Hon’ble Mr. Justice Shiva Kirti Singh  
Chief Justice, Allahabad High Court
MESSAGE

I am happy to learn that the Institute of Judicial Training and Research, U.P. is going to publish XXXIII issue of its Journal containing annual report about the activities and achievements of the Institute and various articles on legal and constitutional topics written by Hon’ble Judges of Supreme Court and Allahabad High Court, eminent Jurists, Lawyers, Law Professors and students of law. The Journal will give the Judges of Subordinate Judiciary a forum to express themselves on various subjects of law and humanity. I am sure that the Journal will prove beneficial for the Judicial Officers of the State.

I congratulate the Director and other officers of the Institute for regular publication of the Journal.

My best wishes go to the Judicial Officers of the State and the Institute for all success in future.

(Shiva Kirti Singh)
HON’BLE MR. JUSTICE SUSHIL HARKAULI
Senior Judge, Allahabad High Court
MESSAGE

This is a matter of immense pleasure for me to know that the Judicial Training & Research, Uttar Pradesh, Lucknow is going to publish its Journal very soon. I have been told that the Institute has been extremely busy in imparting judicial training to the Judges of the State in last two years under the 13th Finance Commission. It goes to credit of the Institute that it has been able to bring out its Journal without much delay. The Journal contains some very good articles contributed by Judges, Academicians and Law Students and I believe that good legal articles and information about new developments in the Institute will certainly increase the academic appetite of the judicial fraternity in the State.

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

(Sushil Harkauli)
HON’BLE MR. JUSTICE UMA NATH SINGH
Senior Judge, Allahabad High Court, Lucknow-Bench
MESSAGE

I am delighted to learn that the Judicial Training and Research Institute, Uttar Pradesh is going to publish 33rd issue of JTRI Journal, which inter alia contains its Annual Report of the year 2011-2012. I am informed that the report is being published to provide all the essential information regarding composition, functioning, achievements and future plans of the Institute. I am also informed that various articles contributed by my brother Judges and academicians on the subjects of contemporaneous importance and relevance, directly or indirectly, touch upon the issues related to our justice dispensation system.

I am happy that the Institute has successfully completed the first round of Judicial Training of almost all the Judicial Officers in the State under 13th Finance Commission during the calendar year 2011-2012 besides periodically organizing workshops, seminars, conferences, symposia, publication of digests etc.

I hope and trust that the Institute, which has a high and steady reputation of being one of the best Judicial Training Centres in the country, will keep on adding new pages to its glorious past. On this occasion, I extend my heartiest congratulations and wish the Institute and its Journal all the success.

(JUSTICE UMA NATH SINGH)
HON’BLE MR. JUSTICE BHANWAR SINGH
Chairman, JTRI, UP, Lucknow
Training is the best method for conversion of a legal knowledge to a judicial approach. Such conversion is best possible by way of methodical training. The word ‘training’ till 40 years back was an idea to which judges, all over the world, were opposed. France was the first country to have established a Judges training college in 1958. Then in 1963 National Judicial College in United States of America, Canadian Judicial Council in 1972 in Canada were opened and Australia followed the suit in 1975. In England, the concept of training had a seriously divided vote and needed deliberations. The Britishers are considered to be the modern law givers and most judicious too in the Justice Delivery System, yet they needed a debate on the issue whether, “Judges do need training”. To resolve the issue, a ‘Judicial Study Board’ was established in the year 1979 and it took long 9 years to deliberate over the subject and the debate eventually concluded, “Yes, Judges too need training” and accordingly established a Judicial Training Institute in the year 1988.

Back home, the lone training college in Allahabad was closed in the year 1961. For some time, our Trial Court Judges and Magistrates were trained in the Administrative College, Nainital, which was meant for the Executive Officers. However, our need could not be catered by the said Administrative College and it was in this background that the State of Uttar Pradesh established this Institute in the year 1987.

As a matter of fact, the Institute was established in order to provide training to Judicial Officers and Prosecutors of the State and also to conduct researches focusing on efficient judicial functioning including the problem of arrears and delay in disposal of cases. Judicial Training is considered to be relevant and necessary because the law students are taught about conceptual and textual laws. This kind of legal education can produce good law students. These good law students need to be converted into good lawyers and good judges. This requires linking legal knowledge with justice administration. Law is a social engineer and its aim is to create a just society in which rule of law is upheld and social evils are removed. How to make and apply law to achieve this object and how to make it an effective tool for administration of justice has been the main thrust of judicial training.

Our Justice Delivery System as in the past and also in the present times is alive to the commitment for its goal. Needless to say, the primary goal is to impart justice up to the expectations of the litigant public. In this context, it may be interesting to mention about the functioning of a statutory 13 Member Independent Judicial Performance Evaluation Commission in State of Utah, a Northern State of USA. Under the statute, 4 members of the evaluation commission are appointed by the Legislative Leaders, 4 by the Governor and 4 by the State Supreme Court. The thirteenth member of the Commission is the Executive Director of Utah on criminal and Juvenile Justice. This commission deals and focuses on the functioning of Judges in the Trial Courts and while approving for retention of Judges in service, the members focus on: (1) whether a Judge has taken interest in the problems and issues subsisting between the parties appearing in his Court. (2) Whether he has carefully listened and decided the issues impartially, (3) Whether he has demonstrated that the parties’ story or perspective has been heard; and, (4) whether he has acted in the interest of the parties and not out of personal prejudices.
It is a unique test of the Trial Courts’ Judiciary and certainly such a test is expected of every judicial system prevalent in any country. I request all the esteemed Judicial Officers of the State for whom we have been managing the training programmes to imbibe the aforesaid 4 virtues of a good judge and win over the public trust and confidence. In this context, it would also be relevant to mention that profile of a good Judge requires that he should be a gentleman with full of legal knowledge, a patient listener with affable mind (as per Kautilya), austere, impartial, God-fearing, (as per Katyayan) and free from anger. His respectful feeling for the lawyers, who in court proceedings teach us law, and guide us in the direction of justice, would beget greater esteem for Judiciary. The language of his judgments must be understandable by common man.

With the object of improving justice delivery system, 13th Finance Commission has approved the proposal for judicial reforms placed through a memorandum presented by the Ministry of Law and Justice, Government of India. Under the scheme, funds have been allocated for enhancing quality of judicial officers through training programmes and also for infrastructural improvements and 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.

The JTRI is the first in the country which under the guidance of the Hon’ble Allahabad High Court has commenced training programmes for the Judicial Officers of state under the 13th Finance Commission Scheme. 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 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.

In conducting the judicial training, the Institute attempts to create amongst the trainees the vision for justice i.e. how to become a powerful hand to support cause of justice. To bring about attitudinal change particularly for the implementation of social welfare laws pertaining to support women, children, weaker class and old age persons has been an important area on which we focus. The trainees are sensitized towards the object of such laws. The Institute updates the legal knowledge of the trainee officers during the training by discussions, interactions, sharing experiences, addressing the practical difficulties the officers face during working and by providing updated reading material containing case laws on useful topics prepared by the Institute. A quiz session was extremely successful, in which all the in-house trainees had participated. After the answers were given by the officers, substantive laws with the latest rulings of the Supreme Court and High Court to the concerned topic were narrated and discussed in detail.

The Institute, in its endeavour, has provided Online Software along with Civil & Criminal Referencer to the judicial officers. Management Training is also being provided in Army Institute of Management and Technology, Greater NOIDA, to the Judicial Officers, to inculcate and develop management skills in them. The Institute has already completed the first round of training of all judicial officers of the State under the 13th Finance Commission. The Second round of training is currently going on. The infrastructural development, construction of auditorium and separate women hostel, renovation of officers’ hostel,
training halls, gymnasium etc. have been undertaken during the award period which is to end on 31st March, 2015. To make our trainee officers to feel delighted, special attention is being given for the development of the campus and in the process plantation of trees, seasonal flower plants and other measures have been taken recourse to. But to me particularly, it is not enough and we have to do much more for the betterment of the campus and the Institute.

The first part of this Journal contains articles which feature on legal subjects of contemporary importance which have been written by Hon’ble Judges of Supreme Court of India and Allahabad High Court, Academicians, faculty members, judicial officers and students of law. We believe that the articles will attract the attention of readers and stimulate their thought processing. The second part of this journal incorporates Annual Report 2011-12 and the purpose is to provide authentic information about the composition, objectives, functioning and activities of the Institute during the period.

With this, Institute being under the patronage of and with the guidance and support of Hon’ble Allahabad High Court, specially Hon’ble Mr. Justice Shiva Kirti Singh, the Chief Justice, more specially the Senior Judge, Lucknow Bench and In-charge Judicial Education Hon’ble Mr. Justice U.N. Singh, still more specially all the Hon’ble Judges of the Allahabad High Court and with the cooperation of the faculty members and judicial officers, we would march ahead successfully to achieve new heights and to excel the Institute to the premier Institute in the country for judicial education.

I believe that in coming years the performance of judicial officers will be better after better and they will increase the confidence of the common man in the judicial system.

Wish you all a very happy and bright new year.

(Justice Bhanwar Singh)
Chairman, JTRI
Editor’s Page

I feel highly privileged in presenting this JTRI Journal which is eventually the XXXIII issue.

The last two years have been hectic for the Institute and it will continue to be so for the next two years. The 13\textsuperscript{th} Finance Commission aims to improve the Judicial System through judicial education. Therefore, funds have been allotted and the Judicial Training & Research Institute has been given the responsibility to impart training to the judicial officers of the State. In pursuance of this responsibility, the Institute has made a plan to undertake the training of Judicial Officers at least thrice in the award period which is to end in March, 2015. We are satisfied that we started the training under 13\textsuperscript{th} Finance Commission in the month of January, 2011 and we have successfully completed the first round of training of more than 2000 Judicial Officers of State. The second round of training will commence from January, 2013. During this period many more courses were undertaken and a number of seminar and workshops were organized on burning legal issues. The 13\textsuperscript{th} Finance Commission has also provided budget for infrastructural development of the Institute and accordingly an Auditorium and Women Hostel is under construction. Hostel and mess facilities have been greatly improved. Library and Conference rooms have been renovated. Campus has been beautified with new trees, plants and well maintained lawns. This process is still going on. We trust that with the continued patronage and encouragement of all, we will be able to take the Institute to new heights.


We are deeply indebted to Hon’ble Judges of the Allahabad High Court (including Hon’ble Judges of Lucknow-Bench), particularly Hon’ble Mr. Justice Shiva Kirti Singh, the Chief Justice, Hon’ble Mr. Justice Sushil Harkauli, Senior Judge, Allahabad High Court and Hon’ble Mr. Justice U.N. Singh, Senior Judge, Lucknow-Bench and In-charge Judge, Judicial Education, who have been always a source of guidance, inspiration and encouragement to us and the Institute. They have blessed this Journal by giving a message for its success. We express our great sense of regards and thankfulness to Hon’ble Mr. Justice Bhanwar Singh, Chairman, Judicial Training & Research, U.P., Lucknow for his valuable advice and guidance without which this Journal could not have been possible in such a short time.

We are highly obliged to Hon’ble Mr. Justice P. Sathasivam Judge Supreme Court of India, New Delhi, Hon’ble Mr. Justice Yatindra Singh, Chief Justice, Chhattisgarh, Hon’ble Mr. Justice Sunil Ambwani, Judge, Allahabad High Court, Hon’ble Mr. Justice A. Mateen, Judge, Allahabad High Court, Lucknow-Bench, Hon’ble Mr. Justice D.P. Singh, Judge, Allahabad High Court, Lucknow-Bench, Hon’ble Mr. Justice Vishnu Sahai, Former Acting Chief Justice, Allahabad High Court and Hon’ble Mr. Justice Amitava Lala, Former Acting Chief Justice, Allahabad High Court for their valuable contribution in terms of articles to enrich the Journal.

We express our gratitude to all other authors who have contributed articles in this Journal.

Special thanks are due to Sri P.K. Srivastava, Additional Director for the hard labour and keen interest in the preparation and compilation of this Journal. Thanks are due to Sri Anupam Goyal, Additional Director (Research), Sri Rajeev Bharti, Additional Director (Training), Dr. Rajesh Singh, Additional Director (Administration), Ms. Saran Piarie Varma Additional Director (Finance), Sri Mahendra Singh, Deputy Director, Sri Akhileshwar Prasad Mishra, Deputy Director, Sri Raviendra Kumar Dwivedi, Deputy Director, Sri Pushpendra Singh, Deputy Director, Sri Arvind Kumar Singh, Assistant Director (Finance) for giving full cooperation in the work.

I express my thanks to the staff of JTRI particularly to Mr. D.C. Kapri, Personal Assistant, who undertook the task of bringing the Journal in a good shape.

In spite of our meticulous care, it is possible that some errors and omissions may have escaped unattended. Any discrepancy or mistakes if found by our noble readers, should be immediately brought to the notice of this Institute. Views expressed in the Articles published in the Journal are solely that of the Author of the Article and the Institute is not responsible for any copyright violation.

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

Wish you all a very Happy New Year.

( U.S. Awasthi )

Director
### INDEX

<table>
<thead>
<tr>
<th>Sl.No.</th>
<th>PARTICULAR</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Message of Hon’ble the Chief Justice of Uttar Pradesh</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>Message of Hon’ble the Senior Judge, Allahabad High Court</td>
<td>5</td>
</tr>
<tr>
<td>3</td>
<td>Message of Hon’ble the Senior Judge, Allahabad High Court, Lucknow Bench</td>
<td>7</td>
</tr>
<tr>
<td>4</td>
<td>From the Pen of Chairman, JTRI, UP</td>
<td>9-11</td>
</tr>
<tr>
<td>5</td>
<td>Editor’s Page</td>
<td>12-13</td>
</tr>
<tr>
<td>6</td>
<td>STRENGTHENING THE JUDICIARY TOWARDS REDUCING PENDENCY AND DELAYS</td>
<td>19-23</td>
</tr>
<tr>
<td></td>
<td>By- Justice P. Sathasivam</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>WHO SHAVES THE BARBER: FUNDAMENTALS OF CYBER CRIME</td>
<td>24-30</td>
</tr>
<tr>
<td></td>
<td>By- Justice Yatindra Singh</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>ALTERNATIVE DISPUTE RESOLUTION</td>
<td>31-37</td>
</tr>
<tr>
<td></td>
<td>By- Justice Sunil Ambwani</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>DNA- OUR IDENTITY IN SCIENCE AND LAW</td>
<td>38-41</td>
</tr>
<tr>
<td></td>
<td>By- Justice A. Mateen</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>SOVEREIGNITY, JUDICIAL REVIEW AND SEPARATION OF POWER</td>
<td>42-56</td>
</tr>
<tr>
<td></td>
<td>By- Justice Devi Prasad Singh</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>ENVIRONMENTAL DEGRADATION AND HUMAN RIGHTS</td>
<td>57-60</td>
</tr>
<tr>
<td></td>
<td>By- Justice Vishnu Sahai</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>“MAKE PERMANENT LOK ADALAT MORE USEFUL”</td>
<td>61-63</td>
</tr>
<tr>
<td></td>
<td>By-Justice Amitava Lala</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>LOK ADALAT : AN EFFECTIVE TOOL FOR ALTERNATIVE DISPUTE RESOLUTION</td>
<td>64-71</td>
</tr>
<tr>
<td></td>
<td>By- Mrs. Gagandeep Kaur Singh</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>LEGAL EVIDENTIARY VALUE OF DNA PROFILING AND ITS FORENSIC USE IN COURT</td>
<td>72-90</td>
</tr>
<tr>
<td></td>
<td>By- Dr. Gokulesh Sharma</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>JUSTICE EDUCATION AND ROLE OF STATE JUDICIAL ACADEMY: KEY ISSUES AND CHALLENGES IN 21ST CENTURY</td>
<td>93-103</td>
</tr>
<tr>
<td></td>
<td>By- Pradeep Kumar Srivastava &amp; Dr. Shashi Srivastava</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>PROTECTION TO JUDICIAL OFFICERS</td>
<td>104-106</td>
</tr>
<tr>
<td></td>
<td>By-S.S. Upadhyay</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>FREE LEGAL AID &amp; SPEEDY CRIMINAL JUSTICE SYSTEM</td>
<td>107-112</td>
</tr>
<tr>
<td></td>
<td>By- Sunil Kumar Singh</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>THE MATRIMONIAL OFFENCES AND MEDIATION: PROTECTING THE INSTITUTION OF MARRIAGE, AND JUSTICE</td>
<td>113-118</td>
</tr>
<tr>
<td></td>
<td>By- Akhileswar Prasad Mishra</td>
<td></td>
</tr>
<tr>
<td>No.</td>
<td>Title</td>
<td>Authors</td>
</tr>
<tr>
<td>-----</td>
<td>-----------------------------------------------------------------------</td>
<td>----------------------------------------------</td>
</tr>
<tr>
<td>19</td>
<td>THE PRIORITY OF CROWN DEBT : THE CONCEPT IN INDIAN SCENARIO</td>
<td>Akhileswar Prasad Mishra</td>
</tr>
<tr>
<td>20</td>
<td>PERSPECTIVE OF THE JUDICIARY TO ECONOMIC REFORMS VIS-A-VIS RIGHTS OF THE POOR</td>
<td>Rajiv Maheshwram</td>
</tr>
<tr>
<td>21</td>
<td>COMMITAL OF CASE: AN ASPECT OF FAIR TRIAL</td>
<td>Akhilendra Kumar Pandey</td>
</tr>
<tr>
<td>22</td>
<td>SEPARATION OF POWERS: NEW DIMENSIONS</td>
<td>Dr. Rashida Ather &amp; Bhanu Pratap</td>
</tr>
<tr>
<td>23</td>
<td>RIGHT TO DEVELOPMENT: REDRESSAL OF ECONOMIC INEQUALITY AND A NEW APPROACH TO DEVELOPMENT</td>
<td>Bhanu Pratap, Dr. Priti Mishra, Avishek Raj</td>
</tr>
<tr>
<td>24</td>
<td>AN INSIGHT TO CHILD PORNOGRAPHY</td>
<td>Swasti Agarwal</td>
</tr>
<tr>
<td>25</td>
<td>TERRORISM AND HUMAN RIGHTS- AN ANALYSIS</td>
<td>Dr. Prashant Mishra</td>
</tr>
<tr>
<td>26</td>
<td>JUDICIAL REVIEW: THE INDIAN SCENARIO</td>
<td>Saksham Dwivedi</td>
</tr>
<tr>
<td>27</td>
<td>SANCTIONING PROSECUTION FOR “OFFICIAL DUTY” A STUDY OF LEGAL PROVISION</td>
<td>Meenakshi Sharma</td>
</tr>
<tr>
<td>28</td>
<td>OWNERSHIP PUZZLE IN HUMAN GENETIC MATERIAL: LEGAL PERSPECTIVE</td>
<td>Kshitij Kumar Singh</td>
</tr>
<tr>
<td>29</td>
<td>Workshop Reports</td>
<td></td>
</tr>
<tr>
<td>30</td>
<td>ANNUAL REPORT</td>
<td></td>
</tr>
</tbody>
</table>
Memorable Events- 2012-13 at JTRI, UP

Hon’ble Mr. Justice S.B. Sinha, Former Judge, Supreme Court of India, Hon’ble Mr. Justice Kurian Joseph, Acting Chief Justice, J & K High Court, Prof. (Dr.) K.N. Chandrasekharan Pillai, Director, NJA, Bhopal & Dr. Virendra Kumar, Director, (Academics) Chandigarh Judicial Academy on the occasion of NJA Zonal workshop at JTRI, UP

Hon’ble Mr. Justice B.S. Chauhan, Judge Supreme Court of India, Hon’ble Mr. Justice U. N. Singh, Senior Judge, Lucknow Bench of Allahabad High Court & Hon’ble Mr. Justice Vishnu Sahai, Member, State Human Rights Commission, U.P., on the occasion of NJA Zonal Workshop, at JTRI
Hon’ble Mr. Justice Devi Prasad Singh, Judge, Lucknow Bench of Allahabad High Court, Sri A.N. Mittal, Director, JTRI (Presently Judge Allahabad High Court) & Faculty of JTRI in the Inaugural Session of Special Training Programme for Enquiry Officers & Presenting Officers of Hindustan Aeronautics Ltd.

Hon’ble Mr. Justice Sunil Ambwani, Judge, Allahabad High Court Addressing the Participants on the occasion of Special Training Programme for Newly Appointed Court Managers in Uttar Pradesh
STRENGTHENING THE JUDICIARY TOWARDS REDUCING PENDENCY AND DELAYS

Justice P. Sathasivam

Law is a noble profession. Lawyers and Courts are still the last refuge for the helpless and the harassed litigants. It is the duty of the Bar to help the needy and deserving members of the society. Lawyers can make a unique contribution to the society by bringing about quick settlement using their best efforts. Twenty-first century calls for changing our approach as the social scenario has been fast changing.

The mounting arrears of cases in Courts, particularly in District Courts and High Courts, has been a cause of great concern. The objective of bringing about the reduction in the time period of disposal of cases and to reduce the existing pendency of cases in a time bound period is of paramount importance.

It is well known that inordinate delay in dispensation of justice is a denial of the litigant’s fundamental right, i.e., right to speedy dispensation of justice. It is the grievance that both the impact of the delay and the denial of justice due to delay result in loss of public confidence in the judicial system. If this situation continues for long, it may result in people resorting to lawlessness and violent crime as a method of negotiating dispute. Therefore, the issue of huge pendency and inordinate delay in disposal of cases is obviously a matter of serious concern and therefore, it is trite to strengthen the judiciary and think of ideal ways and means to bring about judicial reforms to effectively meet the requirement towards reducing pendency and delay in disposal of cases.

Legal Education and Ideal Bar

The importance of legal education to the contribution of Bar, Bench and Justice Administration System is well known. Therefore, it is important to strengthen the legal education and have an ideal and well-informed Bar. To achieve this objective, there should be uniform standards in all law schools and law colleges in the country and law students must be taught all subjects of law and social sciences besides other relevant subjects. Their syllabus must have an orientation to make them suitable for Bar and the Bench. The students must have special legal qualifications when they aspire to become Advocates and Judges. Once lawyers enter the profession, a minimum effective period of practice of five years be made compulsory before they are considered eligible for applying for a post of a Judicial Officer. Bar Associations and Bar Council must organize workshops and seminars periodically. Academies exclusively for advocates be established and Advocates be imparted training and be given orientation which is suited to the system.

* Judge, Supreme Court of India
Some general reasons for huge pendency and delay in disposal

Increase in population (121 crores as on 31.12.2010), lack of adequate number of courts, disproportionate judge strength as against the population, lack of ministerial manpower, lack of infrastructure, snails pace in computerization and use of information technology, inadequate budgetary allocations for judiciary, awareness, globalization, raise in economy, changed economic considerations, literacy, faith in the system, accessibility, resources, impact of legislations, standards of living and new dimensions to relationships and value are the reasons for huge pendency and delay in disposal. Section 138 of the Negotiable Instruments Act, Sec. 498-A IPC and Domestic Violence Act and other enactments contribute a large number of cases in the Criminal Courts.

Implementation of recommendations of Law Commission from time to time

Law Commission over a period of time has suggested timely measures for prevention of increase of cases and also for timely disposal of cases. Some of the recommendations include issues relating to Adequate number of Courts, judicial manpower, increase of judge strength fivefold, filling up of vacancies at all levels in the judiciary within a time frame, commensurate infrastructure (which includes electronic connectivity) adequate budgetary support by the Government (no paucity of funds for justice administration system), financial autonomy of the judiciary, Human Rights, Public Interest Limitation, reduction of costs of litigation, proper maintenance of law and order and lack of adherence to procedures and principles in case management. Either lack of effective will to put into practice the reforms suggested by Law Commission or the delay in implementation of these recommendations is one of the main causes for the present pendency and delay in disposals. Therefore, the reasons for non-implementation and delay in implementation of the recommendations of the Law Commission from time to time shall be identified and steps be taken to do the needful with an effective will.

Government’s role as a party to the litigation

Government as party to litigations contributes to the pendency and also delay in disposals. Government to avoid litigations may set up grievance cells so that all grievances, particularly, small grievances can be settled to avoid litigation, which consumes more time and public money. Government may consider utilization of alternative modes of dispute redressal including pre and post-litigation methods to amicably sort out the disputes with the citizens. Insofar as the Government is concerned, the appeals to the High Court be permitted only when point of law is involved. Efficient law officers at all levels shall be appointed and all vacancies of such law officers be filled up considering vacancy position six months in advance. Training and proper orientation to law officers be introduced and they may be subjected to periodical test as is being done successfully in some Western Countries and their performances be scrutinized and they be made accountable Bureaucrats shall be trained to respect and promptly implement all orders and judgments of the Courts to avoid contempt petitions and second round of litigations. They be asked to adhere to rule of law in administrative matters to avoid unnecessary litigations. Administration be made transparent and the officers accountable. Adherence to international covenants and declarations adopted and ratified by the country be made mandatory.

Government’s role in general

1. Establish adequate number of Courts and Domestic Tribunals.
2. Allocation of adequate budgets to judiciary and give financial autonomy.
3. Provide adequate infrastructure to Courts, like permanent buildings for Academies, Courts and housing, uninterrupted power, ministerial and other staff, furniture, stationery, computers (including electronic connectivity), scanners, photocopiers, FAX machines, telephones, vehicles and all amenities required and congenial for timely dispensation of justice.
4. Appoint efficient law officers at all levels and fill vacancies of such posts taking note of vacancies well in advance.
5. Take note of impact of new legislations on judicial system and provide remedial measures before enforcing the new laws.
6. Government to establish permanent Lok Adalats centers at all Courts at all levels for Daily Adalats and make provisions in all respects for the same.
7. Government to take steps to appoint and empanel sufficient number of Arbitrators, Conciliators, Mediators from all cross sections of society to help the system in Alternative Dispute Resolution and encourage Plea Bargaining.
8. Inadequate number of judges and inadequate manpower in the justice administration system are the two long identified pending issues. In All India Judges’ Association vs. Union of India and in the Law Commission’s reports and also Parliamentary Standing Committee Report, there are suggestions to increase judge strength fivefold and fill up the vacancies. There is a need for having 50 judges for 10 lakh population whereas the present strength appears to be between 10.5 to 13 Judges for 10 lakh population. Therefore, the Government may sanction the required number of Judges to fill the void.
9. Insofar as ministerial staff/non-judicial manpower for Courts is concerned, the Government, in consultation with the High Court, may decide the ideal staff strength for a Court with an ideal pendency between 750 to 1000 cases and the Government may sanction the required posts for each Court.
10. Additional Court complexes with adequate provision for Court rooms, Chambers, Administrative Blocks, Judicial Blocks, Computer Blocks, Blocks for use of advocates and public be designed and made available. It is well-recognized principle that ideal and congenial work atmosphere increase efficiency in performance of all concerned.
11. Slow and inadequate computerization, inadequate electronic connectivity and non-utilization of Information Technology are also contributing factors. Computerization with electronic connectivity will be of paramount importance in increasing speed of dispensation of justice. If data of all the pending cases is computerized, it will help in identifying various categories of cases like old pendency, senior citizens’ cases, cases involving women and children and also in grouping of similar matters involving common questions of fact and law etc. If computerization and electronic connectivity is provided, there will not be delay in preparing of cause lists and making available copies of orders/judgments. Technical aids like Video Conferencing, use of Digital Signatures; hosting of judgments in website through internet will help in cutting down the cost of the litigants in coming to Court and help in reducing the delays.
12. Inadequate allotment of budget and poor budgetary support results in paucity of funds. It is being mentioned in various quarters that approximately 0.01% of the Gross National Product (GNP) is the budgetary allocation to the judiciary whereas in countries like U.K. and U.S., it is several times more. It is common experience that when it comes to mounting arrears and delay in disposals, comparisons are drawn to such countries, but when providing infrastructure and budgetary allocations, such comparisons are forgotten. The judiciary has no financial autonomy. The expenses pertaining to administration of justice in the States are being incurred by the respective States. Under some Central Government Schemes, funds are made available by the Ministry of Law and Justice to States. Such schemes include establishment of Fast Track Courts and Gram Nyayalayas. In the Chief Justices’ Conference, resolutions are already made recommending that budgetary demands made by the High Courts which involve general bare necessities need to be accepted ordinarily and allocation be made by way of planned expenditure.
13. Coming to the cost of litigation, it is the hue and cry of the Human Rights Activists, NGOs and other organizations that cost of litigation in the country is prohibitively high and thereby there is docket explosion. Therefore, measures like recognizing indigence and granting exemption from payment of court fee and providing legal aid have been introduced in the system. However, there is no control over the fee chargeable by the Advocates experienced and well versed in the field. Therefore, empanelling eminent advocates as free legal aid counsel and legal aid counsel on payment of honorarium will serve some purpose. Structuring the fee of Advocates by a proper legislation is necessary.

14. Maintenance of Law and Order and enhancing respect for rule of law will certainly help in reducing institution of avoidable criminal and civil cases.

15. Police be trained and sensitized to serve summons and execute bailable and non-bailable warrants promptly and produce witnesses in Courts without fail and as per schedule. The need for timely investigation and filing of charge-sheets need not be over-emphasized. Use of Forensic and scientific methods of collection of evidence be made mandatory. Training shall be imparted periodically and their work and actions be made transparent and accountable.

Role of Judicial Officers in Case Management and Disposal

The aims can be summed up as follows:

a. Expeditious disposal of cases in Courts
b. Alternative Disputes Resolution Mechanism
c. Maintaining the highest standard of Judicial discipline.

The case management can be broadly discussed under the three following heads:

i) Pre-trial
ii) Trial
iii) Post-trial

Pre-Trial

1. Prompt numbering/registration of cases, which are in order in all respects
2. Prompt ordering of service of summons
3. Prompt execution of Bailable and Non-Bailable warrants
4. Insistence on prompt filing of pleadings by adhering to the time frame in the Court
5. Timely and proper framing of issues and charges
6. Timely committal of cases to the Court of Sessions
7. Identifying cases for Pre-trial settlement, settlement under Section 89 CPC and plea-bargaining
8. Notifying cases ready for trial by giving advance notice and schedule case-wise
9. Grouping of cases involving common questions of law
10. Grouping of cases involving common questions of fact and law.

Trial

1. Categorization of cases - category and year-wise
2. Taking note of number of cases ready for trial
3. Taking note Number of cases part-heard
4. Ideal management of the Board of the Court. Avoid lengthy call work
5. Prompt disposal of interlocutory applications(IAs) and Misc. Petitions (MPs) to avoid hindrance in smooth conduct of trial
6. Day-to-day posting of part-heard cases
7. Avoiding unnecessary adjournments
8. Appropriate implementation of specific provisions (procedural provisions) of CPC and Cr.P.C.
9. Taking up of cases on priority basis for implementation of directions of the superior Courts.
10. Taking up Under-trial prisoner cases and other cases involving senior citizens, children and women on priority basis
11. Implementation of law of perjury
12. Avoiding prolix examination and cross-examination of witnesses
13. Restricting time for arguments, insistence on filing written arguments within a time frame
14. Hearing of arguments soon after the closure of evidence without there being any long interval so that the evidence recorded will be fresh in the memory of the judge
15. Use of alternative, modes of dispute, redressal as and when possible
16. Use of computers in tracking and grouping cases.

Post-trial
1. Giving priority to Execution Petitions
2. Giving priority to cases remanded by superior courts
3. Prompt delivery of copies of orders and judgments by due compliance of copy applications pending
4. Proper maintenance of Record room by taking timely measures for destruction and consigning old record
5. Periodical inspection of courts and Administrative Sections of Courts like Record Room, Copyist Establishment, Establishment, Accounts, Property Rooms etc.

Training and Orientation of Judicial Officers

The importance of training is now well recognized and we have Judicial Academies in every State and National Judicial Academy at Bhopal, where orientation training are being imparted to various cadres of judicial officers. Judgeship requires a multi-faceted personality. To adjudge, a judge must, apart from degree in law, equip himself with Sociology, Economic, Psychology and other social sciences. He must understand psychology of litigants and witnesses and also the process that goes with the decision making and also the problems of rural society, poverty etc. Further, not only knowledge of law, but some aspects like keen intellect, language, communication skills and learning management techniques are necessary for judgesship. Therefore, induction and periodical training of judicial officers must be given due importance by providing adequate infrastructure and budgetary allocations to the judicial Academies.

Training and Orientation for Ministerial Staff

Training and orientation programmes shall be designed for ministerial staff of all Courts and they have to be trained in the State Judicial Academies. For this purpose, necessary provisions shall be made.

Planning and Implementation

A three—tier action plan viz., Immediate, Mid-term and Long-term plans can be prepared.

In the immediate plan issues like Working to the optimum level within the existing limitations, Implementation of case management strategies, Continuation of the need based training to all levels of Judicial Officers and ministerial staff etc. be placed.

In the mid-term plan, the issues like Appointments of ad-hoc Judges and ad-hoc Judicial Officers be made to clear the back-log, Government grievance cells be established, Lok Adalats for identified and grouped cases be held duly involving the Government and its officers at State and District levels, Jurisdictions can be revised, Gram Nyayalayas can be established etc.

