Rangadurai v. D. Gopalan and Ors,\textsuperscript{28} a 3 judge Bench of the Supreme Court held that, "Nobility of law profession lasts till members maintain their commitment integrity to serve community and every delinquent who deceives his common client deserves to be frowned upon." Hence the relationship between the lawyer and client being a fiduciary one, it is the duty of the advocate to uphold the same.

The legality of the Bar Association Resolution that none of its members will appear for an accused came up for consideration in, A.S. Mohammed Rafi v. State of Tamil Nadu, rep. by Home Dept. and Ors.\textsuperscript{29} The Supreme Court while dealing with the resolution of the Bar not to defend police personal in the court held that, professional ethics requires that a lawyer cannot refuse a brief provided a client is willing to pay his fees and the lawyer is not engaged otherwise. Such type of resolutions are wholly illegal and against all tradition of Bar. My brother Markandey Katju J. stated thus;

“In our opinion, such resolutions are wholly illegal, against all traditions of the Bar, and against professional ethics. Every person, however, wicked, depraved, vile, degenerate,
perverted, loathsome, execrable, vicious or repulsive he may be regarded by society has a right to be defended in a court of law and correspondingly it is the duty of the lawyer to defend him. We may give some historical examples in this connection. When the great revolutionary writer Thomas Paine was jailed and tried for treason in England in 1792 for writing his famous pamphlet 'The Rights of Man' in defence of the French Revolution the great advocate Thomas Erskine (1750-1823) was briefed to defend him. Erskine was at that time the Attorney General for the Prince of Wales and he was warned that if he accepts the brief, he would be dismissed from office. Undeterred, Erskine accepted the brief and was dismissed from office.

However, his immortal words in this connection stand out as a shining light even today:

From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of the Judge; nay he assumes it before the hour of the judgment; and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused in whose favour the benevolent principles of English law make all assumptions, and which commands the very Judge to be his Counsel.”

Hence, these decisions are but a few examples to demonstrate, the dire circumstances, lawyers will be placing themselves in, if they indulge in unethical practice. I highly advice and recommend to all, to tread only in the path of justice.

2.2.2 - Ethical Impact of Information Technology on Lawyers

Besides the abovementioned principles, another aspect, which I felt might be of relevance to the young advocates and members of the Bar and which I have observed is not given much importance in our country, is the ethical impact of Information Technology.

Advances in technology are occurring exponentially and these advances increase the pace of practice and client expectations, forcing lawyers to adapt or face extinction. Understanding and implementing new technologies are difficult and time-consuming for lawyers. But now, with the advent of Information Technology, law along with its advocates, should keep up with the changing dynamics, or else, will become casualties to these turbulent times.

From an ethical standpoint, I personally feel that advocates will have to be even more careful in terms of handling various documents, etc., as unlike the yester years where we were using only typewriters to draft various plaints, documents, etc., and use the registered post to deliver the same, nowadays, advocates use computers instead, which allows to store data and also send notices, documents using electronic mail. Although this might be a very good substitute to a typewriter, not to say a major boon, but since advocates deal with highly sensitive and confidential data these days, it is very likely that the same can be misused, very
easily too and hence, I sense that there should be an independent code of rules governing the same.

Below are certain observations and suggestions, which I feel needs to be taken into consideration by advocates and the Bar as a whole;

i. **Privileged communications**

A lawyer who comes into possession of a privileged written communication of an opposing party through the lawyer's own impropriety, or with knowledge that the communication is not intended to be read by the lawyer, must not use the communication nor the information contained therein in any respect and must immediately return the communication to opposing counsel, or if received electronically, purge the communication from the system. This includes communications received through e-mail.

ii. **Conflict of Interest**

To ensure that there is no breach of the obligations and to avoid conflict of interest when delivering legal services while using the Internet or e-mail, a lawyer must determine the actual identity of parties with whom the lawyer is dealing.

iii. **Confidentiality**

A lawyer has a duty to keep all confidential information concerning a client's business, interests and affairs acquired in the course of a professional relationship.

- He must not disclose any confidential information regardless of its source and whether or not it is a matter of public record.
- He must not disclose the identity of a client nor the fact of the lawyer's representation.
- He must take reasonable steps to ensure the maintenance of confidentiality by all persons engaged or employed by the lawyer.

A lawyer while using electronic means of communication, must ensure that communications with or about his client reflect the same care and concern for matters of privilege and confidentiality normally expected of a lawyer using any other form of communication. This would include e-mail, whether via the Internet, internal e-mail or otherwise, or the use of cellular telephones or fax machines to transmit confidential client information.

I advise all lawyers using such technologies to develop and maintain a reasonable awareness of the risks of interception or inadvertent disclosure of confidential messages and how they can be minimized. Encryption software is available and must be used, if electronic means of communication are used, for those confidences that may be so valuable or sensitive that it is in the client's interest to take the extraordinary step of encrypting to protect them. The challenge, as in so many ethical areas, is to recognize those extraordinary situations and exercise sound judgment in relation to them.
Some other aspects which a lawyer, when using electronic means to communicate in confidence with clients or to transmit confidential messages regarding a client must:

- develop and maintain an awareness of how technically best to minimize the risks of such communications being disclosed, discovered or intercepted;
- use reasonably appropriate technical means to minimize such risks;
- when the information is of extraordinary sensitivity, advise clients to use encryption software to communicate with their lawyer, and use such software; and
- develop and maintain such legal practices as offer reasonable protection against inadvertent discovery or disclosure of electronically transmitted confidential messages.

I would also like to provide certain examples from different jurisdictions and how they have handled the same;

In the instant case\textsuperscript{30}, an attorney inappropriately accessed confidential e-mails in an effort to obtain an advantage in a campaign to unionize employees in her workplace. The attorney used both her office and home computers in an attempt to access the e-mail accounts of more than 40 employees and at least one member of the employer's Board of Directors. The purpose of this access was to monitor anti-union sentiment during a unionizing effort that she initiated and supported. Some of the messages she deleted had not yet been read by the recipients. C the lawyer chose to delete contained anti-union information or sentiment. None of this activity was authorized. The lawyer was suspended for two years.

Similarly, when lawyers use their computer knowledge to obtain a competitive advantage against other attorneys, can also face sanctions based on their activities. In one such case, a New York lawyer called his competitor's voice mail system, logged in, and reviewed and deleted voice mails and was subsequently charged in a Federal indictment with violating Federal felonies related to the unlawful access to stored communications. The New York disciplinary authorities also successfully sought the lawyer's disbarment.

According to me, all lawyers have a fiduciary responsibility to preserve the confidentiality of records on their computers, such as clients' files or government records. Based on this responsibility, a system should be created that monitors access to these records on a daily basis and that provides a continual detection mechanism for unauthorized access.

These are but a few instances of professional misuse. India developing as rampantly as it is in the international arena, must also take notice of these scenarios and apply the same.

3 - Art of Advocacy

Having dealt extensively with the Ethical issues and challenges, I also felt it appropriate in explaining the concept of “Advocacy”, as it is a corollary to the principle of professional

\textsuperscript{30} IN RE: Julia Ellis BROWN, Opinion No. 26129, Supreme Court, STATE OF SOUTH CAROLINA, 2006
ethics and one cannot be independently executed without the other, as both are essential facets for an advocate’s success.

Before I delve into explaining the Art of Advocacy, there is a very important and essential ingredient that needs to be demonstrated, be it any profession, in order to achieve success and that is “Industry”

“Live like a hermit, work like a horse”\(^{31}\)

This quote to me is the essence of advocacy and without which no man can achieve success. The above quote should be enshrined in the minds of all those who want to realize greatness in the field of law. Advocacy is not something which one acquires inherently or genetically. It all starts with hours and hours of diligent work and dedication. A sine qua non for success is that you must put forth infinite industry. Lord Atkin said,

“one thing was essential; the capacity for hard and regular work. Nobody had ever risen in the legal profession by doing a few hours’ work here and there when the mood came upon him.”

You have heard it said that “industry is Fortune’s right hand.” It is not in that sense that I am referring to industry. A great man said, “the longer I live, the more I am certain that the great difference between man and man is invisible energy.”

You may have learning, you may have intellect, you may have the good fortune to secure your first clients, but do not believe that you can secure abiding success without industry. As a learned writer puts it, “The genius of success in the contests of the forum is the genius of hard work.”\(^{32}\) I would say that industry would supply even the lack of learning or intellect, for genius itself is but the infinite capacity for taking pains. I can say with confidence that no man has succeeded in the legal profession merely by his intellect and without industry. Let industry, then, be the motto of your professional life. Even for the learned profession of law, you need not be great in intellect or in learning, but if you are a giant in the industry you are likely to be a giant in the profession. Without industry “the armoury of the advocate will lack weapons on the day of battle.” A learned lawyer said, “luck generally comes to those who look after it and my notion is, it taps once in a lifetime at everybody’s door, and if industry does not open it, away it goes.”\(^{33}\) Nothing is truer in advocacy than that preparation is power, and a diligent second-rate man will time and again win victories over a brilliant but less industrious adversary. Hence, my advice to you is, always put the adequate effort; there is no shortcut to success without it. If you feel yourself lagging behind, remind yourself what you are working for and what your ultimate goal is and let that be your source of motivation.

\(^{31}\) Chief Justice of India, Mr. SH Kapadia, (http://news.outlookindia.com/items.aspx?artid=752297)
\(^{32}\) http://www.archive.org/details/cu31924020162123
\(^{33}\) The Standard (Concord, N.C.), 1890-06-06
Remember, if one ignores the law, the law will also ignore him. That is why it is said that “law is a jealous mistress.”

Having stated the most important step to advocacy, once this is followed, half the battle is won. In fact I would also like to quote Judge Abbot Parry, who in an admirable book entitled ‘The Seven Lamps of Advocacy’, refers to the essential qualities that an advocate must possess for success in the Bar, which I recommend be followed to the letter.

I. **Honesty**: “The best of lawyers of all generations have been devotees of honesty”.

Honesty to me is the most important quality that an advocate should possess. His thoughts, words and deeds should have sincere co-relation to each other with genuineness. An advocate should be dependable and reliable to everyone who seeks his advice and services. The uprightness, integrity and honesty of an advocate will increase his reputation and respect in the society.

II. **Courage**: “Advocacy is a form of combat where courage in danger is half the battle. Courage is as good a weapon in the forum as in the camp. Charles Hutton’s. He bath in perfection the tree chief qualifications of an advocate: Boldness, Boldness and Boldness.”

It is the duty of an advocate to fearlessly uphold the interests of his client by all fair means without fear of any unpleasant consequences to himself or any other person. It is the knowledge and skill of the advocate that gives him the necessary courage and confidence to present the case fearlessly and to uphold the interest of the client. The knowledge and the skill can be acquired and developed by mastery of facts, mastery of laws, and mastery in drafting and presentation of convincing arguments.

III. **Industry**: “Charles Lamb quotes ‘the dry drudgery of the desks’ deadwood-Advocacy is indeed a life of industry and a lawyer must study his brief in the same way that an actor studies his part. Success in advocacy is not derived at by intuition.”

I have already dealt with this at length.

IV. **Wit**: “the lamp of wit is needed to lighten the darkness of advocacy. Often the wit of a lawyer will turn a Judge from an unwise course, where judgement or rhetoric would certainly fail.”

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34 The full quotation is: “[The law] is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage.” This is attributed to Joseph Story, The Value and Importance of Legal Studies, in The Miscellaneous Writings of Joseph Story, 503, 523 (1851).

Judges and lawyers have to deal with a variety of serious and important matters affecting life and liberty of the people. So constant clashes between them is common. Anxiety for a favourable verdict on the part of the lawyers; and perpetual worry for the pursuit of truth on the part of the judges generate strain and tension. Occasional wit and humour, provoking a smile or laughter will help them to ease the tension, and refresh themselves to sharpen their brain for the effective discharges of their duties.

V. **Eloquence:** “Eloquence of manner is real eloquence and there is a physical as well as psychological side to advocacy.”

Eloquence means the fluency, force and style of using the language. Strong vocabulary is one of the powerful weapons, which an advocate should possess. Words are his keys of thought. Strong vocabulary gives him assurance, builds his self-confidence and increases his personality. Words must be employed with eloquence. The art of persuasive and impressive speaking will give the desired result in his favour.

VI. **Judgement:** “in nothing does the lawyer more openly exhibit want of judgement than in prolixity.”

It means the ability to come to a sensible conclusion and make wise decisions at the relevant time in the proper way. It is on the basis of these conclusions he should employ the necessary facts and techniques in the case in which he is engaged. This quality is necessary from the beginning of filling the case till its final disposal. An advocate must always anticipate all the possible moves of the other side and must develop the necessary presence of mind, alertness and tact to cope with any awkward situation of difficulty that may arise in the case.

VII. **Lamp of Fellowship:** “it is exactly like a great public school, the boys of which have grown older, and have exchanged boyish for manly objects. By keeping the lamp of fellowship burning, we encourage each other to walk in the light of the seven lamps of advocacy.”

Fellowship means the membership in friendly association or companionship. Fellowship is exactly like great public schools, the boys of which have grown older, and have exchanged boyish for manly objects. Shakespeare said, "Do as adversaries do in law. Strive mightily but eat and drink as friend." Though the advocates are opponent parties before the Bench, they are not enemies with each other. Their conflict ends as they come out of the door steps of the Court. Daniel Webster says, “Lawyers on opposite sides of a case are like the two parts of shears, they cut what comes between them, but not each other”. There is no discrimination of

36 The Taming of the shrew, Act 1, scene 2, 269–277
37 Daniel Webster (1782 - 1852)
age, ability, experience and riches etc. between the advocates. All are equal. Courts give them all equal respect. Among advocates, there is just the same rough familiarly, the general ardour of character, the same kind of public opinion expressed in exactly the same blunt, unmistakable manner. By keeping the lamp of fellowship burning, advocates encourage each other by sharing the knowledge to walk in the light of the seven lamps of advocacy.

Besides the above mentioned 7 Principles, I would like to add one more lamp, i.e. “Tact”, and can be called as “The Eight Lamps of Advocacy”. Tact is the ability of handling people and situations skillfully and without causing offence. An advocate must be in a position to tackle and win his client, opponent party, opponent advocate in a smoother way. Many people of unequal ability have failed for want of tack. An advocate should not quarrel with the Court or loose temper over trifle things in the Court and outside. Men of unquestioned ability have suffered for quarrelling with the tribunal or for standing on their dignity over trifles, for getting their clients, or for losing their tempers; they are men of parts but without tact.

I would like to conclude on the aspect of advocacy by referring to an observation made by the Supreme Court of India in J.S. Jadhav v. Mustafa Haji Mohamad Yusuf:

“Advocacy is not a craft but a calling; a profession wherein devotion to duty constitutes the hallmark. Sincerity of performance and the earnestness of endeavor are the two wings that will bare aloft the advocate to the tower of success. Given these virtues other qualifications will follow of their own account. This is the reason why the legal profession is regarded as a noble one.”

4 - Conclusion

An advocate's duty is as important as that of a Judge. Advocates have a large responsibility towards the society. A client's relationship with his/her advocate is underlined by utmost trust. An advocate is expected to act with utmost sincerity and respect. In all professional functions, an advocate should be diligent and his conduct should also be diligent and should conform to the requirements of the law by which an advocate plays a vital role in the preservation of society and justice system. An advocate is under an obligation to uphold the rule of law and ensure that the public justice system is enabled to function at its full potential. Any violation of the principles of professional ethics by an advocate is as unfortunate, as is unacceptable. Ignoring even a minor violation/misconduct militates against the fundamental foundation of the public justice system. An advocate should be dignified in his dealings to the Court, to his fellow lawyers and to the litigants. He should have integrity in abundance and

38 Ibid. 5
39 AIR 1993 SC 1535: 1993(2) SCC 562
should never do anything that erodes his credibility. He has a duty to enlighten and encourage the juniors in the profession. An ideal advocate should believe that the legal profession has an element of service also and associate with legal service activities. Most importantly, he should faithfully abide by the standards of professional conduct and etiquette prescribed by the Bar Council of India in Chapter II, Part VI of the Bar Council of India Rules. With these few words of wisdom, I wish one and all nothing but the best.
INTRODUCTION

In modern times, biodiversity and its conservation have assumed significant importance globally. Biodiversity is basically the vast variety of natural plant, animal life existing in any region. A region, with larger number of living species, is usually considered to have better environment and the range of biodiversity of a place indicates the richness of natural wealth of that place. Conservation is the maintenance of populations of species in their natural surroundings, where they have developed their distinctive properties. Conservation can be achieved by following practices of sustainable use meaning thereby that the use of components of biological diversity at a rate that does not lead to the decline of biological diversity, thereby maintaining its potential to meet the requirements of society. Biological diversity is fundamental to agriculture and food production. From the millions of genes that serve as building blocks to the thousands of plants and animals that inhabit the earth, almost limitless are the combinations of organisms that make up natural ecosystems. Under the contextual reference of modern intensive agriculture demanding many farmers to adopt high yielding varieties of plants and animals, Biodiversity makes an essential contribution for feeding the millions of population of the world. When farming communities abandon diversity, varieties and breeds of animals extinct and the specialized useful traits may be lost. Agricultural diversity forms an important component for tackling unforeseen effects of climate change and is one of the essential key component for developing varieties and animal species with varying temperature, extreme floods, droughts, outbreak of diseases reducing the crop productivity and directly causing untold hardship to farming community.

Industrialization and urbanization are causing degradation of environment leading to threatening the existence of many species of plants and animals which is not only affecting the species, but also influencing the environment and ecology. Due to this, the world, has become concerned about conserving the existing biodiversity. The conservation of biodiversity is considered as a thrust area of modern scientific activities. In India, efforts have been made during the last two decades, to comprehend the range and impact of biodiversity.

* Chairman, J.T.R.I., U.P., Lucknow
as also the problems related to the conservation of living forms. But, very little has been done to record and analyse the evolution of the traditional perceptions and prescriptions about the conservation of biodiversity.

Hon’ble Supreme court through various Judgments, expressed concern over the bio-diversity conservation casting the duty upon the country and the citizens for conservation of the same. Hon’ble Courts has observed that the bio-diversity of the country is a national property and it should be the duty of every citizen of India to protect and improve natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. It was also observed by Supreme Court in Centre for Environment Law, WWF-I Vs. Union of India (UOI) and Ors. (2013)8 SCC 234 that “Animals in the wild are properties of the nation for which no state can claim ownership and the state’s duty is to protect the wild life and conserve it, for ensuring the ecological and environmental security of the country”. It was further observed that “Several migratory birds, mammals, and animals in wild cross national and international borders created by man and every nation have a duty and obligation to ensure their protection. No nation or organisation can claim ownership or possession over them, the Convention on the conservation of migratory species of wild animals held at Bonn, 1979, supports this principle and the convention recognises that wild animals in their innumerable forms are irreplaceable part of the earth; natural system and must be conserved for the good of the mankind…”

In M.C. Mehta v. Kamal Nath and Ors (1997) 1 SCC 388, Hon’ble Supreme Court enunciated the doctrine of "public trust", the thrust of that theory is that certain common properties such as rivers, seashores, forests and the air are held by the Government in trusteeship for the free and unimpeded use of the general public. The resources like air, sea, waters and the forests have such a great importance to the people as a whole, that it would be totally unjustified to make them a subject of private ownership. The State, as a custodian of the natural resources, has a duty to maintain them not merely for the benefit of the public, but for the best interest of flora and fauna, wildlife and so on. The doctrine of ‘public trust' has to be addressed in that perspective.

**Conservation of Bio-diversity: Historical Background in India**

India has a rich history of conservation of Bio diversity, be it the influence of ancient scripts, religion or ethnic groups. Sanskrit texts are an important resource of ancient Indian wisdom. A close relationship with diverse biological entities and concern for their conservation have remained important components of Indian culture since ancient times.

Hinduism have always been promoting the conservation of ecology. Earth can be seen as a manifestation of the goddess (Devī) and that she must be treated with respect; that the five elements hold great power; that simple living might serve as a model for the development of sustainable economies; and that the concept of Dharma can be reinterpreted from an earth-friendly perspective. According to *Manu Samhita*, Brahma, the god of creation has created all the plants and animals with specific characteristics and functions, and none should disturb
these creatures. The text mentions that the forest-dwelling animals and birds are not articles for sale. Those persons who subsist by displaying various exercises of dog, falcon, and those who earn livelihood with the help of sheep or buffalo should be shunned meticulously from all oblation functions. For saving the plants and their parts from injury/destruction, Manu-Samhita prescribes various punishments for the offenders. The Manu-Samhita states that protecting the animals is the duty of the king. The king who protects animals and punishes the killers earns merits. According to Visnu-Samhitā destruction of trees, shrubs, monocarpous plants etc is a sin. Violence to domestic or wild animals is also a sinful act. Visnu-Samhitā considers injuring or destroying plants, damaging the crops and stealing of the same, as offence, and prescribes punishment for the offenders.

For meditation Hindu, Buddhist and Jain monks and saints sought a natural and peaceful environment, the highest expression of which is the forest. Thus traditionally temples were often built in forests, and by association the surrounding forest became sacred space to be preserved rather than exploited. Traditionally this would tend to promote the conservation of all the species diversity within the surrounding ecosystem. In Jainism, life is arranged hierarchically, according to the number of senses a particular life form has. Thus, earth, water, fire, air, microorganisms, and plants each has its own life (jiva), and experiences the world through the sense of touch. To hurt any of the sentient beings results in the thickening of one’s karma, obstructing advancement toward liberation. To reduce karma, Jainas avoid activities associated with violence and follow a vegetarian diet. Due to their perception of the “livingness” of the world, Jainas hold an affinity for the ideals of the environmental movement. Apart from ahimsa, all the Jain vows are easily apt to be interpreted in ecological terms. For example, aparigraha, the discipline of nonpossession, prevents one from indulging in the acquisition of material goods, one of the root causes of current ecological concerns.

Buddhism has long advocated reverence and compassion for all life. While environmentalism emphasizes that natural resources are limited, Buddhism is more direct in encouraging individuals to limit their resource consumption to the optimal satisfaction of the four basic needs of food, clothing, shelter, and medicine. Following the Middle Way, one lives and progresses in accord with the principles of detachment and moderation.

The earliest known examples in India to provide protection to the species was during the time of Emperor Ashoka the Great. The administration of Emperor Ashoka is known to have had a clear-cut policy of exploiting and protecting natural resources, with specific officials tasked with protection duty. In the subsequent years, many different rulers followed similar policies. Indigenous religious traditions in India seem to have promulgated an ecological ethic, built around the dependence of the indigous communities on local biodiversity. In addition, over 600 different tribes and non-tribe local people who lived in and depended on natural resources and wild flora and fauna for their subsistence, livelihoods, cultural and religious way of life have also been practising conservation in different ways. One of the best known examples of this is the practice of protecting sacred spaces and elements. These were areas or
species left largely untouched because of the religious sentiments associated with them. They could include patches of forest, lakes and ponds, high-altitude valleys or peaks, islands, marine stretches, mangroves, grasslands and nearly every other kind of ecosystem. Such sacred areas were associated with certain deities that resided in them and fear of the deity bringing ill fortune prevented people from violating the rules of these sacred spaces. Extraction of resources, if at all, happened after following intricate religious rituals. Many of these sacred elements continue to survive even today, although because of changing social and cultural environments they too are slowly becoming eroded.

A number of sacred groves have been recorded in the different parts of countries. In addition, there have been numerous examples of communities protecting different plant and animal species for religious or cultural purposes. For example, protection of blackbuck, peacocks, protection of freshwater turtles in temple tanks, protection of fish such as mahseer or trout in river stretches, protection of keystone species such as the banyan (*Ficus bengalensis*) and many others. Among the best known are the Bishnoi, in Rajasthan, Punjab and Haryana who are famous for their self-sacrificing defence of wildlife.

It is believed that in 1730, the king of Jodhpur ordered his men to cut timber from Bishnoi land. The local people, led by Attri Devi, hugged the trees to save them. The king’s men hacked down 263 children, women and men before they gave up. The Bishnoi religion was initiated by Goru Jambeshwar about 500 years ago. Followers believe in a set of 29 principles, hence are called the ‘Bishnoi’. These principles include a ban on felling trees and a ban on killing animals. In particular, they consider the kejari (*Prosopis cinereria*) and blackbuck sacred species. In recent times, this incident has become an inspiration for many communities to save their forests from destruction: the Chipko Movement in the Garhwal Himalayas and the Apiko Movement in Karnataka in the 1980s are two important examples. Different communities, cultures and practices together ensured greater protection and conservation of biological diversity.

Despite this rich tradition of conservation, India today holds the distinction of being one of the most densely populated countries, yet being one of the world’s mega-biodiversity countries, but also having one of the highest rates of biodiversity decline. The reasons of such depletion can be attributed to fast changing culture in society due to influence of western countries, reckless use of natural resources for commercial purpose, the weak laws in the country to regulate such issues, lack of policy and action plan.

**INTERNATIONAL REGIME**

Conserving biodiversity is not an issue confined to any one country or community. It is a crucial global concern. Several international treaties and agreements are in place in the attempt to strengthen international participation and commitment towards conserving biodiversity. Some of these are:
The Convention on Biological Diversity:
The biological diversity being a global asset of tremendous value to the present and future generations, the threat to species and ecosystems was increasing in a fast pace. Species extinction caused by human activities has been continuing at an alarming rate. In response, the United Nations Environment Programme (UNEP) convened the Ad Hoc Working Group of Experts on Biological Diversity in November 1988 to explore the need for an international convention on biological diversity. In May 1989, it established the Ad Hoc Working Group of Technical and Legal Experts to prepare an international legal instrument for the conservation and sustainable use of biological diversity. The experts were to take into account "the need to share costs and benefits between developed and developing countries" as well as "ways and means to support innovation by local people". By February 1991, the Ad Hoc Working Group had become known as the Intergovernmental Negotiating Committee. Its work culminated on 22 May 1992 with the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity. The Convention was opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development (the Rio "Earth Summit"). It remained open for signature until 4 June 1993, by which time it had received 168 signatures. The Convention entered into force on 29 December 1993, which was 90 days after the 30th ratification. The Convention on Biological Diversity was inspired by the world community's growing commitment to sustainable development. It represents a dramatic step forward in the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources. To date the CBD has been ratified by 179 countries. Signatories are required to develop national strategies for the conservation and sustainable use of biological diversity, and to integrate biodiversity considerations into all activities. It focuses not only on conserving biodiversity but also on sustainable use of biological resources and equitable sharing of benefits arising from its use. Broadly, the Convention on Biological Diversity (CBD) is an international legally binding treaty with three main goals 1) conservation of biological diversity 2) sustainable use of its components; and 3) fair and equitable sharing of benefits arising from genetic resources.

The Nagoya Protocol
The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity is a supplementary agreement to the Convention on Biological Diversity. It provides a transparent legal framework for the effective implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The Nagoya Protocol on ABS was adopted on 29 October 2010 in Nagoya, Japan. Its objective is the fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and sustainable use of biodiversity. The Nagoya Protocol will create greater legal certainty and transparency for both providers and users of genetic resources by establishing more predictable conditions for access to genetic resources and helping to ensure benefit-sharing when genetic resources leave the contracting party providing the genetic resources. By helping to ensure benefit-sharing, the Nagoya
Protocol creates incentives to conserve and sustainably use genetic resources, and therefore enhances the contribution of biodiversity to development and human well-being.

The Nagoya Protocol applies to genetic resources that are covered by the CBD, and to the benefits arising from their utilization. The Nagoya Protocol also covers traditional knowledge (TK) associated with genetic resources that are covered by the CBD and the benefits arising from its utilization. The Nagoya Protocol sets out core obligations for its contracting Parties to take measures in relation to access to genetic resources, benefit-sharing and compliance. **Domestic-level access measures** are to Create legal certainty, clarity and transparency, provide fair and non-arbitrary rules and procedures, establish clear rules and procedures for prior informed consent and mutually agreed terms, provide for issuance of a permit or equivalent when access is granted, create conditions to promote and encourage research contributing to biodiversity conservation and sustainable use, Pay due regard to cases of present or imminent emergencies that threaten human, animal or plant health and to consider the importance of genetic resources for food and agriculture for food security. **Domestic-level benefit-sharing measures** are to provide for the fair and equitable sharing of benefits arising from the utilization of genetic resources with the contracting party providing genetic resources. Utilization includes research and development on the genetic or biochemical composition of genetic resources, as well as subsequent applications and commercialization. Sharing is subject to mutually agreed terms. Benefits may be monetary or non-monetary such as royalties and the sharing of research results. **Compliance obligations** are the specific obligations to support compliance with the domestic legislation or regulatory requirements of the contracting party providing genetic resources and contractual obligations, reflected in mutually agreed terms, are a significant innovation of the Nagoya Protocol. The Government of India has approved the ratification of the Nagoya Protocol on October 4, 2012.

**The Cartagena Protocol on Bio-safety**

The *Cartagena Protocol on Bio-safety to the Convention on Biological Diversity* is an international treaty governing the movements of living modified organisms (LMOs) resulting from modern biotechnology from one country to another. It was adopted on 29 January 2000 as a supplementary agreement to the Convention on Biological Diversity and entered into force on 11 September 2003. On 29 January 2000, the Conference of the Parties to the Convention on Biological Diversity adopted a supplementary agreement to the Convention known as the Cartagena Protocol on Biosafety. The Protocol seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology. It establishes an advance informed agreement (AIA) procedure for ensuring that countries are provided with the information necessary to make informed decisions before agreeing to the import of such organisms into their territory. The Protocol contains reference to a precautionary approach and reaffirms the precaution language in Principle 15 of the Rio Declaration on Environment and Development. The Protocol also establishes a Biosafety Clearing-House to facilitate the exchange of information on living modified organisms and to assist countries in the implementation of the Protocol. The Objective of the above protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer,
handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.”

**Strategic Plan for Biodiversity 2011-2020 and Aichi Biodiversity Targets**

It aims to reduce the direct pressures on biodiversity and promote sustainable use, improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity, enhance the benefits to all from biodiversity and ecosystem services, enhance implementation through participatory planning, knowledge management and capacity building. An Informal Workshop on National Experiences in implementing the Strategic Plan for Biodiversity 2011-2020, co-hosted by the Governments of Brazil and the United Kingdom, was held from **12 to 14 March 2012 in Brasilia, Brazil**. The vision for the new plan is: "Living in Harmony with Nature" where “By 2050, biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people.”

The new plan consists of five strategic goals, including twenty Aichi Biodiversity Targets. The twenty headline Aichi Biodiversity Targets for 2015 or 2020 are organized under the five strategic goals. The goals and targets comprise both aspirations for achievement at the global level, and a flexible framework for the establishment of national or regional targets. Parties are invited to set their own targets within this flexible framework, taking into account national needs and priorities, while also bearing in mind national contributions to the achievement of the global targets, and report thereon to the eleventh meeting of the Conference of the Parties. Parties are also invited to incorporate this information in their national biodiversity strategy and action plan. The Five Strategic goals are a) Address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society; b) Reduce the direct pressures on biodiversity and promote sustainable use; c) To improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity; d) Enhance the benefits to all from biodiversity and ecosystem services. e) Enhance implementation through participatory planning, knowledge management and capacity building.

**The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES):**

This is an international treaty which is designed to protect wild plants and animals affected by international trade. The treaty, in force since 1975, controls the export, import and re-export of endangered and threatened wildlife. CITES is an international agreement to which States (countries) adhere voluntarily. States that have agreed to be bound by the Convention ('joined' CITES) are known as Parties. Although CITES is legally binding on the Parties – in other words they have to implement the Convention – it does not take the place of national laws. Rather it provides a framework to be respected by each Party, which has to adopt its own domestic legislation to ensure that CITES is implemented at the national level.

The CMS, or the Bonn Convention aims to conserve terrestrial, marine and avian migratory species throughout their range. Parties to the CMS work together to conserve migratory species and their habitats by providing strict protection for the most endangered migratory species, by concluding regional multilateral agreements for the conservation and management of specific species or categories of species, and by undertaking co-operative research and conservation activities. It is an intergovernmental treaty, concluded under the aegis of the United Nations Environment Programme, concerned with the conservation of wildlife and habitats on a global scale. Since the Convention's entry into force on 1 November 1983, its membership has grown steadily to include 119 Parties (as of 1 April 2013) from Africa, Central and South America, Asia, Europe and Oceania. As the only global convention specializing in the conservation of migratory species, their habitats and migration routes, CMS complements and co-operates with a number of other international organizations, NGOs and partners in the media as well as in the corporate sector.

The International Treaty on Plant Genetic Resources for Food and Agriculture
The objectives of the Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security. The Treaty covers all plant genetic resources for food and agriculture, while its Multilateral System of Access and Benefit-sharing covers a specific list of 64 crops and forages. The Treaty also includes provisions on Farmers' Rights. The International Treaty on Plant Genetic Resources for Food and Agriculture was adopted by the Thirty-First Session of the Conference of the Food and Agriculture Organization of the United Nations on 3 November 2001. -recognizing the enormous contribution of farmers to the diversity of crops that feed the world. The treaty aims at establishing a global system to provide farmers, plant breeders and scientists with access to plant genetic materials and ensuring that recipients share benefits they derive from the use of these genetic materials with the countries where they have been originated.

It includes the multilateral system i.e. it puts 64 of our most important crops – crops that together account for 80 percent of the food we derive from plants – into an easily accessible global pool of genetic resources that is freely available to potential users in the Treaty’s ratifying nations for some uses. It also includes Access and benefit sharing of 64 crops in the Multilateral System for research, breeding and training for food and agriculture. Those who access the materials must be from the Treaty’s ratifying nations and they must agree to use the materials totally for research, breeding and training for food and agriculture. The Treaty prevents the recipients of genetic resources from claiming intellectual property rights over those resources in the form in which they received them, and ensures that access to genetic resources already protected by international property rights is consistent with international and national laws. The Treaty recognizes the enormous contribution farmers have made to the ongoing development of the world’s wealth of plant genetic resources. It calls for protecting
the traditional knowledge of these farmers, increasing their participation in national decision-making processes and ensuring that they share in the benefits from the use of these resources. Most of the world’s food comes from four main crops – rice, wheat, maize and potatoes. However, local crops, not among the main four, are a major food source for hundreds of millions of people and have potential to provide nutrition to countless others. The Treaty helps maximize the use and breeding of all crops and promotes development and maintenance of diverse farming systems.

**World Heritage Convention (WHC)**

The event that aroused particular international concern was the decision to build the Aswan High Dam in Egypt, which would have flooded the valley containing the Abu Simbel temples, a treasure of ancient Egyptian civilization. In 1959, after an appeal from the governments of Egypt and Sudan, UNESCO launched an international safeguarding campaign. Archaeological research in the areas to be flooded was accelerated. Above all, the Abu Simbel and Philae temples were dismantled, moved to dry ground and reassembled. The campaign cost about US$80 million, half of which was donated by some 50 countries, showing the importance of solidarity and nations' shared responsibility in conserving outstanding cultural sites. Its success led to other safeguarding campaigns, such as saving Venice and its Lagoon (Italy) and the Archaeological Ruins at Moenjodaro (Pakistan), and restoring the Borobodur Temple Compounds (Indonesia). Consequently, UNESCO initiated, with the help of the International Council on Monuments and Sites (ICOMOS), the preparation of a draft convention on the protection of cultural heritage.

The primary mission of the WHC is to identify and conserve the world's cultural and natural heritage, by drawing up a list of sites whose outstanding values should be preserved for all humanity and to ensure their protection through a closer co-operation among nations. The Convention defines the kind of natural or cultural sites which can be considered for inscription on the World Heritage List. The Convention sets out the duties of States Parties in identifying potential sites and their role in protecting and preserving them. By signing the Convention, each country pledges to conserve not only the World Heritage sites situated on its territory, but also to protect its national heritage. The States Parties are encouraged to integrate the protection of the cultural and natural heritage into regional planning programmes, set up staff and services at their sites, undertake scientific and technical conservation research and adopt measures which give this heritage a function in the day-to-day life of the community. It explains how the World Heritage Fund is to be used and managed and under what conditions international financial assistance may be provided. The Convention stipulates the obligation of States Parties to report regularly to the World Heritage Committee on the state of conservation of their World Heritage properties. These reports are crucial to the work of the Committee as they enable it to assess the conditions of the sites, decide on specific programme needs and resolve recurrent problems. It also encourages States Parties to strengthen the appreciation of the public for World Heritage properties and to enhance their protection through educational and information programmes.
The Convention on Wetlands of International Importance:

This Convention, also known as the Ramsar Convention, was signed in Ramsar (Iran) in 1971 and came into force in December 1975. It is an intergovernmental treaty that embodies the commitments of its member countries to maintain the ecological character of their Wetlands of International Importance and to plan for the "wise use", or sustainable use, of all of the wetlands in their territories. Unlike the other global environmental conventions, Ramsar is not affiliated with the United Nations system of Multilateral Environmental Agreements, but it works very closely with the other MEAs and is a full partner among the "biodiversity-related cluster" of treaties and agreements. It provides a framework for international cooperation for the conservation of wetland habitats which have been designated to the 'List of Wetlands of International Importance'. Programmes have also been launched for scientific management and wise use of wetlands, mangroves and coral reef ecosystems.

BIO-DIVERSITY & INTELLECTUAL PROPERTY RIGHTS

The relation between IPRs and the conservation of genetic resources occurs at local, national and global levels. To be effective, the responses to these challenges must be integrated, but differentiated so as to address the various needs and stakeholders. The focus has been on benefit sharing, technology transfer and conditions of access, rather than on ensuring that intellectual property rights act as an effective incentive for the conservation of genetic resources. Creating the most appropriate balance between conservation of genetic resources and intellectual property protection involves two major issues i.e. to what extent, the conservation of biological diversity provides a justification for IPRs, or their limitations and whether, and to what extent, it is necessary to create a sui generis right for traditional ecological knowledge. Today the country is facing problems of bio-piracy, patent issues in regard to the traditional knowledge of our country such as Haldi, Neem, Jamun etc. At global level, such issues have become a challenge. The ecology comprising of plants, animals, natural resources etc are considered to be a national property/resources, is gradually coming to the domain of individual Ownership, with broadened definition of Patents.

The relationship between the Trade Related Aspects of Intellectual Property Rights(TRIPS) Agreement and the CBD has also been debated in various WTO fora. The Committee on Trade and Environment has this as a standing item on its agenda. In this context, several interventions have been made regarding the patentability of genetic materials. Some developing country Members have argued against granting patents over genetic material, out of concern that it might limit access and benefit sharing as called for under the CBD. Paragraph 19 of the Doha Ministerial Declaration states “We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), ... to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and ... In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.” It is now clear that the Review should consider a variety of factors including the CBD, the public interest aspects identified in the TRIPS Agreement, and development. Furthermore,
the Doha Declaration also calls for addressing the relationship between WTO rules and multilateral environmental agreements, although this is not meant to alter the balance of rights and responsibilities of WTO Members.

The International Convention for the Protection of New Varieties of Plants (UPOV Convention) establishes UPOV, which creates plant breeder’s rights (PBRs), is one possible sui generis system that would appear to meet the requirements of the TRIPS Agreement. The UPOV Convention was developed in 1961, but has been revised several times, most recently in 1978 and 1991. It provides for PBRs over new varieties of plants. Since 1998, when UPOV 1991 entered into force, new parties to the Convention must adhere to the 1991 version, rather than that of 1978.

*World Intellectual Property Organisation* has also initiated research on the intellectual property aspects of access to genetic resources. As a result of controversies arising from proposals by some developing countries during the negotiations of the WIPO Patent Law Treaty to require certificates of origin for patent applications involving genetic resources, it was agreed to establish a process under WIPO for considering these issues in greater depth. This led to the creation of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, whose first session was held in 2001. The Intergovernmental Committee has proven to be a venue for debating key issues, enabling information gathering, and commissioning further analytical work. So far, it has been unable to forge consensus, although it is still at an early stage of its work. Its mandate contains the following elements *with respect to genetic resources, With respect to traditional knowledge*

Considering the development of “best contractual practices”, guidelines and model intellectual property clauses for contractual agreements on access to genetic resources and benefit-sharing, taking into account the specific nature and needs of different stakeholders, different genetic resources and different transfers within different sectors of genetic resources policy;

**LEGAL GOVERNANCE : BIOLOGICAL DIVERSITY.**

**Biological Diversity Act (2002)**

India’s strategy for conservation and sustainable utilization of biodiversity was evolved from various initiatives framed and formulated largely by the Ministry of Environment and Forests (MOEF). The *Biological Diversity Act 2002* was born out of India’s attempt to realise the objectives enshrined in the United Nations Convention on Biological Diversity (CBD) 1992 which recognizes the sovereign rights of states to use their own Biological Resources. The Act covers conservation, use of biological resources and associated knowledge occurring in India for commercial or research purposes or for the purposes of bio-survey and bio-utilisation. It provides a framework for access to biological resources and sharing the benefits arising out of such access and use. The Act covers foreigners, non-resident Indians, body corporate, association or organization that is either not incorporated in India or incorporated
in India with non-Indian participation in its share capital or management. These individuals or entities require the approval of the National Biodiversity Authority when they use biological resources and associated knowledge occurring in India for commercial or research purposes or for the purposes of bio-survey or bio-utilisation. It also addresses access to biological resources and associated traditional knowledge to ensure equitable sharing of benefits arising out of their use to the country and its people, thereby contributing to achieving the third objective of the CBD. India is one of the first few countries to have enacted such legislation. The Act is to be implemented through a three-tiered institutional structure: National Biodiversity Authority (NBA), State Biodiversity Boards (SBBs) and Biodiversity Management Committees (BMCs).

Biodiversity is a multi-disciplinary subject involving diverse activities and actions. The stakeholders in biological diversity include the Central Government, State Governments, institutions of local self-governmental organizations, industry, etc. One of the major challenges before India lies in adopting an instrument, which helps to realise the objectives of equitable sharing of benefits enshrined in the Convention on Biological Diversity.

Management structure of Biodiversity Act:
A three-tiered structure at the national, state and local level is envisaged.

National Biodiversity Authority (NBA):
All matters relating to requests for access by foreign individuals, institutions or companies, and all matters relating to transfer of results of research to any foreigner will be dealt with by the National Biodiversity Authority.

State Biodiversity Boards (SBB):
All matters relating to access by Indians for commercial purposes will be under the purview of the State Biodiversity Boards (SBB). The Indian industry will be required to provide prior intimation to the concerned SBB about the use of biological resource. The State Board will have the power to restrict any such activity, which violates the objectives of conservation, sustainable use and equitable sharing of benefits.

Biodiversity Management Committees (BMCs):
Institutions of local state government will be required to set up biodiversity management Committees in their respective areas for conservation, sustainable use, documentation of biodiversity and chronicling of knowledge relating to biodiversity.
NBA and SBBs are required to consult the concerned BMCs on matters related to use of biological resources and associated knowledge within their jurisdiction.

People’s Biodiversity Register (PBR):
- The main function of the BMC is to prepare Peoples Biodiversity Register in consultation with local people.
- The Register shall contain comprehensive information on availability and knowledge of local biological resources, their medicinal or any other use or any other traditional knowledge associated with them.
Many of our local people or ecosystem people possess valuable knowledge of uses of biodiversity such as herbal remedies and vegetable dyes, much of the knowledge of the status and dynamics of biodiversity also resides with the people at grassroots.

The tremendous valuation from place to place in the distribution and uses of biodiversity, the documentation has to be highly location specific and time specific.

The PBR is a complex process involving a series of activities linked to each other in many different ways.

All local bodies have the responsibility of documentation of local biological resources

Comprehensive information on availability and knowledge of local biological resources, their medicinal or any other use or any other traditional knowledge associated with them.

Data about the local Vaids and practitioners using the biological resources.

Details of the access to biological resources and traditional knowledge grated, details of collection fee imposed and details of the benefits derived and mode of their sharing.

People’s knowledge is of two kinds.

Knowledge of uses that might find commercial application and that might need to be guarded with respect to IPR.

Knowledge pertinent to prudent management of natural resources that might be widely shared with benefit to all concerned without any unfair commercial profits accruing to any party.

The NBA and the SBB shall provide guidance and technical support to the BMC for preparing Peoples Biodiversity Registers

The Peoples Biodiversity Registers shall be maintained and validated by the BMC

Biodiversity Heritage Sites (BHS): Biodiversity heritage sites (BHS) should includes both wild and domesticated biodiversity and human cultural relations with such biodiversity. The question will arise, how biodiversity and heritage sites are different from the concept of “Protected areas”? Protected areas is covered in The Wild Life Act. It is important to focuss while declaring Biodiversity Heritage sites, on some aspects such as:

a) Local communities would be central to such a process including in identifying and deciding on potentials of BHS.

b) Both Traditional knowledge and modern scientific knowledge could be used for process of management of BHS

c) Involvement of marginalized sections of communities including women should be ensured their involvement in BHS.

d) Government Institutions, NGO’s, Teachers should facilitate local communities for capacity building for managing BHS

e) Institutional linkages between and among the existing institutions like panchayats, gram sabhas, village/tribal council, urban wards should be planned for managing the BHS
Without prejudice to any other law for the time being in force, the State Government may, from time to time in consultation with the local bodies, notify in the Official Gazette, areas of biodiversity importance as biodiversity heritage sites under this Act.

The State Government, in consultation with the Central Government, may frame rules for the management and conservation of all the heritage sites.

The State Government shall frame schemes for compensating or rehabilitating any person or section of people economically affected by such notification.

Without prejudice to any other law for the time being in force, the State government may, from time to time in consultation with the local bodies, notify in the Official Gazette, areas of biodiversity importance as biodiversity heritage sites under this Act.

The State Government, in consultation with the Central Government, may frame rules for the management and conservation of all the heritage sites. The State Government shall frame schemes for compensating or rehabilitating any person or section of people economically affected by such notification.

The National Biodiversity Authority formed an Expert Committee to prepare the guidelines on establishment of Biodiversity Heritage site.

As per section 21(1), the National Biodiversity Authority shall, while granting approvals under section 19 or section 20, ensure that the terms and conditions subject to which approval is granted, secure equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimer.

The National Biodiversity Authority Constituted an Expert Committee to develop guidelines for benefit sharing for the access of biological resource occurring in India or associated knowledge there to for research or for commercial utilization or for biosurvey and bioutilization. The Authority while granting approval to any person for access or for transfer of results of research or applying for patent and IPR or for third party transfer of the accessed biological resource and associated knowledge may impose terms and conditions for ensuring equitable sharing of the benefits arising out of the use of accessed biological material and associated knowledge. No person who has been granted approval under section 19 shall transfer any biological resource or knowledge associated there which is the subject matter of the said approval except with the permission of the National Biodiversity Authority.

Any person who intends to transfer any biological resource or knowledge associated thereto referred to in subsection (1) shall make an application from and in such manner as may be prescribed by the National Biodiversity Authority.

The guidelines shall provide for monetary and other benefits such as royalty; joint ventures; technology transfer; product development; education and awareness raising activities.
institutional capacity building and venture capital fund. The formula for benefit sharing shall be determined on case-by-case basis. The Authority will soon notify guidelines.

**Members of NBA:**
- A Chairperson who shall be an eminent person having adequate knowledge on conservation and sustainable use of biological diversity.
- Three ex-officio members appointed by the Central Government. One representing the Ministry dealing with Tribal affairs. Two representing the Ministry dealing with Environment and Forests of whom one shall be the Additional Director General of Forests.
- Seven ex-officio members appointed by the Central Government to represent respectively the Ministries of the Central Government dealing with
  - Agricultural Research and Education
  - Biotechnology
  - Ocean Development
  - Agriculture and Cooperation
  - Indian Systems of Medicine and Homeopathy
  - Science and Technology
  - Scientific and Industrial Research
  - Five non-official members appointed amongst specialists and scientists,
  - representatives of industry, conservers, creators and knowledge holders of biological resources.

**Functions and Powers of NBA:**
- Regulate activities, approve and advice the government of India on research, commercial, bio-survey and bio-utilization.
- Grant approval to Section 3, 4 and 6.
- Certain persons not to undertake Biodiversity related activities without approval of National Biodiversity Authority (Section 3).
- Results of research not to be transferred to certain persons without approval of National Biodiversity Authority (Section 4).
- Application for IPR rights not to be made without approval of National Biodiversity Authority (Sec. 6).
- Perform such other functions as may be necessary to carry out the provisions of this act.

**Approvals by NBA:**
- Any person who intends to access or apply for a patent or any other form of IPR protection whether in India or outside India referred to sub-section (1) of Section 6 may make an application prescribed by NBA.
- Any person who intends to transfer any biological resource or knowledge associated thereto referred to sub-section (1) of Section 3 shall make an application in such form and in such manner as may be prescribed to the National Biodiversity Authority.
- Determination of equitable benefit sharing by National Biodiversity Authority.

**State Biodiversity Board (SBB):**
- Establishment of State Biodiversity Board in every State.
- State Government may by notification in the Gazette can establish the SBB in their State name e.g. Tamil Nadu Biodiversity Board.
- No State Biodiversity Board shall be constituted for a Union Territory and in relation to Union Territory, the National Biodiversity Authority shall exercise the powers and perform the functions of a SBB for the Union territory.

**Collaborative Research:**
Collaborative research projects involving transfer or exchange of biological resources between government sponsored institutions and similar institutions in other countries will be exempted from this regulation.

**Intellectual Property Rights:**
Intellectual Property Rights relating to biological resources must be defined in order to ensure that the benefits derived from their use are equitably shared. Section 6 of the Act underlines this principle. In case of persons intending to apply for any form of Intellectual Property Right in or outside India for any invention based on any research or information on a biological resource found in India, prior permission of the NBA is required. The NBA may impose benefit sharing fee or royalty or conditions on the financial benefits arising out of commercial utilization of such right while granting permission. Section 21 provides for the determination of "equitable benefit sharing" which is also one of the objectives of the Act. NBA in consultation with local bodies can impose terms and conditions for securing equitable sharing of benefits.

**National Biodiversity Fund:**
A National Biodiversity Fund is being constituted for this purpose. The NBA will ensure that equitable benefit sharing is made during the utilization of biological resources and the knowledge relating to them. The amount of benefit sharing will be deposited in the National Biodiversity Fund and the amount shall be paid directly to such individuals or groups of individuals or organizations in accordance with the terms of any agreement in such manner as decided by the NBA. On behalf of the Central government, the NBA will take all measures to oppose Intellectual Property Rights granted outside India on any biological resource or associated knowledge originating from India.

**Enforcement:**
- The section dealt with under chapter XII provides for enforcement in general and deals with penalty, cognizance of offences, offences by companies, appeal etc in particular.
- Section 58 provides that the offences under the Act shall be cognizable and non-bailable.
- Any person, aggrieved by any determination of benefit sharing or order of the Authority under this Act may file an appeal to the High Court. The time allowed to prefer an appeal is 30 days from the date of communication to the aggrieved person of the Order of the Authority.
- If any person contravenes any direction given or order made by the Central Government, the State Government, the National Biodiversity Authority or the State Biodiversity Board for which no punishment has been separately provided under the Act the person shall be punished with a fine which may extend to one lakh rupees and...
in case of a subsequent offence the fine may extend to two lakh rupees and in case of continuous contravention with additional fine which may extend to two lakh rupees everyday which the default continues.

Biopiracy:
To check biopiracy, the legislation provides that access to biological resources and associated knowledge is subject to terms and conditions, which secure equitable sharing of benefits. Further, it would be required to obtain the approval of the National Biodiversity Authority before seeking and IPR based on biological material and associated knowledge obtained from India.

Exemptions provided in the Act:
The Biological Act, 2002 provides for the following exemptions:

- Exemption to local people and community of the area for free access to use biological resources within India.
- Exemption to growers and cultivators of biodiversity and to Vaidas and Hakims to use biological resources.
- Exemption through notification of normally traded commodities from the purview of the Act.
- Exemption for collaborative research through government sponsored or government approved institutions subject to overall policy guidelines and approval of the Central Government.

Regulation of Access to Biological Diversity

- No person referred to in such-section (2) shall without previous approval of the NBA obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio survey and bio utilization (3(1))
- The persons who shall be required to take the approval of NBA under sub-section (3(1)).
  - A person who is not a citizen of India 3(2a)
  - A citizen of India, who is a non-resident as defined in clause (30) of section (2) of the Income tax act, 1961 (3(2b))
  - A body corporate, association or organization (3(2c))
  - Not incorporated or registered in India (3(2c I) or
  - Incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management. (3(2c II))

Results of research not to be transferred to certain persons without the approval of NBA
No person shall without the previous approval of the NBA transfer the results of any research relating to any biological resources occurring in or obtained from India for monetary consideration or otherwise to any person who is not a citizen of India or citizen of India who is non-resident as defined in clause (30) of section 2 of the Income-tax Act, 1961 or a body corporate or organization which is not registered or incorporated in India or which has any non-Indian participation in its share capital or management.

Collaborative research projects:

- The provisions of section 3 and 4 shall not apply to collaborative research projects involving transfer or exchange of biological resources or information relating thereto.
between institutions including Government sponsored institutions of India and such Institutions in other countries if such collaborative research projects satisfy the conditions specified in sub-section (5(3)).

- Collaborative research projects shall conform to the policy guidelines issued by the Central Government in this behalf (5(a)).
- Should be approved by the Central Government. (5(b)).
- Application for Intellectual Property rights not to be made without the approval of NBA.
- No person shall apply for any Intellectual Property Right, by whatever name called in or outside India for any invention based on any research or information on a biological resource obtained from India without obtaining the previous approval of the NBA before making such application. (6(1)).
- NBA while granting the approval under this section, impose benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilization of such rights. (6(2)).
- The provisions of this section shall not apply to any person making an application for any right under any law relating to protection of plant varieties enacted by parliament. (6(3)).
- Where any right is granted under law referred to in sub-section (3), the concerned authority granting such right shall endorse a copy of such document granting the right to the NBA. (6(4)).

**Determination of equitable benefit sharing by NBA**

NBA shall, while granting approvals under section 19 or section 20, ensure that the terms and conditions subject to which approval is granted, secure equitable sharing of benefit arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers.

**CONCLUSION**

The conservation of biological diversity is a serious and common concern of human beings for better living. It should be recognized that the women in rural setup play a vital role in the conservation and sustainable use of biological diversity and this affirm the need for the full participation of women at all levels of policy making and implementation for biological diversity conservation. Biodiversity is an important component for economic and social development and poverty eradication and overriding priorities of most of the developing countries in the world.

The conservation and sustainable use of biological diversity is of critical importance for meeting the need of food, fodder, fiber, health, water and other needs of growing world population for which purpose, access to and sharing of both genetic resources and technologies are essential. It should be determined to conserve and sustainable use of biological diversity for the benefit of present and future generations. Besides law enforcing forces and regulations of the Governments, it is always better to involve the people in a
Participatory mode including Tribal people, farmers, ecologists, illiterate villagers, for the conservation and protection of Biodiversity wealth of our great Nation. Awareness creation among people, school children, students and teachers in the colleges, Universities is very important to conserve the biodiversity wealth. Participatory mode of involvement of the people at ground level to acquire more knowledge about the biodiversity conservation will help to maintain and sustain the bioresources and biodiversity. The involvement of local people and their willing participation alone could save the national wealth of biodiversity. It is difficult to manage and conserve the biological diversity by the State Government or Central Government alone but the people of our great nation have to be aware of our natural biodiversity wealth of our country and they should take all measures to conserve and protect our rich biodiversity not only for better living of our present generation but also for our future generations.

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Hon'ble Mr. Justice P. Sathasivam, Judge (Now Chief Justice) Supreme Court of India, addressing the august gathering at the inaugural function of women hostel of J.T.R.I.
L to R: Hon'ble Mr. Justice Uma Nath Singh, Judge, Allahabad High Court; Hon'ble Mr. Justice Sushil Harkauli, Senior Judge, Allahabad High Court; Hon'ble Dr. Justice B.S. Chauhan, Judge, Supreme Court of India; Hon'ble Mr. Justice P. Sathasivam, Chief Justice, Supreme Court of India; Hon'ble Mr. Justice Shiva Kirti Singh, Chief Justice, Allahabad High Court; Hon'ble Mr. L.K. Mohapatra, Judge, Allahabad High Court; Hon'ble Mr. Justice Bhanwar Singh, Chairman, JTRI, UP sharing the dais on the occasion of Inaugural Function of Women Hostel at J.T.R.I.

Hon'ble Dr. Justice B.S. Chauhan, Judge Supreme Court of India, addressing the august gathering at the inaugural function of women hostel of J.T.R.I.
The august gathering of Judges and legal luminaries at the inaugural function of women hostel of J.T.R.I. (18.05.2013)

Hon’ble Mr. Justice Ashok Bhushan, Judge, Allahabad High Court, and Hon’ble Mr. Justice N. K. Mehrotra, Lok Ayukta, U.P. with other Hon’ble Dignitaries at Inaugural of Women Hostel of JTRI.
Hon’ble Mr. Justice S. N. Shukla, Judge, Allahabad High Court, and Hon’ble Mr. Justice Arvind Kumar Tripathi II, Judge, Allahabad High Court, at Inaugural of Women Hostel of JTRI.

Hon’ble Mr. Justice Ashwani Kumar, Judge Allahabad High Court & Hon’ble Mr. Justice Sushil Harkauli, the then Senior Judge Allahabad High Court at the inaugural function of women hostel of JTRI.
Hon'ble Mr. Justice Shabihul Hasnain, Judge, Allahabad High Court, and Hon'ble Mr. Justice Ritu Raj Awasthi, Judge, Allahabad High Court, at Inaugural of Women Hostel of JTRI.

Hon'ble Mr. Justice Virendra Singh, Chairman, SCDRC, U.P., and Hon'ble Dr. Justice Satish Chandra, Judge, Allahabad High Court, at Inaugural of Women Hostel of JTRI.
Hon’ble Mr. Justice Anil Kumar, Judge, Allahabad High Court, and Hon’ble Mr. Justice Rakesh Srivastava, Judge, Allahabad High Court, at Inaugural of Women Hostel of JTRI.

Hon’ble Mr. Justice P. Sathasivam, inaugurating the newly constructed Women Hostel of J.T.R.I., with Hon’ble Dr. Justice B.S. Chauhan, Judge Supreme Court of India, Hon’ble Mr. Justice Shiva Kirtil Singh, Chief Justice, Allahabad High Court, Hon’ble Mr. Justice Bhanwar Singh, Chairman, J.T.R.I., and Sri U.S. Awasthi Director, J.T.R.I. And other dignitaries.
Hon'ble Mr. Justice P. Sathasivam, Judge Supreme Court of India, Hon'ble Dr. Justice B.S. Chauhan, Judge Supreme Court of India, Hon'ble Mr. Justice Shiva Kirli Singh, Chief Justice, Allahabad High Court, Hon'ble Mr. Justice Bhanwar Singh, Chairman J.T.R.I. inaugurating the newly constructed Women Hostel of J.T.R.I.

Right to Left: Madam Justice P. Sathasivam, Madam Justice B.S. Chauhan, Madam Justice Shiva Kirli Singh, Madam Justice Sushil Harkauli, Madam Justice Bhanwar Singh, at the inaugural of newly constructed Women Hostel of J.T.R.I. with Hon'ble Dr. Justice B.S. Chauhan, Judge Supreme Court of India, Hon'ble Mr. Justice Shiva Kirli Singh, Chief Justice, Allahabad High Court, Hon'ble Mr. Justice Sushil Harkauli, Senior Judge Allahabad High Court, Hon'ble Mr. Justice Laxmi Kanta Mohapatra, Judge Allahabad High Court, and other dignitaries.
NEWLY CONSTRUCTED WOMEN HOSTEL AT JTRI.
ACCESS TO JUSTICE: INTERNATIONAL ENVIRONMENTAL LAW

INTRODUCTION

1. Human development and technological advancement are exhausting earth's natural resources, which took millenniums to develop. Every single aspect of the environment is being affected by human involvement. With little contribution to the betterment of the environment the earth is on the edge of environmental breakdown. With melting ice caps, rapidly changing environmental phenomenon, increased hurricane and earthquake counts, humans are fighting a battle to keep mother nature on their side. The World Wildlife Funds' Living Planet Reports, 2008 has issued a word of caution that our global footprint now exceeds world's capacity to regenerate by about 30%. If our demands on the planet continue at the same rate, by the mid-2030s we will need the equivalent of two planets to maintain our lifestyles. The ecological credit crunch is now a global challenge. The report tells us that more than three quarters of the world's people living in nations that are ecological debtors as their national consumption has outstripped their countries by capacity. Most of us are drawing exclusively on our current lifestyles, and our economic growth upon the ecological capital of other parts of the world. In the last century the world has moved from ecological credit to ecological deficit.