The major issues, which involve huge financial commitment and which are time consuming be relegated to the long-term plan. There can be issues like — Five-fold increase of Judge strength, Domestic Tribunals, more Courts and more need based Courts, Permanent Buildings for Judiciary, Financial Autonomy etc.
In order to understand fundamentals of the cyber crime, does it matter as to who is the barber; or who shaves him; or even does he require a shave? What matters to proper understanding of cyber crime is, what has been en acted as the law.

Nevertheless, it does matter to a hacker as to who is the barber and who shaves him. This is why it is relevant in understanding the fundamentals of cyber crime. Let me explain.

Towards the end of the nineteenth century, mathematicians started having doubts about the foundations of their subject. They started searching rigorous proofs of their fundamentals. One area of search related to the paradoxes around self-referencing. The most famous of all such paradoxes is Epimenides or liar's paradox? Epimenides was the 6th century Greek philosopher. He was a Cretan. He made an immortal statement: ‘All Cretans are liars’.

It is like, my saying, 'All Indians are liars'

Try analysing it: if you accept it as true, it boomerangs that it is false; If you take it to be false, it backfires that it is true.

A century ago, the Epimenides paradox was reformulated by Bertrand Russell as 'Barber's or Russell's paradox':

'The only barber in the village declared that he shaves only those who do not shave themselves'.

There was no problem with it, till the question is asked, ‘who shaves the barber?’

Russell and Whitehead tried to sort it out in ‘Principia Mathematica’ a giant opus published in 1913. They thought that they had sorted it out but alas, they did not.

Kurt Gödel wrote a paper in 1931. It was in German and its English translation was titled 'On formally Undecidable Proposition of Principia Mathematica and Related Systems'. Gödel solved such paradoxes forever. He proved that it cannot be solved: The basic idea of the paper was,

‘Proof of arithmetic consistency is not possible—every system is incomplete.’
This has wide implications and is that there is no fort that breached; and there is no that cannot be hacked—every computer can be hacked.

It was this idea that was subtly the film, 'Independence Day' a virus in the computer of the let down its protective shield make an opening and insert a it.

In substance, irrespective of measures, there will always be improvement. And Security will never be sufficient: they backed up with adequate legal sanctions. This is the reason that cyber laws are necessary.

But what is cyber law? Are all violations of cyber law called cyber crimes? Let's take a look at what is cyber law.

**CYBER LAWS**

Inventions, discoveries, and new technologies widen the scientific horizon but pose new challenges for the legal world. The information technology (brought about by computers, Internet and cyberspace) has opened new dimensions but has also created problems in all aspects of law. We are finding solutions for them. These solutions—statutory or otherwise—providing answers to the problems are loosely referred to as ‘Computer Laws’ or ‘Information Technology Laws’ or simply ‘Cyber Laws’.

We have enacted a few statutory provisions. The problems (due to the information technology) in the field of Intellectual Property Rights (IPRs), have been sorted out by amending the Copyright and the Patents Act. However, the most important legislative measure is the Information Technology Act, 2000 (the Act). It has also amended the following four Acts.

(i) The Indian Penal Code, 1860;
(ii) The Indian Evidence Act, 1872;
(iii) The Bankers’ Book Evidence Act, 1891;
(iv) The Reserve Bank of India Act, 1934.

**Communication Convergence Bill**

Another Act, entitled Communication Convergence Bill 2001\(^1\) was in the pipeline. It was to

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\(^1\)The complete text of the report of the committee of the Parliament is available is [http://164.100.24.208/ls/committeeR/Communication/39.pdf](http://164.100.24.208/ls/committeeR/Communication/39.pdf)
fully harness the benefits of the three converging technologies of the future namely—the Telecom, Information Technology, and Broadcasting.

A committee was set up to consider the Communication Convergence Bill. It recorded sharply divided opinion of the experts about the desirability of having such enactment. This may be the reason that the Bill is still in the cold storage. It may not be enacted in the near future. However, some of its provisions have been incorporated in the Act by an amendment.

Amendments in the Act
An expert committee was set up to consider the amendments in the Act. It has made its recommendations and proposed amendments. The amendments were proposed in 2005. They were introduced in modified form as the Information Technology (Amendment) Bill 2006; it was further modified and passed by the Parliament on 23.12.2008. After the assent of the President, it was notified on 5.2.2009 as the Information Technology (Amendment) Act 2008 (Central Act no. 10 of 2009)¹ (the amending Act). It has been enforced from 27.10.2009. It has incorporated some important provisions of the Communication Convergence Bill.

Previously mentioned four Acts were amended by Section 91 to 94 of the Act. These sections have been omitted by the amending Act but in view of Section 6A of the General Clause Act² these amendments in the respective Acts will continue. The first two Acts have been further amended by the amending Act.

With this in background, let's consider violations of cyber laws and cyber crimes.

**CYBER CRIME**

Broadly, violations of cyber laws can be divided into two categories:

(a) Violation—Intellectual Property Right (IPR): This can be categorised as:
   (i) IPRs problems in the cyberspace. This includes Copyright and Trademark infringement on the Internet, Domain name dispute, Cyber Squatting, Framing, Metatag and key word disputes, peer to peer file sharing etc.
   (ii) Illegal copying and distribution of computer software;
   (iii) Problems relating to Trade secret, Reverse engineering (Decompilation), and Patents in the computer software.

(a) Violation Other than IPR. This is dealt under the Act and is generally referred to as cyber crime. They can be divided into two categories.
   (i) Crime where the computer or server is the object/ target. It includes hacking a computer or a website or a server, sending a virus, Denial of Service

¹The amendments may seen at:
² Section 6A of the General Clause is entitled 'Repeal of Act making textual amendment in Act or Regulation'. It states that in such a situation unless different intention appears, the repeal does not effect the continuance of any amendment made by the enactment so repealed. In view of this, the amendments in the aforesaid Acts will continue. Notes on the clauses along with the 2006 Bill also state that sections 91-94 are being omitted for the reason that these provisions have become redundant as necessary modifications have already been carried out in the enactments.
(DoS) attack, Adware and Spyware, Data protection, etc.

(ii) Crimes other than those where computer or server is the object/tar
target but computer is used as an instrument for committing the offence. It includes
for example credit card fraud, Phishing, Pornography, identity, theft, violation
of privacy, spam, spim, Cyber stalking, Cyber bullying, Cyber terrorism etc.
This distinction of cyber crime is not distinctive and the line between the two is often
blurred. One act may fall in both of them. There can also be other criteria for
categorising them.

**CYBER CRIMES - REMEDIES**

Civil as well as criminal proceeding can be taken to remedy the cyber crimes.

Chapters IX and X of the Act deal with the civil remedies:
- Section 43 of the Act (Chapter IX) imposes 'penalties and compensation for damage
to computer system etc.
- Section 43A provides compensation for failure to protect data.

These disputes and determination of compensation are not dealt by the civil courts but are
entrusted to adjudicating officers having experience in the field of Information Technology.
Appeal lies against their decisions to an Appellate Tribunal and then to the High Court;

The offences (criminal proceeding) are dealt with in Chapter XI of the Act. The specific
offences (for details see Appendix-1) are punishable under the following sections of the Act:
- Virus, DoS, Adware spyware – section 66 read with 43;
- Cyber stalking, Cyber bullying, Spin, Spam, Identity theft, Violation of privacy, Cyber
terrorism - sections 66 A to 66F;
- Publishing and transmitting obscene, sexually explicit material - sections 67, 67A and
67 B;
- Disclosure of information in breach of lawful contract -r section 72A

The Investigation of the criminal case is to be done under Criminal Procedure Code (with
some modifications) and cases are to dealt by the criminal courts.

**TACKLING—CYBER CRIME**

**Awareness And Precaution**

The best strategy for any crime, be it cyber crime or other, is prevention. The obvious
measure is to improve security measures, enhance public education and vigilance. Most of
the cyber crimes can be prevented by not answering the emails or at least verifying them and
not opening the attachment unless it is from trustworthy person.

**Efficient Enforcement—Improving Confidence**

Not all cyber crimes—that are in the society—are reported. This is not only true in the case of
individuals but also in the case of the corporations. This could be because of lack of the
confidence in the people. Quick and satisfactory resolution of the cyber law crime will boost
the public confidence. This will bring forward more people with their problems.

**PARADOX—INTERNET CYBERSPACE**

I started my article with reference to a paradox. Let me end it with a paradox — the paradox
of cyber crime; the paradox of cyberspace and the Internet.
Peter Steiner published a cartoon in the New Yorker on 15th July 1993: a milestone in many ways. Two dogs with the computer. The dog sitting in front of the computer keyboard telling the other, 'On the Internet, nobody knows that you are a dog.'

This is the paradox of the Internet; it is the paradox of Cyberspace.

CONCLUSIONS

With due apologies to Charles Dickens, it is the time when boundaries are zealously guarded: it is the time that boundaries have become meaningless; it is the age of reality: it is the age of virtuality; it is the beginning of privacy: it is the end of privacy.

The paradox of internet-cyberspace not only shows the difficulty in enforcing cyber laws but also explains the genesis of cyber crimes. People are emboldened to commit a cyber crime because they mistakenly assume that they are anonymous but nothing can be farther than this. There is nothing private in the cyber space: it is the end of privacy.

The paradox in Dicken's, 'A Tale of Two Cities', is the epitome that led to storming of Bastille and the French revolution. We must take precautions lest, the paradox of Internet and cyberspace may lead to banking/financial trade on line catastrophe or compromise in the national security or personal lives.

Appendix-1

(Some common cyber crimes and their punishments are mentioned below. Mobiles phones are getting smarter. Smart-phones have almost all functions of a computer. The following offences may be committed with the help of a computer or a mobile phone or any other communication device.)

Cyber Crimes

Tampering Source Code: Tampering with the computer source document is punishable under Section 65 of the Act,

Virus attack/ Malware: Virus attack/Malware is software designed to infiltrate or damage a computer system without the owner's informed consent. It includes viruses, worms, Trojans, rootkits, backdoors, spyware, botnets, keystroke loggers and dialers. It is punishable under section 66 of the Act.

Denial of Service (DoS): DoS attack means, preventing legitimate users of a service from using that service. It generally occurs when a web server is flooded with requests for information, overwhelming the system. Although such attacks do not normally compromise information security, they do cost time and money.)
It may happen due to—

- flooding a network; or
- disrupting connections between the machines; or
- disrupting service to a specific system or person; or
- preventing a particular individual from accessing a service.
- Illegitimate use of resources.

It is now punishable under section 66 read with section 43 of the Act.

**Data Theft:** Sensitive information belonging to business organisations is targeted by rivals, criminals, and sometimes even by disgruntled employees. Such data (e.g., business plans, tender quotations, etc) may be obtained using hacking or social engineering techniques. It is punishable under sections 66 & 66B of the Act.

**Spyware and Adware:** These two words are often used together and there is a thin line of difference between the two. They are often referred to the programmes that get installed on your computer without or with your permission (perhaps granted unwittingly).

- Spyware installs itself surreptitiously and is difficult to remove without assistance;
- Adware generally comes with an uninstaller, and can be easily removed from a system.

These programmes can drain your computer’s resources, slow your Internet connection, spy on your surfing, and even forcibly redirect your Web browser. They are now punishable under section 66 read with 43 of the Act.

**Cyber Espionage and Cyber Spying:** Cyber espionage or cyber spying is the act of obtaining personal, sensitive, proprietary or classified information without permission. It involves the use of cracking techniques and malicious software including Trojans and spyware. It is punishable under section 66 of the Act.

**Cyber Stalking and Cyber Bullying:** Stalking, is the crime of following and watching somebody over a long period in a way that is annoying or frightening. It generally involves, harassing or threatening behaviour that an individual engages repeatedly such as, following a person, appearing at a person’s home or place of business, making harassing phone calls, leaving written messages or objects, or vandalizing a person’s property. The term cyber stalking, broadly refers to the use of the Internet, email, or other electronic communication devices, to stalk another person.

Cyber bullying is bullying a person in the cyber space.

**Spam and Spim:** Spam is an unsolicited mail. Spim is the chat clients what spam is to email. It is junk or unsolicited instant message (IM).

**Phishing:** Phishing is a fraudulent way of getting confidential information. In phishing, unsuspecting users receive official-looking emails that attempt to fool them into disclosing online passwords, user names and other personal information. Victims are usually persuaded to click on a link that directs them to a doctored version of an organization’s Website.

**Cyber Stalking, Cyber bullying, Spam, Spim, and Phishing** are now punishable under section 66A of the Act.
**Identify Theft:** Identity theft involves the fraudulent or dishonest use of someone's electronic signature, password or other unique identification feature. It is punishable under section 66C of the Act.

**Violation of Privacy:** Publishing or transmitting pictures of a private area of a person without consent is violation of privacy. It is punishable under section 66E of the Act.

**Cyber Terrorism:** Cyber terrorism involves the use or threat of disruptive cyber activities for ideological, religious or political objectives. It can weaken a country's economy and even make it more vulnerable to military attack. It is punishable under section 66F of the Act.

**Financial Crimes/ Cyber Frauds:** This is a wide term that includes credit card fraud, online share trading scams and e-banking crimes. It is punishable under sections 66 and 66D of the Act.

**Punishments**

**Section 65:** Imprisonment upto 3 years or a fine upto rupees 2 lakhs or both.

**Section 66:** Imprisonment upto 3 years and fine upto rupees five lakhs or both.

**Section 66A:** Imprisonment upto 3 years and fine.

**Section 66B to 66 D:** Imprisonment upto 3 years and fine upto rupees one lakh.

**Section 66E:** Imprisonment upto three years or fine upto two lakhs or both.

**Section 66F:** Upto imprisonment for life.

**Section 67:** Imprisonment upto five years and fine up to ten lakhs rupees.

**Section 67B:** Imprisonment upto five years and fine upto ten lakh rupees for the first conviction. And on the subsequent conviction imprisonment upto seven years and fine upto ten lakh rupees.

**Section 72A:** Imprisonment upto three years or fine up to five lakhs rupees or with both.
"It is the spirit, not the form of law, that keeps the justice alive".

L.J. Earl Warren

Introduction

The preamble of the Constitution of India declares, to secure to all its citizens, justice, social, economic and political; and equality of status and of opportunity. Art.39A provides that State shall secure that 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 opportunity for securing justice are not denied to any citizen by reason of economic or other disabilities.

We have the laws to secure constitutional goals and a strong and effective judicial system based on common law principles. The legal system including Courts, Tribunals and Commissions seeks to administer the laws, to secure justice. The public has great faith in our judicial system.

The complexities of our multicultural society, with ever increasing population, and the limited resources within the justice delivery system, has resulted into inordinate delays and expenses in securing justice. In order to secure speedy and inexpensive justice, both to the privileged and under privileged classes, it was found necessary to sidetrack those cases, which are not suited for adjudication, to the processes of Alternative Dispute Resolution (ADR). It may be called appropriate dispute resolution, as it offers options suited to the different categories of cases.

We have at present in civil laws under Section 89 and Order X Rule 1A, 1B and 1C of the Code of Civil Procedure (the Code), a mandatory requirement for the judges to consider at the appropriate stage, whether the dispute brought before it can be referred to any one of the five ADR processes, namely:-

1. Arbitration
2. Conciliation
3. Lok Adalat

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1 Judge, Allahabad High Court. (Paper submitted in 'National Judicial Excellence Enhancement Programme (JEEP) First Visit' September 8th, 2011 to September 13th, 2011, National Judicial Academy India, BHOPAL on September 11th, 2011)
(4) Mediation; or
(5) Judicial Settlement.

**Advantages of ADR**

The advantages of ADR are:

1. to facilitate access to justice to the poor and disadvantaged;
2. to provide for informal, quick and inexpensive resolution of disputes;
3. to take away cases inappropriate for adjudicatory process;
4. remove petty cases, which do not require any adjudication by courts;
5. to reduce the burden of statistical load of cases on the courts;
6. to help promoting in trade and commerce, "fair practice, good commerce and equality";
7. to maintain peace and harmony in society, by reducing hostility and promoting resolution of disputes in a peaceful manner;
8. enhancing faith and confidence in the judicial system; and
9. to provide for dispute resolution by morals and not coercion.

In Afcons Infrastructures Ltd. Vs. Cherian Varkey Construction Company Pvt. Ltd. & Ors. the Supreme Court has after noticing the errors in drafting of Section 89 of the Code, provided the procedure for referring the cases to any one of the ADRs prescribed in Section 89 CPC.

**Cases not suited for ADR**

S.89 of the Code provides for settlement of disputes outside the Court. The cases, which are not suited for ADR process should not be referred under Section 89. These cases may be broadly categorised as:

1. representative suits under Order 1 Rule 8 of the Code, involving public interest or interest of persons, who are not parties before the Court;
2. disputes relating to election to public office, except those where two groups in case of dispute of management of societies, clubs, associations are clearly identifiable and are represented;
3. cases involving granting relief in rem, such as grant of probate or letters of administration;
4. cases involving serious allegations of fraud, fabrication, forgery, impersonation, coercion etc.;
5. cases involving protection of courts for minors, deities, mentally challenged persons and suits for declaration of title against government;
6. cases involving prosecution of criminal offences etc.

**Cases suited for ADR**

All other suits and cases of civil nature normally suited for ADR processes, are:

1. all cases relating to trade, commerce and contracts including money claims, consumer disputes, banking disputes, tenancy matters, insurance matters etc.;
2. all cases arising out of strained or soured relationship (social issues) including matrimonial, maintenance, custody matters; family disputes such as partition/division, and disputes amongst partners;
3. all cases in which there is need for continuation of pre-existing relationship inspite of disputes such as easementary rights, encroachments, nuisance, employer and employee matters, landlord and tenant, and disputes involving members of societies, associations, apartment owners;
4. all cases relating to tortious liability such as motor accident and other accident claims;
5. all consumer disputes including disputes with traders, suppliers, service providers, who are keen to maintain their reputation, credibility or product popularity.
Reference To ADR Process

S.89 of the Code starts with the words "where it appears to the Court that there exist elements to a settlement". The Court has to form an opinion that the case is one that is capable of being referred to a settlement through any of the ADR processes. In the category of cases suited for ADR the civil court should invariably make reference to ADR process. In other cases, which fall in the excluded category, reference is not necessary. The upshot is, that it is mandatory for the Court, if in its opinion there exists element of settlement, to consider to refer the case to ADR process. The actual reference, however, depends upon the discretion of the judge, guided by the nature of dispute and the process of ADR.

After hearing and completing of pleadings, to consider recourse to ADR process under Section 89 is mandatory, the actual reference is not mandatory.

Order 10 Rule 1A of the Code requires the Court to give an option to the parties, after admissions and denials, to choose any of the ADR processes. This, however, does not mean an individual action but to join action or consensus about the choice of ADR process. Rules 1A to 1C of Order X has laid down manner in which such jurisdiction is to be exercised. The Court has to explain the choice available regarding ADR processes to the parties, and permit them to opt for a process by consensus. If there is no consensus, the Court can proceed to choose the process. S.89 of the Code refers to arbitration as adjudicatory process, and negotiatory (non-adjudicatory) processes namely conciliation, mediation, judicial settlement and Lok Adalat.

The adjudicatory process of arbitration and the non-adjudicatory procedure of conciliation, are referred to in the Arbitration and Conciliation Act, 1996 (AC Act), to a private forum, the awards of which are binding on the parties under S.36 in case of arbitration and S.74 in case of conciliation, can be resorted to only if both the parties agree to refer the dispute. In the other three types of ADR procedures namely mediation, judicial settlement and Lok Adalat, the agreement between the parties is not necessary to refer to these processes.

Arbitration

Arbitration is an adjudicatory dispute resolution process by a private forum governed by the AC Act. If there is pre-existing arbitration agreement, the matter has to be referred to arbitration invoking Section 8 or Section 11 of the Act. S.89 CPC pre-supposes that there is no pre-existing arbitration agreement.

The Court can looking to the nature of the dispute and the possibility of settlement, in the category of cases mentioned above such as the disputes relating to trade, commerce and contracts, cases relating to tortious liability or consumer disputes, may gently persuade the parties, to refer the matter to arbitration with the consent of both the sides and not otherwise.

If the parties agree to arbitration then the provisions of AC Act will apply and the case will go outside the stream of the Court. The Court will in such case, where parties agree to refer the dispute to arbitration, make a short order referring to the nature of the dispute, the agreement between the parties, the name of the arbitrator/ arbitrators; take their consent on record or allow the parties to sign the order and refer the case to arbitrator, closing the file.

Conciliation

Conciliation is a non-adjudicatory ADR process, also governed by the provisions of the AC Act (Ss.61 to 81). Where the Court, looking to the nature of dispute arrives at a satisfaction that there are elements of settlement, it can make a reference to Conciliation, if both the parties to the dispute agree to have negotiations with the help of third party, or third parties, either by an agreement or by the process of invitation and acceptance provided under Section 62 of the Act followed by appointment of Conciliator(s) as provided in Section 64.
Conciliation may include an advisory aspect. The settlement with the help of the conciliator under S.74 of the AC Act has same status and effect as if it is arbitral award on substance of dispute given by arbitral tribunal under S.30. Where the dispute settled with the help of Conciliator is not subject matter of suit/proceedings, the Court will have to direct that the settlements shall be governed by S.74 of the AC Act (in respect of conciliation proceedings), or S.21 of the Legal Services Authority Act, 1987, (in respect of settlement by a Lok Adalat or a mediator) to make the settlement effective.

On a reference of conciliation, the matter does not go out of the stream of the Court process permanently. If there is no settlement, the matter returns to the Court for framing of issues and trial.

**Lok Adalat**

The reference to Lok Adalat does not require consent of the parties. The satisfaction of the Court to the nature of the dispute, and the elements of settlement, where the issues are not complicated and do not require determination or adjudication of any dispute, may be referred to the Lok Adalat. The Court should make a short order preferably in a few lines recording its satisfaction that the nature of dispute is not complicated, the disputes are easily sortable and may be settled by applying clearcut legal principles.

Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat under S.20 of Legal Services Authority Act, 1987 determines a reference on the basis of a compromise or settlement between the parties at its instance, and put its seal of confirmation by making an award in terms of the compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law from the stage, which was reached before reference. No Lok Adalat has the power to "hear" parties to adjudicate cases as a court does. It discusses the subject matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok Adalats are guided by principles of justice, equity, fair play. When the LSA Act refers to 'determination' by the Lok Adalat and 'award' by the Lok Adalat, the said Act does not contemplate nor require an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The 'award' of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat.

To provide compulsory pre-litigation mechanism for settlement and conciliation relating to public utility services, the parliament has amended Legal Services Authority Act, 1987 in the year 2002, providing for Permanent Lok Adalats in every district, exercising jurisdiction in public utility services, such as transport, postal, communications, water supply, hospitals and insurance. The party can make an application under S.22C of the Act to the Permanent Lok Adalat for assistance to conciliate under Sub-Section (4) to settle the dispute in an independent and impartial manner. If the parties fail to reach an agreement under sub-section (7), the Permanent Lok Adalat shall under sub-section (8), if the dispute does not relate to any offence, decide the dispute. The award will be final and binding on all the parties under S.22E, and will be deemed to be a decree of Civil Court and shall not be called in question in any suit, application or execution proceedings.
Mediation

Mediation is a structured process of dispute resolution in which a mediator, a neutral person trained in the process of mediation, works with the parties to a dispute, to bring them to a mutually acceptable agreement. The mediator does not decide the dispute or give an award. He is only a facilitator and incharge of the process of mediation. Mediation rules of each State under Chapter X CPC, as recommended in Salem Advocate Bar Association (I)³ and (II)⁴ by the Supreme Court provide for a detailed procedure for mediation.

The mediation is a purely voluntary process in which parties continue out of their free will. They can opt out at any time. Once an agreement is reached and signed, and is accepted by the Court, it is enforceable in law by the Court. The mediation avoids adversarial approach and instead adopts cooperative methods. The parties focus on mutual agreement with long term gains, which improve their relationship. It offers win win situation putting to end to the dispute in an amicable manner. The mediation looks forward and offers long time acceptable solution to the parties.

In B.S. Joshi Vs. State of Haryana⁵, the Supreme Court held that in cases such as Section 498A IPC and Section 125 CrPC, where after a settlement no evidence may be led, the High Court can quash the first information report or the proceedings.

The mediation is recommended in all such matters in which the relations between the parties have to survive beyond litigation. The Court should refer all such matters to mediation in which disputes relating to properties, partition, marriage and custody of children, commercial and business are involved. The mediation also succeeds in consumer disputes, suppliers, contractors, banking, insurance, labour matters, doctor and patients, landlord and tenant and in cases relating to intellectual property rights.

Mediation is not recommended, where questions of law are involved to be adjudicated by the Court, or in which offences of moral turpitude and fraud are involved. Mediation is also not recommended, when there is serious imbalance between the position of the parties, in which fair negotiation is not possible.

The court annexed and court referred Mediation Centres have been established in almost all the High Courts and District Courts. In High Court, the Mediation Centres are run by the Mediation Centres under the Supervisory Committees or Director/Coordinator. In District Courts, Mediation Centres are run by State Legal Services Authorities with a Judicial Officer appointed as Coordinator in each district. There are five essential requirements for any Mediation Centre namely awareness, infrastructure, training of mediators and referral judges, reference by judges under Section 89 and Order X CPC and funds. The 13th Finance Commission has given grants to set up one Mediation Centre in each of the 600 districts in the country with outlay of 750 courts including one court for ADR centres in each district and remaining amount for training out of which 10% may be spent for awareness.

The mediators receive training from the trainers of MCPC and those mediators, who have gained sufficient experience in Mediation Centres in the High court.

In the process of mediation after receiving brief summary of the case from the parties, the mediator gives an opening statement, explaining the entire structure including voluntariness of the mediation process. He commits parties to good behaviour and allows them to sign a form to abide by the terms of the mediation process. He actively listens without showing any sympathy, holds joint and separate sessions, to identify the issues of conflict. He, thereafter, proceeds to discuss the strength and weaknesses of the case with the parties and sets up the agenda. He, thereafter, open channels of communication, brainstorming the options, which the parties generate among themselves, while controlling the process. He allow the parties to focus on their long term interests, takes them out of impasse, if any such situation arise, and brings out underlying issues. The mediator uses dynamic
process of negotiation and bargaining explaining the parties to the Best Alternative to Negotiated Settled Agreement (BATNA) and Worst Alternative to Negotiated Settled Agreement (WATNA).

Parties may agree to resolve the dispute, which may also involve the issues, which are not involved in the case, and may arrive at an agreement, which is mutually beneficial and acceptable. The mediator, thereafter, holds, if the parties reach to a settlement in drafting realistic, legal, valid and effective settlement, which resolves all the issues between them and does not leave anything for any further dispute in future. The agreement then comes to the Court and may be accepted with or without modifications, which the Court may suggest and to which the parties may agree. On the acceptance of the agreement, it becomes binding on the parties under Order 23 Rule 1 CPC against which no appeal lies. The agreement may be vitiated only in case of mis-representation or fraud. The process is entirely confidential in which the mediator binds himself to the confidentiality and cannot be required to appear in court as a witness to the proceedings. The person incharge of Mediation Centre maintains the confidentiality and ethics amongst mediators and in the process of mediation.

Judicial Settlement

The Court may at the stage of Section 89 or Order X Rule 1A, 1B, 1C, looking to the nature of dispute and on being satisfied that there are elements of settlement, refer the dispute for judicial settlement. If the Court feels that a suggestion or guidance by a judge would be appropriate, it may refer the dispute to another judge for dispute resolution. The Judicial Officer to whom the case is referred shall make efforts for settlement between the parties and follow such procedures as may be prescribed. Where the settlement is arrived at before such other judge, the settlement agreement will have to be placed before the court, which referred the matter, and that Court will make a decree in terms of it. The case may not be tried by the same judge to whom the matter is referred for judicial settlement but the parties did not agree to settle the matter.

In case of arbitration and conciliation, it is essential that the parties shall agree to refer the matter to the Arbitrator or Conciliator. In the case of other three ADR processes namely Lok Adalat, mediation and judicial settlement, the consent of the parties is not essential to refer the matter. The Court may on a satisfaction arrived at, on its own discretion even expart refer the matter to these ADR processes. In Family Courts it is recommended that the ideal stage for mediation is before the respondent files objections/written statements, as in such case, the pleadings written with the help of lawyers very often leads to allegations, which aggravates the hostility between the parties.

Summary of procedure

The procedure to be adopted by the Court for reference to any of the processes of ADR may be summed up as follows:-

- When the pleadings are complete before framing issues, the Court has to fix date for preliminary hearing to find out nature of dispute with the help of the parties.
- The Court should first exclude the cases, which are not fit for ADR process and record brief order, as to why the case is not fit for reference to ADR process.
- In other case the Court should explain the choice of the five ADR processes to the parties, to allow them to exercise their option.
- If the parties are willing for arbitration, or conciliation, the Court should record their agreement, and explain to the parties the procedure and the cost involved. If they agree, the matter should be referred to arbitration or conciliation. In case of arbitration, the matter goes out of court proceedings. In case of conciliation the Court has to wait until the conclusion of the proceedings, if the parties agree, the
conciliation awarded can be enforced independently and the file is closed, failing which the Court proceeds with the trial.

- If the case is simple, where legal principles are settled and there is no personal animosity, the case may be referred to Lok Adalat. If there is settlement in Lok Adalat and award is declared, it become decree of the Court and the case goes out of proceedings. Where the parties do not arrive at the settlement, the Court proceeds with the trial.
- In case of judicial settlement, the Court attempts to settle the matter or refers it to some other judge. If the parties arrive at a settlement, such settlement is recorded, and the case is decided in terms thereof, failing which the case is tried by judge, who did not participate in the judicial settlement proceedings.
- If dispute is fit for mediation, the Court records that the dispute is fit for mediation, and refers it to the Mediation Centre, fixing a date by which Mediation Centre may submit its report. If the matter is settled, the agreement signed by parties and verified by the pleaders is recorded as a compromise agreement under Order 23 Rule 3 CPC, failing which the Court proceeds with the trial.
- In all cases of settlement brought before the Court namely in case of judicial settlement and settlement with the help of mediation, the Court examines to find out whether it is valid, effective and enforceable and draws attention of the parties to avoid any further litigation and about executability of the settlement.

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(3) Salem Advocate Bar Association (i) Vs. Union of India, (2003) 1 SCC 49;
(4) Salem Advocate Bar Association (ii) Vs. Union of India, (2005) 6 SCC 344;
(5) B.S. Joshi Vs. State of Haryana, AIR 2003 SC 1386;
DNA: OUR IDENTITY IN SCIENCE AND LAW

Justice A. Mateen

The purpose of Law simply and plainly put is justice. The courts of law have always tried to attain this purpose by vigilantly searching the truth, in disputed facts, by proof of evidence. Needless to say this proof of facts before courts is never an easy affair.

But once we add science to evidence, there arises an interesting but conflicting scenario. On one hand; scientific evidence hold tempting possibility of accurate fact finding that proposes to reduce uncertainty in legal decision making, but at the same time scientific methodologies often include risks of accuracy that law refuses to tolerate on the pedestal of proof beyond doubt.

It is in this long standing dilemma between the fields of science and law that I propose to discuss one recent development in scientific evidences that has fetched curious attention of the legal community- the development of DNA evidence.

DNA

Mahatma Gandhi said, "Fact means truth and once we adhere to truth law comes to our aid naturally"

DNA or Deoxyribonucleic Acid, which is basically a chain of small repeated sub-units found in the nuclei of all human cells, has the power to make a definite distinction between any two persons, barring identical twins. DNA is thus a living truth of identity that exists with all the persons and can be useful in many legal battles, involving issues of identity, both on criminal as well as civil sides.

DNA vis a vis Indian Evidence Act

But then arises a question whether such an evidence would be admissible under our law and above that for which fact it would be relevant.

Section 45 of the Indian Evidence Act incorporates the relevancy of expert opinion. It provides that on an issue, including that of science, requiring special knowledge and competence evidence is admissible from those who have acquired by study or practice, the necessary expertise on that issue because the Court on its own would be unable to form proper opinions.

However expert evidence must be relevant to some issue which arises in a trial and the issue which will usually make DNA profiling relevant is the issue of identity.² Section 9

1 Judge, Allahabad High Court, Lucknow-Bench
2 John Philips, “A View from the Bench”
of the Indian Evidence Act, 1872 declares relevant any fact which goes towards establishing identification of a person.

Recently the Supreme Court while discussing the admissibility of expert evidence, in Santosh Kumar Singh v. State\(^1\) went to the extent of saying that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development. It further held that the DNA report must be accepted as scientifically accurate and an exact science.

Thus the Indian Law accords relevancy to DNA evidence on the issue of identity, however its use in evidence has to be cautiously ascertained.

**DNA Evidence in Criminal Cases**

**DNA and self incrimination:** Before exploring the use of DNA tests in criminal cases it would be pertinent to see if it offends the fundamental right of person against self incrimination. A Constitution Bench of the Hon’ble Supreme Court, in Selvi v. State of Karnataka,\(^2\) while testing the validity of DNA tests on the anvil of Article 20(3) of the Constitution of India, made following observation, “The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. It may also be recalled that as per the majority decision in Kathi Kalu Oghad (AIR 1961 SC 1808), the use of material samples such as fingerprints for the purpose of comparison and identification does not amount to a testimonial act for the purpose of Article 20(3). Hence, the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context.”

**Application in evidence:** Coming to the application in criminal cases, DNA tests can be effectively used in criminal cases for the following purpose. First, it assists in positively identifying the perpetrators of crime, particularly in cases of sexual assault and homicide where identification is often a central issue. Second, to identify the remains of victims of violent crimes. The most suitable application of DNA tests for these purposes is evident in two recent and popular cases namely, Santosh Kumar Singh v. State\(^3\) (establishing commission of rape by the appellant) and Surendra Koli v State of U.P.\(^4\) (to identify dead bodies of victims).

**Statutory Recognition:** It should be noted that the Explanation to Sections 53, 53A and 54 of the Code of Criminal Procedure, 1973 was amended in 2005 to clarify the scope of medical examination of the accused, especially with regard to the extraction of bodily substances, and in particular to use of DNA Profile technique.

Recently in Krishan Kumar Malik v State of Haryana,\(^5\) the Supreme Court in a rape case observed, “Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case.....”

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\(^1\)(2010) 9 SCC 747
\(^2\)(2010) 7 SCC 263
\(^3\)Supra
\(^4\)(2011) 4 SCC 80
\(^5\)(2011) 7 SCC 130
DNA in Civil Cases

The call for DNA test on civil side is generally made to settle the paternity issue involved in cases of divorce, maintenance, inheritance and succession etc.

It is noteworthy that Section 112 provides for the legitimacy of a child born during wedlock and the only ground to rebut this presumption is non access of the husband. Thus at one point of time it was an issue before the court dealing with paternity issues whether such test could be ordered. This issue was discussed at length in Gautam Kundu v State of West Bengal,\(^1\) where the division bench of apex court, inter alia, held as follows:-

“(1) that courts in India cannot order blood test as matter of course; .... (3)There must be a strong prima facie case in that the husband must establish non -access in order to dispel the presumption arising under section 112 of the Evidence Act ..... (5) No one can be compelled to give sample of blood for analysis.

However subsequently a full bench of the Supreme Court in Sharda v Dharmpal,\(^2\) considered the power of a matrimonial court to order such test and clarified that Goutam Kundu (supra) is not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. The Court after hefty discussion summed up three significant conclusions,

1. A matrimonial court has the power to order a person to undergo medical test.
2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

Recently in Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another,\(^3\) the Supreme Court sketched the approach for courts while directing DNA test. The apex court observed, “In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a

\(^1\) (1993) 3 SCC 418
\(^2\) (2003) 4 SCC 493
\(^3\) (2010) 8 SCC 633
routine manner, whenever such a request is made. The court has to consider diverse aspects
including presumption under Section 112 of the Evidence Act; pros and cons of such order
and the test of 'eminent need' whether it is not possible for the court to reach the truth without
use of such test.”

It would be worth to mention the judgment of the Delhi High Court in Shri Rohit
Shekhar v. Shri Narayan Dutt Tiwari and Anr.¹ in which the court has gone a step
further. In peculiar facts of this case, the petitioner, who was born during a subsisting
marriage of her mother, asked for DNA test on the respondent, claiming the latter to be his
biological father. The Court has ordered DNA test on the respondent a third party to
marriage, primarily recognizing, from various international covenants, the right of a child to
know of his biological antecedents.

However the Court has been cautious to judgments of the Hon'ble Supreme Court in
Sharda (supra) and Bhabani Prasad Jena (supra) and justified on reasons a prima facie case
for ordering DNA test.

**Conclusion**

Thus DNA test as evidence of identity has come to be recognised in our judicial
system. However we must remember it is a science coming to help of law. Its application in a
particular case always involves controversial issues ranging from admissibility and
appreciation to privacy and confidentiality.

Further like all other scientific techniques, DNA test also has its risks of accuracy,
though these are minimal. **James D Watson** one of the discoverers of DNA who was
awarded the 1962 Nobel Prize for medicine for the same, has made the following
observations about handling of DNA evidence, “Keeping track of molecular evidence, as
opposed to knives and guns, can be an especially demanding chore; scrapings from a
side walk may be visually indistinguishable from scrapings from a gatepost, and
subsequently extracted DNA sample will doubtless look even more alike when placed in
a small plastic test tubes.”²

Thus although DNA is an exact science its use in evidence has its concerns,
which aggravate in Indian scenario where collection of evidence is shrouded with lack of
promptness and conduct of medical test always remains under a question mark.

The law, it is said, walks a respectable distance behind Science, but courts try to
keep abreast. It is my submission that the court while taking help of such evidence need
to be careful so that justice is secured to both the parties. The Supreme Court has come
up with observations on the civil side directing courts to be extremely careful while
ordering DNA test. However there is void of such guidelines or observation on the
criminal side where the degree of guilt and punishment both is high and this is one area
which requires our attention.

¹ MANU/DE/3701/2010: 2011(121) DRJ 563
SOVEREIGNTY, JUDICIAL REVIEW AND SEPARATION OF POWER

Justice Devi Prasad Singh

The question with regard to sovereignty, judicial review and separation of power, had cropped up while deciding a case with regard to appointment on the post of District Government Counsels. The State claimed privilege on the basis of separation of power. The finding recorded on judicial side is summarized in the present article.

Sovereign function includes legislation, administration and dispensation of justice. All the three functions were vested in the King in the Monarchical system of the government. In democratic polity, three powers have been assigned to three parts of the government, i.e. legislative, executive and judiciary. Under the Constitution of United States of America or under the unwritten Constitution of England, there is strict separation of power. But under the Indian Constitution, the separation of power is not in strict sense. There is overlapping.

The word, "sovereignty" is derived from the Latin word "super"(above) means the authority which controls the actions of every individual, member of the community. The power of Government to make itself obeyed is called sovereignty, and the person or persons who have this power are called the sovereign. According to Harold J Laski, sovereignty is the supreme coercive power and it is by possession of sovereignty that the State is distinguished from all other forms of human association (The State in Theory & Practice by Harold J Laski).

In Constitutional Law, sovereignty is termed as the supreme Power of Legislation and Governance. However, Aristotle, a great Greek legal philosopher said that in democratic States, peoples are sovereign. The supreme power of legislation and governance rests in the people. The Parliamentary sovereignty is subsequent evolution.

The original concept of sovereignty is of popular sovereignty and even the King or the monarch was to obey the wishes of the people.

The Words and Phrases, Permanent Edition, Vol. 39B, defines the sovereignty as under:

"The "sovereign powers" of a government include all the powers necessary to accomplish its legitimate ends and purposes. Such powers must exist in all practical governments. They are the incidents of sovereignty, of which a state cannot divest itself. - Boggs v. Merced Mining Co., 14 Cal. 279, dismissed 70 U.S. 304, 3 Wall. 304, 18 L.Ed. 245.

Accordingly in broader context, the Legislative, Executive and Judiciary jointly constitute sovereign powers with the division of work amongst them under the constitutional framework. Since, India is governed by written Constitution, the sovereign function of the
State should be looked into keeping in view the spirit of written Constitution. However, the proposition that the sovereign function includes the function discharged by Legislature, Executive and Judiciary seems to be correct approach than splitting the sovereign power and making them alien to each other. The Western jurist ordinarily rely upon most celebrated treatise of Montesquieu, viz. Spirit des Lois: Spirit of Laws, published in 1748. Montesquieu discussed and propagated federalism in democratic polity and opined for strict separation of power among legislature, executive and judiciary. Though the larger Benches of Hon'ble Supreme Court of India had continuously ruled that in Indian context and keeping in view the constitutional scheme, there is no strict separation of power and is overlapping but it appears that in some of the judgments decided by the Bench of lesser number of Judges, Montesquieu has been relied upon as a ground not to interfere with the State action even if it causes public harm.

With profound respect, it appears that Montesquieu's treatise 'Spirit of Laws' has not been read as a whole by Hon'ble Judges who followed Montesquieu blindly. The whole and overall reading and understanding of the treatise, "Spirit of Laws" written by Montesquieu reveals that the separation of power among three wings of the government is theoretical and may be made applicable in an "ideal State" means where persons holding offices in all three wings of the government, i.e. legislature, judiciary and executive are honest, fair and learned. In case there are allegation of corruption, casteism, nepotism or abuse of power against the members discharging sovereign function, then the Montesquieu's doctrine shall not only be impractical but may result in serious consequence in due course of time.

In a celebrated book, "Religion, Caste & Politics in India", Christophe Jaffrelot who is a Research Director at Centre National de la Recherche Scientifique (in short, CNRS), author of several books on Indian society and political system had considered corruption and criminalisation of politics. Learned author noted that corruption has become all-pervasive phenomenon in contemporary India (page 621). He further took note of the fact that the criminalisation of politics started long back in the country including Uttar Pradesh. The criminals or mafias developed direct nexus with the politician of the State and helped them to be elected. Initially, the politicians availed the help of criminals in electoral matters but later on, criminals entered into politics and get themselves elected in the Assemblies. It shall be appropriate to reproduce a portion from the book (supra) with regard to criminalisation of politics in the State of U.P. and other States of the country. To quote:-

"The 1996 Legislative Assembly in Uttar Pradesh did not reverse but may have increased the 1993 trend. Not only did the BJP, the BSP, and the SP give tickets to dozens of candidates against whom legal proceedings had been instituted (33, 18, and 22 respectively), but a certain number of BJP, BSP, and Congress MLAs amongst them became ministers when the BJP formed the government, first jointly with the BSP, then alone, from October 1997. This was achieved by recruiting dozens of MLAs from the BSP and the Congress (and offering up to a few hundred thousand rupees per MLA), with a ministerial post for each. Thus, the Uttar Pradesh cabinet comprised 92 members. The BJP Chief Minister, Kalyan Singh, tried to project himself as clean and set up a Special Task Force (STF) in 1998 to capture or liquidate criminals. However, public enemy number one, then, was Shri Prakash Shukla, who appeared to have colluded with at least eight ministers of Kalyan Singh's government; they protected him, making the task of the STF more complicated (Mishra 1998:52).

Uttar Pradesh is not the only state where the entry of the mafia into politics has accelerated in the last few years. Bihar is certainly as seriously affected as UP. In 2000, 31 Legislative Assembly candidates had cases registered against them for crimes ranging from
murder to dacoity. Most of them contested as 'Independents', but there were BJP, Congress, RJD, and Samata candidates as well. Maharashtra is also suffering from the same disease. During the municipal elections in 1997, 150, 72, and 50 candidates with past or present difficulties with the law (Godbole 1997) were fielded from Mumbai, Nagpur, and Pune respectively. Andhra Pradesh is not lagging behind, since in 1999 an NGO called Lok Satta Election Watch released a list of 46 candidates contesting elections to the Lok Sabha or the Legislative Assembly with, allegedly, some criminal background (The Hindu, 3 September 1999:5).

Delhi is also new in this circle of most criminalized states. In fact, Delhi is gradually taking over from Mumbai as the crime capital of India. This city-state tops the list of number of crimes per head, with 527 in 1996 (against 121 in Bihar) and, in terms of percentage change, with +55 per cent change in 1996 over the quinquennial average of 1991-5 (Swami 1998:17). Out of 815 Legislative Assembly candidates in 1998, 120 had more than two criminal cases registered against them, and out of 69 MLAs, 33 had criminals cases against them (The Hindustan Times, 26 October 1998; The Hindu, 23 November 1998).

It shall be unwise to think or infer that the politicians having criminal antecedent do not affect the decision making process, or the governance. Whether in such a situation, in case the argument of the propagators with regard to strict separation of power is accepted, it is easy to understand that the country may see doom's day in due course of time.

While considering the anarchy and autocratic rule prevailing in some of the countries of the world because of committed bureaucracy and judiciary and the trouble, pain and agony faced by the peoples of respective country, Bertrand Russell critically expressed his views as under:

"Stalin could neither understand nor respect the point of view which led Churchill to allow himself to be peaceably dispossessed as a result of a popular-vote. I am a firm believer in democratic representative government as the best form for those who have the tolerance and self-restraint that is required to make it workable. But its advocates make a mistake if they suppose that it can be at once introduced into countries where the average citizen has hitherto lacked all training in the give-and-take that it requires. In a Balcan country, not so many years ago, a party which had been beaten by a narrow margin in a general election retrieved its fortunes by shooting a sufficient number of the representatives of the other side to give it a majority. People in the West thought this characteristic of the Balkans, forgetting that Cromwel and Roberpierre had acted likewise. (UE)"

(page 91 from Bertrand Russell's Best Special Indian Edition)

Russell also took note of American legislators and Nazis under the democratic form of government. To quote:

"The American legislators who made the immigration laws consider the Nordics superior to Slavs or Latins or any other white men. But the Nazis, under the stress of war, were led to the conclusion that there are hardly any true Nordics outside Germany; the Norwegians, except Quisling and his few followers, had been corrupted by intermixture with Finns and Lapps and such. Thus politics are a clue to descent. The biologically pure Nordics love Hitler, and if you did not love Hitler, that was proof of tainted blood. (UE)"

(page 91-92 from Bertrand Russell's Best Special Indian Edition)

Framers of Indian Constitution were wise enough to take care of such situation. With foresightedness while considering the process of judicial review under Art. 226 of the Constitution of India, they used the words, "for other purposes" and gave ample power to Hon'ble Supreme Court to interfere under Art. 32 in the event of violation of fundamental right of the citizens straightway. Conferment of such power to the High Courts and Supreme
Court by the constitutional framers belies the argument with regard to strict separation of power. Needless to say that in the event of judicial overstepping or arbitrariness, legislators have got ample power to legislate law to dilute the effect of judgments of courts.

In such a situation, remedy is to check and balance which has been provided in the Indian Constitution and affirmed by Hon'ble Supreme Court from time to time holding that the separation of power is not applied under Indian Constitutional Scheme in strict sense.

Under Article 143 of the Constitution of India, the President of India, has been conferred power to seek opinion from Hon'ble Supreme Court. Article 144 provides that all civil and judiciary authority shall act in aid of Hon'ble Supreme Court in discharge of its obligations. All matters of inter-state disputes with regard to land and water, are adjudicated by the Tribunal constituted for the purpose. Thus, the Constitution does not envisage strict separation of power.

In the case Delhi Law Act, 1912 in Re, AIR 1951 SC 332, a seven Judges Special Bench of Hon'ble Supreme Court, has considered the doctrine of separation of power and ruled that strictly speaking, it has no place in the system of governance in India nor at the present day under her own Constitution or which she had during the British rule. Unlike the American and Australian Constitutions, the Indian Constitution does not expressly vest the different sets of powers in the different organs of the State. Under Art. 53 (1), the executive power is indeed vested in the President, but there is no similar vesting provision regarding the legislative and the judicial powers. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system, the essential feature of which is the responsibility of the executive to the legislature. The President, as the head of the executive, is to act on the advice of the Council of Ministers, and this Council of Ministers, like the British Cabinet is a "hyphen which joins-a buckle which fastens-the legislative part of the State to the executive part."

Again, in AIR 1955 SC 549: Ram Jawaya Kapur. Vs. State of Punjab, a Constitution Bench of Hon'ble Supreme Court ruled that 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 branch 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. The executive can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

The aforesaid proposition has been reiterated by Hon'ble Supreme Court in the cases reported in AIR 1964 SC 648 Jayantilal Amritlal Sholdhan versus F.N. Rana, AIR 1966 SC 1987 Chandra Mohan versus State of U.P., AIR 1968 SC 1138 Uday Ram Sharma versus Union of India, AIR 1965 SC 1595 Associated Cement Companies Limited versus P.N. Sharma, (1973)4 SCC 225 Keshvanand Bharti versus State of Kerala.

In 1975 Supp. SCC 1: Indira Nehru Gandhi. Vs. Raj Narain, the Constitution Bench of Hon'ble Supreme Court of India, opined that doctrine of separation of power is carried into effect in countries like America, Australia. In India, separation of powers is in a broader sense and not unlike America and Australia where it is in strict sense. The constituent power is independent of the doctrine of separation of powers. The constituent power is sovereign. It is the power which creates the organs and distributes the powers. The rigid separation of power as in American or Australian Constitution, does not apply to India. Though the legislature is entitled to change with retrospective effect the law which forms the basis of judicial decision, it is not permissible to legislature to declare judgment of Court to be void or not binding. The Indian Constitution does not recognise the rigid separation of power. The reason is that the concentration of powers in anyone organ
may, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged. In a federal system which distributes powers between three co-ordinate branches of government, though not rigidly, disputes regarding the limits of Constitutional power have to be resolved by courts and therefore, as observed by Paton, "the distinction between judicial and other powers may be vital to the maintenance of the Constitution itself". No Constitution can survive without a conscious adherence to its fine checks and balances. The principle of separation of powers is a principle of restraint which "has in it the precept, innate in the prudence of self-preservation that discretion is the better part of valour."

In a case reported in AIR 1982 SC 149: S.P. Gupta vs. Union of India, Hon'ble Supreme Court held that independence of judiciary is the basic feature of the Constitution. The concept of independence of the judiciary is a noble concept 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. 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 pressures and prejudices. It has many dimensions, namely fearlessness of other power centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community.

Justice Fazal Ali (supra), while considering the independence of judiciary, opined that it comprises two fundamental and indispensable elements, i.e., (1) independence of judiciary as an organ and as one of the three functionaries of the State, and secondly, the independence of the individual Judge. Their lordships ruled that Constitution of India did not fully envisage complete separation of powers. The power of judicial review has been conferred as a safeguard not only to ensure the independence of judiciary but also to prevent Judge from vagaries of executive. Their lordship held that judiciary has to be inspired by the values enshrined in our Constitution. If rule of law is to run akin to rule of life and a feudal society is to be transformed into an egalitarian society by the rule of law, an introduction of the element of reflection of popular will so as to make judicial system more viable and effective as an instrument of change is inevitable and total aloofness of judiciary is inconceivable.

In 1989 Supp (2) SCC 364: Asif Hameed. vs. State of J.& K., Hon'ble Supreme Court observed that although, the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution-makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ may usurp the functions assigned to another. Legislature and executive, the two facets of people's will, have all the powers including that of finance. Judiciary has no power over sword or the purse; nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits and if it is not so that Court must strike down the action. It is the sentinel of democracy.
Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restrain, the only check on court's own exercise of power is the self-imposed discipline of judicial restrain. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers. The principle of 'broad separation of power' under the Constitution, has been reiterated in (2007) 12 SCC 288: Swamy Shraddananda vs. State of Karnataka.

In AIR 2010 SC 1476: State of W.B. Vs. Committee for Protection of Democratic Rights, a Constitution Bench of Hon'ble Supreme Court while upholding the right of higher judiciary with regard to enforcement of fundamental rights and direction to CBI to hold inquiry in a given case, has not found it to be a encroachment over other's jurisdiction. Hon'ble Supreme Court held that there is no strict separation of power under Indian Constitution. Being the protectors of civil liberties of the citizens, the Hon'ble Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly. In a federal constitution, the distribution of legislative powers between Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of "the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review." If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation.

In (2010) 5 SCC 538: Bhim Singh. vs. Union of India, a Constitution Bench of Hon'ble Supreme Court, after considering the case of Kesavananda Bharati (1973) 4 SCC 225 and in Indira Nehru Gandhi case (1976) 3 SCC 321, ruled that in modern governance, the strict separation of power is neither possible nor desirable. The Indian Constitution does not prohibit overlap of functions, but in fact provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch which results in wresting away of the regime of constitutional accountability. This is the test for violation of separation of powers. The constitutional principle of separation of powers will only be violated if an essential function of one branch is taken over by another branch, leading to a removal of checks and balances. Till the principle of accountability is preserved, there is no violation of separation of powers. Accordingly, the MPLAD Scheme is not a violation of the concept of separation of powers. However, the Constitution Bench seems to have not taken into account the observation made by larger Bench of seven Judges in the case of Delhi Law Act 1912 (supra) whereby, the Article 53 (1) has been interpreted canvassing with regard to vetting of executive powers in the President. Whether executive functioning may be discharged by elected representative, is a crucial question which has not been considered in the light of the observation of larger Bench of Hon'ble Supreme Court?
In a case reported in (2011) 4 SCC 36: GVK Industries Limited and another Vs. Income Tax Officer and another, their lordships of Hon'ble Supreme Court had considered the principle of separation of power in Indian context and held that the power is overlapping. In appropriate case the higher judiciary may pass appropriate order to secure public interest, to quote relevant portion of paras 35 and 36 of the judgment of GVK Industries Limited (supra), as under:

"35. Our Constitution charges the various organs of the State with affirmative responsibilities of protecting the interests of, the welfare of and the security of the nation. Legislative powers are granted to enable the accomplishment of the goals of the nation. The powers of judicial review are granted in order to ensure that legislative and executive powers are used within the bounds specified in the Constitution. Consequently, it is imperative that the powers so granted to various organs of the State are not restricted impermissibly by judicial fiat such that it leads to inabilities of the organs of the State in discharging their constitutional responsibilities.

36. Powers that have been granted, and implied by, and borne by the Constitutional text have to be perforce admitted. Nevertheless, the very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution. Walking on that razors edge is the duty of the judiciary. Judicial restraint is necessary in dealing with the powers of another coordinate branch of the government; but restraint cannot imply abdication of the responsibility of walking on that edge."

This lordships have further proceeded to consider the constitutional philosophy in terms of Indian Constitution and rule that prime concern of the course are to maintain rule of law and secure the public interest, to quote relevant portion of paras 113, 114 and 115 as under:-

"113. The path to modern constitutionalism, with notions of divided and checked powers, fundamental rights and affirmative duties of the State to protect and enhance the interests of, welfare of, and security of the people, and a realization that "comity amongst nations" and international peace were sine qua non for the welfare of the people was neither straight forward, nor inevitable. It took much suffering, bloodshed, toil, tears and exploitation of the people by their own governments and by foreign governments, both in times of peace and in times of war, before humanity began to arrive at the conclusion that unchecked power would sooner, rather than later, turn tyrannical against the very people who have granted such power, and also harmful to the peaceful existence of other people in other territories. Imperial expansion, as a result of thirst for markets and resources that the underlying economy demanded, with colonial exploitation as the inevitable result of that competition, and two horrific world wars are but some of the more prominent markers along that pathway.

114. The most tendentious use of the word sovereignty, wherein the principles of self-determination were accepted within a nation-state but not deemed to be available to others, was the rhetorical question raised by Adolf Hitler at the time of annexation of Austria in 1938: "What can words like 'independence' or 'sovereignty' mean for a state of only six million?"

115. We must recognize the fact that history is replete with instances of sovereigns who, while exercising authority on behalf of even those people who claimed to be masters of their own realm, contradictorily claimed the authority to exercise suzærain rights over another territory, its people and its resources, inviting ultimately the ruin of large swaths of humanity and also the very people such sovereigns, whether a despot or a
representative organ, claimed to represent."

It has been consistent view of Hon'ble Supreme Court of India that the Indian Constitution does not envisage for strict separation of power and in appropriate case, the higher judiciary may interfere and correct the error committed by other two wings of the government to secure public interest and there may be overlapping function to secure public good.

In view of above, it is evident why the principle of strict separation of power has not been accepted by Hon'ble Supreme Court in Indian context.

An industrialist of the country, Azim Premji, who was the part of a group wrote a letter to the Prime Minister showing deep concern to mal-administration in the country, remarked, "The biggest concern now are governance issues and the complete absence of decision-making in the government, in the bureaucracy,". Even if there is little truth in the allegation whether such a situation, as canvassed by the learned counsel for the State or a section of society, strict separation of power should be enforced leaving peoples in the state of uncertainty?

Jeffrey Goldsworthy, working in Faculty of Law at Monash University in Melbourne, Australia, in his book, "Parliamentary Sovereignty", has considered this aspect of the matter. According to Goldsworthy, to quote:-

The once popular idea of legislative sovereignty has been in decline throughout the world for some time. 'From France to South Africa to Israel, parliamentary sovereignty has faded away.' A dwindling number of political and constitutional theorists continue to resist the 'rights revolution' that is sweeping the globe, by refusing to accept that judicial enforcement of a constitutionally entrenched Bill of Rights is necessarily desirable......

For what it is worth, my opinion is that constitutional entrenchment might be highly desirable, or even essential, for the preservation of democracy, the rule of law and human rights in some countries, but not in others. In much of the world, a culture of entrenched corruption, populism, authoritarianism, or bitter religious, ethnic or class conflicts, may make judicially enforceable bills of rights desirable. Much depends on culture, social structure and political organisation.

What explains the loss of faith in the old democratic ideal? I am aware of possible 'agency problems': failures of elected representatives faithfully to represent the interests of their constituents. In many countries this is a major problem. But I suspect that in countries such as Britain, Canada, Australia and New Zealand, the real reason for this loss of faith lies elsewhere. There, a substantial number of influential members of the highly educated, professional, upper-middle class have lost faith in the ability of their fellow citizens to form opinions about important matters of public policy in a suf ciently intelligent, well-informed, dispassionate, impartial and carefully reasoned manner. Even though the upper-middle class dominates the political process in any event, the force of public opinion still makes itself felt through the ballot box, and cannot be ignored by elected politicians no matter how enlightened and progressive they might be.

Learned author while considering the judicial encroachment of constitutional right in some of the countries, opined that shifting power to Judges, amounts to return of mixed government in the political process to check the ignorance, prejudice and passion of the mob. Learned author proceeded to observe as under, to quote:-

"If I am right, the main attraction of judicial enforcement of constitutional rights in these countries is that it shifts power to people (judges) who are representative members of the highly educated, professional, upper-middle class, and whose superior education, intelligence, habits of thought, and professional ethos are thought more
likely to produce enlightened decisions. I think it is reasonable to describe this as a return to the ancient principle of 'mixed government', by re-inserting an 'aristocratic' element into the political process to check the ignorance, prejudice and passion of the 'mob'. By 'aristocratic', I mean an element supposedly distinguished by superior education, intellectual refinement, thoughtfulness and reasonability, rather than by heredity or inherited wealth."

Author opined that, recent challenges in judicial innovation, may require new theories and may constitute a challenge to doctrine of parliamentary sovereignty. But they cast very little light on the nature of parliamentary authority in the past. Author proceeded to observe that defenders of parliamentary sovereignty cannot ignore constitutional change. Constitutional arrangements and understandings today are in many respects very different from those of the past. But the doctrine of parliamentary sovereignty has survived centuries of change, and has the capacity to survive many more. The recent constitutional developments discussed by its critics are compatible with the doctrine. The author noted a passage from 'Constitutional and Administrative Law in New Zealand (3rd Edn.) pp.543-5), to quote as under:-

"Throughout English constitutional history, Parliament and the courts have exercised co-ordinate, constitutive authority... Their is a symbiotic relationship founded in political realities. Parliament and the political executive must look to the Courts for judicial recognition of legislative power, and the Courts must look to Parliament and the political executive for recognition of judicial independence."

In a journal, "The American Journal of Comparative Law", while writing an article, Prof. Jiunn-Rong Yeh, College of Law, National Taiwan University, and Associate Prof. Wen-Chen Chang, National Taiwan University, have considered the extensive interference by South Korean and Taiwan Constitutional Court, to quote:-

"South Korea underwent successful democratization in 1987, culminating in an extensively revised Constitution and a new Constitutional Court. In the two decades since, government power has shifted to the opposition and back, swinging among various political parties. Most impressive has been the performance of the South Korean Constitutional Court. In its decisions involving the constitutionality of statutes or government actions, it has ruled against the government about one third of the time. Similarly, Taiwan also began an incremental democratization process in the late 1980s. Since then, the 1947 Constitution, that was originally adopted in mainland China, has been amended seven times. Governmental power was peacefully passed to the long-term opposition party in 2000 and then swung back again to the former ruling party in 2008. The Constitutional Court of Taiwan, despite being an old institution established in 1948, began exhibiting greater vibrancy since the 1990s and produced a record in which about thirty to forty percent of challenged legislative or administrative acts were ruled unconstitutional."

How adversely affected system of Governance, caused mental pain, agony and persecution of peoples of various countries, may be seen from agitation in different part of the world. Fatima Bhutto in her most celebrated book, "Songs of Blood and Sword", discussed fallacy if it in the trial of Bhutto, to reproduce relevant extracts as under:-

"After reviewing the case files and documents pertaining to Bhutto's trial at the hands of the military regime the jurists issued a statement that would be released to the international press. They agreed that Bhutto's trial clearly failed to meet several necessary standards of justice in 'at least' the six follow ways; maintaining a distinct bias in regard to the trial judges and lawyers, the failure of the junta to hold an open trial, the failure of the courts to maintain an accurate record of Bhutto's trial, the failure to institute a proper trial structure, and the court's decision in moving ahead
with clear evidentiary improprieties and insufficiencies. Lastly, the jurists noted that Bhutto's physical maltreatment at the hands of the state was ominous and a cause for international concern. (Page 168)

Anatol Lieven, a journalist, who had worked in Pakistan and conducted extensive research and also visited India, had written a book, "Pakistan a Hard Country". While writing the book, learned author noted how the South Asia particularly, Pakistan and India are likely to suffer a lot because of blindly following the British legacy in dispensation of justice. In Pakistan, how extra constitutional pockets and extra constitutional nucleus power has been created affecting dispensation of justice is eye opener. This happens since higher judiciary could not evolve new principle of law to match the political evils. Now after sixty years, Chief Justice of Pakistan is striving to regenerate the democracy to establish rule of law but now seems to be too late. Learned author Anatol Lieven observed, to quote:-

"A visit to the Mohmand Tribal Agency in September 2008 (described further in Chapter 11) summed up for me the attitudes of most ordinary Pakistanis to the official judicial system, and how the Pakistani Taleban have been able to exploit this to their advantage. As Tazmir Khan, a farmer, told me, to the approval of the other local men sitting with him, Taleban justice is better than that of the Pakistani state. If you have any problem, you can go to the Taleban and they will solve it without you having to pay anything not like the courts and police, who will take your money and do nothing."

The author further proceeded to observe as under:- "... Even clearer was the entire local population's absolute loathing for the state judicial system; and this was an attitude which I found among ordinary people across Pakistan.

However, it would be wrong to see the Pakistani population simply as innocent victims of a vicious judicial system run from above for the benefit of the elites. Rather, justice in Pakistan is an extension of politics by other means, and everyone with the slightest power to do so tries to corrupt and twist the judicial system to their advantage in every way possible.

Thus cases brought before the state judicial system are key weapons in the hands of individuals and groups fighting for national and local power; and in both the state and the traditional systems of justice, outcomes are determined largely by political considerations. That means kinship, wealth, influence and armed force, but also sometimes and to some extent the ability to win over public opinion in general. The means to do this have changed over time, with the modern media now playing an important role in some cases.

The author (supra) further in very strong words, proceeded to observe, to quote:-

"It would be quite wrong, however, to see the Pakistan masses faced with the state justice system as simply the passive, sheep-like victims of predatory lawyers, judges, policemen and political elites. This is true, but it is also true that the vast majority of Pakistanis (and Indians) with even the most limited power to do so have contributed to the wreckage of the state judicial system by their constant efforts to twist it to their own individual or group purposes. One reason for this is the continual struggles for power which permeate Pakistani society-struggles in which politics and property are often inextricably mixed. In turn, these struggles generate and are generated by the lack of mutual trust which permeates Pakistani society, between but also within kinship groups."

In the aforesaid book, the author has cited several instances, how gradually the judiciary lost its significance, how the judiciary has become weaker and weaker day by day making people disenchanted with the system. Judiciary has become an instrument to persecute the weaker in the hands of mighty people.
Poverty, illiteracy, lack of basic amenities, poor governance, are the prime concern not only for the citizens of the State of U.P., but for whole of India. According to Human Development Report, 2011, prepared by the "Institute of Applied Manpower Research Planning Commission Government of India", published by Oxford University Press, though per capita income has grown but still, it is lower than several other States, to quote:-

"Over the years, the gap between the per capita income of the state and the national average has grown considerably. In 1950-1, the per capita income of Uttar Pradesh was 7 per cent lower than the national average. This difference had grown to 40 per cent in 2000-1 (Uttar Pradesh Human Development Report 2003). In recent years (2002-3 to 2007-8), the average annual growth rate of NSDP was 5.6 per cent as against the national average of 7.9 per cent, while the growth rate of the per capita SDP was 3.6 per cent compared to the national average of 6.4 per cent."

In the field of health also, the State of U.P., is worse than the national average, to quote:-

"In terms of health indicators, the state's performance was worse than the national average (Figure 3, 4 and 5). The proportion of women with BMI<18.5, underweight children and the U5MR are higher in the state as compared to the national average. The Scs and Sts are worse off compared to the state average and their community's respective national averages for all the health indicators.

Although the state made significant efforts in building healthcare infrastructure, it has failed to keep pace with the increasing demand. The state's performance in providing health infrastructure was lower than the national average. The shortage of medical personnel and their absenteeism, particularly in the rural areas, the shortage of medicines, and lack of accountability in the public health system have seriously affected the healthcare system. There was a vast network of private health providers, who were expensive and often beyond the reach of the poor. The State Human Development Report further noted that the state had one of the lowest health expenditures in India by both Indian and international standards. Despite that, the bulk of the expenditure was allocated for the payment of salaries."