2. The Stockholm Declaration of 1972 laid emphasis on the development with protection and preservation of the natural environment. The participant nations agreed that efforts must be made to reconcile the needs of development and the need to protect and improve the environment. The nature's conservation must be given priority in planning for economic development.

3. The movement for sustainable development conceived in Brundtland report gained momentum with the publication of the World Commission on Development

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* Complied from references and presented
** Judge, Allahabad High Court
and Environment-"Our Common Future" in 1987. The principle of sustainable development is based on the principles of intergenerational equity. The goal of economic and social development, the Commission report proclaims, must be defined in terms of sustainability in all countries whether developed or developing, market oriented or centrally planned. It also requires meeting the basic needs of society, and extending to all the opportunity to satisfy their aspirations for better life. Further economic growth and development involves changes in physical ecosystem in both renewable and non-renewable natural resources. Sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are in harmony and enhance both current and future potential to meet human needs and aspirations.

4. The United Nations Conference on Environment and Development (UNCED), 1992 was the hallmark in this respect. It emphasised that economic and social progress depends critically on the preservation of the natural resource base with effective measures to prevent environmental degradation. The UN summit focussed on three broad concepts: An "Earth Charter" covering a number of principles aiming at development and the protection of the environment, was the first focus for discussion. Secondly, "Agenda 21" was intended to be a global action plan for sustainable development: thirdly, developing countries demanded a substantial increase in new funding from developed countries to contribute to sustainable development in the South. Thus it was first a concentrated, concerted and cooperative effort on the part of world nations and delivered an agenda for sustainable development. The Earth Summit resulted in the following documents:

   o Rio Declaration on Environment and Development
   o Agenda 21
   o Convention on Biological Diversity
   o Forest Principles
   o Framework Convention on Climate Change (UNFCCC).

5. Both Convention on Biological Diversity and Framework Convention on Climate Change were set as legally binding agreements. India has ratified both the Conventions in 1993 and 1994 respectively; therefore India has also taken necessary steps to implement them by passing the Biological Diversity Act in 2002. It is to be noted that an important achievement was an agreement on the Climate Change Convention which in turn led to the Kyoto Protocol adopted on December 11, 1997. The main object of Kyoto Protocol was to achieve the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.
6. The Rio Declaration stated that 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'; and that 'National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.' Further it advocated for 'Environmental impact assessment' and 'Precautionary principle' as instruments of sustainable development. Thus it can be said that this Rio Conference (Earth Summit) gave great impetus to the idea that economic growth has to adopt environmental principles to save the world.

7. To avoid misinterpretations of the meaning of such development, the Rio Declaration was supplemented by Agenda '21, the magnum opus of the Conference. Agenda '21, in other words “What must be done in the 21st century”, is the systemic programme for mankind's sustainable development, the strategy for the new, qualitative development. After Rio, insistence on unilateral economic growth is not just an outdated policy but one that is both illegal and unethical.

8. As a sequel to this, the Johannesburg Summit 2002 – the World Summit on Sustainable Development was held. It declared that 'poverty eradication, changing consumption and production patterns and protecting and managing the natural resource base for economic and social development are over arching objectives of an essential requirements for sustainable development'. It also provided the plan for the implementation of resolutions on sustainable development and declared that 'the three components of sustainable development- economic development, social development and environmental protection as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of, and essential requirements for, sustainable development'. This Summit also took note of the Millennium Development Goals of 2000 while formulating the strategies for sustainable development.

9. A holistic approach was adopted to implement the agenda. It considered that the eradication of poverty is indispensable requirement for sustainable development; and participation of indigenous people and women must be made in decision making. Similarly emphasis was also given to health care services, primary education, to increase food availability and its affordability, adequate drinking water, cleaner use of liquid and gaseous fossil fuels, environmentally sound energy services, strengthening
the contribution of industrial opportunities, cities without slums and sustainable natural resource management were considered the basis for sustainable development.

10. Green economy is the part of the larger objective of sustainable development. Therefore imperatives of the sustainable development are the imperatives of green economy. The Green Economy in the context of Poverty Eradication and Sustainable Development is one of the key themes addressed in the UN Conference on Sustainable Development in 2012. Main focus of the Conference was 'green economy in the context of sustainable development and poverty eradication' and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development 2002, and addressing new and emerging challenges”.

**International Green Economics**

11. The three international conferences mentioned above were instrumental in creating awareness in the world about the need and importance of the application of principles of preservation and protection of natural environment in the field of globalization and consumerism. These principles underline that all the policies of economic and social development, in private and public sectors, must be viewed and reviewed in the light of principle of sustainable development. To restructured and revamped the natural environment, which has been destroyed by unprecedented, unscientific and unbridled use of natural resources, is the call of time/urgent requirement to save mankind from the brink of disaster. Keeping these things in view, myriad international Conventions, Declarations, Protocols have been adopted. Some of the significant ones are as follows-

1. Convention Concerning the Use of White Lead in Painting, Geneva, 1921
2. Vienna Convention on Civil Liability for Nuclear Damage, Vienna, 1963
3. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, Moscow, 1963
5. Convention Concerning Protection Against Hazards of Poisoning Arising from Benzene, Geneva, 1971
7. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (as amended), London, Mexico City, Moscow, [Washington], 1972
18. Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 1987
25. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, 1993

12. Thus the plethora of conventions and protocols make it clear that the World States are much concerned about making the economics green. These are some of the steps adopted create awareness about the adverse effects of the brown economics and a pressing need to adopt clean and green technology in all developmental activities. Further the 'brown' economics must be replaced by 'green' economics' to save present generation and its progeny. As per principles of green economics the polluting industries and developmental activities have to take on and employ the clean and green technology for production or they have to cease to operate. The espousal of clean and green economics cannot be delayed or denied as it involves high production cost. We have to reiterate that 'no development at the cost of environment the bottom-line.'

Environment and International Security
13. In 1982, the UN General Assembly Resolution 'World Charter for Nature' officially acknowledged that: “[C]ompetition for scarce resources creates conflicts.” A few years later, the Brundtland Report highlighted possible linkages between environmental problems and international security. It maintained that environmental problems could be” ...a possible cause as well as a result of conflict”. Four years later, the Rio Declaration on Environment and Development acknowledged that the environment may lead to disputes and it reminded States that they must work together in order to solve such disputes peacefully. However, in the last decade the international community has not been too concerned about the linkage between environment and international security. In fact, while both the Millennium Declaration and the Johannesburg Declaration on Sustainable Development further stressed the possibility that environmental problems might lead to violent conflicts, there has been no real follow-up to these declarations.
14. In 2003, the UN Secretary General was convinced that international security had to be redefined in order to highlight new threats and to find plausible solutions. For this purpose he appointed a high-level panel on threats, challenges, and change (hereinafter “high-level panel”) that issued a report in December, 2004. Therein, a threat to international security is defined as:

“Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system...”

15. One of the threats to international security that the high-level panel highlighted concerned:

“Economic and social threats, including poverty, infectious diseases and environmental degradation.”

16. A possible interpretation of the high-level panel's report is that the international community must finally shift from a traditional concept of international security to the concept of human security. An armed conflict may cause significant deaths and upheaval in many regions of the world, but it is not the only possible cause of such misery. Statistics show that natural disasters have affected six times more people than interstate armed conflicts between 1990 and 1999.

17. Water scarcity alone is not a threat to international security. However, if an environmental problem is linked to poverty, excessive urbanization, and social and economic threats, such as in the Middle East or Bangladesh, it may end up constituting a threat to international security, and this is the concern highlighted by the high-level panel.

18. Despite all the international documents that have progressively reaffirmed the linkage between the environment and international security, and the growing literature on this subject moving in the same direction, the Security Council has, to use a colloquialism, the “final word on the matter”. In fact, the latter is the only international body that currently has the power to determine if an international problem is a threat to international peace and security and to give legal effects to such determination. The wording of Article 39 of the UN Charter is very clear:

'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

19. Despite the fact that the UN Security Council has not yet clearly determined that an environmental problem constitutes a threat to international peace and security, the linkages do exist. If current environmental trends are not modified, the relationship will become evident to the international community in the near future. The 2004
report of the high-level panel may create momentum in the UN framework in order to enable the Security Council to readdress the linkage between the environment and international security.

**Climate Change and International Security**

20. The international community has started to link climate change with international security. Until now, all international climate-related efforts were focused on the science of climate change, and how States should attempt to mitigate or adapt to climate change. Despite their importance and relevance, equal efforts have not been dedicated to the linkages between climate change and international security. However, as the scientific evidence and the awareness of the dangers of climate change increase, things are changing. Research institutes and scholars have started to conduct studies on climate change and security. The States have also started to consider climate change as a security issue.

21. Climate change effects, such as sea rise, and clean water scarcity, which can constitute a threat to human security. Climate change constitutes a potential threat, regardless of the manner in which international security is considered, i.e., in military terms or inclusive of a human security issue. On the one hand, climate change may cause serious environmental degradation that will decrease the availability of natural resources, like water, which could then lead to violent conflicts, which may be called as *water wars*. The UN Secretary General stressed that the 21st century conflicts may concern water. On the other hand, climate change may be responsible in the future for natural disasters and the related humanitarian crises. When one considers that in the last decade alone, 188 million people were affected by such extreme events, the threat to human security by increasing disasters in the future appears clear. Natural disasters and humanitarian crises can trigger, just like environmental degradation, massive migration movements, which could foster political tension and finally bring countries to war. This is especially true for developing countries that lack the capacity to respond to such calamities. Armed conflicts due to massive movements of people that want to flee their country for climate change-induced environmental problems are foreseen in the report by the Pentagon, according to which, for example, in 2010 there will be “[B]order skirmishes and conflict in Bangladesh, India, and China, as mass migration occurs toward Burma.” The scenario gets even worse in 2020 when, according to the report, there will be “[P]ersistent conflict in South East Asia …… between] Burma, Laos, Vietnam, India, China.”

The UN Security Council has already maintained that massive flows of refugees due to internal political instability may pose a threat to international peace and security.
22. Although climate change is not the direct cause of a person leaving their home (the direct reason being the flooding caused by sea rise, the destructive power of a storm, or the progressive desertification of land), still one must acknowledge that a primary cause behind these environmental problems is climate change.

23. Can the UN mechanisms, set-up by the international community in order to respond to a global threat, accommodate an environmental menace to peace and security, and in particular one related to climate change? Chapter VII of the UN Charter provides the guidelines as to how the international community must respond once the Security Council has determined that a particular situation constitutes a threat to peace. However, before the Security Council makes a pronouncement on the nature of the situation, States will attempt to deal with the environmental problem through Chapter VI of the Charter.

24. How could the mechanism provided for in the UN Charter respond to a situation, in which the threat to peace does not lead, at least immediately, to a violent conflict? Imagine the following example: The government of the Tuvalu Islands in the Pacific Ocean considers that climate change is a threat not only to their own existence but to the survival of many other small islands in the West Pacific. Increasing sea-levels will eventually cover the islands making life impossible on them. For this reason, the government of the Tuvalu Islands asks the Security Council to carry out an investigation on the possible existence of a threat to peace and international security related to its particular situation. The UN body undertakes an investigation and agrees on specific recommendations aimed at decreasing the risks of sea-level rise. However, the Security Council faces the problem—To whom should these recommendations be addressed? Where a State is preparing military action or acting aggressively against another State, or is acting in a way that might lead to a humanitarian crisis, it is easy to determine the country that recommendations must be addressed to. But which State is directly responsible for sea rise and for the current climate change trends? The Tuvalu Islands see that the UN has not been able to do anything and that the sea-levels are rising at an alarming rate. The Security Council also acknowledges that the situation is worsening, and it finally issues a Resolution in which it determines that climate change-related sea rise is a threat to international peace. Theoretically, the door is open now to the response of the international community. The Security Council has the right to allow all UN Member States to adopt political and economic counter measures. But against whom? The Security Council could decide to start a military campaign in order to restore peace and international security. But where?

25. In conclusion, the first way that the international community may respond once climate change is considered a threat to international peace and security, is through the
traditional mechanisms provided for in Chapters VI and VII of the UN Charter. On one hand, if the climate change-related environmental problem leads to a traditional armed conflict between States, the mechanism could be effective. However, if Security Council resolutions are vetoed by one of the permanent members, the international community response may be blocked. This could eventually lead to unlawful unilateral interventions in the name of global environmental protection. On the other hand, if the international community intends to tackle a climate change-related environment problem before it leads to a military or a humanitarian crisis, then the UN Charter is irreparably flawed. In fact, how can the Security Council decide to whom it should address recommendations under Chapter VI and, in particular, against whom may it allow political and economic countermeasures under Chapter VII?

**Implementation of International Environmental Treaties by Judiciary-Access to Justice in International Environmental Law**

26. Two main interrelated causes can be identified: a continuing environmental degradation and a lack of respect for the law going hand in hand with a changed approach to ethical and moral values. Recent monitoring and data-collection systems evidence the increasing, frightening amount of threats and damages to the environment with global, transboundary and national deleterious effects. Although the endeavours on the national and international level to avoid and prevent environmental risks and infringements have intensified since Rio 1992, the object has not been achieved adequately. This negative result was also stated by the UN Millennium Declaration of September 2000 and confirmed again by the Johannesburg Declaration on Sustainable Development in September 2002. Under para 13 it says:

'The global environment continues to suffer. Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, the adverse effects of climate change are already evident, natural disasters are more frequent and more devastating and developing countries more vulnerable, and air, water and marine pollution continue to rob millions of a decent life.'

27. To alter this state the Millennium Declaration stressed the urgent need to implement and respect the principles of equity and social justice, of tolerance, eradication of poverty and to develop a new ethic of conservation and stewardship for our common environment with more respect for nature to guarantee in the end peace and security on our planet. Emphasizing the opportunities of globalization in general, the Declaration states that ‘at present its benefits are very unevenly shared, while its costs are unevenly distributed’. In order to translate all these shared values into actions, it postulates to develop more efficient capacity-building, good governance
and democracy instruments and to promote the protection of human rights, by peaceful dispute resolution in conformity with the principles of justice and international law. The Johannesburg Summit, which can be characterized as the ‘Summit of implementation, accountability and of partnership’, picked up and stressed these targets and undertook to speed up improved, more effective implementation of Agenda 21 and of further political commitments by its Plan of Implementation. It does not, however, directly address aspects of legal access to courts and refers to the position of non-governmental actors only in a very general way in the context of building partnerships with governments.

28. There is a unique challenge and opportunity for national and international lawyers to promote and support this implementation process. They have to consider innovative legal instruments such as progressive environmental laws and international agreements on the one side and to guarantee their implementation and execution on the other. As unfortunately a huge deficiency in the application of legal norms can still be stated, the tool of judicial control by independent institutions is indispensable. According to the theory of separation of powers it belongs to the hallmarks of each democratic legal order that at least an independent judicial institution is empowered to control the legislative and executive organs to guarantee the implementation, application and execution of law. Without such an instrument the existence of any legal system is endangered. The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium in August 2002 is a step in that direction. The judges reminded the Community of States and all parts of society to respect, uphold, strengthen and enforce the Rule of Law. They are right to affirm that:

"an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law."

29. The judges stressed that the ‘Judiciary has a key role to play in Integrating Human Values set out in the United Nations Millennium Declaration ....’ By its four key principles and the adopted, concerted and sustained programme of work—determining in a very precise manner the elements of information, data-exchange, environmental law education, access to justice etc. – the judges have proposed fundamental environmental law capacity building instruments to promote the implementation of the Montevideo Programme III and to effectuate sustainable
development in the future. The Montevideo Programme by its objectives and detailed fixed actions, has laid a general strong foundation for the further development of environmental law and the means for making it more effective.

30. The UNEP Governing Council with its Decision 22/17 on Governance and Law adopted on 7 February 2003, recalled the six regional judges symposia on environmental law convened by the UNEP Programme during the period 1996-2001, noted with appreciation the Global Judges Symposium of Johannesburg. It calls on the Executive Director to support within the Montevideo Programme the improvement of judicial capacity-building commitments. The Decision stresses the need to improve:

the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law at the national and local levels such as judges, prosecutors, legislators and other relevant stakeholders, to carry out their functions on a well informed basis with the necessary skills, information and material with a view to mobilizing the full potential of the judiciaries around the world for the implementation and enforcement of environmental law, and promoting access to justice for the settlement of environmental disputes, public participation in environmental decision-making, the protection and advancement of environmental rights and public access to relevant information.

31. This demand reflects Principle 10 of the Rio Declaration and the goals which have been implemented in the meantime by the Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Such an approach is, however, restricted to the national law level and may fail in solving transnational, international environmental law affairs. That part on ‘Enhancing the Application of Principle 10 of the Rio Declaration’ of Decision 22/17 merits special attention. Thereby the Governing Council requested the Executive Director:

to assess the possibility of promoting, at the national and international levels, the application of principle 10 … and determine, inter alia, if there is value in initiating an intergovernmental process for the preparation of guidelines on the application of principle 10.

32. The concrete contents and meaning behind this demand remain ambiguous. For instance such potential guidelines enable concerned citizens and victims of transnational environmental damage to bring an action against State organs – even against the foreign polluter-State – and to grant them legal access to international courts, such as the International Court of Justice? Such an assumption certainly would be unconventional, because the sovereignty of States stands against it and the States
are not willing to relinquish their sovereign rights. What States have in mind is to rule the complex problems of legal access on the level of private actors, i.e.; on the level of domestic or comparative national law. This tendency is also manifested by promoting the instrument of civil liability concepts and the lack of progress in setting up binding obligations in the field of State Responsibility/Liability as evidenced by the Work of the UN International Law Commission. The future will prove whether this ‘private-actors’ approach can sufficiently meet the environmental challenges of today. The enhancing legal access to national courts according to the law on conflicts and international procedural law is a first step in the right direction. Not only individuals directly or potentially affected in their legal interests must be granted direct access to the courts, civil society organizations, such as environmental interest groups and NGOs representing common societal and environmental interests and acting as guardians of the state of the environment, must have legal access as well. Accordingly, the Montevideo Programme stresses new options ‘for advancing the effective involvement of non-state-actors in promoting international environmental law and its enforcement at the domestic level’.

33. The ‘domestic judiciary’ approach accepted for the time being is not sufficient and must be changed, or expanded and amended by new instruments on the international level of jurisdiction. When it comes to litigation before civil courts of the polluted state, both claims for compensation and also actions to cease environmentally harmful and hazardous activities meet with failure.

- individuals mostly abstain from filing a lawsuit because of the potentially high costs and the problem of dealing with a foreign language;
- immunity from jurisdiction may hinder the competence of the home-courts as well as of the court of the polluter-state;
- pursuant to the rules on the law of conflicts or of the ‘ordre public’ the application of the substantive law can be excluded; and
- immunity from enforcement can defeat the enforcement of a foreign decision.

34. As regards lawsuits brought before the administrative courts of the polluter-state the 'ius standi' can be very problematic. In particular, the application of the substantive law, dominated by the principle of territoriality, can be refused if it does not protect foreign legal interests. By reason of sovereignty the home-court of the injured individual has no competence to examine public foreign law aspects. The polluter-state’s court will argue that its decision cannot be enforced abroad by reason of immunity from enforcement.

35. With regard to environmental protection by the criminal courts, the German Supreme Criminal Court has emphasised in a case concerning the transboundary
movement of hazardous waste from Germany to Poland, that the German criminal law does not protect the legal interests of foreign injured individuals and will only apply on German territory.

36. The national judicial proceedings are still mostly ineffective because they lack the requisite powers and have to be further improved in matters concerning international environmental law. The long duration of litigation, lasting sometimes more than a decade - as with the River Rhine Salinisation case and the Lingen case - also undermines legal protection. The protection of the global commons remains outside the scope of national jurisdiction and courts refuse, or are very reluctant to guarantee these legal interests by an interpretation pursuant to public international law. Such a task of interpretation demands too much from the national judge who is not as proficient in international law.

37. In this context it is worth mentioning that the Supreme Court of India has recently established the special national environmental courts composed of judges highly qualified in environmental law and with technical experts and scientists very proficient and experienced in environmental matters. The Permanent Court of Arbitration has implemented this approach by its recent procedural Optional Rules for conciliation and arbitration of international disputes in the field of the environment.

38. As a unique exception for the protection of global commons and the implementation of the principles of intergenerational equity and responsibility the decision of the Supreme Court of the Philippines in the famous Oposa case of 1993 is noteworthy. The plaintiffs, all minors, duly represented by their parents, successfully claimed to cease the continuing deforestation of the tropical rainforests – the indispensable natural resource for the life of present and future generations.

**Indispensability of International Judiciary**

39. There is not the slightest doubt about the indispensability and fundamental role of domestic judiciary for effective enforcement of environmental law. Cases with transnational effects, however, cannot always be solved sufficiently for various reasons. National jurisdiction, therefore, must be flanked by international judiciary. It is indispensable for the following main reasons:

- the behaviour of the states must fall within judicial control, as states themselves may commit or tolerate environmental destruction;
- only an independent judicial institution can scrutinize the implementation and enforcement of international treaty law and international law obligations, if the States at an earlier stage have failed to achieve compliance by ‘political non-confrontational’ mechanisms or agreement;
the necessary protection of Global Commons and the development of ‘ergaomnes-obligations’, as well as of a Human Right to a decent environment can be ensured and promoted by international judiciary.

40. Another crucial problem is the initiating of an international dispute settlement procedure, if not merely state interests but interests of individuals or environmental associations as well, are at stake. States, not infrequently, by political opportunity are very reluctant or refuse to support their injured nationals and to bring the ‘polluter-state’ to court, as for instance in the Chernobyl case. State interests, in particular economical priorities, can stand against those of citizens and the environment. The individuals, enterprises and environmental civil society organisations must be granted direct access to international judicial institutions. For the controlling of state activities as well as of private actors the engagement of NGOs, environmental interest groups and individuals as guardians of environmental matters should be encouraged as environmental grievances are clearly highlighted by the activities of these groups. We may recollect the protesting activities of Greenpeace movement against the introduction of toxic substances into rivers and the North Sea, against the nuclear tests on the Mururoa-Atoll, or the campaign against the disposal of the oil platform ‘Brent Spar’ in addition to the numerous activities of the World Conservation Union (IUCN) in the fields of nature protection and biodiversity.

41. Despite the indispensability of an international judicial institution, we must be aware of the fact that even a tribunal or a court in the end cannot replace the will of states to implement effectively their obligations under international agreements because the competence of an international arbitral or tribunal instrument also depends on the will of the states, in the agreement or compromise. The decisions of a court and impending potential sanctions may nevertheless press states to implement their obligations.

42. The importance of peaceful settlement of environmental disputes is emphasised in Principle 26 of the Rio Declaration, in Agenda 21 and in the Montevideo III Programme. Paragraph 39.10 of Agenda emphasises, inter alia, the importance of the judicial settlement of disputes. It calls on states ‘to further study mechanisms for effective implementation of international agreements, such as modalities for dispute avoidance and settlement’. It identifies the full range of techniques such as: prior consultation, fact-finding, commissions of inquiry, conciliation, mediation, non-compliance procedures, arbitration and judicial settlement of disputes. Paragraph 4 of the Montevideo Programme undertakes to realise the respective targets of Agenda 21 in particular stresses the need ‘to consider innovative approaches to dispute avoidance’. There is a general consensus that all preventive instruments of dispute
avoidance should be favoured in principle. The ‘political’ non-confrontational mechanisms of ‘compliance-procedure’ as well as of ‘Conference of the Parties (COP)’ need special attention. Regarding the Convention on Biodiversity (CBD) for example, it is noted that the CBD does not contain a provision establishing a compliance regime. Instead of this the COP-mechanism is favoured in Article 23. In case an agreement cannot be achieved by further negotiation or a decision of COP, Article 27 para 3 of the CBD provides for an agreed compulsory settlement of disputes either by arbitration or submission of the dispute to the International Court of Justice. The CBD also recognises the indispensability of a judicial control mechanism, if all modalities for dispute avoidance remain unsuccessful. Laudable though this approach is, it must be stressed that these ‘non-judicial’ instruments operate only between the organs of the states. NGOs or private third parties are not involved yet. They also cannot participate in the non-compliance procedure.

43. A unique exception is the new ‘compliance-procedure’ to the Convention for the Protection of Alps and its protocols adopted in November 2002. It enables NGOs – under certain conditions of confidentiality - to participate in the controlling mechanisms concerning the implementation and enforcement of the Convention. Such an innovative approach reflects the idea of participation as described in the Report ‘Implementing Agenda 21’ of the UN Secretary-General. It emphazises that:

> Participation generates shared values, mutually reinforced commitments, joint ownership and partnership, which are crucial to achieving sustainable development… The increase in major group participation has been a key area of success in the post-Rio period ….

44. But also worthy of notice is its critical remark on the participation of non-state-actors at the national and international level:

> "Participation is often based on temporary and ad hoc rather than permanent and reliable mechanisms and procedures. A strengthened sense of ownership of the decisions taken among participating stakeholders would help in implementing many decisions relating to sustainable development.

**International Court of Justice (ICJ)**

45. In 1993 the ICJ established an ad hoc chamber for environmental matters. The ICJ, however, cannot be the right forum, because states alone have direct access. This is regrettatble because by its very function, the ICJ could be the proper institution to control the implementation of environmental treaty obligations– as shown in the Gabčikovo-Nagymaros case, – to develop further and improve international environmental law and to concentrate on the urgent problems of protecting the global commons by applying the concept of *erga omnes* obligations. Sooner or later, under
the influence of the current efforts and programmes of the state community to strengthen and enhance the legal position of NGOs, non-state-actors will also be granted legal access to the ICJ. But such step would require states to relinquish sovereignty and expose themselves to legal proceedings as a prerequisite. Such necessary reform of the ICJ Statute and of the UN Charter do not appear to be possible at the moment.

**International Tribunal for the Law of the Sea (ITLOS)**

46. As regards the protection of the marine environment, according to Article 20 of the Statute of the Tribunal, the ‘States Parties’ to the Law on the Sea Convention, can submit disputes concerning interpretation and implementation of the regulations to the International Tribunal for the Law of the Sea, established in Hamburg in October 1996. Pursuant to para 2 of Article 20 the Tribunal is also open to ‘entities other than States’ in cases provided for in Part XI of the Convention. This concerns the competence of the special Sea-Bed Disputes Chamber with regard to seabed activities. The Chamber can hear cases brought by or against the International Sea-bed Authority, parties – including non-State parties – to a contract and prospective contractors. The same provision extends further the jurisdiction of the Tribunal in ‘any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case’. According to Article 187 para (c) read in connection with Article 153, private natural persons can present the dispute to the chamber only with the consent of a State. In general it must be emphasised that Article 20 of the Statute only enable a limited jurisdiction in the field, and do not go beyond. Also the term ‘entities’ still needs to be precisely defined by future jurisdiction of the Tribunal.

**The Court of First Instance and the Court of Justice of the European Communities (ECJ)**

47. In Europe NGOs, enterprises and individuals have access to the Court of First Instance, established in 1988, and the Court of Justice of the European Community (also court of appeal), if the interpretation of primary and secondary European environmental law or the correct implementation and application of EU-Regulations and Directives is concerned. However, a claim of legal and natural persons is admitted only if their rights are potentially injured directly and individually. This was stated by judgment of the ECJ of 2 April 1998 where Greenpeace International and concerned residents claimed in vain against a subvention granted by the EU Commission for the establishment of two electricity-power-installations in Gran Canaria and Tenerife. The claim of three French nationals with residence on Tahiti against the testing of atomic bombs on the Mururoa-Atoll were rejected as well in 1995. In general the courts are
proud of an extensive case-load in environmental matters, but according to the restricted regional field of application of European Law, their jurisdiction does not go as far as is desirable for global environmental protection. Nevertheless the importance of these courts for the further development of regional environmental law and general environmental principles remains unquestioned.

**European Court on Human Rights (ECHR)**

48. The jurisdiction of the European Court on Human Rights has paved new ways to improve environmental protection through an expanded concept of human rights and by linking both fields of law which traditionally have been treated separately. In its groundbreaking López-Ostra decision in 1994 the Court has opened the door for the protection of human rights against nearly all sources of environmental pollution, as opposed to just noise emissions and radiation, as was the case in the 1970s and 1980s.

**International Criminal Court (ICC)**

49. A conceivable perspective for the future could perhaps also be the International Criminal Court which was established on 17 July 1998 by the United Nations Diplomatic Conference of Rome. According to Article 5 of its Statute, the Court has jurisdiction for the most serious crimes of concern to the international community as a whole. Those crimes are the crime of genocide, crimes against humanity, war crimes, as well as the crime of aggression. The creation of a highly desirable, autonomous, explicit jurisdiction in environmental matters by extending the list of crimes to ‘crimes against the environment’, as ruled for instance in Article 19(d) of the ILC’s Draft Articles on State Responsibility, however, failed to gain support in the deliberations to the Statute. During the work of the Preparatory Committee on the Establishment of an ICC, a large majority of States wanted to limit the jurisdiction of the ICC to the core crimes mentioned, and refused to include the so-called ‘treaty-crimes’. Instead of this it was decided to insert environmental aspects in a modified form under the heading of either a crime against humanity or a war crime. Article 8, para 2, of the Statute defines as a war crime:

> intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

50. Although this regulation does not grant comprehensive protection of all elements of the environment, in general this approach is a preliminary step in the direction.
Permanent Court of Arbitration (PCA) as proper forum

51. As a specialist International Environmental Court with mandatory jurisdiction does not yet exist, the Permanent Court of Arbitration, The Hague, could be the appropriate forum to settle environmental disputes. This idea was born at the First Conference of the Members of the Court in September 1993 and in ICEF-Venice Conference 1994, where this idea found strong support, from the Secretary-General of the International Bureau of the PCA. Numerous resolutions also stressed the potential role of the PCA to act as the competent institution for the settlement of disputes in environmental matters, for example, the Resolutions of the George Washington University and of the American Bar Association, Washington, April 1999, of ICEF, Rome, October 2000 and of Biopolitics International Organisation, Athens 2001. The Second Conference of the Members of the PCA by its Resolution of May 1999 also called upon the Secretary-General and the International Bureau of the PCA:

- to expand the Court’s role … including the area of environmental disputes, taking into account the entire range of international dispute resolution mechanisms administered by the Court.

52. This institution, having its roots in the Hague Peace Conferences of 1899 and 1907, in particular the Conventions for the Pacific Settlement of International Disputes, is well recognized and accepted by numerous UN Member States. It is a very flexible and unique institution, because it offers facilities for four of the dispute-settlement methods listed in Article 33 of the UN Charter: inquiry, mediation, conciliation and arbitration.

53. As regards conciliation the PCA established in 1996 new Optional Conciliation Rules, enabling the parties, including States, International Organisations, NGOs, companies and private associations to use this mechanism. The Rules are based on the UNCITRAL-Conciliation Rules and can be linked with possible arbitration.

54. For arbitration, the Court adopted in 1992 Optional Rules for Arbitrating Disputes between Two States, and in 1993 Optional Rules for Disputes between Two Parties of which one is a State. As a consequence, disputes between a non-state-actor and a state can be submitted to the Court. In May 1996 the set of Optional Rules was extended in the rules for Arbitration involving International Organisations and States as well as between International Organisations and Private Parties. By widening its jurisdiction to all parties of the community of states, including organisations, and all members of society, it goes far beyond the competence of the International Court of Justice.
A new Dimension: the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment

55. By its recent and special Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment of 19 June 2001 – unanimously adopted by 94 Member States – the PCA has opened a new dimension for peaceful settlement of international environmental conflicts. In a unique manner the Rules which seek to address the principal lacunae in environmental dispute resolution meet most of the respective requirements of the Montevideo III Programme and have effectuated the fundamental targets of legal access of non-state-actors to judiciary, of legal protection and of effective control of implementation and enforcement of international environmental treaty obligations and of international environmental law in general. The Rules, which have been drafted by a special PCA Working Group on Environmental and Natural Resources Law since June 1996.

56. To meet such challenges of our modern, globalized world the States must cooperate with non-state-actors albeit with the limitation of their sovereignty. Altogether, both PCA Optional Rules can play a model role for the enhancement of a ‘ius standi’, for ‘non-state-actors’ and for the international environmental judiciary in general. This target could also be achieved and supported by the amendment of dispute settlement clauses in existing environmental agreements and their insertion into future treaties. The PCA Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements offer significant assistance in this regard. As to international judiciary the open question ‘Do we need a new International Court for the Environment with mandatory jurisdiction?’ needs further deliberations.

57. Altogether, the recent activities of judges recalling and asserting the importance of the Rule of Law and of the indispensability of judiciary in the field of environmental protection at the national and international level, is an appropriate impetus contributing to meeting more effectively the aim of sustainable development in future.

58. Shri Justice S.H. Kapadia, the then Chief Justice of India said in a massage dated June 18th, 2011 in the International Seminar on Global Environment & Disaster Management: Law and Society:-

"Environment and development have been accommodated in a framework of balancing and ad hoc equity rather than an absolute application of rights by the Indian Courts. This has been done by balancing conflicting rights and by striking compromises between development, on one hand, and the right to livelihood, on the other hand. Environmental protection, in decision-making
and implementation, requires a legal language capable of incorporating technical specifications, evaluation of industrial processes, balancing of rights (particularly socio-economic rights) and protecting complicated biological and ecological system. Thus, the subject requires application of constitutional doctrines like, doctrine of "margin of appreciation", doctrine of "proportionality", "principle of reasonableness" etc."

References:

(i) Institutional Innovation for Environmental Justice: By Lord Justice Robert Carnwath (Seminar Volume, International Seminar on Global Environment & Disaster Management: Law & Society, Vigyan Bhawan, New Delhi);

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(iii) Imperatives of Green Economics: By Satish C. Shastri (Seminar Volume, International Seminar on Global Environment & Disaster Management: Law & Society, Vigyan Bhawan, New Delhi);

(iv) Ex Post and Ex Ante [Legal] Approaches to Climate Change Threats to the International Community: By Francesco Sindico (The Icfai Journal of Environmental Law, Vo.VI No.1)


Erga omnes

Erga omnes is a Latin phrase, which literally means "towards all" or "towards everyone". In legal terminology, erga omnes rights or obligations are owed toward all. For instance a property right is an erga omnes entitlement, and therefore enforceable against anybody infringing that right. An erga omnes right (a statutory right) can here be distinguished from a right based on contract, which is only enforceable against the contracting party.

In international law it has been used as a legal term describing obligations owed by states towards the community of states as a whole. An erga omnes obligation exists because of the universal and undeniable interest in the perpetuation of critical rights (and the prevention of their breach). Consequently, any state has the right to complaint of a breach. Examples of erga omnes norms include piracy, genocide, slavery, torture, and racial discrimination. The concept was recognized in the International Court of Justice's decision in the Barcelona Traction case [(Belgium v Spain) (Second Phase) ICJ Rep 1970 at paragraph 33]:

"...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their
protection; they are obligations erga omnes. [at 34] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law.... others are conferred by international instruments of a universal or quasi-universal character.”

**Examples**

* In its opinion of 9 July 2004 the International Court of Justice found "the right of peoples to self-determination" a right erga omnes. The finding referred to article 22 of the Covenant of the League of nations.
ROLE OF ETHICS IN DISPENSATION OF JUSTICE*

Hon’ble Mr. Justice Ashok Bhushan **

Very good afternoon. Sri U.S. Awasthi, Director, other judicial Officers of the institute, newly appointed Additional District and Sessions judges present in this hall, ladies and gentlemen. To be with you this afternoon gives me happiness which one feels when he is with his family.

God has been benevolent to all of you since he has put you on a pious and truthful path. By choosing a judicial career you have chosen a challenging path in life. The judicial office carries along with it difficult but higher rules for leading a life. As a Judge you perform divine function, which demands a higher code of conduct. A judge by his own conduct, by his fairness in hearing and by his just and equitable decisions earns for himself and for whole judiciary, the trust and respect of the public and the members of the Bar. Our today's subject of discussion i.e. "Role of Ethics in Dispensation of Justice" touches one of an important quality, which is essential to be possessed by person occupying a judicial office.

The word 'ethics' is "of or relating to moral action, conduct, motive or character; containing precepts of morality; moral, professionally right or befitting; conforming to professional standards of conduct, code of right and wrong, sense of right and wrong, virtuous conducts, virtues". For us ethics are, thus, code of conduct which should pervade in our conduct and behaviour while performing our job as Judges. Justice R.C. Lahoti while delivering 'M.C. Setalvad Memorial Lecture' gave a very simple definition of judicial ethics "Simply put, it can be said that judicial ethics are the basic principles of right action of the Judges. It consists of or relates to moral action, conduct, motive or character of judges; what is right or befitting for them. It can also be said that judicial ethics consist of such values as belong to the realm of judiciary without regard to the time or place and are referable to justice dispensation".

The cannon of ethics are mostly unwritten rules of conduct, which govern our conduct. They are not to be found in any statute book or rules of conduct framed for regulating the service conditions of Judges, these cannons after being put in practice for time immemorial have been recognised as rule of conduct commanding acceptability akin to

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* Address during Foundaion Training Programme of Additional District Judges dated 1.2.2014
** Judge, Allahabad High Court.
religion or firm faith.

Justice R.V. Raveendran has enumerated five ethical standards to be followed and practised by a Judge, they are: (i) integrity and honesty (ii) judicial aloofness and detachment (iii) Judicial independence (iv) Judicial temperament and humility (v) impartiality i.e. freedom from prejudice and bias.

Integrity and honesty are the fundamental prerequisites for a Judge. They are neither special qualities nor achievement to be boasted. A Judge is required to be upright and expected to be a man of integrity. If judge is not honest or lacks integrity, he has no business to be a Judge. In this context, I want to emphasize that as a Judge we have close knit and a vast fraternity. When a judge does something improper it is not only the erring judge but the entire judiciary that will be seen in a bad light. When we adorn a chair at our dais in robes, our individuality, lineage, caste or community vanish and we are only a Judge. When something improper is committed by a Judge, no one takes the name of a judge, who has committed an impropriety rather it is said that Judicial Magistrate/Additional District Judge/District Judge has committed impropriety. Thus, apart from individual impeccable conduct we have collective responsibility to the society in discharge of our function. Thus, in our fraternity those who are older in age and experience have a responsibility to guide and caution younger colleagues, if on after deliberation, they are of opinion that brother judge is to be guided for better result. Institutions in the world consist of individual members. It is the collective effort of all members which prove the utility and usefulness of an institution. My endeavour is to impress upon junior officers to give value and weight to the words and advice of their seniors. Judges have to be cautious not to take a personal favour from a lawyer, politicians or businessmen. Some of the judges assume that if the favour is unrelated to any case pending before them, it is not objectionable and shall not affect their integrity. Their assumption is wrong. Please remember favours normally come with strings attached. Whenever a concession or favour is shown to a Judge, the person showing it will consider it as an investment for the future and would, when the occasion arises, demand, or at least expect, a return of the favour in some form or the other.

Judicial aloofness and detachment is maintaining a detachment from the arena of contest and rendering justice unmindful of the consequences. You have to dispassionately decide who is right and who is wrong in accordance with law. Judicial aloofness does not mean that you live in an ivory towers. It does not mean that you should not be alive to the problems of the society or that you can ignore the day-to-day realities of life. Judges should be able to understand the needs of the society and connect to the problems and difficulties of the weaker sections and provide access to justice to all who come at the doors of the justice.

Judicial independence is both independence of the judiciary as an institution and the independence of individual judge in performing his judicial functions. Independence of individual judge means freedom from any influence or pressure and freedom from any interference by the executive or the legislature in the judicial process. You have the
right to decide a case in the manner which you consider to be in accordance with law. You have absolute immunity against any actions or reprisals or personal criticism, in respect of your judicial actions and decisions. Judicial independence is not freedom to do what you like and what you consider just and equitable. Judicial independence does not mean that you can exercise your discretion as per your whims and fancies. Even when you are exercising discretion, for which there are no statutory guidelines or precedents, you are required to act justly and fairly and not arbitrarily.

While inside and outside the Courts, the judges are addressed with respect. You decide the fate of litigants, you send people to jail, you have captive audiences in your court who give appreciative nods to your observations but above should not lead you to think that you are personification of wisdom, knowledge, or intelligence and your word is law. Such assumptions will gradually lead fading of humility from your mind. Humility is the quality which makes a judge realise, that he is neither infallible nor omnipotent. Without humility a Judge becomes arrogant and opinionated, perverse with a closed mind, and starts believing that the lawyers do not know much, that he knows better and that his decisions are always just and right. One should be more concerned about rendering justice rather than trying to exhibit your erudition, intelligence or power which inevitably leads to injustice. Justice Frankfurter described "Judicial humility" as having a mind that respects law, that can change its thinking, that can accept that another view is possible, that can be persuaded by reason, that which is detached and aloof, that quests for truth and that puts passion behind its judgment and not in front of it.

The most crucial and special quality of a Judge is impartiality. To achieve impartiality one has to possess the other four qualities as mentioned above i.e. honesty and integrity, judicial aloofness, independence, humility. You should be free from both external and internal bias.

The Supreme Court in the case of C. Ravichandran Iyer vs. Justice A.M. Bhattacharjee and others reported in (1995)5 S.C.C. 457, noted the qualities and conduct, which a Judge must possess. I read paragraphs 21 and 23 of the said judgment for your benefit:

"21. Judicial office is essentially a public trust. Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude
from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself. It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than that expected of a layman and also higher than that expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society.

"23. To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy of the rule of law and the working of the Constitution itself. The Judges of higher echelons, therefore, should not be mere men of clay with all the frailties and foibles human failings and weak character which may be found in those in other walks of life. They should be men of fighting faith with tough fibre not susceptible to any pressure, economic, political or of any sort. The actual as well as the apparent independence of judiciary would be transparent only when the office-holders endow those qualities which would operate as impregnable of the judiciary In short, the behaviour of the Judge is the bastion for the people to reap the fruits of the democracy, liberty and justice and the antithesis rocks the bottom of the rule of law."

What should be the befitting conduct of Judges have been tried to be put in black and white on more than one occasion. Although no statutory code of conduct has been framed enlisting the code of conduct but our Supreme Court in its Full Court meeting had adopted a charter called "Restatement of Values of Judicial Life" on May 7, 1997. Restatement of
Values of Judicial Life contains several ethical rules, which are to be punctually followed by the Judges of higher judiciary. Those restatement of values are also fully relevant for the officers of the subordinate judiciary. There has been Bangalore declaration of the year 2002. In Bangalore declaration certain principles have been adopted. It is relevant to note the details of both, which are as follows:-

"(i) Restatement of Values of Judicial Life (1999)
On May 7, 1997 the Supreme Court of India in its Full Court unanimously adopted a Charter called the "Restatement of Values of Judicial Life" to serve as a guide to be observed by Judges, essential for independent, strong and respected judiciary, indispensable in the impartial administration of justice. This Resolution was preceded by a draft statement circulated to all the High Courts of the country and suitably redrafted in the light of the suggestions received. It has been described as the 'restatement of the pre-existing and universally accepted norms, guidelines and conventions' observed by Judges. It is a complete code of the cannon of judicial ethics. It reads as under:

"(1) Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a Judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided.

(2) A Judge should not contest the election to any office of a Club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.

(3) Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.

(4) A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in- law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.

(5) No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge
actually resides or other facilities for professional work.

(6) A Judge should practice a degree of aloofness consistent with the dignity of his office.

(7) A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.

(8) A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.

(9) A Judge is expected to let his judgments speak for themselves. He shall not give interviews to the media.

(10) A Judge shall not accept gifts or hospitality except from his family, close relations and friends.

(11) A Judge shall not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.

(12) A Judge shall not speculate in shares, stocks or the like.

(13) A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business).

(14) A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.

(15) A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be resolved and clarified through the Chief Justice.

(16) Every Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held.

These are only the "Restatement of the Values of Judicial Life" and are not meant to be exhaustive but illustrative of what is expected of a Judge."

The above "restatement" was ratified and adopted by Indian Judiciary in the Chief Justices' Conference 1999. All the High Courts in the country have also adopted the same in their respective Full Court Meetings.
(ii) The Bangalore Draft Principles

The values of judicial ethics which the Bangalore Principles crystallises are: (i) independence (ii) impartiality, (iii) integrity, (iv) propriety (v) equality and (vi) competence & diligence.

The above values have been further developed in the Bangalore Principles as under:-

i. Judicial **independence** is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A Judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

ii. **Impartiality** is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

iii. **Integrity** is essential to the proper discharge of the judicial office.

iv. **Propriety**, and the appearance of propriety, are essential to the performance of all the activities of a judge.

v. Ensuring **equality** of treatment to all before the courts is essential to the due performance of the judicial office.

vi. **Competence and diligence** are prerequisites to the due performance of judicial office.

vii. **Implementation** - By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles, if such mechanisms are not already in existence in their jurisdictions."

There has been a lot of debate with regard to conduct which a Judge has to follow while conducting himself privately or interacting with the society. A person who is occupying an office of Judge remains Judge during court hours as well as when not sitting in the Court. When a judge sits on trial, he himself is on trial. The trust and confidence of 'we the people' in judiciary stands on the bedrock of its ability to dispense fearless and impartial justice. Any action which may shake that foundation is just not permitted. Once having assumed the judicial office, the judge is a judge for 24 hours. It is a mistaken assumption for any holder of judicial office to say that I am a judge from 10 to 5 and from 5 to 10 it is my private life. A judge is constantly under public gaze.

Justice P.B. Gajendragadkar said "Judges ordinarily must observe certain rules of decorum in their social behaviour and a little isolation and aloofness are the price which one has to pay for being a judge, because a judge can never know which case will come before him and who may be concerned in it. No hard and fast rule can be laid down in this matter, but some discretion must be exercised".

A Judge should always be careful as to how he deals with others in ones private life. One should never assume "I am honest. My conscience is clear. Therefore, I can freely mix with anyone". You may be honest. But, unfortunately, the litigants and the public do not
assume that you are honest. A cynical world, which has seen dishonesty and corruption everywhere, would not hesitate to assume corrupt motives, if your conduct give room for it, even though you may be honest. If they see you in the company of any lawyer or a litigant in a club or a restaurant, they will always assume that some deal is going on. They will never think that you are having dinner with friends. One has to keep a distance so that no one can get an opportunity to assume things and put motives.

The above are some of the principles which have been enumerated and can be termed as legal ethics to be followed by Judges in dispensation of justice. The legal ethics are not the principles which can be thrust upon anyone. Legal ethics have to come from one's inner self. For being true to our duties, we have to transform ourselves from within and how the said transformation takes place has been told to us by our ancient saints and scholars. It is useful to recall a poetic composition in VRIHADARANYAKA UPANISHAD. I quote English translation of the verse:-

"You are what your deep, driving desire is.
As your desire is, so is your will.
As your will is, so is your deed.
As your deed is, so is your destiny."

Thank your. Jai Hind.
Unlike America which has no language or religion of its own, India is a land of diversity and is the birthplace of many religions and sects with firm faith in divinity.

Contrary to the general perception that man has subjugated women to his will and used her for promoting his comforts, the Vedic age reflects that it was a period of feminine glory in India. In that era women in India were educated and enjoyed equal status with men. Men and women together used to perform religious duties and no 'Yagya' was possible without the wife. According to Hindu mythology, in the absence of Sita even Lord Rama was advised to have her golden statue to perform a 'Yagya' successfully.

“यत्र नार्यस्तु पूजयन्ते, समन्ते तत्र देवता”
अते जहाँ नारी को पूजा जाता है वहाँ देवताओं का निवास होता है ऐसी हमारी मान्यता है।

The status of women suffered a setback with the invasion of India by Alexander and later by Muslims which pushed the women behind the 'pardha' for security reasons and gave rise to several evils like Sati, Jauhar and child marriage.

The great social reformers Raja Ram Mohan Roy, Ishwar Chandra Vidyasagar, Mahrashi Dayanand Saraswati, Swami Vivekanand worked hard for the revival of the old Vedic society where women were held in high esteem.

अर्थात माता के तुल्य कोई छाया नहीं है। माता के तुल्य सहारा नहीं है। माता के सदृश कोई रक्षक नहीं है तथा माता के समान कोई प्रयव वस्तु नहीं है।

* Judge, Allahabad High Court, Allahabad.
In a country like India with such strong beliefs and where women have been revered and worshiped, we do not find any law or much law concerning women in the earlier period. One reason may be that under the tenants of Hindu religious scriptures women were regarded as mother of all men and women where men owed the moral responsibility of the welfare of women folk, their security and upliftment.

Even in the absence of any legislation for the protection of the rights of the women they were more secure and safe and enjoyed more independence in comparison to modern days where they are excelling in all spheres but with little or no security probably for the reason that men earlier considered it to be their religious and a social obligation to respect and protect women.

Gradually, with the influence of western culture the concept of joint family and the institution of marriage caved in and the morality lost all significance.

Duncan M. Torret in his treatise “The death of Marriage Law” observed that in India disputes between husband and wife were not supposed to be handled by the courts but by the assembly of either the relatives as elderly members of the society. There was no matrimonial litigation or if any it was avoided.

The Indian Penal Code, 1860 for the first time identified the crimes against women and provided for the offences like rape, kidnapping and abduction, molestation, sexual harassment and later dowry deaths or torture of women both mental and physical. At the same time Section 125 Cr.P.C. provided for the grant of maintenance to wives.

The adoption of the Constitution after independence, apart from conferring fundamental rights upon all her citizens, both men and women, took special care for ensuring freedom and equality to women and for the elevation of their social, economic, educational and political rights. These privileges available to the women under the Constitution can be referred to Article 14, 15, 16, 39A, 42, 243D(3), 243D(4), 243T(3) and 243T(4).

The preamble that is regarded as the key to the Constitution of India itself points to equality between men and women by saying “We the people of India” which includes within its fold both men and women.

In addition to the above, several legislations have been passed to protect the interest of the women and for their empowerment namely:-

1. The Family Courts Act, 1984,
2. The Special Marriage Act, 1954,
3. The Hindu Marriage Act, 1955,
4. Hindu Widows’ Remarriage Act, 1856,
5. The Hindu Succession Act, 1956 with amendment in 2005,
6. Immoral Traffic (Prevention) Act, 1956,
7. The maternity Benefit Act, 1961 (Amended in 1995),
8. Dowry Prohibition Act, 1961,
9. The Medical Termination of Pregnancy Act, 1971,
In 1990 National Commission for Women Act was passed by the Central Government and a National Commission for Women was constituted to study and monitor all matters and laws relating to women and for suggesting necessary amendments in the existing legislation and for taking new legislative measures.

The Government has also come out with a national plan for action for girl child with the objection of building a better future for them and a National Policy for Empowerment of Women.

The Indian judiciary has also played a pivotal role as a reformist of the socio-economic condition of women in the country. The law marks judgment of the Apex Court in the case of Vishakha1 goes a long way in protecting the women and their rights specially at work plays.

Despite all efforts and all enactments, the general belief is that the position of women in Indian society has suffered a lot. There are emptied number of cases reported every day of molestation, harassment, rape, prostitution, illegal trafficking of women and dowry death and of the kind.

The graph is on the rise and none is able to check its rising trend. The outcry is for harsh and legislation and time bound disposal of cases concerning rights of the women. It may be justified or the need of the day but the reforms are meaningless unless we educate ourselves, have a strong moral character and respect for human beings.

Gandhiji used to say:-

आज की शिक्षा प्रणाली से कहीं बेहतर हमारी पुरानी शिक्षा पद्धति थी जहाँ मूल्यों पर आधारित शिक्षा दी जाती थी।

The education should not be confined to gaining knowledge alone but it should be directed towards character building and man making as has been rightly put by Martin Luther King Jr.

“Intelligence plus character is the goal of true education.”

Swami Vivekanand also propagated that “The goal of all education should be man making”.

I may reminded of Swami Vivekanand's views towards reforms concerning women. He said “Educate your women first and leave them to themselves; Then they will tell you what reforms are necessary for them. In matters concerning them, who are you?”

1 Vishaka vs. State of Rajasthan AIR 1997 SC 3011
Endorsing the above view to my mind the better course open is to develop a good society consisting of people of good moral character who would desist from encroaching upon other persons’ rights and acts of crime against women. This is only possible by good education based upon moral values and the character building of citizens.
राष्ट्र निर्माण में युवा शक्ति का उपयोग
HARNESSING YOUTH POWER IN NATIONAL BUILDING

Justice Pankaj Mithal*

आज देश जिन कठिन अनिश्चिता की परिस्थितियों से गुजर रहा है उस वातावरण में “राष्ट्र निर्माण में युवा शक्ति का उपयोग” (Harnessing Youth Power In Nation Building) एक बड़ा ही महत्वपूर्ण विचारणीय प्रश्न है। इस विषय पर मेरी सोच कुछ अलग या नयी नहीं है। मैं भी वही सोचता हूँ जो संभवतः भारत में रहने वाला हर व्यक्ति सोचता है।

उपरोक्त विषय में मुख्यतः दो शब्दों का प्रयोग होता है। पहला “युवा शक्ति” दूसरा “राष्ट्र निर्माण”। अतः पहले यह समझ लेना समीचीन होगा कि युवा शक्ति व राष्ट्र निर्माण से हमारा क्या लाभ पर्याप्त है।

युवा शब्द परिभाषित नहीं है। युवा कोई भी हो सकता है। यह हर प्राणी की अपनी सोच और शारीरिक क्षमता पर निर्भर करता है। एक अधेड़ उम्र का व्यक्ति भी उर्जा से ओत-प्रोत अपने आयुक्त मन से युवा मानता है व एक 30-40 वर्ष का व्यक्ति अपनी शारीरिक अक्षमता के कारण अपने को किसी भी श्रेणी में रखने से करता है। मेरी समझ से 15 से 35 वर्ष की आयु वाला व्यक्ति साधारणतः युवा की श्रेणी में रखा जा सकता है। जिसमें विद्यार्थी, कर्मचारी, कृषक, मजदूर, शिक्षक, अशिक्षित, व्यवसायी, खिलाड़ी आदि सभी सम्मिलित हैं। इससे कम उम्र वाले जीवन की व्यवहारिकता से अनिश्चित होने के कारण राष्ट्र निर्माण में अधिक भागीदार नहीं हो सकते। दसौं और 40 से ऊपर की आयु वाले यह समझ बेढ़ते हैं कि उन्हें अपना लक्ष्य निर्धारित कर लिया है या फिर जीवन जी लिया है और एक ऐसे comfort zone में आ गये हैं जिससे निकलना उनके लिए अब स्वाभाविक नहीं है। अतः राष्ट्रविधि में स्वत: कुछ भी बनाने में इस्तेमाल नहीं हैं। अन्ततः गौरवशील ले देखर राष्ट्र निर्माण व उसकी उन्नति का भार 15 से 35 या 40 वर्ष की आयु के युवाओं के कल्याण पर आ टिकता है। परन्तु जब मैं युवा शक्ति की बात करता हूँ तो मेरे सामने

* Judge, Allahabad High Court, Allahabad.
"Arise, awake, for your country needs tremendous sacrifice. It is the young men that will do it. The young, the energetic, the strong, the well built, the intellectual for them is the task."

What our country needs is
not only iron men with nerves of steel,
gigantic wills and sharp intellect but
men with golden heart and beautiful mind as well,
having strong moral character.
The children of today will make the India of tomorrow. The way we bring them will determine the future of the country.

That one who fails to plan is planning to fail.

The Youth in Nation Building Act, 1994
मान्त्र के लिए Youth Foundation अथवा Nehru Yuva Kendra जैसे संगठन बना कर भी उनकी शाखा का सही व पूर्ण प्रयोग नहीं कर पा रहें है।

हमारी शिक्षा प्रणाली भी अधिक से अधिक विद्यार्थियों को शिक्षा देने शिक्षा के पश्चात उनको नौकरियों देने व उनको जीविकापत्तन का साधन उपलब्ध कराने में लग गयी है पर हम यह भूल गये कि हमारी शिक्षा प्रणाली किस प्रकार की होनी चाहिए या किस प्रकार की शिक्षा हमें अपने युवा नागरिकों को देनी चाहिए जिसका परिणाम यह हुआ कि हमारी नयी पीढ़ी अपना भविष्य तो शायद सुधार पायी पर नैतिक शिक्षा के अभाव में राष्ट्र का निर्माण नहीं कर पायी।

राष्ट्र निर्माण का सही वास्तविक अर्थ नागरिकों के चरित्र निर्माण व उनके व्यक्तित्व के निखार में है। नीतिगत व मूल्यों पर आधारित शिक्षा से नागरिकता के निर्माण करने में सर्वप्रथम दायित्व मान बाप का होता है। तत्त्वज्ञान उनके अध्यापकों का महत्त्वपूर्ण योगदान होता है और जब अभिवाक्य और अध्यापक दोनों साथ-साथ नयी पीढ़ी का चरित्र निर्माण करते हैं तभी सही मानवने में एक मजबूत और बड़ा राष्ट्र उभर कर आता है। किसी ने ठीक ही कहा है शिक्षा जो केंद्र पुस्तकों आदि पर आधारित हो और जिसमें नैतिकता का कोई अंश न हो वह एक रेगिस्तान की तरह है।

पुस्तकीय ज्ञान जीविकापत्तन के लिए आवश्यक है परंतु केंद्र रोटी खाने को जीवन नहीं कहते। जीवन वह है जिसमें हम परोपकार कर मानवता का कल्याण कर सकें व स्वंय खुश रहकर दसूंे को भी प्रसन्नचित कर सकें।

राष्ट्रपिता महात्मा गांधी का भी मानना था—

“The aim of University education should be to turn out true servants of the people who will live and die for the country.”

मेरे विचार हैं राष्ट्र के नवजुवक का राष्ट्र निर्माण में सर्वाधिक महत्त्वपूर्ण योगदान है। मैं तो कहूँगा कि आज का युवा वर्ग ही राष्ट्र का सच्चा उत्तराधिकारी और संचालक है और हमें उन्हें देश के भविष्य की कहानी लिखने के लिए तत्वतंत्र छोड़ देना चाहिए।

२० एन० ऑक्टॊबर के पूर्व जनरल सेक्रेटरी कोफी अन्नान का तो कहना यहाँ तक था—

Young people are key agents of development and must be at the forefront of global change and innovation.