With regard to literacy rate, again Uttar Pradesh is lower than the national average, to quote:-

"The literacy rate in Uttar Pradesh was lower than the national average. According to latest estimates of Census (2011), Uttar Pradesh has a literacy rate of 70 per cent as compared to the 74 per cent national literacy rate in 2011. As per NSS (2007-8), all the social groups including Scs and Sts have a literacy rate lower than the state average and also lower than the literacy rate of their communities at the national level (Figure 6). Among the various programmes undertaken, Uttar Pradesh Basic Education Project (UPBEP 1 and 2) initiated in select districts of the state in 1993 and 2000, respectively, and DPEP (Centrally sponsored) resulted in a notable improvement in enrolment and a decline in dropout rates in the districts where these programmes were implemented. During the period 1996-7 to 1999-2000, enrolment in UPBEP districts increased by 68 per cent as against 37 per cent in non-UPBEP districts (Uttar Pradesh Human Development Report 2003). Poor infrastructure along with inadequate financial allocation were the major hindrances in achieving higher educational targets. The state allocation on education increased from 0.5 per cent of the SDP in 1950-1 to 3.2 per cent in 2007-8, but it is still very low compared to the demand."

With regard to basic household amenities again, Uttar Pradesh is marginally below the national average in terms of improved drinking water facilities to quote:-

"In terms of basic household amenities, the performance of the state is marginally
below the national average in terms of improved drinking water facilities. However, it is one of the rare states where the average for the SC and ST households was better than the state average and also than the national average for their respective communities in terms of access to improved drinking water facilities. In the case of sanitation, the state average is slightly better than the all India average (Figure 8). However, only 16 per cent of SC households have access to toilet facilities vis-a-vis 35 per cent of SC households at the all India level."

In such a situation, it is not easy for the citizens to avail justice from the Government. There shall always be disparity in public dealing and peoples may suffer for one or the other cause because of poor governance system.

Mahatma Gandhi Ji compared the governance system of European countries and India and expressed his views, to quote from "Mahatma Gandhi Essays & Reflections" by Sarvepalli Radhakrishnan (page 18-19):

"In my humble opinion the ordinary method of agitating by way of petitions, deputations, and the like is no remedy for moving to repentance a Government so hopelessly indifferent to the welfare of its charge as the Government of India has proved to be. In European countries, condemnation of such grievous wrongs as the Khilafat and the Punjab would have resulted in a bloody revolution by the people. They would have resisted, at all cost, national emasculation. Half of India is too weak to offer violent resistance, and the other half is unwilling to do so. I have therefore ventured to suggest the remedy of non-co-operation, which enables those who wish to dissociate themselves from Government, and which, if unattended by violence and undertaken in an ordered manner, must compel it to retrace its steps and undo the wrongs committed; but whilst I pursue the policy of non-co-operation, in so far as I can carry the people with me, I shall not lose hope that you will yet see your way to do justice."

While he maintains that British rule in its present form has made India "poorer in wealth, in manliness, in godliness and in her sons' power to defend themselves."

He was firmed that no improvement in Indian situation was possible so long as the British adopted an unnatural attitudes of patronage and superiority. Things not changed, even after independence, men in power are stashing Indian currency to foreign countries. Be the bureaucracy or the peoples representatives, the malpractices, maladministration, misappropriation of Government fund, or discriminatory treatments, all parts of Indian governance system and it has become part of life with full of scams. In such a situation, strict separation of power shall neither be feasible or appropriate for India in its national and social interest.

It may be noted that according to the report (Hindustan Times dated 9.8.2011), amongst 395 members of the legislative assembly of the State of U.P against 138 members (34%), criminal cases are pending. Out of 138, against 72 members of the Legislative Assembly (18%), cases with regard to heinous crime like murder, kidnapping, robbery, dacoity, extortion, rape and sale of minors etc are pending.

According to an Article published in "Times of India" dated September 2, 2011, written by Dipankar Gupta, the record of 15th Lok Sabha is also not encouraging; rather it is a matter of deep concern for the civilised society. In 15th Lok Sabha, as many as 153 (162 according to author report) MPs have criminal records, out of which, 74 of them are charged with serious offences like murder, abduction, misappropriation of public fund etc.

Thus, the peoples' representatives seem to have failed to check infiltration of persons having criminal record in the legislative bodies.

Coming to second limb of governance, the bureaucracy, where also things are not too
good. It is of common knowledge that substantial number of bureaucrats succumb to political pressure and do not tender correct advice to the government resulting in loss of revenue, misappropriation of public fund and abuse of power. Shri Bhaskar Ghose, an I.A.S. Officer who served for 36 years in the cadre has shown his deep concern with regard to falling standards among the bureaucracy. He has written his autobiography in the name and title, "SERVICE OF THE STATE, THE IAS RECONSIDERED. Learned author observed as under:

"A number of IAS officers have been charged with, even arrested for, corruption; and many, many more have taken to ways that are not, strictly speaking, illegal but are repellent nonetheless- the ways of nepotism, of intrigue, of lobbying and cultivating the politically powerful to worm their way up the administrative ladder. Krishnan and Somanathan have reported wryly on a 'formulation' to which another officer, K. Ashok Vardhan Shetty, has, according to the two, made a contribution. I cannot resist reproducing it in full:

In a sense, the IAS can be divided into three groups - the 'vives' (those who are attached to one party), the 'nuns' (officers who remain unattached to any party), and the 'prostitutes' (who attach themselves to whichever party is in power and switch when there is a change of government). The authors have been at pains to clarify that these terms are used metaphorically, to make an analytical point and should not be misconstrued or misquoted, out of context.

Point taken, and the quotation is very much in context and has not been misconstrued; in case anyone has any doubts the metaphorical nature of the terms is emphasized; after all, whoever heard of an IAS officer actually being a prostitute?

But this study, and others like it, have made the enquiry into the service and its relevance in the twenty-first century not just relevant, but urgent. If India is to take its place in the world as an economic superpower it cannot be burdened with an administrative system that is controlled by one group of officers, some of whom have been exposed as corrupt and many more known to be courtiers and arch intriguers and lobbyists."

Learned author which concluding the book had placed on record his opinion with pain and sorrow. To quote:

"It is true that there are a number of corrupt officers in the IAS, more than one would like to see, and it makes me-and I'm sure many, many other IAS officers-ashamed and disgusted. One hopes they will be punished and driven out of the service. Apart from corruption, there are others who openly practice nepotism, who manoeuvre to get themselves coveted postings, who cultivate people who they think will be useful to them in some way at some time."

Another I.A.S. Officer Shri Radhey Shyam Agarwal while writing his autobiography, titled "Inside Story of….Bureaucracy" has given glimpse of state of affairs of bureaucracy in U.P., in the following words:

"As a matter of fact the new Minister wanted to shift the responsibilities on to me and would not like to be bothered by others. I had a lot of difficulty in dealing with the union leaders who always had been putting forth their demands of promotion and transfer. Whenever they went to meet the director, he always referred them to me. The actual fact was rather different. He would say something to me and would do something otherwise.

Learned author (supra) while in-capsuling his experience suggested to adopt remedial measures to maintain the intellectual integrity of political bosses as well as that of the bureaucracy in the following words:
"This is high time that one should give serious thoughts on how to maintain the intellectual integrity of political bosses as well as that of the bureaucracy. It is for the political parties in the interest of the country, not to create a vicious circle by exploiting the bureaucracy in their own interest. Let the bureaucracy work with impartial mind and if anybody amongst them is found corrupt or having a partisan attitude such a bureaucrat must be given punishment. At the same time the members of the Legislative Assembly and Members of the Parliament should not be allowed to interfere in the affairs of transfers and postings and day-to-day administration. Since we have not been able to implement the policies of government in the true sense, nor have we developed a proper work culture, there is an adjustment gap which needs to be filled in a reasonable way."

Shri Vinod Rai, Comptroller and Auditor General of India while giving a lecture on 11th October, 2011 at Sardar Vallabhbhai Patel National Police Academy in Hyderabad had shown his deep concern to the succumbing bureaucracy indulged in corruption in different forms of mal-practices giving way to political system to be more corrupt and whimsical. It shall be appropriate to quote relevant portion of the opinion expressed by Shri Vinod Rai, Comptroller and Auditor General of India as published in the newspaper, "Hindu" of 13th October, 2011:

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"That governance is at its lowest ebb. That the morale of the civil servants is low. That credibility of the government is at its lowest. That decision-making has become a casualty. Second: That this situation is deleterious for the nation. That too much is at stake for too many in such a situation. Third: On you and officers of the All India Services, among others, rests the onus to remedy the situation …………………

Today, we are facing a testing time in the history of our nation. The quality of governance is below par. There has been an erosion of people's faith in government. Their confidence in public institutions has declined. National trust in the bureaucracy, including the police force has collapsed. The integrity and professionalism of civil servants are being questioned. This has brought the credibility of the government to the lowest since Independence.

. . . Most of us would not be able to convince ourselves that we are capable of being part of a legacy which provided this nation the foundations on which the edifice of good governance stood. And that is where the greatest challenge to the police force lies today, when the moral fabric of the nation seems to be tearing apart in the absence of an optimal governance system, characterised by a near total absence of accountability; where loyalty takes precedence over the sense of one's duty, and where national interests are often, and with impunity, subjugated to individual gains."

While discussing the fall of political system and bureaucracy, the Times of India, Lucknow dated 17.10.2011 remarked, "The steel framework is cracking - bending under the weight of people's expectations and being pulled down by the political class. The IAS and IPS officers themselves are caught in a debilitating dilemma as governance, in the words of Vinod Rai, "touches a new low"."

After considering number of instances with regard to evil or persecuted bureaucracy,
the reporter (supra) considering the plight of certain honest upright officers observed, to quote :

"It's an evil throughout the country. Ruling parties do post people arbitrarily, without merit. It's done to subjugate the bureaucracy into toeing a certain line.; says TSR Subramanian, former cabinet secretary of India. But, says Subramanian, the bureaucrats should voice their concerns within the bounds of service rules.

"Done in that manner, the service rules protect you and provide immense immunity."

But others blame bureaucrats themselves for their plight as they have not learnt to say "no" to their political masters. "The message should be loud and clear that reshufflings would not help matters," says a Maharashtra cadre IPS officer, giving the example of a fiercely independent cadre-mate, then Nasik, I.G. B.D. Mishra, who had to be reinstated because of public pressure after he was shunted out for acting against some local heavyweights."

The reporter while considering the plight of honest officers quoted the comments of some bureaucrats and remarked, to quote:

"While an officer may lower his own expectations, he may not always have the luxury of ignoring people's expectations. Nor can he afford to antagonize the political class. To maintain that difficult balance, while some seek central deputation, others go on unending sabbaticals. Yet others, like a 1985-batch Bihar-cadre IPS officer, plead to the government that instead of all the harassment they just be declared insane."

(Extract from The Times of India, Lucknow, Monday, October 17, 2011).

Under the facts and circumstance and the proposition of law discussed (supra), there is no cake walk to the members of other wings of Government (executive and legislature) to claim immunity of their actions under the garb of sovereign function or Montesquieu's doctrine of separation of power.
ENVIRONMENTAL DEGRADATION AND HUMAN RIGHTS

Justice Vishnu Sahai

I am grateful to Mr. Akhil Prasad, Managing Director of DAS India for inviting me today to deliver the keynote address on Environmental Degradation & Human Rights. That today is the World Environment Day makes the choice of the subject very appropriate. This address is in India's context. The Constitution of India is the supreme law of the land. The importance it gives to environment can be gauged by the fact that in the year 1976 by Forty Second Amendment Act Articles 48A and 51A(g) were inserted. They read thus:

| Article 48A | “The state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country” |
| Article 51A | “It shall be the duty of every citizen of India-(g) to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures” |

2. The question is whether the state and citizens are sufficiently performing their aforesaid duty. The honest answer has to be no. There is environmental degradation on a massive scale resulting in violation of human rights.

Air pollution, water pollution, falling ground water tables, garbage pollution, wildlife natural habitat pollution, noise pollution, fuel adulteration, unscientific and uncontrolled quarrying and mining, industrial plants discharging their effluents and contaminating the environment, lack of flood control and monsoon water drainage system, diversion of consumer waste into rivers are some of the biggest environmental challenges facing the country.

3. It would be unfair and incorrect to wholly castigate the State for turning a blind eye to environmental degradation and the resultant carnage of human rights. It is true that trees are being cut by State for constructing high size buildings for the purposes of housing and constructing buildings where government business can be conducted but at the same time government is planting trees, though regretfully not in the same proposition in which they are being cut.

It is also true that a number of legislations have been enacted by the government to

1 Former Acting Chief Justice, Allahabad High Court, Member, State Human Rights Commission, Uttar Pradesh
prevent environmental degradation; for e.g. The National Environment Appellate Authority Act which empowers the appellate authority to hear appeals against orders granting environmental clearance in designated areas where industrial activity is restricted under the Environment Act.

4. But at the same time it cannot be disputed that the response of the State is inadequate bearing in mind the gravity of the problem. This is mainly for two reasons namely.-

(a) Financial Crunch - Finances with the State are limited. Bearing in mind the colossal population and the limited money naturally most of the money is spent by the State on basic things like, health care, education, food etc. leaving it with little money for containing environmental degradation and protecting human rights.

(b) In India the fate of the government in elections does not depend on its performance in preventing environmental degradation and protecting human rights.

I dare say that if people were to project this issue as a major election issue: making it plain to the government that its chances of returning to power would depend on how well it tackles this problem the response of the government would be for better.

5. While examining this problem from the standpoint of the State two things have to be borne in mind:-

(i) Increase in population by leaps and bounds and the acute level of poverty of the majority population. Whatever steps are taken by the State to contain environmental degradation they are not enough because the rise of population is far more in proportion to them; for example the number of houses which the government constructs are cosmetic bearing in mind the size of population and this forces people to live in conditions which pollute the environment. Again majority of the population on account of poverty is not able to afford the relatively cheap houses constructed by the government forcing them to live in slums which are a breeding ground for environmental degradation. Ultimately people have to realize that for a better environment there has to be population control and this should prompt them to restrict the size of their families;

(ii) Some environmental degradation is the cost to be paid by people for sustainable development of the country. India being a developing country requires economic progress and for that some ecological sacrifice has to be made; For e.g. to solve the problem of housing multi-storeyed residential complexes have to be constructed and for this trees, at times on a large scale, have to be cut. The same happens when government buildings and accommodation for government officials are constructed.

6. There can be no dispute that sustainable development of the country is necessary but it has to be in consonance with and not at the expense of human rights. To quote the Supreme Court in Narmada Bachao Andolan Vs Union of India (2000 (10) SCC 664 at p727) “sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation.”

The State should always remember the warning of the Supreme Court in the case of M.C. Mehta Vs Kamal Nath (1997) 1 SCC 388 in terms that the State is a trustee of all natural resources and is under a legal duty to protect them and to ensure that resources meant for public use should not be transferred to private ownership.

7. The State should also bear in mind that under the pretext of sustainable development it cannot trample upon human rights which as defined in Section 2(d) of Protection of Human Rights Act 1993 means rights relating to life and dignify
guaranteed by the Constitution.

Right to life is guaranteed by Article 21 of the Constitution which reads: "No person shall be deprived of his life or personal liberty except according to the procedure established by law".

By applying the doctrine of judicial activism the Supreme Court has held that implicit in the right to life is the right to a dignified life and not mere animal existence. It has held in the cases of:-

(i) **Francis Coralie Mullin vs The Administrator Union Territory of Delhi. (AIR 1981 SC 746)** "the right to life includes the right to live with human dignity and all that goes alongwith it, namely the bare necessities of life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms? freely moving about and mixing and comingling with fellow human beings."

(ii) **Subhash Kumar vs State of Bihar (AIR 1991 SC 420)** "The right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to take recourse to Article 32 of the Constitution.

This interpretation of Article 21 has resulted in emergence of environmental jurisprudence in India and there are numerous decisions of Supreme Court wherein the right to clean environment, drinking water, a pollution free atmosphere have been given the status of human rights and the fundamental right to life guaranteed by Article 21. The Supreme Court has used right to life as a basis for:-

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<td>(a)</td>
<td>Combating air &amp; water pollution. -</td>
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<td>(b)</td>
<td>Closure or relocation of industries and ordered that evacuated land be used for needs of community.</td>
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<td>Taking a serious view of unscientific and uncontrolled quarrying &amp; mining</td>
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<td>Issuing orders for maintenance of ecology around coastal areas</td>
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<td>Shifting of hazardous and heavy Industries</td>
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(V Mathur Vs Union of India (1996) 1 SCC P 119)
(M. C. Mehta Vs Union of India ; 1996(4)SCC 351)
(Rural litigation & Entitlement Kendra vs State of U.P.; AIR 1991 SC 2216)
(Indian Council for Environment Legal Action vs Union of India; (1996) 5 SCC p 281)
(M C Mehta vs Union of India; (1996)4 SCC 750)
(M C Mehta Vs Union of India; AIR 1988 SCC p 1037)

If the State were to enact any law which violates the right to life or any other fundamental right, most of which are another name for human rights, the said law would be struck down by the Supreme Court in view of Article 13(2) of the Constitution which provides that a law which violates fundamental rights shall be null and void to the extent to which it violates it.
8. There is no doubt that it is largely on account of the Supreme Court that in India human rights survive and environmental degradation is contained. Its contribution in this direction is far more than that of the other two organs of the State, namely the Executive and Legislature.

9. But I close my address with a feeling of anguish. The painful reality is that containing environmental degradation and protection of human rights has a very low priority in the minds of majority of the Indians. We still find people (even the educated ones) urinating in open places, throwing used bags in public places, cutting forests, throwing garbage and waste material in lakes and rivers and setting up factories without making provisions for discharge of effluents. Had people been sensitive to the problem of environmental degradation and conscious of human rights they would not have left this issue to the government alone but would have discharged their duty in terms of Article 51A(g) of the Constitution which provides:

"It shall be the duty of every citizen of India "(g)" to protect and improve the natural environmental including forests, lakes, rivers and wildlife and to have compassion for living creatures".

I regret that most of the Indians have miserably failed to perform this constitutional duty of theirs and make no bones in saying that unless they perform it, the issue of environmental degradation and protection of human rights would never be wholly resolved.
Objective, as I understand from the Law books, in our democratic set-up, laws are made for all men—common or uncommon. In common parlance, by common man we understand—a man on the street. A man who may not have any status, office, post or rank in the society. An ordinary citizen with expectations of a just and human order. A legal system and its effectiveness has to be gauged or measured by the extent of its usefulness to the common man. The failure of law for common man is due to no change of heart or outlook of other fellow beings who are privileged and have a better status in the society. There has been no emotional integration between haves in the society and haves not. In the absence of any effort in the proper direction, the common man is deprived of the benefit of the law enacted for him which do not reach him.

By virtue of the Constitution (Forty-second Amendment) Act, 1976, our Constitution under its Article 39-A also emphasises the duty of the State to provide free legal aid. Article 39-A, which mandates for equal justice and free legal aid, provides that 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.

In this regard, the Legal Services Authorities Act, 1987 (for short the “Act, 1987”) also seeks to fulfil the aforesaid constitutional mandate and goal of providing affordable and speedy justice. The Preamble of the Act, 1987 specifically enunciates as under:

“An Act to constitute Legal Services Authorities to provide free and competent legal service to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.”

In order to achieve the aims of promoting justice on the basis of equal opportunity, the Act, 1987 provides for constitution of several authorities at the National level, State level, District Level and Taluk level, and also several Committees. The duties and functions of the Authorities and Committees have been specifically provided under such Act. The Act, 1987 confers statutory recognition to the Lok Adalats. It is also stipulated that the State Legal

1 Former Acting Chief Justice, High Court of Judicature at Allahabad & Former Executive Chairman, Uttar Pradesh State Legal Service Authority.
Services Authority will continue to provide preventive legal aid services, such as, Lok Adalats, legal literacy and training of para-legals.

Besides above, introduction of Chapter VI-A with effect from 11\textsuperscript{th} June, 2002, in the Act, 1987 is a milestone for the people at large. Such Chapter deals with pre-litigation conciliation and settlement. Section 22-B provides for establishment of “Permanent Lok Adalats” and such Permanent Lok Adalats shall exercise the jurisdiction in respect of the “public utility services” enshrined under Section 22-A(b). Presently, the public utility service means any—

“(i) transport service for the carriage of passengers or goods by air, road or water; or
(ii) postal, telegraph or telephone service; or
(iii) supply of power, light or water to the public by any establishment; or
(iv) system of public conservancy or sanitation; or
(v) service in hospital or dispensary; or
(vi) insurance service,
and includes any service which the Central Government or the State Government, as the case may be, may, in the public interest, by notification, declare to be a public utility service for the purposes of this Chapter.”

However, mere introduction of such law will not be effectively operative unless and until the persons attached to it sensitize themselves before sensitizing others. Grammatically, if you are sensitive to other people’s needs, problems, or feelings, you show understanding and awareness of them. People attached to it should understand that their nature of work is social justice and without sensitizing the people, no goal will be achieved. Therefore, it is prime duty of the people attached to Permanent Lok Adalats to make the people aware. So far as my experience is concerned, in a meeting Institute of Judicial Training & Research Institute, U.P. (JTRI) I found that many persons attached to the Permanent Lok Adalats are more keen about their rights than their duties, which should have been other way round.

Now we have to see who are going to discharge the work of Permanent Lok Adalats—retired District Judges or Additional District Judges having been appointed as District Chairmen of the Permanent Lok Adalats and two other Members, who will be recruited from the different section of the society. Normally, a Judge, when retires from his office, gets an assignment to use his experience. But there is huge difference between other assignments and the present one. Here, one has to be dedicated and devoted.

Let us have a clear picture in respect of the justice delivery system of the mainstream of judiciary. In such justice delivery system, when a litigant goes to the Court and files necessary suit, application, etc. or faces the criminal cases, gets justice after a considerable period. There are several procedural hazards. Whenever one crosses such procedural hazards and reaches to the doorstep of substantial justice, a considerable period is elapsed. Sometimes the exercise appears to be futile in nature. Therefore, a search had been made by the proper persons to find out the alternative dispute resolution system. In the process, a light had been thrown to adopt the system of the western world. Settlement by Courts, mediation, arbitration, conciliation, etc. are outcome of such alternative dispute resolution system. Though the concept came from the West but settlement by Lok Adalat and disposal by Permanent Lok Adalat are essentially original concepts of our country. We have given independent thought how to carry it out in our country of huge population unlike the West. In the Western countries population is much lesser than our country. They are developed, sufficiently educated and disciplined. Our country is a developing country. Rate of population growth is very high. Rate of poverty, illiteracy and indiscipline are higher. Against this background, sensitizing the people is a mammoth task. We have to go to their doorsteps to mobilise them. Normally, the people are afraid of coming to the Court in whatever name it is
called. Fear psychosis will not go unless they become aware that an easy, less costlier and humanitarian process of justice is awaiting for them. Therefore, the persons attached to Permanent Lok Adalat should not only be sensitive but also be devoted, humble, submissive and convincing. Hence, at the time of their recruitment these essential qualifications are to be seriously taken note of.

So far as my personal view is concerned, there should not be two different Lok Adalats i.e. Lok Adalat and Permanent Lok Adalat. Where there is no existence of Permanent Lok Adalat, Lok Adalat may run but when huge State exchequer is utilized by making Permanent Lok Adalat, why it will exercise the jurisdiction only in respect of public utility services, is best known to the Legislature. Lok Adalat activities will be heavily focused if it is given to Permanent Lok Adalats absolutely. Presently, National Legal Services Authority (NALSA) has granted huge sum to the State to make Alternative Dispute Resolution Centre in each district. Concept of making the same is to bring all alternative dispute resolution systems under one umbrella. Therefore, policy and execution cannot differently run.

Another aspect is required to be discussed here. If the law is amended and the works of Lok Adalats are given to the Permanent Lok Adalats along with their existing works, the works of mainstream of the judiciary will be reduced substantially. Judicial Officers will be free to utilize such time in disposing huge backlog. On the other hand, there would not be any confusion in the mind of the general people about existence of two Lok Adalats. In further, as per the ratio propounded by the Supreme Court in 2011 (7) SCC 463 (Interglobe Aviation Limited Vs. N. Satchidanand) the power of the Permanent Lok Adalat is much wider. It will not conciliate alone the matter like Lok Adalat but conciliate and arbitrate in the form of arbitration.

I further suggest that till the law is amended, we can take the advantage of existing Section 19 (2) of the Act, 1987. Under Section 19 (2) of the Act, 1987, every Lok Adalat organized for an area shall consist of such number of—(a) serving or retired judicial officers; and (b) other persons, of the area as may be specified by the State Authority or the District Authority amongst others. But we do not find adequate involvement of retired judicial officers in the matter of organizing Lok Adalat. In spite of discharging regular judicial and administrative functions, the serving judicial officers are additionally discharging works of Lok Adalat in the weekend since in the week days they are heavily involved in their main works. On the other hand, retired judicial officers, who are occupying the post of District Chairmen of the Permanent Lok Adalats, and people of different sections, who are appointed as Members, are regularly sitting to discharge similar works for whole of the week from 10.00 A.M. to 05.00 P.M. but they discharge their service with inadequate number of litigations that too for limited purpose. Hence, in addition to the work of Permanent Lok Adalat, if necessary, Courts can refer the matter to the Permanent Lok Adalat to act as Lok Adalat in the referred matters, when not only the workload of the mainstream will be reduced but people will also be more vigilant. Real purpose of making Permanent Lok Adalat will be fulfilled.

The main motto of making alternative dispute resolution system is not only to make the people aware about its object and faster disposal of litigation but also to reduce the workload of mainstream of the judiciary.

These are the suggestions for the better prospect and there is no bar in suggesting and dreaming clear sunshine.
Introduction

In the present era of rapid development, conflict of interests are growing with individual needs and expectations. People have also become more conscious about their individual rights and litigation becomes an inevitable part of their life due to rising incidence of disputes and intolerance among them. In a modern technologically and economically well advanced society, litigation is a primary means of resolving disputes. Seekers of justice are in millions and it is becoming rather difficult for the Courts to cope up with the ever-increasing cases with the present infrastructure and manpower. Courts are clogged with cases. There is serious problem of overcrowding of dockets. Because of the ever-increasing number of cases the Court system is under great pressure. It is in this context that the alternative modes of dispute resolution have gained primacy in the present millennium.

Justice delivery institutions in most of the developing countries in the world are currently confronted with serious crises, mainly on account of delay in the resolution of the disputes particularly the delay in disposal of the commercial and other civil matters. The cause for such backlog of cases is institutional and the delay in disposal of the cases, is due to procedural laws. With the mounting pressure of cases-civil, criminal, revenue, industrial and others the workload of judiciary increased leaps and bound and it has now reached a stage of unmanageable magnitude and the cases remain undecided for years together for one reason or the other.

Conceptual Background: Alternative Dispute Resolution

Article 39A of the Constitution of India provides that 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 disability.

Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all.

In the complexities of modern life-style litigants want a decision and that too as quickly as possible. As a problem of over-burdened courts, a number of tribunals were established in India. Even after formation these adjudicatory tribunals and setting up of

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1 Additional District Judge/Presiding Officer, Industrial Tribunal-cum-Labour Court, Panipat, Haryana
Family courts and a number of commissions for the protection of rights of men and women, the problem of delay in courts still persists unabated thereby defeating the cause of justice.

Today the complexity of disputes with the dynamic era of Globalisation has led to formulation of new laws pertaining to the information technology, intellectual property and economic laws and in view of the nature of disputes, it has become essential for developing an institution based system for speedy disposal of the cases.

In *Surjeet Singh & other V/s Harbans Singh & others*¹, the Supreme Court expressed its anguish for long delay as the case was lying pending in civil Court at Patiala since 1948 with no sight of its finalization. In case of *Dr. Buddhikota Subbarao V/s K.Parasharan*,² the apex court observed “No litigant has a right to unlimited drought on the court time and public money in order to get his affairs settled in the manner as he wishes.”

Mr. N.A. Palkhivala, an Eminent jurist observed:

“The fault is mainly of legal professionals. We ask for adjournments on the most flimsy grounds. If the Judge does not readily grant adjournment, he is deemed highly unpopular, I think it is the duty of the legal profession to make sure that it co-operates with the judiciary in ensuring that justice is administered speedily and expeditiously, it is a duty of which we are totally oblivious”.

The law commission reports from time to time has expressed the concern in regard to pendency of arrears of cases and has suggested for developing mechanism for speedy disposal of cases. Alternative Dispute Resolution (ADR) describes process of resolving disputes in place of litigation and includes arbitration, mediation, conciliation, Lok adalat etc. The objective of ADR, as the phrase itself suggests is to resolve disputes of all sorts outside the traditional legal mechanism. ADR offers an alternative route for resolution of disputes. The emphasis in the ADR, which is informal and flexible, is on assisting the parties to help themselves.

In India, one of the mechanisms of Alternative dispute resolution was effectively implemented in the area of labour laws, namely Industrial Disputes Act, 1947. Conciliation has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workers and the management. The provision in the I.D. Act makes it attractive for disputing parties to settle disputes by negotiation and failing that through conciliation by an officer of the government, before resorting to litigation. Another area, where Alternate Dispute Resolution recognized in India is in family law. Section 5 of the Family Court Act provides provision for the Government to require the association of Social Welfare Organisation to hold the family Court to arrive at a settlement. Section 6 of the Act provides for appointment of permanent counsellors to effect settlement in the family matters. Further Section 9 of the Act imposes an obligation on the Court to make effort for settlement before taking evidence in the case. Further, by amendment of the Code of Civil Procedure in the year 2002, Sec.89 has been included in the code, which gives importance to mediation, conciliation and arbitration etc. This section casts an obligation on the part of the Court to refer the matter for settlement either before the Lok adalat or other methods provided in the provisions.

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1. AIR 1996 SC 135
2. AIR 1996 SC 2678;
Lok adalat: An effective mode for Alternative Dispute Resolution

“Discourage litigation. Persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time”.

Abraham Lincon

Alternative dispute resolution has been an integral part of Indian culture. The institution of Lok adalat in India, as the very name suggests, means, People's Court."Lok" stands for "people" and the vernacular meaning of the term "Adalat" is the court. This has been widely used in our country for effective resolution of the disputes. It has been proved to be a very effective alternative to a present system of long drawn litigation in courts. The ancient concept of settlement of dispute through mediation, negotiation or through arbitral process known as "Peoples' Court verdict" or verdict of "Nyaya-Panch" is conceptualized and institutionalized in the philosophy of Lok adalat. The main characteristics/features of Lok adalat includes participation, fairness, voluntariness, transparency, efficiency resulting in brotherhood and win-win situation for the parties. This system is deeply rooted in Indian legal history and has now known to be most suited to Indian environment, culture and societal interests.

The need and importance of the Lok adalat has been discussed at length in Abdul Hasan and National Legal Services Authority Vs. Delhi Vidyut Board and others

"The need of the hour is frantically beckoning for setting up Lok-Adalats on permanent and continuous basis. What we do today will shape our tomorrow. Lok adalat is between an ever-burdened Court System crushing the choice under its own weight and alternative dispute resolution machinery including an inexpensive and quick dispensation of justice. The Lok adalat and alternative dispute resolution experiment must succeed otherwise the consequence for an over burdened court system would be disastrous. The system needs to inhale the life giving oxygen of justice through the note”

The introduction of Lok adalats added a new dimensions to the justice dispensation system of this country and succeeded in providing an additional forum to the stakeholders for effective settlement of their disputes. Lok adalat (people’s courts), established by the government settles dispute by the principles of justice, equity and fair play, which are the guiding factors for decisions based on compromises to be arrived at before such Adalats.

The camps of Lok adalats were initially started in the state of Gujarat in 1982. The first Lok adalat was organized on 14th March 1982 at Junagarh. Maharashtra commenced the Lok Nyayalaya in 1984. The movement has now subsequently spread all over the country.

A Lok adalat has jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute in respect of any matter falling within the jurisdiction of any civil, criminal, or revenue courts or of any tribunal constituted under any law for the time being in force for the area for which the Lok adalat is being organized. In a case where a pending action or proceeding is referred to Lok adalat by a joint application of the parties, the

1. AIR 1999 Delhi 88
Lok adalat is to proceed to dispose of that proceeding or matter and arrive at compromise or settle the disputes between the parties. Every award of the Lok adalat is a civil decree and every award made by the Lok adalat is deemed to be final and binding on all parties to the proceedings or disputes. No appeal lies to any court against such an award. The Lok adalat is empowered to exercise substantive powers vested in a civil court under the Code of Civil Procedure while trying suit of proceeding.

In a Lok adalat, if a compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and cannot be appealed, not even under Article 226 because it is a judgment by consent. All proceedings of a Lok adalat are deemed to be judicial proceedings and every Lok adalat is deemed to be a Civil Court. Section 25 of the Legal Services Authority Act, 1987 provides that the provisions of the Act have an overriding effect notwithstanding anything which is inconsistent with any other law.

In Punjab National Bank v. Lakshmichand Rai, an appeal was filed under S. 96 of the Code of Civil Procedure against the award made by a Lok adalat. The question before the court was whether such an appeal is maintainable. So in this case it was reiterated that “an appeal would not lie under the provisions of Section 96 C.P.C. Lok adalat is conducted under an independent enactment and once the award is made by Lok adalat the right of appeal shall be governed by the Legal Services Authority Act.” It has been specifically mentioned in S. 21(2) that no appeal shall lie against an order of a Lok adalat.

Further, in Board of Trustees of the Port of Visakhapatnam v. Presiding Officer, Permanent, Lok adalat-cum-Secretary, District Legal Services Authority, Visakhapatnam and Anr., it was observed that the award is enforceable as a decree and is final. The endeavor is only to see that the disputes are narrowed down and make the final settlement so that the parties are not again driven to further litigation or any dispute.

During the last few years, Lok adalat has been found to be a successful tool of alternate dispute resolution in India. It is most popular and effective because of its innovative nature and inexpensive style. The system received wide acceptance not only from the litigants, but from the public and legal functionaries in general. In India, during the last few years Lok adalat has been functioning continuously and permanently in every district centre. In taluk centres also sittings of Lok adalats have been held successfully. Several thousands of pending cases and disputes which had not reached law courts have been settled through Lok adalats.

Lok adalats ensure speedier justice because it can be conducted at suitable places, arranged very fast, in local languages too, even for the illiterates. The procedural laws are not strictly followed while assessing the merits of the claim by the Lok adalat. The stateholders may be represented by their advocate or they can interact with the Lok adalat judge directly and explain their stand in the dispute and the reasons thereof, which is not possible in a regular court of law.

Secondly, the mechanism is now gaining a lot of acceptance in all the sections of the society and is progressively solving the problems of back log of cases. The scheme helps the overburdened Courts to alleviate the burden of arrears of cases and as the award becomes

1. 2000(MP) 301
2. 2000 5 ALT 577
final and binding on both the parties, no appeal is filed in the Appellate Court and, as such, the burden of the Appellate Court in hierarchy is also reduced.

Thirdly, it is the only institutionalized mechanism of dispute resolution in which the parties do not have to bear any expenses. There is no court fee in Lok adalat. If the case is already filed in the regular court, the fee paid is refunded in the manner provided under the Court Fees Act. This kind of refund is an incentive given to parties to negotiate for settlement.

Fourthly, the main thrust of Lok adalats is on compromise. Its role is to persuade the parties to sit for a solution and help in reconciling the contesting differences. It encourages consensual arrangements. It is not possible for Lok Adalat to decide upon any issue not acceptable to any of the parties. In Lok adalats, disputes are not only settled but also the cordial relations between the parties are retained as disputes are resolved amicably. Hence, it is a very healthy way of dispute resolution.

However, Lok adalats are also required to follow the principles of natural justice and other legal principles. In Kishan Rao v. Bidar District Legal Services Authority, the question raised was whether the Lok adalat could pass a decree when all the parties had not appeared before the Lok adalat nor had notice been issued to them. The Karnataka High Court interpreted Section 20(3) of the Legal Services Authorities Act to hold that all the parties to the suit must be present if the compromise was to be a valid one. Thus the impugned decree was struck down as being a nullity by reason of violation of natural justice.

National Legal Services Authority & State Legal Services Authority

The Genesis of the initiatives of Govt. to formulate legal aid/Lok adalat can be traced from 1950s onwards during which, the Govt. of India also started addressing to the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the Govt. for legal aid schemes. In different states legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments.

In 1980, a Committee at the national level was constituted to oversee and supervise legal aid programmes throughout the country under the Chairmanship of Hon. Mr. Justice P.N. Bhagwati (then a Judge of the Supreme Court of India). This Committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country.

The introduction of Lok adalats added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes. In 1987 Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9th of November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994.

1. WP 2535 OF 1999.
National Legal Services Authority was constituted on 5th December, 1995. His Lordship Hon. Dr. Justice A.S. Anand, Judge, then a Judge of Supreme Court of India took over as the Executive Chairman of National Legal Services Authority on 17th July, 1997. A nationwide network has been envisaged under the Act for providing legal aid and assistance. The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker sections of the society and to organize Lok adalats for amicable settlement of disputes. Hon'ble Mr. Justice Altamas Kabir, the Chief Justice of India is the Ex- officio Patron-in-Chief of the National Legal Services Authority.

In every State a State Legal Services Authority has been constituted to give effect to the policies and directions of the Central Authority (NALSA) and to give legal services to the people and conduct Lok adalats in the State. Chief Justice of the State High Court is its ex officio Patron-in-Chief State Legal Services Authority. A serving or retired Judge of the High Court is nominated as its Executive Chairman. District Legal Services Authority is constituted in every District to implement Legal Aid Programmes and Schemes in the District. The District Judge is its ex-officio Chairman.

The National Legal services authority is continually monitoring the progress of the disposal of cases in Lok Adalat and The national statistics relating to disposal of cases in Lok adalats (upto 2010) has been 16,71,944 in 60,981 Lok adalats organized during the year. An effective online data base monitoring system has also been developed to monitor the details of cases dealt in each state upto taluka level. The other focus areas of the NLSA is providing free, competent, effective and comprehensive legal services, Other area includes, widening the network of Lok adalats, Access to Justice to marginalized section of society, legal literacy and awareness camps, strengthening and training the legal aid lawyers synergy with Judicial Academies, creating a base for para-legal volunteers etc. Accordingly different programmes are organized at National, state, district, village level.

Haryana State Legal Services Authority has been instrumental in achievement of the mandate of the constitution of India and the directions of the National Legal services Authority. The Authority has leveraged the important mechanism of ‘Lok adalat’ as an effective alternative dispute resolution method for ensuring quick and final consensual disposal of cases binding on the parties, without incurring any extra cost or fees. HALSA has introduced various initiatives for ensuring access to Justice and for speedy disposal of cases under Patronage of its Patron-in-Chief, Hon'ble Mr. Justice Arjan Kumar Sikri, Chief Justice High Court of Punjab & Haryana and under guidance of Executive Chairman, Hon'ble Mr. Justice Satish Kumar Mittal, Judge, High Court of Punjab & Haryana.

The various initiative of Haryana State Legal Services Authority are as illustrated below:

A. **Scheduled Lok adalats**

HALSA is organizing scheduled Lok adalats in all the districts courts and sub divisional courts of Haryana from time to time as per schedule prepared by DLSAs. In these

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3. http://hslsa.nic.in/
Lok adalats, pending cases of all nature are taken up by different Lok adalat benches presided by judicial officers and members.

82,363 cases were taken up in Lok Adalats/Special Lok Adalats\(^1\) and 29,872 cases have been settled and Rs. 17,32,71,705/- awarded in 1,016 MACT cases in 2010-11

B. **Mobile/Rural Lok adalats**

HALSA organises Mobile/Rural Lok adalats in the villages to make speedy and inexpensive justice available to the people at their door step by amicable resolution of their disputes through mediation/conciliation by the respectables of the village and Village Gram Panchayats. In these Mobile/Rural Lok adalats, all the pending cases in the courts as well as cases at pre-litigative stage of such village and adjoining villages are taken up for settlement. These Adalats are attended by Panel Advocates and Para Legal Volunteers, who make efforts to bring parties together in all pending matters of that area, where rural Lok adalat takes place, to arrive at acceptable settlement. Similar efforts are made in pre-litigation matters of that area. The cases, in which parties agree for settlement, are then taken up in forthcoming Lok adalat. 23,232 cases were taken up in Mobile/Rural Lok Adalats\(^1\) and 15,926 cases were settled during 2010-11.

C. **Daily Lok adalat**\(^1\)

Daily Lok adalats were first started in Sonepat district. After the encouraging results, these daily Lok adalats were started in the remaining districts. At present, daily Lok adalats are being held in all the 21 districts. Every court of the sessions division, after court hours, gets converted into daily Lok adalat and judicial officers hold sittings for this, depending upon the workload of cases coming for settlement every day in each court. This way, there are as many daily Lok adalats as the number of courts in that sessions division. A daily Lok adalat is assisted by one lawyer or social worker on the panel.

D. **Permanent Lok adalats (Public Utility Services)**

On the initiative of HALSA at present, six PLAs are functioning in the state. The state government has also agreed to sanction five more at Rewari, Bhiwani, Sirsa, Sonepat and Karnal, which shall start functioning shortly.

In such Lok adalats, cases relating to Public utility services: namely (i) transport service for the carriage of passengers or goods by air, road or water; or (ii) postal, telegraph or telephone service; or (iii) supply of power, light or water to the public by any establishment; or (iv) system of public conservancy or sanitation; or (v) service in hospital or dispensary; or (vi) insurance service (vii) housing and estates (viii) banking and finance, are settled without any expenditure and at the earliest, up to the value of Rs. 25 lakh. 6087 cases were taken up in these Lok Adalats and 2399 cases have been settled in the Permanent Lok Adalats for Public Utility Services during 2010-11 in the State of Haryana.\(^2\)

Apart from above, a number of initiative for spreading awareness in the form of legal literacy camps are being organized at all levels. Further, initiatives in the form of exhibitions,

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1. Source: Annual report 2010-11, HALSA (http://hslsa.nic.in)
2. http://hslsa.nic.in
School Competitions, Training of advocates, para legal staff, NGOs etc. are being taken up continually.

**Conclusion**

The Lok adalat system has received vide appreciation and acclaims from the different stakeholders. It also helped in evolution of jurisprudence of peace in the larger interest of justice and wider public interest. Its process is voluntary and works on the principle that both parties to the disputes are willing to resolve their differences by amicable solutions. Through this mechanism, disputes can be settled in a simpler, quicker and cost-effective way at all the three stages i.e. pre-litigation, pending-litigation and post-litigation.

It is the dire need of the hour to set up Lok adalats on permanent and continuous basis. Our future depends on the initiatives, we take today. Lok adalat is a buffer between an over-burdened Justice dispensation and alternative dispute resolution machinery. It is comparatively in-expensive and quick mode of justice dispensation.

Lok adalats, serve very crucial functions in a country due to many factors like pending cases, illiteracy etc. The Lok adalat was a historic necessity in a country like India where the illiteracy has so far, dominated the society as well as governance system. The concept of Lok adalat has been a great success in present scenario.

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LEGAL EVIDENTIARY VALUE OF DNA PROFILING AND ITS FORENSIC USE IN COURT

Dr. Gokulesh Sharma

Abstract

DNA testing has become an established part of criminal and civil justice process, and the admissibility of the test results in the courtroom has become routine. There is not, and has never been, controversy about its ability to eliminate suspicion in cases where the suspect’s DNA does not match the evidentiary sample. Debate continues, however, concerning the extent to which the guilt can be inferred when an apparent match occurs. In most cases, the best it can ever do is to place a suspect at the scene of the crime. However, the uncritical adoption of ‘forensic biologic evidence’ as the objective solution to the problem of determining criminal identity raises the possibility of ‘scientific appropriation’ of the criminal and civil justice process and ignoring the fact that in most contested criminal cases, the crucial issue is not identity but of consent or mens rea, for which DNA evidence provides no assistance. This paper examines the current debate over the many roles that DNA can, and should, play in criminal and civil justice system.

I. Introduction

Perhaps the most significant advancement in criminal investigation since the advent of fingerprint identification is the use of DNA (DNA is an abbreviation of deoxyribonucleic acid. It is an organic substance which is found in every living cell and gives an individual a personal genetic blueprint. It can be extracted from a whole variety of different materials like blood, saliva, semen, hair, urine, body fluids, bones, body organs, etc.) technology to help convict criminals or eliminate persons as suspects. DNA analysis on saliva, skin tissue, blood, hair and semen can now be reliably used to link criminals to convict for crimes. Increasingly accepted during the past twenty years, DNA technology is now widely used by police, prosecutors, defence counsels and courts throughout the world. DNA testing can make a virtually positive identification when the two samples match. It exonerates the innocent and helps to convict the guilty. These DNA profiles have revolutionised criminal investigations and become powerful tools in the identification of individuals in criminal and paternity cases. DNA contains the genetic code of an individual from whom it is taken. It is hereditary and responsible for many attributes of the individuals. DNA is present in the nucleus of every living cell (except red blood cells) of the body so that any trace of blood (white cells contain DNA), semen, or hair root (not hair or nails) found at the scene of the crime may help to ascertain who was present because a DNA profile of the material may be matched with those of suspects. Despite these positive characteristics, there are strong grounds for exercising caution. DNA profiling evidence is not the same as a unique calling card left at the scene of the crime. In particular, using DNA profiles raises questions in three crucial respects: The reliability of the conduct of the tests; their interpretation; and the implications for human rights. Some people think that DNA is like a fingerprint, but they are not similar, A fingerprint is the impression of a finger and nothing else, but DNA contains

1 Additional District & Sessions Judge, Banda.
information that raises much broader privacy and other civil liberties concerns. Although DNA profiling is used in a similar way to conventional blood grouping, for the elimination or association of suspects with a crime, the possible vast increase in discrimination power allows much firmer statements to be made. There is also only a small chance of a false positive result. The greater discrimination power also means that large population can be screened as an alternative to conventional crime investigation. DNA profiling is complementary to conventional blood grouping in a rape investigation because blood group substances are contained within the seminal fluids, while DNA is contained in the sperm, which can be separated and kept frozen. DNA profiling is an extension of technology which allows more precise results. Today, the use of DNA technology has gained acceptance in the field of forensic and life sciences, and courts in the USA, Europe and Asia have availed of DNA evidence in civil and criminal cases.

II The science of DNA identification

Each person has a unique set of fingerprints. As with a person’s fingerprint, no two individuals share the same genetic make up. This genetic makeup, which is the hereditary blueprint imparted to us by our parent is stored in the chemical deoxyribonucleic acid (DNA), the basic molecule of life. Examination of DNA from individuals other than identical has shown that variations exist and that a specific DNA pattern or profile could be associated with an individual. DNA is the biological material which contains all the genetic information within living organisms, including human beings. The ability cell of human body to replicate itself is due to the presence of the “blueprint” in the chromosomes within the nucleus of each cell. Each human cell contains 23 pairs of chromosomes within its nucleus. One half of each pair of chromosomes is provided by each parent at the time of conception. Although most of the information stored in human DNA includes general information common to all humans, some of the information is unique to a particular individual. Only identical twins have identical DNA. The DNA information unique to a particular individual is stored in genes known as polymorphic genes and their location on a DNA molecule is called a polymorphic site or locus by isolating and identifying certain segments of the DNA molecule contained in human tissue samples (e.g. blood, skin, hair follicles or semen stains), it is possible to identify the individual who is the source of the DNA. Like fingerprints, DNA evidence can be useful in criminal investigations and prosecutions.

At the crime scene, DNA is found in blood, semen, skin cells, tissue, organs, muscle, brain cells, bone, teeth, hair, saliva, mucus, perspiration, fingernails, urine, faeces, etc. From so many sources, the chance of finding races of the perpetrator’s DNA at a crime scene is very likely. Using modern techniques, every type of bodily fluid or tissue can potentially yield DNA for testing. Fortunately, that means, many criminals probably left enough evidence to link him/her to the crime scene. While a DNA test result may reveal that ‘A’ was in the crime scene, it cannot tell for how many hours A was there and what role A played in the commission of the crime. It may disclose that B had sex with C but it cannot tell that B forced C. Lastly, even if DNA evidence puts D in the murder scene, it cannot speak who as between D and X pulled the knife first.

Unfortunately, every individual examining the scene can as well leave his/her own DNA behind. In some cases, sufficient DNA for testing purposes may be obtained from blood or semen smears on the suspect’s clothing and has — even been obtained from saliva on a cigarette butt. Such smaller and possibly degraded samples are of poor quality than blood
samples and may yield less reliable results. Scientific techniques commonly used in DNA identification analysis are the process of isolating and identifying segments of the DNA molecule. The scientific community developed the techniques in order to study human genetics. The research leads to the discovery that the same DNA segment has different length in different individuals and that various analysis techniques will be used to match samples of human DNA. Two analysis techniques are most often used in forensic DNA analysis. These are commonly known as Restriction Fragment Length Polymorphisms (RFLP) and Polymerase Chain Reaction (PCR). The most-commonly used and recognized technique is RFLP. In the RFLP method, the first step is to extract DNA from the evidence sample by the use of solvents. Next, the extracted DNA is cut into smaller segments by the use of a restriction enzyme. The location of these restriction sites and the resulting DNA fragment lengths differ among individuals. The idea is that an enzyme is used which cuts the DNA whenever a certain sequence of bases occurs (a restriction site), generating a number of fragments of the DNA of varying lengths. In some individuals, random changes in the DNA will cause one or more sites to be lost or may otherwise cause variation between individuals in those frequent lengths. Extraction of DNA from cells is a relatively straightforward process. Yields, however, are typically low, and DNA is frequently rapidly degraded once it is no longer within a living organism. A spectacular advance has been the discovery of the Polymerase Chain Reaction (PCR), which permits potentially unlimited amplification of minute DNA traces. Such as may be found in small samples of dry bone or skin. An inevitable consequence of this massive amplification potential is its sensitivity to contamination, particularly if the same forensic laboratory and technicians are handling samples from both the suspect and the crime scene. The major disadvantage to using RFLP analysis is that DNA samples which have been degraded by exposure to prolonged sunlight or extensive soiling cannot be used. Again, it is relatively easy to determine that two are different if one has a band and the other lacks, but it is far more difficult to determine, on the basis of identical banding patterns, of the two samples must have come from the same individual. This problem of determining the significance of matches lies at the basis of debate on use of DNA in legal cases. The major drawback to using PCR amplification analysis is that it is particularly susceptible of contamination. DNA profiles produced from manufactured kits are routinely used as evidence; these kits operate within a specific range of amounts of DNA typically 0.5-2.5 nanograms. However, some claim that by varying conditions under which the kit is used profiles can be produced from lower amounts of starting or template DNA. This technique has become known as Low Copy Number (LCN) DNA analysis. The LCN technique was specifically designed to analyses amounts of DNA below 0.1 nanograms (100 picograms) and to produce reliable profiles even in the presence of stochastic effects. There has been for some time controversy about its use in the courts in England and some other countries. LCN DNA evidence. With very low number of template DNA molecules, the process may fail to amplify the template which can lead to number of problems in the interpretation of the resulting profiles. At a time, LCN DNA technique had questions about its validity as admissible evidence in England. That led to the temporary suspension of the LCN technique as the Home Office carried out a review of its applicability for court purposes. In early 2008, that review concluded that it was scientifically robust and, therefore, appropriate for court cases. The Court of Appeal confirmed this approach in Reed and Garmson 2009) EWCA Crim 2698.
III. Validity and reliability of DNA technology: Problems of standardization and certification

Given the variation in DNA sequence among individuals, no scientific doubt exists that technologies available today accurately detect genetic differences. Properly performed and interpreted, a sufficiently detailed examination of two samples of DNA can determine if DNA patterns match, and if they do, the likelihood that a single source is responsible for both samples (except in the case of identical twins). In 1990, the US congress Office of Technology Assessment (OTA) examined DNA typing methods and reported that these were valid and reliable if performed properly. Nevertheless, it is generally agreed that applying DNA tests to forensic samples, especially criminal evidence, potentially presents more difficulties than applying samples in basic research or clinical diagnosis. Samples from crime scenes are frequently small and might be of poor quality because of exposure to a spectrum of environmental onslaughts.

An important matter in the use of DNA as evidence is whether the detection methods are scientifically valid. The validity centers on whether a test will correctly identify true matches and true non-matches. Initial concern about the validity of DNA typing for forensic applications focused on the nature of the samples. Samples are obtained from a variety of less than sterile materials (eg. glass, wood, dirt, and fabric) that are often subjected to sunlight, moisture or desiccation. Samples can also be contaminated with unknown genetic materials such as bacteria, plant or animal secretions. A great caution must be taken in collecting the evidence while avoiding contamination. Contamination usually occurs from touching evidence without wearing gloves, sneezing, coughing and a variety of other mishaps. Some DNA contaminating sources can be eliminated, for example, by taking DNA samples from victims or surrounding witnesses, so their DNA profiles can be identified among the collected forensic samples. Police and crime scene units are usually advised to change their gloves often, avoid talking, sneezing or coughing over any potential evidence. The second aspect of DNA testing of forensic samples is reliability. Reliability involves several factors, including the procedures used, laboratory performance, laboratory record keeping, and quality control and quality assurance. Finally, although forensic uses of DNA tests are valid and reliable when performed properly, many harbor the misconception that DNA typing applied to forensic samples always yield a “yes” or “no” answer. A test that does not give a ‘yes’ or ‘no’ each time is neither incorrect nor unreliable. After the biochemical part of the testing has been done the question will arise whether there is a ‘match’ between the DNA profile of the accused and that of the sample. This is not without problems. Practice hitherto has been to set an arbitrary threshold of similarity and to treat as irrelevant anything falling short and as compelling anything satisfying the criteria. It has powerfully been argued that common sense rebels against the notion that sample differing by standard deviations (sd) ‘match’ and that samples differing 5.01 sd do not ‘match’. The problem in fact is the whole idea match’.

Proper use of DNA samples requires that expertise in molecular population genetics and statistics be brought to bear. The production of the profiles requires biochemical expertise. The hazards of testing include: possible mixing of samples before the tests are carried out mishandling causing contamination either at the time the sample is collected or later in the laboratory; contamination with bacterial, viral, other human or nonhuman DNA at the scene of the crime. A small can complicate the test and make further verification impossible and the test itself may be carried out incorrectly. People v. Castro,(545N.S.Y.2nd 985sup ct.1989) the New York Supreme Court, in the most
critical assessment of DNA analysis performed to that date, developed a so called three prong test for DNA evidence: (1) is there a generally accepted scientific theory arguing that DNA sequence differ between individuals and that difference can be tested, (2) is there a reliable technology that can be performed to detect these DNA differences, (3) that DNA technology applied correctly in this particular case. Owing the application of the three prong test for admissibility of DNA evidence with the Castro evidence, the court concluded that it failed prong three, and the testing was not performed correctly in this case. Under the prong three, a scientist may have no trouble accepting the general proposition that DNA typing can be done reliably, yet still have doubts about the reliability of the test being performed by a particular laboratory. The defence asserted that the testing laboratory failed in several major respects to use the generally accepted scientific techniques and experiments for obtaining reliable results, within a reasonable degree of scientific certainty. Following this case, it was determined that some sort “standard” needed to be in place for DNA testing, so the FBI created the now famous “Technical Working Group on DNA Analysis Methods” to establish universal procedure for testing DNA. In 1990, the National Academy of Sciences of the USA initiated a study by the National Research Council (NRC) of DNA typing methods, and its report, issued in April 1992, recommended, among other things:

• That current DNA typing procedures are fundamentally sound;

• That each laboratory should have a detailed quality assurance programme in place;

• That laboratories have proper accreditation; and

• That a national DNA profile data bank be established, especially of convicted sex offenders and of unidentified samples from crime scenes.

The interpretation of the data sometimes requires expertise in population genetics. Fragments from two people may be the same or similar, especially within a community which has interbred extensively. Such circumstances increase the chances of two profiles being similar, thus rendering the probability that the DNA profile could originate otherwise than with the accused.

IV. Admissibility of DNA evidence in criminal cases: A comparative analysis

Lawyers’ and other professionals’ demand for expert evidence by scientists has increased since the 1980’s, reflecting growing recognition that scientists ‘have a unique contribution to make to judicial proceedings’. As shown in this paper, DNA experts, including biologists, have been accepted as experts on both sides of the Atlantic and in the Antipodes. Scientists, of course, are called as expert witnesses in both civil and criminal cases. As seen below, the range of cases has been broader in some countries than in others. The terrain traversed is dotted with very significant developments in the courts’ treatment of expert testimony by scientists in a broader range of areas. It is noted that in a major judgment in Dasthert v. Merrell Dow Pharmaceuticals, 509 US 579 (1993) the US Supreme Court has reasoned its criteria for deciding whether expert evidence shall be admissible without abandoning the old ‘common knowledge and experience rule’, the courts in England have opened the door to the scientific expert witnesses. Careful examination relevant case law in Australia, Canada and India shows that in a series of recent cases, the courts in these countries have followed a liberal approach to the interpretation of the common knowledge
This paper does not purport to deal with the controversies about adequacy of legal procedures for selecting or qualifying experts, whether expert testimony can be prejudicial, the objectivity of expert witnesses, the ethics of expert testimony by counter experimental results scarcity of generally acceptable scientific methods and theories. The idea is to show the extent to which the courts are inclined to DNA evidence in criminal proceedings.

AMERICA

IN USA, all scientific evidence in criminal trials including evidence derived from DNA identification analysis, must satisfy the test of admissibility in effect in a particular jurisdiction. In general, courts use of two tests. The so-called Frye test, which was pronounced by the U.S. Circuit Court for the District of Columbia in *Frye v. United States,* (293 F. 1013, 1014 (D.C. Cir. 1923) or one of its variations, is used in a majority of jurisdictions. Under the Frye test, a novel scientific technique must have gained general acceptance the relevant scientific community before it is admitted by the court. The second ruler(Rules 401, 402, 403 and 702) follows the basic relevancy standard of the federal rule of evidence and is used in a majority of state jurisdictions. For admissibility under the federal rules, scientific evidence must have some relevance to the issues in the case, and its probative value must outweigh the potential for prejudice. In *Daubert v. Merrell Dow Pharmaceuticals,* (509 US 579, 113 S.C. 2786 (1993) the U.S Supreme Court ruled that the federal rules of evidence have replaced the Frye test in federal court trials. Additionally, the court defined a new federal standard under the rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. Determining reliability entails a preliminary assessment of “whether the reasoning or methodology underlying the (expert) testimony is scientifically valid and... whether (the) reasoning or methodology can be applied properly to the facts in issue”.

The court provided a nonexclusive list of factors that may be used to determine scientific validity: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of errors in using a particular scientific technique and the existence and maintenance of standards controlling the technique operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field. While the Daubert test applies to federal courts, most state courts continue to follow the Frye test. In general, state and federal courts have increasingly accepted DNA evidence as admissible. In general, courts that have used the Daubert standard have been more likely to admit DNA evidence, although many jurisdictions that have relied on Frye have also permitted it. Nearly all cases, in which DNA evidence was ruled inadmissible, have been in jurisdictions that have used Frye. In *People v. Castro* the New York Supreme Court in a 12 week pretrial hearing exhaustively examined numerous issues relating to the admissibility of DNA evidence. Castro was accused of murdering his neighbour and her 2-year old daughter. A blood stain on Castro’s watch was analysed for a match to the victim. The court held: DNA identification theory and practice are generally accepted among the scientific community. DNA forensic identification techniques are generally accepted by the scientific community. Pretrial hearings are required to determine whether the testing laboratory’s methodology was substantially in accord with scientific standards and produced reliable results for jury consideration. The Castro ruling supports the proposition that DNA identification evidence of exclusion is more presumptively admissible than DNA identification evidence of inclusion. In Castro, the court ruled that DNA test could be used to show that blood on Castro’s watch was not, but could not be used.
to show that the blood was that of his victims. In the court also recommended extensive
discovery requirements for proceedings including copies of all laboratory results and reports,
explanations of statistical probability calculations, explanations for any observed defects or
laboratory errors, including observed contaminants, aim of custody of documents. These
recommendations soon were expanded upon by the Minnesota Supreme Court in Schwartz v.
State,( 447 NW. 2d 422 (1989) which noted, “ideally, a defendant should be provided with
the actual A samples in order to reproduce the results. As a practical matter, may not be
possible because forensic samples are often so small that the entire sample is used in testing.
Consequently, access to the data, methodology, and actual results is critical for independent
expert review.” N Schwartz, the Supreme Court of Minnesota refused to admit the A
evidence analyzed by a private forensic laboratory. The court noted the laboratory did not
comply with appropriate standards and controls. In particular, the court was troubled by
failure of the laboratory to reveal its underlying population data and testing methods. Such
secrecy precluded replication of the test. As stated in the National Research Council’s 1996
Report on DNA evidence, the state of the profiling technology and the methods for
estimating frequencies and related statistics have progressed to the point where the
admissibility of properly collected and analyzed DNA data could not be in doubt. At this
time, 46 States admit DNA evidence in criminal proceedings. In 43 States, courts have ruled
on the technology and in 3 States, statutes require admission.

Wisconsin courts have rejected the Frye requirement of general acceptance within the
scientific community as a prerequisite to admissibility. In State v. IValstad, 26 the Wisconsin
Supreme Court confirmed that Wisconsin’s expert witness relevancy standard as promulgated
by the Supreme Court and codified in section 907.02, Stats, determines the admissibility of
expert testimony

“Testimony of Expert—if scientific, technical, or other specialized knowledge will assist the
Trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as
an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Although many states are still wrestling with
the issue of admissibility of DNA evidence, the relevancy test adopted by the Wisconsin
Supreme Court in Walstad permits the admission of scientific evidence, including DNA
evidence regardless of whether the evidence meets the reliability requirements set forth in
Frye and Daubert. As noted by the Wisconsin Supreme Court in Walstad: (192 Wis. 674, 534
N.W. 2d 867 (1995) the fundamental determination of admissibility comes at the time
the witness is “qualified” as an expert. In a state such as Wisconsin, where substantially
unlimited cross-examination is permitted, the underlying theory or principle on which
admissibility is based can be attacked by cross-examination or by other types of
impeachment. Whether a scientific witness whose testimony is relevant is believed is a
question of credibility for the finder of fact, but it clearly is admissible. Again, in State v.
Peters,( a385 S.E. 2d 253 (W.Va. 1989) case specifically of DNA evidence, the Wisconsin
Court of Appeals rejected the argument made by the defendant on appeal that DNA evidence
should not have been admitted because the trial court had failed to make a determination as to
the reliability of the evidence. In making this ruling, the Court of Appeals held: Once the
relevancy of the evidence is established and the witness is qualified as an expert, the
reliability of the evidence is a weight and credibility issue for the fact finder and any
reliability challenges must be made through cross-examination or by other means of
impeachment. Two other important early cases involving DNA testing were: State v. Woodall
and Spencer v. Commonwealth. In Woodall,( 384 S.E. 2d 775 (1989) the West Virginia
Supreme Court was the first state High Court to rule on the admissibility of DNA evidence. The court accepted DNA testing by the defendant, but inconclusive results failed to exculpate Woodall. The court upheld the conviction for rape, kidnapping and robbery of two women. DNA testing determined that Woodall was innocent and he was released from prison. In another case, the Virginia Supreme Court upheld the murder and rape convictions of Spencer, who had been on the basis of DNA testing that matched his DNA with that found in several victims.

In 1996, the National Institute of Justice published a book titled convicted by Juries, Exonerated by Science, which cited the use of DNA technology not only for the conviction of offenders, but also for the exoneration of the wrongly charged or convicted individuals in criminal cases.

ENGLAND

England is widely recognized as having the most effective and efficient approach to the use of DNA technology in the world. DNA technology and DNA data basing have been central to the process of criminal investigation since the establishment of the National DNA Database in 1995, England has become a world leader in discovering innovative ways to use DNA to identify suspects, protect the innocent to convict the guilty. Colin Pitchfork was the first person convicted of murder with the use of DNA. Lynda Mann and Dawn Ashworth, were sexually assaulted killed in 1983 and 1986, respectively. Semen samples were taken from both victims. The prime suspect was a seventeen year old kitchen porter who confessed to killing Dawn Ashworth. Alec Jeffrey was called in and revealed that semen from the two bodies was from the same man that man was not the confessing kitchen porter. Leicestershire police decided to undertake the world’s first DNA mass screening. No profiles matched the profile of the killer. A year later, a woman told police that she had overheard, Ian Kelly, bragging that he had given his sample while he was masquerading as his friend. Cohn Pitchfork, a local Daker had persuaded Kelly to take the test for him. Pitchfork was arrested and his DNA profile found to match with the semen from both murders. Although his case did not actually go to trial due to his confession, he is usually credited with being the first DNA base murder conviction. Collin received a life prison sentence for both the murders in 1988 (2009j EWCA Crim 963). In combined appeals of R. v. Reed and Reed and R. v. Garmson, the Court of Appeal considered the use of LCN DNA analysis as an evidentiary tool which was challenged in these appeals. In two different cases, the appellants appealed against their convictions to the Court of Appeal. The Reed brothers had been convicted of murder and the forensic scientist had used LCN testing on two pieces of plastic fragments found at the murder scene. Similarly, in Garmson’s trial for kidnapping, rape and sexual assault, LCN testing was used in respect of DNA found on four items. Lord Justice Thomas held, in dismissing the appeals, that LCN DNA could be used to obtain profiles capable of reliable interpretation if the quantity of template DNA was above a minimum stochastic threshold of between 100 and 200 picograms. In cases within the range of 100 to 200 picograms, evidence might be necessary as to whether in a particular case a reliable interpretation could be made. Recently, the (English) Law Commission thoroughly examined the admissibility of expert evidence in criminal proceedings in England and Wales. The Law Commission was in no doubt in favour of reform of the law relating to the admissibility of expert evidence. The commission aims to bring a degree of clarity and certainty to the law and legal processes governing the admissibility of expert evidence. In its view, numerous scientists, practitioners and legal academics have come to the same conclusion, calling for a
new basis for screening expert evidence to ensure that only sufficiently reliable evidence will be considered by the jury and the judge. The Law Commission’s basic premise was that expert evidence must satisfy a minimum standard of evidentiary reliability to be admissible. Its proposal consists of the introduction of a new statutory test for determining the question of admissibility, supported by guidelines relating to both scientific-based and experience-based expert evidence. The test would require a judge to take on a gate keeping role. He or she must be satisfied that the evidence is sufficiently reliable to be admitted, namely that it is based on sound principles, technologies, methods and assumptions, that these have been properly applied to the case, and that the conclusions reached are logically sustainable.