स्वामी विवेकानन्द का मिशन नवजुवकों को जगाकर भारत माता की खोई प्रतिष्ठा वापस लाना था और उसके लिए उनको नयी पीढ़ी पर पूरा मरोसा था। इस संबंध में उनकी सोच कुछ इस प्रकार थी।

(i) “My faith is in the younger generation”

(ii) “It is for the youth to build nation”
(iii) “My hope of the future lies in the youths of character”

भारत की विशाल युवाशक्ति न केवल भारत में पररनु दुनिया में चमकाव कर सकती है। उससे भी बड़ा चमकाव जो टिप्पणियाँ, इजिप्ट और लीबिया अमी देखने को मिला और जिसका कुछ अंश मात्र वर्षों पूर्व हमने देश के राज्यों बिहार, गुजरात और आसाम में देखा था। इस सबके लिए आवश्यक है कि हम अपनी विशाल युवाशक्ति की ऊर्जा को बनाये रखें। उसको राष्ट्र निर्माण व उन्नति की सही दिशा में लगाये रखें अन्यथा उनकी यही शक्ति डेस्ट्रोकिए कार्यों में लग जाएगी और संभवतः वह कार्य का सहारा लेने लग जाए। ऐसा न हो इसके लिए अमेरिका के राष्ट्रपति कैंटनी ने 1961 में एक शारी पीस मिशन कांप्यु दिया की स्थापना की और अम्रीकी नवयुवकों को उसके माध्यम से देश विदेश में गाँवों में जनता का लगा दिया और इस कार्य के अनुभव से आने वाले समय में अम्रीका को बड़े ही अनुभवी और कार्यकुशल व्यक्ति आसानी से उपलब्ध हो गये। हमने भी एनो सी0 सी10 आदि जैसे कार्यक्रम बनाये पर सफलता नहीं मिली और यह सब मूलप्राय होकर रह गये हैं।

नवयुवकों के चरित्र निर्माण की नींव पर राष्ट्र निर्माण में हम उनके किस प्रकार प्रयोग में लायें अब यह प्रश्न हमारे सामने है।

अधिकतर युवा बेरोजगारी की समस्या से ग्रस्त हैं उसके पास उनकी शिक्षा के अनुरूप कार्य नहीं है। इस समस्या का समाधान गुवाकों को राष्ट्र निर्माण में लगाकर कुछ हद तक शायद पूरा किया जा सकता है। शिक्षित व चरित्रवान गुवाकों को जिलासत्र पर हर गाँव की प्राइमरी पाठशाला, स्वास्थ्य केन्द्र, किसान केन्द्र का प्रभावी बनाकर उसको स्टाइपेन्ड दिया जा सकता है। इससे हमारे नवयुवकों को स्टाइप गैप रोजगार मिल जाएगा और साथ ही गाँव के स्तर पर सामाजिक केन्द्रों को कार्यशील किया जा सकेगा।

यह प्रायः देखा गया है कि हर जनगणना में विद्यालयों के अध्यापकों को व अन्य सरकारी कर्मचारियों को लगा दिया जाता है जिसके कारण विद्यार्थियों की शिक्षा, कार्यकर्ता का काम प्रायः ठप हो जाता है। अगर इस जनगणना के कार्य में हम अपने बेरोजगार नवयुवकों को लगा सकें तो वह अत्यन्त ही लाभकारी सिद्ध हो सकता है। उनको कार्य मिल जाएगा और उस कार्य से वह अनुभव प्राप्त कर सकेंगे।

इस प्रकार दुनिया के समय भी सरकारी कर्मचारी, अध्यापकों व बैंक कर्मचारियों का प्रयोग कर हम अपनी युवाशक्ति को इस कार्य में सुधार कर सकते हैं। हम जिलासत्र पर गुवाओं की बढ़त बढ़ी फौज खड़ी कर उदाहरण के रूप में कुम हादी जैसे कार्यक्रमों में पुलिसबल के साथ-साथ उनकी सेवाओं लेकर हर प्रकार के मैनेजमेंट में उनका भागीदार बना सकते हैं।

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पुलिस भर्ती में कुछ तकनीकी दृष्टिकोण से असफल परीक्षार्थियों को होम गार्ड जैसी सेवाओं में बिना किसी और परीक्षा के भर्ती किया जा सकता है। इससे न केवल भर्ती की प्रक्रिया कम हो जाएगी वरन् होम गार्ड में अच्छे कार्यकर्ता मिल जाएंगे।

इस प्रकार के अनगिनत कार्यकर्म हो सकते हैं जिसमें हम अपनी युवाशिकता जब तक कि उन्हें उनकी शिक्षा के अनुरूप रोजगार नहीं मिलता हम लगा सकते हैं। हमें ऐसे कार्यकर्मों व नवजीवकों की सहायता से ही राष्ट्र का निर्माण करना चाहिए और इस सबके पीछे मूलतः हमारे वरिष्ठ नागरिकों का मार्गदर्शन स्वामाज्ञान है।

यह सर्वविदित है कि

“रवि रहेगा जिसके पीछे वही अरुण भेदेगा तमा”

सर्वावधाय, अर्थात् सबकी एक साथ उन्नति तभी सम्भव है जब आप अपने संघ के चरित्र निर्माण और स्वयं सफलता प्राप्त करने का प्रयास करें और दूसरों को भी सफल रहें।
SECTION 169 CRIMINAL PROCEDURE CODE
(The most misinterpreted provision)

Justice Arvind Kumar Tripathi

During my career, as a Judge in Subordinate Judiciary, which extends to about more than three decades, I am yet to come with a provision of Criminal Procedure Code, more misinterpreted and more misused other than Section 169 of the Criminal Procedure Code. The basic concept, which is in the mind of Subordinate Judiciary is, that whenever an application under Section 169 Cr.P.C. is moved before the Magistrate by the Investigating Officer, Magistrate is bound to release the accused on bail either with sureties or without sureties. Often, Magistrates have asked me during my tenure as District Judge that whenever an application is made before the Magistrate by Investigating Officer to release the accused on bail under Section 169 Cr.P.C. and/or no prayer for extension of remand is made then what should they do. Even in the Monitoring Cell Meetings and in the monthly meetings of Judicial Officers taken by me, this question was often raised as to what course of action the magistrate may adopt if the Investigating Officer either deliberately or inadvertently does not seek extension of remand. I always tried to tell them the correct position of law. Now as I have been elevated and working as a Judge of Allahabad High Court, I feel that it is my duty to guide and steer the Magistrates' working in this State, in right direction for correct appreciation of Section 169 Cr.P.C.

Before proceeding further, it will be proper to reproduce the provisions of Section 169 Cr.P.C., so that the Magistrate may grasp the impact of language used in that Section.

“Section 169 of Criminal Procedure Code:- Release of accused when evidence deficient- If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.”

* Judge, Allahabad High Court, Lucknow-Bench
A bare perusal of this Section reveals that (i) Magistrate has no role to play in this Section. The word "Magistrate" has only been used with regard to forwarding the accused to a Magistrate. (ii) Investigating Officer too has no power to proceed under Section 169 Cr.P.C. Only the officer incharge of the police station is empowered to act under this Section. (iii) The stage of 169 Cr.P.C. starts after the arrest of the accused and ends after first remand has been granted because, the officer incharge of a police station can only act under this Section when he after arrest of the accused and before sending the accused to the Magistrate having jurisdiction, finds the evidence is not sufficient to forward the accused before the Magistrate then he may release the accused on his executing bond with or without sureties. After first remand is granted, the power of Incharge Police Station to act under Section 169 Cr.P.C. ends. After that stage, report under Section 173 Cr.P.C. can only be filed which may either be in form of charge-sheet or final report.

Section 173 Cr.P.C. is reproduced below so that the requirement of this section may be clear:

**173. Report of police officer on completion of investigation.-**

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(1-A) The investigation in relation to rape of child may be completed within three months from the date on which the information was recorded by the officer in charge of the Police station.

•(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offense on a police report, a report in the form prescribed by the State Government, stating -

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offense appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(h) Whether the report of medical examination of the woman has been attached where investigation relates to an offense under Sections 376, 376-A, 376-B, 376-C or 376-D of the Indian Penal Code (45 of 1860)
(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offense was first given.

A confusion may arise in the mind of the Magistrate, when the strict interpretation of provision of Section 169 Cr.P.C. is followed that Magistrate has no role to play under Section 169 Cr.P.C. then what he should do when the investigating officer fails to or declines to seek subsequent remand either knowingly or inadvertently.

The answer is very simple. Section 167 Cr.P.C. which deals with the procedure for remand during investigation, reads as follows:-

167 Procedure when investigation cannot be completed in twenty four hours. (1)"Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:—

Provided that—

[(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding—ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

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

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

[Explanation I.-For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail ;]

[Explanation II.-If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be provided further that in case of woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution.

[(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.]

A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.
• Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

• If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offense unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offense has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offense subject to such directions with regard to bail and other matters as he may specify.”

Reference in this connection may also be instructively made to Section 309 which provides for the remand of accused after cognizance and during trial. Sub section (2) of section 309 is in the term of following:

“Section 309(2) Cr.P.C. - If the Court, after taking cognizance of an offense, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may be a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen day.”

It is manifest from the plain language of the afore quoted two provisions that they do not expressly mandate any formal application for remand by the prosecution, nor does it appear to be so by any necessary implication. The power is conferred and vested in the Magistrate without any such pre-condition. To my mind, it would be doing violence to the plain language of Sections 167 (2) and 309 (2) of the Code by reading into them, that for remand of accused, there is a requirement of a formal application for remand.

Now, apart from the language of the statute, even on principle, if it be interpreted that a formal request for remand is essential then the necessary legal result will be that the issue of the custody of the accused would pass on completely in the discretion of the investigating agency, leaving the Magistrate or the Court as a helpless spectator of their actions and whimsicality. Negatively put, the proposition canvassed will be that if the Investigating Officer does not choose to apply or pray for further remand, the Court is powerless to do so.
No such absurd result can be easily countenanced. The whole spirit of the Code is that the custody and liberty of the accused is entirely governed by the authority and sanction of a Court of law beyond the initial period of twenty four hours between the first arrest and production before the Magistrate thereafter. By no twisted interpretation can this power in actual fact and practice be passed on into the mere discretion of the investigating agency, whether they ask for remand or not. In my view, once an accused person is produced before a Magistrate, he is, in a legal sense in custodia legis and it is the Court's responsibility and power whether he is to be remanded to further custody or granted bail or released altogether. By no stretch of imagination can this power of the Court be whittled down and be indeed passed on to the mere discretion of the investigating agency alone.

In view of above, the Magistrate is not duty bound to wait for request for investigating officer for remand. He can, if he is satisfied, extend the detention of the accused in the custody, as per provisions of Section 167 Cr.P.C.
INCLUSION OF DEEMED DIVIDEND IN THE INCOME TAX ACT - A NEED

Dr. Justice Satish Chandra*

The word "Dividend" in its ordinary meaning, is a distributive share of the profits or income of a company given to its shareholders. It may be in the form of advance; or loan; or payment for the benefit of the shareholders. Whether it has taxable cover in only transaction where no money or worth of money is being transferred. This aspect need to be examined. But before it, anatomy of "dividend" and its taxability is required to be discussed. It is pertinent to mention that in the Income Tax Act, the word "deemed dividend" is not used. It is only by way of judicial interpretation.

DIVIDEND IS INCOME

The "dividend" is taxable and covered by the definition of Section 2(24) of the Act, where the income is defined as including "dividend". What is taxable as "dividend" need not necessarily be paid in money; it may be paid in money's worth by the delivery, say, of goods or securities or shares in another company and the amount of the "dividend" should be taken to be the market value of the money's worth on the date the "dividend" is declared as per the ratio laid down in the case of CIT vs. Central India Inds.¹

DIVIDEND AND COMPANY LAW

Under the Companies Act, 1956, a company cannot pay dividend otherwise that out of the profits of the year or any other undistributed profits². But "there is nothing in law to prevent a company using an income receipt as cash in its hands to discharge a capital liability or to purchase a capital asset, and then, after the close of its financial year, paying a dividend out of other cash, or borrowing for the purpose, to the extent of the credit balance standing on profit and loss account³. In any event, dividend does not lose its taxable character as dividend merely because it is paid out of capital in violation of the law.⁴ Similarly, non-observance by the company of the formalities

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¹ 82 ITR 555 (SC)
² Per Viscount Simon LC, Thomas Fattorini vs. IR, 24 TC 328, 347 (HL).
³ Kishinchand vs. CIT, 46 ITR 640 (SC).
⁴ Kantilal vs. CIT, 41 ITR 275 (SC).

* LL.M. (Gold Medalist), LL.D., Chancellor’s Medalist in Law; Judge, Allahabad High Court, Lucknow Bench, Lucknow.
required by the company law for declaration of dividend would not affect the shareholder's liability to taxation in respect of the dividend.

A shareholder is liable to pay tax on his dividend income without any credit for the tax paid by the company on its own profits; and further, the company must deduct, under Section 194 (except as otherwise provided in that section), the shareholder's tax at source when paying the dividend. For the purpose of this section, the shareholders must have 10% or more voting power in the closely held company. Therefore, for example if a closely held company gives a loan to its director who holds 10% of the voting power of the company, then the amount received by the director from the company will be taxed in his hands.

In case the closely held company makes a loan or advance to another corporation/company in which the closely held company shareholder of more than 10% voting power has a substantial interest, in that case also the provisions of deemed dividend will be applicable. Substantial interest is defined as holding more than 20% more of the income of that concern at any time during the previous year.

Since closely held companies generally never paid dividends, any loan or advances made by the closely held company in the above instances, would be considered as deemed dividend.

Accumulated profits for the purpose of this section mean the aggregate of commercial profits. If certain disbursements have been disallowed at the time of assessment but the expenditure had in fact been incurred, they should be excluded from accumulated profits. In computing commercial profits, all the disbursements made and expenditure incurred for business purposes should be taken into account.

CHARACTERISTIC FEATURE

The word "dividend" is a sum of money or portion of divisible thing to be distributed according to a fixed scheme being what the shareholder earns as return on his investment; it is his share of corporate earnings credited to his account. The characteristic feature of 'dividend' is that it is declared and paid wholly from the net profits or undivided earnings leaving intact the shareholder's fractional interest represented by his holding in the capital stock. A ‘dividend’ is not capital but the produce of capital. Subject to well recognised limitations, ‘dividend’ is a word of general and indefinite meaning without any narrow, technical or rigid significance. As explained above, the term, ‘dividend’ is applied to a distributive sum, share or percentage arising from some joint venture as profits of a corporation. In the second sense, it is proportionate amount paid on liquidation of a company. In this context, ‘dividend’ is referred to as corporate profits set apart for rateable division amongst the shareholders being surplus assets obtained in excess of capital.

Needless to mention that the definition of the ‘dividend’ is inclusive and not exhaustive and since it creates an artificial liability to tax, it should be strictly
construed, as per the ratio laid down in the case of Kantilal v. CIT.\(^5\) It merely extends the connotation of the word ‘dividend’, so as to comprise items of distribution or payment by a company which normally may not be regarded as ‘dividend’.

**DEEMED DIVIDEND**

The situation may arise where the assessee is Managing Director of a Non-Banking Company collecting deposits from the public. The assessee was also a partner in a firm, which was acting as an agent of the said company for mobilizing the deposits. The assessee was a beneficial owner of the shares in various companies of the group. In the firm, the assessee kept funds, which were supposed to be transmitted to the companies concerned at the earliest but detained for no reason and in the meantime, the funds detained were utilized for other purposes including personal one. In this situation being a shareholder in the company concerned, the interest which was not paid but was due, can be considered as a **deemed dividend**. A deeming fiction is already been created that a "dividend" has been distributed by the company to its shareholder in the form of a loan.

The argument may be advanced on behalf of beneficiary that the amounts which were collected by the firm in carrying on of the business activities for and on behalf of the principals were during the course of business and by no stretch of imagination, it can be termed as loan by the company to the firm. So, the provisions of Section 2(22)(e) of the Act is not applicable. Another argument may be advanced that if the firm and company of the assessee is only one man show and everything belongs to the assessee, then there is no question of giving any loan by somebody to anybody because the total amount belongs to the assessee himself. But, this argument is not tenable for the reason that the company/partner is separate legal entity for the purpose of taxation concerned. Deemed Dividend is applicable when the firm has shown this amount collected on behalf of the company in its balance-sheet as a loan or liability.

It is clarified that **deemed dividend** under Section 22 of the Act is not dividend for all purposes of the Act, but only for the purpose of making an assessment on the amount of loan advanced by the company in favour of the shareholder, to the extent of accumulated profits of the company, as per the ratio laid down in the case of **CIT vs. T.P.S.H. Selva Saroja**\(^6\).

But sub-clause of Section 2(22)( e) treats loans granted by 'closely-held' company to any of its shareholders in the same manner as it treats dividends distributed by it to them. The justification is plain. The company in question is a company in which assessee is controlling its affairs and possessing a block of majority shares. Since there was substantial income of the assessee and a tax planning was made by this nobel method to avoid the payment of tax. So, the assessee would not be liable to pay tax. In order to avoid such a tax liability the loan were granted. When such a loan is advanced to a shareholder who has a substantial interest in the company, the inference is irresistible that the loan is a made-up affair, and there is every reason for treating

\(^5\) 41 ITR275 (SC)

\(^6\) (2000) 244 ITR 685-86 (Mad).
such a loan as dividend.

Hon'ble Apex Court in the case of *CIT vs. Alga Sundaram Chettiar*, observed that the term "payment" must not be given a literal interpretation but it must be seen whether a jural relationship of debtor and creditor was created between the parties and it was not necessary that payment should have been made in cash or in kind to the assessee. Had the assessee not retained the amount in the Firm and transmitted the same immediately to the concerned companies then companies might have earned the profits, or at least saved interest liability.

**DEEMED DIVIDEND AND TAX LIABILITY**

As per provision of sub section (e) of Section 2(22) of the Act, by way of loan to a share-holder amounts to dividend. Section 2(22)( e) of the Act defines as under:

"Section 2(22)-dividend includes-

(a) ***
(b) ***
(c) ***
(d) ***
(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) [made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern, in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)] or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits."

Thus, for a dividend to arise under this sub-clause, the following conditions should be fulfilled:

(i) the company must be a company shares of which are closely held.
(ii) money (not money's worth) should be paid by the company.
(iii) the money must form a part of the assets of the company.
(iv) it may be paid either by way of advance or loan or it may be "any payment".
(v) (a) the payee must be a shareholder of the company having substantial interest in the company, or

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7 (2001) 252 ITR 893, 894
(b) the payee must be a person who is acting on behalf of or for the individual benefit of such shareholder.

The expression ‘person who has a substantial interest in the company’ is defined in Section 2(32) as meaning “a person who is the beneficial owner of shares, not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits, carrying not less than twenty percent of the voting power.”

If these conditions are fulfilled, then a dividend would arise to the extent to which the company possesses accumulated profits.

Further, from the Assessment Year 1988-89 (onwards) the provisions of Section 2(22)(e) have undergone modification by the Finance Act, 1987. Accordingly, it also includes advances or loans made to any concern in which such shareholder is a member of partner and in which he has a substantial interest. In the latter case, the advance or loan will logically have to be treated as dividend in the hands of the shareholder concerned and not the concern because the scope of the sub-clause is only to rope in benefits given by a closely-held company to certain shareholders, directly or indirectly. This construction, however, will create difficulties in a case where more than one shareholder has a substantial interest in the concern. It would, therefore, be more logical to tax the concern which enjoys benefit from the advance or loan though it has directly nothing to do with the closely-held company. It is also conceivable that payments made to a concern in which the shareholder has no interest or even less than substantial interest if they can be shown to have been made on behalf of or for the individual benefit of such shareholder so as to attract the second part of the sub-clause.

In the case of CIT vs. Alagusundaram Chettiar\textsuperscript{8}, it was observed that the provisions of this clause are attracted to any payment by a company, of any sum (whether as representing a part of the assets of the company or otherwise) by way of (1) advance; or (2) loan; (3) any payment on behalf of any shareholder; or (4) any payment for the individual benefit of any shareholder. The first two cases deal with a payment to the shareholder directly. The last two cases contemplate payment by a company not to the shareholder but to a third party on behalf of or for the individual benefit of the shareholder.

On the date when the loan is advanced, the recipient should be a shareholder. If it is not so established, the provisions of section 2(22)(e) will not apply as observed in the case of CIT vs. H.K. Mittal\textsuperscript{9}.

Thus, any payment by any company of any sum representing a part of the assets by way of advance would come within the mischief of deemed dividend. It would seem that deposits made by a closely-held company would also be covered by the expressions advance or loan.

Advances given by a company to its shareholders should be treated as payment out of accumulated profits of the company, whether capitalised or not, and must be

\textsuperscript{8} (1977) 109 ITR 508 Mad).
\textsuperscript{9} (1996) 219 ITR 420 (All).
treated as dividend and would go to reduce the tax liability, whenever such tax liability is required to be determined as observed in the case of CIT vs. Narasimhan G\textsuperscript{10}

Advance given to the managing director, who had also substantial interest in the company for meeting cost for construction of building to be taken on lease by the company and the advance is to be adjusted with the lease rent, will be treated as deemed dividend for the purpose of section 2(22)(e) as observed in the case of CIT vs. P.K. Abubucker\textsuperscript{11}.

Even if the loan is not granted directly to a shareholder who has a substantial interest as aforesaid, if a payment be made to a third person on behalf of or for the individual benefit of such a shareholder, the amount granted as loan would be treated as dividend as observed in the case of Ravindra D Amin vs. CIT\textsuperscript{12}, as observed in another case CIT vs. Alagusundaram Chettiar L.\textsuperscript{13}, a company advanced moneys out of accumulated profits to a low-paid employee and it was found that he was, in turn, advancing huge sums by way of advances to the Managing Director of the company. It was held that the Managing Director was assessable under this sub-clause. Advances received by an assessee from a company in which he has no substantial interest but the company advances the sums out of sums borrowed by it on the very same date from another company in which the assessee has substantial interest can be said to be payments by the latter (company) for the benefit of the assessee and so taxable under the sub-clause. But if there is no such correlation and the company that advances the loan does so out of mixed funds, the sub-clause will not be applicable as observed in the case of Nandlal Kanoria vs. CIT\textsuperscript{14} The mischief of this sub-clause, which does not contain the words 'directly or indirectly', cannot be extended to cover a case where it cannot be established that the amounts were in fact received by the taxpayer from the company by way of loan or advance.

DEEMED DIVIDEND AND PERKS

Another aspect of the deemed dividend may be confused. In this regard, it may be mentioned that the provisions of Section 2(22)(e) of the Act, create a legal fiction and treat the loan advanced by a company not being a company in which the public are substantially interested to the shareholder as dividend to the extent of accumulated profits of the company subject to fulfillment of other conditions. The perquisite value under Section 17(2) of the Act would be the amount of interest or the benefit or amenity enjoyed by the employee/director from the use of the company's funds. The distinction between these two should be borne in mind. Section 2(22)(e) of the Act deals with the loan amount, whereas the provisions of Section 17(2) of the Act deals with interest on the user of the company's funds by the employee. In other words, the principle behind the provisions of Section 17(2) is that if the employee had the benefit of user of the company's funds during the relevant accounting year, then to the extent

\textsuperscript{10} (1999) 236 ITR 327 (SC).
\textsuperscript{11} (2003) 259 ITR 507 (Mad).
\textsuperscript{12} (1994) 208 ITR 815 (Guj).
\textsuperscript{13} (1977) 109 ITR 508 (Mad).
\textsuperscript{14} (1980) 122 ITR 405 (Cal.).
of the accrual of interest on the loan advanced in favour of the assessee, the amount would be treated as perquisite in the hands of the employee. Therefore, both the concepts are entirely different.

Payment by the company towards the personal expenses of the shareholder would be treated as deemed dividend, as per the ratio laid down in the case of CIT vs. K. Srinivasan\(^\text{15}\). Similarly, loan obtained by the shareholder through proprietary concern would be treated as deemed dividend as per the ratio laid down in the case of Nandlal Kanoria vs. CIT\(^\text{16}\).

**CONCLUDING REMARKS**

From the above, it is clear that there are loopholes, where tax can be evaded by the partners, who are also the shareholders in the companies. Many practical difficulties arise in the working of deemed dividend, as the statute is silent about this deeming provision. Ultimately, it is the assessee, who is at sea while the Assessing Officers tend to press this legal fiction beyond its true limits, making it a powerful taxing tool for the Revenue. The glaring lacuna is also pertaining to inter-corporate deposits. It is a debatable issue whether the inter-corporate deposits are deemed dividend or not. But fact remains that there is a distinction between deposits vis-a-vis loans/advances. Section 2(22)(e) enacts a deeming fiction whereby the scope and ambit of the word "dividend" has been enlarged to bring within its sweep certain payments made by a company. Such a deeming fiction would not be given a wider meaning than what it purports to do. Similarly, the loans given to sister concerns who are not shareholders, also attracts the deeming provision. The Authority for Advance Rulings in the case of Madura Coats Private Ltd.,\(^\text{17}\) observed that a proposed loan by a company to its financial arm based outside India is not to be treated as deemed dividend to the extent of accumulated profits.

Another ambiguity relating to deemed dividend is as to whether there is a loan to a shareholder assessable as dividend or is it to be treated as distribution of dividend for the purpose of Section 104. The Hon'ble Calcutta High Court in the case of Moore Avenue Properties (P) Ltd. V. CIT\(^\text{18}\) held that there would be no further application of Section 104, basing it on the established proposition that legal fictions have to be carried to their logical conclusions.

In view of above, it is crystal clear that a legislative amendment is long overdue considering the fact that this section has not been amended and no clarification has been issued by the CBDT. A legislative amendment/clarification pertaining to the deemed dividend is needed and the same will be beneficial to the assessee, lawyers and the judiciary.

\(^{\text{15}}\) [1963] 50 ITR 788 (Mad).

\(^{\text{16}}\) [1980] 122 ITR 405 (Cal).

\(^{\text{17}}\) In re (2005) 145 Taxman 366

\(^{\text{18}}\) (1966) 59 ITR 466 (Cal).
Hon'ble Mr. Justice Uma Nath Singh, Senior Judge, Lucknow Bench addressing the trainee officers.
GLOBAL WARMING –
INDUSTRY & ENVIRONMENT**

Justice Satya Poot Mehrotra*

INTRODUCTORY: Since the decade of 1960s, there has been growing concern in the world over the state of environment. The decline in environmental quality has manifested itself in a number of ways. In June, 1972, United Nations Conference on ‘Human Environment’ was held in Stockholm, where the world community resolved to protect and enhance the environmental quality. In our country also, there has been growing concern in regard to decline in environmental quality on account of the varied reasons. Environment is at present concern of all professions and subjects-Social Sciences, Natural Sciences, Law, Archaeology, etc.

One of the main areas of concern in the field of environment is Global Warming.

Global Warming:

The overall temperature of the planet earth is increasing. This phenomena is called Global Warming. The increase in average global temperature is accompanied by the change in climate in unpredictable ways-flood, hurricane, heat waves, drought etc. In order to deal effectively with this phenomena of Global Warming and Climatic Change, it is necessary to appreciate the causes leading to these phenomena:

1. Ozone Layer depletion: Ozone Layer is a layer in the atmosphere of earth containing relatively high concentrations of Ozone Gas. Ozone Gas is a thin gas. It consists of three atoms of Oxygen. Ozone Layer was discovered in 1913 by French Physicists Charles Fabry and Henri Buisson. Ozone Layer protects the earth from the harmful ultraviolet rays coming from the Sun. These ultraviolet rays are of three kinds: UV-C, UV-B and UV-A. Some of these rays are reflected by the Ozone Layer. Some are absorbed by the Ozone Layer. Only some come down to earth, which are not harmful.

Rays, which are reflected back, and rays which are absorbed by Ozone Layer,

** Based on Speech delivered at National Conference on Industry and Environment held on 15.12.2012 at Singrauli, Madhya Pradesh.
* Judge, Allahabad High Court, Allahabad (Retd.)
are very harmful. If these rays are allowed to come to earth without being stopped or absorbed by Ozone Layer, then the entire life system would be in danger. If these rays reach earth, then these may cause Cancer, Cataract and numerous other diseases relating to Eyes and other kinds of disabilities.

Question is as to how Ozone Layer is being depleted. In 1928, Chloro-fluro-carbon (CFC) was discovered. This is a component which is not harmful to us or to atmosphere. CFC is very useful. It is used in spray for clearing tape of VCR, hair spray. In Refrigerator, it is used for Air-conditioning. CFC is also of several types - CFC 11, 12, 13.

Normally CFC is not dangerous for us. When CFC comes in atmosphere after use, then it remains in atmosphere. In several years it gets multiplied. When CFC reaches Ozone Layer (which is 15 to 50 Km. from earth) then it converts ozone to oxygen. No longer ozone will be there to reflect or absorb ultraviolet rays.

CFC is much used in developed countries-Air-conditioned cars, houses, etc. Now In developing countries also, the use of CFC is on the rise.

This CFC is going to affect all of us. All of us are thus source of depleting Ozone Layer.

2. Carbon Emissions: Carbon dioxide is released in the atmosphere from various sources. In a Natural Carbon Cycle, Carbon dioxide is re-absorbed by plants and trees. However, on account of burning of fuels in an uncontrolled manner and also on account of decline in the number of plants and trees, natural carbon cycle has become inadequate, and there has been extra carbon dioxide in the atmosphere. This carbon dioxide is causing increase in overall temperature of the earth.

3. Greenhouse Effect: There are certain gases which are known as green-house gases in the atmosphere. These green house gases absorb thermal radiation from a planetary surface and re-radiate the same in all directions. Some part of this re-radiation comes back towards the surface and the lower atmosphere. This results in rise in the average atmosphere temperature above what it would be in the absence of the gases. This process is known as Green-House Effect.

Earth’s natural green-house effect makes life possible. However, human activities have intensified the natural green-house effect, causing global warming. Such human activities are primarily the burning of fossil fuels and clearing of forests.

In this regard we may note one more phenomena.

As environmental atmosphere is on decline, Ozone layer may come down and then it will reach Bio-Sphere. Then ozone will act as pollutant with other pollutants. This ozone will increase heat of earth’s atmosphere. This will again contribute to Green-House Effect. Melting of North Pole and South Pole will create havoc. Several countries, such as, Maldives, Holland etc. will face the danger of being flooded with water.
Impact of Global Warming:

As noted above, Global Warming is accompanied by Climate Change.

Global Warming and Climate Change are resulting in melting of glaciers, which in-turn is leading to significant rise in the sea-level. The Climate Change results in unusual weather events, such as flush floods, droughts etc. affecting large section of population, resulting in loss of life. Climate Change is also causing harm to human health resulting in a number of diseases. Climate Change is also resulting in decline of various species/varieties of birds and animals.

These illustrations are not exhaustive. It is not possible to foresee the extent of harm that would be caused on account of continuous increase in the temperature of the Earth accompanied by Climate Change.

Remedial Measures:

In order to overcome the problem of Global Warming and Climate Change, efforts are going-on at the International level as well as at the National Level in our country.

At the International level, the United Nations Organization is making its efforts so that the Nations may cooperate in solving the problems of Global Warming and Climate Change.

Vienna Convention for the protection of the Ozone Layer was adopted on 22.3.1985.

Montreal Protocol of the Vianna Framework Convention on Ozone Degrading Substances was adopted on 16th September, 1987 which was adjusted and amended on 29th June, 1990. Under the provisions of the said Convention, production of the industrial chemicals, known as 'CFCs' was to have ceased in developed countries, while developing countries have been given a ten-year grace period before they must phase-out production as well.

In June, 1992 United Nations Conference on 'Environment and Development' was held in Rio D Janeiro, which is also known as the 'Earth Summit'. The Framework Convention on Climate Change was opened for signatures in Rio to deal with the problem of Global Warming.

In 1997, the Kyoto Protocol was concluded, which established legally binding obligations for only industrialized developed countries to reduce their greenhouse gas emissions, while exempting the developing countries.

In December, 2009, United Nations Climate Change Conference, commonly known as 'the Copenhagen Summit' was held at Copenhagen, Denmark. The result of the Copenhagen Summit was non-binding 'Copenhagen Accord', which though not perfect, has provided the beginnings of an agreement to tackle the Climate Change.

Recently, about 200 Nations participated in the 'United Nations Global Warming Talks' in Doha to settle the differences on fossil fuel emissions and climate aid so as to
pave way to a new treaty by 2015.

At the national level, a number of Laws have been enacted to deal with the various aspects affecting the environment. Legislations, numerous in numbers, cover wide field including various aspects of pollution, forest preservation and so many others. The Ozone Depleting Substances (Regulation and Control) Rules, 2000 have been framed in exercise of powers under the Environment (Protection) Act, 1986. These Rules, interalia, provide for regulation, production and consumption of ozone depleting substances, sale of such substances, purchase of such substances, use of such substances etc..

Our Constitution contains provisions regarding environment protection.

Article 48A, contained in Part-IV of the Constitution of India, lays down that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. This Article was inserted by 42nd Constitutional Amendment.

Again, Part-IVA of the Constitution of India, inserted by 42nd Constitutional Amendment, provides as one of the Fundamental Duties of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures.

Our Supreme Court has been dealing with the problems concerning environment in various fields, including pollution, mining, forests, emissions from industries, etc..

In Subhash Kumar Vs. State of Bihar and others, (1991) 1 SCC 598, the Supreme Court has laid down that right to live is a Fundamental Right under Article 21 of the Constitution of India and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life.

To strike a balance between development and protection of environment, the Supreme Court has developed the concept of 'Sustainable Development'. Thus, in Karnataka Industrial Areas Development Board Vs. C. Kenchappa and others, AIR 2006 SC 2038, the Supreme Court noted the concept of 'Sustainable Development'. The Supreme Court' also took note of the environmental degradation and its consequences. The Supreme Court took note of rising problems of Global Warming, depletion of ozone layer, acid rain, etc., and their ill effects. The Supreme Court has also developed the concepts of 'Polluter Pays' and 'Pre-cautionary Principle' as part of the concept of 'Sustainable Development'.

Even though numerous efforts are being made to over-come the problems of Global Warming and Climate Change, such efforts will be meaningless unless the people change their behaviour. It is to be noted that when collective danger is coming and some Rule is to be followed to meet such danger, everyone thinks: “Other should follow it. I will not follow it”. This behaviour of people is to be changed. This can be done by
sharing more and more information with the people and making them personally accountable.

Great responsibility lies on the industries to protect the environment as the activities in the industries widely effect the quality of environment. The industries owe duty to the society to make every possible effort to avoid harm to the quality of environment on account of their activities. The least that can be done is that various rules made for regulating the activities in the industries are strictly followed by the industries.

Someone has remarked that ‘Ice-Age is coming’. Let us disprove the apprehension.
DEVELOPMENT
OF
ENVIRONMENT LAWS IN INDIA

U.S Awasthi∗

Man's paradise is on earth; This living world is the beloved place of all;
It has the blessings of Nature's bounties: Live in a lovely spirit.

- Atharva Veda (5.30.6)

INTRODUCTION

Environment plays an important role in human life and is essential for every life on
the planet. With growing technological advancement and industrialization, the purity of the
environment has been threatened to a larger extent. The ecological degradation and economic
deprivation generated by the resource have resulted in environmental degradation. The
various environmental problems such as depletion of ozone layer, acid rain, green house
effect, soil erosion, deforestation, water pollution, air pollution, and noise pollution have had
devastating impacts on human well being and are also culminating into long term damage to
ecosystems. The environmental problems have caught the attention of policy makers,
intellectuals, social movement activists and research other stake holders.

INTERNATIONAL EFFORTS

The development of the statutory provisions pertaining to the environment in India is
due to the international efforts towards global protection of environment. First such efforts in
regard to concern for environment, was the United Nations Conference on Human
Environment was held at Stockholm in June 1972. Important milestones in this directions are
as under:

Stockholm Declaration
In 1968, Sweden put forth a proposal to the General Assembly of the United Nations
that a UN conference be convened in 1972 to increase awareness ad to identify
environmental problems which needed international co-operation. As a result, the
United Nations Conference on the Human Environment was held on 5-16 June 1972,
in Stockholm, Sweden. This meeting was the first major international gathering of
nations to address the world’s environmental problems. The Stockholm Conference
was attended by representatives of 114 countries. India was also a participatory state

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and subsequently enacted the Air Act, 1981 and the Environment (Protection) Act, 1986 in order to implement the decisions taken at the Conference. The motto of the Stockholm Conference was “Only One Earth”, a revolutionary concept for its time. The outcome of this conference was a Declaration of principles and an Action Plan, but no legally binding document was evolved. This Declaration on the Human Environment contains 26 principles and the Action Plan. In 1972, the United Nations Environment Programme (UNEP) was established in Nairobi, Kenya, to act as a catalytic agency to promote the results of the Conference, and has been heralded as one of the major achievements of the conference.

It was in this Declaration that the concept of Sustainable Development was developed although the term had not been coined as yet. The Declaration outlined “broad goals and objectives” and that a detailed action programme should be embodied in other documents to be adopted by the Conference. The Declaration also introduced the concept of Precautionary Principle in Principle 18 in the following words, “Science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind.” Of all the Principles in the Declaration, Principle 21 has special significance. It contains the provision that States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment beyond their own borders. Thus, Principle 21 affirms the Limited Territorial Sovereignty Principle as applied to environmental pollution. Principle 22 enjoins upon States to cooperate “to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction”, thus developing the concept of Polluter Pays in the international arena.


The concept of sustainable development received further impetus and was crystallised in the World Conservation Strategy (WCS) report which was formulated in 1980. The WCS was commissioned by the United Nations Environment Programme (UNEP), which together with the World Wildlife Fund (WWF), provided the financial support for its preparation and contributed to the evolution of its basic themes and structure. This Report sought to explain the contribution of living resource conservation issues and the main requirements for dealing with them and proposed ways to achieve conservation of Nature and Natural Resources.
3. **Brundtland Report, Our Common Future, 1987**

The World Commission on Environment and Development was set up by the General Assembly of the United Nations in 1983 under the auspices of the then Prime Minister of Norway Ms. Gro Harlem Brundtland. It was also called the Brundtland Commission. In 1987, the Commission published its report *Our Common Future*, or the Brundtland Report. It was in this Report that the concept of Sustainable Development was first defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.


The preparation for the Rio Summit was set in motion as far back as 1989 by the UN General Assembly, so that it would coincide with the twentieth anniversary of the Stockholm Conference. The culmination of this effort was the UNCED, also Known as the Earth Summit, organised form 3-14 June, 1992 in Rio de Janeiro, Brazil. Overall, 178 governments and 500 NGO groups were represented at the then-largest UN Conference ever held. *The parties adopted a Declaration on Environment and development which reaffirmed the Stockholm Declaration and provided 27 principles guiding the environment and development.*

*Agenda 21:* Officially known as the Programme of Action on Environment and Development, Agenda 21 was an action plan for sustainable development in the 21st century. It is popularly called the Magna Carta of environment protection. A Commission on Sustainable Development, under the UN Economic and Social Council, was also established at Rio to oversee the implementation of Agenda 21.

*Forest Principles:* The Statement of principles for the Sustainable Management of Forests was a non-legal, non-binding set of fifteen principles for the management, conservation and sustainable development of all types of forests.

*Conservation on Climate Change and on Biological Diversity:* Two multilateral legally binding treaties were signed by representatives of more than 150 countries.

With the goal of establishing a new and equitable global partnership through the creation of new levels of co-operation among States, key sectors of societies and people, the Rio Declaration laid down 27 legally non-binding Principles for States to follow. The Rio Declaration, crystallised the concept of sustainable development and adapted it to changing times. It also shaped a number of new principles of environmental importance.

**Principle 1** of the Rio Declaration States that “*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.*”

**Principle 2** repeats the Limited Territorial Sovereignty Principle as extended to responsibility for environmental protection.
Principle 3 evoked the Intergenerational Equity Principle as: “The right to development must be fulfilled so as to equitably meet developmental & environmental needs of present & future generations.”

A special session of the UN General Assembly, called Earth Summit, was held in New York from 23 to 27 June, 1997. The aims of this Summit were to review global progress made in sustainable development sine Rio, to identify reasons why goals set in Rio had not been met and suggest corrective action, and to call on Government, international organisations and major groups to renew their commitment to sustainable development.

6. World Summit on Sustainable Development, Johannesburg, 2002: Johannesburg Declaration
A decade after the historic UNCED, the UN convened another conference to address sustainable development. The World Summit on Sustainable development (WSSD), unofficially known as Rio or Earth Summit 2002, was a UN summit incorporating world governments, UN agencies, NGOs and scientists to assess global progress since the UNCED. The Summit was held from August 26 to September 4, 2002. The official agenda of the World Summit was to review the achievements since the Rio Summit and to determine whether enough had been done to implement Agenda 21.

DEVELOPMENT OF ENVIRONMENT LAWS IN INDIA

Before the independence, there was no precise environmental policy in India. First such efforts started with formation of committee on human environment under the chairmanship of Pitambar Pant, member of the Planning Commission on the basis of a report sought from UN for organizing a conference on the human environment in 1972 in the twenty-fourth UN General Assembly. With the help of the reports, the impact of the population explosion on the natural environment and the existing state of environmental problems were examined. Eventually, as a result of the major issues highlighted by the reports, a National Committee on Environmental Planning and Coordination (NCEPC) was established in the Department of Science and Technology. The NCEPC is an apex advisory body in all matters relating to environmental protection and improvement. At its inception, the Committee consisted of fourteen members drawn from various disciplines concerning environmental management. Most of the non official members were specialists. The Committee was to plan and coordinate, but the responsibility for execution remained with various ministries and government agencies.

Parliament enacted The Water (Prevention and Control of Pollution) Act for the purpose of prevention and control of water pollution and for maintaining and restoring the wholesomeness of water. The Water Act represented India’s first attempt to deal with an environmental issue from a legal perspective. In 1976, the Constitution of India was amended to insert a separate fundamental duties chapter. In the year 1980, the Forest (Conservation)
Act was passed for the conservation of forests and to check on further deforestation. The Air (Prevention and Control of Pollution) Act of 1981 was enacted by invoking the Central Government's power under Art 253. The Air Act contained several distinguishing features. The preamble of the Air Act explicitly reveals that the Act represents an implementation of the decisions made at the Stockholm Conference. Also, a notification relating to Noise Pollution (Regulation & Control) Rules was made in the year 2000 with the objective of maintaining Ambient Air Quality Standards in respect of noise. In the wake of the Bhopal gas tragedy, the Government of India enacted the Environment (Protection) Act, 1986. The laws that existed prior to the enactment of EPA essentially focused on specific pollution (such as air and water). The need for a single authority which could assume the lead role for environmental protection was answered through the enactment of EPA. It is also in the form of an enabling law, which delegates wide powers to the executive to enable bureaucrats to frame necessary rules and regulations.

Apart from this, several notifications and rules have also been made, some of which include the Hazardous Wastes (Management and Handling) Rules in 1989, the Biomedical Wastes (Management and Handling) Rules in 1998, Recycled Plastics (Manufacture and Usage) Rules 1999, Environment (Siltion for Industrial Projects) Rules 1999 and the Municipal Solid Wastes (Management and Handling) Rules in 2000. In addition to these eco-specific legislations, realising that there is no comprehensive legislation dealing with biodiversity in India, and to fulfil its international obligation under the Convention on Biodiversity, the Government of India has enacted the Biological Diversity Act, 2002.

CONSTITUTIONAL PROVISIONS

The Preamble to the Constitution of India, reflects the deep-rooted concern for protection of the environment when the constitution was framed. The importance to constitute a 'socialist republic requires the State to pursue policies which are directed towards the elimination of inequities, ensuring healthy living conditions for all.

The State's responsibility with regard to environmental protection has been laid down under Article 48-A of our Constitution, which reads as follows: "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country". Environmental protection is a fundamental duty of every citizen of this country under Article 51-A(g) of our Constitution: - "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures." Article 48-A of the Constitution comes under Directive Principles of State Policy and Article 51 A(g) of the Constitution comes under Fundamental Duties. The 42nd amendment to the Constitution was brought about in the year 1974 makes it the responsibility of the State Government to protect and improve the environment and to safeguard the forests and wildlife of the country. The latter,
under Fundamental Duties, makes it the fundamental duty of every citizen to protect and improve and to have compassion for living creatures.

Several fundamental rights, and in particular, those guaranteed by Arts. 14, 19, 21 and 32, have been interpreted in developing environmental jurisprudence of the country to move towards the goal of a pollution-free India. The judiciary, to fulfill its constitutional obligations has been always prepared to issue appropriate orders, directions and writs against those persons who cause environmental pollution and ecological imbalance. This is evident from a plethora of cases decided by starting from the Ratlam Municipality Case. This case provoked the consciousness of the judiciary to a problem which had not attracted much attention earlier. The Supreme Court, in Rural Litigation and Entitlement Kendra v. State of U.P. ordered the closure of certain limestone quarries causing large scale pollution and adversely affecting the safety and health of the people living in the area. In Vijay Singh Puniya v. State of Rajasthan, the High Court of Rajasthan it was observed that any person who disturbs the ecological balance or degrades, pollutes and tinkers with the gifts of nature such as air, water, river, sea and other elements of the nature, he not only violates the fundamental right guaranteed under Art 21 of the Constitution, but also breaches the fundamental duty to protect the environment under Art 51A (g).

In a series of judicial decisions, the Hon’ble Supreme Court and Hon’ble High Court has interpreted the above articles under Fundamental rights to give environment and ecology that protection which they richly deserve, as will be clear from the following cases:

a) Rural Litigation & Entitlement Kendra, Dehradun v. State of UP., AIR 1985 SC 652 : “The right to live implies the right to live in a healthy environment”. Vide this Judgement, mining operations which were effecting human health and disrupting the delicate ecology of the Mussorie Hills were directed to be stopped.

b) M. C. Mehta v. Union of India, AIR 1988 SC 1037 : In the Ganga Pollution Case, tanneries in Kanpur which were discharging untreated effluents into the Ganga river were ordered to be closed down until they had taken proper steps to establish primary treatment plants, irrespective of their financial capacities.

c) M. C.' Mehta v, Union of India, AIR 1989 SC 1986 : “the right to live in pollution - free environment is a facet of Art. 21 of the Constitution”.

d) F. K. Hussain v, Union of India, AIR 1990 Ker 321 : "The right to life is much more than the right to animal existence and its attributes are manifold, as life itself. The right to sweet water and the right to free air are the attributes of the right to life for these are the basic elements which sustain life itself.”

e) Subash Kumar v. State of Bihar, AIR 1991 SC 420 : "the right to live includes the right to enjoyment of pollution-free water and air for full enjoyment of life".

f) P. A. Jacob v. Superintendent of Police, Kottayam, AIR 1993 Ker 1: It has
been held that the freedom of speech does not include the freedom to use loudspeakers. In fact, freedom from tormenting sounds is guaranteed by the Constitution of India.

g) **Sushila Saw Mill v. State of Orissa, AIR 1995 SC 2484:** A stale law prohibiting the operation of a saw mill in the Keonjhar District in Orissa was upheld by the Supreme Court as it would impede the preservation of forest wealth. The court considered it to be a reasonable class legislation to protect illicit chopping of forest trees.

h) **M. C. Mehta v. Union of India, (1996) 4 SCC 750:** the environmental pollution was caused by hazardous and noxious industries operating in Delhi, the Supreme Court ordered 168 such industries to be shifted or relocated to other places.

i) **Biranganga Religious Society v. The State, (1996) 100 CWN 617:** Held that the indiscriminate use of microphones and loudspeakers during daily pujas and other religious activities violates a citizen's right to sleep and his right not to hear.

j) **M. C. Mehta v. Union of India, (1997 3 SCC 715:** The Supreme Court rejected the argument that a restriction on construction activities on a lake violated Art. 14 because such a restriction was not extended to other lakes also. The court observed that each ecosystem is unique in itself and such a restriction is therefore valid.

k) **M. C. Mehta v. Union of India, (1997) 2 SCC 353:** In the Taj Mahal Case, the Supreme Court ordered industries in the TTZ (Taj Trapezium Zone) to stop functioning and relocate to alternate sites as they were polluting the atmosphere by using coal and coke as industrial fuel.

l) **Ivory Traders & Manufacturing Association v. Union of India, AIR 1997 Del 301:**
Prohibitions on ivory trade were upheld in the interests of biodiversity, although they interfered with the petitioners' right to carry on their trade.

m) **Murli Deora v, Union of India, AIR 2002 SC 40:** Held that *non-smokers have a right to be protected against the adverse effects of "passive smoking", thus justifying a ban on smoking in public places.*

**The subjects related to environment in the seventh schedule of the Constitution:**

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### Common or Concurrent List Entries

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As per Article 246(1), the Union is supreme to make any law over the subjects enumerated in List I, the States, under Article 246 (3), has powers to legislate on the entries contained in List II, and both the Union and the States under Article 246(2) have concurrent jurisdiction on entries contained in List III. In the event of a clash, the Union enjoys a primacy over States in that its legislation in the Union and the Concurrent List prevails over State legislations. Also, the Parliament has residuary powers to legislate on any matter not covered in the three Lists (Art. 248).

Considering growing issues of Environment with technological advancements and industrialization, Hon’ble Courts have been time and again suggesting for establishing environment courts in India or that a Bench of the High Court be reserved for hearing cases relating to environment, The concept of “green courts" have been emphasized in many cases, for instance. *M. C. Mehta v. Union of India (AIR 1987 SC 965)*, *Indian Council for Enviro-Legal Action v. Union of India [(1996) 3 SCC 212]* and *Vellore Citizens' Welfare Forum v, Union of India [( 1996) 5 SCC 647]* etc.

**National Green Tribunal Act, 2010** (NGT) was enacted under Article 21, which assures the citizens of India the right to a healthy environment. The tribunal itself is a special fast-track court to handle the expeditious disposal of the cases pertaining to environmental issues. The Objective of the Act is to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto”. Presently, its Chairperson is Justice Swatanter Kumar. The Tribunal's dedicated jurisdiction in environmental matters is to provide speedy environmental justice and help reduce the burden of litigation in the higher
courts. The Tribunal is not bound by the procedure laid down under the Code of Civil Procedure, 1908, but is guided by principles of natural justice.

**SUSTAINABLE DEVELOPMENT**

The expression "sustainable development" was first used in 1972 and it received a universal backing at the Stockholm Conference, 1972, and thereafter has been the most important theme of all conferences and declarations on environment. Essentially, sustainable development is a multi-dimensional concept with three dimensions i.e. **ecology, economics and ethics** completing the triangle. The global commitment to sustainable development was reiterated at the World Summit on Sustainable Development held at Johannesburg, South Africa, from 2nd to 4th September, 2002, where it was decided to assume a collective responsibility to strengthen the three interdependent pillars of sustainable development **economic development, social development and environmental protection**. The underlying idea of this concept is that natural resources like the sea-bed are not the fruits of the labour put in by the present generation, and that therefore, they should be used and exploited, always keeping in mind the needs of future generations. Several natural resources in this world are non-renewable, as for instance, fossil fuels and minerals. Once a particular quantity of such resources is used, the total quantity stands reduced forever. All that sustainable development requires is that we use these resources with extreme caution, respecting the "rights" of future generations. "Protection of the environment" and "development" are thus two sides of the same coin, inseparable from the other. Over-emphasis on either will leave mother earth in a state of imbalance.

The Supreme Court explained the concept in **Narmada Bachao Andolan v. Union of India [(2000) 10 SCC 664]**, wherein it observed that "**Sustainable development means what type or extent of development can take place which can be sustained by nature or ecology with or without mitigation.**"

**Principles**

1. **The Intergenerational Equity Principle (IEP)** is the central principle in the definition of sustainable development as given by the Brundtland Report. It means that the every generation is under an obligation to preserve its natural and cultural heritage for the enjoyment of the future generations. Each person is a trustee of the legacy handed over to him by his ancestors, for the benefit of the future. The concept of IEP is well explained by the proverb, **"We do not inherit the Earth from our ancestors. We borrow it from our children"**.

2. **The Precautionary Principle** – it requires the authorities in charge to anticipate, prevent and attack the cause of environmental pollution. In the Stockholm Declaration (1972), the concept of environmental protection is based on "the assimilative capacity rule". Thus, Principle 6 of the Declaration declared, inter alia that **"the discharge of toxic substances must be halted in order to ensure that**
serious or irreversible damage is not inflicted upon ecosystems". This principle clearly presumes that the relevant scientific and technical expertise would be available when the environmental harm was predicted and that there would be sufficient time to use such technology to avert any damage to the environment. Measures should be taken in anticipation of environmental harm, rather than seek to cure such harm after it is inflicted. One of the beneficial outcomes of the application of the Precautionary Principle is in the field of burden of proof in cases involving threats to the environment. The Precautionary Principle today has been accepted by most countries of the world, including India. In the Vellore Citizens Welfare Forum's case, the Supreme Court laid down that the Precautionary Principle is not a "part of the law of the land". The principle was also applied in the Taj Mahal Case to protect the Taj Mahal from environmental pollution. In A. P. Pollution Control Board v. Prof. M. V. Nayudu (AIR 1999 SC 912), the Supreme Court has observed that "The principles of precaution involves the anticipation of environmental harm and taking measures to avoid it - or to choose the least environmentally harmful activity".

3. The Polluter Pays Principle; the Precautionary Principle tries to anticipate and prevent environmental pollution. Under this principle, it is the polluter who must not only compensate the victims of the pollution, but also pay the costs and expenses of restoring the environmental degradation. The responsibility to repair the environment and pay the clean-up costs is that of the polluter, and not that of the future generations or even of the Government. This is so because if the Government were to bear such costs, the financial burden would ultimately be shifted to the tax-payer, i.e. the non-polluter. The Polluter Pays Principle thus imposes absolute liability in such cases. The Polluter Pays Principle is now widely accepted by most countries in the world, including India. The Policy Statement for Abatement of Pollution, issued by the Ministry of Environment and Forests, Government of India, accepts the Polluter Pays Principle as a fundamental objective of government policy to abate pollution. In order to ensure that directions to make payment ordered to be made under the Polluter Pays Principle are effectively complied with, the Public liability Insurance Act was also enacted in 1991, to make it a mandatory duty of all industries having a capital of Rs. 2 lakhs or more to get themselves insured under the said Act. The Polluter Pays Principle was applied for the first time by the Supreme Court in the Bichhri Case, where remedial and clean-up costs to restore the environment were ordered to be recovered from the polluter under the writ jurisdiction of the court. The court referred to this rule as a universal rule to be applied to all polluters. In another case, Ramji Patel v. Nagrik Upbhokta Marg Oarshak Manch, (2000) 3 SCC 29 the Supreme Court reiterated the principle and held that it is the polluter who is under an obligation to make good the damage caused by him to the environment.
In the Span Motel Case (M C. Mehta v. Kamalnath, (1997) 1 SCC 388), the Supreme Court directed the motel which had made constructions which interfered with the natural flow of the River Seas, to pay compensation for restitution of the environment and ecology.

4. **The Public Trust Doctrine:** The ancient Romans developed a legal theory known as the Doctrine of Public Trust. This doctrine is, in fact, a part of the principle of sustainable development and it lays down that certain resources like air, sea, water forests, etc. can never be the subject-matter of private ownership. Such resources are a gift of nature and should therefore be available to all - irrespective of a person's cultural, religious, social or financial status. In the Span Motel Case (M C. Mehta v. Kamalnath, (1997) 1 SCC 388), the Supreme Court held that the Public Trust Doctrine is part of Indian law and it implies the following three restriction on the authority of the government, namely,-

a) Such property must only be used for a public purpose, but it must also be made available for use by the general public
b) Such property cannot be sold to a private user, even for a fair cash equivalent.
c) The property must be maintained for particular types of uses only.

**PROTECTION OF THE ENVIRONMENT UNDER GENERAL LAWS**

1. **Environment Protection under the Law of Torts**

A common law action under the law of torts is perhaps the oldest of all legal remedies for protection of the environment. Effective remedies exist in this branch of the law to tackle the problem of environmental pollution mainly under three categories of torts, namely, nuisance, negligence and "strict liability", which was converted into "absolute liability" by the Supreme Court in the wake of the Bhopal tragedy. The law of torts allows the plaintiff to sue for damages (including exemplary damages) or for an injunction or both. As held by the Supreme Court in M. C. Mehta v, Kamal Nath, (2000)6 SCC 213, environmental pollution amounts to a tort committed against the community in general. It was held that "Pollution is a civil wrong. By its very nature, it is a tort committed against the community as a whole. In addition to damages, the person guilty of causing the pollution can also be held liable to pay exemplary damages, so that it may act as a deterrent for other not to cause pollution manner."

**Nuisance**

The deepest doctrinal roots of modern environmental law are to be found in the common law doctrine of nuisance. The law of torts recognizes two categories of nuisance, private nuisance and public nuisance. Whereas private nuisance causes a substantial and unreasonable interference with the use and enjoyment of the plaintiff’s
property, a public nuisance is one which is an unreasonable interference with a general right of the public by causing an injury or annoyance to persons in general or a class of persons, as for instance, residents of a particular locality or neighborhood.

**Negligence**
Where there is a failure of the duty to take care and these results in environmental pollution, a suit can, in a fit case, be filed for the tort of negligence. Hon’ble Supreme Court in *Naresh Dutt Tyagi v, State of UP., 1995 Supp. (3) SCC 144* observed that “where chemical-pesticides were stored in a godown in a residential area and fumes emanating from such pesticides fund their way into an adjoining property, killing three children and an infant in its mother's womb, it was held that this was a clear case of negligence.”

**Rule of "strict liability" and "absolute liability"**
The English rule of strict liability is illustrated in its most classic form in the judgment passed in *Rylands v. Fletcher* (1868 LR 3 HC 330), where the court held that a person who keeps intrinsically dangerous things on his land is liable if such things escape and cause loss or damage to others. It was, therefore, held that a person who builds a reservoir on his own land is liable to compensate his neighbour if the water escapes from such a reservoir and damages the neighbor’s property. Under the Rule in *Rylands v. Fletcher*, the question of negligence is not relevant at all. This rule of strict liability has been followed in India and also applied to cases of environmental pollution. However, the English law of torts recognises several exceptions to the Rule in *Rylands v. Fletcher*, as for instance, an act of God, an act of a third party, the fault of the plaintiff, etc. The traditional doctrine of strict liability may not provide adequate relief in some cases due to its manifold exceptions, some of which have been referred to above. The gas leak tragedy in Bhopal amply demonstrated what havoc the hazardous substances and gases can play with the life of thousands of innocent persons. Hon’ble Chief Justice Bhagwati in the *Sriram Gas Leak* case, evolved a stricter doctrine, namely, the doctrine of absolute liability. It was held, in that case, that when an enterprise is engaged in a hazardous or Inherently dangerous industry, it owes an absolute and non-delegable duty to compensate anyone whose health and safety is adversely affected by an accident in operating such an industry. This rule of absolute liability was later incorporated in the Public Liability Insurance Act, 1991.

**ENVIRONMENT PROTECTION UNDER THE INDIAN PENAL CODE**
The Indian Penal Code (IPC) had, as far back as 1860, made several provisions which could be invoked to protect the environment. Thus, for instance, the object of Chapter XIV of the IPC (Ss. 268 - 294A) is to safeguard public health, safety and convenience by punishing acts which pollute the environment or threaten people's
lives. Thus, these provisions can be used if there is escape of gas, filth, water, germs - or even noise. The most important provisions are those dealing with public nuisance. S. 268 defines "public nuisance" as under:

"A person is guilty of public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

Ss. 269 to 271 of the IPC provide for punishment for negligent acts which are likely to spread infection and diseases. In cases where pollution is caused by any act which spreads an ingenuous disease, these provisions can surely be availed of. S. 277 of the IPC makes it an offence to do any act whereby a person voluntarily fouls the water of a public spring, well or reservoir, rendering it less fit for purposes for which it is ordinarily used. Under S. 278 of the IPC, a person is punishable if he voluntarily vitiates the atmosphere of any place so as to make it noxious to the health of persons in general or dwelling or carrying on business in the neighborhood-or even passing along a public highway. It is equally an offence to commit any rash or negligent act with regard to any poisonous substance (S. 284) or with fire or any combustible matter (S. 285) or with any explosive substance (S. 286), so as to endanger human life or cause hurt or injury to any person. The provisions of S. 290 of the IPC (which provides punishment for public nuisance) have been invoked in the past if any act or omission of a person causes injury to another person by polluting the environment. Even cases of noise pollution can be tackled under this provision. Similarly, although Ss. 426 to 432 of the IPC deal with the offence of "mischief", if any pollution is caused as a result thereof, these provisions can be usefully invoked in fit cases.

2. ENVIRONMENT PROTECTION UNDER THE CODE OF CRIMINAL PROCEDURE

Perhaps a speedier and more effective remedy to control environmental pollution via the route of public nuisance is to invoke the provisions of the Code of Criminal Procedure (Cr.P.C.) Ss. 133 to 144 of the Cr.P.C. can be used to control any public nuisance causing pollution of air, water or noise. Thus, under S. 133, if a Magistrate is of the view - that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel lawfully used by the public: or that the conduct of any trade or occupation or the keeping of any goods or merchandise is injurious to the health or physical comfort of the community; or that any tank, well or excavation adjacent to any public way or public place should be fenced to prevent danger arising to the public; he can pass a conditional order directing the offender to remove the public nuisance which is causing the pollution. Such an order is "conditional" because it is a preliminary order which can be made absolute or final after giving the offender sufficient opportunity to be heard in the matter. If concerned
person fails to obey, he can be prosecuted under S. 188 of the IPC.

S. 133 of the Cr. P.C. can even be invoked against statutory bodies like municipal corporations and other government bodies if they are guilty of any act or omission which causes environmental pollution or any other public nuisance. Under S. 144 of the Cr.P.C., a Magistrate can pass an order directing a person to do or to abstain from doing a particular act with regard to certain property in his possession or under his management, if the Magistrate considers that such a direction is likely to prevent obstruction, annoyance or injury to any person or to prevent danger to human life, health and safety.