AUSTRALIA

Unlike United States and Canadian courts, the courts in Australia had no occasion to articulate, in a comprehensive way, the criteria of expert evidence at common law. In this context, the question was whether there is an area of expertise test in the way the United States, Canada and New Zealand. There have been several prominent cases on the matter to date in Australia. In R. v. Tran, (t (1990) 50A Crim R 233) the Crown sought to lead evidence of DNA profiling to connect the accused with the rape and murder of the victim. Vaginal swabs and a bloodstain were taken from the deceased and so taken from her boyfriend and the accused and sent to laboratory (a UK company) for analysis. McInerney J ruled that DNA typing results provided by Cellmark, were inadmissible, owing to doubts about the existence of certain bands in the profile which Cellmark said matched the accused. There was evidence that the actual offender was Vietnamese and, therefore, it was argued that the court provided with an estimate of the likelihood of a chance match among the Vietnamese people. Sydney Cellmark did not have a Vietnamese but provided estimates for the Caucasian Afro-Caribbean and Indian Pakistani population of the UK. This was considered the most conservative of the databanks possessed by the Cellmark laboratory. Several scientists of “varying backgrounds” called by the defense questioned the reliability of the prosecution’s evidence. Freckelton provides a summary of concerns. They include possible cross-contamination, technical problems with the reading of the gels, and the fact that the reference database did not match the Vietnamese ethnicity of the defendant. The essence of the McInerney J’s reasoning lies in the state of the evidence: Since it was unsatisfactory, it had to be excluded. Even if the evidence had been rejected because the jury could not determine the threshold question, it would have been excluded as more prejudicial than probative. What is significant about Tran is, in Freckelton’s view, “the telling evidence from the defense scientists which persuaded his Honour of the unreliable aspects of the DNA testing in this case. In R. v. Lucas, (1992)55A crim R 361) Hampel J in the Victorian Supreme Court also considered the matter and similarly excluded DNA profiling evidence. The prosecution case rested upon circumstantial evidence consisting of human blood smear on the accused’s father’s garage wall where the Crown alleged the accused had killed the deceased. The Crown sought to admit the results of DNA tests of blood samples claiming they would show the bloodstain to be blood of either the deceased or of a close relative to a high degree of probability. Various experts differed in their estimations of the new techniques and procedures employed and Hampe J drew attention to the difficulty confronting the jury in resolving those different views and queried whether they could resolve them meaningfully and relate them to the reliability of the tests and the significance of the results. The evidence was, therefore, not admissible because it lacked sufficient probative value compared with its possible prejudicial effect.
It can be said that the Australian law is developing within the framework of judicial perception of the function and capacity of jurors. In this regard, R. v. Jarrett (1994) 73 A Crim R 160 of the Supreme Court of South Australia is illuminating. In this case, the accused sought exclusion of DNA analysis and the statistical interpretation of that analysis. It was decided, firstly, that once it is determined that evidence (including expert evidence) is relevant to a fact in issue, and there is no policy or discretion-based reason for its exclusion, it should be admitted even if it is contested and there is credible expert testimony to the contrary. Secondly, it was decided that there is no requirement in Australian law that, where the issue is not admissibility but whether the expert analyst employed recognized and standard techniques or did the work competently, there ought to be a voir dire on those issues. Thirdly, the court determined that once there is relevance and the conditions for the admission of expert are met, it is difficult to see how the evidence may have a prejudicial effect which outweighs its probative value, unless the probative value is slight. Fourthly, on the question of whether the DNA evidence was substantially probative, the court decided that it was, and that any prejudicial effect arose from that probative weight. The evidence (that from a DNA analysis of the blood of various men, only the accused could not be excluded as the donor of the semen) was admissible. The court also observed that the giving of blood for the DNA analysis by the appellant was free and voluntary, and not tainted by any impropriety or unfairness. It was also decided that the computer-generated evidence as to the frequency in the general population of the DNA match was admissible and there was no reason to exclude the evidence in the exercise of discretion. In re Perecerep, (1994) 2 VR 109 the Victorian Court of Criminal Appeal also considered the matter. In an appeal against convictions of armed robbery, the appellant challenged admission of DNA profiling evidence. Prosecution witnesses admitted upon a voir dire that opinions contrary to their own existed in the scientific community, although they were resolute as to the correctness of their own views. Counsel had persuaded the trial judge to exclude the evidence on the basis of it being so imprecise as to lack probative value. Neither of these arguments was accepted by the appeal as a sufficient to warrant exclusion of the evidence. In re vs Melaragni, (1992) 73 CCC (3d) 348 Moldaver J applied a threshold test of reliability to what was described as “a new scientific technique or body of scientific knowledge. Two factors were mentioned whether the evidence was likely to assist the jury in its fact-finding mission or was likely to confuse or mislead them, and whether the jury was likely to be overwhelmed by mystic infallibility” of the evidence or able to keep an open mind and objectively assess the worth of the evidence. Two recent New South cases, R. v. Pantoja (1996) 88 A Crim R 554 and K. v. Milat, (1996) 87 A Crim R 446 have added to Australian case law on DNA evidence. The ruling in Pantoja emphasizes the essential that DNA evidence merely establishes that the suspect and the offender may be the same person, not that they are the same person. In this particular case, two expert witnesses, using a combination of RFLP analysis and blood substance testing, declared a ‘match’ between the offender and the suspect, whereas a third expert, using PCR analysis positively excluded the suspect. The appeal court ruled that whatever evidence of a match is found from other blood testing, a single positive exclusion is sufficient to eliminate a suspect. Accordingly, the conviction was quashed and new trial was ordered. Pantoja provides a nice illustration the caution necessary in interpreting the astronomical odds arising from the DNA evidence. It appears from the above cases that Australian courts have shown some reticence in admitting DNA evidence and in protecting the rights of the accused, particularly in the situation of conflicting expert evidence. This may reflect the inherent resistance of the judiciary to the encroachment of the scientific disciplines as much as concern over civil liberties.
The Canadian courts have generally admitted expert testimony on a broader range of issues instead of focusing narrowly, as has been the approach of courts in England, Australia and New Zealand. While the impact of the Daubert decision on Canadian courts is difficult to predict, it is interesting to note that in R. v. Johnston (1992-69-ccc-395), it was held that the Frye test was not part of the Canadian law and that the criteria for admissibility for novel scientific evidence were relevance and helpfulness to the tribunal of fact, helpfulness to be decided by considering a list of fourteen factors. The factors in Johnston go beyond those stated in Daubert. Freckelton and Selby state that the most important Canadian decision concerning the admissibility of expert evidence is R. v. Mohan in which the Supreme Court determined that the question of expert evidence admissibility is to be decided applying the following four criteria: relevance; necessity in assisting the trier of fact; the absence of any exclusionary rule; and properly qualified expert. The Mohan approach(1994-20scr-9) has been applied by the Supreme Court of Canada in R. v. J-LJ and R. v. DD.(200-1-scc43and 51) Mohan did hold that evidence that did not meet the Frye test could still be admitted if it was shown to be reliable using more varied criteria.

The first known use of DNA evidence in a Canadian case was R. v. Parent,(1989-46-ccc-414) where PCR-based evidence was obtained by Crown through a private laboratory. It excluded the accused and was entered with consent at trial. The first case in Canada in which DNA evidence was entered to implicate an accused was in the sexual assault trial of R. v. mcNally(1989-o.j.no.2630) This was a test case for the RCMP DNA laboratory, as they had not yet opened for routine case work analysis. There, the judge dismissed a defence application to enter into a voir dire to determine the admissibility of the DNA evidence concluding that DNA should not be treated any other expert evidence and that it was for the jury to assess the weight be given to it. The accused pleaded guilty after the DNA heard. In re vs bourguignon,(1991-o.j.no.2670) where the Frye standard was also applied, the DNA evidence was admitted. However, the statistical method of conveying the matching DNA profile was not permitted to be put jury. Instead, the judge permitted only the qualitative statements by the experts (e.g. rare, extremely remote, etc.) to describe the significance of the matching profiles. In R. v. Legere,(401-A.P.R. -321) the New Brunswick court of Appeals held that the science underlying DNA testing was credible and reliable, and that the evidence was admissible provided that the specific tests used were relevant and helpful to the trier. The court also said that it was not necessary for jurors to understand all the scientific terms and tests involved in order to evaluate the testimony of DNA expert. In re v. Rogers,(2006-1-scr-554) the Canadian Supreme Court upheld a Criminal provision and the 1998 DNA Identification Act, allowing for retroactive DNA sampling of prisoners without notice. The court found these offenders’ identity have become a matter of state interest and have lost any reasonable expectation of privacy in their identifying information derived from DNA sampling in the same way as they have my expectation of privacy in their fingerprints, photographs or any identifying measure.

The Constitution of India, by article 51A(h) and (j), commands that it shall be the fundamental duty of every citizen of India “to develop the scientific temper, humanism and the spirit of enquiry and reform” and strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour.
achievements”. Though there is no specific DNA legislation enacted in India, sections 53 and 54 of the Code of Criminal Procedure, 1973 (Cr PC) provide for DNA tests implied and they are extensively used in determining complex criminal cases. Section 53 deals with examination of the accused by medical practitioner at the request of police officer there are reasonable grounds to believe that an examination of his person will afford evidence as to the commission of the offence. Section 54 of Cr.P.C. further provides for the examination of the arrested person by the registered medical practitioner at the request of the arrested person. By the Amendment Act of 2005, the Cr.P.C. was amended inter alia to add new section 53-A which mandates the examination of a person accused of rape by a medical practitioner. By this amendment, new explanation includes within its ambit examination of blood, blood stains. Semen, sputum, swabs, sweat, hair samples and finger nails by the use of modern techniques in the case of sexual offences including DNA profiling and such other tests which is necessary in a particular case. Though section 53-A refers only to examination of the accused by medical practitioner at the request of the police officer, the court has wider power for the purpose of doing justice in criminal cases, by issuing direction to the police officer to collect blood samples from the accused and conduct DNA test for the purpose of further investigation under sections 173(8) and 293(4)(e) of the Cr PC. Apart from these provisions, section 45 of the Indian Evidence Act, 1872 is more important so far as the admissibility of DNA evidence is concerned. Section 45 deals with the opinion of the expert. It states: “When the Court has to form an opinion upon a point of foreign law, or science or art, or as to identity of handwriting (or finger impressions), the opinion upon that point of persons specially skilled in such foreign law, science or art (or in question as to the identity of handwriting or finger impressions) are relevant facts.” Section 293 of the Cr PC deals with reports of certain government scientific experts. Section 293(2) provides that the court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report. In a number of cases, the courts have opined that medical evidence is only an evidence of opinion and hardly decisive. It is not substantive evidence. But they say that the opinion of the doctor who has conducted the post mortem examination and of the forensic science laboratory is reliable. It is further stated that unless there is something inherently defective in the medical report, the court cannot substitute its own opinion for that of the doctor. Several convictions have occurred in India where the scientific evidence (DNA) has been accepted under section 45 of the Indian Evidence Act. DNA testing has become an established part of criminal and civil justice procedure, and the admissibility of test results in court has become routine. India has adopted adversarial system of justice administration and ordinarily medical evidence is admitted only when the expert gives an oral evidence the courts of law except under special circumstances. The supreme court in Madan Gopal Kakkad v. Naval Dubej(1992-30sec-204) held: A medical witness called in as an expert and the evidence given by the medical officer is really an advisory character based on the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspects of the case by explaining the terms of science so that the court although not an expert, may form its own judgment on those materials after giving due regard to the expert opinion because once the expert’s opinion is accepted it the opinion of the medical officer but that of the court. Patangi Balarama Venkata Ganesh v. State of A.P.,(2003 cr.l.j.4508) the Andhra high Court held that the opinion of DNA expert is admissible in evidence as it is a perfect science. In this case, the DNA expert had as under: “If the DNA fingerprint of a person matches with a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population.” It means that DNA test
gives the perfect identity. It is a very advanced science the court observed. In Goutam Kundu v. State of West Bengal,(1993-3-scc-418) the Supreme Court expressed the most reluctant attitude in the application of DNA evidence in resolving paternity dispute arising out of maintenance proceeding. In this case, father disputed the paternity and demanded blood grouping test to determine parentage for the purpose of deciding whether a child is entitled to get maintenance under section 125 of the Cr PC from him. In this context, the Supreme Court held that: where the purpose of the application was nothing more than to avoid payment of maintenance, without making out any ground whatever to have recourse to the test, the application for blood test couldn’t be accepted. It was also held that no person could be compelled to give sample of blood for analysis against his/ her will and no adverse inference can be drawn against him/her for such refusal.

In Thogorani Alias K. Damgyanti v. State of Orissa,(2004 cr.l.j.4003) the Orissa High Court noted that the only restriction for issuing a direction to collect the blood sample of the accused for conducting DNA test would be that before passing such a direction, the court should balance the public interest vis-à-vis the rights under articles 20(3) and 21 of the Constitution of India in obtaining evidence tending to confirm or disprove that the accused committed the offence concerned. In balancing this interest consideration of the following matters would be relevant:

(a) the extent to which the accused may have participated in the commission of the crime;
(b) the gravity of the offence and the circumstances in which it is committed;
(c) age, physical and mental health of the accused to the extent they are known;
(d) whether there is less intrusive and practical way of collecting evidence tending to confirm or disprove the involvement of the accused in the crime; (e) the reason, if any, for the accused for refusing consent.

The Bombay High Court in Sadashiv Mallikayun Kheradkar v. Smt. Nandini Sadashiv Kheradkar(1995 cr.l.j.4090) held that the court has power to direct blood examination but it should not be done as a matter of course or to have a roving inquiry. The Bombay High Court even felt that there should be a suitable amendment by the legislature and after noting that nobody can be compelled to give blood sample, it was held that the court can give a direction but cannot compel giving blood sample. In Raghuvir dayal vs State (2007 cr.l.j.829) the Bombay High Court noted that “DNA testing is clinching piece of evidence - DNA testing can make a virtually positive identification when two samples match. It exonerates innocent and help to convict the guilty.” In geeta shah v. NCT of Delhi,(1999-1-jcc-829) a Division Bench of Delhi High ordered that a DNA test be conducted on a foetus of a rape victim. The court distinguished this case from Goutam Kundu, wherein it was held that wife cannot be forced to give blood sample and no inference can be drawn against her for this refusal. In Ms. X v. Ms. Z(96-2002-DLT-354) single judge of the Delhi High Court had allowed a similar application directing that at the cost of husband, the pathology department of all Institute of Medical Sciences should conduct the DNA test. The DNA test was to be conducted of a foetus. A fortiori where the the child is in issue, a similar test should be ordered. Although the scientific evidence such as the results of DNA tests are widely accepted in criminal proceedings, such tests have little relevance in paternity disputes. In Bhabani Prasad Jena v. Convener Secretay, Orissa State for women,(A.I.R.2010 S.C.2851) the Supreme Court has, however, said that the court should never as a rule grant applications directing one party or the other to undergo DNA test. In this case, the Supreme Court expressed the position as follows:
“in matter where paternity of a child is in issue before the court, use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under section 112 of the Evidence Act; pros and cons of such order and the test of ‘eminent need’ whether it is not possible for the court to reach the truth without use of such test.

However, more recently, in Rohit Shekhar v. Shri Narayan Dutt Tiwari,(2011-DRI-562) the Delhi High Court (in a paternity dispute case) examined the concept of DNA testing and the law pertaining to the same. S. Ravindra Bhat J culled out the prevalent laws on the subject and examined them in the light of international decisions, international human rights instruments and national legislations and finally directed the defendant to undergo DNA test to ascertain the paternity of the claimant. In this case, the court heavily relied on international human rights instruments and expressed the view that the right of the child to know of her (or his) biological antecedents is now recognized internationally as being of crucial importance. Major international instruments such as the UN Declaration on Human Rights have recognized the rights of a child irrespective of her (or his) legitimacy and article 7 of the Convention on the Rights of the Child (CRC), 1989 has expressly specified a right to knowledge of parenthood.

While dealing with the aspect as to whether subjecting a person to a medical test is violative of article 21 of the Constitution of India, the Supreme Court in Sharda v. Dharampal,(A.I.R.2003-3450) stated that the right to privacy in terms of article 21 of the Constitution is not an absolute right. Passing of testing order by the court would not be in violation of the right to personal liberty under article 21 of the Constitution. However, in a matter where paternity of a child is in issue, the use of DNA test is to be resorted to only if such test is eminently needed. In Selvi v. State of Karnataka,(2010A.I.R.1974) the Supreme Court held that the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context. However, if the DNA profiling technique is further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain. Hence the use of material samples such as DNA for the purpose of identification does not amount to a testimonial act for of article 20(3). Some author feel that while the underlying principles of the technique cannot be questioned, legal scrutiny can only revolve around questions related to the collection, forwarding and of samples. However, other authors feel that there is as yet no international (and national) guideline and that each laboratory has its control and standardization method. But the fact remains that unlikely to understand in any detail the principles of the process. The expert’s opinion is taken by the courts on trust and faith may still be reluctant to admit
some type of scientific evidence as they may feel that it does not follow the Frye test. Of late, it is generally held that unless there is some special circumstances all relevant evidence is admissible.

Further, the so called father and son tussle was also decided in April 2012 when in the case of Rohit Shekhar v. Narayan Dutt Tiwari & Ors. 2012(2)RCR(Criminal)889 the Delhi HC held:

‘A direction for DNA testing can be issued only after the test of eminent need is satisfied. The order dated 23rd December, 2010 directed DNA testing of the respondent no. 1 only after holding the said test to be satisfied in the facts of the present case. The impugned judgment though also holding that the test of eminent need is satisfied has declined to enforce the order. It is thus not as if the order for DNA testing is made or has been made in the present case on the asking or in a routine manner for the consequence only of adverse inference to flow from non-compliance thereof. We find inherent contradiction in the Court on the one hand holding eminent need for such a test and in the same breath allowing the need to remain unsatiated. We also find the drawing of adverse inference from refusal to comply with the direction for medical examination to be not sufficient to satiate the need found by the Court. A legal fiction under Section 114 of the Evidence Act, as adverse inference is, is not reality but which the said provision requires the Court to accept as reality. The Court is not bound to or obliged to draw such adverse inferences (see Emperor v. Sibnath Banerjee MANU/FE/0010/1943 : AIR 1943 FC 75, Dhanvantrai Balwantrai Desai v. State of Maharashtra MANU/SC/0150/1962 : AIR 1964 SC 575 and Fakir Mohd. (Dead) by LRs v. Sita Ram AIR 2002 SC 433). A presumption is not in itself evidence but only makes a prima facie case for parties in whose favour it exists (see Sodhi Transport Co. v. State of U.P. MANU/SC/0409/1986 : (1986) 2 SCC 486). As far back as in Damisetti Ramchendrudu v. Damisetti Janakiramanna AIR 1920 PC 84 it was held that presumption cannot displace adequate evidence. The Supreme Court also in Mohanlal Shamji Soni v. Union of India MANU/SC/0318/1991 : 1991 Supp (1) SCC 271 held that it is the rule of law in evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue and the Court ought to take an active role in the proceedings in finding the truth and administering justice. Recently in Maria Margarida Sequera Fernandes v. Erasmo Jack de Sequeria (Dead) MANU/SC/0225/2012 : 2012 (3) SCALE 550 it was reiterated that the truth is the guiding star and the quest in the judicial process and the voyage of trial. The trend world over of full disclosure by the parties and deployment of powers to ensure that the scope of factual controversy is minimized was noticed. We are therefore of the opinion that adverse inference from non-compliance cannot be a substitute to the enforceability of a direction for DNA testing. The valuable right of the appellant under the said direction, to prove his paternity through such DNA testing cannot be taken away by asking the appellant to be satisfied with the comparatively weak "adverse inference".’

V. DNA TEST AND HUMAN RIGHTS

The use of DNA (and other scientific evidence) has raised number issues about increased police powers and the unquestioning adoption conservative crime control agenda in
the administration of criminal system. These concerns are clearly legitimate, given the current on the right to silence as a protective clock for “the guilty”. The lack of critical debate over the use of scientific technology in this erosion of civil liberties points to a reconstruction of the notion of “justice” which corresponds to the idea of a value-free scientific method. International human rights law provides that everyone has a right to a fair and public hearing by the independent and impartial tribunal. It is essential fair trial that the suspects have the opportunity to challenge the reliability of the scientific testing. In order to use DNA profiling, it is necessary to obtain certain of body material. The sample may be obtained by chance. In a case where the sample is obtained without coercion, the sample is lawfully obtained both in India and many other countries. The crucial legal question whether it is permissible to use body samples for DNA testing have been obtained by chance. This question has not been fully resolved. Two lines of reasoning are possible. The first is that the DNA test such forms no separate interference with the right to the integrity of body, so if the body material has been obtained lawfully, there is also right to perform a DNA test on such material. This line is based on the view that there is no legal consideration specific to DNA testing. The second line of reasoning is based on the view that all persons have the right to decide what happens to their own body tissue. This method of reasoning is especially strong in health law. It is based on the view that there is a need for greater protection of body tissue, as a consequence of the evolution of science. According to this view, DNA testing as such is an interference with the right to the integrity of the body, resulting from prior interference, caused by the taking of body materials against the suspect’s will. According to the Dutch Supreme Court, the taking of body tissue from the suspect for the purpose of DNA testing is not permitted under the existing law (1990N.J.751). In this context; attention may be drawn to the European Convention on Human Rights (ECHR). The use of force to obtain DNA samples must be considered in the light of articles 3 and 8 of the ECHR. Of these, article 3 covers extreme interferences with the physical or psychological integrity of the person. In practice, contravention of article 3 is unlikely partly because the authorities would stop before that point is reached but also because most people would submit.75 Breach of article 8 is more likely. Clearly, the non-consensual taking of a blood sample is an interference with private life contrary to article 8(1).76 It would only be permitted if is ‘in accordance with the law’ and ‘necessary in the democratic society for the prevention of crime and for the protection of other rights. According to Kruslin vs France (1990-12EHRR 547) to be ‘in accordance with the law the power must be clearly set out in law; its consequences accessible to the person and it must be compatible with the rule of law. As indicated in kruslin and Malone (1985-7-EHRR-14) the last requirement is the most useful control because to be compatible with the rule of law, there must be some practical and meaningful control incorporated into the domestic laws which will protect against arbitrary interferences or misuse of discretionary powers. The checks required in any law depend on the interference with human rights. In re application of S. v. Chief Constable of South Yorkshire,(2003-1-ALL.E.R.-148) the issues before the Court of Appeal (in the U.K.) arose in respect of retention of fingerprints and DNA samples taken from persons who had been suspected of having committed offences in the past but were not convicted for them. It was argued that this policy violated articles 8 and 14 of the ECHR. Article 8 deals with the ‘right to respect for private and family life’ while article 14 lays down the scope prohibition against discrimination’. Lord Woolf CJ who delivered the judgment of the court, had this to say: So far as the prevention and detection of crime is concerned, it is the larger the databank of fingerprints and DNA samples available to the police, the greater the value of the databank will be in preventing crime and detecting those responsible for crime. There can be no doubt that if every member of the public was required to provide fingerprints and a DNA sample
this would a dramatic contribution to the prevention and detection of crime. To take but one example, the great majority of rapists are not known already to their victim would be able to be identified.

It is a well established rule of English law that any evidence which relevant is admissible even if it has been obtained illegally provided purpose is to prevent serious crimes. This approach was reflected in decision of the House of Lords in *Attorney General’s Reference (TVo. 3 1999-(2001) 1 All ER 577 at 584*) where Lord Steyn said: It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public. The Council of Europe Recommendation does not forbid the use of coercion in relation to the taking of DNA samples for analysis, but states that “....the introduction and use of these techniques should take full account of and not contravene such fundamental principle as the inherent dignity of the individual and respect for the human body, the rights of the defense and the principle of proportionality in the carrying out of criminal and civil justice.”

The most crucial question in forensic use of DNA technology is that of forced testing. In U.K., a distinction is made between intimate and other body samples. A non-intimate sample can, under appropriate circumstances, be taken without consent. An accused cannot be forced to donate an intimate body sample such as a sample of body fluid. In England and Wales, if the suspect, without good cause, refuses to comply with a request in proper form to give an intimate body sample; the court can draw such inferences as it sees proper from the refusal. This means that refusal to supply a sample is capable of amounting to evidence of guilt. Failure to supply samples when an appropriate request is made may also be used to corroborate other evidence. The safeguards against abuse are: that the suspect may only be asked to provide an intimate body sample if there are reasonable grounds for suspecting that he has a serious offence. In India, the DNA Profiling Bill, pending in Parliament, is expected to be considered and sometime in future. If this were to happen, all convicted criminals in the country will have to undergo mandatory DNA tests.

**VI. Retention, use and destruction of DNA database**

Improvement in computer technology, it has become increasingly easy to store. Search and analyses large amounts of data, and this in itself has an increase in the amount of DNA information that is gathered. The Canadian government has developed the world’s most and sophisticated DNA database, capable of automatically identifying persons through analysis of minute amounts of blood, semen, or skin cells. Britain has the world’s biggest DNA database with samples more than 4.5 million people. Some commentators believe that the law that has allowed the police to hold on to DNA from people, even if charges against them are dropped or if they are found to be innocent should be changed. They fear being on a criminal database breaches their human rights. One major area to be considered is the question whether DNA profile of either convicted or suspected persons should be stored on a databank possible use in future cases. In certain international crimes, DNA samples may be used as part of the evidence. In these cases, DNA will be of international use and importance. It may be that the information contained in DNA databanks will be shared between the different countries for solving crime problems. The greatest advantage of DNA databank is
its potential to recover abducted children, assisting adults with amnesia, providing security to Alzheimer patients. *Kaemmerling v. Lappin and Mukasej* (553.F.3D.669) the US Court of Appeals for: District of Columbia held that the collection of DNA from a convicted for database purposes does not violate the Religious Freedom restoration Act, 1993 or the First, Fourth and Ninth Amendments of the constitution. In *United States v. Pool* (no.crs-09-0015) the District Court of California held the constitutionality of DNA sample collection from all those rested upon possible cause for the commission of a federal felony finding. Apart from these beneficial aspects, it is said that the storage and of such data implies an interference with the right to privacy guarantee by international human rights instruments and national laws. In England if a suspect is cleared of an offence or if no prosecution is bro section 64 of the PACE requires the destruction of all intimate and intimate body samples collected pursuant to sections 62 and 63. But section does not require the destruction of the DNA profile once it been obtained nor is there anything which would prevent its use for purpose not directly related to the particular crime under investigation. The individual is convicted, there appears to be no protection at all. Better protection is afforded to fingerprint evidence under the amendment mw to section 64 of PACE in 1988. In *S. and Maiper v. United Kingdom* (2009-48-EHHR-50) the European Court of Human Rights rejected the practice in UK retaining without time limit the DNA samples, DNA profiles an fingerprints of suspects who have been cleared or never convicted. The greatest danger of a forensic DNA databank is its potential engulf a significant part of the population to be a genetic population Imagine a state policy where the government had samples of tissue an fluid from the entire community on file and a computerized databank of each individual’s DNA profile. In that situation, not only law enforcement officials, but insurance companies, employers, schools, adoption agencies and many other organizations could gain access to those files on a “needto-know” basis or on a showing that access is “in the public interest”. Imagine then that an individual could be turned down for jobs, insurance, adoption, health care and other social services and benefits on the basis of information contained in his/her DNA profile, such as genetic disease, heritage, or someone else’s idea of a genetic “flaw”. One of the major concerns people have voiced about the DNA database is its potential conflict with presumption of innocence. In the criminal and civil justice system, the use of a DNA testing for matters of identification is becoming more widespread. National DNA databases are becoming increasingly important; the idea being that storing criminal’s DNA will provide faster and better services in solving future crimes. With many criminals re-offending a database would allow police to immediately identify them in new crimes.

VII. Conclusion

Although DNA testing has accomplished a great deal in opening up forensic evidence, its full potential to identify perpetrators and exonerate people falsely convicted has yet to be realized. For this to be done further advances are required in testing technology and in systems to collect and process the DNA evidence. The development of forensic DNA testing is expanded the types of useful biological evidence. In addition to semen and blood, such substances as saliva, teeth and bones can be the source of DNA. These sources are expanding still further. Lawyers are wary of DNA profiling for a number of reasons, some are good and some are not DNA profiling is the most powerful break yet to appear English common law tradition of the right against self- incrimination. Lawyers do not like ‘machine’ evidence, where a scientific effect dominates a verdict; they believe that DNA profiling technology in effect dominate a verdict. They believe that DNA profiling is not fullproof and flawless investigative and probative tool in the hand of skilled operator, it provides incisive results. In
the hands of a fool, it provide rubbish. Its major strength is that the rubbish is not produce a false positive result from a sample (a false conviction of an innocent party). However, the process is reliable as the sample it receives, so if there is a careless or fraudulent collection of sample from the crime scene or suspect, the result would be wrong, independent of the accuracy of the science. If the sample is degraded, the odds ratio will have less probative value. The process involves a very large number of small steps, each of which has to done correctly. The major source of error is in mixing up transfers of material one step to the next. In addition, there are problems over quality assurances interpretation of the test, independent scrutiny, and right of the defence to gain access to the evidence. All these difficulties should at least generate accepted methods and standards of testing and quality controls. In England and Wales, the Royal Commission on Criminal and civil justice considered these issues and suggested a number of measures to insure that such evidence is carefully obtained, tested and presented and that the rights of defence are preserved. Despite many challenges, the technique is unique in the way that it is power of DNA profiling to exclude the innocent that is its greatest value to society. It also shows a quantum jump in its ability to convict guilty. Justice demands a full understanding of the technology by courts and the general public. The technique is also valuable in the sense that it has become commercially valuable property as current patent challenge testifies. A recent survey of forensic experts revealed widespread frustration with the lack of scientific knowledge by lawyers. The lawyer and judges be briefed before trial about complex scientific information that may assist them in understanding the DNA profile and its evidentiary value in the administration of criminal and civil justice.
Mamorable Events- 2012-13 at JTRI, UP

Hon’ble Mr. Justice Ravindra Singh, Judge, Allahabad High Court, Sri A. N. Mittal, Director, JTRI (Presently Judge, Allahabad High Court), Sri A.K. Tripathi, District Judge, Varanasi & Sri V.K. Singh, I.G., Varanasi Range in the Inaugural session of Regional Conference at Varanasi on “Standing Together for Strengthening the Administration of Justice”

Glory of Dias in Welcome Function of Hon’ble Mr. Justice Shiva Kirti Singh, Chief Justice, Allahabad High Court organized by UP Judicial Service Association at JTRI, UP
Hon’ble Mr. Justice Shiva Kirti Singh, Chief Justice of Uttar Pradesh, Hon’ble Mr. Justice Uma Nath Singh, Senior Judge, Allahabad High Court Lucknow Bench, Hon’ble Dr. Justice Satish Chandra, Hon’ble Mr. Justice V.K. Dixit, Hon’ble Mr. Justice V.K. Mathur & Hon’ble Mr. Justice V.C. Gupta in UP Judicial Service Association function at JTRI, UP

Hon’ble Mr. Justice Shiva Kirti Singh, Chief Justice of Uttar Pradesh, Hon’ble Mr. Justice Uma Nath Singh, Senior Judge, Allahabad High Court Lucknow Bench with the office bearers of UP Judicial Service Association
Justice Education and Role of State Judicial Academy*: Key Issues and challenges in 21st Century

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Dr. Shashi Srivastava***

Concept
Judicial decision making requires continuing legal study and judicial education. Here, I am deliberately omitting to use the expression ‘judicial training’ for judicial education. The reason is that training prepares an individual to acquire a skill that will result in a specific kind of behaviour, whereas education is a wider term which provides opportunities to live and perform better in every dimension of life. Thus, training narrows whereas education broadens an individual’s range of responses.1

India is a country where majority of the people are socially and economically backward. When the country became independent, the system of administration inherited by us was suppressive. Needless to say justice administration system was also not different. The Constitution of India was enacted and enforced in 1950. But most of the laws we followed were of pre independent origin. Those statutes were not enacted with the object of bringing about social justice. Instead the objective was largely how the British regime could rule and continue to rule the country. The Constitution of India is based on the principles of justice, freedom, equality and fraternity. For the governance of the country in tune to the said basic values, the state should adhere to Directive Principles contained in Para IV of the Constitution. Even after a lapse of 60 years it is not possible to say that various laws in force in India help to achieve the social objectives of the constitutional mandate.