**MAJOR ENVIRONMENTAL LAWS/POLICY IN INDIA**

**Laws/Provisions pertaining to Water Pollution.**

Water is essential for life. All living things rely on it and are made up of it. 60% of the human body is composed of water. With water covering 71% of the Earth's surface, one would think everyone should have easy access to water, but it is unevenly distributed. Water Pollution is presence of harmful material in water in sufficient concentrations to make it unfit for use. India’s 14 major, 55 minor and several hundred small rivers receive millions of litres of sewage, industrial and agricultural wastes. Presently, only about 10 per cent of the waste water generated is treated; the rest is discharged as it is into our water bodies. Due to this, pollutants enter rivers, lakes and groundwater. Water pollution is any chemical, physical or biological change in the quality of water that has a harmful effect on any living thing that drinks or uses or lives (in) it. When humans drink polluted water it often has serious effects on their health. Water pollution can also make water unsuited for the desired use.

**Legislations, policies and programmes for water pollution in India**

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### International conferences on water quality

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<tr>
<td>UN Conference on Environment and Development (UNCED, Earth Summit), Rio de Janeiro, 1992</td>
<td>Agenda 21, holistic management of freshwater and integration of sectoral water plans programmes within the framework of national economic and social policy.</td>
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<tr>
<td>First World Water Forum, Marrakech, 1997</td>
<td>Water and sanitation, management of shared waters, preserving ecosystems, to encourage the efficient use of water</td>
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<td>International Conference on Freshwater, Bonn, 2001</td>
<td>Water – key to sustainable development</td>
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<tr>
<td>Third World Water Forum, Kyoto, 2003; Fourth World Water Forum, Mexico, 2006; 5th World Water Forum Instanbul, 2009</td>
<td>Raise the importance of water on the political agenda, support the deepening of discussions towards the solution of international water issues in the 21st century, formulate concrete proposals and bring their importance to the world’s attention and generate political commitment.</td>
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**Water (Prevention and Control of Pollution) Act** was enacted in 1974 under article 252 of Constitution which provides power to the Parliament to legislate for two or more States by consent and adoption of such legislation by any other State. The Act provides for the prevention and control of water pollution and for the maintaining or restoring of wholesomeness of water in the country. To achieve this objective, the Act provided for establishing Boards at the Central and State level for the prevention and control of water pollution and conferred and assigned powers and functions relating this to these Boards. It
lays down a system of consent whereby no industry or operator process or any treatment and disposal system can be established without the previous consent of the State Board. Similarly, no industry or process can discharge sewage or trade effluent into a stream or well or sewer or land in excess of standards. Contravention of provisions of this Act is punishable in monetary as well non-monetary terms.

The Water (Prevention and Control of Pollution) Cess Act, 1977 provides for the levy of cess on use of water by various users of water i.e. industry and local authorities which are entrusted with duty of supplying of water under the law. This cess was meant to augment the funds required by State pollution Boards for their effective functioning in discharge of duties under the Water (Prevention and Control of Pollution) Act, 1974. The cess is collected by the State Government concerned and paid to the Central Government. The proceeds are credited to the Consolidated Fund of India. After this, the Central Government, after due appropriation made by Parliament by Law, disburses such sums of money as if may think fit to the Central Board and the State Boards, having regard to the amount of cess collected by State Government concerned.

Environment (Protection) Act, 1986 provides for the protection and improvement of environment and for matters connected there with. The definition of ―environment" includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property. The Central Government has the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution. Thus, MOEF has the responsibility of controlling water pollution under Environment (Protection) Act, 1986.

Salient features of the Water (Prevention and Control of Pollution) Act, 1974.

- Water (Prevention and Control of Pollution) Act, 1974 provides for the management of water pollution; the maintenance or restoration of wholesomeness of water; the establishment, of Boards for the prevention and control of water pollution; conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith.
- The Water (Prevention and Control of Pollution) Act, 1974 has 64 Sections and has been divided into eight chapters relating to i) Preliminary, ii) Central and State Boards for the Prevention and Control of Water Pollution, iii) Joint Boards, iv) Powers and Functions of Boards, v) Prevention and Control of Water Pollution, vi) Funds, Accounts and Audit, vii) Penalties and Procedures, and viii) Miscellaneous.
- The Act provides for the creation of the Central Pollution Control Board and State Pollution Control Boards. It authorises the establishment of the Joint Boards. The main function of the Central Board, under Section 16(1) of the Act, is to promote cleanliness of streams and wells in the States. Section 16(2) provides certain functions in the nature of advice, planning, co-ordination, publications, education and programmes for preventing, controlling and abating water pollution.
The State Boards (under Section 17) of the Act are expected not only to plan comprehensive programmes for the prevention and control of water pollution in the State but also to inspect sewage or trade effluents, works and plants for their treatment, to lay down standards for such effluents, their treatment and for the quality of receiving waters, and to make orders for waste disposal and the like.

Under the Water (Prevention & Control of Pollution) Act, 1974, power to give directions is conferred on The Central Government (which can give directions to the Central Boards), The Central Board (which can give directions to the State Boards), The State Government (which can give directions to State Boards).

The Act imposes on the person concerned, an obligation to inform the State Board where owing to any accident etc, there is any discharge of person poisonous, noxious or polluting matter. Failure to do so is punishable under Section 45a, which is the residuary penal provision.

By Section 32, the State Board is empowered to take emergency measures if it appears to them that any poisonous, noxious or polluting matter is present in any stream or well or on, even due to any accident or other unforeseen act or event, and if the Board is of the opinion that it is necessary to take immediate action, it may for the reasons to be recorded in writing, carry out such operations as it may consider necessary.

The Act provides that, where it is apprehended by a Board that the water in any stream or well is likely to be polluted by reason of the disposal or likely disposal of any matter in such stream or well or in any sewer, or on any land, or otherwise, the Board may make an application to a Court, not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first Class, for restraining the person who is likely to cause such pollution from so causing.

Under the Water (Prevention and Control of Pollution) Act, 1974 (subject to directions of the Central Government), a Board can, in the exercise of its powers and performance of its functions under the Act, issue directions. Breach of such directions is punishable under Section 41.

The Water (Prevention and Control of Pollution) Act, 1974 is of considerable importance in practice. It provides for penalties and punishments for non-compliance of the directions given by the State Board, for certain acts and for contravention of provisions of the Act. The punishment under the Act may be imprisonment for a term varying from three months to seven years and / with a fine which may extend to ten thousand rupees, with an additional fine.

The Act provides for enhanced penalty if any person who has been convicted of any offence under Section 24 (Prohibition on use of stream or well for disposal of polluting matter, etc.) or Section 25 (Restrictions on new outlets and new discharges) or Section 26 (Provision regarding existing discharge of sewage or trade effluent) is again found guilty of an offence involving a contravention of the same provision, he
shall, on the second and on every subsequent conviction, be punishable with imprisonment for a term which shall not be less than one and half years but which may extend to six years and with fine. No cognisance shall be taken of any conviction made more than two years before the commission of the offence which is being punished.

➢ The Act provides penalty, for the contravention / failure of compliance of any order or direction given under certain provisions of this Act, for which no penalty has been elsewhere provided in this Act, of an imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or both and in the case of a continuing contravention or failure, with an additional fine which may extend to five thousand rupees for every day during which such contravention or failure continues after conviction for the first such contravention or failure.

➢ Under the Act, when an offence under this Act has been committed by a company, every person at the time the offence was committed who was in-charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. But the person held guilty proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such an offence, in such situation he is not liable for punishment provided under the Act.

➢ Under the Act, Court shall take cognisance of any offence under this Act only on the complaint made by a Board or any other officer authorised in this behalf by it, or any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint, to the Board of officer authorised as aforesaid, And no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first Class shall try any offence punishable under this Act.

➢ Under the Act, members, officers and servants of Board shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code while acting or purporting to act in pursuance, of any of the provisions of this Act (45 of 1860) and the rules made there under.

➢ The Act bars Civil Courts from exercising their jurisdiction to entertain any suit or proceeding in respect of any matter which an appellate authority constituted under this Act is empowered by under this Act to determine, and no injunction can be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

The National Water Policy
The National Water Policy was adopted in 1987 and was reviewed and updated by National Water Policy 2002 by the Ministry of Water Resources in 2002. This policy aimed at meeting the challenges that have emerged in the development and management of water resources
including water pollution. The following are the salient features of National Water Policy relating to water pollution:

- Both surface water and ground water should be regularly monitored for quality. A phased programme should be undertaken for improvements in water quality.
- Effluents should be treated to acceptable levels and standards before discharging them into natural streams.
- Minimum flow should be ensured in the perennial streams for maintaining ecology and social considerations.
- Principle of ‘polluter pays’ should be followed in management of polluted water.
- Necessary legislation is to be made for preservation of existing water bodies by preventing encroachment and deterioration of water quality.
- As maintenance of water resource schemes is under non-plan budget, it is generally being neglected. The institutional arrangements should be such that this vital aspect is given importance equal or even more than that of new constructions.

**AIR POLLUTION**

Air Pollution in India is a serious issue with the major sources being fuelwood and biomass burning, fuel adulteration, vehicle emission and traffic congestion. India has a low per capita emissions of green house gasses but the country as a whole is the third largest after China and the United States. A legal definition of air pollution is the presence in the outdoor atmosphere of substances or contaminants put there by man in quantities or concentration and of a duration as to cause any discomfort to a substantial number of inhabitants of a district or which are injurious to public health or the safety of human, plant or animal life or property, or which interferes with reasonable or comfortable enjoyment of life and property. The American Medical Association Council of Industrial Health has defined Air Pollution as: “the concentration of foreign matters in the air which adversely affects the well being of the individual or causes damage to the property”. The World Health Organization estimates that about two million people die prematurely every year as a result of Air Pollution, while many more suffer from breathing ailments, heart disease, lung infections and even cancer. Fine particles or microscopic dust from coal or wood fires and unfiltered diesel engines are rated as one of the most lethal forms or air pollution caused by industry, transport, household heating, cooking and ageing coal or oil-fired power stations. There are four reasons of air pollution are - emissions from vehicles, thermal power plants, industries and refineries.

The Air (Prevention and Control of Pollution) Act was passed in 1981 to regulate air pollution and there have been some measurable improvements. However, the 2012 Environmental Performance Index ranked India as having the poorest relative air quality out of 132 countries. The object of the Act is to provide for the prevention and control of air pollution for the establishment with a view to carrying out the aforesaid purposes, of Boards for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected there with. Under the Air Act, all industries operating within designated air pollution control areas must obtain consent (permit) from the State Boards.
Prior to its amendment in 1987, the Air Act was enforced through mild Court administered penalties on violators. The 1987 amendment strengthened the enforcement machinery and introduced stiffer penalties. Now, the Boards may close down a defaulting industrial plant or may stop its supply of electricity or water. A Board may also apply to a Court to restrain emissions that exceed prescribed standards.

**Salient features of The Air (Prevention and Control of Pollution ) Act.1981**

1. Air (Prevention and Control of Pollution) Act 1981 is a step for the preservation of the natural environment on the Earth which includes the preservation of the quality of air and control of air pollution.


3. The Act provides that the State Government, in consultation with the State Board, is empowered to declare any area or areas within the jurisdiction of the concerned State an “Air Pollution Control Area”.

4. The Act provides that the Central and State Boards established under the Water (Prevention and Control of Pollution) Act, 1974 will also exercise and perform powers and functions respectively under the Air (Prevention and Control of Pollution) Act, 1981.

5. The Act provides that the State Government in consultation with the State board has a power to give instructions to the registration authority under the Motor Vehicle Act, 1939 (Act 4 of 1939) for ensuring standard for emission from automobiles driven with the help of petrol or diesel.

6. The Act provides for the imposition of restriction on the use of certain industrial plant in any pollution control area without the previous permission and consent of the State Board.

7. The Act provides that the Board has the power to make an application to the Court for restraining persons from causing air pollution.

8. The Act provides that whoever operates or establishes any industrial plant in an pollution control area without the consent of the State Board or allows emission of an air pollutant in excess on the standard laid down by the State Board, or violates any direction issued by the Board, in the above situation, is punished with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and with fine.

**LAWS RELATING TO ENVIRONMENT PROTECTION**

With a view to protecting and improving the environment, different legislations have been made and different regulations, rules have been issued. The Government of India,
through its Ministry of Environment and Forests is administering has enacted nation wide comprehensive laws. One of the major environmental enactments came just two years after the Stockholm Conference in 1974. In the wake of the Bhopal gas tragedy, the Government of India enacted the Environment (Protection) Act, 1986. The laws that existed prior to the enactment of EPA essentially focused on specific pollution (such as air and water). The need for a single authority which could assume the lead role for environmental protection was answered through the enactment of EPA. It is in the form of an umbrella legislation designed to provide a framework for Central Government to coordinate the activities of various central and state authorities established under previous laws. It is also in the form of an enabling law, which delegates wide powers to the executive to enable bureaucrats to frame necessary rules and regulations.

**Salient Features of Environment (Protection) Act, 1986**

As compared to all other previous laws on environment protection, the Environment (Protection) Act, 1986 is a more effective and bold measure to fight the problem of pollution.

1. The Environment (Protection) Act, 1986 has 26 Sections and it has been divided into four chapters relating to i) Preliminary, ii) General Powers of the Central Government, iii) Prevention, Control, and Abatement of Environmental Pollution, iv) Miscellaneous.

2. The Act consists of and deals with more stringent penal provisions. The minimum penalty for contravention or violation of any provision of the law is an imprisonment for a term which may extend to five years or fine up to one lakh rupees, or both. The Act also provides for the further penalty if the failure or contravention continues after the date of conviction. It is Rs. 5000/- per day.

3. The Act empowers the Central Government to take all appropriate measures to prevent and control pollution and to establish effective machinery for the purpose of protecting and improving the quality of the environment and protecting controlling and abating environmental pollution.

4. The Central Government or any other person duly authorised is empowered to collect the samples of air, water, soil or other substances as evidence of the offences under the Environment (Protection) Act, 1986.

5. The Act prescribes a special procedure for handling hazardous substances and the concerned person has to handle the hazardous substances according to the procedure of the Act.

6. In the commission of the offence under this Act by Government Department, the Act holds the Head of the Department as guilty of the offence unless the head of the Department proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

7. This Act also empowers and authorises the Central Government to issue directions for the operation or process, prohibition, closure, or regulation of any industry. The Central Government is also authorised to stop, regulate the supply of electricity or
water or any other service directly without obtaining the order of the Court in this regard.

8. The Environment (Protection) Act, 1986 grants immunity to the officers of the Government for any act done under the provisions of this Act or under the powers vested in them or functions assigned to them under this Act.

9. The Act debars the Civil Courts from having any jurisdiction to entertain any suit or proceeding in respect of an action, direction, order issued by Central Government or other statutory authority under this Act.

10. Under the Act, there will be supremacy of provision. In other words, the provisions of this Act and the rules or orders made under this Act shall have effect and supremacy over anything inconsistent contained in any enactment other than this Act.

**Salient features of The Public Liability Insurance Act, 1991**

The object of the act is to provide for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance and for matters connected therewith or incidental thereto. This Act, imposes on the owner the liability to provide immediate relief in respect of death or injury to any person or damage to any property resulting from an accident while handling any of the notified hazardous chemicals. This relief has to be provided on 'no fault' basis. The owner handling hazardous chemical has to take an insurance policy to meet this liability of an amount equal to its "paid up capital" or upto Rs.500 millions, whichever is less. The policy has to be renewed every year. New undertaking will have to take this policy before starting their activity. The owner also has to pay an amount equal to its annual premium to the Central Government's Environment Relief Fund (ERF). The reimbursement of relief to the extent of Rs.25,000/- per person is admissible in case of fatal accidents in addition to the reimbursement of medical expenses upto Rs.12,500/-. The liability of the insurance is limited to Rs.50 million per accident upto Rs.150 millions per year or upto the tenure of the policy. Any claims in excess to this liability will be paid from the ERF. In case the award still exceed, the remaining amount shall have to be met by the owner. The payment under the Act is only the immediate relief, owners shall have to provide the final compensation, if any, arising out of legal proceedings.

**CONCLUSION**

There has been a paradigm shift over the concept of right to environment and awareness level. Among these, the Stockholm Conference played a significant role in throwing light on environmental degradation that has been caused worldwide. As a result, the international stature of environmental & ecological balance has been enhanced to such a level which the countries of the world had never imagined in history. The Courts in India have played a distinguishing role in gradually enlarging the scope of a qualitative living by applying various issues of environmental protection. Consequently, activities posing a major
threat to the environment were curtailed so as to protect the individual's inherent right to wholesome environment.

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### Environmental Regulations in India

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<th>Year</th>
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<td>Water (Prevention &amp; Control of Pollution Act) Amendments, 1988</td>
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<td>1975</td>
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<td>1986</td>
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<td>1986</td>
<td>The Environmental (Protection) Rules</td>
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<td>1997</td>
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<td>2001</td>
<td>Batteries (M&amp;H) Rules</td>
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The pressure on world government to act on climate change is greater than it has ever been. One of the measurers that government appear to have reached consensus on is what is called the REDD agenda. REDD stands for reduction of emissions due to deforestation and environmental degradation. It is a system that aims to create a monetary value for forests that is linked to the value of these forests as carbon sinks, incentivizing its protection. While governments have seen this as an agreeable model, REDD has been opposed by environmentalists, social workers and NGOs for various reasons. The implementation of the REDD agenda has been characterized as controversial. This paper seeks to explain the REDD agenda, its implications and the issues regarding its effective implementation in India.

I- Introduction

It was estimated in 2009 that about 3,00,000 people a year died from the effects of climate change. A further 325 million are seriously affected. (Kofi Annan, Anatomy of a Silent Crisis, as per study conducted by Global Humanitarian Forum, 2009) Climate change is no longer a problem for future generations. It is here and now and it is important and necessary to evaluate the legal response to the problem. Such a legal response must accept changing priorities in environmental legislation. It must attempt to fit a concerted global effort and simultaneously preserve the rights of the people at the local level facing the brunt of the consequences.

The Kyoto Protocol, finalized in 1997, is currently the only binding international instrument of climate change. It envisages that parties will cut greenhouse gas emissions by about 5.2 per cent from 1990 levels. However, the complex ratification requirements meant that the Protocol which is silent on commitments beyond 2012 only became binding about seven years after it was finalized, by which time it became necessary to negotiate commitments beyond the commitment period. Negotiations started immediately after 2005. Papua New Guinea and Costa Rica with a few other countries put forward a proposal that considered the crediting of benefits from avoiding further deforestation. Avoiding deforestation appeared to be among the cheaper mitigation options before developing countries, especially countries with significant forest cover. (Commissioned by the then UK

* District and Sessions Judge. Mahoba, U.P.
Two years later, in Bali, a road map for negotiations included in what was called the Bali Action Plan was drawn up. This action plan, *i.e.* Decision 1/CP 13 at paragraph 1(b)(iii) commits parties to consider “policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.” This has become, what is now known as REDD and REDD plus.

The Copenhagen Conference 2009 was to be the culmination of four years of negotiations under the Bali Action Plan. The accord recognizes the REDD concept flagging the crucial role of reducing emissions from deforestation and forest degradation. (Decision 4/CP 15 of the UN Framework Convention on Climate Change, dated 30th March, 2010.) It established a Copenhagen Green Climate Fund to support projects, programme, policies and other activities in developing countries related to mitigation including REDD and REDD plus, adaptation, capacity building technology development and transfer, (Paragraph 10 of the Copenhagen Accord.) India associated itself with the Accord pledging to reduce emission intensity excluding agriculture of its GDP by to 20 to 25 per cent compared to 2005 levels. (Letter including India’s domestic mitigation actions (30 January 2010). Available at <http://unfccc.int/files/meetings/application/pdf/indiacphaccord_app2.pdf>.)

The Cancun Summit a year later made governments promise to boost action to curb emission from deforestation and forest degradation in countries with technological and financial support. (Press Release of the UN Framework convention on Climate Change titled “UN Climate change Conference in Cancun delivers balanced package of decision, restores faith in multilateral process”.

In his speech at the 2010 Cancun Conference, the Union Minister for Environment and Forests, stated that India has 70 million hectares of forests with not only ecological, but also livelihood significance, as they support the livelihood of 250 million people. He stated that India was launching an ambitious Green India Mission to increase the quality and quantity of forest cover in 10 million hectares of land. (Speech by Jairam Ramesh, Minister of State (I/C) for Environment and Forests and Leader of the Indian Delegation at Cancun in the Conference of Parties to the UNFCCC (COP 16) on 8 Dec. 2010) Among all the mechanisms in place or being worked on, REDD has gained almost unilateral support from governments. It has been stated that it was only a failure to reach a general agreement at Copenhagen that no specific agreement on REDD was reached. Despite that, the EU has pledged around 2.6 billion euro a year towards REDD related projects for 2010, 2012. (“REDD under the hood” available at http://india.carbon-outlook.com/content/redd-under-hood)

It, therefore, becomes necessary to analyses and understand the intricacies of a REDD and REDD plus system as elaborated internationally, and the reasons for its support.
issues and concerns that have been raised regarding implementing such a system of environmental regulation must also be considered, with valuable insight proved by the reported experiences of other nations as well as scholarly writing on the subject. REDD and REDD plus in the Indian context has its own unique concerns some of which have been highlighted by case law, and the zeal with which the Supreme Court has dealt with deforestation.

**II-REDD and REDD plus understood**

It is estimated that global deforestation accounts for nearly 20 per cent of greenhouse gas emission. To put this in perspective, the contribution of the global automobile fleet is around 3 per cent. The REDD mechanism is a method by which developing countries are paid to protect their forests. *(John Vidal, “Q&A Reducing Emissions from Deforestation and degradation (Redd)” available at http://www.guardian.co.uk/ environment.2009/sep/24/redd-reducting-emissions-from-deforestation)* It is a system that will try to create an economic value for forests as understood under the proposal, protecting their importance as global carbon sinks and ensure that this economic value is greater than potential economic profits to industry from logging and deforestation. It seeks to ensure that economic interests of all players in the market are aligned towards the preserving of forests. It is a convergence of public international law, commercial law, financial law, development law projects, taxation law, company law and securities law, among others.

An assessment is made of the forests, and a carbon value is calculated. This is done using historical data, satellite imagery and through direct measurement of trees, the extent, condition and the carbon content of their forests. The idea that previous deforestation is factored into carbon value has been opposed by countries without a significant history of deforestation. With the data available, the prices for protection are calculated. Three salient conditions of this proposal are *firstly*, that at a state level, reduction to emissions from a REDD project cannot be replaced by other emission reduction schemes, with diverted. *Secondly*, there should be no leakage of greenhouse gasses, *i.e.* the clearing of another forest while conserving one forest. *Thirdly*, the rejuvenated forest should be self-sustaining and not prone to deforestation. In theory, and judging from its support several government, REDD is seen as easier to implement. Forests absorb greenhouse gases and store them in biomass and soil. Wood products are carbon dioxide stores, and over a period of the store’s lifetime that amount of carbon dioxide is removed from the atmosphere. Further, use of wood fuelled energy reduces reliance on fossil fuels. Wood in construction replaces concrete, the manufacture of which products more emissions that the consumption of wood. *(Opinion of the European Economic and Social Committee on the role of forest and forest based sector in meeting the Eu’s climate based commitments (Exploratory Opinion); Official Journal C 228, 22.09.2009.)* The REDD plus mechanism includes the REDD concept but extends it to sustainable management of forest ecosystems and enhancement of forest carbon stocks in developing countries. The specifics of REDD plus obligations are still to be decided.
Protecting and conserving the forests, coal powered electricity to renewable power, or moving away from development linked to fossil fuels. (Supra note 8)

There are several proposals on the table for funding the REDD project. The first is voluntary funding, like the current international aid system from one country to another. The second proposal is to have an international auction of the emission allowances. Alternatively, REDD credits could be tradable alongside existing certified emission reductions (CERs). Companies and government unable or unwilling to meet their reduction obligations would have to buy these credits at market prices, funneling resources to conservationists. (Supra note 9.) This is one of the key issues in the negotiation of REDD and REDD plus obligations. Australia and New Zealand have argued for a reliance on carbon markets. Brazil has promoted a fund based approach. There is a general consensus that initially at least, a fund based approach might be necessary to build capacity for REDD and REDD plus based economic system. This has led to the consideration of phases based funding, with Norway suggesting that REDD plus activities could initially be supported by voluntary sources, with a shift to a mix of public funding and carbon markets in the final phase of implementation. (Foundation for International Environmental Law Development “Guide for REDD plus Negotiations” October 2010; available at http://www.indiaenvironmental.org.in/files/Field_REDDPlus_ENG_v1_WEB.pdf.) It has been suggested that the international carbon market has proven an effective tool to simultaneously encourage investment in low emission projects in developing countries, while at the same time allowing developed countries to meet their reduction targets. Rights or credits in the carbon market are quasi-property transferable rights governed by international law. States and the UN regulate right to emit a certain amount of greenhouse gases. The right is created by international law but is subject to private law and have been considered in the nature of negotiable instruments. (Jean-Charles Bancal and Julia Kalfon “The Institutional and contractual instruments of Kyoto’s Clean Development mechanism” International Business LJ 665(2009). It is hoped that a system with a target of 30 per cent reduction will cut mitigation costs by about a quarter by about 2020, and simultaneously, generate financial flows to developing countries of about 38 billion USD per annum. There will only be demand for public finance if the carbon market fails to deliver on these targets. In any case, several developing countries possess the finances to shoulder some of the burden, with Brazil announcing that it will carry a significant part of the financing for its REDD obligations. (“communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions- Stepping up International Climate Finance: A European Blueprint for the Copenhagen deal” 1172[SEC(2009)) This issue is linked to whether countries will be free to implement sub-national REDD mechanisms,. There is also the further issues of indigenous people and their role in ecosystem preservation, as well as their rights and benefits under the system. Due to their close relationships with forests, indigenous communities can influence the effectiveness of REDD programmes on the ground. One could even go so far as to say that REDD effectiveness depends on the willing participation of

III-Issues and concerns with REDD and REDD plus

Of the agreed REDD plus text, it has been argued that “conservation” implies in practice the establishment of national parks by large scale evictions and the loss of indigenous communities rights. “Sustainable management” also used in the REDD plus text, far too often results in subsidies to commercial logging operations in old grown forests and land conversion. The UN definition of forests also permits no distinction between an old grown forest and plantations, with serious consequences for biodiversity and indigenous people’s rights. The definition itself is capable of including exotic fast growing plant varieties that damage existing ecosystems and destroying natural forests. Companies could replace forests with plantations and still qualify for REDD resources. There has been a call for some international instrument on REDD to also, reaffirm international human rights instruments to avoid international norms being manipulated at the local level. There is growing unease about the lack of recognition of indigenous people’s rights in these discussions. (“REDD: An introduction”, available at http://www.redd-monitor.org/redd-an-introduction/ Further, there is the fear that the system itself is not designed to cut down on emissions, but only allows developed countries to purchase their way to continued emissions, resulting in no real decrease in emissions.

The REDD mechanism has been described as the “low hanging fruit” of efforts to prevent climate change. Reasons include a general view that most forested countries remain extremely corrupt, and theft of international funding is usual . There is more often that not, very little governmental ability to supervise and enforce existing anti-deforestation laws. Efforts to bring greater transparency to “fast start finance”, i.e. the pledge made by the developing countries in 2009 to provide USD 30 billion in new and additional finance for climate mitigation and adaptation have led to accusations of non-delivery of money, or of diversion from development assistance. (Jacob Werksman “Restoring trust: Global Action for transparency, climate Governance: Ensuring a collective commitment to a low carbon, climate resilient future” 14th International Anti Corruption Conference, 10-13th November, Bankok , Thailand.) Implementation, given the flexibility of the UN definition of forests, could also include bare land which is “temporarily unstocked” of trees, is a serious issue. (Simon Counsell “Seeing REDD in Cancun:” 8th Dec. 2010, available at http://www.guardian.co.uk/commentisfree/cifamerica/2010/dec/08/redd-deforestation-carbon-trading). The biggest beneficiaries of REDD, it is argued, are not indigenous people but large oil companies and banks. (John Vidal “Oil Companies and Banks will profit from
the UN Forest protection scheme” 28th Nov. 2010, available at http://www.guardian.co.uk/environment/2010/nov/28/redd-forest-protection-banks-oil.) The opposition has gone so far as to consider REDD and REDD plus inherently dangerous proposals. (Interview with Shanker Gopalakrishnan, Campaign for Survival and Dignity, available at http://www.downtoearth.org.in/node/2367)

There is risk of increasing socio-economic and environmental vulnerabilities to by adding complex value to their homes and surroundings. Commoditization of forest land brings with it the greater threat of displacement and consequent conflict. Further, if REDD plus is intended also to benefit the indigenous peoples and set up a reward system for their efforts at conservation, there must be systems in place to ensure that such rewards reach these indigenous communities in the form necessary. It has been felt that the concerns of indigenous communities have thus far been underrepresented in the negotiations. (supra note 16)

Another concern raised has been the notable absence of gender related concerns being addressed. Traditionally, it is the women’s role in forest dependent societies to handle subsistence needs for fuel wood, medicinal products and fodder for livestock, while a man’s role is more likely to be linked to timber extraction for commercial purposes. In engaging with forest dependent communities, there may be no engagement with the individuals directly dependent and with direct stake in forest conservation. Conservation measures that bar access to forest will make demands on a woman’s time rather than a man’s. Forests being replaced by plantations do not provide the multiple benefits to woman are living. It is also important to note this applies equally to indigenous communities, where one does not automatically assume safeguarding of women’s land right within a community by safeguarding an indigenous community’s rights. (Jeanette Gurung, “REDD: Putting women at risk or providing opportunities?) Implementations of such schemes in Brazil and Indonesia have been controversial. Forests can be as small as 0.05-1 hectare in size where at least 10-30 per cent of the area is covered with trees reaching a minimum height of 2-5m. Reports state that Malaysia and Indonesia have cleared old growth forests which were biodiversity hotspots in favor of palm oil plantations, while still using these plantations to claim REDD credits. (“A REDD dawn in India”)

The first step along this route was taken in California with the Global Warming Solution Act of 2006, commonly known as AB32. Its emissions trading framework is set to be operational from 2010. Its success or failure could have a significant bearing on the final international framework.

IV-REDD in the Indian context

British rule in India focused on sustained commercial timber production, favoring a few commercially valuable species over others. The basic approach was to declare forests state property and curtail the rights of forest dwellers. The first Indian Forest Policy of 1894 was for the stated aim of managing forests for public benefit. However, it completely denied
forest communities right and role in the preservation of these forests. It simply fed the revolution of the indigenous people that started in 1784.

Independent India’s responsibility to protect forests is laid down in Article 48A of the Constitution of India which states that “The State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country”. In furtherance of this objective, the state brought several environmental legislations into force, the most relevant of which is the Forests (Conservation) Act, 1980. The Act prescribes the procedure for identification of forests for clearing purpose and imposes several safeguards on the grant of any clearing rights. The difficulty has arisen in the implementation of these rules on the ground. The Supreme Court was seized of this issue when two writ petitions were filed by the Environmental Awareness Forum and T.N. Godavarman Thirumulpad, in what has since become known as the Godavarman case. (T.N. Godavarman Thirumulpad v. Union of India (2006) 10 SCC 491) The Supreme Court directed that “all ongoing activity within any forest in any State throughout the country. Without the prior approval of the Central Government must cease forthwith” The court directed each state government to constitute committees to identify forests land that was degraded and once forested land as well as plantations for the purposes if implementing the Forests (Conservation) Act, 1980. In what is perhaps its most significant order, of 13.11.2000, the Supreme Court through an interim order restrained all state governments from dereserving national parks, sanctuaries and forests. The order stated that “This Court while directing to list the above application after five weeks doth order that pending further orders no dereservation of Forests/Sanctuaries/National Parks shall be affected. And this Court Doth further order that this Order be punctually observed and carried into execution by all concerned”.

The Supreme Court’s response and the felt necessity to take charge of the implementation of the Forest (Conservation) Act highlight the basic problems with the successful implementation of any REDD plus based conservation attempt. Widespread corruption has hindered attempts in the past and will continue to do so in future as well. Law and order in these areas is also a significant issue, and there will be circumstances where proper measurement of carbon values as well as implementation of a support structure for carbon trading is unfeasible. Further, economic pressures coupled with inadequate enforcement might render the REDD value of forests unequal to immediate perceived value of forests, either legally or illegally. Pressure of subsistence and shifting agriculture may render the carbon value of forests immaterial. (Supra note 24) The challenges faced by other developing countries, especially in the context of the wide definition of the term forests and its effects are a cause for concern. A very careful balance will have to be struck, given the experience of the Forest(Conversation)Act,1980 with the Scheduled Tribes and Other Traditional Forest Dwellers(Recognition of Forest Rights)Act,2006, dealing with rights specifically granted to indigenous forest dwellers.

REDD plus in India has a better chance of succeeding if it is implemented in such a way that, firstly, old growth forests are not compromised, either by deforestation or by
plantation cultivation. Secondly, indigenous forest dwellers are made an integral part of the process. Mechanisms for quantifying carbon emissions and carbon value are properly implemented, without further disadvantaging disadvantaged sections. There is often a lack of acknowledgement that subsistence emissions cannot stand on the same footing as luxury emissions. Funds available must be channeled to the right sources with accountability and transparency at priority.

A property rights framework needs to be developed that favours and facilitates cooperation rather than effectively marginalizing even further valuable allies in the fight against climate change.

V-Conclusion

India’s two main approaches to REDD are ‘compensated reduction’ and ‘compensated conservation’ where it says that carbon is saved from reducing deforestation and degradation, and carbon is added through conservation, the sustainable management of forests and increases in forest cover (forestation and reforestation). Both have to be compensated equally. It is estimated that a REDD plus programme in India could provide capture of more than 1 billion tones of additional carbon dioxide over the next three decades while funneling more than US$ 3 billion as carbon service incentives under REDD plus. (“India’s Forests and REDD +” Ministry of Environment and Forests: Government of India). It is the attraction of this package that has caused the apprehension in the minds of activists and indigenous forest dwellers alike. There is a need for systems in place to ensure that catastrophic exploitation does not take place.

While the world has moved successfully forward from sulphur emissions based development, moving forward from carbon emission based development has thus far proved elusive. No country in history has ever successfully industrialized without doing significant damage to the environment. India’s challenge in the world of climate change is to buck the trend.
DYNAMIC RULE OF INTERPRETATION

Dr. Anupam Goyal

Introduction

In a human society, the system of law deals with human beings regulating their conduct. Change is the law of nature. Every living being is subject to changes every moment which are subtle, however perceptible when viewed over a long span of time. Man and the society in which he lives also keep changing and the complexity in the human society is continuously increasing. As the law deals with living entities, it is also like a living organism. That law is best which can sub serve the needs of present society. For the law to keep abreast with the changes of society, it is necessary that law must keep changing according to the changing needs. If the law is static and lagging behind the changes in the society, the legal crisis eventuates. Any human society cannot withstand the legal crisis for long. Men, whether individual or associated in a group, so far as he is a reasonable being is constrained to believe that order not the chaos is the governing principle of the world in which he has to live. The scientific and technological developments have unleashed political, economic, social and cultural forces which are transforming the society at an increasingly fast rate. For an orderly society, the law has to be inherently of dynamic character so as to keep with the pace of changes in the society and answer the problems which may arise due to such changes. The technique of updating interpretation and creating interpretation fills the gap and has the salutary effects in keeping the law with pace of the time.

This paper involves a study of leading cases decided in India and other countries in which technique of updating/creative interpretation was applied in order to give effect to purposes of the law in view of the scientific, technological, changes or social developments.

Updating Construction/Interpretation

The term ‘Science’ is a dynamic concept. Scientific development and changes are taking place at faster pace. Hence, all development present and potential in the field of science might be given effect to an updating interpretation approach. It is imperative for a judge to have a wide and long vision and psychological flexibility in application of law. However, while applying the principle of updating/creative interpretation, a judge has to be conscious of the fact that the interpretation applied to the text of any law is to facilitate the

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1 The conspicuously example in this regard are the civil and criminal procedural laws applicable in India which are unable to facilitate the timely disposal of the cases, although they might have been the very good pieces of law. The reason is the piling up of the cases at an unprecedented pace is an upshot of the phenomenon of population explosion transpiring in the characteristics similar to that of a supernova phenomenon, continuously showing its draconian face. The flood of litigation has outpaced the capacity of procedural laws for timely disposal of the cases.
3 Indian Evidence Act, Section 45, provides that, the court may form an opinion upon a point of foreign law, or of science, or art.
purpose and intendment of the legislation and not to do any violence with the object of the law.

The Supreme Court of Israel laid down in the case of “Solel Boneh Building and Infrastructure Ltd. and another v Estate of the late Ahmed Abed Alhamid deceased and others”, that ‘Interpretation is an ever-changing process. Modern content should be given to the old language. Thus the disparity between the statute and life is reduced. The interpreter may understand the statute better than the creator of the statute, and that the statute is always wiser than its creator. This leads to the interpretive approach that is accepted in England, whereby statute should be given an updating interpretation . . .’ The supreme Court of Israel held that ‘Indeed, the statute is a living creature. Its interpretation should be dynamic. It should be understood in a way that is consistent with and advantageous to modern reality’.

The leading jurist Francis Bennion stated in his theory that “It is presumed the Parliament intends the Court to apply to an on-going Act, a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.” “In construing an on-going Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters… That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.” “An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.”

Justice Bhagwati in the case of National Textile Workers' Union v. P.R. Ramakrishnan, said: “We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it

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5Id.
8(1983) 1 SCC 228.
will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind. ”

**Significance of Updating Interpretation in View of Electronic Communications**

The advent of 3rd Industrial Revolution witnessed an increasing number of transactions in international trade being carried out by means of electronic data interchange commonly referred to as “electronic commerce”, which involve the use of alternatives to paper-based methods of communication and storage of information.

Perceiving the necessity to give legal value to the computer generated records United Nations General Assembly in para 5(b) of its Resolution no. 40/71 of 11.12.1985 called upon governments and International Organizations to take action in conformity with the recommendation of United Nations Commission on International Trade Law to ensure legal security in the context of the widest possible use of automated data processing in international trade. The UN General Assembly in its resolution No. 51/162 dated 16th December 1996, adopted ‘Model Law on Electronic Commerce Adopted by the United Nations Commission on International Trade Law’. In the said resolution, the General Assembly believed that the adoption of Model Law on Electronic Commerce by the Commission will assist all States significantly in enhancing the legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists recommended that all States give favourable consideration to the Model Law when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information.

The proliferation of computers, the social influence of information technology and the ability to store information in digital form have all required Indian law to be amended to include provisions on digital evidence. In year 2000, Parliament enacted the Information Technology (IT) Act 2000, which amended the existing Indian statutes to allow for the admissibility of digital evidence. In the wake of, Information Technology Act 2000, amendments were also rendered In Indian Evidence Act, 1872, The Code of Criminal Procedure, 1973, Indian Penal Code etc.

(i) **Recording of Evidence of Witness through Video-conferencing**

In the case of *State of Maharashtra, v. Dr.Praful B. Desai* 11, the Supreme Court applied the principles of updating interpretation determining that recording of evidence.

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9 Id., at p. 255.
10 At its eighteenth session (1985), the Commission had before it a report by the Secretariat entitled “Legal value of computer records” (A/CN.9/265). That report came to the conclusion that, on a global level, there were fewer problems in the use of data stored in computers as evidence in litigation than might have been expected. It noted that a more serious legal obstacle to the use of computers and computer-to-computer telecommunications in international trade arose out of requirements that documents had to be signed or be in paper form. After discussion of the report, the Commission recommended to international organizations elaborating legal texts related to trade to take account of the present Recommendation in adopting such texts and, where appropriate, to consider modifying existing legal texts in line with the present Recommendation.”
through video conferencing was tantamount to recording of evidence in presence of accused. In such a case, though the witness may not be physically present but happens to be present through video conferencing.

In the instant case the Supreme Court was confronted with the question that whether section 273 of Cr.P.C. providing for the recording of evidence in the presence of accused was governed by the principle of ‘contemporanea exposit to est optima et fortissimo’ (The contemporaneous exposition is the best and the strongest in law). The issue to be determined by the Apex Court was whether the recording of evidence of witness present through videoconferencing was just a virtual reality and violative of article 21 of the Constitution of India for the reason that presence on a screen and recording of evidence by videoconferencing was not contemplated by the Parliament at the time of drafting the Code of Criminal Procedure.

Relying upon the theory of Francis Bennion, the Supreme Court considered that the Code of Criminal Procedure was an ongoing Act, and that the principle of ‘contemporanea exposit to est optima et fortissimo’ had no application in an interpretation of the provision of an ongoing Act like the Code of Criminal Procedure.

The Supreme Court opined that “Videoconferencing has nothing to do with virtual reality. Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place. To take an example today one does not need to go to South Africa to watch World Cup matches. One can watch the game, live as it is going on, on one’s TV. If a person is sitting in the stadium and watching the match, the match is being played in his sight presence and he/she is in the presence of the players. When a person is sitting in the drawing room and watching the match on TV, it cannot be said that he is in the presence of the players but at the same time, in a broad sense, it can be said that the match is being played in his presence. Both the persons sitting in the stadium and the person in the drawing room, are watching what is actually happening as it is happening. This is not virtual reality, it is actual reality. One is actually seeing and hearing what is happening.”

The Supreme Court stated that Videoconferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in

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12S. 273 Cr.P.C. - Evidence to be taken in presence of accused.-Except as otherwise expressly provided all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Explanation.- In this section, “accused” “includes a person to relation to whom any proceeding under Chapter VIII has been commenced under this Code.

[“Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.”] - Inserted by Section 20 of “The Criminal Law (Amendment) Act, 2013”

13Supra 7.

14Supra 11.

15Id.
the same room. In video conferencing both parties are in presence of each other”16 “[Therefore] so long as the accused and/or his pleader are present when evidence is recorded by video conferencing that evidence is being recorded in the “presence” of the accused and would thus fully meet the requirements of section 273, Criminal Procedure Code”17

(ii) Computer Hard Disk Included in the Description of Documents

In the case of State of Punjab v Amritsar Beverages Ltd18 the question before the Supreme Court was the literal compliance of the provisions of sub section 3 of section 14 of the Punjab General Sales Tax Act19, which provided that any book, register or documents

16Id.
17Id.
19Section 14, Punjab General Sales Tax Act reads as follows:
"14. Production and inspection of books, documents and accounts
(1) The commissioner or any person appointed to assist him under subsection (1) of section 3 not below the rank of an [Excise and Taxation Officer], may, for the purpose of the act, require any dealer referred to in section 10 to produce before him any book, document or account relating to his business and may inspect, examine and copy the same and make such enquiry from such dealer relating to his business, as may be necessary.
Provided that books, documents and accounts of a period more than five years prior to the year in which assessment is made shall not be so required.

(2) Every registered dealer shall:
(a) maintain day-to-day accounts of his business;
(b) maintain a list of his account books, display it along with his registration certificate and furnish a copy of such list to the assessing authority;
(c) produce, if so required, account books of his business before the Assessing Authority for authentication in the prescribed manner; and
(d) retain his account books at the place of his business, unless removed therefrom by an official for inspection, by any official agency, or by auditors or for any other reason which may be considered to be satisfactory by the assessing authority.

(3) If any officer referred to in subsection (1) has reasonable ground for believing that any dealer is trying to evade liability for tax or other dues under this act, and that anything necessary for the purpose of an investigation into his liability may be found in any book, account, register or document, he may seize such book, account, register or document, as may be necessary. The officer seizing the book, account, register or document shall forthwith grant a receipt for the same and shall:
(a) in the case of a book, account, register or document which was being used at the time of seizing, within a period of 10 days from the date of seizure; and
(b) in any other case, within a period of 60 days from the date of seizure;
return it to the dealer or the person from whose custody it was seized after the examination or after having such copies or extracts taken therefrom as may be considered necessary, provided that the dealer or the aforesaid person gives a receipt in writing for the book, account, register or document returned to him. The officer may, before returning the book, account, register or document, affix his signature and his official seal at one or more places thereon, and in such case the dealer or the aforesaid person will be required to mention in the receipt given by him the number of places where the signature and seal of such officers have been affixed on each book, account, register or document.

(4) For the purpose of subsection (2) or subsection (3), an officer referred to in subsection (1) may enter and search any office, shop, godown, vessel, vehicle or any other place of business of the dealer or any building or place except residential houses where such officer has reason to
seized by the authorities were to be returned to the dealer or person from whose custody it was seized after the examination or after having such copies or extracts taken therefrom as might be considered provided the person to whom the documents were returned was to give refuting writing for such book, register or documents returned to him. The state of Punjab felt immense difficulties in giving effect to the provisions as how to have copies or extracts of the hard disk.

The Apex Court held in this case that in such cases like hard disk recourse to scientific method was necessary. The Court said “Section 14 of the Act although has been amended, the problem, in our opinion, should be dealt with keeping in view of the fact that the procedural laws should be construed to be ongoing statutes similar to the Constitution and, thus, creative interpretation according to the circumstances is permitted. The Court in view of development of science has to meet and contend with challenges as an intermediary between the litigant and the court.”

Internet and other information technologies brought with them the issues which were not foreseen by law as for example, problems in determining statutory liabilities. It also did not foresee the difficulties which may be faced by the officers who may not have any scientific expertise or did not have the sufficient insight to tackle with the new situation. Various new developments leading to various different kinds of crimes unforeseen by our legislature come to immediate focus. Information Technology Act, 2000 although was amended to include various kinds of cybercrimes and the punishments therefor, does not deal with all problems which are faced by the officers enforcing the said Act.

Creative interpretation had been resorted to by the Court so as to achieve a balance between the age old and rigid laws on the one hand and the advanced technology, on the other. The Judiciary always responds to the need of the changing scenario in regard to development of technologies. It uses its own interpretative principles to achieve a balance when Parliament has not responded to the need to amend the statute having regard to the developments in the field of science.”

believe that the dealer keeps or is, for the time being, keeping any book, account, register, document or goods relating to his business.

The power conferred by subsection (4) shall include the power to open and search any box or receptacle in which any books, accounts, register or other relevant document of the dealer may be contained.

Any officer empowered to act under subsection (3) or subsection (4) shall have power to seize any goods which are found in any office, shop, godown, vessel, vehicle or any other place of business or any building or place of the dealer, but not accounted for by the dealer in his books, accounts, registers, records and other documents.”

Supra 18.

Id. The definition of ‘Evidence’ given in Section 3 of Indian Evidence Act, was amended to the effect that ‘all documents including electronic records produced for the action of the action of the court’ substituting the phrase ‘all documents produced for the inspection of the Court’, vide by Act of 21 of 2000.

Id.
(iii) Handwriting Includes Typewriting

In the case of State (through CBI/New Delhi) v. S.J. Choudhary, the Supreme Court had an occasion to decide whether the term ‘handwriting’ used in Section 45 of ‘Indian Evidence Act’, would include ‘typewriting’. Quoting the statement from ‘Law of Disputed Forged Documents’ by J. Newton Baker, the Supreme Court held that “…the word ‘science’ is wide enough to meet the requirement of treating the opinion of a typewriter expert is an opinion evidence coming within the ambit of section 45 of the Evidence Act. We may, however, added that the long accepted practice of judicial construction which enabled the reading of the word ‘telegraph’ to include ‘telephone’ within the meaning of that word in the Act of 1863 and 1869 when the telephone was not invented would also be available in the present case to read ‘typewriting’ within the meaning of the word ‘handwriting’ in the Act of 1872.”

(iv) Notice in Writing Includes Notice by Fax

In the case of SIL Import, USA v. Exim Aides Silk Exporters, Bangalore, the Supreme Court had to decide that whether the phrase ‘notice in writing’ mentioned in section 142 of the ‘Negotiable Instruments Act, 1881’ would mean to include ‘notice by fax’. Responding in affirmative, the Apex Court stated that “Chapter XVII of the Act, containing Sections 138 to 142, was inserted in the Act as per Banking Public Financial Institution and Negotiable Instruments Laws (Amendment) Act, 1988. When the legislature contemplated that notice in writing should be given to the drawer of the cheque, the legislature must be presumed to have been aware of the modern devices and equipment already in vogue and also in store for future. If the court were to interpret the words “giving notice in writing” in the section as restricted to the customary mode of sending notice through postal service or even by personal delivery, the interpretative process would fail to cope up with the change of time.”

The Supreme Court further laid down that “Facsimile (or Fax) is a way of sending handwritten or printed or typed materials as well as pictures by wire or radio. In the West such mode of transmission came to wide use even way back in the late 1930s. By 1954 International News Service began to use Facsimile quite extensively. Technological advancement like Facsimile, Internet, E-mail etc. were on swift progress even before the Bill 23(1996) 2 SCC 428.

24 “… Since typewriting possessive individuality it can be compared and identified in the same manner as handwriting”. Also, “the individuality of the typewriter is established by the character of its type impressions on the paper. These characteristics of pipetting can be analysed, compared and differentiated and can be positively identified as those of a particular typewriter. This individual comparison and identification of characteristics may establish the genuineness or forgery of a typewritten instrument and when admitted in evidence is sufficient proof.

The occurrence of similar irregularities in typewriting in two or more machines is practically impossible. The rule the typewriter creates for itself a certain distinctive character of writing which identifies one certain machine from all other machines is well established. To prove that two instruments were written on a particular typewriter similar coincidence of characteristics must be shown in both instruments, and these coincidences considered collectively must demand a single conclusion.”

25 Supra 23.

26 (1999) 4 SCC 567

27 Id.
for the Amendment Act was discussed by the Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue.”28 The Supreme Court quoted Francis Bennion in Statutory Interpretation where he stressed the need to interpret a statute by making “allowances for any relevant changes that have occurred, since the Act’s passing, in law, social conditions, technology, the meaning of words, and other matters”.29

Legitimate Law-making Functioning of Judiciary

In common law countries or the countries which have adopted the legal system based on that of common law countries, much of the basic law is still the common law. The common law is judge-made law. For centuries judges have discharged the responsibility of keeping the law abreast with current social conditions and expectations. In all modern democratic legal systems, doctrine of separation of power is prevalent and it is the legislature which carried on the functioning of law-making. However, though limited but the development of common law is continuing at the hands of Judiciary. Such continuing but limited development of the common law is this fashion is an integral part of the constitutional function of the judiciary. Development of law at the hands of Judiciary is a deep-rooted tradition in a democratic legal system because of the great utility of development of law which continuously infuses life in the law and legal system. Sir Matthew Hale over 300 years ago said that the decisions of the courts do not constitute the law properly so called, but are evidence of the law and as such “have a great weight and authority in expounding, declaring, and publishing what the law of this Kingdom is.”30, “... judges themselves have a legitimate law-making function. It is a function they have long exercised. Had the judges not discharged this responsibility the common law would be the same now as it was in the reign of King Henry II”.31 It is because of this that ‘the common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live’.32

English legal system is based on parliamentary form of government where it is the Parliament which is supreme. In Federal Constitutions, it is the Judiciary which is the its final interpreter of the Constitution and the law, afortiori, the Judiciary under such Constitutions has a bigger role to play in developing the law which may answer the needs of the current social, political and economic conditions.

Common Law Development in India

Constitution of India is federal in character. Independence of judiciary is essential to working a federal constitution. Constitution of India provides institution of Judiciary in a hierarchical order with the Supreme Court as the Apex Court. The Constitution provides, “The

28Id.
29Id.
32Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349, 377.
law declared by the Supreme Court shall be binding on all courts within the territory of India.”33 The aforesaid provision gives ample scope for development of common law by the Supreme Court which is the final interpreter of the Constitution. The Supreme Court of India has performed its constitutional obligation in this regard whenever there was need to modify the existing principles of law. Two important milestones are as to below:-

(i) **Principle of Absolute Liability**

In case of *M. C. Mehta v. Union of India*,34 the Supreme Court extended the ambit of the principle of ‘strict liability’ under low of tort, into ‘absolute liability’ to the effect that where an enterprise was engaged in hazardous or inherently dangerous activity owed an absolute and non-delegable duty to the community to ensure that no harm would result to anyone on account of hazardous and inherently dangerous nature of the activity carried out and therefore was not subject to any exception applicable on the principle of ‘strict liability’.35

(ii) **Public Interest Litigation**

In another landmark judgement given in the case of *S. P. Gupta and Other v. Union of India and Other*,36 the Supreme Court acknowledged the concept of ‘public interest litigation’ and diluted the common law principle of *local standi* in view of giving effect to the constitutional philosophy of ensuring justice to ‘have not’ section of the society who could

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33 Article 141.
34 AIR 1987 SC 1086.
35 Id. The Supreme Court stated ‘The rule in Ryland v. Fletcher, what evolved in the year 1868 and it provides that a person who for his own purpose brings on to his land and collects and keeps their anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person brings on to his land and collects and keeps anything likely to do harm and such thing escapes and does damage to another, he’s liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority...” “This rule evolved in the 19th century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic development taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situation. Lock cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy...” “We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arrived in and which is likely to arrive in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy there is no reason why we should hesitate to evolve such principle of liability...” “We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas the enterprise is strictly an absolutely liable to compensate all those who were affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortuous principle of strict liability under the rule in Ryland v. Fletcher.” (emphasis added). Id.
36 AIR 1982 SC 149.
not approach the court for enforcement of their fundamental right due to social, economic or cultural handicaps.  

**Conclusion**

Updating interpretation not only gives a living component to any norms of law but also injects the evolutionary characteristics in the development of law. Such evolutionary characteristic infused into law strengthens the roots of the legal system prevailing in a State. The Constitution of England is a paradigm which crystallized into modern democratic shape through evolutionary process spanning over a very long period of about 1000 years. The development of English legal system in that way has given the unshakable strength to democratic norms of English Constitution. The evolutionary characteristics thus exemplifies that updating interpretation has twin benefit for a legal system i.e. firstly, it enables the legal system to accommodate the modern development whereby it fulfils the contemporary needs of society; secondly, characteristics of evolutionary process strengthens the normative characteristics of a legal system.

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37The Supreme Court stated “The traditional rule in regard to local standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal rights or legal protected interest by the impugned action of the state or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is the rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born.” “[I]t must now be regarded as well settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reason, such as his socially or economically disadvantaged position, some other person can invoke assistance of the court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him.”Id.
JUDGMENT IN THE CASE OF LILY THOMAS:
A MILESTONE IN THE WAY OF POLITICAL REFORMS

Sri Brahmatej chaturvedi*

तस्मात् स्वधमम भूतानं राजा न व्यभिचारयेत्।
स्वधमम सन्दधानो हि, प्रेत्य चेह न नन्दतिः। (1/3)

Old scriptures tell us the qualities of king and his ministers. The above mentioned shloka of Arthashastra advises a king for encouraging his citizens to observe their duties as well as to do his own duties. A good king had to be very careful while appointing his ministers or other officials. He made himself assured that the person to be appointed as the important officer of his kingdom was not a corrupt one and he was not a criminal.

Now we live in the age of Democracy. There are no kings. People of a country elect their representatives. In our type of democracy some of these representatives perform the duty of kings.

If the people of a country are prosperous, educated and aware of their political rights and duties they, generally keeping in their mind the good character of the candidates, elect the competent and sincere candidates of the political parties but in a country like ours so many factors affect the decision of the voters. Caste, Religion, Influential family, Money and so many other thoughts move in the mind of Indian voters. We should not have a hitch to say that our moral values have also been deteriorated. Gone are the days when a rich person of bad character was not honoured or appreciated in the society and the people did not have the relation with the person of criminal character. Nowadays if you are successful and rich you, generally, deserve the respect of layman and they are not going to think about the means you have adopted for the success. Some influential persons with a criminal background desire to have their say in law making process. And this is the juncture where criminals dare to enter the parliament and state legislatures. Today many members of the Parliament and state legislatures are facing criminal charges.

Our forefathers could imagine the deteriorating conditions of the society and therefore they drafted our constitution in such a way that the criminals can be prevented from entering the parliament and state legislatures. Articles 102 and 191 of the Constitution of India empower the parliament to make the law regarding disqualification for membership of parliament legislatures of states.

* Addl. Civil Judge(Sr. Div.), Agra
It is pertinent to mention here that Article 83 of the Draft Constitution corresponds to Article 102 of the Constitution. During the debates on the Draft of the Constitution many amendments were moved by the members of the Constituent Assembly. Mr. Shibban Lal Saksena moved an Amendment No. 1590 on 19.05.1949 in respect of Article 83 of the Draft Constitution. He wanted to provide that the seat of a convicted disqualified member of Parliament person shall, notwithstanding anything in this Article, not become vacant by reason of the disqualification until three months have elapsed from the date of conviction or, if within those three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of, but during any period during which his membership is preserved by this provision, he shall not sit or vote. The amendment to Article 83 of the Draft Constitution was not adopted in the Constituent Assembly.

Present Article 102 of the Constitution is as under:

102. Disqualifications for membership.— (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) ......................
(b) ......................
(c) ......................
(d) ......................
(e) if he is so disqualified by or under any law made by Parliament.

In the same manner article 191 states as under:

191. Disqualifications for membership.—(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(a) ......................
(b) ......................
(c) ......................
(d) ......................
(e) if he is so disqualified by or under any law made by Parliament.

In exercise of the powers conferred under Articles 102(1)(e) and 191(1)(e) of the Constitution, Parliament enacted Representation of the People Act, 1951 (for short ‘the Act’). This Act provides for the conduct of elections of the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection
with such elections. Section 8 of this act which enumerates some disqualifications on conviction for certain offences is as under:

1. **Disqualification on conviction for certain offences.**— (1) A person convicted of an offence punishable under—

   (a) section............ of the Indian Penal Code (45 of 1860); or
   (b)...........................
   (c) .........................
   (d) .........................
   (e).........................
   (f) .........................
   (g) .........................
   (h).........................
   (i).........................
   [j].........................
   [k] .........................
   [l] .........................
   [m].........................
   [n] .........................

(2) A person convicted contravention of— for the

(a) .........................
(b) .........................
(c).........................

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

[(4) Notwithstanding anything [in sub-section (1), sub-section (2) or sub-section (3)] a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation. —In this section, —.............

In other words sub-section (4) of Section 8 of the Act provides that the disqualification under sub-sections (1), (2) and (3) of Section 8 for being elected as a MP, MLA or MLC shall not take effect in the case of a person who is already a MP, MLA or MLC on the date of the conviction if he files an appeal or a revision in respect of the conviction or the sentence within three months till the appeal or revision is disposed of by the
Court. Thus sub section 4 of section 8 of this act wipes out the effect of the disqualifications under sub-sections (1), (2) and (3) of Section 8 and gives a big relief to the elected representatives of people.

The effect of sub-section (4) of Section 8 of the Act was that many people with criminal background who once have been elected and thereafter convicted remained eligible for being reelected. Since these people have a great influence on the voters of their constituency the political parties view is that the voters were responsible for electing the candidates with criminal record and the political parties were compelled to give the tickets to such persons.

In the case of **Lily Thomas Versus Union of India & Ors.** [WRIT PETITION (CIVIL) NO. 490 OF 2005] sub section 4 of section 8 of this act was challenged.

The main contention of the petitioners was that clause (1) of Articles 102 and 191 of the Constitution make it clear that the same disqualifications are provided for a person being chosen as a member of either House of Parliament, or the State Assembly or Legislative Council of the State (for short MP, MLA and MLC respectively) and for a person being a MP, MLA or MLC and therefore the disqualifications for a person to be elected as a MP, MLA or MLC and for a person to continue as a MP, MLA or MLC cannot be different. The Petitioners contended that sub-section (4) of Section 8 of the Act, in so far as it provides that the disqualification under sub-sections (1), (2) and (3) of Section 8 for being elected as a MP, MLA or MLC shall not take effect in the case of a person who is already a MP, MLA or MLC on the date of the conviction if he files an appeal or a revision in respect of the conviction or the sentence within three months till the appeal or revision is disposed of by the Court, is in contravention of the provisions of clause (1) of Article 191 of the Constitution. The Petitioners also contended that during the debates on Draft Constitution an amendment of same nature was not adopted. Instead, in sub-clause (e) of clause (1) of Articles 102 and 191 of the Constitution, it was provided that Parliament may make a law providing disqualifications besides those mentioned in sub-clauses (a), (b), (c) and (d) for a person being chosen as, and for being, a MP, MLA or MLC. According to the Petitioners, in the absence of a provision in Articles 102 and 191 of the Constitution conferring power on Parliament to make a provision protecting sitting MP, MLA or MLC, Parliament lacks legislative powers to enact sub-section (4) of Section 8 of the Act. The Petitioners submitted that in appropriate cases, the Appellate Court may stay the order of conviction of a sitting member of Parliament or State Legislature and allow him to continue as a member notwithstanding the conviction by the trial court, but a blanket provision like sub-Section (4) of Section 8 of the Act cannot be made to keep the disqualification pursuant to conviction in abeyance till the appeal or revision is decided by the Appellate or Revisional Court. sub-section (4) of Section 8 of the Act, in so far as it does not provide a rationale for
making an exception in the case of members of Parliament or a Legislature of a State is arbitrary and discriminatory and is violative of Article 14 of the Constitution.