The courts in India are supposed to protect the rights of the people. While deciding cases in accordance with the provisions of law, the subordinate judiciary is expected to translate into action the concept of socio economic justice within the framework of the Constitution. Unless the judicial administration is efficient and capable to translate the Constitutional ideals into practice this social object cannot be achieved. Making various laws socially vibrant and capable for ensuring socio economic justice to all is the responsibility of the legislature, translating the same into actual practice is the duty of the justice administration system.

The background
The reform of judicial administration has been subject of more than one report of Law Commission of India. In the 14 report it was said,

“The problem of efficient judicial administration, whether at the level of the superior courts or the subordinate courts, is largely the problem of finding capable and competent judges and judicial officers. Delays in the disposal of cases and the accumulation of arrears are in a great measure due to the inability of the judicial officers to arrange their work methodically and to appreciate and apply the provisions of the Procedural Codes... However well framed the substantive law and carefully designed the procedural law may be

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the proper application and working of these laws lies largely in the hands of the officers presiding over the courts. Even if these laws were perfect, we would need adequately trained and capable judicial officers to apply and administer them. Without such personnel, administration of justice can never be satisfactory.”

It further said, “Not only has the volume and variety of the work increased but the place at which a munsif has to perform his duties has quickened. Unless a young officer is given the proper training, he is likely to acquire by reason of his inexperience, un-businesslike habits which he may find it difficult to shed later on and which may prevent him from becoming an efficient judge. A certain amount of training in the administrative work of a court is also essential to a fresh entrant into the service from the Bar, if he is not to be at the mercy of his office clerks”.

Similar observations have been made in the 54th Report and 117th Report and the emphasis was on clearance of backlog and need of training to judges to enable them to discharge their duties effectively, convectively and justly.

**Ideals and Goals of Judicial Education and Training**

The goal of the Judicial Education in State may be enumerated as follows-

1) To develop among the judicial officers a common vision regarding role, goal, method and performance including timeliness of the judicial system.
2) Judicial education must help the courts to translate Constitutional values into practice
3) Equipping the judges to deal with multi cultural society while maintaining the social standards
5) Necessity to acquire knowledge in the new areas of science such as DNA Finger printing, Genetic Engineering, surrogate parenting, Cyber Forensics, Narco Analysis. Etc.
6) Equipment of judges to have a comparative thinking with reference to the developments elsewhere in the context of the globalize society.
7) Ensuring of functioning of the court up to the expectation of the society with the help of data studies and researches.

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1 The 54th report the Law Commission said “Even at the cost of repetition, we wish to emphasize that the success of any system, and particularly the judicial system depends on the men who work the system... Successful completion of the training should be a condition precedent to confirmation of appointment in the judiciary”. “The subjects to be included should be such as to deal with the relationship of law to other social sciences, including, in particular, economics and sociology. The emphasis should not be on technical law or procedure, but on law as a part of an inter-disciplinary study and on the application of the law to the facts of a particular case... A subject of importance is the effect of social change on legal institutions.”
2 In the 117 report the Law Commission observed that updating of the knowledge and skills can hardly be left to the voluntary efforts of individual judges, that the training can significantly upgrade capability of everyone called upon to perform a duty and that it is all the more so in the case of judicial officers because sociology of law is acquiring new and added significance in the development of the society
Need of Judicial Education

The function of judging is sovereign, unique and independent. The Judiciary has been given independent status, so that it can work without any fear or pressure from outside. The work of a judge is unique because it has to give decisions on other’s dispute. A thinker, jurist, sociologist or academician has not to give any finding or judgment and therefore they are free to excel their thoughts to any extent. But a judge has to decide and give a judgment on the basis of objective facts and evidence. Judicial Education is meant to educate judges to undertake their unique role & responsibility. To transform lawyers into judges and from judges to good judges and great judges who will have vision, compassion & responsiveness to the felt needs of the society.

What is Education?

Education is a process of creating thoughts and strategic ideas to meet organizational objectives and to open up the minds and break the mental barriers. Mere listening can not create thoughts and ideas. Hence education involves thinking process and active participation.

What is Judicial Education?

Judicial education is a process to evolve solutions to problems facing administration of justice for consideration of and implementation by Judges. It involves updation of legal knowledge and development of new technique and judicial skill. It broadens the vision of the judicial officers and enables them to adjudicate correctly, expeditiously and justly. It sensitizes the judges towards the cause of justice to the best of those who need a sympathetic support from the system. Judicial Education makes the judges to learn and identify their role in the society. It obligates them to enforce and apply protective laws in favour of women, child, old age persons, down trodden and poor for the welfare of whom such laws have been enacted.

Difference between Legal Education & Judicial Education

The process of judging is the main function of judiciary, which requires judicial reasoning and logic which is not taught in law colleges. The main concern of Judicial Education is “dispute settlement for achieving justice.” The study of judging is a distinct, specialized discipline. It is mainly concerned with law, but it also has several other dimensions. It is not confined to law alone. We don’t have judicial colleges or universities. We create only lawyers. Hence to transform law graduates and lawyers into a good sensible and sensitive judge is the main thrust of judicial education.

The Challenges

In India the multitude of society follows various cultures. Majority is either downtrodden or marginalized and legal education is to the minimum. To a great extent the courts in India are able to deliver justice to the persons who approach the courts. The real problem is how to provide justice to those who are aggrieved and needing justice, but are unable to approach the court. While delivery of justice must be with maximum speed, no one shall be deprived of justice for want of economic incapability as well. The position of judicial system will become more vulnerable unless it is sufficiently equipped, and is able to deliver timely and quality justice especially in the light of globalization and almost unchecked market economy. The challenges that pose to the judicial education in India are to be understood in the above context. They are

1) to have a continuing judicial education which helps to dispel the traditional system of justice delivery system and to help to evolve a system that can live up to the public expectation and translating Constitutional and social values into actual practice.
2) to ensure a judicial administration system with understanding of the circumstances of the common people who come to the court and to avoid a hostile and intimidating atmosphere in courts for them.

3) to have sufficient exposure for the members of judiciary so as to acquire comparative and analytical thinking with reference to the ongoing developments elsewhere in the world.

4) to have sufficient and effective training in the use of Information Technology not only to the judges but also to the members of staff in shortest possible span of time.

5) to provide updated knowledge base keeping in view the new enactment.

6) to equip the judges to use alternative dispute Redressal (ADR) and plea bargaining methods effectively and suitably.

7) to have constant monitoring and study based on field research with a view to ensure effectiveness of the judicial system on the point of view of ordinary citizens of the country.

Judicial function itself is a challenge. Judging is a delicate task demanding knowledge and skills of wide range and variety. At the same time the facilities and support services available to a judge are limited making his task more complex, difficult and challenging. The credibility and legitimacy of judicial decisions depend not only on their merits and soundness in law, but also on public perception of impartiality and objectivity of the procedure adopted by the judges. Legal education alone is not sufficient to equip a person to discharge this sovereign and delicate function of judging. Judges are selected from fresh law graduates and lawyers. The quality of legal education is not up to the mark to enable them to act as judges. Selection process is not full proof so as to guarantee entry of competent persons in the service. Judicial function is no more a traditional job. The role of judge is changing. The perception of justice itself is changing. Judging is becoming more complex in view of the changing society. There is lack of sufficient inter-disciplinary approach and analysis. Ideas of human rights and democratic accountability are putting new parameters to judicial function. Privileges and immunities of judges are being re-examined. There is persistent demand for transparency and accountability and influence of media and NGOs is increasing. The judicial functioning is under close public scrutiny requiring the judges to be more sensitive towards the cause of justice.

While all the issues and challenges that encounter the judicial education and adverted to above are common, the U.P. State scenario requires a little different consideration. The literacy level is less in the State and the people may be exploited because of their ignorance by some clever persons. The number of courts, infrastructure, frequent training and judicial education to the judges in the Institute, implementation of e-courts and other like projects are far below the requirements. It affects the system of justice dispensation both in quality and quantity.

**About State Judicial Academy**

The Institute became functional in April 1987. The founders of the Institute had a vision to develop it as a premier institution for judicial training and research so as to achieve excellence and highest standards in field of justice education with special emphasis on moral and ethical values. Broadly, *the activities of the Institute are dedicated to the cause of justice* and besides the induction and refresher training of judicial officers; the Institute has to improve knowledge and skill of judicial officers to enable them to perform their duties more effectively, correctly and justly. It has to conduct study, analysis and research in the field of law and legal education pertaining to the practical problems of district judiciary to make the legal system more effective and to find out the ways and means for speedy disposal of cases.
Very like the National Judicial Academy, the Institute attempts to develop a common vision amongst the judicial officers on the role, goal, method and performance including timeliness of the judicial system.

Here, it is necessary to understand the concept of justice in the context of district judiciary. The popular myth and the wrong notion has to be done away that justice means disposal of cases according to law. Law is no longer a mere command of sovereign and not limited to maintenance of order and peace in the society. Law is a social engineer, the purpose of which is to bring about socio-economic change in the country. Justice is a constitutional goal and the object is protection of life, liberty, dignity and freedom of the individual and elimination of disparity, inequality and injustice from the society. The common vision for judicial approach should be derived from the constitutional goal to secure and promote justice, which finds further support from S.P. Gupta case\(^1\) and 117\(^{th}\) Report of the Law Commission of India on Judicial Education\(^2\). Justice, therefore, may be understood in this context as human conduct consistent with constitutional values. Rights and duties are established under law to uphold constitutional values and the courts have to secure justice by protecting rights and enforcing duties of individuals.

**To discharge judicial function judges require-**
- Expert knowledge of all the aspects of Constitution, substantive & procedural laws.
- Skill of reasoning, logic & analysis on thought basis.
- Expertise for enhancing efficient & fair conduct of court procedures & court management
- Highest standards of independence, fairness, justice, ethics and integrity.
- Experience to make courts more friendly and accessible, especially to the weaker and vulnerable sections of the society.

Thus justice education is required for creating new knowledge and practical ideas, to evolve best practices out of interactive process of sharing of experiences and participation amongst judges themselves and where needed, between judges and experts in various other fields.

**Issues & Challenges before Judiciary**

There are three main issues and challenges facing the Judiciary at present and they are-
1. Reducing delay and ensuring speedy disposal of cases
2. Clearing backlog and arrears and (Docket Explosion)
3. Docket Exclusion
4. Enhancing quality and responsiveness of justice.
5. Ensuring availability of adequate capacity and infrastructure.

**Aims of Judicial Education**

1- To equip judges with an outlook oriented towards justice.
2- To strengthen judicial skills and enhance knowledge, techniques and tools based on modern technology and management method to better manage court processes so as to control and reduce arrears and delays even within existing institutional policy and financial constraints.
3- To teach them innovating ways to deliver responsive and effective justice within existing framework of law.

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\(^1\) AIR1982SC149
\(^2\) Supra Note 3
4- To endow them with vision as to what is expected of the system they serve.
5- To enforce their personality by helping to foster character, commitment, competence and compassion.
6- To deepen their knowledge and expertise on substantive and procedural law.
7- To expose them systematically to new and emerging areas of the law.
8- To provide new insight into the larger, social and policy context. Exploring & exposing barriers to justice delivery system and exterminating false barriers.
9- Sharing of best practices evolved through working experience. Expanding horizons of timely justice in accordance with law.

Training Methods
- Field visits
- Research analysis
- Learning by doing
- Use of case studies
- Role playing
- Demonstration
- Group Discussion
- Simulation
- Mock trial
- Moot Court

Judicial Education for other Stakeholders
Justice Delivery system is teamwork. Unless all the team members are educated, mere judicial education of judges will not serve the purpose. Judicial Education should not remain confined to judges alone. It should be imparted to other stakeholders namely, police, public prosecutors, members of bars, NGOs working in their specialized fields etc.

Action Programme
A- For reduction of delay and arrears:
   1. Use of modern management systems for court and case management
   2. Strengthening core judicial knowledge and skill.
   3. Use of information & communication technology.
   4. Promotion of ADR methods.

B- For building up capacity of judiciary to respond to priority areas of justice demand:
   1. Broadening Judges’ vision and perspectives.
   2. Sensitizing them to the need for effective justice delivery.
   3. Developing the ability of judges to adopt new and innovative approaches to effectively respond to the demand for justice deliver within the existing legal framework.

Arrears and Backlog
In our state 1299048 Civil cases and 4105585 Criminal cases were pending at District level on 1.1.2010. Thus the total pendency is 5404633. From 1.1.2010 to 31.3.2010, total 130405 civil cases and 597589 Criminal cases total 727994 cases have been decided by 1921 Judges which means that per judge disposal has been 379 cases. During this period 133307 Civil cases and 674526 Criminal cases total 807833 cases have been instituted. It means that the institution rate is higher than the disposal. This figure may be compared with the situation from 1.7.2010 to 30.9.2010 where the opening balance of civil cases was 1317376 and of Criminal cases was 4247654. Thus the total pendency was 5565030. During this period 146121 civil cases and 701659 Criminal cases were decided by 1893 Judges.
142895 cases and in Criminal side 771848 cases were instituted. It means that in Criminal side the institution rate is higher whereas in Civil side the disposal is a little more. The total disposal during this period is 847780 cases by 1893 judges which means that during this period per judge disposal is 448 cases. This further means that if cases are disposed with this pace, in one year, the total disposal will be about 1800 per judge.

On the other hand the situation from 1.7.2011 to 30.09.2011 appears to be different because during this period 1864 judges have disposed 691781 cases which means per judge disposal has been about 370 cases. During this period institution rate has been higher than disposal and if this trend is taken to be continuing, the disposal will be only 1500 cases per year by one judge, whereas one year before the disposal appears to be almost 1800 cases per judge.

At this stage we can compare the disposal rate in other states during 1.7.2011 to 30.9.2011. In Kerala 395 judges have disposed 254803 cases which means 645 cases by each judge. Likewise, in Tamil Nadu, 472016 cases by 761 judges, 620 cases per judge, in Punjab 212362 cases by 379 judges, 560 cases per judge, in Rajasthan 396293 cases by 751 judges, 528 cases per judge and in Delhi 337392 cases by 468 judges, 432 cases per judge have been disposed. In Uttar Pradesh the disposal has been 370 cases per judge during the above period. It means Uttar Pradesh stands on 6th position in the country, so far as the disposal is concerned.\textsuperscript{1}

Here arises a valid question as to what should be termed as ‘arrear’? Whether the cases instituted this year either in Civil or Criminal side should be characterized as arrear? Certainly not. Under law every case, whether civil or criminal has its own life span. If a case continues beyond that life span, it can be termed as arrear otherwise not. For example, a civil case may be given a life span of four years within which it should be decided. Similarly, Sessions cases may be given three years while others may be given two years for warrant trial cases and one year for other cases. If a case continues to be pending thereafter, it will come in the category of arrears or backlog.

There may be various and multiple reasons for heavy arrears. In our State, the total sanctioned strength of Judicial Officers is 2185 including District Judges, Additional District & Sessions Judges, C.J.M./Civil Judge (S.D.) and Judicial Magistrate/ Civil Judge (J.D.). The working strength has been 1864 only. This shows that per Judge disposal is 370 cases during this period. It is important to mention that out of the total working strength, about 120 Judicial Officers are probationers undergoing training in the Institute or at their respective place of posting and much disposal is not expected from them. If these 120 probationers are excluded from the total strength, per judge disposal will reach 398 cases. This figure will look much brighter some if the hostile conditions faced by the judicial system in terms of lawyers strike are taken into account. In most of districts in the State almost 3 to 4 months have been spoiled by some or other resolution of the Bar abstaining from work. In view of this situation and looking to the per judge disposal rate, it can be hardly said that the district judiciary has not been able to dispose of cases expeditiously.

**Gender Justice sensitiveness**

A Judge has to be enlightened about gender issue particularly in the perspective of constitutional proclamations, aims and objectives. Enough has to be done to sensitize the judges as most of the judges in country are males and may not have sufficient amount of understanding, empathy, sympathy and compassion for the women society. Gender fairness requires empathy and understanding of the life experiences a person’s gender creates.

\textsuperscript{1} See Supreme Court News (2010-2011)
However, crossing the gender barrier proves a formidable task. Can a male judge really imagine what it is like to be pregnant? To be a female victim of sexual assault? To experience sexual harassment or spousal abuse as woman? To be sexually objectified in pornography as woman? On the other hand, most male judges likely can imagine themselves as fathers, accused rapists, batters, or consumers of pornography. Because most judges are men, women’s life experiences tend to be objectified. In balancing competing gender-based interests and values, judges too often give insufficient (or no) weight to women’s interests. This leaves women less protected or even unprotected by laws that protect men-laws that affect their equality, economic opportunity, independency and personal freedom.¹ The recent hue and cry regarding misuse of Section 498A IPC and the Domestic Violence Act is perhaps the outcome of that peculiar mind set which is occupying the mind of the male dominating society. During training, workshops of the Judges should be organized in order to sensitize them on Gender Issues in the correct and Constitutional perspective.

**Juvenile Justice**

The issue of Juvenile Justice is a human right issue. The Parliament has passed the Juvenile Justice (Care & Protection of Children) Act, 2000 to protect the human right of the children below 18 years. It applies to child in need of care and protection which includes homeless child, beggar child, street child, or disadvantaged child and child living under physical, mental, social or other handicap². Juvenile in conflict with law means a child who has committed an offence³. For first category there is need of Observation Home and Special Home where they have to be kept. The Juvenile who has committed an offence cannot be sent to jail during investigation, inquiry, trial or even after conviction. The Juvenile has to be released on bail. The problem with the judges who are presiding officer of Juvenile Justice Board is that they have not been able to appreciate the intention of law, which is for the protection of the juvenile. Consequently, they adopt the approach of the regular courts and do not grant bail generally in sessions triable cases. They need to develop a mindset that bail should be refused only when it is necessary to protect the interest of juvenile and not for any other consideration.

**Alternative Dispute Redressal and Plea Bargain**

The recent amendment in the Civil Procedure Code has introduced ADR system to be integral part of civil proceedings. Mediation, Conciliation, Arbitration and Lok Adalats are the four modes, which have been given recognition by section 89 of the code. A dispute can be resolved either by way of adjudication by court or tribunal or by negotiation which is a non-binding process depending upon the volition of parties. If it results in success, it becomes a solution agreeable to the parties. Mediation, Conciliation and Lok Adalats are examples of negotiation with the assistance of a neutral third party. All cases arising from strained personal relationship such as matrimonial disputes, cases based on contracts, cases with relationship and neighbors, cases of tortious liability and consumer disputes can be comfortably decided through this process. The need for ADR is felt necessary because regular courts are not able to dispose of the cases expeditiously. The conditions of the courts has become like a hospital having indoor facility with a surgeon but without a physician. In such case, patients suffering small diseases may be admitted though they need only prescription. In such cases only those who are rich or really needy will need to be admitted

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¹ See Kathleen E. Mahoney, the Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice, 32 Willamette L. Rev. 785
² Section 2(d)
³ Section 2(i)
and they can afford to bear expenses. In Mediation, the mediator simply facilitates settlement without suggesting or forcing any solution. He only identifies the point of conflict and makes the parties to come to a amicable settlement. On the basis of this settlement the court passes a judgment. When a suit is filed, at the time of framing issues or at any subsequent stage, the court has to search out a possibility of settlement and after formulating the points for settlement; the court has to refer the matter for mediation. If some settlement is reached the matter is decided accordingly and if not, the file is back to the court for disposal according to law. Mediation is a structural device which has been evolved in view of the shortcomings of regular adjudicatory process such as delay, difficult enforcement, high cost, hostile atmosphere in courts, uncertainty and inflexibility. In mediation the parties are made to understand the strength and weaknesses of their case which helps them to reach a settlement and the tension between the parties ends forever. But the problem is that the courts at district level do not appear to be keen to adopt this process due to heavy work load and non cooperation of bar. The lawyers, judges and litigants should be made aware of the advantage of ADR system.

Similarly, considering the arrears and delay in disposal of criminal cases and on the recommendations of Malimath committee Chapter XXI-A (from section 265-A to section 265-L) has been incorporated in Criminal Procedure Code and is in force from 5-7-2006 which provides for plea bargain. Under this scheme if the accused pleads guilty he may be released on probation with the help of section 360 of the code. Offences punishable up to seven years imprisonment may be decided by recourse to this scheme provided the offence does not fall in excluded category in Annexure-1. This scheme does not apply in case of offences committed against women or children below 14 years age. A previous convict cannot get the benefit of plea-bargaining.

The courts at district level are very slow in adopting the ADR system and plea bargain. For sensitizing the judge’s special training programme and workshop should be organized.

**Cyber Crime**

Cyber Crimes are those types of crimes, which are committed by or against the computer or other electronic device. The Information Technology Act has been recently amended to include a bunch of cyber crimes and punishment for the same. In our State so far only 2-3 cases have been registered. Due to peculiar nature of crime there is lack of awareness. Even if some case is registered there is minimum chance of successful prosecution. For proof of the offence specialized knowledge of computer technology and Internet is required. By normal evidence the identity of the offender can hardly be established. There is absence of coordination at international level. Cyber Crimes are incapable of geographical limit and there is no physical boundary in cyber space. The standard of obscenity and morality differs from place to place and country to country and it is quite possible that what is crime in India may not be a crime in European country. In such case even though there is extradition treaty, there is a likelihood that the mother country may not give the culprit in the custody. Even if the address of mother website is known, a court in India may not be able to punish the person. The dispute of jurisdiction will be always there. Again the quantum of punishment also differs from country to country. A special

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1 This has been explained by R.V. Raveendran, Justice, Supreme Court of India in his article Mediation- its Importance and Relevance, (2010) 8 SCC (J) I
2 Id. At 7-9
investigation agency having expert knowledge of computer and Internet will be required for effective investigation.

**Access to Justice**

The Constitution of India has been adopted by ‘We, the people of India’ and it aims to achieve ‘justice, social, economic and political’. Justice is the spirit and vision of our Constitution and it obligates the state to secure a social order in which the legal system of the country may promote justice on a basis of equal opportunity. The State has to ensure that opportunities for securing justice are not denied to any citizen because of his economic, social or other disabilities. Access to prompt and quality justice is the key for realizing this vision. More than sixty years have passed since the enforcement of our constitution, but, can we say that this vision of justice and just society has been materialized fully? If not fully, whether partially or satisfactorily? When and how this constitutional promise of justice will become a reality? Law and Legal procedure is constitutionally designed instrument not only for imparting justice but also for bring about social change. Has it been possible till now? Is rule of law and right of access to justice a myth or constitutional reality? Can we address this issue promptly in order to maintain the faith of society in our legal and judicial system? Justice is the basic concern of the common man. It is as important as shelter, food, clothes, livelihood, health and access to common resources and property. With the three crores cases pending in the courts in the country, with inadequate strength of judges, insufficient staff and below standard infrastructure, can we be able to administer timely justice by disposing off case within reasonable time and in least expenses? These are questions from the side of people of this country which certainly need reply from the system.

Undue delay in disposal of cases and arrears of cases are two serious problems our judicial system is facing. Unduly long delay has the effect of bringing about blatant violation of the rule of law and adverse impact on the common man’s access to justice. A person’s access to justice is a guaranteed fundamental right under the Constitution and particularly Article 21. Denial of this right undermines public confidence in the justice delivery system and incentivises people to look for short-cuts and other fora where they feel that justice will be done quicker. In the long run, this also weakens the justice delivery system and poses a threat to Rule of Law. It may not be out of place to highlight that access to justice must not be understood in a purely quantitative dimension. Access to justice in an egalitarian democracy must be understood to mean qualitative access to justice as well. Access to justice is, therefore, much more than improving an individual’s access to courts, or guaranteeing representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.

**Petty offences**

Petty offences are those offences, which are punishable by fine, which is limited to one thousand rupees. But normally, small offences are understood to come into this head. In our country, 80% pending and instituted cases are of criminal nature out of which 70% cases involve petty offences relating to poor people. They can be decided in summary way. But these cases continue for a long time due to lack of attention by the court and staff. The Judges need to be sensitized.

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1 Imtiyaz Ahmad vs. State of UP (2012) 2 SCC 688 at page 699
3 Section 206 (2) Cr.P.C.
Constitutional Exposure

There is thinking in the mind of most of the judges working at district level that the Constitution is not within their jurisdiction. But the fact is that justice is the cherished goal of the Constitution and the judges need to realize that it is the most inspiring force in judicial decision making. While appreciating the fact and evidence in cases, the principle of justice, freedom, equality and liberty must be present in the mind of judge. It enables the judges to identify their role as a judge in the society.

Court Management & Stress Management

The judges need to learn the communication skill, public speaking, Time Management, Cases Management, Office Management and Stress Management. Due to over workload, the judges are under stress and in a peculiar kind of apprehension. The strike and unbecoming behaviour of lawyers is big challenge before district judiciary. The judges need to be enlightened in the training programmes about the advocate psychology and some empirical research should be made to analyze the psychology and mind set of the lawyers. It will help the judges in conducting the court proceedings.

The Judges should be trained to strike balance between subjectivity and objectivity as the presence of sixth sense in judgment making process finds recognition in a recent Supreme Court judgment\(^1\). The syllabus for judges and the training pattern should be so designed which can strengthen the administration of justice, ensure speedy disposal of cases and improve quality of judicial work capable of enforcing legal duties and protecting legal and constitution rights of individual. It must aim to improve skill, knowledge and case and court management. The judges training should enhance legal and practical knowledge of all type of adjudication coming before the court and the judges must be able to identify main challenges and their solution faced by the judicial system.

Conclusion:

Society expects a great deal from its judges. It expects them to be objective, knowledgeable, independent, discerning, practical and sensitive. Society also expects them to be fair. All these expectations exist because judges have to play a very important role and make decisions on disputes affecting the life of people, their livelihood, safety, freedom, property, status and humanity.\(^2\) This requires that judges should be regularly provided judicial education so as to develop in themselves vision for justice, to bring about attitudinal changes to serve the purpose of law for which the same was enacted, to be sensitized towards a cause related to marginalized sections of society particularly women, children and weaker class and to be updated with current legal knowledge and modern concepts incorporated in the constitution and developed through judicial creativity. A Judge has to work in a human society, a society which is full of various conflicting and competing interests. Therefore, a judge is required to understand the changes in the society and the changing human behaviour. Only then he can be able to link and apply legal knowledge to resolve the social and individual conflicts, so necessary for the development of peaceful society.

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\(^1\) See Himmat Sukdev Wahur Wagh vs. State of Maharastra (2009) 6 SCC 712

\(^2\) See Kathleen E. Mahoney, the Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice, 32 Willamette L. Rev. 785
PROTECTION TO JUDICIAL OFFICERS

S.S. Upadhyay*

1. **The Judicial Officers’ Protection Act, 1850 & The Judges (Protection) Act, 1985:**

The Judicial Officers’ Protection Act, 1850 contains only one section and is aimed at providing protection to the judicial officers acting in good faith in their judicial capacity. In the year 1985, the Parliament passed The Judges (Protection) Act, 1985 to provide certain more protections to the Judges and Magistrates of the Sub-ordinate Judiciary in addition to what was already available to them under the Judicial Officers’ Protection Act, 1850. Section 52 of the IPC defines the word 'good faith' and provides that nothing is said to be done or believed in good faith which is done or believed without due care and attention. Section 77 of the IPC provides that nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law. No Court shall entertain or continue any civil or criminal proceeding against any person, who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function. The Judges (Inquiry) Act, 1968 deals with the judges of the Hon'ble Supreme Court and High Courts and not with the members of the Sub-ordinate Judiciary. In the case reported in *Rachapudi Subba Rao vs. Advocate General, A.P., (1981) 2 SCC 577*, it has been held by the Hon'ble Supreme Court that the protection to judicial officer u/s 1 of the Judicial Officers’ Protection Act, 1850 would be available if he is found to have been acting in the discharge of his judicial duties. In order to exclude him from the protection of Sec. 1 of the Judicial Officers Protection Act, 1850, the complainant has to establish that (i) the judicial officer complained against was acting without any jurisdiction whatsoever and (ii) he was acting without good faith in believing himself to have jurisdiction. In the matter of *High Court of Judicature at Patna vs. Shiveshwar Narayan and another, 2011 (3) SLJ 392 (SC)*, the Hon'ble Supreme Court has held that a judicial officer exercises sovereign judicial powers.

2. **Conduct of Judicial Officers in and out of Court:** Where a Munsif Magistrate had appeared in LL.M. examination held by the Aligarh Muslim University and was caught by the invigilator using unfair means and was first suspended and after departmental enquiry by the Allahabad High Court, was removed from service, the Hon'ble Supreme Court held that the judicial officers cannot have two standards, one in the Court and another outside the Court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy. A judicial officer, who has been found guilty of using unfair means in the LL.M. Examination, is undoubtedly not a fit person to be retained in judicial service and as such the Supreme Court refused to extend the benefit of Sec. 1 of the Judicial Officers’ Protection Act, 1850 to the delinquent Munsif Magistrate. See *Daya Shankar Vs. High Court of Allahabad, AIR 1987 SC 1469*.

3. **Pre-conditions for FIR & arrest etc. of Judicial Officers:** In the case of *U.P. Judicial Officers’ Association versus Union of India, (1994) 4 SCC 687*, the Hon'ble

*Legal Advisor to Governor, UP Lucknow*
Supreme Court has observed that there is, however, apprehension that the executive being the largest litigant is likely to misuse the power to prosecute the Judges. That apprehension in our over-litigious society seems to be not unjustified or unfounded. Care should be taken that honest and fearless judges are not harassed. They should be protected. No crime or criminal case can be registered against a judicial officer in respect of anything allegedly done or purported to be done in discharge of his duty or in his capacity as holder of such judicial office without prior permission of the Chief Justice of the High Court concerned. A judicial officer is protected against malicious prosecution etc for any judicial act done by him in his official capacity.

4. Judicial Officers not to visit Police Station: In Delhi Judicial Service Association, Tis Hazari Courts Delhi vs. State of Gujarat, AIR 1991 SC 2176 (Three-Judge Bench), the Hon'ble Supreme Court has prohibited the judicial officers from visiting the Police Stations on their own except in connection with their official and judicial duties and functions. If it is necessary for a Judicial Officer to visit a Police Station in connection with his official duties, he must do so with the prior intimation of his visit to the District & Sessions Judge.

5. Directions issued by the Supreme Court in Delhi Judicial Service Association, Tis Hazari Courts Delhi vs. State of Gujarat, AIR 1991 SC 2176 (Three-Judge Bench): (A) If a Judicial Officer is to be arrested for some offence, it should be done under intimation to the District Judge or the High Court as the case may be. (B) If facts and circumstances necessitate the immediate arrest of a Judicial Officer of the Subordinate Judiciary, a technical or formal arrest may be effected. (C) The fact of such arrest should be immediately communicated to the District and Sessions Judge of the concerned District and the Chief Justice of the High Court. (D) The Judicial Officer so arrested shall not be taken to a police station without the prior order or directions of the District and Sessions Judge of the concerned district, if available. (E) Immediate facilities shall be provided to the Judicial Officer for communication with his family members, legal advisors and Judicial Officers including the District and Sessions Judge. (F) No statement of a Judicial Officer who is under arrest be recorded nor any panchanama be drawn up nor any medical tests be conducted except in the presence of the Legal Advisor of the Judicial Officer concerned or another Judicial Officer of equal or higher rank, if available. (G) There should be no handcuffing of a Judicial Officer. If however, violent resistance to arrest is offered or there is imminent need to effect physical arrest in order to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case, immediate report shall be made to the District & Sessions Judge concerned and also to the Chief Justice of the High Court. But the burden would be on the Police to establish the necessity for effecting physical arrest and handcuffing the Judicial Officer and if it be established that the physical arrest and handcuffing of the Judicial Officer was unjustified, the police officers causing the arrest will be responsible for such arrest and handcuffing and would be guilty of misconduct and would also be personally liable for compensation and/or damages as may be summarily determined by the High Court.

6. No Publicity of complaint against Judicial Officer: In U.P. Judicial Officers’ Association vs. Union of India, (1994) 4 SCC 687, the Hon'ble Supreme Court has held that any complaint against a Judge and its investigation, if given publicity, will have a far-reaching impact on the Judge and the litigant public. The need, therefore, is for a judicious use of taking action under the law and care should be taken that honest and fearless judges are not harassed. They should be protected. The Hon'ble Supreme Court has in the case of High Court of Judicature at Patna vs. Shiveshwar Narayan and another, 2011 (3) SLJ 392 (SC), held that even unproved complaints may disentitle a Judicial Officer of certain benefits.
7. Judicial Officers not to be made party in petitions etc. : In the cases reported in Savitri Debi vs. District Judge, Gorakhpur & IV Addl. Civil Judge (Junior Division) Gorakhpur, 1999 (2) SCC 577 and Pepsi Foods Ltd. Vs. Spl. Judicial Magistrate, (1998) 5 SCC 749 the practice of impleading judicial officers, who had disposed of the proceedings, as parties in writ petition under Art. 226 or in SLP under Art. 136 of the Constitution, has been strongly deprecated by the Supreme Court. It has been further directed by the Supreme Court that such practice should be stopped as the judicial officers cannot be in any way equated with the officials of the State.