From the side of the Respondents it was submitted that the legislative power to enact sub-section (4) of Section 8 of the Act is located in Article 246(1) read with Entry 97 of List I of the Seventh Schedule and Article 248 of the Constitution, if not in Articles 102(1)(e) and 191(1)(e) of the Constitution. They said that in the case of K. Prabhakaran v. P. Jayarajan etc. [(2005) 1 SCC 754] the Constitution Bench has held that the purpose of carving out a saving in sub section (4) of Section 8 of the Act is not to confer an advantage on sitting members of Parliament or of a State Legislature but to protect the House.

Hon'ble Supreme Court observed that Article 246(1) read with Entry 97 and Article 248 only provide that in residuary matters (other than matters enumerated in List II and List III) Parliament will have power to make law. Articles 102(1)(e) and 191(1)(e) of the Constitution, on the other hand, have conferred specific powers on Parliament to make law providing disqualifications for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State other than those specified in sub-clauses (a), (b), (c) and (d) of clause (1) of Articles 102 and 191 of the Constitution. No power is vested in the State Legislature to make law laying down disqualifications of membership of the Legislative Assembly or Legislative Council of the State and this power is vested in Parliament. Thus the legislative power of Parliament to enact any law relating to disqualification for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State can be located only in Articles 102(1)(e) and 191(1)(e) of the Constitution and not in Articles 246(1) read with Entry 97 of List I of the Seventh Schedule and Article 248 of the Constitution.

Hon'ble Supreme Court observed that from the language of the provisions in Articles 102(1)(e) and 191(1)(e) of the Constitution it is very clear that the Parliament would make one law for a person to be disqualified for being chosen as, and for being, a MP, MLA or MLC. Parliament thus does not have the power to make different laws for a person to be disqualified for being chosen as a member and for a person to be disqualified for continuing as a member of Parliament or the State Legislature.

Hon'ble Supreme Court observed that Article 101(3)(a) and similarly Article 190(3)(a) provide that if an MP or MLA becomes subject to any of the disqualifications mentioned in clause (1) of these articles, his seat shall thereupon become vacant. Thus the seat of a MP or MLA disqualified under any law made by Parliament under Articles 102(1)(e) and 191(1)(e) of the Constitution, automatically falls vacant by virtue of Articles 101(3)(a) and 190(3)(a) of the Constitution and Parliament cannot make a provision as in sub-section (4) of Section 8 of the Act to defer the date on which the disqualification of a
sitting member will have effect and prevent his seat becoming vacant on account of the disqualification under Article 102(1)(e) or Article 191(1)(e) of the Constitution.

The Hon'ble Court held-

“Looking at the affirmative terms of Articles 102(1)(e) and 191(1)(e) of the Constitution, we hold that Parliament has been vested with the powers to make law laying down the same disqualifications for person to be chosen as a member of Parliament or a State Legislature and for a sitting member of a House of Parliament or a House of a State Legislature. We also hold that the provisions of Article 101(3)(a) and 190(3)(a) of Parliament to the Constitution defer the date expressly from prohibit which the disqualification will come into effect in case of a sitting member of Parliament or a State Legislature. Parliament, therefore, has exceeded its powers conferred by the Constitution in enacting sub-section (4) of Section 8 of the Act and accordingly sub-section (4) of Section 8 of the Act is ultra vires the Constitution.”

So far as the apprehension of the false and frivolous cases against the sitting MPs, MLAs or MLCs is concerned the Hon'ble Court made it clear that our laws have already provisions for their protection in appropriate case. The Hon'ble Court quoted the judgment in the case of Rama Narang v. Ramesh Narang & Ors. [(1995) 2 SCC 513] and held-

“Therefore, the disqualification under sub-section (1), (2) or (3) of Section 8 of the Act will not operate from the date of order of stay of conviction passed by the Appellate Court under Section 389 of the Code or the High Court under Section 482 of the Code.”

Obviously the aforesaid relief under section 389 or 482 of the Code of Criminal Procedure would not be granted in each and every case and the Appellate Court or the High Court will scrupulously go into the matter before granting the relief. Before this judgment was passed every convicted MP or MLA, who merely filed an appeal or a revision against the conviction order, had an opportunity to fight the election on basis of provision given in sub-section 4 of section 8 of the Act. Now a balanced legal solution has been provided by Hon'ble Supreme Court.

We can say that the judgment in the case of Lily Thomas is a milestone in the way of electoral reforms. Now the political parties cannot say that the voters are responsible for electing the candidates with criminal record and the political parties are compelled to give the tickets to such persons. As I have earlier said that in a country like ours so many factors affect the decision of the voters. Caste, Religion, Influential family, Money and so many other thoughts move in the mind of Indian voters. It is also true that some influential criminals get the tickets from political parties and they threaten the voters to vote them. Now the political parties will avoid to give their tickets to criminals and we the people of India will be able to move a step towards the Political Justice.
INTRODUCTION

Human beings are dependent for their sustenance, health, well-being and enjoyment of life on natural biological systems and derives food, medicines, finished products from the various natural resources. The most striking feature of Earth is the existence of life, and the most striking feature of life is its diversity, that is biological diversity or biodiversity. The enormous diversity of life in itself is of crucial value, probably giving greater resilience to ecosystems and organisms. People have long used biological resources for scientific and medicinal use. Wild plants, animals and microorganism resources are of immense importance in the search for new medicinal compounds. Medicines originating from wild species, including penicillin, aspirin, taxol, and quinine, have saved millions of lives and alleviated tremendous suffering. It is estimated that about 40% of all prescriptions are for medicines that originated from plants and animals. One of the important benefits of conservation of biodiversity is the availability of wide gene pool to augment the narrow genetic base of the established food crops, providing disease resistance, improving productivity and bringing environmental balances.

Rapid demographic changes, overconsumption, and the use of technologies that damage the environment, now combined with climate change, are pushing our planet to its limits. Unsustainable exploitation of natural resources to supply human demands as well as pollution and a changing climate endanger numerous species. Changes in land use endanger others, and yet more are menaced as humans divert fresh water to their own uses. Severe shortages of food, water and energy are predicted as human pressures on the planet’s climatic, geophysical, atmospheric and ecological processes approach a level at which abrupt global environmental change is likely to occur. Human activity is increasingly breaking down the food web interactions that keep ecosystems functioning. If one of the building blocks trembles or disappears, this inevitably have impact on others. Scientists believe we are beginning to transgress the planetary boundaries within which societies have been sustained for the past many billion years.

The Biological resources are depleting very fast which has become a global concern. The impact of environmental degradation is most severe among the rural population living in poverty, since they have few livelihood options. Access to and sustainable use of biodiversity
by the poor are of direct relevance to efforts aimed at poverty reduction. Addressing the biodiversity challenge has become a priority for sustainable development. Reversing biodiversity loss and ecosystem degradation is one of the most important challenges of our times and it is being realized that the priority area for conservation of biological diversity is to harness the positive opportunities provided by biodiversity and natural ecosystems.

UNDERSTANDING BIO DIVERSITY

Biological diversity or biodiversity refers to the variety of life forms: the different plants, animals and microorganisms, the genes they contain and the ecosystems they form in the natural environment. The concept emphasizes the interrelated nature of the living world and its processes.

Biodiversity is the sum total of living things with their associated ecological processes and specifically refers to the variability and variety within species as well as among the ecological processes that connect. Biodiversity is the variability of living organisms, regardless of the source and including land, marine and other aquatic ecosystems the ecological complexes they belong to as well as the diversity within each species and among species and ecosystem. Biological diversity exists at the level of genes, species and ecosystems genetic diversity. This is the variation of genes within a given species and is expressed in the forms of different varieties or breeds e.g. crops & animals varieties about 47000 plant species (11% of the world for a) and nearly 90000 species of fauna (over 7% of the world fauna) are reported to occur in India that is why India is called a mega diverse country.

Biological diversity is usually considered at three different levels: genetic diversity, species diversity and ecosystem diversity. Genetic diversity refers to the variety of genetic information contained in all of the individual plants, animals and microorganisms. Genetic diversity occurs within and between populations of species as well as between species. Species diversity refers to the variety of living species. Ecosystem diversity relates to the variety of habitats, biotic communities, and ecological processes, as well as the tremendous diversity present within ecosystems in terms of habitat differences and the variety of ecological processes.

INTELLECTUAL PROPERTY RIGHTS ON BIOLOGICAL RESOURCES

In the past, access to genetic resources and associated traditional knowledge was free for all mankind. Genetic resources and knowledge were often taken from communities and countries by organizations, food, pharmaceutical and other industries and individuals who monopolized the benefits. The research and commercialization of genetic resources and associated traditional knowledge has existed in many forms for hundreds of years. From the
beginning of 18th century systematic exploration begun. In the 18th Century, European colonial explorers travelled to different parts of the world seeking exotic plants. They brought back decorative flowers, medicinal herbs, and new types of food. These expeditions were a one-way transfer of knowledge, with biological explorers taking knowledge from local communities. There was little or no exchange of knowledge and no offer of compensation to such communities.

During the later part of the 1900’s, a few countries developed legal provisions for access and benefit sharing (ABS). However, benefits were usually narrowly defined as tangible benefits (such as royalties) and benefit sharing was largely carried out at the government level. Benefits did not reach the traditional owners of genetic resources and associated traditional knowledge (TK). Local communities and countries of origin were often not informed about the use of their genetic resources and associated traditional knowledge, limiting their bargaining power and preventing them from sharing in the benefits of their own resources. Growing concern over the monopolisation of benefits led genetic-resources providing countries to restrict access to genetic resources and associated traditional knowledge and the need for regulating was thought off. During the above period, growing importance of Intellectual Property rights made the situation worse with introduction of IPR on life forms.

The trend of granting IPRs on biological resources began around the 1930s. USA was the first country to introduce IPRs on life-forms. The US Plant Patent Act was passed in 1930, allowing IPRs to be granted for asexually reproduced plant species. Other countries followed it by extending IPRs to plant varieties. In subsequent years, particularly in the last two or three decades, public sector investment in agricultural research declined, while private sector investment increased. Private investors wanted effective means of recouping their investment costs, and IPRs on plant varieties was one way of doing so. Secondly, advances in biotechnology (especially genetic engineering) and nanotechnology, especially in the last 20 years or so, has expanded the realm of innovation in life sciences, triggering debate on what can and cannot be classified as an invention. Since genetically engineered organisms do not occur naturally, it is often argued that they are inventions and can therefore be patented (or covered by other IPRs).

The trend of granting patents on genetically engineered life-forms has its origins in a US Supreme Court judgment in 1980. A microbiologist, Ananda Chakrabarty, applied for a patent on a genetically engineered bacterial strain. This claim was recognised by the US Supreme Court (Diamond vs. Chakarvarti, Supreme Court,447 U.S,303) in 1980, thus validating the view that any life-form that is ‘man-made’, i.e. that does not occur naturally, can be patented. Since then, there have been several examples of genetically modified organisms being patented. A famous example is the Onco mouse bred at Harvard University USA, where the mouse was genetically engineered to produce a high number of cancerous
cells and thus aiding cancer research. (Harvard College vs. Canada (Commissioner of Patent)
Supreme Court of Canada, Judgement of 5 December 2002, 4, SCR, 45).

In some countries (e.g. the USA or EU countries), patents are also granted for discoveries of
existing natural phenomena, such as genes or the genetic sequence of organisms, by viewing
them as inventions. Countries of the EU, for example, grant patents on genes isolated from
their natural environment, on the grounds that a gene does not exist in isolation in its natural
state, and requires innovative intervention by humans, thus making it a patentable invention
rather than a discovery of what exists in nature.

The management of biological resources has been an increasingly contentious subject at the
national and international levels. This is linked in large part to the progressive recognition of
new economic opportunities arising from the use of biodiversity, primarily the possibilities
opened up by genetic engineering. As a result, international legal frameworks for the
management of biological resources in particular the Convention on Biological Diversity
have had to increasingly take into account not only the needs of biodiversity conservation but
also concerns about its potential for economic use and its contribution to the process of
economic development.

This has important repercussions from a legal perspective because the new products
developed by the biotechnology industry can often easily be copied once they have been put
on the market. As a result, the biotechnology industry has strongly argued for the introduction
of intellectual property rights over genetically modified organisms, seeds and animals. These
calls were heeded at the international level in the context of the negotiations for an agreement
on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) as part of the
Uruguay Round of trade negotiations. The resulting TRIPS Agreement is an intellectual
property rights framework that has directly little to do with environmental management but
has significant impacts on the ways in which developing countries such as India can devise
legal frameworks to manage their biological resources.

INTERNATIONAL REGIME: MANAGEMENT OF BIOLOGICAL RESOURCES

First such organized efforts at international level has been through the Convention on
Biodiversity (CBD), which was held in 1992. The biodiversity convention is the main treaty
dealing with the conservation and management of biodiversity. Its three main goals are the
conservation of biological diversity, the sustainable use of its components, and the fair and
equitable sharing of the benefits derived from the use of genetic resources. The convention
reaffirms the principle of state sovereignty, which grants states sovereign rights to exploit
their resources pursuant to their own environmental policies together with the responsibility
to ensure that activities within their own jurisdiction or control do not cause damage to the
environment of other states. It provides a number of general obligations for its member states. These include a commitment to develop national strategies, plans or programs for the conservation and sustainable use of biological diversity. Member states must also integrate the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programs and policies. The Nagoya Protocol on Access and Benefit Sharing & Cartagena Protocol to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology are also milestones for conservation of biological diversity.

The biodiversity convention also provides a general legal framework regulating access to biological resources and the sharing of benefits arising from their use. It attempts to provide a framework that respects donor countries' sovereign rights over their biological and genetic resources while facilitating access to those resources for users. It therefore requires member states to provide access on "mutually agreed terms" and is subject to the "prior informed consent" of the country of origin of those resources. The biodiversity convention provides that donor countries of microorganisms, plants or animals used commercially have the right to obtain a fair share of the benefits derived from such use. Benefit-sharing as conceived under the convention and the related "Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization" can take the form of monetary benefits or non-monetary benefits such as sharing the results of research and development; collaboration, cooperation and contribution in scientific research and development programs, participation in product development; and access to scientific information relevant to the conservation and sustainable use of biological diversity. With regard, to biodiversity related knowledge, the convention acknowledges the relevance of intellectual property rights but requires member states to ensure that intellectual property rights support the convention's objectives.

The issue of patents of biological resources is being criticized that patents create perverse incentives which encourage the destruction of biodiversity, the monopolies they establish are inherently unfair and/or immoral, and that they legitimate and support "biopiracy" (the unauthorised commercial exploitation of the knowledge and biological resources of indigenous peoples and/ or of developing countries). Many such critics on principle oppose the patenting of "inventions" based closely on traditional knowledge even if the patent holders have undertaken to share benefits with the communities concerned.

The relationship between the TRIPS Agreement and the Convention on Biological Diversity has been the subject of growing interest and also contention. The development and transfer of appropriate technology is important for the successful realisation of the CBD’s objectives. The CBD refers to technologies that are "relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to
the environment.” It requires parties to transfer technology to developing countries on “fair and most favourable terms”, including on concessional and preferential terms where mutually agreed.

LEGAL FRAMEWORK FOR IPRs AND BIODIVERSITY MANAGEMENT IN INDIA

Environmental law in India has developed rapidly over the last thirty years, influenced in part by international treaties and standards but driven largely by domestic pressures and concerns. The last ten years have; however, has seen increasing international influence in this area. The TRIPS agreement is a part of the multilateral trading regime integral to these changes and its significance is enhanced by reliance on the WTO dispute settlement mechanism to ensure implementation by all member states. The agreement has therefore played an important part in bringing about TRIPS-compliant legislation and more generally contributed to an increasing emphasis on the appropriation of biological resources and knowledge through property rights. A number of specific requirements of the TRIPS agreement have an impact on the regime for the management of biological resources in India. Most significant is the widening of the scope of patentability, which imposes for instance the introduction of patent protection to new areas such as health and agriculture, and the requirement for intellectual property protection for plant varieties. This required amendment to the Patents Act, 1970 that had restricted patentability and the rights conferred in the areas of health and agriculture and had explicitly disallowed the patentability of living organisms. Two different TRIPS-compliant amendments were finally enacted in 2002 and 2005. Separate legislation for the protection of plant varieties was adopted in 2001. The Biodiversity Act, 2002 was adopted ostensibly to give effect to India's commitments under the biodiversity convention. Added to this were instances of assertion of intellectual property claims over knowledge in the public domain in India in foreign jurisdictions (“biopiracy”). The Geographical Indications Act, 1999 are other important legislations in this regard. The acts read together therefore provide a picture of a state under international pressure to accord greater protection to claims of private intellectual property.

Patents in India are granted and obtained on the basis of The Patents Act Of 1970. The ratification of the TRIPS agreement meant that significant changes had to be brought to India's Patents Act of 1970. India has amended its Patents Act three times in order to meet these obligations in a phased manner. Following the third amendment in 2005, India’s Patents Act is now in full compliance with TRIPS. The amended act specifically rules out the patentability of living things or non-living substances occurring in nature and further rejects the patentability of plants and animals. Further, the act specifies that it excludes biochemical, biotechnological and microbiological processes. In reaction to concerns over biopiracy and the unwarranted use of traditional knowledge, the act first proposes to impose the disclosure
of the source and geographical origin of biological material used in an invention. Further, it makes the non-disclosure of the geographical origin of biological material used in the invention or the anticipation of the invention in local or indigenous knowledge a ground for opposing or revoking the patent. The amendment in 2005 extends the product patent regime to agro-chemicals, food and biotechnology products, apart from drugs and pharmaceuticals. While the main changes brought through the amendments do not substantially affect traditional knowledge, farmers’ rights and biodiversity, there are a few provisions, which attempted to reduce biopiracy. For instance, the scope of an ‘invention’ has been broadened to cover all aspects of new scientific creations. The amendments provide at least a partial answer to bio-piracy concerns by requiring the disclosure of the source and geographical origin of biological material used in a claimed invention. The act also indirectly addresses questions related to traditional knowledge protection by denying the patentability of traditional knowledge.

In regard to the biological resources and related traditional knowledge, the patent act provides that the source and geographical origin of biological resources used in the invention must be declared in order to obtain a patent. Failure to provide correct information can lead to the patent being cancelled. Further, a patent application is advertised before it is approved, to invite any objections from the public. Biological material used in the invention is made available to the public upon publication of the advertisement. Post-grant opposition to the patent is also possible on various grounds, including prior public use/knowledge of the invention in India, failure to provide correct information on the source and geographical origin of biological resources used in the invention, or if it is proved that the invention is ‘non-patentable’ subject matter.

The act specifically provides as to what is not patentable vis a vis biological resources and related to traditional knowledge. Such inventions that conflict with public order and morality, or those that can harm human beings, plant or animal species, or the environment. Any living or non living thing that already exists in nature cannot be invented so cannot be patented. To be more specific, Plants, seeds, animal varieties and their species, including their parts (this does not include micro-organisms). Further agricultural or horticultural methods cannot be patented, as they benefit the larger section of society. Similarly any treatment of animals to make them disease-free or to increase the economic value of animals and their products cannot be patented. In the similar lines any medical treatment process for curing human beings cannot be patented, again in larger benefit of the society. Essentially biological processes used for plant breeding and animal breeding cannot be patented. It means that processes that are not essentially biological can be patented, e.g. genetic engineering. But it does not mean that genes, cells and cell lines can be patented. Similarly such drugs which are included in the Indian Systems of Medicine e.g. Ayurvedic medicines cannot be patented. On the same pattern knowledge which is traditional, including oral knowledge e.g. (dadi nani ke
nuskhe) or any invention derived from traditional knowledge, or any such invention that is part of such knowledge cannot be patented. It also includes knowledge available with any local or indigenous community, within or outside India.

Anything that is not on the non-patentable list is patentable. The following are some of the things that are patentable i.e. Micro-organisms (but the mere discovery of micro-organisms is not patentable); Microbiological processes for the production of plants and animals; Processes or methods of production of non-living substances including enzymes, hormones and vaccines; Non-biological processes used for production or propagation of plants and animals (e.g. genetic modification); Methods relating to the treatment of plants (e.g. a method for making plants free of disease) and processes for improving a plant’s value or increasing the value of its products.

Although there is lot of demarcations done in the Act, still some of the issues have been left out and their relevance is increasing day by day, the issues could have been better addressed in the Act such as Patenting of GM micro-organisms: Micro-organisms, such as bacteria, virus, fungi, etc. can be patented (though this does not include micro-organisms discovered in nature). The moral and ethical reasons against patenting life-forms have been ignored and overruled. It is also important to guard against the possibility that this will set a precedent for the patenting of higher life-forms. Patenting of GM seeds can also become a potent issue as GM seeds are not explicitly excluded from patentability. In case of contamination of other crops by patented seeds, there is a risk that patent holders will claim royalties and ownership of the contaminated crop. Monsanto has already set a precedent for this, in its legal battle against Canadian farmer Percy Schmeiser whose fields were contaminated by Monsanto’s GM canola seeds. Terminator seeds issue is not a old one, where company wanted patentable rights on such crops which produce very good quality of seeds but can produce crop only once thus in turn benefitting the company only, where farmer had to buy the seeds every time, as they cannot be developed in their own fields.

The Biological Diversity Act was adopted following India's ratification of the biodiversity convention. The Act has, however, also been informed by developments in other contexts such as the adoption of the TRIPS agreement. In fact, the Act does not provide a comprehensive regime for the conservation and sustainable use of biological resources but focuses on the question of access to resources and related issues. Its response to the current challenges is to rely on the time-tested principle of permanent sovereignty over natural resources. It proposes to put stringent limits on access to biological resources or related knowledge for all foreigners. Under the act, all foreigners are treated in the same way regardless of whether there are from developed countries or from least developed countries. Furthermore, the strong provisions to regulate access by foreigners are not matched at the national level where local knowledge holders are not given strong control over their resources.
and knowledge. More specifically, the Act's aim is to provide for the "conservation of biological diversity, sustainable use of its components and for the equitable sharing of the benefits arising out of the use of biological resources."

It institutionalizes a National Biodiversity Authority (NBA) at the federal level and State Biodiversity Authorities (SBA) at the provincial level, as nodal bodies to oversee the conservation, use and sharing of the benefits from the use of biological resources. It makes prior intimation of the intention to obtain biological resources for commercial utilization or bio-survey or bio-utilization, to these boards mandatory. It further requires that all inventors obtain the consent of the National Biodiversity Authority before applying for intellectual property rights where the invention is based on any biological resource obtained from India, and grants the authority the power to "impose benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilization of such rights." Given the lack of extraterritorial jurisdiction of the National Biodiversity Authority and its inability to monitor applications overseas though, the efficacy of such a provision remains in doubt.

The Act condones the introduction of intellectual property rights in the management of biological resources provided for in the TRIPS agreement but does not directly address the subordination of intellectual property rights to the goals of the biodiversity convention as mandated by article 16 of that convention. It attempts to impose checks on the intellectual property rights system in some other respects by authorizing the authority to allocate a monopoly right to more than one actor and in giving to the authority the power to oppose the grant of intellectual property rights outside India. It also seeks to address the question of the rights of holders of local knowledge by setting up a system of benefit-sharing. The benefit-sharing scheme is innovative in that it provides that the authority can decide to grant joint ownership of a monopoly intellectual property right to the inventor and the authority or the actual contributors if they can be identified. The Act also provides other forms of benefit sharing which are progressive in so far as they prioritize non-financial benefits such as transfer of technology, which are more long-lasting than financial compensation.

However, the Act does not give current rights holders the capacity to defend their rights in the same way that it seeks to equip the Indian state with tools to ward-off biopiracy or even with rights equivalent to that provided patent holders or applicants. In cases where benefit-sharing is allocated in the form of money, the authority can direct the payment to a Biodiversity Fund, and the proceeds from this fund can then either be channeled to the benefit claimers or used generally for biodiversity management activities. The potential claimants do not have automatic access to share of the benefits. Even where property rights are allocated instead of money, local innovators do not have a right to the allocation but are dependent on the authority’s decision in contradistinction with applicants for patent rights who need the
authority's approval but cannot be stopped from applying for the right. Further, the Act is not strongly worded on its treatment of traditional and local knowledge, merely requiring the central government to "endeavor to respect and protect" such knowledge, whereas the question, especially in the Indian context is important enough to not be left to the discretion of the executive and to require a definitive statement of law. The Act attempts to regulate access to biodiversity for commercial purposes, to fight biopiracy, and recognizes community rights over traditional knowledge and biodiversity. However, it does not authorize local community, the actual owners, to decide on granting IPRs to others or sharing benefits, since all powers are vested in the national body. Therefore, the legislation is not that participatory as it deemed to be.

Overall, one of the striking features of the regime is that it completely obliterates common property arrangements whose importance and extent in the context of the management of biological resources is still immense. The Act centralizes property rights either in the hands of the state through sovereign appropriation or in the hands of private inventors through monopoly of intellectual property rights. It does not, however, provide a framework for the rights of all other holders of biological resources and related knowledge. The consequence is that resources and knowledge that are not allocated to private entities through intellectual property rights or arrogated by the state to it will be deemed freely available.

The issues which require to be addressed is that the provisions regarding community involvement are weak, with ultimate decisions remaining in the hands of the government, rather than in the hands of local communities who are the traditional custodians of the resources and knowledge. The community representation on state and national biodiversity boards is weak. There is no explicit provision for the participation and decision-making of local communities in the process of outsiders accessing biological resources or in determining benefit-sharing arrangements. It is largely left up to the NBA to take the views of communities into consideration. The BMC’s (Biodiversity Management Committees) role is to respond when the NBA or SBB ask for advice. Though BMCs are to be consulted by the NBA or SBB before access is granted, it is not clearly defined as to what is meant by ‘consult’, and does not necessarily include obtaining the Prior Informed Consent of the local community. Consultation could thus become a formality. The main role of BMCs is limited to documenting local information about resources and traditional knowledge in People’s Biodiversity Registers; in addition the BMC does not even have the right to protect these Registers against misuse of theft. There is no requirement for obtaining the community’s permission to access information in the Register. Further, there is no legal protection given to the information recorded in People’s Biodiversity Registers. Neither the local communities or the SBB or the NBA has the mandate to protect the Registers against theft and misuse. Thus a People’s Biodiversity Register is in danger of becoming a ‘shopping list’ for entities who want to exploit the resources of an area. (However, some states like Madhya Pradesh have
The rules regarding equitable benefit-sharing do not define ‘equitable’. Payment of benefits is to be made not directly to the community, but through the district administration which creates an unnecessary layer of bureaucracy. The procedure for accessing only biodiversity-related traditional knowledge (i.e. without accessing a biological resource) is vague.

The Protection of Plant Varieties and Farmers' Rights Act, 2001 (PVPFR Act) was drafted in response to a specific provision requiring the introduction of plant variety protection, article 27 (3) (b) of the TRIPS agreement. The act sets out "to recognize and protect the rights of the farmers in respect of their contribution made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties" as well as "to protect plant breeders' rights to stimulate investment for research and development, both in the public and private sector, for the development of new plant varieties." It largely follows the model provided by the UPOV convention incorporating elements from the 1978 version of UPOV. It also includes some elements of the more stringent 1991 version. The section on farmers' rights was substantially reworked by the parliamentary committee adding a whole new chapter to what was a single provision, in making an effort to put farmers' rights on a par with breeders’ rights. The Act provides, for instance, that farmers are entitled, like commercial breeders, to apply to have a variety registered and that farmers should generally be treated like commercial breeders and should receive the same kind of protection for the varieties they develop. However, given the fact that the Act adopts the registration criteria of the UPOV convention namely novelty, distinctiveness, uniformity and stability, which cannot be easily applied for the registration of farmer's varieties, it is unclear how effective the protection provided to farmers' contribution will be. This Act, while protecting the rights of the breeders, also attempts to protect farmers’ rights. The recognition of their rights is unique and has been regarded as a pro-farmer sui generis system of plant variety protection. Under this Act, farmers have the right to conserve, exchange, sell and breed protected seeds. However, they are not allowed to sell the protected seed using the company brand or name. Under this legislation, they are also protected against false claims and spurious seeds that lead to crop failure. The liability clause in it entitles them to compensation from the provider. Apart from giving rights to farmers over new varieties, the act recalls the residual minimum rights that cannot be taken away from farmers. Further, through the mechanism of "benefit-sharing," the Act seeks to foster the participation of farmers in some of the potential profits from the commercialization of registered plant varieties. The Act provides two different channels for claiming compensation, sections 26 and 41. In both cases, it is significant that the Protection of Plant Varieties and Farmers' Rights Authority instituted under the Act is vested with significant discretion in disposing of the benefit-sharing claims. At a conceptual level, the benefit sharing regimes envisaged by the Act are an admission of the inability to provide property rights to protect the contributions of farmers in the same manner that property rights operate in the interests of plant breeders. Furthermore, even where the act
envisages financial compensation, by placing the burden of proof on the claimants they are left finally significantly dependent on the authority's discretion. While overall, the section on farmers' rights is relatively progressive, a further rethink of the conceptual framework of the Act would be required to provide farmers' rights with more meaning. This is first because farmers' rights were only added as an afterthought to a regime based on the UPOV convention that is specifically addressed to the interests of plant breeders and not farmers. Second, benefit-sharing as envisaged under the current Act does not contribute to strengthening the rights of farmers but merely offers financial compensation for actors not in a position to apply for property rights.

The main problem with the PVPFR is that it accepts and sets up a legal and ideological framework whereby plant varieties, including traditional farmer’s varieties, can and should be granted intellectual property rights. It sets up a framework that promotes private ownership of seed, and works against community-centered control over seeds. Even though the PVPFR Act aims to balance breeders and farmers’ rights by extending PBR cover to traditional farmers’ varieties, and providing for benefit-sharing between farmers and breeders, the ground reality is that there is not a level playing field between formal breeders and farmers.

In most cases, awarding PBRs to traditional varieties may simply not be feasible, for the reasons such as the onus is on the farmer (or farming community) to go and register his or her variety and seek formal protection for it. Given the level of literacy, time and money it is highly unlikely that the average farmer would go through this process, thus leaving the field open for some other party to acquire rights over the traditional variety. Apart from the literacy and money required, the fact also remains that private ownership of a plant variety is an alien and often culturally offensive concept in most traditional communities. Likewise, it is equally unlikely that the average farmer would have the knowledge, time or money to challenge a false claim of ownership over a traditional variety, or to demand benefit-sharing when his/her contribution in developing a new variety has not been acknowledged. Meanwhile, the National Bureau of Plant Genetic Resources, which has the responsibility of identifying the genetic composition of plant resources, does not seem to have the financial or institutional capacity to create a detailed catalogue of farmers’ varieties, which could effectively provide evidence of prior art. Further, Traditional varieties may not meet the criteria of being distinct, uniform and stable as defined in a strict ‘scientific’ sense, since they are not developed or propagated in a controlled or homogenous environment. It is also difficult to determine the owner of a traditional variety (and therefore benefit-sharing arrangements), since old varieties have usually been collectively developed and used by communities over hundreds of years. Nor does the PVPFR Act have any provision to deal with conflicting claims of ownership from different parts of the country.
An important impetus for the introduction of the Geographical Indications of Goods (Registrations and Protection) Act, 1999 was the patenting of Basmati varieties by the American Company Rice Tec in 1997. As per TRIPS, other countries are under no obligation to provide Geographical indications protection to a product, if the product is not similarly protected in its country of origin. RiceTec was able to market its rice varieties as ‘Basmati’ mainly because India did not have any Geographical Indications (GI) legislation which could have been used to provide GI protection to Basmati. India passed the Geographical Indications Act in 1999 to avoid such costly debacles in the future. The Geographical Indications Rules were formulated in 2002. The Geographical Indications Act came into force in September, 2003. The main weaknesses arise from the characteristics and limitations of GIs in general, rather than limitations of the Act per se: It protects traditional products, but not traditional processes/technologies. E.g. anyone can use the technology and obtain IPRs on innovations based on such technology, without acknowledging the contributions of the original holders of that technology. Secondly it cannot be used for protecting traditional knowledge-based products that are not confined to a specific geographical location.

CONCLUSION

At the global level, the distribution of property rights over biological resources has been a long-standing concern. The question of the ownership of biological material has become a matter of specific concern due to economic opportunities which it provides. The influence of the TRIPS agreement over recent legislative activity is a fact that assumes more significance because its impacts go beyond the so called defined field of intellectual property. This is visible insofar as some of the changes imposed by TRIPS directly impact on the management of biological resources. Overemphasis on private property-rights regimes in the management of biological resources favour exploitation modes which focus mainly on the commercial potential of the resources, and neglect their use to satisfy basic subsistence needs. As a result the international legal frameworks for the management of biological resources in particular the convention on biological diversity have had to increasingly take into account not only the needs of biodiversity conservation but also concern about its potential for economic use and its contribution to the process of sustainable development. The nature of the current property rights regime that on the surface puts power in the hands of state by reaffirming sovereign rights over biological resources but in effect removes more power from their control by insisting on the increasing scope of private property rights must be addressed concurrently at the national and international levels.

India is one of the few countries with significant biological resources, the potential to develop an own biotechnology industry and strong local knowledge bases concerning the use of its biological resources. The Patents Act specifically sought to accept patents as a useful tool to reward inventiveness while recognizing that the system had to be carefully bounded to avoid undesirable social outcomes. The Biological diversity Act clearly reflects the trends of the
international level. It seeks at the same time to promote sovereign and private appropriation of biological resources and related knowledge. But most significant element is probably is the fact that the question of the relationship between the patent system and sustainable biodiversity management has been addressed neither in the Biodiversity Act nor in the Patents Amendment Act.

The conflict and overlapping issues between intellectual property rights regimes and biodiversity management remain an evolving and unsettled issue at the international level. India has to put in place legal frameworks for the management of biodiversity that synchronizes with Intellectual property regulations. While the existing national regime is insufficiently concerned with the overall coherence of the system put in place, which can be addressed at the level of implementation.

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Sri U.S. Awasthi, Director, JTRI, UP addressing the trainee offices

Hon’ble Mr. Justice S.N. Shukla, Judge, Lucknow-Bench along with Hon’ble Chairman & Director, JTRI, UP

Hon’ble Mr. Justice S.N. Shukla, Judge, Lucknow-Bench addressing the trainee officers & Members Juvenile Justice Board.

Faculty Members, JTRI, Trainee Judges & Members of Juvenile Justice Board attending the Inaugural Programme.

Hon’ble Mr. Justice Allaha Raham, Chairman, U.P. State Public Services Tribunal addressing the trainee Judges

Hon’ble Mr. Justice A.N. Mittal, Judge, Allahabad High Court addressing the trainee officers
Hon’ble Mr. Justice Uma Nath Singh, Senior Judge, Lucknow Bench, Hon’ble Mr. Justice S.K. Saxena, Judge, Lucknow-Bench & & Member, Training Committee, JTRI, U.P. with Hon’ble Chairman & Director, JTRI during inaugural session of induction training programme of Additional District Judges.

Trainee Officers of U.P. Nyayik Seva 2012 Batch attending the Induction training programme.

Newly appointed Additional District Judges attending the Induction Training Programme.

Trainee Officers of U.P. Nyayik Seva 2012 Batch attending the Induction Training Programme.

Newly appointed Additional District Judges attending the Induction Training Programme.
CRITICISM OF JUDICIAL PRONOUNCEMENTS
VIS-A-VIS
FREEDOM OF SPEECH

A.P. Mishra *

Freedom of speech and expression has always been considered as the most cherished right of every human being. Justice Brennan of U.S. Supreme Court, while dealing with a case of libel - New York Times Company v. L.B. Sullivan observed that "it is a prized privilege to speak one's mind, although not always with perfect good taste, on all public institutions and this opportunity should be afforded for vigorous advocacy no less than abstract discussion." In all civilized societies, the Courts have exhibited high degree of tolerance and accepted adverse comments and criticism of their orders/judgments even though, at times, such criticism is totally off the mark and the language used is inappropriate. The right of a member of the public to criticize the functioning of a judicial institution has been beautifully described by the Privy Council in Andre Paul Terence Ambard v. Attorney General of Trinidad and Tobago, in the following words 1:

"No wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

In Debi Prasad Sharma v. The King Emperor, Lord Atkin speaking on behalf of the Judicial Committee observed:

"In 1899 this Board pronounced proceedings for this species of contempt (scandalization) to be obsolete in this country, though surviving in other parts of the Empire, but they added that it is a weapon to be used sparingly and always with reference to the administration of Justice: McLeod v. St. Auhyn. In In re a Special Reference from the Bahama Islands the test applied by the very strong Board which heard the reference was whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the law. In Queen v. Gray it was shown that the offence of scandalizing the court itself was not obsolete in this country. A very scandalous attack had been made on a Judge for his judicial utterances while sitting in a criminal case on circuit, and it was with the foregoing opinions on record that Lord Russell of

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* Deputy Director, J.T.R.I., U.P., Lucknow.
1 AIR 1936 PC 141: The Supreme Court quoted in -Indirect Tax Practitioners Association v. R. K. Jain"AIR 2011 SUPREME COURT 2234
1A AIR 1943 PC 202,
Killowen, C.J., adopting the expression of Wilmot, C.J., in his opinion in Rex v. Almon which is the source of much of the present law on the subject, spoke of the article complained of as calculated to lower the authority of the Judge.”

**In Regina v. Commissioner of Police of the Metropolis,**¹ Lord Denning observed:

"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."

In the land of Gautam Buddha, Mahavir and Mahatma Gandhi, the freedom of speech and expression and freedom to speak one's mind have always been respected. After independence, the Courts have zealously guarded this most precious freedom of every human being. Fair criticism of the system of administration of justice or functioning of institutions or authorities entrusted with the task of deciding rights of the parties gives an opportunity to the operators of the system/institution to remedy the wrong and also bring about improvements. Such criticism cannot be castigated as an attempt to scandalize or lower the authority of the Court or other judicial institutions or as an attempt to interfere with the administration of justice except when such criticism is ill motivated or is construed as a deliberate attempt to run down the institution or an individual Judge is targeted for extraneous reasons. Ordinarily, the Courts do not use the power to punish for contempt for curbing the right of freedom of speech and expression, which is guaranteed under Article 19(1)(a) of the Constitution. Only when the criticism of judicial institutions transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the Court would use this power.²

The judgments of the Supreme Court in **Re S. Mulgaokar³ and P.N. Duda v. P. Shiv Shanker⁴** are outstanding examples of this attitude and approach. In the first case, a three-Judge Bench considered the question of contempt by newspaper article published in

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¹(1968) 2 All ER 319.
³(1978) 3 SCC 339 : (AIR 1978 SC 727)
⁴(1988) 3 SCC 167 : (AIR 1988 SC 1208)
Indian Express dated 13.12.1977 criticising the Judges of the Supreme Court. The article noted that the High Courts had strongly reacted to the proposal of introducing a Code of judicial ethics and propriety. In its issue dated December 21, 1977 an article entitled "behaving like a Judge" was published which inter alia stated that the Supreme Court of India was "packed" by Mrs Indira Gandhi "with pliant and submissive judges except for a few". It was further stated that the suggestion that a code of ethics should be formulated by judges themselves was "so utterly inimical to the independence of the judiciary, violative of the constitutional safeguards in that respect and offensive to the self-respect of the judges as to make one wonder how it was conceived in the first place". A notice had been issued to the Editor-in-Chief of the newspaper to show cause why proceedings for contempt under Article 129 of the Constitution should not be initiated against him in respect of the above two news items. After examining the submissions made at the Bar, the Court dropped the contempt proceedings.5

The Chief Justice Beg, expressed his views in the following words:

"Some people perhaps believe that attempts to hold trials of everything and everybody by publications in newspapers must include those directed against the highest Court of Justice in this country and its pronouncements. If this is done in a reasonable manner, which presupposes accuracy of information about a matter on which any criticism is offered, and arguments are directed fairly against any reasoning adopted, I would, speaking for myself, be the last person to consider it objectionable even if some criticism offered is erroneous. In Bennett Coleman and Co. v. Union of India,6 I had said

"John Stuart Mill, in his essay on 'Liberty', pointed out the need for allowing even erroneous opinions to be expressed on the ground that the correct ones become more firmly established by what may be called the 'dialectical' process of a struggle with wrong ones which exposes errors. Milton, in his 'Areopagitica' (1644) said:

Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?... Who knows not that Truth is strong, next to the Almighty; she needs no policies, no stratagems, no licensings to make her victorious; those are the shifts and defences that error makes against her power ...."

Political philosophers and historians have taught us that intellectual advances made by our civilisation would have been impossible without freedom of speech and expression. At any rate, political democracy is based on the assumption that such freedom must be jealously guarded. Voltaire expressed a democrat's faith when he told, an adversary in arguments: "I do not agree with a word you say, but I will defend to the death your right to say it". Champions of human freedom of thought and expression throughout the ages, have realised

5 See: 2
6 (at p. 828) (SCC pp. 827-28) : (AIR 1973 SC 106 at pp. 149-150)
that intellectual paralysis creeps over a society which denies, in however subtle a form, due freedom of thought and expression to its members.

"Although, our Constitution does not contain a separate guarantee of Freedom of the Press, apart from the freedom of expression and opinion contained in Article 19(l)(a) of the Constitution, yet, it is well-recognised that the Press provides the principal vehicle of expression of their views to citizens. It has been said:

"Freedom of the Press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited."

Justice Krishna Iyer agreed with Chief Justice Beg and observed:\(^7\):

"Poise and peace and inner harmony are so quintessential to the judicial temper that huff, "haywire" or even humiliation shall not besiege; nor, unveracious provocation, frivolous persiflage nor terminological inexactitude throw into palpitating tantrums the balanced cerebration of the judicial mind. The integral yoga of shanti and neeti is so much the cornerstone of the judicial process that criticism, wild or valid, authentic or anathematic, shall have little purchase over the mentation of the Court. I quite realise how hard it is to resist, with sage silence, the shafts of acid speech; and, how alluring it is to succumb to the temptation of argumentation where the thorn, not the rose, triumphs. Truth's taciturn strategy, the testimony of history says, has a higher power than a hundred thousand tongues or pens. In contempt jurisdiction, silence is a sign of strength since our power is wide and we are prosecutor and judge."

In P.N. Duda v. P. Shiv Shanker\(^8\), the Supreme Court was called upon to initiate contempt proceedings against Shri P. Shiv Shanker who, in his capacity as Minister for Law, Justice and Company Affairs, delivered a speech in the meeting of Bar Council of Hyderabad on November 28, 1987 criticising the Supreme Court. Justice Sabyasachi Mukharji, (as he then was) referred to large number of precedents and made the following observation:

"Administration of justice and judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by their conscience and oath of their office, that is, to defend and uphold the Constitution and the laws without fear and favour. This the judges must do in the light given to them to determine what is right. And again as has been said in the famous speech of Abraham Lincoln in 1865: "With malice towards none, with charity for all, we must strive to do the right, in the light given to us to determine that right." Any criticism about the judicial system or the judges which hampers the administration of justice or which erodes the faith in the objective approach of judges and brings administration of justice into ridicule must be prevented. The contempt of court proceedings arise out of that attempt. Judgments can be criticised; the motives of the judges need not be attributed, it brings the administration of justice into deep

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7 See -3 Re S. Mulgaokar(1978) 3 SCC 339 : (AIR 1978 SC 727)
8 See-4 .(1988) 3 SCC 167 : (AIR 1988 SC 1208)
disrepute. Faith in the administration of justice is one of the pillars through which democratic institution functions and sustains. In the free market place of ideas criticisms about the judicial system or judges should be welcomed, so long as such criticisms do not impair or hamper the administration of justice. This is how courts should approach the powers vested in them as judges to punish a person for an alleged contempt, be it by taking notice of the matter suo motu or at the behest of the litigant or a lawyer.

It has been well said that if judges decay, the contempt power will not save them and so the other side of the coin is that judges, like Caesar's wife, must be above suspicion, per Krishna Iyer, J. in Baradakanta Mishra v. Registrar of Orissa High Court. It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the court and in the majesty of law and that has been caused not so much by the scandalising remarks made by politicians or ministers but the inability of the courts of law to deliver quick and substantial justice to the needy. Many today suffer from remediless evils which courts of justice are incompetent to deal with. Justice cries in silence for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is a criticism which the judges and lawyers must make about themselves. We must turn the searchlight inward. At the same time we cannot be oblivious of the attempts made to decry or denigrate the judicial process, if it is seriously done. This question was examined in Rama Dayal Markarha v. State of Madhya Pradesh where it was held that fair and reasonable criticism of a judgment which is a public document or which is a public act of a judge concerned with administration of justice would not constitute contempt. In fact such fair and reasonable criticism must be encouraged because after all no one, much less judges, can claim infallibility. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts. But when it is said that the judge had a predisposition to convict or deliberately took a turn in discussion of evidence because he had already made up his mind to convict the accused, or has a wayward bend of mind, is attributing motives, lack of dispassionate and objective approach and analysis and prejudging of the issues which would bring administration of justice into ridicule. Criticism of the judges would attract greater attention than others and such criticism sometimes interferes with the administration of justice and that must be judged by the yardstick whether it brings the administration of justice into ridicule or hampers administration of justice. After all it cannot be denied that predisposition or subtle prejudice or unconscious prejudice or what in Indian language is called "sanskar" are inarticulate major premises in decision making process. That element in the decision making process cannot be denied, it should be taken note of."

In Baradakanta Mishra v. Registrar of Orissa High Court, Justice Krishna Iyer, speaking for himself and Justice P.N. Bhagwati, (as he then was) emphasized the necessity of maintaining constitutional balance between two great but occasionally conflicting principles

9 (AIR 1974 SC 710)
10 (AIR 1978 SC 921)
1.1 See 9 i.e. (1974) 1 SCC 374 : (AIR 1974 SC 710)
i.e. freedom of expression which is guaranteed under Article 19(1)(a) and fair and fearless justice, referred to "republican justification" suggested in the American system and observed:

"May be, we are nearer the republican justification suggested in the American system: "In this country, all courts derive their authority from the people, and hold it in trust for their security and benefit. In this state, all judges are elected by the people, and hold their authority, in a double sense, directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and laws emanating from the people, which the judges sit to exercise and enforce. Contempt against these courts, the administration of their laws, are insults offered to the authority of the people themselves, and not to the humble agents of the law, whom they employ in the conduct of their Government."

This shift in legal philosophy will broaden the base of the citizen's right to criticise and render the judicial power more socially valid. We are not subjects of a king but citizens of a republic and a blanket ban through the contempt power, stifling criticism of a strategic institution, namely, administration of Justice, thus forbidding the right to argue for reform of the judicial process and to comment on the performance of the judicial personnel through outspoken or marginally excessive criticism of the instrumentalities of law and justice, may be a tall order. For, change through free speech is basic to our democracy, and to prevent change through criticism is to petrify the organs of democratic Government. The judicial instrument is no exception. To cite vintage rulings of English Courts and to bow to decisions of British Indian days as absolutes is to ignore the law of all laws that the rule of law must keep pace with the Rule of life.12

McWhinney, wrote:

"The dominant theme in American philosophy of law today must be the concept of change - or revolution - in law. In Mr. Justice Oliver Wendell Holmes' own aphorism, it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. prestige argument, from age alone, that because a claimed legal rule has lasted a certain length of time it must automatically be valid and binding at the present day, regardless of changes in basic societal conditions and expectations, is no longer very persuasive. According to the basic teachings of the Legal Realist and policy schools of law, society itself is in continuing state of flux at the present day; and the positive law, therefore, if it is to continue to be useful in the resolution of contemporary major social conflicts and social problems, must change in measure with the society. What we have, therefore, concomitantly with our conception of society in revolution is a conception of law itself, as being in a condition of flux, of movement. On this view, law is not a frozen, static body of rules but rules in a continuous process of change and adaptation; and the judge, at the final appellate level anyway, is a part - a determinant part - of this dynamic process of legal evolution."

This approach must inform Indian law, including contempt law.

1.2 "Indirect Tax Practitioners Association v. R. K. Jain" AIR 2011 SUPREME COURT 2234
It is very necessary to remember the legal transformation in our value system on the inauguration of the Constitution, and the dogmas of the quiet past must change with the challenges of the stormy present. The great words of Justice Holmes uttered in a different context bear importance in this context:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

In Naramada Bachao Andolan v. Union of India\textsuperscript{14}, Dr. A.S. Anand, the Chief Justice, speaking for himself and Justice B.N. Kirpal,\textsuperscript{(as he then was)} observed as under:

"7. We wish to emphasise that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the court and bring it into disrepute or ridicule. ........Courts are not unduly sensitive to fair comment or even outspoken comments being made regarding their judgments and orders made objectively, fairly and without any malice, but no one can be permitted to distort orders of the court and deliberately give a slant to its proceedings, which have the tendency to scandalise the court or bring it to ridicule, in the larger interest of protecting administration of justice."

The growing acceptance of the phenomenon of whistleblower is also a factor which has relevance while treating contempt petitions against such persons who have raised their voice against some malfunctioning of a particular system. A whistleblower is a person who raises a concern about wrongdoing occurring in an organization or body of people. Usually this person would be from that same organization. The revealed misconduct may be classified in many ways; for example, a violation of a law, rule, regulation and/or a direct threat to public interest, such as fraud, health/safety violations and corruption. Whistleblowers may make their allegations internally (for example, to other people within the accused organization) or externally (to regulators, law enforcement agencies, to the media or to groups concerned with the issues). Most whistleblowers are internal whistleblowers, who report misconduct on a fellow employee or superior within their company. One of the most

\begin{itemize}
  \item[1.3] As held and quoted in -- "Indirect Tax Practitioners Association v. R. K. Jain"AIR 2011 SUPREME COURT 2234
\end{itemize}
interesting questions with respect to internal whistleblowers is why and under what circumstances people will either act on the spot to stop illegal and otherwise unacceptable behaviour or report it. There is some reason to believe that people are more likely to take action with respect to unacceptable behaviour, within an organization, if there are complaint systems that offer not just options dictated by the planning and controlling organization, but a choice of options for individuals, including an option that offers near absolute confidentiality. However, external whistleblowers report misconduct on outside persons or entities. In these cases, depending on the information's severity and nature, whistleblowers may report the misconduct to lawyers, the media, law enforcement or watchdog agencies, or other local, State, or federal agencies.15

The national interest requires that all criticisms of the judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by any partisan spirit or tactics. This should be a part of national ethics. The comments about Judges of the Supreme Court suggesting that they lack moral courage to the extent of having "disowned" what they had done or in other words, to the extent of uttering what was untrue, at least verge on contempt. None could say that such suggestions would not make Judges of the Court look ridiculous or even unworthy, in the estimation of the public, of the very high office they hold if they could so easily "disown" what they had done after having really done it. The judiciary cannot be immune from criticism. But, when that criticism was based on obvious distortion or gross misstatement and made in a manner which seems designed to lower respect for the judiciary and destroy public confidence in it, it could not be ignored. The Court should act with seriousness and severity where justice is jeopardised by a gross and/or unfounded attack on the Judges, where the attack was calculated to obstruct or destroy the judicial process. The Court must harmonise the constitutional values of free criticism, and the need for a fearless curial process and its presiding functionary, the Judge. To criticise a Judge fairly albeit fiercely, is no crime but a necessary right. Where freedom of expression subserves public interest in reasonable measure, public justice cannot gag it or manacle it. People must avoid confusion between personal protection of a libelled Judge and prevention of obstruction of public justice and the community's confidence in that great process.

1.5 "Indirect Tax Practitioners Association v. R. K. Jain" AIR 2011 SUPREME COURT 2234.
MEANING OF HUMAN RIGHTS:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Everyone is entitled to all the rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or other status. Furthermore, no discrimination shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Human rights are those minimal rights that individual needs to have against the State or other public authority by virtue of being members of human family. The Human Rights Act 1998 requires everybody and specifically 'public authorities' to act towards all citizens in accordance with certain internationally - recognized standards. These standards were set out in the European Convention on Human Rights and for convenience are known as the Convention Rights. It is unlawful for public bodies, which include local authorities to act in a way that is incompatible with those rights and freedoms. The definition of 'public authority' includes Courts and tribunals. It also includes Local Authorities, Health Authorities and Trusts and may include charities and private bodies, which are contracting with the Local Authorities to carry out some of their functions. The Convention on Human Rights contains twelve fundamental rights and freedoms. Some of the important articles are Article 2 - Right to life, Article 3 - Prohibition of torture, Article 4 - Prohibition of slavery, Article 5 - Right to liberty, Article 6 - Right to a fair trial, Article 7 - No punishment without law, Article 12 - Right to marry, Article 14 - Prohibition of discrimination, Article 8 - Right to respect for private and family life, Article 9 - Freedom of thought, conscience and Religion, Article 10 - Freedom of expression Article 11 - Freedom of assembly and association.

The U.N Charter in its preamble expresses the determination of the organization, and reaffirms the faith in the fundamental human rights. One of the main objectives of this Charter is to seek international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The United Nations has many wings like- Economic and Social Council (ECOSOC) and U.N. Human Rights Council, which strengthens the promotion of human rights around the globe. Human rights are not legalistics, economics and politics. It is a transformation of the global regime, and incarnation of a New World Human Order.
Simply stated that human right means the rights of the human. Without human rights the existence of a human being is meaningless. The human rights include the rights relating to life, liberty, equality, and dignity, of the individual which are enshrined in our constitution of India as part III of it, in the form of the fundamental rights. In India the human rights have history since the period of Vedas and Upanishads. After independence our constitution adopted and detailed declaration of rights. Article 14, 15(1), 17, 19, 21, 32(1) are one of the most important provisions which protect and promote the human rights. In Daryao V. State of Uttar Pradesh (AIR 1961 SC at 1461) the court observed “the fundamental rights are not only to protect individuals rights but they are based on high public policy. Liberty of the individual and the protection of his fundamentals rights are the very essence of the democratic way of life adopted by the constitution and it is the privilege and the duty of this court to uphold those rights. This court would naturally refuse to circumscribe them or to curtail them except as provided by the constitution itself”. Universal Declaration insists in Art.8: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamentals rights granted him by the constitution or by law” Art 10 of Universal Declaration lays down “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” The Great Covenant on Civil and political Rights in Art.14 stresses that: “Everyone shall be entitled to fair and public hearing by a competent, independent and impartial tribunal established by law.” However, constitutional guarantees of judicial independence are sometimes vulnerable to executive and parliamentary displeasure. Democracy, where the bells toll for human rights and human justice, degenerates into crushing tyranny unless the political order keeps the flame of free and fearless justice, institutional and individual, burning.

Religion plays a very pivotal role in regulating and implementing the human rights. In India the concept of human rights could be traced back to Rig-Veda which has reference of civil liberties pertaining to body dwelling house and life. Even before Hobbes taught about the civil liberties of the individual we find references of it in the Mahabharata. The Ancient Indian society was a structured society with functional specialization. It was the concept of Dharma which governed the functioning and policy making of the State and the social and individual behavior of subjects and it encompassed the theories of rights, duties and freedom. Whatever may be the religion, whether it is a Hindu religion or Islam or may be Christianity all religions indicates the respect towards the humanity and give a moral preaching to live in and let live maintaining the mutual harmony and social peace.

However, human rights can gain their true meaning only if there is an independent Judiciary to enforce them. Here the dharma-shastras are clear and categoric. The Independence of Judiciary was one of the outstanding features of the Hindu Judicial system. Even during the days of Hindu Monarchy, the administration of justice always remains separate from the executive. It was a rule independent both in the form and in sprit. It was the Hindu judicial system that first realized and recognized the importance of separation of
judiciary from the executive, and gave this fundamental principle a practical shape and form. The case of **Anathapindika V. Jeta**, reported in the Vinaya-Pitaka, is a shining illustration to this principle. There a prince and a private citizen submitted their case to the law-court, and the court decided against prince. The prince accepted such a decision as a matter of course and as binding on him. The evolution of the principle of separation of the judiciary from the executive was largely the result of the Hindu conception of law as binding on the sovereign. Law in Hindu jurisprudence was above the sovereign. It was the dharma. The laws where then not regarded so much as a product of supreme Parliaments and legislatures as at present. Certain laws were regarded as above all human authority. Such, for instance, were the natural laws, which no parliament, however supreme, could abolish. Technically speaking, a supreme Parliament may proclaim a law abolishing the law of gravitation, but it will not, in fact, be abolished by the Parliaments fiat.

**ROLE OF JUDICIAL SYSTEM:**

The role of judiciary is pivotal and important in the enforcement of human rights, as human rights are part of the global issue which are to be redressed in a speedier and effective manner so that the violations of the civil, political, economic and cultural rights gets minimized and people can live freely and fearlessly without any exploitation. The judiciary is the main organ which analyses and interprets the law and also gives a new horizon to the state for the enforcement and implementation of human rights. The Apex court is established at the apex of the judicial system as the final interpreter and guardian of the constitution and of the fundamental rights of the people. In the case of **Pathumma V. State of Kerala** (AIR 1978 SC at 774) the court asserted that while interpreting the constitution, the judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. It would not be overstating that judiciary has played a crucial and central role in protecting human rights. The fundamental rights had been given a wide meaning by the Judiciary which encompasses the human rights. **Maneka Gandhi V. Union of India** (AIR 1978 SC 597) is a landmark case in the history of jurisprudence and constitution of India, wherein we find the changing role of judiciary from a traditional, perspective to a very broad perspective with its expanding horizons of interpretations where Article 21 has been given a very broader meaning. The new and fresh interpretation attributed to the term “procedure” as to mean “fair, reasonable and just procedure” and it gave rise to the concept of the due process of law in the Indian judicial set-up. Now court could insist of a fair and just procedure especially in the realm of liberty of a human being, since the observation of fair and proper procedure becomes very crucial in protecting individual’s liberty. The post-Maneka Gandhi era saw many changes, one of them being a transformation from “according to procedure established by law” to “due process of law.”

**Justice Bhagwati** has correctly observed, “The Apex court is the ‘ultimate interpreter’ of the constitution. It is for this court to uphold the constitutional values and to enforce the
constitutional limitations. That is the essence of rule of law. In an landmark case of **D.K. Basu v. State of West Bengal** Apex court of India took a stern view regarding the arrest of an individual. The court laid down detailed “requirements to be followed in all cases of arrest and detention.” These eleven directions have gone a long way in protecting the human rights of an individual from being violated at whims. The directives are:

1. The police personnel carrying out the arrest and handling the interrogation of the arrested should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handled interrogation of the arrestee must be recorded in a register.

2. The police officer carrying out the arrest of the arrestee shall prepare a memo of the arrest at the time of arrest and such memo shall be attested by at least one witness who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lockup shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organization in the district and the police station of the area concerned telegraphically within a period of eight to twelve hours after the arrest.

5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

7. The arrestee should, where he so requests, be also examined, at the time of his arrest, and major and minor injuries, if any, present on his/ her body, must be recorded at that time. The ‘inspection memo’ must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.

8. The arrestee should be subjected to medical examination by trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by the director, Health Services of the concerned state or union territory. Director, Health Services should prepare such a panel for all tehsils and districts as well.
9. Copies of all the documents including the memo of arrest referred to above should be sent to the magistrate for his record.

10. The arrestee may be permitted to meet his lawyer during interrogation though not throughout the interrogation.

11. A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of the custody of the arrestee shall be communicated by the officer causing the arrest. Within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

Thus, judicial activism or judicial creativity is made possible because of Apex court’s creative or innovative use of its power of interpretation.

In the Constituent Assembly, highlighting the importance of judiciary, Pt. Nehru observed “….. We must respect the judiciary, the Apex Court…..” In democracy, the courts are the ultimate savior of the citizens for the violations of human rights.

THE PRESENT PROBLEMS, LACUNA, AND FLAWS, WHICH JUDICIAL SYSTEM IS FACING, IN THE ENFORCEMENT OF HUMAN RIGHTS

The fair and fearless justice is the universal fundamental right and independent and humane justices are integral to the fulfillment of this imperative of the world legal order.

Long back in the landmark case of *Keshavanand Bharti v. State of Kerala* (AIR 1973 S.C. 1467), Justice Y.V. Chandrachud stated, “.....it is really the poor, starved, and mindless millions who need the court's protection, for securing to themselves the enjoyment human rights in absence of explicit mandate the court should abstain, from striking down, the constitutional amendment which makes endeavor ‘to wipe out tear in every eye’....”

The concept of public interest litigation has given a new dimension for redressal to the public grievance, and indeed it has been a boon to the public at large, in the form of cheapest and speedy remedy in terms of constitutional protections and human rights.

Insidious temptations, incurable vices and deep-routed subjective prejudices of the judges themselves may menace that conscientious impartiality which is the essence of fair and independent justice. The democracy of justice includes equal justice beyond any pressure or purchase, easy access to the humblest and poorest litigant and early finality of the Judgment.

The Supreme Court in India has explained in emphatic terms, the superlative importance of judicial independence in a dynamic democracy in *S.P. Gupta V. Union of India*. (AIR 1982 SC 197-198). The concept of independence of the judiciary is a noble thought, which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the constitution, it is the principle of the rule of law and under the constitution; it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and
effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in the armoury of the law, that the judiciary seeks to protect the citizen against violations of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the state as a bulwark against executive excesses and misuse or abuse of power by the executive and therefore it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the constitution makers by making elaborate provisions in the constitution to which detailed reference has been made in the judgment in Sankalchand Sheths case (AIR 1977 SC 2328). But it is necessary to remind our self that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressure and prejudices. It has many dimensions, namely fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the persons working in the judiciary belong. It includes the independence protection from the challenges from outside, as well as from within the system itself. If we may again code the eloquent words of Justice Krishna Iyer:

“Independence of judiciary is not genuflexion; nor is it opposition to every proposition of government. It is neither judiciary made to opposition measure nor government’s pleasure.”

Michael Kirby of the High Court of Australia makes some jurisprudential observations:

“As a result of numerous attacks on the independence of the judiciary in many lands, international agencies and conferences of jurists have busied themselves in attempts to state the basic principles necessary to ensure judicial independence.”

The huge pendency and disproportionate number of courts are basic challenges that the judiciary in India, is facing, added to it are: lack of latest state of art facilities and infrastructure, lack of proper co-operation from other stake/duty holders of court system, and other agencies supposed to work in the aid of the court. Misuse of rule of procedure, hostility and non availability of witnesses are other problems, the judiciary, particularly the subordinate judiciary is facing. But, this is remarkable, that despite all odds, no stone has been left unturned to endeavour to the justice to be more qualitative, effective, and speedy by the courts. This has also been attempted to make it more distributive, and enable it to be within the reach and access of the last person in the society. And in that way, the courts in India have been not only dispensing justice on merits, but also working as legal aid clinics to facilitate right form of justice and judicial approach by the litigant, including facilitating the financial and other legal helps like providing amicus curie, etc., as provided under the rules governing this area. They are working as a part of national and state legal services authorities created and constitutes under the act of legislature viz. Legal Services Authority Act 1987 which was implemented in year 1994(Nov.09-1994) This enactment was a milestone in the history of Indian justice delivery system, to make it more effective to protect the fundamental
and all civil and other rights of the citizen, by providing a mechanism which has been governed by the judiciary of country itself. It provided for an authority, within full control of trifoliate judiciary, i.e. at the level of the Supreme Court, the High Courts, and District Courts which includes taluqa courts also, in the form of National Legal services Authority, State Legal Services Authority, District and Taluqa legal services authorities, respectively. Apart from this the courts are also adopting alternative dispute resolution mode to reduce the pendency, and rigour of litigation. In this process they also avail opportunity to work as one of the authority viz. Lok Adalat to facilitate the justice. In addition to it they are also forwarding cases to the mediation and conciliation centres to enable to litigating parties to reach to an amicable solution to their dispute. Thus in this way the courts are not only saving their actual court time, which may be used to the other important cases, but also discharging the justice with better speed, and also with harmony amongst the parties to the litigation. This is also important that by invoking this system of justice delivery, the right of fair justice is also strengthened, because, in this way the probability of unfairness of justice delivery, is much diluted and mitigated, rather the fairness goes to the hands of the parties themselves, from the court, and they are free to address their problems in the way suited to them, without entangling in rule of procedure and rigidity of law.

CONCLUSION:

Human rights today occupy the top slot in priority nationally and internationally over other issues relating to mankind. Unfortunately its observance leaves much to be desired. With a growing tendency of the legislature and executive to be apathetic towards human rights the very survival of mankind is under threat. It is very often blamed that large scale human rights violations take place right under the nose of the government and at time the state itself is blamed as a perpetuator of this crime. Under such circumstance the role of judiciary in protecting human rights become crucial and important. Judiciary in India has been able to restore the human rights to the people. There is a remarkable shift in judiciary’s role from narrow to broader perspective. Initially the court followed and confined themselves to the literal interpretation of rights but later in the present scenario the courts have followed the innovative and creative interpretation so as to develop the law relating to human rights. Thus to sum up it can be said that the role judiciary can be studied in three perspectives. Firstly, Judiciary can be seen as the protector and guardian of the human rights. Secondly, It act an interpreter of these rights and lastly judiciary made attempts to integrate directive principles with fundamental rights. This in turn can be said as judicial creativity. No doubt the Judiciary is doing excellent and gives a far reaching effect in the implementation and enforcement of the Human rights but question again gets unaddressed that how many of them in India get their human rights enforced and at what cost? What is to be done for the citizen of India who has been victim to
the human right violations so that they may get their rights redressed in a speedier and economical manner?

The subordinate courts in the country are also giving their invaluable contribution in the protection of human rights, at all such levels and stages of criminal justice system when their probability of being jeopardized and violated is very high, viz. when a person is arrested and brought before the court of law, when such person is forwarded to police or judicial custody, the health and dignity of prisoner, rights of women in the hands of state authority, right of children when they are accused and witness in a criminal trial, right of under privileged when they are produced before the court as witness or as an accused, the right of hearing before sentencing, right of defence in criminal trial. The courts not only safeguard those who are accused, but also those who are proposed to be accused. In the same in protecting the rights to the properties the courts are playing very crucial role, like- granting injunction orders against invaders to the property, adopting other interim measures like attachment, appointment of receiver, and inspection of property etc. In the age of growing and raising population, the right to property has got a very important significance, in the litigation system and behavior, as it has been identified to be in source of repeated human rights violations, which can be curbed by using these measures by the courts at front level.

The delay itself has been a great impediment in the enforcement of rights. This is also important that state is itself a great litigant so many cases are filed by and against state which can be addressed by the state through its agencies, and courts can be spared from frivolous and baseless litigation, or at least a litigation which can be resolved without invoking the judicial authority. At the National Consultation for Strengthening the Judiciary toward Reducing Pendency and Delays held on the 24th and 25th October, 2009 the Union Minister for Law and Justice, presented resolutions which were adopted by the entire Conference unanimously, the said Resolution acknowledged the initiative undertaken by the Government of India to frame a National Litigation Policy with a view to ensure conduct of responsible litigation by the Central Government and every State Government to evolve similar policies. The National Litigation Policy is based on the recognition that Government and its various agencies are the pre-dominant litigants in courts and Tribunals in the country. Its aim is to transform Government into an Efficient and Responsible litigant. This policy is also based on the recognition that it is the responsibility of the Government to protect the rights of citizens; to respect fundamental rights and those in charge of the conduct of Government litigation should never forget this basic principle. This a novel step to reduce the pendency, and this will encourage the courts to give better productivity in terms of protection of human rights in India.

SUGGESTIONS:
1. Human rights to enjoy remedial effectiveness must have independent institutional justice and so the freedom and integrity of the judicature in any country is a categorical imperative for the realization of human rights.

2. Protection of human rights is a global issue. If all countries get together to fight against the violations of human rights and get the rights enforced in true spirit it can be said a beam in a dark which makes implementation of the human rights more emphatic. For this a new legislation with strong application and justifiability needs to be done which should be followed around the globe.

3. The independence of the judiciary should be promoted by the State as enshrined in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

4. The number of courts should be proportionate to the population of the country and it should be made more distributive, so as to reach to the borderline cases and persons of remote.

5. The rules of procedure need to be amended in present scene of society and globe, to make justice delivery more speedy and quick responsive.

6. The courts should be made more user friendly, and the litigant should be free and easy to access the court as and when required. There should be no hindrance in any form between the litigant and the court.

7. The docket inclusion should be qualified with fair litigation and vexatious and frivolous litigation should be frustrated at all levels, because unfair exercise of rights may jeopardize the rights of the innocent, and it also costs to the state exchequer.

8. There is a need to categorize the cases specifically which should be routed through alternative dispute resolution mechanism and courts should be spared from applying mind and time on such cases. It also needs mandatory provision of law to avail ADR mechanism at pre-litigation stage.

9. The courts in India are functioning in three dimensions, first-core judicial work, second-as part of ADR mechanism, as part of legal service authority, at levels of national, state, and district. This has increased the burden of courts, which keeping in view the pendency with them, making their function as core judicial work hampered and jeopardized. It therefore it needs that such extra-core functions should be separated from them, so that they may work more efficiently and with good timing rate.

Judiciary has done a lot and has to go a long way in order to provide each and everyone proper justice to the citizen of this country which vast population with below poverty line and facing crucial problem of illiteracy and unemployment.
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CODIFIED LAWS VERSUS PERSONAL LAWS: WHY UNIFORM CIVIL CODE IMPERATIVE FOR INDIA

Aviral Saxena

I. INTRODUCTION

During my stay at Allahabad High Court, I have had an opportunity to work upon cases or diverse nature. Cases that irritated me a lot were the ones dealing with the marital disputes. While going through such cases, I got an insight into the personal laws of different religions. I realized that the family life of Indians is, rightly or wrongly, guided by their respective religious and customary beliefs. Religions more or less survive only through the ceremonies and social customs enforced upon its member. The need for codified code emerges whenever disputes relating to marriage, divorce, adoption, succession, maintenance etc are brought before the courts, especially when one party to the dispute resorts to personal laws while the other pins hope on the judicial process to settle the matter. Then starts the tussle between the judiciary and the respective personal law. The Supreme Court has repeatedly urged the Government of India to enact Uniform Civil Code to bring differing laws in consonance. Whenever there is a debate on the issue of having a Uniform Civil Code in India, the so called pseudo secularists immediately set the alarm bells ringing, stating vehemently that Code would result in the personal laws of the Hindus being imposed on other communities.

II. LEGAL UNIFORMITY AND CULTURAL DIVERSITY

Due to the geo-political nature of the country, various cultures and religions flourished in the country and as a result, we have various personal laws in place. The ramifications of the defects within the various personal laws have resulted in an increase in the cultural diversity within the Indian society. In a complex situation such as India, the question that ultimately comes to our minds is regarding the reconciliation of the inherent pluralism of the Indian social order with a demand for uniformity. It is pertinent to note that, the aspect of 'Legal Uniformity' is supposed to be in consonance with Cultural Diversity. There are various cultural factions within various religious communities. The existing personal laws not only

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In one such instance, the Supreme Court of India had allowed a writ petition declaring section 118 of Indian Succession Act of 1925 illegal on the grounds of arbitrariness, irrational, and violative of Article 14 of the Constitution. The bench allowed a writ petition filed by a Christian priest John Vallamattom challenging the provision as it discriminated against Christians bequeathing their property for charitable and religious purpose. Under Section 118 of the Indian Succession Act, applicable only to the Christians, "no man having a nephew or niece or any nearer relative shall have the power to bequeath any property to religious or charitable uses except by a will executed not less than 12 months before his death".
promote cultural diversity but also fail to provide social justice particularly equal rights for women, aspects relating to adoption and inheritance. Hindus, Sikhs and Jains are governed by Hindus Marriage Act 1956 and Hindu Succession Act, 1956. Even though the laws prohibit bigamy, the practice continues on a large scale. The Hindu Succession Act gives Hindu women an equal right to parental property even then they sign away their right to their father's property at the time of marriage while accepting dowry as a recompense for a share. The Shariat Act states that Muslim personal laws shall govern the Muslims and that "law has priority over custom". However in practice personal law is mostly based upon interpretations of Quran\(^1\) and the Hadit. The Registration of Marriage is compulsory within the Christian Laws. However, it is optional as per the Hindu Laws.\(^2\) For proper regularization of the institution of marriage within the Indian society, compulsory registration of marriage is a necessity. Similarly, there are other aspects within the various communities, the reform of which is important for the reform of the Indian society and for that a uniform system of laws in the nature of Uniform Civil Code is desirable. There are various Islamic countries in the world that strictly ban the system of bigamous marriage and have done away with the system of "Triple Talaq". In India, widow remarriage has been recognized and practice of Sati has been completely done away with. Time has now come when we create a conducive atmosphere for social and cultural integration by accepting a single system of governance.

### III. UNIFORM CIVIL CODE AND RELIGIOUS MINORITIES

The UCC is all about National Integration. It does not talk about abolition of any religious identity. The Supreme Court has time and again talked about having a uniform civil code as per Article 44 of the Constitution. Personal laws largely concern the Minorities. Matters like property, marriage etc. are however, still a function of religious identity for Hindus as much as these are for Muslims and Christians. Also, Hindu code bill did not lay the foundation of 'secularization of Hindu laws'. The law has missed granting minorities within the Hindu fold itself, a decent and deliberative space. There are various ambiguities within the Hindu laws itself.\(^3\) Therefore, there is a real need to evaluate and revaluate the Hindu code itself along with the Christian and Muslim personal laws so that they are in consonance with the

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\(^1\) That the Muslim Personal law has not delivered justice to women is well chronicled, (misinterpreted and misguided decrees have been repeatedly reflected in cases like *Bal Tahir v. Ali Husain Fissali Chota* case of 1979 or the *Smt. Khatoon v. Mohammad Yamin* case of 1982)

\(^2\) Under Section 8 of the Hindu Marriage Act 1954, there exists a provision for registration of marriages. However, it's left to the contracting parties to either solemnize the marriage before the sub-registrar or register it after performing the ceremony in conformity with Hindu beliefs.

\(^3\) The Hindu Marriage Act prohibits marriage between two persons within the prohibited degrees of relationships. For example, a Hindu cannot marry his own brother's or sister's daughter. However, the Act immediately adds that such marriages are valid if permitted by the customs governing the parties to the marriage. In the South there is a custom to marry one's sister's daughter, while in the North it is prohibited; * Though "Saptapadi is essential for solemnising the marriage but not so if it is not required under the customs governing the parties to the marriage." * In the matter of succession and inheritance, the "mitakshara and "dayabhaga schools have different rules of succession with even different sub-schools within the former. For example, while in the North, in a partition between father and sons, the mother is given a share equal to that of a son. In the South, this practice has fallen into disuse and hence the mother would not get a share.
constitutio
on and other codified laws like IPC, Cr.P.C. etc. Whenever there is a talk of formu
lating a Uniform Civil Code in the country, some minority fundamentalist organi
zations come together protesting that it poses a threat to their religious identity. The politics of vote bank takes precedence over India's integrity and unity. The Uniform Civil Code does not mean a Hindu Code. It means an attempt to inculcate the best from all the communities and religions, both minorities as well as majority. The Code shall not endanger the freedom of religious minorities in any way. It will rather reflect the sanctity of one's religious beliefs and practices in a more matured form.

IV. PERSONAL LAWS: HANGOVER OF A PATRIARCHAL SOCIETY

Even after 57 years of independence, coming of women's liberation and start of the age of IT revolution, India still reels under the vicious social set up which has its roots within the patriarchal domain. In Orissa a drunken Sheikh Sher Mohammad says 'talak' thrice to his wife but forgets in the morning. The neighbours and the clerics asked him to desert her even though within Islamic laws 'Talaq' pronounced in intoxicated state is invalid. In Haryana, the panchayat dominated by male Hindu hardliners forcibly asked wife to tie 'rakhi' to her husband because they later turned out to be from same 'gotra'. Likewise there are various instances within every religious community where the males dominate their will upon the weaker sections just for the satisfaction of their 'egos', which gets backed by lousy religious interpretations. Need of the hour is therefore to evolve a mechanism to check religious misinterpretation, for which a Uniform Civil Code is desirable.

V. UNIFORM CIVIL CODE AND WOMENS' RIGHTS

The inconvenient as well as archaic features of the personal laws are necessary ingredients in causing hardships to the women community. Legal reforms have been in the center of the agenda for promoting gender justice in India. Women have been the targets of injustice even today. India is a signatory to the Convention on Elimination on All forms of Discrimination Against Women or CEDAW. The Uniform Civil Code can incorporate the provisions of CEDAW for the welfare of women. Incidents of divorce, bigamy, polygamy, inequality with respect to property laws etc. have time and again brought to notice the fact that there is a need to have a uniform system of laws that will protect the interests of women. Their interests shall only be guarded if we have a single law at the national level; applicable to the entire women community, irrespective of the community or religion they belong to. The CEDAW also talks about sanctions, where possible in order to prevent discrimination

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6 India became a signatory to the Convention on 30 July 1980 and ratified on 9 July 1993 with two Declaratory Statements and one Reservation
7 Article 2(a) of the Convention states that in order to embody the principle of equality of men and women the state shall undertake such steps through legislations and other means, if they are not yet incorporated within the national laws
against women. However the instances of Imrana, Guddi, and Shah Bano etc. clearly state that imparting justice to women is a far cry if we let the women be governed by their respective personal laws. The Universal Declaration of Human Rights also talks about Equal protection of law, which is also applicable to women. The formation of a Uniform Civil Code shall also ensure the incorporation of the various International Human Rights Treaties within its domestic laws.

VI. UCC, CONSTITUTION AND THE SUPREME COURT OF INDIA

The Supreme Court has time and again suggested that the Parliament should frame a Uniform Civil Code for the country, as that will help the cause of national integration. The Supreme Court is the upholder of the Constitution and interprets it in the light of the spirit of the same. While Article 25 guaranteed freedom of conscience and free profession, practice and propagation of religions, Article 44 has divested the religions from social relations and the personal law. Thus Article 44 is not in conflict with Articles 25 and 26 of the Constitution. These are reflected in the various Supreme Court exhortations over the years on this sensitive and contentious issue. The Court has gone to the extent of saying that Article 44 has remained a dead letter, thereby expressing their anticipation as to the possibility of the existence of a Uniform Civil Code. Laws relating to marriage, divorce, inheritance, maintenance etc. are of a secular nature and therefore a uniform system of law governing them is a possibility and is in consonance with spirit of the Constitution.

VII. THE CHALLENGE AND THE DEBATE

It is ironic that a constitutional provision intended to bring people closer in a secular order has become an object of divisive, often acrimonious debate. The challenge today is to separate the core issues from the dross and the reactionary. Personal laws relate to marriage, divorce, maintenance, succession, and adoption. They also have tax and other implications. While the domain of these of these laws should not be exaggerated, self-evidently a secular and democratic society requires the common law to "invade" all aspects of human relationships. However, the matter is not as simple as it sounds. As democratic women's organizations have been pointing out, the concept of a uniform, or rather equality, between communities and equality within communities, that is, between men and women. The unfortunate truth is that personal laws, as they exist in India, tend stubbornly to discriminate against girls and women. This is not to deny the gains made by various attempts that are reforming these laws and the progressive contributions made over the long term by the higher judiciary in moderating or lessening the iniquitous impact of the personal laws. Muslim

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8 Article 2(b)
9 Article of the UDIIR states that men and women, within limitation with respect to race or religion are entitled to rights as to marriage, during marriage and at its dissolution.
10 Article 25 talks of freedom of conscience and free profession, practice and propagation of religion while Article 26 talks about the rights of the religious denominations to manage the affairs of their religion without any interference from the state, whatsoever
11 Article 44 of the Constitution of India states that the State shall endeavor to secure a Uniform Civil Code for the people of India.
women are about the worst off, but the essential problem does not concern Muslim women alone. Women Hindu, Muslim, Christian, Sikh and so on are invariably the losers under the personal law regime. The embryo of a common civil code is seen in such progressive enactments as the Special Marriage Act, 1954 but such instances are few and far between. Gender discrimination is the critical issue. Pious advocacy of a Uniform Civil Code as an instrument for ushering in "national integration" and communal campaigns that use Article 44 as a stick to intimidate minorities with fail to address this issue. The democratic women's movement is absolutely right when it proposes that call for a Uniform Civil Code, which must eventually be put in place by any society that calls itself secular and democratic, must be "preceded" by the demand for equal rights and equal laws that ensure gender justice. The task is well cut out.

VIII. HISTORY AND CODES AND CODIFICATION IN INDIA

According to Oxford dictionary, 'code' means 'a systematic collection of statutes, body of law, so arranged as to avoid inconsistency and overlapping'. Legislature seems to be the most important source of law in modern times. By legislation, sometimes, a new law is made, sometimes, a custom or an usage is embodied in a statute, and it is put in a coherent and systematic form. The law put in this form is called code. The law making and putting it in this form is called codification. Thus codification means promulgation, compilation, collection and systematization of the body of law in a coherent form by an authority in a state competent to do so.

There have been codes since very ancient times. In India, the Code of Manu\textsuperscript{12} is a very ancient code. There were many other law givers who gave their codes as Yajnavalkya, Brihaspati, Narada, Parashara etc. These various codes applied in different parts of the country. Though these codes cannot be said to be codes in the modern sense of the term, they are important because they made a beginning out of which the modern codes evolved in course of time.

During medieval period personal laws and customs governed people. When the Britishers came here, they too, as a matter of policy, recognized personal laws and local customs, and justice was administered in accordance with that. But after they had consolidated their position here, they paid their attention to codification. Under the provisions of the Charter Act of 1833, the first Indian Law Commission was appointed with Lord Macaulay as its chairman. They drafted a number of codes such as the Indian Penal Code, the Civil Procedure Code and the Indian Limitation Act. A Second Law Commission was set up under Charter Act of 1853. The Indian Penal Code was passed. Later on, the Criminal Procedure Code and some other Acts were drafted and passed. Law Commissions were set up again in 1861 and 1879, which drafted and revised many Acts. Thus the criminal law, civil law, in most part, and procedural laws had been codified. Now the personal laws remained

\textsuperscript{12} It refers to Manu Smriti
operative in respect of limited fields only. With the introduction of legislatures in Provinces and the Centre the codification was expedited. After nation became independent, various Law Commissions made recommendation in regard to personal laws which are still pending.

However, over the period, there have been attempts to codify personal laws applicable to each religious group. The codified personal laws relating to marriage, Divorce and inheritance are mainly:\(^{13}\):

- The Indian Christian Marriage Act of 1872 (applicable to whole of India except areas of erstwhile Travancore- Cochin, Manipur and Jammu & Kashmir),
- Anand Marriage Act, 1909 (for Sikh marriages),
- Cochin Christian Civil Marriage Act of 1920 (applicable for Travancore- Cochin areas),
- Muslim Personal Law (Shariat) Application Act, 1937 (making Shariat laws applicable to Indian Muslims),
- The Parsi Marriage and Divorce Act, 1937
- Hindu Marriage Act, 1955 (applicable to not merely Hindus, Buddhists and Jains but also, to any person who is not a Muslim, Christian, Parsi or Jew, and who is not governed by any other Law).

**IX. CODIFICATION OF PERSONAL LAWS: THE PANACEA**

India is a developing country facing numerous problems. Planning has been resorted to for a comprehensive development. The planned development of legal jurisprudence is possible only through codification. A nation cannot make the desired development if the people are left to regulate their relations in different and divergent ways. By codification there comes uniformity and the desired development is speedily achieved.

For the national unity and integrity, which unfortunately are very grave problems of India, the uniformity of the law is very necessary, which can be achieved only through codification. Perhaps it was keeping this objective in view that Article 44 of the Indian Constitution that is, 'Directive Principles of State Policy. It runs as: -

"The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".

Thus in India, though much has been done towards codification, there still remains more to be done as far as personal laws are concerned.

Codification brings about certainty. Laws no longer remain vague and uncertain as it is generally in precedent and custom. It makes law simple and accessible to everybody. It can be said that law is logically arranged in a coherent form. There are little chances of any

\(^{13}\) [http://www.wikipedia.com](http://www.wikipedia.com)
conflict or inconsistency arising among the different provisions of the law. Thus the law is harmonized and systematized in the code. This would in a sense prevent frivolous petitions filed before Courts regarding personal laws and their implementation and thus preserving precious time.

The codification makes the law stable. The law which comes into existence through other sources has not that much of stability. Stability is very essential for law so that the people may have confidence in it and legal transaction may be made easily and smoothly. Also, it is an instrument of forging unity among the people. Codified laws have uniform and wider application. The persons governed by the same laws, in course of time, develop an affinity amongst them and they come closer to each other. Thus, it helps in creating unity and integration in a country like India, which is a land of diversities. This is one of the major arguments for promoting the idea of Uniform Civil Code in India.

It is pertinent to note that most of the demerits of the codification have been magnified and exaggerated. Codification of personal laws has undoubtedly some demerits but they are very insignificant in comparison to the merits it has. Codification causes planned development of law. It enables the law to fulfill the purpose for which it is meant. Many of the demerits have been attributed to it due to mistaken view that codification means the complete abolition of case law and customary law. Contrary to it, these case law always work as a supplement to the code by interpreting it, reconciling it and filling up the lacuna, if any because in code, howsoever meticulously prepared they might be, some defects generally find their place. If case law functions side by side with the code, most of the demerits would not come into being at all.

India needs a Uniform Civil Code. The Constitution says, bit only in a manner of speaking in the soft part labelled "Directive Principles of state Policy", which include such tall promises as the "right to work [and] education\(^{14}\), "free and compulsory education for all children\(^{15}\)", and so forth. Article 44 "directs", non-bindingly of course, that the state shall make an effort to bring about Uniform Civil Code. \textit{Even Italy has one, as do the rest of the developed world.} Nowhere is a scenario in India, of various personal laws jostling together. It needs to come on the heel of a political consensus, which has been a long term demand. We all know that this has to be marked by consensual politics. But when and how.... these questions still remain unanswered?

\(^{14}\) Article 45 of the Indian Constitution
\(^{15}\) Article 41 of the Indian Constitution
IMPRISONMENT FOR LIFE: A TREND TOWARDS LIMITING POWER OF REMISSION

Sri Akhilendra Kumar Pandey

Abstract: The punishment should be in proportion to seriousness of crime. A convict is entitled to receive just punishment. The court has power to impose sentence prescribed under the law. For serious crimes, the penal legislations provide death sentence or, alternatively, imprisonment for life. The judicial trend has gradually shifted from death sentence to life imprisonment. Death sentence is being awarded in extreme cases only. Sometimes even in serious crimes the court does not feel it appropriate to impose death sentence and imposes imprisonment for life. But at the same time the court also apprehends that the government may, exercising its statutory power of remission, release the convict prematurely. Due to such an apprehension the court has started putting a restriction on the power of remission by directing that the prisoner shall not be entitled to premature release unless served 20 years or 35 years in prison and thereby it created another category of punishment. This judicial trend is likely to create conflict with the legislative penal policy and the executive. With a view to avoid conflict and also to create a disciplined society appropriate legislation in this regard has been suggested.


I. Introduction

The rise in incidence of crime is a matter of serious concern. The State machinery, by and large, could not contain the rate of crime in India. The judiciary appears to be desperate in controlling the crime and thus frequently resorts to deterrence. The focus of judiciary on reformation of the convict is conspicuously invisible. Earlier, where the offence was punishable with death sentence and alternatively by life imprisonment, imposition of death sentence was the rule and life imprisonment was an exception. In such a situation, the court was required to give reasons for imposing life imprisonment but no such requirement existed for imposition of death sentence. The legislative change brought a paradigm shift in sentencing. Presently, life imprisonment is the rule and death sentence is an exception. The imposition of death sentence has further been constricted due to the insistence that death sentence be imposed in rarest of rare cases. The objective of punishment in modern society has undergone a change so that the concern is now less to avenge the crime than to transform the criminal. Life imprisonment ordinarily means imprisonment till life unless remission was granted by the government. A new trend is discernable that while awarding life imprisonment, the Supreme Court nowadays is also prescribing minimum period of sentence.

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without remission. In present work an attempt has been made to discuss the judicial trend restricting remission while imposing life imprisonment and its possible effect on the relationship between the judicial and the executive powers. Precisely, the purpose of this work is to examine whether under the existing constitutional scheme is it permissible for the Court to restrict the power of remission vested in the appropriate government.

II. Trend towards prescribing term in Life Imprisonment

Life imprisonment is one of the modes of punishment enumerated under the Indian Penal Code.\(^{18}\) The sentence of imprisonment for life is not for any definite period rather it is imprisonment for life and it is, prima facie, treated as imprisonment for the whole of the remaining period of the convict person’s natural life.\(^{19}\) The court is expressing its concern for those cases where the death penalty ought not to be awarded and life imprisonment appeared to be inadequate; particularly, in view of the fact that executive may exercise its power of remission. In several cases the Supreme Court has put a clog on the power of the executive to remit the sentence by directing that the accused undergoing imprisonment for life shall not be released unless he had served a term of imprisonment as directed by it.\(^{20}\)

The law governing suspension, remission and commutation of sentence is both the statutory\(^{21}\) and the constitutional.\(^{22}\) The stage for the exercise of this power is post judicial, i.e., after the judicial power has come to an end. The duty to judge and award appropriate punishment according to law is the judicial function. When the judicial function ends, the executive function of giving effect to judicial verdict commences.\(^{23}\) In an attempt to bridge the hiatus between death sentence and life imprisonment, the judiciary has started to fix the period of imprisonment by imposing a restriction of 20 years or 25 years of sentence of imprisonment while awarding life imprisonment and thereby it has taken away the power of the executive from exercising its statutory power of remission. In some corner of the judiciary it is said that in India sentencing process has not been taken seriously with the result that it has become ‘judge centric sentencing’ rather than a ‘principled sentencing.’\(^{24}\) The ‘rule of law’ requires that any organ of the State should not act arbitrarily. There is an obligation to act in accordance with the rule of law which is one of the central features of constitutional

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\(^{18}\) It was inserted by Criminal Law Amendment Act, 1955.

\(^{19}\) Mohd. Munna v. State of West Bengal AIR 2005 SC 3440 Balakrishnan and Srikrishna, JJ.


\(^{21}\) Section 432 and 433 Criminal Procedure Code, 1973

\(^{22}\) Articles 72 and 161 of the Constitution of India

\(^{23}\) Ashok Kumar v. Union of India AIR 1991 SC 1791 per Ahmadi, J.

\(^{24}\) Sangeet Kumar v. State of Haryana AIR 2013 SC 447 Madan Lokur, J.
scheme and is a basic feature of the Constitution. Each organ should act within the power conferred upon it.

A trend towards prescribing period of imprisonment while imposing life imprisonment is a new phenomenon in India. In some cases the Supreme Court held that the accused shall not be entitled to claim remission before serving 20 years in jail; and in few cases 35 years. In *Shri Bhagwan v. State of Rajasthan*, a young culprit of 20 years of age barbarically battered five members of a family to death and was found guilty, *inter alia*, under section 302 of the Penal Code. The trial court sentenced him to death which was confirmed by the High Court. The Supreme Court opined that in reducing the death sentence a care is to be taken as to the fact that the punishment should be sufficient to have deterrent effect as well as the accused should not have further chance for relapsing into the crime and becoming danger to the society. The Court observed that:

…in the interest of justice, we commute the death sentence imposed upon the appellants and direct that the appellant shall undergo the sentence of imprisonment for life. We further direct that the *appellant shall not be released from prison unless he had served out at least 20 years of imprisonment including the period already undergone by the appellant*.27

In *Ram Anup Singh v. State of Bihar*, the appellant along with two other accused annihilated the entire family of his brother. The trial court found the accused guilty of murder under Section 302 IPC and sentenced the appellants with death. While the High Court confirmed the sentence of death against two accused, the appellant was awarded imprisonment for life. The Supreme Court did not find safe to maintain death sentence mainly on the ground that they were neither menace to the society nor were beyond reformation or rehabilitation. The Supreme Court under such circumstances observed that:

…on a careful consideration of all the relevant circumstances we are of the view that the sentence of death is not warranted in this case. We, therefore, set aside the death sentence awarded by the trial court and confirmed by the High Court to the appellants Lallan Singh and Babban Singh. We instead sentence them to suffer rigorous imprisonment for life with the condition that they shall not be released before completing an actual term of 20 years including the period already undergone by them.29

On certain occasions the court without putting on the basis of number of years before which the criminal would not be entitled for remission has debarred the criminal from seeking remission and also restricted the exercise of power of remission in such a case. In *Jayawant Dattatraya Suryarao v. State of Maharashtra*, commonly known as JJ Hospital shoot out case, the accused was involved in heinous act of terrorism and brutally killed two

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25 ADM, Jabalpur v. Shivakant Shukla AIR 1976 SC 1207
26 AIR 2001 SC 2342 The Bench comprised Shah and Balakrishnan, JJ.
27 Id at 2349 per Balakrishnan, J.
28 AIR 2002 SC 3006 The Bench comprised Shah, Singh and Sema, JJ
29 Id at per 3014 Singh, Bindeshwari Prasad, J
30 AIR 2002 SC 143
police constables on guard duty. The Supreme Court holding that it was not a fit case for imposition of death sentence, awarded imprisonment for life and directed that the accused will not be entitled to any commutation or premature release under Section 433A of the Criminal Procedure Code, Prison Act, Jail Manual or any other statute and rules made for the purpose of commutation or remission.

In Prakash Dhawal Khairnar v. State of Maharashtra, the appellant, who was having some dispute on partition of property, had annihilated entire family of his brother along with his own mother. The trial court sentenced him death penalty and the High Court had confirmed the sentence. The Supreme Court setting aside death sentence directed that the accused shall suffer imprisonment for life but he shall not be released unless he had served out at least 20 years of imprisonment.

In Nazir Khan v. State of Delhi, the trial court convicted the accused, interalia, under section 364 A of the Indian Penal Code, under Section 3 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and Section 14 of the Foreigners Act, 1946 as well. The accused/appellant was given death sentence by the Designated Court, TADA. The Supreme Court commuted the sentence of death to imprisonment for life and concluded:

...considering the gravity of the offence and dastardly nature of the acts and consequences which have flown out and, would have flown in respect of the life sentence, incarceration for the period of 20 years would be appropriate. The accused appellants would not be entitled to any remission from the aforesaid period of 20 years.

Where the accused has already remained in prison for fourteen years during trial and the Apex Court awards imprisonment for life, then in such a situation with the pronouncement of judgment by the Apex Court may entitle the accused for release if the government decides to remit the sentence. In Ramraj @Nanhu @ Binhu v. State of Chhatisgarh, the accused was found guilty of killing his wife and was sentenced to imprisonment of life. The High Court maintained the conviction and the sentence. The Supreme Court did not interfere with the conviction and the sentence awarded by the Sessions Court and confirmed by the High Court. However, during the course of hearing of the Special Leave Petition before the Supreme Court the counsel for the State pointed out that the petitioner has already undergone 14 years of actual imprisonment and it occasioned the Supreme Court to consider the petitioner’s release on the basis of period of sentence already undergone on the ground of the meaning given to the term “life imprisonment” or “imprisonment for life” used both under the Criminal Procedure Code and in the Indian Penal Code. The Supreme Court directing that the premature release of the accused would be considered by the authorities only after the accused completed twenty years in the prison, observed that:

31 AIR 2002 SC 340
32 AIR 2003 SC 4427 The Bench consisted of Doraiswamy Raju and Arijit Pasayat, JJ.
33 Id at 4443 per Pasayat, J.
34 AIR 2010 SC 420 The Bench comprised Altmas Kabir and Chauhan, JJ.
In the present case the facts are such that the petitioner is fortunate to have escaped the death penalty. We do not think that this is a fit case where the petitioner should be released on completion of 14 years’ imprisonment. The petitioner’s case for premature release may be taken up by the concerned authorities after he completes twenty years’ imprisonment, including remission earned.35

In Swamy Shraddhananda @ Murali Manohar Mishra v. State of Karnataka,36 the accused brutally killed a lady of fortunes and concealed her dead body by burying it in one of the rooms of the house itself. The Sessions Court found the accused guilty of murder and pronounced death sentence and which was later on confirmed by the High Court. In appeal to the Supreme Court the sentence of death was substituted by imprisonment for life and the Supreme Court also directed that the accused shall not be released from prison till the rest of his life. The Supreme Court pointed out that the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where death penalty might be substituted by punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission. The Supreme Court observed:

The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this court may find, as in the present appeal, that the case just falls short of rarest of rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally work out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court’s option is limited only to two punishments, one a sentence of life imprisonment, for all intent and purpose, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such course would indeed be disastrous. As far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belong to the court, i.e., the vast hiatus between 14 years’ imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option, primarily because of the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all.37

35 Id at 425 per Chauhan, J.
36 AIR 2008 SC 3040 The Bench comprised Agrawal, Singhvi and Aftab Alam, JJ.
37 Id at 3060 per Aftab Alam, J.
In some cases the Supreme Court has fixed the period to 35 years and the convict was held not entitled to claim remission before the expiry of stipulated period. In *Haru v. State of West Bengal*,38 the Supreme Court while substituting the sentence of death with imprisonment for life without remission unless the accused suffered in jail for thirty five years, observed:

That leaves with a question as to what sentence should be passed. Ordinarily, it would be the imprisonment for life. However, that would be no punishment to the appellant - accused, as he is already under the shadow of sentence imprisonment for life, though he has been bailed out by the High Court. Under the circumstances, in our opinion, it would be better to take the course taken by this court in case of Swamy Shraddhananda, where the court referred to the hiatus between the death sentence on one part and the life imprisonment which actually might come to 14 years imprisonment. In that case, the Court observed that the convict must not be released from the prison for rest of life or for the actual term, as specified in the order, as the case may be….We do not propose to send the appellant - accused for the rest of his life; however, we observe that *the life imprisonment in case of appellant accused shall not be less than 35 years of actual sentence, meaning thereby, appellant/accused would have to remain in jail for minimum of 35 years.*39

In *Neel Kumar @ Anil Kumar v. The State of Haryana*,40 the Supreme Court awarded life imprisonment with the note that the accused shall serve a minimum period of 30 years in jail without remission. The Court also directed that the case of accused for premature release shall not be considered before 30 years in jail. Similarly, in *Gurvail Singh @ Gala v. State of Punjab*,41 the Supreme Court held that though the extreme sentence of capital punishment was not warranted but, on the other hand, due to the fact that the appellants were instrumental for the death of four persons and also the nature of injuries which had inflicted the court opined that the accused deserved no sympathy. In this case, the Supreme Court while awarding life imprisonment to the accused observed that they must serve a minimum of thirty years in jail without remission. In instant case the appellant along with two others were tried for the offence of murder under section 302/34 of the Indian Penal Code. The trial court found no mitigating factors in favour of appellants and holding the case in the category of ‘rarest of rare cases’ imposed death sentence. On the question of conviction and sentence, the High Court concurred with the trial court. The Supreme Court found that there were few mitigating circumstances as enunciated in *Machi Singh case*.42 The mitigating factors in instant case were age of the appellant and the possibility of reformation. The Supreme Court observed:

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38 (2009) 15 SCC 551
39 Id at 565 per Sirpurkar, J.
41 AIR 2013 SC 1177
42 AIR 1983 SC 957
Age definitely is a factor which cannot be ignored, though not determinative factor in all fact situations. The possibility that the accused person could be reformed and rehabilitated is also a factor to be borne in mind.\footnote{Supra note 26 at 1181 per Radhakrishnan, J.}

It appears that the court has laid emphasis on the people’s perception while imposing sentence on the accused besides the crime and criminal test. The Court observed:

To award death sentence, the aggravating circumstances (Crime Test) have to be fully satisfied and there should be no mitigating circumstances (Criminal Test) favouring the accused. Even if both the tests are satisfied against the accused, even then the court has to finally apply the rarest of rare cases test (R – R - T) which depends on the perception of the society and not judge centric, that is, whether the society will approve the awarding of death sentence to certain kinds of crime or not. While applying this test, the court has to look into the variety of factors like society’s abhorrence, extreme indignation and antipathy to certain types of crimes like rape and murder of especially intellectually challenged minor girls, minor girls with physical disability, old and infirm women with these disabilities etc. examples are only illustrative and not exhaustive. Court awards death sentence because situation demands, due to constitutional compulsion reflected by the will of the people, and not judge - centric.\footnote{Ibid.}

In \textit{Sahib Hussain @ Sahib Jan v. State of Rajasthan}\footnote{2013 Cri L.J. 2359}, the trial court had convicted the appellant under Section 302 of the Penal Code for killing five persons and sentenced him to death. The appellant filed an appeal before the High Court and the matter was also referred for confirmation of death sentence. The High Court commuted the sentence of death to the imprisonment for life and also made a direction that the accused shall not be released from the prison unless he served out at least 20 years of imprisonment and also he shall not get the benefit of any remission either by the State or by the Government of India on any auspicious occasion. This order was challenged before the Supreme Court. The issue was whether the courts are warranted to limit the remission power under the Code for whatsoever reason. Up Holding the order of the High Court, the Supreme Court observed:

\ldots the fact that the in case on hand 5 persons died and also of the fact that the High Court commuted the sentence of death into life imprisonment imposing certain restrictions, the decision of the High Court cannot be faulted with and in the light of well reasoned judgments over a decade, we agree with the conclusion arrived at by the High Court\ldots \footnote{Id at 2369 per Sathasivam, J.}

The Court has also fixed 18 years before which premature release may not be claimed by the accused. In \textit{Ram Deo Prasad v. State of Bihar}\footnote{2013 Cri LJ 2369. The Bench comprised Aftab Alam and Mrs. Ranjana Prakash Desai, JJ.}, the appellant was convicted by the trial
court under Sections 376 and 302 Indian Penal Code for raping and inflicting injuries to a three year old girl child and was awarded death penalty. The matter was referred to the High Court which confirmed the death penalty. In Special Leave Petition before the Supreme Court, filed by the amicus the execution of death sentence was stayed. However, declining to confirm the death penalty, the Court observed:

…we feel it quite unsafe to confirm the death sentence awarded to the appellant…we set aside the death sentence given to the appellant and substitute it by imprisonment for life that should not be less than actual imprisonment for a period of 18 years. The case of the appellant for any remission may be considered only after he has served out 18 years of actual imprisonment.48

The court may impose sentence which is prescribed by law. The cases analysed makes clear that on several occasions the Court has commuted death sentence to life imprisonment but has prescribed, arbitrarily and without any legislative provision, a period of 18 years, 20 years, 25 years, 30 years and 35 years imprisonment and also has taken away the claim of the prisoner for premature release. Such a trend is not only affecting the right of the convict who is otherwise entitled for early release on the ground of good behavior and having shown the chances of reformation and rehabilitation but also the power of the government to release the offender has been affected.

III. Trend against Restricting the Executive Power of Remission

Premature release of convict imbibes reformative contents. A trend to make new category of sentence where the executive could not exercise its power of remission is recent and which appears to have arisen due to the failure to reduce the rate of serious crimes in the country. The gradual restraint on imposition of death sentence coupled with the increase in serious crimes, one of the probable reasons for such an approach may also be due to judicial pessimism that the reformative theory of punishment could not leave desired impact on the criminals. The court at times has also raised doubt as to whether the judiciary can restrict the power of remission statutorily given to the executive.

In Sangeet Kumar v. State of Haryana49, the Supreme Court expressed its concern about the trend regarding those cases where the death sentence ought not to be awarded and a life sentence was inadequate in view of the remission power vested in the executive award of sentence for 20 years, 25 years without remission. On the issue whether it is constitutionally permissible to restrict the power of remission vested in the appropriate government, the Court opined that the power of the executive has been nullified by such an award of sentence for 20 years, 25 years and in some cases even more and with the restriction of without remission. The Court observed:

. . .by giving a sentence in capital offence 20 years or 30 years imprisonment without remission, is to effectively injunct the appropriate government from

48 Id at 2376 per Aftab Alam, J.
49 AIR 2013 SC 447
exercising its power of remission for a specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever the reason.\textsuperscript{50}

The Supreme Court in \textit{Sahib Singh case}\textsuperscript{51} did not agree to the view expressed by Radhakrishan, J, in \textit{Sangeet Kumar case}\textsuperscript{52} that any detailed discussion by the larger bench in this case was required. The court concluded that:

\dots observation made by this court in Jagmohan Singh v. State of U.P. (AIR 1973 SC 947) and 5 years after the judgment in Jagmohan’s case, Section 433 A was inserted in the Code imposing a restriction on the power of remission or commutation in certain cases. After the introduction of Section 433 A another Constitution Bench of this Court in Bachan Singh v. State of Punjab (AIR 1980 SC 898) with reference to power with regard to Section 433 A which restricts the power of remission or commutation conferred on appropriate government, noted various provisions of Prisons Act, Jail Manual etc and concluded that reasonable and proper course would be to expand the option between 14 years imprisonment and death. The larger Bench has also emphasized that the court recourse to the extended option primarily because in the facts of the case the sentence of 14 years imprisonment would amount to no punishment at all.\textsuperscript{53}

The new emerging trend towards restricting the remission power vested in the executive is likely to enhance the crowd in prisons. Many prisons of the country are already having more criminal than the sanctioned strength.\textsuperscript{54} Further, it may give rise to an occasion for confrontation between judiciary and the executive.

\textbf{IV. Basis of New Trend}

The following justifications for prescribing a period while imposing life imprisonment before which remission cannot be claimed by the prisoner as discernable:

\textbf{(i) Sound Sentencing Policy}

\textsuperscript{50}Id. at 459 per Radhakrishnan, J.
\textsuperscript{51}2013 Cri L.J. 2359 Supra note 30
\textsuperscript{52}Supra note 34
\textsuperscript{53}Supra note 30 at 2368-69
\textsuperscript{54}According to information furnished by the National Crimes Record Bureau, New Delhi the number of prisoners in various jails of State of Uttar Pradesh is as: the District Jail of Aligarh has 2324 prisoners as against the capacity of 1088; in Central Jail of Agra 4108 prisoners as against the capacity of 1050; in Bareilly Central Jail 1908 prisoners as against the capacity of 1413; in Fatehgarh Central Jail has 2440 prisoners as against the capacity of 1370; Naini Central Jail, Allahabad 2400 against the capacity of 2080; in Varanasi Central Jail 1991 prisoners against the capacity of 948; in Pratapgarh District Jail 1537 against the capacity of 458; in Fatehpur District Jail 1869 prisoners against the capacity of 670; in Banda District Jail 1165 prisoners against the capacity of 567; in Hamirpur District Jail 540 prisoners against the capacity of 400; in Mirzapur District Jail 993 prisoners against the capacity of 312; in Varanasi District Jail 2103 as against the capacity of 747 and in Ghazipur District Jail 566 prisoners as against the capacity of 397.
The new trend of pronouncing term sentence in life imprisonment and putting an embargo on the power of the executive to remit the sentence imposed on the convict started on the ground of good and sound principle of sentencing. In *Dalbir Singh v. State of Punjab*\(^{55}\), the Supreme Court reduced the sentence of death to life imprisonment but put a rider that the accused shall not be released unless he had served out at least 20 years imprisonment. The Court observed that:

... we suggest that life imprisonment which strictly means imprisonment for the whole of the man’s life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of convicting court, be subjected to the condition that the sentence of imprisonment shall last as life lasts where there are exceptional indicators of murderous recidivism and the community cannot run the risk of the convict being at large.\(^{56}\)

**(ii) Standardization or Categorization of offences**

It appears that the Supreme Court in making endeavor to punish the convicts guilty of heinous offences has made an attempt to restrict the remission power of the government so that the accused without losing his life may be adequately punished for the offence committed by him derived its basis from the observation of the Constitution Bench in *Jagmohan Singh v. State of U.P.*\(^{57}\) and in *Bachan Singh v. State of Punjab*\(^{58}\) which firmly had declined to draw and making standardization or categorization of cases for award of death sentence. In Jagmohan Singh case, the Supreme Court observed:

Laying down of standards to the limited extent possible as was done in the Model judicial Code would not serve the purpose. The exercise of judicial discretion on well recognized principles is in the final analysis the safest possible safeguard for the accused.\(^{59}\)

The refusal of the Supreme Court to standardize the cases for imposition of death sentence appears to be one of the bases for limiting the remission power of the executive.

**(iii) Complete Justice**

Article 142 of the Constitution of India provides that the Supreme Court in exercise of its jurisdiction may make such order an order as is necessary for doing complete justice in any matter or cause pending before it. The Supreme Court at times has exercised this residual power in matters pertaining to punishment.\(^{60}\) Any criminal court including the High Court may pass the sentence authorized by law.\(^{61}\) While putting restriction on remission in sentence of imprisonment for life, the Supreme Court appears to invoke, though it did not categorically refer, the power given under Article 142. If it is so, then an order to do complete justice must be consistent with the provisions of the relevant statutory laws. It is regarded as a valuable

\(^{55}\) AIR 1979 SC 1384

\(^{56}\) Id at 1389 per Krishna Iyer, J.

\(^{57}\) AIR 1973 SC 947. The Constitutional Bench comprised Sikri, C.J., Ray, Dua, Palekar and Beg, JJ.

\(^{58}\) AIR 1980 SC 898

\(^{59}\) AIR 1973 SC 947 at 958 per Palekar, J.

\(^{60}\) Ashok Kumar v. State of Haryana 2010 Cri L J 4402 (SC)

\(^{61}\) See, Chapter III Power of Courts under the Criminal Procedure Code, 1973
weapon in the hands of the Court to prevent “clogging or obstruction of stream of justice”. This power is curative in nature and cannot be construed as powers which authorize the Court to ignore the substantive rights of a litigant. This power cannot be used to build a new edifice by ignoring express statutory provisions dealing with the subject.62 The power cannot be used to supplant substantive law applicable to the case or cause under consideration. Thus in order to minimize the hiatus between life imprisonment on the one hand and death sentence on the other, the court may avoid in taking the help of concept of complete justice.

V. Remission under Criminal Procedure Code, 1973

Remission is a statutory provision under the Criminal Procedure Code which is based on modern penological thought. Section 433-A belongs to that class of prisoners who do not deserve to be released unless they have completed 14 years of incarceration. Section 433-A restricts the power of the government63 given to it under section 432 and 433 of the Criminal Procedure Code and it is not to be exercised in a way to enable the two categories of convicts referred to for freedom before they have completed 14 years of actual imprisonment. The stage for the exercise of this power is post – judicial. The duty to judge and award appropriate punishment according to law is a judicial function. When the judicial function ends the executive function of giving effect to the judicial verdict commences.64

A brief historical background of Section 433-A would not be out of context. The Law Commission in its Forty Second Report had suggested changes in the Indian Penal Code. In pursuance of those suggestions, a Bill65 was introduced in Rajya Sabha. One of the proposals in the said Bill was to bifurcate Section 302 of the Indian Penal Code into two parts. First, provided that, except in the cases specified in the second part, the punishment for murder will be imprisonment for life where as the second part applicable to more heinous crimes enumerated in clauses (a), (b) and (c) provided for death or life imprisonment for life. The Bill was referred to the Joint Parliamentary Committee. The Joint Parliamentary Committee after making several changes in the Bill66, but retaining the amendments proposed in Section

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62 Supreme Court Bar Association v. Union of India AIR 1998 SC 1895 where it was held that the power of the Supreme Court is though quite wide but it cannot be extended to determine whether an advocate was also guilty of professional misconduct; See also, M.S. Ahlawat v. State of Haryana AIR 2000 SC 168 where it was held that the Supreme Court does not assume jurisdiction by issue of notice proposing conviction for forgery. It was though not clear whether the power under Art. 142 of the Constitution was exercised to convict the petitioner but it was assumed that it was exercised by that power as there was no other provision enabling the passing of such an order; M. C. Mehta v. Kamal Nath AIR 2000 SC 1997 it was held that Art. 142 of the Constitution cannot be pressed into aid in a situation where action under the said Article would amount to contravention of the specific provisions of the statute. The Court cannot take the recourse to Article 142 to impose fine.

63 Section 433A of the Criminal Procedure Code reads as: “Restriction on Power of Remission or Commutation in certain cases: Notwithstanding anything contained in section 432, where a sentence for imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 in to one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

64 See, Ashok Kumar v. Union of India AIR 1991 SC 1791

65 Amendment Bill No. XLII of 1972 was introduced on December 11, 1972

66 The Joint Parliamentary Committee had recommended for deletion of Section 303 of the Penal Code. Section 303 was declared unconstitutional by the Supreme Court in Mithu v. State of Punjab AIR 1983 SC 473
302, IPC, presented its report to the Rajya Sabha. The Joint Parliamentary Committee had also recommended for the substitution of Section 57 of the Penal Code by inserting a proviso to the effect that:

where a sentence of imprisonment for life is imposed on conviction of a person for a capital offence, or where a sentence of death imposed on a person has been commuted into one of the imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

The Joint Parliamentary Committee had a reason in introducing such a proviso. The Committee had observed that sometimes due to grant of remission even murderer sentenced or commuted to life imprisonment was released at the end of 5 to 6 years.’ The Committee felt under the circumstances that such convict should not be released unless served at least 14 years of imprisonment. It is thus evident that the proposed proviso was intended to be applied to those convicts who were convicted of capital offence.

Consequent upon the recommendations of the Joint Parliamentary Committee two Bills, namely, Criminal Procedure Code (Amendment) Bill, 1978 and the Indian Penal Code (Amendment) Bill, 1978 were introduced. The Rajya Sabha passed the Indian Penal Code Amendment Bill, but it lapsed in Lok Sabha. However, the Criminal Procedure (Amendment) Bill was passed by both the Houses of the Parliament after incorporating the proviso to section 57, IPC in it. In other words, the proviso which was intended to be inserted in Section 57 of the Indian Penal Code was, in fact, inserted in the Criminal Procedure Code, 1973. During the discussion, the Parliament felt that as the said proviso to Section 57 IPC appropriately related to Chapter XXXII of the Criminal Procedure Code, 1973 therefore it would be expedient to insert the said proviso in the Criminal Procedure Code itself and, thus, Section 433-A was inserted in the Criminal Procedure Code. Moreover, the proposal to bifurcate Section 302 of the Penal Code could not be passed as it lapsed. To cut the story short, while the Criminal Procedure Code (Amendment) Bill 1978 was passed after introducing Section 433 A in it, but the Indian Penal Code (Amendment) Bill, 1978 could not be passed.

In Ashok Kumar v. Union of India, the validity of Section 433-A was one of the issues. The counsel for the petitioner while arguing branded Section 433-A of the Criminal Procedure Code as a ‘legislative fraud’ (which the Court euphemistically called colourable) in view of the fact that the provision was approved by the Parliament on the assurance that the said provision was complementary to various amendments proposed in the Indian Penal Code Bill, 1978. However, the Court did not accept the contention that the provision was in

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67 On January 29, 1976
68 The term ‘capital offence’ was defined in Clause 15 of the Bill to mean ‘an offence for which death is one of the sentence provided by law or where sentence of death was commuted into one of life for imprisonment and not to those who were governed by First Part of the proposed Section 302, IPC.’
69 The provision came into effect on December 18, 1978
70 AIR 1991 SC 1792. The Bench consisted of Ahmadi, Sawant and Agrawal, JJ.
any way colourable as the Parliament was competent to make the law on this subject matter. It was not a case of legislative incompetence, the court held.

VI. Nature of Prison Rules and Short Sentencing Policy

The government is empowered to make rules concerning the administration of prison and prisoners. The scope and relevancy of Rajasthan Prison (Shortening of Sentences) Rules, 1958 and Section 433-A of the Criminal Procedure Code, 1973 were considered in *Ashok Kumar @ Golu v. Union of India.* The Rajasthan Rules provided that a ‘lifer’ who had served actual sentence of about nine years and three months was entitled to be considered for premature release if the total sentence including remission worked out to be 14 years and the convict was reported to be of good behavior. The grievance of the convict was that his case for premature release was not considered by the concerned authority in view of the embargo laid down by Section 433-A of the Criminal Procedure Code. It was held that the Remission Rules have limited scope and in case of a convict undergoing sentence for life imprisonment, it acquires significance only if the sentence is commuted or remitted subject to Section 433-A of the Criminal Procedure Code. The nature of provisions contained in Para 516-B of the Punjab Jail Manual providing for remission and executive instructions were considered in *Sadhu Singh v. State of Punjab.* It was held that the Jail Manual contained only executive instructions and had no statutory force.

In *State of Haryana v. Balwan,* the respondent had filed a writ petition before the High Court of Punjab for premature release of life convicts. In considering the entitlement of premature release, the High Court had held that the Government Policy/instructions in force at the time of their conviction by the trial court would be a relevant consideration and the State government was not right in applying the subsequent policy decision and instructions that were in force at the time when the case was taken up for consideration. The State of Haryana filed a writ petition against this order of the High Court. Allowing the writ, the Supreme Court observed:

...no life convict can validly contend that his case for premature release should be considered according to the Government policy/instructions that were in force on the date on which he came to be convicted...

In *State of Haryana v. Jagdish,* this issue again came up for consideration before the Punjab and Haryana High Court. The High Court this time deviating from *Balwan case* held that the case of convict was to be considered on the strength of the policy existing on the date of conviction. The Supreme Court in appeal justified the order of the High Court. The Supreme Court emphasizing upon the beneficial construction in favour of the accused opined that if a liberal policy prevails on the date of consideration of the case of the life convict for premature release such benefit should be extended to him and it observed:

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71 AIR 1991 SC 1792
72 AIR 1984 SC 739
73 AIR 1999 SC 3333. The bench comprised Phukan and Nanavati, JJ.
74 Id at 3335 per Nanavati, J.
75 AIR 2000 SC 1690 at 1704 per Chauhan, J
76 Supra note 58
…State authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of his conviction that his case for premature release would be considered after serving the sentence, prescribed under the short sentencing policy existing on that date.\textsuperscript{77}

In \textit{Lakshman Naskar, Sisir Roy, Zahid Hussein and Arun Dey v. State of West Bengal}\textsuperscript{78}, the petitioners undergoing life sentence who had completed 20 years of their continued detention including the remission earned, applied for premature release under Rule 591 (4) and (29) of the West Bengal Rules (Relating to Premature Release of Life Convicts)\textsuperscript{79} and it was rejected by the Government on the ground of police report called for the purpose revealed that there were chances of committing crime in future also. The police report was to be based on certain parameters like whether the offence was an individual act without affecting the society at large, chances of future recurrence of committing crime, loss of potentiality of the convict to commit crime in future, the fruitfulness of continued confining and the socio-economic condition of the convict’s family. The Court quashed the impugned order of the Government on the ground that the Government instead of paying sufficient attention on other parameters laid its sole emphasis on the fact that the chances of committing the crime again. The Court found that the State Government did not follow the relevant rules/guidelines.

In \textit{Mohd. Munna v. State of West Bengal},\textsuperscript{80} the petitioner, who was convicted under Section 302 read with Section 34 of the Indian Penal Code and was sentenced to imprisonment for life, filed a writ petition under Article 32 of the Constitution claiming that since the duration of life imprisonment is equivalent to 20 years and as he has already undergone 21 years of imprisonment and thus under Rule 571 (c) of the West Bengal Jail Code he was entitled to be released for prison. Referring to the observation of the Judicial Committee of the Privy Council in \textit{Kishori Lal v. Emperor}\textsuperscript{81} where it was held that the meaning of imprisonment for life is not to be taken as to mean in all cases 20 years, the Court observed:

\begin{itemize}
\item \textsuperscript{77} Supra note 60 at 1704 per Chauhan, J.
\item \textsuperscript{78} AIR 2000 SC 986 The Bench comprised Nanavati and Phukan, JJ.
\item \textsuperscript{79} Sub Rule (4) and (29) of Rule 591 of the West Bengal Rules reads as: (4) In considering the cases of prisoners submitted to it under sub rules (1) and (2), the State Government shall take in to consideration – (i) the circumstances in each case; (ii) the character of the convict’s crime; (iii) the conduct in prison and (iv) the probability of his reverting to criminal habits or instigating others to commit crime. If the State Government is satisfied that the prisoner can be released without danger to the society or to the public it may take steps for issue of orders for his release under Section 401 of the Code of Criminal Procedure, 1898.
\item \textsuperscript{80} AIR 2005 SC 3440. The bench comprised Balakrishnan and Srikrishna, JJ.
\item \textsuperscript{81} AIR 1945 PC 64
\end{itemize}
The Prisons Rules are made under the Prisons Act and the prisons Act by itself does not confer any authority or power to commute or remit sentence. It only provides for regulation of the prisons and for the terms of the prisoners confined therein. Therefore, the West Bengal Correctional Services Act or the West Bengal Jail Code does not confer any special right on the petitioner herein.\textsuperscript{82}

The rules framed by the government to regulate the prison authority do not confer any power on the prison authorities to release the prisoner prematurely. However, the power is vested in the government and it may remit the sentence on the basis of report submitted by the prison authorities. Section 433A of the Criminal Procedure Code, 1973 limits the power of government in case of convict undergoing imprisonment unless he has completed minimum 14 years; in other words, remission in such case is possible only after the completion of 14 years in prison.

VII. Relationship between Clemency Power and Statutory Power of Remission under Criminal Procedure Code

The Constitution of India vests clemency power in the President of India and the Governors of States.\textsuperscript{83} The clemency power is unfettered. In \textit{State of Punjab v. Joginder Singh}\textsuperscript{84}, it was held that while exercising constitutional power under Article 72/161, the President or the Governor, as the case may be, can exercise an absolute power which cannot be fettered by any statutory provision such as Section 432, 433 and 433-A of the Criminal Procedure Code. This power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provision or Prison Rules. Section 433-A of the Criminal Procedure Code cannot and does not affect the constitutional power conferred on the President or the Governor.\textsuperscript{85}

The right of the convict is limited only to the extent that his case may be considered in accordance with the relevant rules but he cannot claim premature release as a matter of right. A convict undergoing a sentence does not have right to get remission of sentence but he has a right to have his case considered for grant of remission.\textsuperscript{86} However, to say that the power under Article 72/161 cannot be exercised before the convict completes the incarceration period provided in the Short Sentencing Policy would be inconsistent with the theory that clemency power is unfettered. Even if a life convict does not satisfy the requirement of remission rules/Short Sentencing Schemes, there can be no prohibition for the President or the Governor, as the case may be, to exercise the power of clemency under Art. 72/161 of the Constitution.\textsuperscript{87} It is clear that the judiciary has not interfered with the executive power vested under the Constitution but has only restricted the statutory power of remission. In view of this, it may be submitted that the court may avoid in putting the executive power of remission

\textsuperscript{82} Supra note 65 at 3445 per Balakrishnan, J.
\textsuperscript{83} Article 72 and 161
\textsuperscript{84} AIR 1990 SC 1396
\textsuperscript{85} Ashok Kumar v. Union of India AIR 1991 SC 1792
\textsuperscript{86} State of Haryana v. Mahender Singh (2007) 13 SCC 606
\textsuperscript{87} Supra note 60
under any eclipse by prescribing a term beyond the statutory limit and thereby may eliminate
the chances of conflict with other organ of the State i.e., executive.

VIII. Separation of Powers

The principle of separation of power argues for separation of governmental power in
distinct organs of the State. Though the Constitution of India does not specifically provide for
separation of power but the principle has not been altogether discarded. In Ram Jawaya v. State of Punjab\textsuperscript{88}, the Supreme Court observed:

The Indian Constitution has not indeed recognized the doctrine of separation of
powers in its absolute rigidity but the functions of the different parts or
branches of the Government have been sufficiently differentiated and
consequently it can very well be said that our Constitution does not
contemplate assumption, by one organ or part of the State, of functions that
essentially belong to another.\textsuperscript{89}

The concept of separation of power has been recognized as one of the basic structures
of the Constitution of India.\textsuperscript{90} In State of Bihar v. Bal Mukund Sah,\textsuperscript{91} the Supreme Court observed:

Such an exercise, apart from being totally forbidden by the constitutional
scheme, will also fall foul on the concept relating to separation of powers
between the legislature, the executive and the judiciary as well as the
fundamental concept of an independent judiciary. Both these concepts are now
elevated to the level of basic structure of the Constitution and are the very
heart of the constitutional scheme.\textsuperscript{92}

In view of the fact that principle of separation of power though not categorically
incorporated under the Constitution of India but it has assumed the status of basic feature of
the Constitutional scheme. Thus any of the State organs is not permitted to usurp and
encroach upon the domain of another organ. The trend of the court in restricting the statutory
power of remission given to the executive may create confusion and conflict. It may be
avoided by incorporating appropriate amendment.

IX. Conclusion

The sound penal policy requires that the quantum of punishment imposed on the
convict must be commensurate with the seriousness of the crime. In serious offences the
statutes usually provide death sentence or, alternatively, imprisonment for life. The
imposition of death sentence is an exception and life imprisonment is rule. The imposition of
death sentence is in rarest of rare cases. The government has been empowered to release the
convicted prisoner prematurely under certain circumstances is based on reformatory theory of
punishment. Where the convict has committed serious offence and the court is of the view

\textsuperscript{88} AIR 1955 SC 549
\textsuperscript{89} Id at 556
\textsuperscript{90} Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299 per Ray C.J. and Beg, J.
\textsuperscript{91} AIR 2000 SC 1296
\textsuperscript{92} Id at 1317 per Majmudar, J.

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that it is not an appropriate case for the imposition of death sentence and thus awards imprisonment for life, but at the same time it apprehends that the convict may not be adequately punished for his guilt because the executive may prematurely release such a convict by resorting to statutory power conferred on it, in such circumstances the court is not only prescribing the minimum term of imprisonment but also putting restriction on the power of remission vested in the executive. This judicial attitude shifts the focus away from the offender’s character, background, history and background. The purpose of punishment is not only to restrain and discipline the society but also it helps in creating a disciplined society. As creation of a category of punishment, lying between death sentence and imprisonment for life, appears to be sensitive as it is likely to create a wrong impression and also to affect relationship with other organs of the State by creating a scope for confusion and conflict, it would be appropriate on the part of the to initiate appropriate legislation in this regard on the pattern of Indian Penal Code (Amendment) Bill, 1978 so that the accused be adequately punished, the possible conflict between various organs of the State could be avoided and the constitutional scheme could be maintained.
LEGAL AID FOR CAPITAL OFFENDERS: A CRITICAL ANALYSIS

Ms. Awekta Verma*

ABSTRACT

Legal Aid is an important means of ensuring access to justice for all; be it a victim, an accused, a complainant or a destitute. Right to legal aid is a necessary concomitant in having the Rule of Law in a democratic polity. Over a period of time legal aid has become an all encompassing concept; it has widened in its scope and dimensions, increased its reach and its object and context has also undergone a paradigm shift. This has come about as a result of public interest litigations by public spirited organizations or individuals, judicial exhortations and the reports of various committees set up by the Government from time to time. Creative interpretation of right to legal aid by the judiciary has made it a formidable right and resulted in enactment of laws by the legislature on this aspect. Though legal aid was first extended to criminals facing death sentence and later on to other categories but still a lot remains to be done. In case of capital offenders the issue assumes increased importance as it is the life of the person which is at stake and majority of them usually belong to economically and socially disadvantaged section of the society. Being poor they cannot afford to have a lawyer. Illiteracy and lack of legal awareness further compound their problems. Lack of proper or incompetent legal representation can result in wrongful convictions and award of death sentence. Moreover, capital offenders require legal aid at different stages till all the remedies have been exhausted but provisions for legal aid hardly cover all the aspects. A holistic approach involving all the stakeholders is much desired in this area as it has been time and again pointed out by the courts that the provisions for legal aid are there on paper but the spirit of the law has been defeated. The paper seeks to critically analyse the provisions for legal aid for capital offenders and the gap therein, in theory and practice. In the light of recent judicial pronouncements and the legislative measures available, it is to be seen that how far we have succeeded in making legal aid for capital offenders a successful venture both in letter and spirit. Also, it explores that how access to justice is facilitated or is denied to capital offenders in the criminal justice administration.

I INTRODUCTION

LEGAL AID in common parlance means providing to an indigent person having limited means services of a lawyer at State expense in courts in civil or criminal matters. It is of extreme importance in administration of criminal justice as it affects the life and liberty of the individuals. The poor come before the courts generally as accused and because of their economic and social disabilities fail to access the legal processes to demand or secure justice.
Complex and multiple substantive laws, technicalities of law of procedure and proof and lengthy trials in the adversarial system, adopted and established by us has made legal aid a systemic need.\(^1\) Without it the constitutional guarantees of fair trial and equal justice can’t be met. The capital offenders\(^2\) require it the most as it is a matter of life or death for them. Whether sentenced to life or given death sentence or acquitted, availability of competent and quality legal services to the capital offender plays a crucial role. Without it he does not stand a chance, as he has to match the best of the prosecution talent engaged by the state. This was recognized quite early as the legal aid was formally given in India by first making it available to capital offenders only.\(^3\) Later on, it was extended to other offenders and now the policy is to extend it to anyone in need- in civil as well as criminal matters. Thus, the right of free and competent legal aid, is, a ‘sine-qua-non’, in criminal justice administration, particularly in case of capital offenders for ensuring that the rule of law, which is one of the important basic structures of the Constitution of India is not only maintained but also preserved and gets deeply ingrained in the system.

The scope, extent, contours and dimensions of legal aid have changed, diversified and grown over the years but still there is a large gap between theory and practice. This impacts the capital offenders the most. Being the first to receive the legal aid, the context of their problems and demands has yet not changed despite the enactment of new laws and excellent landmark judgments by the Supreme Court. The paper seeks to critically analyse and examine the provisions for legal aid to capital offenders and the loopholes therein. It traces the development and application of law on this aspect and seeks to chart the road ahead. It is to be analysed and examined as to how the competing claims of the right to equality, dignity, not to be deprived of ones life or liberty except by just, fair and reasonable procedure, of the capital offender, on the one hand and the society’s feeling of vengeance, retribution, its sense of security and the need for maintaining law and order, on the other have been balanced and reconciled while providing for legal aid to the capital offender. For the success of any legal aid programme due consideration and proper harmonization of these aspects is imperative.

II LEGISLATIVE MATRIX

The right to legal aid is enshrined in the Constitution of India as well as the Criminal Procedure Code and other Statutes and Schemes which run parallel to them and further supplement and elaborate the scope and extent of the legal aid.

A. Statutory Provisions

\(^1\) See Prof.N.L.Mitra, “Towards a relevant legal aid logic and strategy in India”, (1989)1NLSJ82

\(^2\) Capital offenders mean those persons who are charged of committing such offences which on conviction entail death penalty. There are nine statutes which provide for death penalty for different offences in India.

\(^3\) Though Section 340 Cr.P.C.1898 recognised the right of legal representation of the accused, it did not provide for legal aid at state expense. That was a matter of judicial discretion and was given in capital cases only. For details see infra Part II and III of this paper.
Right to legal aid, in a criminal trial is a fundamental human right. But prior to independence, an accused facing trial for a capital offence could not as a matter of right ask to be defended at state expense and it depended on the discretion of the trial judge. It was not a statutory right and judicial discretion decided the fate of the accused. Thus, right to counsel was recognized in the Criminal Procedure Code,\(^4\)1898 which under Section 340 provided that, “Every person accused before any Criminal Court may of right be defended by a pleader.” The word ‘accused’ in the above section was interpreted in different ways by the courts and that caused a lot of confusion regarding the scope of the section. The conflict was resolved with the amendment of Section 340 by CrPC (Amendment) Act, 1923.\(^5\) The amended Section provided that, “Any person, accused of an offence before the Criminal Court or against whom proceedings are instituted, under this Code, or any such Code, may of right, be defended by a pleader.”

After independence it was realized that to ensure equitable justice and fair trial to an accused in criminal proceedings it was essential that he gets competent and efficient legal representation to defend himself. This realization came about slowly as evidenced by Law Commissions 14\(^{th}\) and 41\(^{st}\) Reports wherein it was recommended that legal aid at state expense should be provided at least to an accused facing sessions trial. However, in its 48\(^{th}\) Report a more progressive outlook was adopted by the Law Commission of India as it recommended that legal representation at state expense should be given to all accused.\(^6\)

The recommendations of the Law Commission were accepted to a limited extent and given effect to as they were codified in Sub-section (1) of Section 304 of the Criminal Procedure Code, 1973.\(^7\) It provides for legal aid to a poor or an indigent unaided accused in a sessions case and it is a mandatory duty. Only an accused facing sessions trial is eligible for legal aid at state expense under Section 304 CrPC,1973. Though legal aid is required at all stages since the time of arrest, it leaves out the pre-trial and post-trial stages. Nonetheless, under Section 304(3), the State Government, may, by notification, direct that the provisions of Sub-Section (1) will apply to any class of trials before other courts in the State.\(^8\)

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\(^4\) Though the Criminal Procedure Code was amended from time to time, the right to counsel always existed. It was provided under Section 432 in Cr.P.C1861, under Section 186 in Cr.P.C.1872, under Section 340 in Cr.P.C.1882. See S.Murlidhar, Law,Poverty and legal Aid: Access to Criminal Justice 82-83(2004)

\(^5\) The emphasis in Section 340 Cr.P.C 1923 was on "any person accused of an offence in a criminal case is entitled to be defended, as of right, by a lawyer". Presently, Section 303 of the new Criminal Procedure Code, 1973, also, confers "a right on a person, accused of an offence before the Criminal Court or against whom proceedings are instituted under this Code, to be defended by a pleader of his choice".


\(^7\) Hereinafter mentioned as CrPC,1973.

\(^8\) Section 304 CrPC: Legal Aid to accused at State expense in certain cases :--
(1) Where, in a trial before the Court of Sessions, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.
(2) The High Court may, with the previous approval of the State Government, make rules providing for -
(a) the mode of selecting pleaders for defence under sub-section (1);
(b) the facilities to be allowed to such pleaders by the courts;
The suggestion given by the Law Commission in its Forty-Eighth Report that the State shall make provision for providing free legal aid for all accused who are undefended by a lawyer for want of means still remains to be implemented. The discretion lies with the court in granting free legal aid to indigent accused so left out of the statute if the interest of justice necessitates it.

The lacunae regarding legal aid which have been left in the Criminal Procedure Code are addressed to some extent in the Legal Services Authorities Act 1987 and the Regulations and Rules made there under. By the time the LSAA, 1987 was enacted the doctrine of legal aid had undergone a paradigm shift. Catenae of judicial decisions had elevated the status of legal aid to that of fundamental right. There was a shift from viewing it as a welfare measure to recognizing it as a constitutional right. Keeping up with the evolving perceptions, the "legal aid" phrase was deliberately not used and instead the expression "Legal Services" was included. Justice J.N.Bhatt in Labhu Laxman v. State of Gujarat has aptly explained the meaning and concept of legal aid in the following words:

'Aid' means, to assist or to help, whereas, "services" means to perform the duty. Therefore, it can, safely, be concluded that the legal aid is not, merely, a right of the needy and the deserving but is, correspondingly, duty of the authority to make it available to the deserving and the needy and more so in a case of a person who is facing the charge in a criminal trial.

The criteria for giving legal aid under LSAA, 1987 is provided under Section 12 which states that:

Every person who has to file or defend a case shall be entitled to legal services under this Act if that person, is---
(a) a member of a Scheduled Caste or Scheduled Tribe;
(b) a victim of trafficking in human beings or beggar referred to in Article 23 of the Constitution;
(c) a woman or a child;
(d) a person with disability as defined in clause (i) of section 2 of persons with disabilities [Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);]
(e) person under circumstances of undeserved want such as being a victim of mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Sessions.

9 Hereinafter mentioned as LSAA, 1987.
10 Section 2(c) of LSAA, 1987 defines the term ‘Legal Service’ as: “Legal Service” includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advise on any legal matter.
11 MANU/GJ/0365/1998
(f) an industrial workman; or

(g) in custody, including custody in protective home within the meaning of clause (g) of Section 2 of the Immoral Traffic (Prevention) Act, 1956(104 of 1956) or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987(4 Of 1987); or

(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.

Further Section 13 LSAA, 1987 prescribes about entitlement to legal services. Anyone satisfying the criteria as listed in Section 12 and having a prima facie case to prosecute or defend is eligible for legal aid.¹²

Thus, legal aid in criminal case under section 13 can be denied if no prima facie case is found to exist. However, it is no longer a matter of charity or mercy. It is an important right backed by the Constitution and that is the reason why the Government of India in its national and legal aid policy programmes devised the Legal Services Authorities Act, 1987, which has been amended from time to time to keep pace with the new challenges faced in its implementation.

B. Constitutional Provisions

The basis of providing legal aid under Criminal Procedure Code 1973, LSAA 1987, various schemes of states or by non-governmental organizations is the Constitution of India itself. It is the touchstone at whose altar is determined the scope and enforceability of legal aid. The Preamble of the Constitution incorporates the doctrine of Equal Justice. It talks of justice in a broader perspective as social, economic and political. This objective is further strengthened by the constitutional provisions in Arts. 14, 21, 22, 32, 39-A, 51-A and 226 of the Constitution of India. For about two decades after independence only Article 22(1) was understood as providing for the right to legal aid. Article 22(1) reads: “No person who is arrested shall be….denied the right to consult, and be defended by, a legal practitioner of his choice.” But it did not specifically talk about right to legal aid at state expense. It was in the seventies that Article 14 and 21 were interpreted in a way so as to make the right to legal aid

¹² Section 13,LSAA 1987 states that:

(1) Persons who satisfy all or any of the criteria specified in section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima facie case to prosecute or to defend.

(2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit.
implicit in them. During this time, the right to legal aid was included as a Directive Principle by Constitution (42nd Amendment) Act 1976, whereby Article 39-A was inserted. Providing for equal justice and free legal aid it proclaims:

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

This article has served as an interpretative tool for Article 21. It has again amplified and magnified the concept and philosophy of free, fair and full justice. It emphasises that free legal service is an inalienable element of 'reasonable, fair and just' procedure as without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice.

C. Human Rights Instruments

In order to be human, existence of certain fundamental freedoms and human rights are necessary. The dignity and worth of human beings cannot be assured of otherwise. All human beings are born free and equal in dignity and rights. The same philosophy permeates the Universal Declaration of Human Rights, 1948; the Constitutional provisions enshrined in Chapter III and IV, the provisions of Legal Services Authorities Act 1987 and the CrPC 1973. Articles 3, 8, 10 and 11 of the Universal Declaration of Human Rights 1948, insist on legal aid when liberty of a person is threatened. Article 3 of Universal Declaration of Human Rights guarantees the liberty of a citizen and its deprivation shall be only in accordance with law. The accused has the fundamental right to defend himself under Article 10 of Universal Declaration of Human Rights. Right to legal aid for the same permeates all the Articles mentioned above and has been specifically provided in Article 14(3)(d) International Covenant on Civil and Political Rights, 1966 to which India is a party.

14 Universal Declaration of Human Rights recognizes need for counsel for ensuring fair trial in its various Articles. Its Article 3 reads as follows:
“Every one has the right to life, liberty and security of person.”
Its Article 8 provides:
“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law.”
Ensuring due process its Article 10 states:
“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial Tribunal, in the determination of his rights and obligations and of any criminal charge against him.”
Article 11 guarantees everyone charged with a penal offence all the rights necessary for defence. It reads as follows:
“Article 11(1) Everyone charged with a penal offence has the right to be presumed, innocent until proved guilty according to law in a public trial, at which he has had all the guarantees necessary for his defence.
(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor, shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

15 Hereinafter referred as ICCPR. Further, Article 14(3)(d) of the International Covenant on Civil and Political Rights guarantees to the citizens of nations signatory to it many rights in the determination of criminal charge and confers on them certain minimum guarantees. Its Article 14(3) provides for following rights:
guarantees to indigent citizens of member countries the right to be defended and to have legal assistance without payment. The legal provisions providing for legal aid in India very well conform to India’s international obligations under the above mentioned international instruments.

III Judicial Matrix

Judiciary has played a seminal role in bringing to life the right to legal aid as provided for in the law by construing the provisions in a progressive and liberal manner. The journey has been from conservative to an activist approach. In *A.K.Gopalan v. State of Madras* it was quite acceptable that any law is sufficient to deprive the life or personal liberty. This traditional approach continued in *Janardan Reddy v. The State of Hyderabad*. It was held in this case that ‘the right to be defended by a legal practitioner of his choice’ could only mean a right of the accused to have the opportunity to engage a lawyer and did not guarantee an absolute right to be supplied with a lawyer by the State. The Court pointed out that the American rule enunciated in the case of *Powell v. Alabama* founded on the doctrine of ‘due process’ was not applicable to India and that under Article 22(1) there was no absolute right to an accused to be supplied with a lawyer by the State. Thereafter, the insertion of Article 39A by the Constitution (Forty-Second) Amendment Act, 1976, and the enactment of Sub-section (1) of Section 304 of the CrPC 1973, led to replacement of the traditional view expressed by this Court on the interpretation of Article 22(1) of the Constitution in *Janardan Reddy*. The shift in the stance of the judiciary is very much visible from the landmark judgment given in *Manealka Gandhi v. Union of India*. It was categorically stated in this case that the procedure under which a person may be deprived of life or liberty should be "reasonable, fair and just". And a procedure, which does not make available the legal services to an indigent accused person, who is too poor to engage a lawyer and therefore has to go through the trial undefended cannot be regarded as "reasonable, fair and just". After *Manealka Gandhi* it is now well settled that the procedure contemplated under Article 21 should be a just, fair and reasonable procedure. In fact, the judicial creativity and activism of the Apex Court in *Manealka Gandhi* started the journey towards constitutionalisation of right to legal aid. The new liberal approach is quite visible in *M.H. Hoskot v. State of Maharashtra*.

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

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16 [1950]SCR88
18 287 US 45 (1932)
wherein the Apex Court impressed upon the need of securing the competent and efficient legal services for a prisoner who is accused of committing an offence or is standing trial in a criminal case. According to the Honourable Court this is an essential ingredient for ensuring fair trial and equal justice to the accused. Thus, the right to legal aid has become almost like a fundamental right by creative interpretation of Article 14, 21 and 22 by the Apex Court of India.

Keeping up the activist approach the Supreme Court in Hussainara Khatoon v. State of Bihar,\(^{21}\) stated, that the right to free legal services is clearly an essential ingredient of 'reasonable, fair and just' procedure, for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This Principle was reiterated in Khatri v. State of Bihar,\(^{22}\) wherein the Court stated, that the State is under a constitutional mandate to provide free legal aid, to an accused person, who is unable to secure legal services on account of poverty, and whatever is necessary for this purpose, has to be done by the State. The law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty or financial constraints.

These judgments by the Supreme Court put every Magistrate or the Sessions Judge before whom an accused appears under an obligation to inform the accused, that if he is unable to engage the services of a competent lawyer because of poverty then he is entitled to avail legal aid at State cost. Every State has to make provisions for free legal aid especially in cases entailing imprisonment as a mode of punishment or where if the circumstances of the case and social justice requires that free legal aid should be given to the accused.

The Supreme Court took this rights based approach a little further in Suk Das v. Union Territory of Arunachal Pradesh.\(^{23}\) Chief Justice Bhagwati, while speaking for the court emphatically laid down that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty. He stressed that the fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. The plea that the accused failed to apply for legal aid violates the constitutional mandate implicit in Article 21 of informing and providing free legal aid to every indigent accused likely to suffer imprisonment if convicted. It was made quite clear that unless refused, failure to provide free legal aid to such accused persons would vitiate their trial, entailing setting aside of the conviction and sentence against them.\(^{24}\) The court in such scenario can either order retrial or on consideration of the circumstances of a particular case the court may direct that no fresh trial shall be held.

The dictum of Suk Das was taken a step further and given a larger dimension by Justice J.N. Bhatt in Dineshbhai Dhimenrai v. State of Gujarat\(^{25}\) He emphasised that the combined and conjoint reading of the provisions of Article 22(1) of the Constitution, Section

\(^{21}\) MANU/SC/0122/1979
\(^{22}\) MANU/SC/0518/1981
\(^{23}\) (1986) 2 SCC 401
\(^{24}\) Ibid., see Editorial Note
\(^{25}\) MANU/GJ/0054/2001
304 of CrPC 1973 and the provisions of Article 39-A of the Constitution and the provisions of Legal Services Authorities Act, 1987, make the right of the accused to enjoy the services of an Advocate or a Counsel in a criminal case unfettered and unqualified. It is not restricted to a particular kind or classes of offences. Thus, it is not the type of the charge or the nature of the offence committed, but the disability of the accused on account of indigence, illiteracy or any other disability of the accused that entitles him to free legal services at the cost of the State. And the purpose behind all these provisions is basically to ensure equality before law so that nobody suffers because of these disabilities.

**IV LEGAL AID FOR CAPITAL OFFENDERS**

Capital charge is a serious charge and conducting trial of an unaided accused definitely leads to miscarriage of justice. Proper representation of the accused in such cases is a sine-qua-non for fair and just trial. To ensure fair trial in capital proceedings it is important that not only the frame, and forms of law providing for legal aid is technically observed, but also, there has to be full recognition and just application of its principles in substance for discovery of truth and prevention of miscarriage of justice. The Judge plays an important role in delicately balancing the competing interests of the accused, the victim and the public interest involved in bringing to justice the capital offenders while not losing sight of the basic tenet for ensuring fair trial i.e. finding the truth. The judiciary indeed has played an important role in development of doctrine of legal aid in the criminal jurisprudence. Even before independence, when there were no statutory provisions for providing legal aid at state expense, the judiciary set up precedents whereby in capital cases legal aid at state expense could be extended to an indigent capital offender. After independence legal aid at state expense was categorically provided in Section 304 CrPC, 1973 and it had to be tested in the context of fundamental right given in Article 22(1) of the Constitution. It took nearly three decades for the courts to show a clear preference for liberal and rights based approach while interpreting provisions for legal aid at State expense. After the enactment of Criminal Procedure Code, 1973 and decision of the Supreme Court in *Maneka Gandhi* case judicial activism reached its zenith as many issues were resolved by way of Public Interest Litigation. Thus, it is convenient to study the development of legal aid at state expense for capital offenders in two phases i.e. (A) Pre-Independence stage (B) Post-Independence stage

**A. Pre-Independence Stage.**

The absence of specific statutory provisions providing for legal aid at state expense did not stop many High Courts from coming to the aid of indigent accused who could not engage a lawyer because of their poverty. In *Re.Llewelyn Evans*, Justice Madgavkar emphatically laid the importance and philosophy of legal representation especially in capital trials. He laid down that to ensure justice and fairness in a criminal trial of grave nature where

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26 For details see S Murlidhar, law, Poverty and Legal Aid:Access to Criminal Justice Chapter IV & V (2004)
27 AIR1926 Bombay 551
it is a matter of life or death for an accused, both the prosecution and defence should be given an equal opportunity to prepare their case. And to ensure that, the State needs to provide the poor accused with skilled legal assistance at State expense. Taking a very progressive and proactive stance, he pointed out that Section 340 CrPC, 1923, extended to the cases not only of a person accused of an offence in a criminal court, but to the case of any person against whom proceedings were instituted under the Code in any court. He emphasized that the accused should have the opportunity of legal counseling even while in custody. Moreover, he clarified that under Section 340 CrPC the law contemplated that accused be allowed access to legal advisers before and irrespective of the filing of the charge sheet.\(^{28}\)

Right to legal aid was further enlarged in *Emperor v. Sukh Dev.*\(^{29}\) In the instant case the question before the court was that whether a court can allow counsel to appear for a capital offender without his consent. It was answered in the negative as such a counsel is neither chosen by the accused nor given to him by his express or implied consent. The counsel does not represent him in the real sense and no court has the authority to force upon a prisoner the services of a counsel if he is unwilling to accept them. It results in breach of confidence and can make the accused responsible for the defence that may be advanced by the pleader but which the accused would never have made.\(^{30}\)

Another facet of legal representation was emphasised in *Darpan Potdarin v. Emperor.*\(^{31}\) The Division bench of the Patna High Court while discharging the death reference and allowing the appeal of a woman sentenced to death for murder of her daughter pointed out the importance of quality legal representation. It stated that selection of lawyers for legal aid should not be a matter of patronage for the benefit of the lawyer so appointed. Young men of marked ability should be selected. The court observed that it had been found quite frequently that the appointed counsels did their work very badly and ignored the arguments and conspicuous opportunities for cross-examination. Pointing out the role of the judge, it was stated that the trial judge should remember that in such circumstances he owed the duty to both - the prosecution as well as the defence. On seeing the incompetence of the defence lawyer he should use his greater experience in cross-examining the witness whenever it is desirable in the interest of justice.\(^{32}\)

In *Prabhakar Kesheo Tare v. Emperor,*\(^{33}\) it was held by Nagpur High Court that the detained persons have the right to reasonable and proper legal advice. Refusing access to legal advice is an abuse of power. The trial despite all safeguards has to be according to the cannons of natural justice. The jurisdiction of courts is not wholly ousted by Defence of India Act, and that there remains a residue of matter into which the Courts can and must enquire.

### B Post-Independence Stage

\(^{28}\) Id. At 554

\(^{29}\) AIR 1929 Lahore 705

\(^{30}\) Id.at 706

\(^{31}\) AIR 1938 Patna 153, also see Dickson Mali v. Emperor, AIR 1942 Patna 90 wherein the Court affirmed the earlier observations of the Division Bench of Patna High Court in Darpan Potdarin

\(^{32}\) Id. At 158

\(^{33}\) AIR (30)1943 Nagpur 26
New developments at the legislative front and landmark judicial pronouncements in the light of the constitutional provisions changed the contours of right to legal aid at state expense in the post independence phase. It gradually became a statutory right and by innovative interpretation by the judiciary of Article 14,21 and 22 it acquired the character of constitutional right and has been even labelled as a fundamental right in many judicial pronouncements. Inspite of these laudable developments some problems with respect to providing legal aid to capital offenders have persisted and are continuing. It is an irony that though the right to legal aid at state expense was first given to those facing capital charge, the spirit of the law has not yet even after six decades after independence, been imbibed and ingrained in the criminal justice delivery system. The challenges to the doctrine of legal aid at state expense for capital offenders regularly come from the following spheres:

(a) Trial without defence counsel
(b) Delay in Appointment of Counsel
(c) Appointment of incompetent counsel
(d) Ramifications of the Failure to provide legal aid.
(e) Miscellaneous issues

The abovementioned defects of the legal aid mechanism affect the legitimacy and credibility of the whole criminal justice administration.

(a) Trial without defence counsel

In all criminal trials, particularly trials involving capital charge, it is the duty of the courts to provide defence lawyer to the accused if he is not in a position to engage competent lawyer at his own cost. Such independent legal counseling is the minimum requirement of fair trial and effective defence. Added to this is whether the accused is given the chance to exercise his right of choice of counsel guaranteed by Article 22(1) of the Indian Constitution. If not, then the legal assistance so provided fails to be independent or effective, as mere show of defence does not mean effective defence. Strangely, it has been stated in many cases, that it is much better and safer for the accused to go undefended than have defunct defence because then he may draw the active, watchful and energetic attention of the presiding judge to test prosecution witnesses by questions and check prosecution counsel against any unfairness or overzealousness to introduce inadmissible evidence. But this is asking for the moon because had the trial judge been alert, the procedural errors as stated above would not have occurred. It is an irony that the very person who has been insensitive and careless in his approach in conducting the trial in spite of the absence of the defence counsel is expected to be responsible, proactive and alert in such a scenario.

In *Tara Singh v. The State*, the Supreme Court failed to build on the progressive jurisprudence in relation to the right to legal aid at state expense as practiced by the judiciary in the pre-independence stage. In the instant case Tara Singh was charged under Section 302

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35 AIR 1951SC441
and his relatives refused to help him in getting the services of a counsel. The court also did not appoint any standing counsel to defend the accused. The trial, therefore, was conducted without any legal representation for the accused. He was subsequently convicted and sentenced to death. He appealed to the Supreme Court under Article 136 of the Constitution, arguing, that his right to be represented by a counsel under Section 340 CrPC 1898 was violated by the Committal Magistrate who had recorded the evidence of the witnesses without affording him the opportunity to have legal representation. Thus, his case was greatly prejudiced and consequently the trial had been vitiating and the same was liable to be set aside. Speaking for the court Justice Vivian Bose repelled the arguments and stated that the Magistrate, the Police or the State, are under no obligation to provide a lawyer to the accused under Section 340CrPC,1898. It is only a matter of privilege and if he wanted to engage a lawyer it was his duty to ask for one and that also had to be engaged by him or through his relatives. The only duty cast on the magistrate is to afford him the necessary opportunity. Moreover, he had never objected to the absence of lawyer throughout the proceedings of the case and that showed that he had no intention of engaging the counsel.36

Mysore High Court followed Tara Singh in In re Govinda Reddy and others.37 Herein three people were charged and convicted under section 302. It was contended by one of them that appointment of same lawyer for all of them prejudiced his interests and vitiating the trial. Rejecting the contention, the High Court stated that there is no statutory or constitutional requirement to provide legal assistance to accused persons. An accused person has no right to demand the court to supply him with a lawyer. It is his duty to ask for one if he wishes to engage one. Article 22(1) of the Constitution of India confers on him this right. Section 340 CrPC, 1898 also entitle him to engage a lawyer of his choice. The courts are only bound to give him necessary opportunity to engage a counsel of his choice on his own.38

However, In In re Palaniappan39 the Madras High Court took the right to legal aid at state expense a little further. While stressing on the mandatory nature of Rule 166 of the Madras Criminal Rules of Practice under which a counsel is appointed at Government cost to take instructions from the accused and to defend him, it emphasized that the right of the counsel to continue representing him depended on the express or implied consent of the accused. It was stated that the Sessions Court in the instant case had no authority to permit the counsel to keep on representing the accused charged for murdering his father-in-law after his express repudiation by the accused. Thus, because of the above procedural infirmities retrial was ordered.

Again, in 1963 the Supreme Court lost the opportunity to restore the right for legal aid to its pre-constitutional pedestal. In Ram Sarup v. The Union of India40 a sepoy was sentenced to death by the General Court Martial for shooting dead three army personnel. In the writ

36 Id. at 443
37 AIR 1958 Mysore 150
38 Id. at 159
39 AIR 1961 Madras 417
40 [1964]5SCR931
petition filed before the Supreme Court the petitioner challenged his conviction and sentence on the ground that he was not allowed to be defended by a legal practitioner of his choice and thereby his fundamental right under Article 22(1) had been violated. The Apex Court did not accept this argument as in its view he had failed to prove any request being made by him to the Military Authorities in this regard. However, contradicting its own views, the court at the same time recognised the fact that he was denied access to his relatives at the time of arrest and so could not arrange for a civilian lawyer to defend him during the Court Martial proceedings.

Three years later, the Calcutta High Court in *Panchu Gopal Das v. The State*,\(^{41}\) took a progressive stance. While confirming the death sentence of the accused it showed grave concern about imposing a defense counsel on the accused. It was categorically stated by the court that Article 22(1) guarantees to the accused choice of counsel for his defense and the State Government cannot engage a defence lawyer either without ascertaining accused’s wishes or giving him a choice in selection of the lawyer. At the same time, it was stated, that as had happened in the instant case, if the lawyers engaged by the State keep on appearing for the accused throughout the trial in the presence of the accused and without any protest on his part at any stage of the trial, then it can be inferred, that the accused has tacitly or impliedly accepted them as his defence counsel. Further, it was made clear by the Bombay High Court in *Rajendra Gandhi v. State of Maharashtra*\(^ {42}\) that the right guaranteed under Article 22(1) to an accused person to defend himself by a counsel of his choice does not come to an end when he engages a counsel of his choice. If he indicates his desire to change the counsel, the court trying his case is under an obligation to provide him a fresh opportunity for this purpose. Any other view would render the right as wholly illusory.\(^ {43}\)

Trial and conviction of a murder accused who was sentenced to death in the absence of a defense lawyer throughout the trial was strongly condemned by Assam and Nagaland High Court in *The State v. Tikaram Haneri*.\(^ {44}\) There was clear violation of the rule of Pauper Defence by the Additional Deputy Commissioner. Showing serious concern *Justice Goswami* opined:

> ...Whenever and wherever under the jurisdiction of this Court an accused person is tried for murder under Section 302, Indian Penal Code, where the extreme penalty of law may be inflicted if the offence is established, he must not remain undefended in the trial. No person can be allowed to lose his life in an established Court of Law under any civilized system without affording an opportunity of defence. The reason that the accused did not ask for a lawyer or did not know his rights to exercise the same to ask for an opportunity for being

\(^{41}\) AIR 1968 Calcutta 38  
\(^{42}\) 1989 CrLJ1073(Bom.)  
\(^{43}\) Id. at 1087  
\(^{44}\) 1970CrLJ780 (Assam & Nagaland)
defended by a lawyer of his choice, does not absolve the trial court from its duty to arrange for his defence.\textsuperscript{45}

Though the right to legal aid has been given a colour of fundamental right by the Supreme Court, the judiciary, especially the lower courts have failed to imbibe and incorporate the same in their functioning. Even more than a decade after \textit{Suk Das} the Rajasthan High Court in \textit{The State v. Heera Lal}\textsuperscript{46} remitted the murder case back to the Sessions Judge as the Sessions Judge even in the absence of defence counsel did not adjourn the trial or appoint another counsel for the accused but proceeded with it and examined three prosecution witnesses present on that day. Thus, he contravened the provisions of section 304 CrPC, 1973.

Far from any improvement on this count, lack of sensitivity of judges on this aspect is displayed regularly and unabatedly. Despite the fact that appointment of counsel for an indigent accused is a right guaranteed by Article 21 of the constitution and violation of which renders the trial vitiates, the lapses on the part of trial judges in providing defence counsel continues. In \textit{The State v. Ravi alias Munna}\textsuperscript{47} the Delhi High Court while acquitting the accused of murder charge observed that the trial court continued recording the evidence even after non-confidence was shown by one accused in his counsel and the other accused remained unrepresented.

There may be instances where the capital offender refuses to have a lawyer for his defence. In such cases the courts need to be very cautious and careful. Their duty does not end by merely asking a question as to whether the accused requires legal aid or not but it is the duty of the court to consider as to whether in a serious, complex and capital charge or matter, an ‘amicus-curiae’ should be appointed or not? And whether the powers under Section165 of the Evidence Act, should be successfully exercised and applied. \textit{In Labhu Laxman v. State of Gujarat}\textsuperscript{48} the accused pleaded guilty for murdering his wife. In response to the query by trial judge for legal aid he again pleaded guilty. Neither did he engage any lawyer to defend himself nor was he provided the same by the court. In this scenario the Sessions Judge proceeded with the trial and directed the prosecution to prove the case. Showing total disregard to the basic necessities of a murder trial, the judge did not put any questions though he is empowered to do under Section165 of the Indian Evidence Act. The High Court ordered new trial from the stage of setting up of guilty plea, as in its view, there was miscarriage of justice because of failure of performance of duty to provide effective legal services by the trial court and the Public Prosecutors responsibility to guide the court in such matters. The court clarified that even if the accused refuses to avail the free legal services it is the duty of the court to see that justice is done after free, fair and reasonable procedure is followed and sufficient opportunity is afforded to the accused. To ensure the same at least an

\textsuperscript{45} Id. At 780-81
\textsuperscript{46} 1997CrLJ4233 (Raj.)
\textsuperscript{47} 2000CrLJ1125 (Del.)
‘amicus-curiae’ could have been appointed by the court but no reasons were given for not doing so.

However, the approach of the Supreme Court in *Mohan v. State of Tamil Nadu* was a very regressive step and a great disappointment as it nullified what was gained even in *Bashira v. State of Uttar Pradesh*. In the instant case, four persons were charged for the offence of kidnapping and murder of a child. They were undefended and unrepresented throughout the trial. The lawyers appointed by the court for three accused neither appeared for them nor withdrew their appearance on record. The private lawyer engaged by one of the accused was also absent on several days of the trial. Even in such a scenario the accused’s request for adjournment or to have a choice in selecting their defence lawyer was rejected. The trial court sentenced all of them to death. The High Court also dismissed their appeals and confirmed the death sentence. Leave to appeal was granted limited to the question of sentence only in the Supreme Court. The Supreme Court did not at all examine the question of the fairness of the trial. It confirmed the death sentence of three accused and commuted that of the fourth accused to life imprisonment. This decision of the Supreme Court sounded like a death knell for the rights of the accused facing trial for capital offence. The right for legal aid was restricted and narrowed as it followed from this judgment that:

(i) The accused could be tried, convicted and sentenced to death even in the absence of the lawyer throughout the trial.

(ii) If an indigent or poor accused has no means to engage a counsel then he does not have a choice of counsel.

(iii) The accused has no right to reject the counsel appointed by the court on any ground like incompetence, unavailability etc.

(iv) The accused has no right to ask for a counsel after deciding to conduct the defence himself as that will amount to defeating the process of law.

The decision in *Mohan* is not representative of the Indian legal position if we see the progressive interpretation of legal provisions with respect to legal aid as laid down in the Constitution of India, the Criminal Procedure Code 1973 and the Legal services Authority Act1987, by the Supreme Court of India in many cases from *Maneka Gandhi* onwards. Remarkably, many High Courts have taken a serious note of the absence of counsel or of incompetent counsel for conducting defence of the capital offender and held the trial to be vitiated because of these reasons. Fortunately, the non-appointment of counsel altogether in the first instance by the court or legal aid committee to represent the accused in trial or an appeal has been viewed strictly by the Supreme Court. In *Satbir v. State of Haryana* an appeal of murder convict was received from jail by the High Court. The court dismissed the appeal after hearing the State counsel.

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50 [1969]1SCR32

51 MANU/SC/2584/2005
and perusing the evidence on record and findings recorded by the trial court. This was totally in disregard to the general practice consistently followed by the Supreme Court while hearing jail appeals, whereby, either an amicus curiae is appointed or the matter is referred to the legal Aid Committee for nominating a counsel for the accused. Consequently, objecting strongly to the manner of disposing of the appeal by the High Court the Apex Court directed the High Court to hear the appeal afresh either by appointing an amicus curiae or by referring the matter to Legal Aid Committee for appointing an advocate to represent the accused.

(b) Delay in appointment of Counsel

High Courts have shown more liberal and positive approach while adjudicating on matters wherein the right of capital offender for legal aid at state expense is in question. Andhra Pradesh High Court showed great courage in making a departure from the approach of the Supreme Court in the matter of providing legal aid to the murder convict. In In re Alla Nageswara Rao, an advocate was appointed for the indigent accused, charged with the offence of murder, just two hours before the trial in Sessions Court. Setting aside his conviction and sentence and ordering retrial, it emphatically stated, that in case of grave offences the accused persons should be given every reasonable opportunity to put forward their case and their defence. A mere formal compliance will not carry out the object underlying the rule. Sufficient time should be given to the advocate engaged on behalf of the accused to prepare his case and conduct it on behalf of his client. As the time given in the instant case was insufficient, so no real opportunity to defend himself was given to the accused.

As compared to the High Courts, the Supreme Court of India took a long time to realize the importance of providing for an effective and meaningful defence to an accused in a capital case. This awareness dawned on the Supreme Court in Bashira v. State of U.P In the instant case, the Sessions Court had appointed an Advocate for the appellant just before the beginning of trial and on the very same day evidence of two principal prosecution witnesses was recorded. Later on, when the defence counsel asked for recall of the sole eyewitness for further cross-examination as the same could not be done effectively earlier, the Sessions Judge rejected the application and convicted the appellant and sentenced him to death. The High Court confirmed the conviction and sentence. On appeal to the Apex Court, it was contended by the appellant that belated appointment of counsel deprived him of adequate legal aid and that he would be deprived of his life in violation of his fundamental right under Article 21. The Supreme Court held the trial to be void because of error in the procedure adopted at trial and retrial de novo was ordered. Regarding the time which should elapse between the appointment of counsel and the beginning of trial so as to have a fair trial, the court opined that any hard and fast rule cannot be laid down and the same depends on the circumstances of each case. However, it is the duty of the Sessions Court to see that the time granted to the counsel is sufficient to prepare for the defence of his client.

52 AIR1957 AP 505
53 [1968]1SCR32
Similarly, in *Raj Kishore Rabidas v. The State* the Calcutta High Court in a murder reference showed its emphatic condemnation and deep disappointment at the callousness of the Additional Sessions Judge who had displayed utter lack of appreciation of essential necessities that need to be adhered to especially in cases entailing death sentence. The court rejected the death reference and pointed out that in the absence of defence lawyer the trial judge should have not only restrained himself from allowing the examination and cross examination of witnesses, but should have adjourned the trial. Continuing with the trial in the absence of defence lawyer who had the brief and by appointing another defence lawyer who did not have the brief or being given any opportunity or time to prepare himself was a negation of fair trial.

In *Ranchod Mathur Waswa v. State of Gujarat* an amicus curiae was appointed on the day the trial began. Condemning the insensitive approach of Sessions Judges in providing legal aid to the accused Justice Krishna Iyer stated:

Session Judges do not view with sufficient seriousness the need to appoint State Counsel for undefended accused in grave cases. Indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronising gestures to raw entrants to the Bar. Sufficient time and complete papers should also be made available, so that the advocate chosen may serve the cause of justice with all the ability at his command.

In spite of the strong condemnation of the trial court judges in conducting shoddy trials of even capital offenders the right to fair trial has not been ensured in practice. In *Arjun Karmakar v. State of Assam* the accused was convicted and sentenced to life imprisonment under Section 302 IPC. He was unable to engage a lawyer on account of poverty, indigence and incommunicado situation. As the lawyer appointed by the Court failed to appear on the date of hearing, a new lawyer was appointed to represent the accused. On the very same day, cross-examination of important witnesses was done and the case was closed. This resulted in a mock trial in a case which could result in capital punishment. The legal aid in fact was given to be denied and the accused was deprived of fair trial. Condemning the approach of the trial court the High Court stated that in reality no legal aid was provided to the accused as it was impossible for the lawyer to prepare the case instantaneously, to cross-examine the witnesses and argue effectively on the very same day. Legal aid was in fact provided to the lawyer and not the accused. Accordingly fresh trial was ordered by the court.

(e) Appointment of Incompetent Counsel

The ultimate aim in any criminal proceedings is to find out the truth and deliver justice accordingly. A judge is not a prosecutor and his duty is to discern the truth so that he

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54 1969CrLJ360(Cal.). See also Chellappan v. State of Kerala, 1971CrLJ1021(Ker.) wherein retrial was ordered by the Kerala High Court. The court directed the trial judges to look into the matter sufficiently early and appoint the counsel for the accused well in advance before the commencement of the trial.
55 1974CrLJ799(SC)
56 Ibid.
57 MANU/GH/0123/1986
is able to arrive at a correct conclusion. A defence lawyer plays an important role in culling out the truth before the court by cross-examination of witnesses and placing relevant evidence before the court. The absence of proper cross-examination can result in miscarriage of justice and the court has to be alert to such a scenario. The principle that a competent lawyer should be engaged at state expense to defend an indigent accused who is unable to engage a lawyer on account of his poverty was recognized in our country even during pre-independence phase. Judgments in *Darpan Potdarin v. Emperor* and *Dickson Mali v. Emperor* bear testimony to this aspect.

In *Kunnunmal Mohammed and another v. State of Kerala*, the Kerala High Court showed its concern about the appointment of incompetent counsels in criminal trials. While setting aside the conviction and sentence of the accused under Section 302 because of lack of legal evidence it warned the sessions judges about appointing raw and inexperienced juniors to defend the accused in capital cases. Justice Anna Chandy exhorted the judges to play an activist role in such a scenario by saying:

[…] if however such inexperienced advocates alone are available to defend such unfortunate accused, the court has a primary duty to come to the aid of the accused by putting timely and useful questions and warning the advocates from treading on dangerous grounds. In this case it is really unfortunate that the court has instead, freely made use of the defects resulting from the inexperience of the advocates to built up the case against the accused.

A rule of caution to be followed in the appointment of defence counsels for the indigent accused was given by the Allahabad High Court in *Ram Awadh v. State of U.P.* In the instant case the amicus curiae appointed by the court made no effort to cross-examine the witnesses on any material point which a defence lawyer is expected to do in a murder case. He failed to discharge the duty of defending the accused. Ordering retrial of the murder convict the court stated that:

The requirement of providing counsel to an accused at the State expense is not an empty formality which may be fulfilled by merely appointing a counsel whatever his caliber may be. When the law enjoins appointing a counsel to defend an accused, it means an effective counsel, a counsel in real sense who can safeguard the interest of the accused in best possible manner which is permissible under law.

A warning was sounded by the court, that for a person accused of murder who may end up being sentenced to life or death, only a competent counsel and not a novice or one who has no professional expertise should be appointed. No one should be appointed merely to provide him with some monetary benefit. Recognising the low remuneration being given

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58 AIR1938Patna153 and AIR1942Patna90
59 AIR1963Kerala 54
60 Id. at 59
61 1999CrLJ4083(All.)
62 Id. at 4086
for the work which discourages senior and busy lawyers from becoming amicus curiae, it was stated, that still the efforts should be made to engage capable lawyers. It should not be a matter of charity to those who because of their incompetence have not been able to make a mark in the profession.\textsuperscript{63}

In \textit{Kishore Chand v. State of Himachal Pradesh}\textsuperscript{64} the Supreme Court emphasized that accused should be defended by such advocates who have sufficient experience in handling the charges which he is called upon to defend. The court explained that if an inexperienced young person is assigned to the accused it will result in giving unequal defence though the Constitution provides fundamental rights to equal justice and free legal aid. Yet, the state of affairs did not improve in the next decade as it is quite visible from the fact that even in the year 2001 the Gujarat High Court had to point out the importance of competent legal representation in \textit{Dineshbhai Dhemenrai v. State of Gujarat}.\textsuperscript{65} The court directed:

Ultimate anxiety of the Court, always, should be to see that an accused, who is facing serious, complex and capital charges receives as far as possible, in one or the other mode, the help and assistance of a trained and competent person like a lawyer so as to see that he gets free, fair and objective trial, which is the ‘sine qua non’ of the criminal jurisprudence, and it is as such a fundamental human right.\textsuperscript{66}

Thus, despite the dictum of Supreme Court in \textit{Ranchod Mathur Waswa, Kishore Chand} and a decade thereafter, appointment of inexperienced lawyers to defend the capital offenders has continued unabatedly. In \textit{Sunil S/o Damodhar Gaikwad v. The State of Maharashtra}\textsuperscript{67} the Bombay High Court in a death reference ordered the Sessions Court to appoint an experienced defence counsel having adequate experience of conducting sessions trials of offences punishable under Section 302 IPC for representing the murder convict. In its view the appellant was not provided with effective and meaningful legal assistance as examination and cross-examination of the witnesses had neither been completed nor properly done. The trial court was ordered to complete the recording of evidence of prosecution witnesses within three months from the date of receipt of the writ of the High Court.

\textbf{(d) Lack of Judicial Consensus On Ramifications Of Failure to Provide Legal Aid.}

Right to legal aid has been placed at the pedestal of fundamental right and there is unanimity on holding the trial to be vitiated in case of failure to provide the same. However, there is an urgent need to clarify the remedy to be granted in such cases i.e. whether to order

\textsuperscript{63} Id. at 4078
\textsuperscript{64} MANU/SC/0374/1990. Hereafter referred as Kishore Chand.
\textsuperscript{65} MANU/GJ/0054/2001
\textsuperscript{66} Id.at para 26
\textsuperscript{67} MANU/MH/1098/2009.Also see Abdul Razak v. State of Kerala MANU/KE/0560/2009 In the instant case the Division Bench found that the accused was prejudiced in his defence due to poor lawyering. A junior lawyer having less than five years experience instead of the stipulated five years of practice under Rule 3 of the Legal Aid to Accused Rules,1999 was appointed . Thus, there was incompetent advocacy because of lack of experience and the same resulted in vitiating the trial of the Appellant.
fresh trial or set the accused free.\textsuperscript{68} This has been left to judicial discretion keeping in view the peculiar circumstances and facts of each case. The judicial norm in capital cases has been to order retrial, but still, clear guidelines need to be laid down, as any ambiguity in this regard in capital cases can cause serious damage to the image of the judiciary and the criminal justice system. The recent decision of the Division Bench of the Supreme Court in \textit{Mohd.Hussain@ Julfikar Ali v. State (Govt. of NCT of Delhi)},\textsuperscript{69} very aptly demonstrates this. In the instant case, the accused i.e. Mohd.Hussain, a Pakistani national, committed the grave terrorist act of planting a bomb in a Blueline bus in Delhi which exploded and caused death of four people and injured many. No effective and meaningful legal aid was provided to the accused and he was sentenced to death by the trial court. High Court affirmed the conviction and sentence and failed to rectify the grave procedural error committed by the trial court. On appeal, the division bench of the Supreme Court unanimously held that the appellant was denied due process of law and his trial was contrary to the procedure prescribed by the criminal procedure code as he was denied the right to effective, meaningful and substantial representation by a counsel in the trial. However, the judges differed on the course to be followed after holding that the trial against the appellant was flawed.

\textit{Justice H.L.Dattu} was of the view that the requirement of counsel was so vital and imperative that the failure of the trial court to make an appointment of a counsel was not only a denial of due process of law but also breach of mandatory provisions of Section 304 CrPC.\textsuperscript{70} Reversing the judgments he remanded the trial to the trial court with specific direction that the trial court would assist the accused by employing a State Counsel before the commencement of the trial till its completion if the accused was unable to employ a counsel of his own choice. Further, he directed the trial court to conclude the trial within a timeframe of three months from the date of communication of his order.\textsuperscript{71}

However, \textit{Justice C.K.Prasad} did not agree to remand the matter to the trial court for fresh trial of the appellant. He opined that the right to speedy trial is a fundamental right and in the instant case much time had already passed as he was awarded death sentence more than seven years ago, so it would be unjust to direct de novo trial for the appellant. According to him the conviction and trial of the appellant was vitiated not on merit but on the ground that his trial was not fair and just. Declaring his conviction and sentence illegal he held the natural consequence of such a trial would be release of the appellant from prison and so he directed

\textsuperscript{68}Failure to provide legal aid has resulted in different judicial remedies. Retrial was ordered in In re Palaniappan, AIR1961Madras 417; Bashira v. State of U.P., [1968]1SCR32 and State v. Tikaram Haneri, 1970CriLJ780 etc. However, after setting aside the conviction and sentence the accused was set free in Suk Das v. Union Territory of Arunachal Pradesh, (1986)2SCC401. But Suk Das was case under Section 506 of the IPC. In Nasira Pradhan v. State,1970 CrLJ 396 (Gau.), the Assam High Court set aside the conviction and sentence of the accused under Section 304, Pt I/ 34 IPC, as the entire trial was vitiated because of lack of legal assistance being provided to the accused. But as he had already served three years in prison retrial was not ordered.

\textsuperscript{69} (2012)1SCC(Cri)919.

\textsuperscript{70} Id. at 944

\textsuperscript{71} Id. at 946
that appellant being a Pakistani national should be deported to Pakistan in accordance with law.\textsuperscript{72}

The difference of opinion in the above case necessitated reference to the larger bench\textsuperscript{73} which confirmed the view held by Justice H.L.Dattu. Speaking for the court Justice R.M.Lodha made it clear that though speedy trial and fair trial to a person accused of an offence are integral part of Article 21 yet there is qualitative difference between the two. As compared to the accused’s right of fair trial, the deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative and depends upon diverse circumstances. He laid down the following principles of law in this context:\textsuperscript{74}

1. Facts and circumstances of a case are to be given importance while addressing the question of delay in conclusion of a criminal trial.
2. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuation of prosecution or dismissal of indictment.
3. The factors concerning the accused’s right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in the judicial system.
4. Speedy trial secures rights to an accused but it does not preclude the rights of public justice.
5. The nature and gravity of crime, persons involved, social impact and social needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the cases and exigencies of the situation tilts the balance in his favour, the prosecution may be brought to an end.\textsuperscript{75}

Applying the above mentioned principles Justice Lodha held the offence to be too grave and considered factors like long trial and mental agony of death sentence as not sufficient enough for acquittal and dismissal of indictment. He opined that even after giving due consideration to the appellant’s right, other factors like the nature of the crime and its gravity, the impact of crime on society and particularly when it caused death of four people and shook the public could not be ignored and overlooked. According to him the punishment needed to follow the crime as closely as possible. Pronouncing the case to be an extremely serious criminal case of an exceptional nature he stated that it would result in failure of justice if the prosecution is not taken to its logical conclusion and so ordered retrial by remanding the matter for a de novo trial with a further direction to the trial judge to complete the trial within an outer limit of three months from the date of communication of the order.\textsuperscript{76}

\textsuperscript{72} Id. at 952
\textsuperscript{73} Mohd. Hussain @ Julfikar Ali v. State (Govt. of NCT of Delhi), (2012)3SCC(Cri)1139
\textsuperscript{74} 2012)3SCC(Cri)1155
\textsuperscript{75} Id. at 1156
\textsuperscript{76} Id. at 1156-57
Thus, non-application of the provisions for legal aid and their implementation in a very casual and lackadaisical manner because of abdication of duty on the part of even any one of the officials responsible for the administration of criminal justice i.e. the Magistrate, the Sessions Judge, the Public Prosecutor, the Lawyers empanelled for legal aid work, the Police personnel, Jail officials etc; result in causing grave miscarriage of justice. Ultimately, it is the delivery of justice to the accused as well as the victim which is sacrificed at the altar of the legal technicalities of the judicial process in providing legal aid to the accused.

(e) Miscellaneous Aspects

At times administrative laxity and casual approach also results in denying fair trial to the accused. In Sheesh Ram S/o Sri Kirana Singh v. State of U.P.\textsuperscript{77} the Allahbad High Court showed its serious concern about denial of any effective right of legal aid to an accused facing murder charges which is guaranteed under section 304 CrPC,1973 and Article 22(1) of the Constitution of India. Though the amicus curiae was appointed by the court on time during the trial and his appeal from jail was also filed on time, yet it was admitted after a gap of five long years by the High Court. Taking serious note of the matter the court directed the Registry to remedy such situations and ensure that jail appeals are placed for admission and hearing at a very early date after they are received from jail. The paper book should be prepared expeditiously and all efforts should be made for listing the jail appeals for hearing on a priority basis preferably within six months of their being filed.

An important issue of remuneration to the chosen counsel was addressed in Martin @ Tamilselvan v. State\textsuperscript{78} The Madras High Court held that Section 304(1) CrPC,1973 should be read along with Section 303 CrPC,1973 which contemplates the right of the accused to have a pleader of his choice. In case the accused is able to prove his indigence then the remuneration should be borne by the State. This right of the accused originates from the right to fair trial which includes right to defend effectively through a pleader who is competent in the subject.

V CONCLUSION

The developments made on the front of providing legal aid for capital offenders are not uniform throughout India. In fact the concept has not been fully internalized and has not percolated down in practice in the criminal justice system especially at the entry level i.e. at the stage of arrest and trial. The following aspects require immediate attention and remedial action on the part of the government to make legal services to the poor accused a meaningful and successful venture instead of ending up as poor aid or aid to the lawyer.

\textsuperscript{77} MANU/UP/0269/2005
\textsuperscript{78} MANU/TN/1364/2008. See also Ranjan Dwivedi v. Union of India, MANU/SC/0138/1983. The Supreme Court recognized the problem of inadequate remuneration being given to empanelled lawyers in sessions trial which made it impossible for a person facing a sessions trial on capital charges to get competent professional assistance. Also see T.Suthendraraja and another v. The State of Tamil Nadu and another, MANU/TN/0191/1994
1. Though right to legal counseling at the stage of arrest was recognised in *Nandini Satpathy v. PL Dani*, provision for free legal aid at the stage of arrest is yet not a reality in India in spite of the fact that India has a bad reputation for custodial violence and custodial deaths. Having duty solicitors at the police station is the need of the hour.

2. Though there are directions by the Supreme Court to the states to ensure that jail authorities and its officials provide effective and prompt legal aid to convicts these have been observed more in their breach as delay in filing appeals make it obvious. The convicts suffer because of lack of co-ordination and non compliance with the written rules of practice by the prison and court administration. The convicts sentenced to death need continued legal assistance even after disposal of their appeal by the Supreme Court as they still have a chance of getting alternative sentence of life imprisonment. Filing of review petition, curative petition, mercy petition, seeking remission and their follow up with authorities require expert legal advice and counseling which is hardly available to a person lodged in jail. And the jail manuals also do not specify the availability of legal aid at the stage of filing of these petitions.

3. The dictum of *Suk Das* that right to legal representation of an indigent accused at state expense is a fundamental right in cases involving loss of personal liberty and violation of this right would invalidate the trial has not been applied consistently by the courts. In *Mohan v. State of Tamil Nadu*, grave miscarriage of justice occurred when the accused who were undefended and unrepresented throughout the trial were given death sentence by the Madras High Court and the Supreme Court also refused to look into the fairness of the trial. Thus, the law stated in *Suk Das*, needs to be incorporated in the Constitution and the Criminal Procedure Code.

4. In *Labhu Laxman*, Justice J.N.Bhatt, aptly stated that it was very disappointing and disheartening to notice, that even after fifty years of independence there was want of sensitization for the fundamental rights of the accused. This results in not only violation of the constitutional mandate but causes grave miscarriage of justice. It was observed that the sensitization to the best of the administration of justice at its pyramid-bottom was yet not only incomplete, but insufficient and inefficient.

Thus, it is not only the police and the judiciary but also the Public Prosecutor and the lawyers, especially those who are involved with legal services programme, who need to be sensitized about the right for access to justice of the accused. *Firstly*, as the trial judge is the kingpin in the hierarchical system of administration of justice and directly comes in contact with the litigant during the proceedings in court, the responsibility lies on him in building up the case appropriately. It is on his understanding of the matter that the cause of justice is first

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79 (1978)2SCC544  
80 See S. Murlidhar, Law, Poverty and legal Aid: Access to Criminal Justice 222(2004). In Harbans Singh v. State of U.P., (1982)1SCC101, wherein the accused had filed writ petition in the Supreme Court after rejection of his mercy petition and the court realizing the grave injustice done to him recommended that President of India should now commute the sentence under Article 72 of the Constitution.  
81 (1998)5SCC336. See Supra note 49  
82 See Supra note 80 at 250
answered. He should not only explain, but ensure legal aid at state expense to an indigent accused. Sensitization to these aspects needs to be incorporated in the judicial training programmes.

Secondly, the Public Prosecutor as an officer of the court plays a significant role in murder trials. It has been emphasized by the courts that in case of murder accused being undefended, it is the duty of the court as also the Public Prosecutor to see that the accused facing a charge of murder is defended by a lawyer. Quite aptly, the Kerala High Court in *State v. K.Rangaraju*, had pronounced that the Public Prosecutor is not merely a counsel of the Government but is an officer of court, and it was his duty too to have guided the sessions judge and pointed out to him the relevant rules of the Criminal Rules of Practice. In *Labhu Laxman*, it was emphasized that Public Prosecutor belongs to a creed and chamber of "pro-bono-publico". He is under an obligation to assist the court in seeing that substantial justice is done on merits. He does not have to remain an eye witness of miscarriage of justice, failing in imparting and providing effective and efficient assistance to the court. Justice *J.N.Bhatt*, criticised and condemned the role played by the Public Prosecutor during trial in the instant case as by failing to point out to the learned trial court judge the inappropriateness of conducting examination-in-chief of key witnesses in the absence of defence lawyer, he had become an abettor in converting a fruitful legal battle into a futile and sterile proceeding.

Thirdly, it has been evidenced in many cases that lawyers appointed to defend the accused in murder cases either do not defend the accused properly or absent themselves from the proceedings altogether without even putting their absence on record. This irresponsible conduct on the part of the lawyers prejudices the accused and reduces the trial to a mere mockery and denial of justice to the accused. The lawyers empanelled for legal services programme also need to be sensitized to this aspect.

5. Availability of competent, experienced, senior lawyers for defending the indigent accused at state expense has always been problem area. Very low remuneration given to such lawyers is stated to be one of the reasons for lack of motivation amongst the legal fraternity to join the legal aid programme. Lawyers engaged in providing legal services should be paid fees at least on par with public prosecutors.

Like medicare, whereby the Government provides healthcare to poor people, we need to have juridicare by making permanent appointment of lawyers on salary basis to provide their services to the poor people. It is very important for the survival of rule of law, though it needs to be made an autonomous and independent institution so that the interest of the accused as well as the Government are balanced and no prejudice is caused to the accused. Juridicare will help in creating renaissance of National Legality and will provide a rendezvous for social amity, affinity and social justice. It is, therefore, necessary to consider having (i) National Legal Aid Corporation, (ii) National Equal Access to Justice Library, not

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83 The State v.Tikaramhaneri, 1970 CrLJ780
84 1971CrLJ1021(Ker.)
only for better monitoring and management of legal aid, but also, for providing competent legal aid to poor.\footnote{Dineshbhai Dhemenrai v. State of Gujarat MANU/GJ/0054/2001}

6. A very casual approach to the question of quality and standards is taken in appointment of defence counsels to the poor. Instead of viewing the right to legal aid as a non-derogable fundamental right, it is still seen as a welfare measure. Courts have time and again emphasized the need to have competent, skilled and experienced lawyers for providing legal services to the capital offenders. The rules of different High Courts or States about appointment of defence lawyers at State expense provide for at least 5 years of experience at the bar. But that is not sufficient as in capital cases lawyers who have expertise in handling such cases are required. Mere experience of sessions trial in cases of a different nature is not enough. Moreover, a minimum standard of performance of assigned lawyer needs to be insisted upon.

7. The fundamental right of having pleader of ones choice needs to be put into practice by allowing and making available the choice of counsel. In cases where the accused finds the counsel ineffective, the right to repudiate the representation should be given.

8. For a successful legal aid programme for capital offenders participation of not only judges but also lawyers in policy making, the views and problems of the victims, the difficulties faced by the accused in accessing justice and public perception of providing legal aid to capital offenders needs to be incorporated. It has been seen that in some cases because of threat from the public the lawyer fails to appear for the accused. So, the public also needs to be educated about this essential aspect of ensuring fair trial.

The need of the hour is to curb, minimize and ultimately eliminate the systemic failures which result in not only denying effective and meaningful legal aid to the accused but also prevent proper implementation of the very potent provisions of law. The victims, accused and the people in general need not suffer because of the unprofessional conduct of the few officials. Instead, those who abdicate their duty in this regard should be made responsible, disciplined and accountable for the miscarriage of justice done by them.
ROLE OF JUDICIARY
AS A VECTOR FOR SOCIAL ENGINEERING IN
INDIA

Sri Ashutosh Mishra*

“We hold these truths to be self-evident, that all men are created equal, that they are
endowed by their creator by certain inalienable rights, that among these are life, liberty, and
the pursuit of happiness.” American Declaration of Independence, 1776

“Over two centuries have passed since Thomas Jefferson wrote those memorable words,
which are still ringing in history, but a large section of Indian society still regard a section of
their own countrymen as inferior. This mental attitude is simply unacceptable in the modern
age, and it is one of the main causes holding up the country's progress.” Markandey Katju J.

Indian Judiciary has a long and glorious past and it continues to evolve as per the
evolving diktats of the fast changing percepts of the society, the economic considerations of
the denizens, customary and religious cleavages as seen in a rapidly modernizing and
developing country like India. Like all the other commonwealth countries, common law is
followed in India which basically is the ‘law of the precedents’.

“Judicial philosophy which motivates judges to depart from strict adherence to judicial
precedence in favour of progressive and new social policy which are not only consistent with
the restraint expected of appellate judges. It is commonly marked by decision calling for
social engineering and occasionally these decision represent intrusion in the legislative and
executive matter.”

Roscue Pound’s essential contribution to the jurisprudence is that law should be used
as an instrument of social control. He coined the phrase social engineering as a description of
the problems of the legal order in balancing individual wants and social interests.

Social engineering is discipline in social science that refers to effort influence popular
attitudes and social behavior on a large scale, whether by government or private groups.
Virtually all law and governance has the effect of seeking to change behavior and could be
considered "social engineering" to some extent. Prohibitions of honour killing, violence in the
opposition of inter caste marriage, discrimination of Lesbian and Gays are all policies aimed
at discouraging undesirable behaviors.

In the present article analyses landmark judgment of the Hon’ble Supreme Court of
India and some High Courts in various States which have significantly impacted the way we
perceive ourselves as individuals, society and nation.

Even though Judicial Pronouncements are generally deemed to be on a case to case
basis and in normal course should not affect the society in general in the amplified manner in
which the other two organs of Government i.e. the Legislature and Executive impact the

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functioning of the society. However, there have been various instances wherein judicial decisions have impacted, and sometimes even drastically effected the social perceptions in ways that the Legislature or the Executive could not even think of achieving. This article will dwell into the various case laws that seek to bring about the harmony and seek to identify the various compulsions and insights on how the judiciary interpreted situations and law to bring about identifiable changes on the various percepts at the individual level, social level and national level.

OBSERVATION OF JUDICIARY IN PROMOTION OF INTER-CASTE MARRIAGE, PREVENTION OF HONOUR KILLING AND ROLE OF KHAP-PANCHAYAT

To start the dialogue, one has to identify the major issues wherein the Judiciary had to intervene when the Legislature and the Executive failed to exercise their powers in respect of curbing the social demon of caste-ism which is ever lurking behind the psyche despite years of progress and development. It is most rampantely visible in both rural and urban scenarios wherein honour killings have been prominently highlighted in past couple of years.

In the case of Lata Singh v. State of U .P. and Anr.1, the Hon’ble Supreme Court has held that:

“The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, intercaste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. ……..We sometimes hear of ‘honour’ killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honorable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.”

In the case of Arumugam Servai v. State of Tamil Nadu2 the Hon’ble Supreme Court while also noted the ambivalent position of the concerned district administrative and

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1 At 12 of the judgment cited [(2006) 5 SCC 475]
2 [AIR2011SC1859; (2011)6SCC405]
police officials and had to pass orders whereby the Hon’ble Court directed “…the administrative and police officials to take strong measures to prevent such (violence based on caste) atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government is directed to immediately suspend the District Magistrate/Collector and SSP/S Ps of the district as well as other officials concerned and charge sheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection.”

Another aspect of the Arumugam case was the discussions on the Khap Panchayats which have taken on the role of sentinels of preserving caste hierarchy in rural societies in parts of North India or for that matter similar placed Katta Panchayats in Tamil Nadu wherein the judgment went on to describe the practice of such institutions of decreeing or encouraging honor killings or such other atrocities in an institutionalized manner on boys and girls from different castes and religion on getting married.

JUDICIAL OBSERVATION IN NAZ FOUNDATION CASE

Another prominent role that the judiciary has played has been in giving a thoughtful ear to the rising LGBT3 Rights in the case of Naz Foundation v. Government of NCT and Ors.4 wherein the judiciary exhibited for the first time its lack of aspersion in visiting areas which are recognized as socially taboo. For the first time the Division Bench Hon’ble Delhi High Court while adjudicating the constitutionality of Section 3775 with regards to consensual sexual relations between two individuals wherein the adjudication was on the issue of discriminatory attitudes exhibited by state agencies towards gay community, MSM or trans-gendered individuals, under the cover of enforcement of Section 377 IPC, as a result of which basic fundamental human rights of such individuals/groups (in minority) stood denied and they were subjected to abuse, harassment, assault from public and public authorities. It was averred by the petitioner that “….. while right to privacy is implicit in the right to life and liberty and guaranteed to the citizens, in order to be meaningful, the pursuit of happiness encompassed within the concepts of privacy, human dignity, individual autonomy and the human need for an intimate personal sphere require that privacy - dignity claim concerning private, consensual, sexual relations are also afforded protection within the ambit of the said fundamental right to life and liberty given under Article 21. It is averred that no aspect of one's life may be said to be more private or intimate than that of sexual relations, and since private, consensual, sexual relations or sexual preferences figure prominently within an individual's personality and lie easily at the core of the "private

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3 Lesbian, Gay, Bisexual, Transgender
5 Section 377 of the Indian Penal Code (IPC) is with regards to “Unnatural Offences” wherein it prescribes that ‘Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.’
space”, they are an inalienable component of the right of life. Based on this line of reasoning, a case has been made to the effect that the prohibition of certain private, consensual sexual relations (homosexual) provided by Section 377 IPC unreasonably abridges the right of privacy and dignity within the ambit of right to life and liberty under Article 21.”

In the said Judgment the court entered into and discussed various aspects of private interests of a minority (based on sexual orientation), public interest (of Sexual Orientation in society) and the Social Interests while contrasting the same with ethical and even religious norms. The Hon’ble Court while adjudicating on the issue discussed at length the history of the penal provisions criminalizing what was deemed as ‘Unnatural Offenses’ i.e. non-procreative sexual intercourse, judicial interpretation of the said provision, privacy laws in India and the protection it was afforded under the Constitution, whether the said provision i.e. S. 377 was an infringement of the rights to dignity and privacy, discussed sexuality and orientation identity and also looked into the global trends in the protection of privacy and dignity rights of homosexuals. The judgment also contains a discourse on the impact of criminalization of homosexuals, and S. 377 as an impediment to Public health and further discussed whether morality can be considered as a ground for restriction to fundamental rights.

The Judgment while declaring that Section 377 IPC, insofar as it criminalises consensual sexual acts of adults in private, as violative of Articles 21, 14 and 15 of the Constitution went on to observe that:

“[I]f there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as "deviants' or 'different' are not on that score excluded or ostracized. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. ...... In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.”

JUDICIAL OBSERVATION IN PROTECTION OF WORKING WOMEN THROUGH PREVENTION OF SEXUAL HARASSMENT AT WORKING PLACE

In the year 2012 still bill on prevention of sexual harassment of working women in pending in the parliament but question arose how and why? the legislature has been compelled to frame this bill. The credit should go through the justice J.S. Verma for his pronouncement in land mark judgement vishakha6 and Neelabati bahera7 case.

6 Vishakha V/s State of Rajasthan (AIR 1997) 6 SCC 241
7 Neelabati v/s State of Orissa (AIR 2005) 12 SCC 1
Supreme Court Judgment in Vishakha case is the landmark because not only the court has taken into consideration the problem facing by working women but also in this case supreme court set out detailed guideline for prevention and redresal of the malaise. In doing so the Supreme Court did not merely confined itself into interpreting the law but went into the legislative exercise of law making. The court travelled beyond its traditional confined of being the interpretive organs of laws and went into the terrain of law making which it has historically shield away from.

Supreme Court relied upon the convention for elimination of all forms of discrimination against women, international covenant for civil and political right, international covnent for social and economic right and universal declaration of human right through these reliance supreme court has shown the efficacy of self adoption theory and transformation theory of international law. This is also the best example how the supreme court adopting international convention, covenant and protocol in Indian Judicial process.

Vishakha Judgment was delivered in 1997 and after that no such strong and persuasive efforts were made in the direction of enacting a law although the bill (2012) is still pending. So the guidelines still continued to be followed across the country.

JUDICIAL OBSERVATIONS IN RESERVATION CASES

In a caste and gender sensitive society, the role of Indian judiciary has become more meaningful than ever in social engineering concerning the common man and the community. This is so because it has continuously strived to protect the fundamental rights of the citizens and has not wavered from its path of upholding the rule of law. The success of Indian judiciary on the constitutional front with respect to the social engineering is unparallel and its contribution in enlarging and enforcing human rights is universally appreciated. Their handling of PIL has brought judicial institutions closure to the oppressed weaker section of the society. Our constitutional institutions to remove social and economic disparities, so as to make opportunities available to all and make the life of the poor and disadvantaged and disabled citizens of the country really meaningful and worthwhile while removing economic inequalities , protecting the weaker sections of the society and providing a decent standards of living to our people.

“Judicial philosophy which motivates judges to depart from strict adherence to judicial precedence in favour of progressive and new social policy which are not only consistent with the restraint expected of appellate judges. It is commonly marked by decision calling for social engineering and occasionally these decision represent intrusion in the legislative and executive matter.”

The writ under article 32 cannot be issued to make reservation, but Supreme Court and different high court had tried their best to interpret the constitutional provision in order to maintain equality in the society. Sometimes, in order to accomplish this task, they are in favour of preferential discrimination. In this particular article, I am discussing the observation

7 Nilabati bahera v/s State of Orissa (AIR 1993) 2 SCC 746
of how our judicial process is compelling or enabling the executive and legislature to take into consideration some important issues for maintaining the balance in the society.

‘Backward’ and ‘more backward’ classification is not bad- In the case of Balaji vs. State of Mysore\(^8\), the supreme court held that sub classification made by the order between backward classes and more backward classes is not justified under article 15(4). Backwardness as envisaged by article 15(4) must be both social and educational, and not either social or educational. Though caste may be relevant factor, but it cannot be the sole test for ascertaining whether a particular class is a backward class or not. Poverty, occupation, place of habitation may all be relevant factor to be taken into consideration. Article 15(4) does not speak of castes but only speaks ‘classes’ and ‘caste’ and ‘class’ are not synonymous. The impugned order however proceeds on the basis of caste without regard to the other relevant factors and that is sufficient to render the order invalid. The court said that State was not justified in including the list of backward classes all those castes or communities whose average of student population per thousand was slightly above or very near or just below the state average. Only those which were well below the average can be regarded as backward. It was held that this was inconsistent with article 15(4). Reservation of 86 per cent of seats in technical institutions such as engineering and medical colleges to the exclusion of all other candidates if a single candidate from the schedule tribe was available would amount to fraud upon the constitution. Clause (4) of article 15 only enables the state to make special and not exclusive provision for the backward classes. The State would not be justified ignoring altogether advancement of rest of the society in its zeal to promote the welfare of the backward classes. National interest would suffer if qualified and competent student are excluded from admission in institution of higher education. Speaking generally, the court said that special provision should be less than 50% how much less than 50% would depend upon the relevant prevailing circumstances in each case.

In the Indra Sawhney v.Union of India\(^9\), popularly known as Mandal Commission Case the Supreme Court by 6-3 majority has held that sub classification of backward classes into ‘more backward classes’ and ‘backward classes’ for the purpose of article 16(4) can be done. But as result of sub-classification, the reservation cannot exceed more than 50%. The distinction could be on the basis of degrees of social backwardness. In fact such classification would be necessary to help the more backward classes otherwise those of the backward classes who are little more advanced than the more backward classes might take away all the seats. This interpretation is equally applicable to article 15(4) as the word backward classes of citizens in article 15(4) are wider and includes the SCs & STs and other socially and educationally backward classes also. On this point the decision of Balaji case has been disapproved.

\(^8\) AIR 1963 SC 649  
\(^9\) AIR 1993 SC 477
Relaxation of minimum qualifying marks for admission for SCs and STs:

In State of M.P. v. Nivedita Jain\(^{10}\), Supreme Court upheld the validity of an Executive order of the State Government which had completely relaxed minimum qualifying marks in pre-medical examination for selection of students to Medical Colleges of the State in respect of SCs and STs candidates.

High Caste girl marrying scheduled tribe - Not entitled to Reservation benefit:

In Dr. Neelima v. Dean of P.G. Studies A.P. Agriculture University, Hyderabad\(^ {11}\), it has been held that a high caste girl marrying a boy belonging to scheduled tribe is not entitled to the benefit of reservation available to scheduled tribes. The court observed that she could not acquire the status of scheduled tribe and she cannot take the benefit of the reservation. Mere acceptance of family of husband is not sufficient. Strict proof of acceptance by community of husband is necessary.

SUPREME COURT OBSERVATION FOR PROMOTION OF SCs AND STs IN INDIA

Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate caste-ism in the country. Reservation is under-written by a special justification. Supreme Court observed in the case U.P. Power Corporation Ltd. Vs. Rajesh Kumar and Ors.; AIR (SC 0334) 2012 that Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16 (4-A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist State-wise.

The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

In the case of Ashok Kumar Gupta and Anr. Vs. Respondent: State of U.P. and Ors\(^ {12}\).

Having declared that the reservation in promotion as unconstitutional, it is void ab initio under Article 13(2) of the Constitution. It bears, thereby, no legal or constitutional existence. The promotion made to respondents at all levels, therefore, is unconstitutional. The

\(^{10}\) AIR 1981 SC 2045
\(^{11}\) AIR 1993 229
\(^{12}\) 14 AIR (SC 1176) 1997
operation of the unconstitutional direction cannot be postponed by prospective overruling of Rangachari’s ratio. The judgment of Jeevan Reedy, J. concurred by Pandian, J. being minority judgment, cannot operate prospectively. Even if it is assumed that it is a majority judgment, it is inconsistent with and contrary to the constitutional scheme of Articles 14 and 16 violating the fundamental rights of the appellants/petitioners and, therefore, the power under Article 142 of the Constitution cannot be exercised to curtail the fundamental rights guaranteed in Part III of the Constitution.

The fundamental requisites to all employees are honesty, integrity and character, apart from hard work, dedication and willingness to apply assiduously to the responsibilities attached to the office or post and also inclination to achieve improved excellence. What Dalits and Tribe employees need is an opportunity and fair chance of promotion to higher posts and offices earmarked for them in the roster where they are not adequately represented. In a clash of competing claims between general category employees on the one hand and Dalits and Tribes on the other, what the authorities need to take into consideration is the aforesaid factors and their service record with an objective and dispassionate assessment. When the authorities have a power coupled with the constitutional duty, the doctrine of full faith and credit under Article 261 gets due acceptance when done truly and sincerely with an honest, objective and dispassionate assessment by the appropriate authority. Their claims need to be considered in that perspective; they should be given promotion, if found eligible, to the posts or classes of posts in the higher cadre, grade, class or category etc. The selecting officer/officers need to eschew narrow, sectarian, caste, religion or regional consideration or prejudices which are deleterious to fraternity, unity and integrity and integration of the nation as unified Bharat. What needs to be achieved by the Dalits and Tribal officers so promoted is that they should, on par with others assiduously devote themselves with character, integrity and honesty in the discharge of the duties of the posts with added willingness and dedication to improve excellence. Thereby the efficiency of administration would automatically get improved and the nation constantly rises to higher levels of achievement. Therefore, it cannot be held that reservation in promotion is bad in law or unconstitutional.

Conclusion:

Judicial decision has been pronounced in above all cases in which courts has shown its own endeavorence to emancipate the whole society. The concept of social engineering has got life blood through all these decisions in which high court and supreme court tried themselves to take into considerations the changing aspect of the society whether it relate to the emancipation of working women class, inter-caste marriage, honour killing and LGBT rites.

The judiciary has been promoting social change through rights-friendly interpretations of the Constitution aimed at implementation of economic and social rights. The increasingly positive attitude of the judiciary towards public interest litigation, overcoming earlier inhibitions which had constrained the role of the judiciary, has enabled the judiciary to play a dynamic role in facilitating and promoting social change. Judicial review has continued to
expand in India on the premise that every organ functioning under the Constitution has limitations and it is for the court to determine those limits. Abuses of executive powers, the failure to discharge legal duties and pervasive human rights violations have all called for redress. This has accounted for the expansion of the scope of judicial review. The challenge of implementation of economic and social rights has seen innovative approaches being applied, including the development of public interest litigation. New challenges are presented by issues, amongst others of gender justice, bonded labour, forcible eviction of slum dwellers, and different forms of environmental degradation which have had to be dealt with by the judiciary.

Justice V. R. Krishna Iyer, has rightly observed that ´Law is not a brooding omnipotence in the sky but a pragmatic instrument of social order. Judicial Process is a means of enforcing law. In the light of the above discussion certainly it would be perfectly right to say that Judicial Process is an instrument of social-ordering. The prominent work of Indian Courts today may be seen as prosecuting poor people for petty crime. The main role of courts continues to be, as in colonial times to (i) enforce law against (mostly poor) citizens; (ii) protect property rights (state and private) and (iii) uphold and protect the authority of state. On the other hand, in the immortal words of Supreme Court in S.P.Gupta Case Indian Constitution has made a revolutionary change in the role of Indian Courts from being an arm of the RAJ to being an instrument of SWARAJ, an ´arm of social revolution.

No doubt courts are facing lot of criticism through all corner for its judicial adventurism but we should introspect ourself and then we can appreciate these decisions which has given a new direction to our whole society. These judicial legislation should be appreciated because courts has shown its courage to give new way to the society and we can say the observation of Roscoe Pound - "The law must be stable, but it must not stand still" is correct if all these decisions will be positively interpreted.
FACEBOOK AND THE LAW
NOTHING PRIVATE ABOUT IT

Sri Vashishth Vibhuti Parashar

Sharing is life. Enter Facebook. No, I am not beginning to run it down for the simple reason that for all its flaws and ill-effects- if ‘it’ has any of those and not the users- it is a remarkable tool to connect and answers to our most basic need at all times since the Stone Age- Collaboration. Yes, ‘collaboration’ is indeed a big, heavy and perplexing word compared to the lightness, breeziness and flippance we attach to ‘Facebook’. But the desire to connect and stay connected is basically an urge that has its roots in the existential need to stay in groups to improve chances of survival against natural enemies. Of course, we have come a long way from there, but we still exist and live best within the ambit of human societies, however big, small, crude or cultured they might be. Therefore, staying connected is not so much a choice; it’s hardwired in us. So, if the world is drawn to Facebook and Twitter the way it is, it shouldn’t surprise anybody. However, what must be born in mind at all times is that social networking tools are not a substitute but only an extension of our lives. One’s Facebook personality may be slightly different from one’s real life personality, but it’s not an a ‘alternative personality’. it’s just another dimension of your own self. Treating your online personality as different from your real-life persons may not only create social and psychological issues, but also incur legal consequences. And, apparently, people don’t realize the seriousness of any of these.

One of my students - a teenager under 18 years of age- remarked that he did not take his Facebook comments ‘seriously’, and I couldn’t help taking that remark ‘seriously’. And then there was Kapil Sibal trying to shackle and regulate online media drawing considerable criticism from all quarters in the process. I abhor the idea of pre-censorship as much as anybody else, but for all the inappropriateness of approach and motive, what Sibal was asking in principle was for the social media websites to be more ‘responsible’ and ‘accountable’ for the content they hosted. To paraphrase, Mr. Sibal wanted the social networking websites to take what they publish ‘seriously’. Just that he was holding the wrong man by the collar. Facebook, Twitter, Google and the like don’t ‘publish’ the content they display; we do. And if somebody has to be blamed, made accountable and told to take things ‘seriously’, it’s the users and not the hosts.

Certainly, online speech is not free of all restrictions, but is subject to all reasonable restrictions imposed by the same laws and regulations that regulate speech and expression in the normal course. It’s also nobody’s case that the social media websites should not act

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promptly and take the offensive material down forthwith after such a content is brought to its notice without insisting on procedural niceties. However, this is not the last of possible consequences, and is certainly not the fixing of accountability because website might be held accountable for not promptly taking the material off, but cannot be held accountable for the material itself. Therefore, the accountability of the website with respect to objectionable user-generated content is very limited, but is complete and absolute with the original ‘publisher’ of the content. All Substantive and procedural laws operating under the constitutional umbrella of Article 19 (2) apply with full force with respect to any material posted in the Internet as much as they apply to any violation outside cyberspace. There is no protection worth the name afforded by the much hyped concept of ‘online privacy’. It is no special right or privilege, but only an extension of the right to privacy as it otherwise exists. Being in cyberspace neither dilutes, nor enhances any of the rights enjoyed by the citizens under the Indian law with all concomitant limitations and restrictions. So, to cut a long story short, if you violate the law in the virtual world, you might be headed to the prison in the real world.

With over 845 million (84.5 crore) active users worldwide and some 43 million (4 crore, 30 lakh) in India alone, Facebook is at the center of the social networking talk followed closely by Twitter with over 500 million active users (in June 2011) across the world.

Although both Facebook and Twitter are considered tools for online social networking, the two are considerably different in many ways including the way the users approach these sites. While Facebook is like a massive drawing room housing a get-together of friends, acquaintances and some friends-of-friends, who can overhear parts of the conversation you have with your friends, Twitter is more like your conversation with the external world, which your friends and acquaintances are also a very small part of. And the users carry this distinction in the back of their minds subconsciously, which is why they behave differently on Facebook than on Twitter. Twitter, as we all know, is a microblogging website, where Facebook is more of a sharing platform for friends and acquaintances to connect.

Therefore, unlike Twitter, Facebook is treated as ‘personal space’ by most of the users, which, legally speaking, is a myth. For the most part, the content one posts on Facebook stands on the same footing as the content one publishes on Twitter the moment it is visible to anybody other than the one publishing the content. So, unless you made your post visible to our only, you are accountable to the law for all that you ‘say’ on the Facebook. So, you can ‘not’ take your comments ‘seriously’ only at your own peril. If your posts and comments can offend people, they can also offend the law; and while people might fume and curse as you giggle away merrily, the law can turn the burner on.

Recently, websites like Facebook, Yahoo and Google found themselves in the dock facing criminal charges for hosting users-generated ‘objectionable content’. And this time it was not the government crying hoarse; it was a citizen who chose to initiate criminal
proceedings against the websites. And there was no legal challenge to the person’s right to invoke criminal jurisdiction of the courts in the matter.

Websites like Facebook, Yahoo and Google fall within the definition of “intermediary” under section of 2(1) (w) of The Information Technology Act, 2000, according to which “intermediary’ with respect to any particular electronic message means “any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.”

The Information Technology (Intermediaries Guidelines) Rules, 2011 enacted in exercise of the powers conferred by the IT Act, 2000, makes it mandatory for the “intermediaries” to inform the users by clearly stating under “rules and regulations, privacy policy and user agreement”. published on the website that they are not supposed to “host, display, upload, modify, publish, transmit, update or share” any such content that is “grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another’s privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling or otherwise unlawful in any manner whatever.” [Section 3 (2)(b)]

Once a violation within the description of any of the provision under section 3(2) is noticed by or is brought to the notice of an “intermediary” by any “affected person” through a written communication by e-mail or otherwise, section 3(4) of the Rules requires the “intermediaries” to take down the objectionable material within thirty-six (36) hours.

This means that any ‘objectionable content’ that falls within the description of section 3(2) not only violates the relevant laws of the land, but also violates the basic ‘Terms and Conditions’ that your agreed to when you joined the social networking site in question. Therefore, if the “intermediary” is taken to the court and has to pay damages or suffer any losses due to one’s posting the ‘objectionable content’, nothing stops the “intermediary”(Facebook or any other) from using one to recover the damages arising out of the breach of the express ‘Terms and Conditions’. At the same time, the “affected person” might also initiate a criminal action or a civil suit, or both against the violator.

So, if ‘X’ posts defamatory remarks against ‘Y’ or impersonates him or her [section 3(2) (g) of the IT Rules 2011], ‘X’ might be sued both by the concerned “intermediary’ for the violation of the ‘Terms and conditions’, and also by ‘Y’ for defamation. Additionally, ‘Y’ might also choose to initiate criminal proceedings against ‘X’, and sue the “intermediary’ for failing to take down the objectionable content within the stipulated period of thirty-six (36) hours, if the “intermediary” failed to act after having been notified of the offending material by ‘Y’. And if the “intermediary” had to compensate ‘Y’ the amount paid might be recoverable from ‘X’. In short, ‘X’ is neck-deep in boiling soup.

However, it might be difficult for ‘Y’ to have the ‘intermediary’ prosecuted under criminal provisions because of the obvious difficulties involved in establishing criminal intent on the intermediary’s part.
Furthermore, offences like posting obscene or pornographic material don’t even need an “affected person”. The State can prosecute the offender on its own for the crime without anybody’s turning up with a complaint.

And it might be heartbreaking for those who breathe easy under the myth of ‘internet anonymity’ that it’s less than a cakewalk for the authorities to turn your IP address into a knock on your door.

So, there is absolutely no reason for you to ‘not take’ your posts and comments on Facebook and your tweets on Twitter ‘seriously’.
ADMINISTRATIVE TRIBUNALS: A GRIEVANCE REDRESSAL MACHINERY

Ms. Aayushi Rastogi*

Introduction:
The old police state has now become a welfare state and because of this radical change in the role to be played by the state its functions have also increased. Today, it not only exercises sovereign functions but it also regulates industrial relations as well as exercises control over production.

In the interest of the disputant parties and for the benefit of the society the disputes between the worker and the management should be settled as early as possible. So in order to speed up the settlement of such disputes administrative tribunals have been established.

In Durga Shankar Mehta v. Raghuraj Singh AIR 1954 SC 520 the supreme court has defined the term administrative tribunal in the following words; "the expression tribunal used in article 136 does not mean the same thing as ‘court’ but includes within its ambit all adjudicating bodies, provided they are constituted by the state and are invested with judicial as distinguished from administrative or executive functions.

In Jaswant sugar mills v.Lakshmi Chand AIR 1963 SC 677 the Supreme Court laid down a test to determine a tribunal. The court said that, "an authority deriving power of adjuration from a statute or statutory rule having power to summon witness and administer oath is immune from any administrative interference in the discharge of their judicial functions and is not bound by strict rules of evidence is a tribunal."

Constitutional status of Tribunals

The provision for the setting up of the administrative tribunals was adopted by the 42nd amendment act in the year 1976. Under part xiv-A, two articles 323-A and 323-B where incorporated which dealt with the power and jurisdiction of the tribunals. But several provision of the 42nd amendment act including the provisions of administrative tribunals envisaged in part xiv-A were looked upon with suspicion and misgivings which resulted into an attempt by the janata government to abolish them. The 44th amendment act was enacted to abolish part xiv-A altogether. But this attempt of janata government was unsuccessful as it could not muster adequate support in parliament.

Historical Development:

Although the 20th century has witnessed a rapid growth of administrative tribunals. But even in the past, more than three centuries ago the commissioners of custom and excise were given

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judicial powers. After World War I and II several tribunals were created under various welfare legislations. Today administrative tribunals deal with and decide innumerable disputes between individuals and individuals as well as subjects and their government.

Reasons for the Growth and Development of Administrative Tribunals.

The reasons for its growth and development are as follows:-

1. Administrative tribunals impart justice which is quick and less expensive. In most of the cases it does not charge stamp duty. Like courts of law the procedure followed by tribunals to administer justice is not cumbersome lengthy and costly.
2. In modern administration question of specialisation and expertise arise and knowledge in a particular subject is necessary over and above legal knowledge. In modern society individuals have to deal with more complex problems which cannot be settled just by applying legal principles which are pure and simple.
3. The tribunals have reduced the burden of courts and have provided them relief.
4. In this changing world of today, administrative tribunals are not only the appropriated means of administrative actions but one of the most effective means of imparting adequate justice.

Types of Tribunals

There are different types of administrative tribunals which are governed by the rules and regulations of the central and state government, they are as follows:

1. Industrial Tribunals
   This tribunal is governed by the Industrial Dispute Act 1947. The tribunal dispenses disputes between the employee and the workers in matters relating to wages, compensation, allowances, retrenchment, closure and hours of work. The appeal against the decision of the tribunal lies with the Supreme court.

2. Income Tax Tribunal
   This tribunal has been established under the Income Tax Act 1961. The tribunal has its benches in various cities and appeals can be filed before it by an aggrieved person against the orders passed by the Deputy Commissioner, Chief Commissioner or director of Income Tax. An appeal against the orders lies in the high court and also to the supreme court if the high court deems fit.

3. Central Administrative Tribunal
   The Administrative tribunals act 1985 provides for the establishment of central administrative tribunal. Its consists of chairman, Vice Chairman and members. These members are drawn from the judicial and administrative streams. The appeal against the orders of central administrative tribunals lies with the supreme court of India.

4. Election Commission
   The election commission adjudicates matters pertaining to the allotment of election symbols to parties and similar other problems. An appeal against the orders lies with the supreme court.

5. Railway Rates Tribunal
The provisions for the establishment of Railway Rates Tribunals lies under the Indian railways act 1989. It adjudicates the matters relating to the complaint against the railway administration. These may be related to the discriminatory rates or prefferential treatment meted out by the railway administration. An Appeal against the orders lies to the supreme court.

Likewise other administrative tribunals are Bar Councils of India, Custom and Excises Revenue Appellate Tribunal, Foreign Exchange Appellate board etc.

**Working of Tribunals:**

**Its Functions:**

Administrative tribunals not only determines the constitutional validity of the subordinate legislations but also carries out the disciplinary and procedural functions. They are as follows:

1. An administrative tribunal may declare a statute or a subordinate legislation unconstitutional if it contravenes the provisions of the constitution.
2. In a case where enquiry has been dispensed with under the 2nd provision of article 311 the tribunal is competent to examine the legal jurisdiction for such dispensation. *(Held in Om Prakash Pathak v. UOI 1986 SLR 251)*
3. A tribunal is not barred by the provisions of Evidence act. In order to find the truth the administrative tribunal may investigate the matter without violating the principle of natural justice.
4. The decisions of the most of the tribunals are in fact judicial rather than administrative in as much as they have to record findings of facts objectively and then to apply the law to them without regard to execute policy. Though the decision is conferred on them it is to be excercised objectively and judicially.
5. Most of the administrative tribunals are not concerned exclusively with the cases where government is a party they also decide disputes between the two private parties.
6. The tribunal is competent to go into the facts and set aside the order passed by the disciplinary authority where the conclusion arrived is arbitrary and preverse.

**Power and Jurisdiction of Tribunals**

1. With the enforcement of Administrative Tribunals Act 1985, all judicial remedies except that of the supreme court have been abolished and the pending proceedings to other courts have been transferred to the administrative tribunals under s.29 of the act.
2. In *Sampat kumar v. UOI 1987 1 AIR 34* the supreme court held that the jurisdiction of tribunal is not supplementary but is a complete substitute of the high court and civil court.
3. As per s.14 of the Administrative Tribunals Act 1985, in case where the suit lay the employee will have to seek remedy under s.19 of the act. In *Kaptan Singh v. UOI 1986 4 SLR 545 (Del)* it was held that the pending suit shall stand transferred to the Administrative Tribunal having territorial jurisdiction under s.29 of the act.
4. The order of the administrative tribunal cannot be challenged before the high court.
5. In the year 1986 a new section s.29A was inserted which gave an appellate jurisdiction to the administrative tribunals. In *UOI v. Deep Chand Pandey 1992 4 SCC 432* it was held...
that the appeals from the judgements of Civil courts in suits relating to service matters shall lie to the administrative tribunal.

**The limitations of Administrative Tribunals:**

Though the administrative tribunals have certain benefits it as its pitfalls also. Some of the drawbacks of administrative tribunals are:

1. It is against the doctrine of rule of law.
2. No rules have been laid down as to procedure at a tribunal hearing. Witnesses may be heard or left unheard at their pleasure.
3. A judge in a court of law is trained to look at things objectively and without any bias uninfluenced by the consideration of policy while an executive officer at a tribunal keeps in view such considerations.
4. Since there is no evidence on oath therefore there can be no proper examination as in a court of law.

**Tribunals power to Grant Interim Relief**

The administrative tribunals possess many powers conferred on it by the parent act but over and above those powers, it also has a power to grant interim relief. The tribunal may grant interim relief during the pendency of a suit. This power of the tribunals had made it more effective in its working. In ITO V. M.K. Mohammed Kunhi AIR 1969 SC 430(433:(1969)2 SCR 65) the supreme court said, "it is firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective."

**Administrative Tribunals and Principles of Natural Justice**

Administrative Tribunals must act openly, fairly and impartially. They must afford a reasonable opportunity to the parties to represent their case and to adduce the relevant evidence. Thus in *State of U.P. v. Mohd. Nooh AIR 1958 SC 86 :1958 SCR 595* where the prosecutor was also an adjudicating officer and also in *Bhishamber Nath Kohli v. state of U.P.AIR 1986 SC 573:1966 2 SCR 158* , where the adjudicating authority accepted new evidence at the revisional stage without giving other side an opportunity to rebut the same, the decisions where set aside.

**Administrative Tribunals and Doctrine of Precedent**

In a tier system decisions of higher authorities are binding on lower authorities and quasi judicial tribunals are also bound by this principle. In *Bhopal Sugar Industries v. ITO AIR 1961 SC 182, 185* The Income tax officer refused to carry out clear and unambiguous directions issued by income tax tribunal. Observing that such refusal would lie against the fundamental principles of hierarchy of courts, the supreme court stated, "such a view is destructive of the basic principles of administration of justice."

**Administrative Tribunal and Doctrine of Res Judicata**

The doctrine of Res Judicata means that if an issue had been made a subject matter of the previous suit and had been raised tried and decided by a competent court having jurisdiction to try the suit, the same issue cannot thereafter be raised, tried or decided by any court
between the same parties in a subsequent suit. This doctrine is embodied under section 11 CPC. The administrative adjudication is also bound by the doctrine of res judicata.

**Administrative Tribunal and Doctrine of Stare Decisis**

Doctrine of Stare Decisis does not apply in strict sense on the tribunals. The duty of such tribunal is to reach the right decision in the circumstances of the moment. The mere fact that the tribunal failed to follow the earlier decision is, by itself not a ground for reversing a subsequent decision if it is otherwise in accordance with law.

**Contempt of Administrative Tribunals**

The tribunals have been empowered by the Administrative Tribunals Act 1985 under s.17 to punish a person for committing their contempt. In such cases, a tribunal can exercise powers under the Contempt of Courts Act 1971.

**CONCLUSION:**

In my opinion, though the administrative tribunals are an inexpensive and an appreciable mode of imparting adequate justice still there are certain lacunas which are required to be fulfilled in order to increase public confidence in them. This can be best done by minimizing the executive and political interference which is the reason for impeding the proper development of tribunals in India, increasing the competency and objectivity of tribunals in determining disputes and by establishing a single centralised agency to check the functioning of the tribunals and ensure independence of tribunals in matters of tenure and funds.

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INTRODUCTION

The term trafficking in this context literally means the action of dealing or trading in something illegal. It also implies the transportation of goods or passengers, which in this case is done in an illegal manner.

Human trafficking is the trade in humans, most commonly for the purpose of sexual slavery, forced labor or for the extraction of organs or tissues, including surrogacy and ova removal. Human trafficking can occur within a country or internationally. Human trafficking is a crime against the person because of the violation of the victim's rights through coercion and exploitation. Victims of human trafficking are generally forced to work for or provide services to the trafficker or others. They are held against their will through acts of coercion. The work or services may include anything from bonded or forced labor to commercialized sexual exploitation. It is a lucrative industry, representing an estimated $32 billion per year in international trade, compared to the estimated annual $650 billion for all illegal international trade circa 2010.

TRAFFICKING OF CHILDREN

Trafficking of children or the sale of children is a form of human trafficking and is defined as the "recruitment, transportation, transfer, harboring, and/or receipt" of a child for the purpose of exploitation. Though statistics regarding the magnitude of child trafficking are difficult to obtain, the International Labour Organization estimates that 1.2 million children are trafficked each year. The trafficking of children has been internationally recognized as a major human rights violation, one that exists in every region of the world. Yet, it is only within the past decade that the prevalence and ramifications of this practice have risen to international prominence, due to a dramatic increase in research and public action.


Reliable estimates on the number of children who have been trafficked or who fall victim to trafficking each year are hard to obtain. ILO report gave the following regional breakdown for the numbers of trafficked children:

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1 U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
<table>
<thead>
<tr>
<th>REGION (SOURCE)</th>
<th>Trafficked Children</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asia-Pacific</td>
<td>250,000</td>
</tr>
<tr>
<td>Latin America+ Caribbean</td>
<td>550,000</td>
</tr>
<tr>
<td>Africa</td>
<td>200,000</td>
</tr>
<tr>
<td>Transition Economies</td>
<td>200,000</td>
</tr>
<tr>
<td>Developed, Industrialized Economies</td>
<td>N/A</td>
</tr>
<tr>
<td>TOTAL (Rounded)</td>
<td>1,200,000</td>
</tr>
</tbody>
</table>

**TRAFFICKING AS A VIOLATION OF THE RIGHTS OF THE CHILD:**

All children should be enjoying all the rights under the UN Convention on the Rights of the Child. Trafficking is a serious violation of children’s rights, including specifically their rights to be protected from exploitation, to remain with their family, to go to school, to be protected from sexual violence and to have time to play. When children are trafficked, they almost always end up in work that is dangerous to their health, safety and sometimes morals. They are not able to go to school and so lose the opportunity to improve their lives in the future. They are often cut off from their families and at risk of sexual abuse and other forms of violence. Apart from the dangers that a child faces while being trafficked and then being exploited, child trafficking violates many other rights promised to children in international law. In addition to the special rights guaranteed to children, of course, all children should also enjoy all the rights accorded to all human beings. Article 4 of the Universal Declaration of Human Rights (1948) reminds us that “No-one shall be held in slavery or servitude” and Article 1 is clear that “All human beings are born free and equal in dignity and rights”. By its very nature, child trafficking threatens these rights.

**TRAFFICKING IN THE CONTEXT OF LABOUR MIGRATION AND EXPLOITATION**

Child trafficking happens when a child is moved from one place to another within a country or across a border into a situation in which they are exploited, and this exploitation can take many different forms. The movement part of the trafficking ‘event’ accompanied by the action of someone who intends to exploit the child for profit is essential to the difference between child trafficking and migration into child labour. The movement away from home, local community, support and safety mechanisms into an environment where the child is isolated and manipulated by others greatly increases the child’s vulnerability and makes child trafficking a particularly despicable crime and a violation of their rights. Where legal migration channels are closed, difficult to take or not known to people who want to migrate for work, then illegal migration, people smuggling and human trafficking are more likely to happen. Keeping migration channels open and helping people to use them in a regular, safe and easy way is an important step in preventing illegal migration, smuggling and trafficking.

Exploitation is the other essential part of child trafficking. Trafficking is always made up of both movement and (the intention of) exploitation. If there is only movement and no (intent of) exploitation, then this is not trafficking. If there is exploitation but no movement,
then this is not trafficking either.

When children take up a job but have not yet reached the legal minimum age for work, this is considered to be ‘child labour’. When they are employed in hazardous or other exploitative circumstances, such as slavery and slavery-like situations, in commercial sexual exploitation or illicit activities, they are in a worst form of child labour. Hazardous work - according to the Worst Forms of Child Labour Convention, 1999 (No.182) - is “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children”. Hazardous work is defined by each country, with government, workers’ and employers’ organizations in consultation developing a list of sectors (for example ‘underground mining’) or tasks (for example ‘handling loads over 10 kilos’) that constitute hazardous work. No child under 18 should be in a worst form of child labour. Children under 15 (or 14 in some countries) should not be in regular work, and children under 13 (or 12 in some countries) should not even do light work according to ILO Convention No. 138 on the minimum age of employment. Trafficking children below the mentioned ages into the mentioned situations is in itself considered to be a ‘worst form of child labour’, because children who have been trafficked are in a particularly vulnerable situation. They are away from home, usually separated from their family and community, may be isolated in a country or region where they do not know the language, cannot get help and have no way to return to their home. Isolated in this way, they are commonly the victims of abuse of power. Trafficked children are totally at the mercy of their employers or the people who are controlling their lives and so risk sexual aggression, starvation, loss of liberty, beatings and other forms of violence. Because any exploitation that includes trafficking is a worst form of child labour, children must be removed at once from this situation and be given the support they need to recover and rebuild their lives in safety and security.

TRAFFICKING AS A CRIMINAL ACT AND ISSUE OF NATIONAL SECURITY:

In international law and in most countries’ national laws, trafficking is a criminal offence. It disrupts families and communities, earns profits for criminals and criminal networks.
In relation to the exploitation of trafficked children, it also undermines financial structures and the national economy, since goods and services produced with trafficked labour are often from enterprises working outside regulated markets. It destabilizes the workings of the regular labour market, under-cutting prices and wages and encouraging corruption and unfair practices. Trafficking is also a security issue when it includes crossing of national borders because traffickers make large profits from introducing people illegally into a country and exploiting their labour. Many traffickers are also involved in moving other forms of contraband along the same routes as their human cargo, such as cigarettes, stolen cars or ‘dirty’ money, so governments across the world have increasingly become concerned about the operations of traffickers. In some parts of the world, there are insidious links between the trafficking of children and the drug trade. Children are trafficked into exploitation as drug couriers and dealers, and are often ‘paid’ in drugs in order that they become addicted and so entrapped. Such children are at high risk of other forms of violence and even murder. Because of the illicit nature of drug dealing and trafficking, children who are caught are more often than not treated as serious criminals whereas they are, in fact, in need of specialized help. Among the most important tools for combating child trafficking are the internationally or regionally agreed commitments that are laid down in instruments variously called conventions, protocols, memorandums, joint actions, recommendations or declarations.

### INITIATIVES OF UNITED NATIONS

Although it can occur at local levels, human trafficking has international implications, as recognized by the United Nations in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (also referred to as the *Trafficking*
Protocol, an international agreement under the UN Convention against Transnational Organized Crime (CTOC) which entered into force on 25 December 2003. The protocol is one of three, which supplement the CTOC. The Trafficking Protocol is the first global, legally binding instrument on trafficking in over half a century, and the only one with an agreed-upon definition of trafficking in persons. One of its purposes is to facilitate international cooperation in investigating and prosecuting such trafficking. Another is to protect and assist human trafficking's victims with full respect for their rights as established in the Universal Declaration of Human Rights. The Trafficking Protocol defines human trafficking as.

(a) [...] The recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age.

The Trafficking Protocol was adopted by the United Nations in Palermo in 2000 and entered into force on 25 December 2003. As of March 2013 it has been signed by 117 countries and ratified by 154 parties.

DEFINING CHILD TRAFFICKING:

The first major international instrument dealing with the trafficking of children is part of the 2000 United Nations Palermo protocols, titled the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. Article 3(a) of this document defines child trafficking as the "recruitment, transportation, transfer, harboring and/or receipt" of a child for the purpose of exploitation. The definition for child trafficking given here applies only to cases of trafficking that are transnational and/or involve organized criminal groups; in spite of this, child trafficking is now typically recognized well outside of these parameters. The International Labour Organization expands upon this definition by asserting that movement and exploitation are key aspects of child trafficking. The definition of "child" used here is that listed in the 1989 U.N. Convention on the Rights of the Child, which states, "A child means every human being below the age of 18 years, unless, under the law applicable to the child, majority is attained earlier." The distinction outlined in this definition
is important; because some countries have chosen to set the "age of majority" lower than 18, thus influencing exactly what legally constitutes child trafficking.

**NATIONAL LAWS**

National laws pertaining to child trafficking continue to develop worldwide, based on the international principles that have been established. Anti-trafficking legislation has been lauded as critical by the United Nations Global Initiative to Fight Human Trafficking, because it ensures that traffickers and trafficking victims are treated accordingly: for example, "if migration laws are used to pursue traffickers, it is often the case that the victims too are prosecuted as illegal migrants, whereas if there is a specific category of 'trafficker' and 'trafficked person,' then it is more likely that the victim will be treated as such." The existence of national laws regarding child trafficking also enables trafficking victims and/or their families to take appropriate civil action.²

More and more national laws are being brought into line with international principles and so there is more consistency and harmony in the treatment given, for example to children who have been trafficked, in individual countries’ laws. Not all countries have laws relating specifically to human trafficking; instead traffickers are prosecuted under laws relating to abduction, prostitution, illegal migration or people smuggling, counterfeiting or labour exploitation. Dedicated anti-trafficking laws are important, though, so that traffickers can be prosecuted as traffickers and so that trafficking victims are given appropriate consideration (for example, if migration laws are used to pursue traffickers, it is often the case that the victims too are prosecuted as illegal migrants, whereas if there is a specific category of ‘trafficker’ and ‘trafficked person’, then it is more likely that the victim will be treated as such). It is also vital that the specifics of child trafficking and the special needs of both girls and boys are taken into account in laws relating to human trafficking. Anti-trafficking legislation should furthermore cover internal in addition to cross-border trafficking, and should go beyond coverage of sexual exploitation and also include other forms of labour exploitation as unacceptable end result of trafficking. In addition to criminal law covering trafficking, at national level civil law can also be relevant. For example, trafficking victims or their families might decide to take civil action to pursue compensation from traffickers for loss of income or damages. Confiscation of the proceeds of trafficking is additionally a strong deterrent to trafficking, which is after all basically a profit-making activity.

**CHILD TRAFFICKING IN INDIA- A CHALLENGE**

It has been observed that the case of children being sold as commodities is on a sudden rise from the past few decades. As much as it is hard to believe but this inhuman practice of child trafficking is not something which came about in the 21st century but dates back to historic times. This is the bitter reality for a large number of boys and girls around the

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globe. They are the victims of an unscrupulous but extremely profitable business that meets and international demand. Child Trafficking as we all know is a serious Human Rights issue. Child trafficking is not a new social evil but in present times it has re-surfaced has a stronger force to reckon with, at the same time becoming a serious threat to India’s security. Children and their families are often lured by the promise of better employment and a more prosperous life far away from their homes. A large number of others are kidnapped and then sold. Trafficking violates a child’s right to grow up in a family environment and exposes him or her to a range of dangers, including violence and sexual abuse. It is estimated that more than 1 million people are trafficked annually around the world; some experts say it could be double than that. Human trafficking is the sale, transport and profit from human beings who are forced to work for others- is the modern equivalent of slavery.

Trafficking of children is the recruitment, transfer, transportation and harboring of children for the purpose of exploitation. Trafficking of children usually happens through well-organised networks. Family, friends, relatives, community leaders, brokers, the pimps, owners of brothels, the police, political connections and the criminal nexus: all of these are said to be involved in the entire process of child trafficking. People suffer both physical and mental trauma and go through social stigmatization. They become isolated and lose their ties with former lives and families. More than that trafficking subverts development efforts and raises social and health costs. While both boys and girls are the victims of trafficking, it is primarily girls who are more vulnerable, especially to trafficking for sexual purposes.

In India, a large number of children are trafficked not only for the sex ‘trade’ but also for other forms of non-sex based exploitation that includes servitudes of various kinds, as domestic labour, industrial labour, begging, organ trade and false marriage.

AGGRAVATING FACTORS OF CHILD TRAFFICKING IN INDIA:

1) **Sexual Exploitation:** In India, traffickers need girls to satisfy their customers for tier sexual needs. The girl child fall prey to the prostitution rackets and land in the brothels or end up being sex slaves themselves. Another aspect of this, which is very common in India is religious prostitution. Young girls are married to a local goddess and have to be sexually available to men in the temple.

2) **Marriage:** One third of the world’s child brides live in India, which also accounts for a large number of unregistered births. A recent study indicated that 5000 girls were sold in Mewat region of Haryana. It has been noted that young Indian girls are sold off into ‘casual marriages’ to the Sheikhs of the Middle East.

3) **Labour:** Child labour is a grave and extensive problem across India. Children under the age of 14 are forced to work in glass-blowing industries, fireworks and most popularly in Carpet-making factories. Reports through various governmental and non-governmental organisations’ sources suggest that there exist about 50 million child labourers around the world. These children are involved in bonded labour or Domestic Work.
4) **Economic Factors:** Poverty is often cited as one of the key reasons leading to child trafficking, though it’s not the sole reason. Loss of traditional sources of livelihood, growing unemployment, forced migration, the commodification of children and growing consumerism resulting from globalization have all contributed to the increase in child trafficking. According to the UNICEF poverty is the single most important reason for child trafficking in South Asia.

5) **Cultural, Religious and Social Factors:** Anecdotal evidence has suggested that priests in the temple have used their position to traffic girls for prostitution. They made use of outlawed practices like the ‘Devdasi’ and ‘Jogin’ systems. Traffickers sell the girls to Bedia and Bacchara communities who live in Madhya Pradesh, and the border districts of Uttar Pradesh and Maharashtra and the Rajnats of Rajasthan, families where prostitution is the traditional means of earning a livelihood. A myth, which makes young girls even more vulnerable, is the widespread belief that sex with a virgin girl will cure men of STD and HIV/AIDS.

6) **Geo-Political factors:** India shares its borders with seven other countries namely Pakistan, China, Bangladesh, Bhutan, Nepal, Myanmar and Afghanistan (touches the POK region). With the connivance of the border police on either side, it is not difficult to enter India. Political instability and economic compulsions are reasons for young girls from Nepal, Bangladesh, and Myanmar and even as far as Uzbekistan, to be sold to traffickers. Trafficking from these countries is a one-way route, ‘into India’. Children are also transported for other reasons such as for Entertainment and Sports.

**STATUTORY PROVISIONS RELATING TO TRAFFICKING OF CHILDREN IN INDIA:**

At the state and National level, India has various laws focused on the prosecution of traffickers, rescue and care for victims of trafficking. India has a fairly wide framework of laws enacted by the Parliament as well as some State legislatures, apart from provisions of the Constitution, which is the basic law of the country:

1) Article 23 of the Constitution of India guarantees right against exploitation; prohibits traffic in human beings and forced labour and makes their practice punishable under law.

2) Article 24 of the Constitution prohibits employment of children below 14 years of age in factories, mines or other hazardous employment.

3) The National Legal Framework also provides provisions that are relevant and applicable to situations of trafficking. Some of these are:

4) Sec 363 A of IPC: Kidnapping or maiming a minor for the purpose of begging.

5) Sec 366 A of IPC: Procuring minor girl for the purpose of sexual exploitation.

6) Sec 366 B of IPC: Importation of girl from foreign country for sexual exploitation.

7) The Immoral Trafficking Prevention Act 1956: Procuring, inducing or taking a person for the sake of prostitution.
8) The Juvenile Justice Act: Procurement of a child under the age of 18 years for the purpose of exploitation.
9) Guardian and Wards Act 1890.
10) Factories Act 1948.

NATIONAL ACTION PLANS ON CHILD TRAFFICKING:

For coordinated action to happen effectively, all the anti-trafficking actors need to have an agreed ‘blueprint’ that details where each actor will work and on what, and how to report on progress. At a national level, this generally takes the form of a National Action Plan (NAP). The development of a NAP needs to involve national debate, so that everyone who needs to work on implementing the plan will be consulted from the very beginning and so that no-one is excluded. During these consultations, the views of children directly affected (and their families) need to be considered. It will be important, as part of developing the NAP, that any existing frameworks or plans relating to areas relevant to child trafficking, such as child labour or forced labour are taken into account. Where possible, such existing plans should be revised to include child trafficking. Where this is not possible, new plans should be complementary rather than repetitive, and these plans should cross-reference each other. If other plans or frameworks are in the process of being developed or revised, it will be important that at a minimum they take account of child trafficking and include actions that will complement efforts in this area. Some elements to include in the NAP are:

- An introductory section on concepts and definitions, to make sure everyone is ‘speaking the same language’ and that there is a common platform of understanding. This should also include specifics on the children at risk (profile) and any other premises that everyone should know (for example which international or regional conventions have been ratified and how they are translated into national law);
- Consideration of children at special risk, for example runaways, children from dysfunctional families, homeless children, AIDS orphans, children from ethnic minorities and out-of-school children;
- Reference to known gender specificities among children at risk and as part of the trafficking event;
- A listing of the exploitative sectors that are known to exist in the country, and the sectors into which children who are trafficked out of the country end up;
- Recognition of internal versus cross border trafficking;
- Recognition of source, transit and destination areas that each requires different interventions;
- Addressing demand in addition to supply;
- Reference to data sets that are disaggregated by sex, age, ethnic grouping etc.
In relation to the actions included in the NAP, these should be age-specific responses that recognize the specific rights and needs of specific subgroups of children. For example, children under 15 should be offered free basic education (under the Education For All initiative), whereas children aged 15 and up are allowed to work if in decent conditions (and would benefit from skills training, job placement services, safe (internal) migration and youth employment interventions); They should cover measures of broad protection to prevent trafficking of children at risk and former victims, prevention of the crime of trafficking, law enforcement and victim assistance.

**CONCLUSION:**

In addition to necessary legal reforms, the respective governments must take necessary proactive steps towards effective reinforcement of those laws without which these laws will remain only as mere pieces of paper stacked in shelves. State must establish effective inter-agency coordination mechanism for victim identification, investigation, extradition in cases of cross border trafficking, and prosecution. This will require comprehensive training of the police, Border Security Forces, immigration officials and other relevant agencies of the government. Traffickers need to be apprehended, prosecuted and suitably punished. For these to happen, law to prevent trafficking must focus on the trafficker- usually a chain of traffickers that lure the victim, transport her to an unknown city and force her into submission so that she is then exploited by the traffickers, with no available avenues of escape.

It will be appropriate if the Child Lines all over India, NGOs’ working on Child Rights, missing person bureaus and police help lines are linked together as a formidable tool against trafficking.

The challenge of combating trafficking is far beyond the capacity of individual organisations. Therefore, all sectors of the society, government, international organisations, corporate sector, NGOs’ and media should come together to tackle this growing menace. More attention is needed on prevention and demand as a major part of prevention efforts, Men and boys must be included in efforts to reduce son preference and violence against women. If demand for sex work is reduced, supply will also decline. The commoditization of women encouraged through the greater ease of access to pornography through information and communication technologies deserves a lot more attention. Related to this are gender stereotypes in media, which devalue femininity and glorify dominance and power and attribute those qualities to men.
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