8. Calling for report from judicial officers on the judicial orders passed-- Disapproved by the Supreme Court: A Sub-ordinate Judicial Officer cannot be required by a Superior Court to send a report in defence of his judicial order as reasons in support of a judicial order can appear only in the order itself and it is an unwholesome practice to compel a Judicial Officer to write a report subsequently in defence of his conclusions. See : Braj Kishore Thakur vs. Union of India and others, AIR 1997 SC 1157.


10. Powers of Judicial Officers u/s 228 IPC & Sec 345 CrPC : In case any person intentionally offers any insult or causes any interruption in the judicial functioning of the court, the presiding officer may proceed summarily against such person u/s 345 CrPC and may punish him u/s 228 of the IPC.

11. Judicial Officer’s Prosecution for defamatory comments on Transfer Application & Sec. 197 CrPC : In the matter of B.S. Sambhu vs. T.S. Krishnaswamy, AIR 1983 SC 64, where a Munsif Magistrate by a letter to the District Judge submitted his remarks against the allegations made by an advocate in a transfer petition for transfer of a suit pending in Munsif’s Court and while so doing called the Advocate ‘rowdy’, “a big gambler” and “a mischievous element” and on this letter being read in open court the Advocate filed criminal complaint against the Munsif without the sanction contemplated u/s 197 CrPC, it was held that the act complained of had no connection with the discharge of official duty by the Munsif. Hence, the protection of Section 197 CrPC was not available to the Munsif.

12. Family court Judge not covered within the word ‘Judicial Officer’-- In the case reported in S.D. Joshi vs. High Court of Judicature at Bombay, 2011(1) SCJ 169, it has been ruled by the Hon'ble Supreme Court that the Judges presiding over family court are neither members nor integral part of judicial services. The word “judicial officer” has not been defined in the constitution of India. A family court judge cannot be considered for elevation to High Court.

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FREE LEGAL AID & SPEEDY CRIMINAL JUSTICE SYSTEM

Sunil Kumar Singh-1

Ensuring speedy and easy access to Justice has become a very difficult task and a great challenge before any judicial system. On the one hand, the weaker and poor section of society do not have easy access to the courts. On the other hand, literate and the resourceful people do have the efficiency to exercise their legal rights through Courts very easily. Legal awareness & the high influx of new cases in the courts every year is also responsible for making the challenge more problematic. This situation is alarming and has a tendency to create an impediment in securing justice. Law can be ceremontised only, if it has qualitative, cheaper, equal & speedier mode for dispensation of justice. If this situation exists, society can be more developed and more progressive. Attempts of providing free legal Aid to the poor and needy persons can be seen in the international back ground.

In USA, the first organised legal Aid society was founded in 1876 to serve poor German immigrants. The work of Reginald Heber Smith made Legal Aid Movement a major force for making access to justice available to the poor in the United States. In US, ‘speedy trial’ and ‘legal aid’ are the constitutionally guaranteed rights under the sixth amendment of US Constitution, which provides as under-

“Criminal Court Procedure” -- In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed by Law and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of the council for his defence.”

In India, The legal aid movement has been influenced by contemporary legal developments in other countries, mainly the UK and USA. It was after publication of the Ruschcliff committee report in England in 1964 that legal aid movement in India gathered momentum. In 1980, Government of India constituted a committee for implementing legal aid scheme under the chairmanship of Hon’ble Justice PN Bhagwati who originated the concept of legal aid to the poor and setting up of Lok Adalats.

In Hussainara Khatoon(No.1) V Home Secretary, State of Bihar3, Hon’ble Apex Court said that although unlike American Constitution, speedy trial is not specifically enumerated as Fundamental Right, it is implicit in the broad sweep and content of Art. 21 of Indian Constitution as interpreted in Maneka’s case4 SC further held that the speedy trial is the essence of criminal Justice and further reiterated above view in Hussainara Khatoon(2)5 & (3)6.

1 Addl. Distt. & Sessions Judge(FTC), Ghaziabad(U.P).
2 First ten Amendments (in the form of ‘Bill of Rights’ were included in US Constitution in 1791 after ten years of it’s coming into force in 1781.
3 AIR 1979 SC1360
4 AIR 1978 SC 597
5 AIR 1979 SC 1369
6 AIR 1979 SC 1377
In Raghubir Singh V State of Bihar\(^1\), Hon’ble Apex Court held that the right of a speedy trial is one of the dimensions of the fundamental right to life and liberty guaranteed by Art. 21 of the Constitution.

**Equal Justice and Free Legal Aid** -- Art. 39-A\(^2\), directs the State to ensure that the operation of the legal system promote justice, on the basis of equal opportunities 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.

In H. M. Hoskot V State of Maharashtra\(^3\), Hon’ble Apex Court has held ‘legal aid’ to be a Fundamental right under Art. 21 of the Indian Constitution available to all prisoners and enforceable by the Courts. The State is under duty to provide lawyer to a person and it must pay to the lawyer his fee as fixed by the Court.

In Centre of legal research V State of Kerala\(^4\), Hon’ble Apex Court has held that in order to achieve the objectives in Art. 39-A, the State must encourage and support the participation of voluntary organisations or social action groups in operating the legal aid programme. The legal aid programme which is meant to bring social Justice to the people can not remain confined to the traditional or litigation oriented programme, but it must take into account the socio economic conditions prevailing in the country and adopt a more dynamic approach. The voluntary organisations must be involved and supported for implementing legal aid programme and they should be free from government control.

In State of Maharashtra V Manubhai Bagaji Vashi\(^5\), Hon’ble Apex Court held that the right to free legal aid and speedy trial are guaranteed Fundamental Rights under Art. 21 of the constitution. Art. 39-A provides “equal Justice and free legal aid” means Justice according to law.

**Legislation and Schemes**

The Legal Services Authorities Act, 1987 was enacted by the Parliament to constitute legal Services Authorities to provide free and competent legal Services to the weaker sections of the society to ensure that opportunities for securing Justice are not denied to any Citizen by reason of economic or other disabilities and to organise Lok adalats to secure that the operation of the legal system promotes Justice on a basis of equal opportunities.\(^6\) This Act was amended in 1994 and was given a concrete form on 09-11-1995. In the state of UP, following rules regulations, and schemes have been notified.

1. The Uttar Pradesh State Legal Services Authority Rules,1996.\(^7\).
2. The Uttar Pradesh State Legal Services Authority(Transaction of Business and other

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\(^1\) (1986) 4 SCC 481.
\(^2\) Added by 42\(^{rd}\) Constitution Amendment Act, 1976 as new directive. This Provision was added pursuant to the new policy of the Govt. to give legal aid to economically backward classes of people.
\(^3\) AIR 1978 SC 1548.
\(^4\) AIR 1986 SC 1322.
\(^6\) Object indicated in the legal services Authorities Act,1987.
\(^7\) UP Govt. Notification No.123/7-Nyay-7- 96 -45-90 dt. 12 March 1996.
Provisions), Regulations, 1997 have also been notified.1
3. The High Court Legal Services committee Regulation, 19972
4. The District Legal Services Authority (Transaction of Business and other Provisions), Regulations, 1997.3
5. The Tehsil Legal Services Committees Regulation, 1997.4
7. Permanant Lok Adalat (other terms and conditions of appointment of Chairman and other persons) 2003.

**Speedier criminal justice and duty of jail and other Government authorities** – In supreme court legal services committee V Union of India and others5, Hon’ble Apex court has observed that the following directions are implied in the implementation of the Legal Services Authorities Act, 1987, yet allowed the prayer for directions as sought in the writ petition, which are as follows against each of the respondents, i.e. Jail and other Government authorities.

(1) That, they will, by issuing administrative orders/instructions ensure that every prisoner/convict is provided with free copy of the judgements of sessions court or the High court in her/his case or matter within 30 days of the pronouncement of such judgement and the Registry of the court concerned will personally endorse such copy to the superintendent of jail for forwarding the same to the petitioner.

(2) The superintendent of the jail concerned to ensure that the judgement of the sessions courts or the High Court, as the case may be, is read out to the prisoner and explained to him in the language as understood by him.

(3) That the prisoner will be informed by superintendent of every jail about the availabilities of legal aid in the high courts and the supreme court and be asked whether he is desirous of exercising his constitutional right to avail of legal aid.

(4) That every jail will have to provide, at the cost of state exchequer, copy of Vakalatnama, proforma affidavit in the form as required by the respective high courts and the supreme court, for being signed by the prisoner immediately upon expressing his intention to avail of legal aid.

(5) That the superintendent of the jail will ensure that complete papers/records of the case are sent to the supreme court legal aid committee or the high court legal aid committee along with the signed Vakalatnama and affidavit of the prisoner forthwith by registered post at the cost of state exchequer and that if there is any delay in forwarding the papers, the reasons for forwarding the papers belatedly will accompany such papers.

(6) That where the judgement of the sessions court and the high court is in the language other than English, the superintendent of the jail will at state’s cost arrange to have the same translated before sending the papers to the supreme court legal aid committee or the high court legal aid committee as the case may be

**Legal Literacy Mission** - National Legal Literacy Mission was started on 06 March 2005 in New Delhi by national legal services authority. India is the Largest democracy in the world.

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Uttar Pradesh is the first State of India, whose population is over 17 crores, however the percentage of legal literacy is very less in comparison to its population. For awakening the consciousness towards legal literacy, State wide programme was launched on 14-01-2006 at Lucknow by Uttar Pradesh Legal Services Authority. Judicial Officers have also been cooperating and standing by in such literacy missions and legal literacy campaigns being at State levels in addition to their assigned Judicial work, showing their sensitiveness and commitments for such a great noble mission.

**Can any time limit be fixed for trial of offences?**

**Earlier View** -

(A) In “Common Cause”, A Registered society through its Director V Union of India & others ¹, Hon’ble Apex Court issued two sets of directions.

Category – 1  Traffic offences – Directed that the cases to be closed and accused to be discharged on lapse of more than two years on account of non serving of summons to the accused or for any other reasons whatsoever.

Category – 2  - If the trial has not commenced within the period noted in the following table, the cases shall be closed and the accused shall be discharged or acquitted.

(a) Cases compoundable with permission of court – more than two years.
(b) Cases pertaining to offences which are non cognizable and bailable – more than two years.
(c) Cases relating to offences punishable with fine only and are not of recurring nature – more than one year.
(d) Cases punishable with imprisonment up to 1 year, with or without fine – more than one year.
(e) Cases relating to offences punishable with imprisonment – up to three years with or without fine – more than two years.

Hon’ble Apex Court said that the calculation of the above period will be made from the date, the accused is summoned.

(B) In Raj Deo Sharma(1) V State of Bihar ², Hon’ble Apex Court supplemented and clarified common cause (supra) and held that courts are either to close the evidence or the accused shall be released on bail in the following circumstances.

(1) If prosecution evidence is not concluded within two years from the date of making plea/charge and the offence is punishable by less than seven years whether the accused is in jail or not.
(2) If the prosecution evidence is not concluded within three years from the date of framing the charge, if punishable by more than seven years whether the accused is on bail or not.

Unless for very exceptional reasons to be recorded and in the interest of justice, the court considers it necessary to grant further time to the prosecution to adduce evidence beyond the time limit of three years. (C) In Raj Deo Sharma(2) V State of Bihar ³, Hon’ble Apex Court issued following additional directions.

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¹ 1996(2) crimes 114 (SC).
² 1998(37) ACC 834 SC.
³ 1999(39)ACC665(SC)
Additional period of one year can be claimed by the prosecution in respect of matters pending on the date of the Judgement, pronounced in Raj Deo Sharma (1),(supra), i.e. from 08-10-1998.

Delay due to the conduct of the accused shall be deducted.

Trial remaining stayed by order of the court or by operation of law shall be excluded.

All the criminal courts implemented above directions throughout the territory of India as authoritative and binding precedent. Thousands of accused persons facing criminal trials in various states were either discharged or acquitted from the respective offences, that fell within the four walls of the criterion laid down as above. The above guide lines were contrary to Apex Court's Judgement in A. R. Antuley's case and were subsequently overruled by Apex Court in P. Ramchandra Rao's case, upholding the Decision of A. R. Antuley (supra).

Present View:

In P. Ramchandra Rao V. State of Karnataka (supra), Hon.ble Apex Court deleted the Bars of limitation as was directed by it in common Cause (supra) and Raj Deo Sharma (1)&(2) (supra) in respect of the fixing of definite time limits for speedy trial on the following two grounds.

1. Because bars of limitation amounts to judicial Legislation.
2. Because they run counter to the doctrine of binding Precedent.

Accordingly giving approval to the decision given in A. R. Antuley (supra), which needs to be illustrated here.

In Abdul Rahman Antuley V R. S. Nayak ((supra), Hon.ble Apex Court has laid down detailed guide lines for speedy trial of an accused in a criminal case but it declined to fix any time limit for trial of offences. The burden lies on the prosecution to justify and explain the delay. The court held that the right to speedy trial flowing from Art. 21 is available to accused at all stages of investigation, inquiry, trial, appeal, revision and retrial. The concerns, underlying the right to speedy trial from the point of view of the accused are -

(a) The period of remand and pre-conviction detention should be as short as possible.
(b) The worry, anxiety, expense and disturbance to his vocation and peace resulting from an unduly prolonged investigation, inquiry or trial shall be minimal.
(c) Undue delay may result in impairment of the ability of the accused to defend himself whether on account of death, disappearance or non-availability of witnesses or otherwise.

The Court said that the accused cannot be denied the right of speedy trial merely on the ground that he had failed to demand a speedy trial. As regards the time limit, the court said that it has to be decided by balancing the attendant circumstances and relevant factors, including nature of offence, number of accused and witnesses, the workload of court etc. No time limit can be fixed for speedy trial.

This legal position makes it clear that no definite time can be fixed for the conclusion of a criminal trial, yet, cheap, expeditious and speedy criminal justice is the Fundamental Right of every accused person whether on jail or on bail. The inhibition of ‘Free Legal Aid’ in the criminal justice system may help in attaining qualitative, cheap and speedier criminal justice. Parliament has taken care of weaker sections of the society by enacting the above said

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1 Art. 141 of constitution of India.
3 P. Ramchandra Rao V State of Karnataka, 2002(44) ACC 974 SC.
legislation for providing free legal services to them, a step to ensure social and economic Justice, which is the main objective of Indian constitution.

**Conclusion – Lawyers’ strike as hindrance in speedier criminal trials** - Lawyer’s strikes are the main hindrance in the speedier criminal trials. In *Ex. Capt. Harish Uppal V Union of India and another*\(^1\), A Five Judges constitution bench of Hon’ble Apex Court has declared that the lawyers have no right to strike or to give calls for boycott not even of a token strike.

Despite this law of the land, frequent strikes by lawyers, very substantially hamper the judicial work. Under the rule of law, litigant public cannot be stopped from approaching the courts for seeking judicial remedy, as judicial system gives an expectation to the general public, that, they can redress their grievances before the only forum of Judiciary.

In *Mahabir Prasad Singh V Jacks Aviation (p) Ltd.*,\(^2\) Hon.ble Apex court held that at any rate, no Advocate can ask the court to avoid a case on the ground that he does not want to appear in that court. It further said that it is the solemn duty of every court to proceed with the judicial business during court hours and no court should yield to pressure tactics or boycott calls or any kind of browbeating.

In *R. D. Saxena V Balram Prasad sharma*,\(^3\) Hon.ble Apex court held as under - “In our country, admittedly, a social duty is cast upon the legal profession to show the people beckon (sic beacon) light by their conduct and actions, the poor, uneducated and exploited mass of the people need a helping hand from the legal profession, admittedly, acknowledged as a most respectable profession. No effort should be made or allowed to be made by which a litigant could be deprived of his rights, statutory as well as constitutional, by an advocate only on account of the exalted position conferred upon him under the judicial system prevalent in the country.” Lawyers are most learned and an important segment of legal system and civilised society. The development of new professional ethics by reforming the bar may also help in eradicating the menace of delay in the criminal trials.

Unnecessary adjournment is another reason for delayed justice. This problem of adjournments can be tackled more effectively and substantially by strictly resorting to new provisions added to section 309 of Cr.P.C., as amended in the year 2009\(^4\).

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\(^1\) AIR 2003 SC739  
\(^2\) (1999) 1 SCC37  
\(^3\) AIR 2000 SC 2912  
\(^4\) Inserted by Act No. 5 of 2009
THE MATRIMONIAL OFFENCES AND MEDIATION: PROTECTING THE INSTITUTION OF MARRIAGE, AND JUSTICE

Akhileswar Prasad Mishra *

The advent of the institution of marriage was to regulate the social system and promote natural growth of the human society. It was one of the most effective tool to bind the human being in a system, and it was an institution which always contributed to integrate and organise the human groups. But with the growth of the human society and emergence of urban and industrial social structure, the concept of marriage suffered so many invasions of thoughts of utilitarianism and industrial rationality based on development of physical sciences and change of values in the society with the development and progress of it. The settled traditions and mores of social groups broke down and marriage then became a root cause of social and individual disorganization which with passing of time created so many social and ethnic problems which with the change and developments of law became an offence like offence under section 498A of Indian Penal Code and Section 3,4, etc. of Dowry prohibition Act.

It is aptly said that the knowledge is power, but there is another aspect of it too and that is misuse of power and corruption due to power or in social terms degradation of society binding values. The law which is created always for the growth and development of society and protection of its units like individual, family, neighbourhood, play mates and sub-groups within the society, becomes detrimental to system of human beings, with the rising misuse of it. Provisions to address the harassment of matrimonial grievances have become a tool to satisfy individual whims and a via media to find the ends other than that desired by the legislators, and this has harassed the units of society and its values.

The element of tolerance is losing its significance in social behaviour and whole philosophy of human living is confined to the individual needs and rights without any obligation to the group of the people or society. Everyone is conscious of rights against others and hardly careful of duties owed to him against others. The concept of duty has also undergone a great change and its organisational or orientation to group aspect has lost its significance. People if ever take pain to their duties they confine themselves to the obligations imposed by the law and that too in most of the cases pertaining to the individuals and formal units of the society. No one is eager and inclined to think of informal units and organs of the society like family, kinship neighbourhood etc. The loss of society is loss to the individual, but individual has no time and inclination to understand it.

Matrimonial offences are used to exploit and harass the counterparts to get undue benefits and short cut to tear off the relations that one is ready to carry on against the other. The Courts are packed with number of false and frivolous cases which result to the

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consequences of number of acquittals due to compromise and misuse of authority and time of court, which courts can use to impart justice in other severe and important issues or cases.

In the legal arena a new mechanism was evolved and is being practiced world wide that is to resolve the dispute without going to and using the time and authority of the regular courts, and that too without causing any hardship, harassment or pain to the persons involved, and of course with the hope to settle the matter by restoring the faith and confidence of one in other. This is called alternative dispute resolution system or mechanism, in which courts are using modes of arbitration, mediation and conciliation to resolve the dispute preferably with the consensus of the parties. This has helped a lot to solve the matrimonial problems, and has put a great check on misuse of law by one better placed by law against the other having less privileges in courts of law. This has also helped in restoring the strength to the social units and institutions like family, marriage etc. which are sometimes embarrassed by the arrogance of the person privileged by law.

A new provision, section 498-A IPC was enacted in 1983 for putting a check on dowry related offences and other acts of cruelty by the husband and other family members of married women. It provides for punishment extending to 3 years and fine. The offence was made cognizable and non-bailable. The new provision was welcomed by society, but it was also found that it was being misused. Criminal prosecution under this provision were used for settling personal agendas which arose out of momentary disputes between spouses, without looking to the long term consequences. Entire families including minor school going brother and sisters, grandchildren, unmarried and married sisters-in law were roped in and faced prospect of arrests. In the eventuality of an arrest, the possibility of future reconciliation between the parties was diminished and family life was disturbed. Therefore, the Apex Court, the High Courts and the Government of India had been issuing directions from time to time for checking the misuse of section 498-A IPC.

The Apex Court after noticing the positive features and need for this provision for given protection to women who have been subjected to cruelty during marriage has also drawn attention to its potential for misuse, when for momentary disputes or for oblique reasons entire families are roped in. It has also called on the members of the Bar to check misuse of this provision, and not to file exaggerated complaints and to first endeavour to bring about reconciliation between the parties so that families are saved and there is peace in society. Even a short stint in jail drastically reduces the chance of compromise. The legislature and law commission have also been called upon to consider bringing about pragmatic changes in the related provisions for furthering the aforesaid objectives.

Thus in Preeti Gupta v State of Jharkhand, it has been observed that it is a matter of common experience that most of the complaints under section 498-A IPC are filed in the heat of the moment over trivial issues without proper deliberations. A large number of such complaints which are not even bona fide, are filed with oblique motive. At the same time, rapid increase in the number of genuine cases of dowry harassment are also a matter of serious concern. It was also said that the members of the Bar have enormous social responsibility and obligation to ensure that the social fiber of family life is not ruined or

1. AIR 2010 SC 3363, in paragraphs 30 and 31

114
demolished. They must ensure that exaggerated versions of small incidents should not be reflected in the criminal complaints. Majority of the complaints are filed either on their advice or with their concurrence. The members of the Bar who belong to a noble profession must maintain its noble traditions and should treat every complaint under section 498-A of Indian Penal Code as a basic human problem and must make serious endeavour to help the parties in arriving at an amicable resolution of that human problem. They must discharge their duties to the best of their abilities to ensure that social fiber, peace and tranquility of the society remains intact. The members of the Bar should also ensure that one complaint should not lead to multiple cases.

In Sushil Kumar Sharma v Union of India, the Supreme Court reiterated same view and stated that the object of the provision is prevention of the dowry menace. But many instances have come to light where the complaints are not bona fide and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the ignominy suffered during and prior to trial. Sometimes adverse media coverage adds to the misery. The question, therefore, is what remedial measures can be taken to prevent abuse of the well-intentioned provision. Merely because the provision is constitutional and intra vires, does not give a licence to unscrupulous persons to wreck personal vendetta or unleash harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. Till then the Courts have to take care of the situation within the existing frame work. The object of law is to strike at the roots of dowry menace but by misuse of the provisions a new legal terrorism can be unleashed. The provision is intended to be used a shield and not an assassin's weapon.

**Diluting the rigour of Bail:**

The HIGH COURT OF ALLAHABAD has taken a bold step in such matters and directed that the rigorous provisions of bail should be made lenient and liberal approach should be taken in such matters. In the case of Sanjeev Kumar and others v. State of U.P, the Court ruled:

“we further direct that dowry related cases or offences under section 498-A IPC, which are of minor nature involving no injuries or minor injuries, and where there has been no repetition of cruelty and no other special features exist for denying the benefit we recommend, the court concerned could consider releasing the accused persons on interim bail even on their personal bonds. This practice of releasing accused persons on interim bail on their appearance pending consideration of their regular bail pleas subsequently in some special classes of matters such as those involving matrimonial disputes and other minor matters has been subsequently in some special classes of matters such as those involving matrimonial disputes and other minor matters has been approved by the Apex Court in Lal Kamlendra Pratap Singh v. State of U.P. the Full Bench of this Court in Amrawati and another v. State of U.P., and a division bench of this Court in Sheoraj Singh @ Chuttan v State of U.P. and others.”

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2. AIR 2005 SC 3100 para-18
3.(crl. Writ petition No. 3322 of 2010 decided on 29-03-2011), 2011(2) JIC 481:: 2011 (73) AC 613,
4. (2009) 4 SCC 437,
5. 2005 Cri.L.J.755,
6. 2009(65) ACC 781.
The Mediation and Courts:

The court in the above noted case of Sanjiv Kumar\(^7\) also directed the lower courts or trial courts to use methodologies of mediation, conciliation and counselling in such matters to meet the ends of justice and preserve the institution of marriage to protect the organs of the society. The court directed to use these methods either by itself or by some other agency available at the District concerned.

The High Court directed:

“... the Magistrate concerned may try and bring about reconciliation between the parties either by himself, or in districts where some agency exists for bringing about mediation, conciliation or counselling, through the said agency. In cases where the Magistrate is not himself engaged in trying to bring about reconciliation between the parties, where Mediation/ Conciliation or counselling of the couples and their family members has been undertaken by some other agency, the said agency must report the fact of failure or success of the mediation/ conciliation etc. within a week of the conclusion of the exercise. Only when the Magistrate comes to the conclusion that the efforts for mediation or conciliation between the parties has failed, he may pass orders on the bail plea of the various accused persons on merit. By complying with these general directions the undue pressure on the High Court requiring filing of individual writ petitions, in cases where reports under section 498A IPC are filed against husbands or other family members, causing a huge backlog of arrears, leaving little time for the High Court to deal with murder appeals and other major matters, would be considerably reduced.”

Certainly we should not conduct a surgery when disease can be cured by a small pill of medicine. The cases relating to marital relations are on same footing, and they are not required to be dealt with the same rigour and approach as other criminal cases. In resolution of such disputes mediation and conciliation can be a very useful tool and it can help in reducing the number of cases, and level of apathy caused to social relations.

**The Role of Investigating Officer:**

The investigating officers in the such matters pertaining to matrimonial relations of conflicting persons can also play a vital role in settling the matters before reaching to the courts. In cases where due to mediation or otherwise if parties have settled their disputes the Investigating officer may take steps to end the matter with the final report subject to the final orders of the court.

In the same case of Sanjeev Kumar the Court held that in case where the parties have settled their disputes and there is no prospect of conviction the Investigating officer may consider the appropriateness of initiating criminal proceedings, if it has not so far been initiated in a particular case or of submitting a final report. The trying Magistrate may also consider passing appropriate orders at the trial accordingly.

\(^7\) supra note 3
Making it Compoundable and Bailable:-

The offences under section 498A are not bailable nor compoundable. The Courts being aware of these facts and in the changing scenario, have ordered and directed the government to make it bailable and compoundable, so that its rigour may be diluted and its abuse against the innocent persons may be prevented, with ultimate object to preserve the social fragments and institution and prevent the disorganization of social structure.

In Ramgopal v State of M.P.,8 the Apex Court has suggested to the Central Government and to the Law Commission to consider making offences under section 498-A IPC compoundable and bailable. Similar suggestions were given by a division bench of Allahabad High Court in Rajeev Verma v State of U.P.,9 to the Law Commission of U.P to consider recommending that the said offence could be made compoundable with the permission of the Court under section 320 Cr.P.C. and in case of Sanjeev Kumar10 directed the Secretary (Law) U.P., to give a response of the State government to this suggestion for making the said offences compoundable and/or bailable.

Counselling and Police:-

The police has first and foremost role in prevention of crime and in process of social reform. But the rigorous approach of police officials sometimes makes the situations worse. A very significant circular dated 13.10.2010 issued by the Director General of Police (DGP) of State of U.P is notable specifically in two directions as:

1. In matters under section 498-A IPC arrest of the accused should only be effected when it was imperative and unavoidable as observed by the Hon'ble Supreme Court in the case of D.K. Basu Vs. State of W.B., decided on 18.2.1996.11 The procedure for arrest should only be given effect to after efforts for bringing about mediation, counselling or conciliation between the parties had failed.

2. In such matters, before initiation of proceeding under section 498-A IPC, an effort should first be made for bringing about reconciliation between the parties by conciliation, counselling or mediation and only after the failure of the re-conciliation proceedings, when it appeared that an offence under section 498-A IPC or another provision was made out on the facts of the case, only then legal proceedings should be initiated. Counselling, conciliation etc. should be got done by professional educated advisors in the women's crime cells.

It was opined by the Court in the case of Sanjeev Kumar,12 for proper training to the officials so that their approach to matrimonial offences be changed. The Court said, that counselling should not take place at the police stations, which lack the proper atmosphere for mediation and either the matter should be referred to the agencies for mediation and conciliation in the Courts, and where unavoidable it should be conducted at a neutral place.

8. 2010 (7) SCALE 711
9. 2004 Cri.LJ 2956,
10. supra note 3
such as the police lines, or SSP/SP's office in the district headquarters or in the C.O.'s office or tahsil office etc. in the tahsils which are at a considerable distance from district headquarters. The help of volunteer lawyers or lawyers appointed by Legal Services Authority, and reputed NGO's, social organizations and individuals working on women and family issues, preferably who have received training in mediation, conciliation or counselling could be utilized for this purpose at various places. It was also suggested that the police officer entitled to facilitate mediation or conciliation should be at least of the rank of a Circle Officer. The State government should also render all help even at stage when the complainant approaches the police station. Police officials being the first point of contact when reports are lodged by the aggrieved wife or her family, if an attempt at reconciliation is made right from that stage and unnecessary arrests are initially avoided as suggested in the DGP’s circular dated 13.10.10, it may succeed in nipping the problem in the bud, especially where there are no injuries on the victim and the crime complained about is not so grave, and it is not a repeated offence. It would also help the police officers in being sensitized to the philosophy that crimes arising from matrimonial disputes are of a different nature from regular crimes, and in such offences first an attempt needs to be made for bringing about reconciliation between the parties, and the accused are not to be arrested straight away unless the offence is of grave nature or there is likelihood of recurrence of violence.

Thus the recent developments in approach to tackle the matrimonial offences has raised a hope that the fragments of society and its units and institutions would not be put to further erosion and social threads would be strengthened, to better and happy human civilization.

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THE PRIORITY OF CROWN DEBT: THE CONCEPT IN INDIAN SCENARIO

Akhileswar Prasad Mishra*

The doctrine of priority of crown postulates the preference of state claim over that of individuals. It also imbibes in itself the philosophy of state prerogative, in cases of recovery of dues whether they be in the form of duty, tax, or revenue. The concept originates with the English law and certainly it has attributes of monarchy form of governance or state, though which has been functioning under shelter of parliamentary democracy. The concept is residue of the arbitrary authority of state. The concept is relevant specifically in matters of taxation and revenue. It simply means that when there is competition between two or more creditors and one of them is state, the preference will be give to the state's claim, and its recovery will be in priority to other claims.

Generally, the rights of the crown to recover the debt would prevail over the right of a subject. Crown debt means the debts due to the State or the king; debts which a prerogative entitles the Crown to claim priority for before all other creditors.

The priority given to the Crown is not on the basis that the debt being a judgment-debt or a debt arising out of statute, but the principle is that if the debts are of equal degree and the rights of the Crown and the subject are equal, the Crown's right will prevail over that of the subject.

The English Law:
Crown debt in English Law is debt due to the crown i.e. state. The crown has been given priority for its debts before all other creditors by various statutes, the first dating from the reign of the Henry VIII of England (1541). In common law the crown always had a lien on the lands and goods of the debtors, which could be enforced even when they had passed into the hands of other persons. The difficulty of ascertaining whether lands were subject to a crown lien or not was often very great, and a remedy was provided by the Judgments Act 1839. Now by the Land Charges Act 1900, no debt due to the crown operates as a charge on land until a writ of execution for the purpose of enforcing it has been registered under the Land Charges Registration and Searches Act 1888. By the Act of 1541 specialty debts were put practically on the same footing as debts by record. Simple contract debts due to the crown also become specialty debts, and the rights of crown are enforced by a summary process.

Halsbury enunciates the law very succinctly in 2nd edn., Vol. VI, at p.584, "Where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being 'detur digniori'".

Halsbury in Third Edn. Vol. 7, p. 221, para 463 enunciates the law as follows:
"the royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her legal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England."

Herbert Broom states:

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1 [See Advanced Law Lexicon by P. Ramanatha Aiyer (3rd Edn.) p. 1147
2 "V. Lakkanna v. State"AIR 1970 MYSORE 198 (V. 57 C 50)
"Quando jus domini regis et subditi concurrunt jus regis praeferri debet. - Where the title of the king and the title of a subject concur, the king's title must be preferred. In this case detur digniori is the rule. ... where the titles of the king and of a subject concur, the king takes the whole.... where the king's title and that of a subject concur, or are in conflict, the king's title is to be preferred."  

The priority claimed has always been considered at any rate since Lord Coke enunciated the rule in Quick's case as one of the established prerogatives of the Crown in English Law. In Rex v. Wells, in a passage, Macdonald, C.B., said:

"I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the Kings's shall be preferred".

In New South Wales Taxation Commrs. V. Palmer, the Privy Council said:

"Except so far as the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests, of individuals are to be postponed to the interests of the community".

'In re Henley and Co.', the case that the Court was considering was of a property tax due to the Crown, and what was held was that the Crown had a right to payment in full of a debt due from the company for property tax before the commencement of winding up in priority to the other creditors, but what is of interest is the observation made by the learned Judges. At p.481 Lord Justice James says:

".... Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails."

Lord Justice Brett at p.482 enunciates the same proposition:

"...in the administration of the assets of the company the Crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects the light of the Crown must prevail."

Therefore, the priority given to the Crown is not on the basis of its debt being a judgment-debt or a debt arising out of statute, but the principle is as enunciated by Halsbury that if the debts are of equal degree and the rights of the Crown and the subject are equal, the Crown's right will prevail over that of the subject.

According to Dicey, prerogative is the residue of the discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown. However, the powers specially created by statute are not prerogative though powers do not cease to be prerogative simply because they have been declared by statute. The prerogative may be pro tanto merged in the statute and of course it can also be abridged or even superseded by statute containing express words to that effect, the reason being that the King as a party to the statute has consented to such a curtailment of his right.

3. Legal Maxims, 10th Edn., pp. 35-36
4. 9 Rep 129b
5. (1807) 16 East 278,
6. 1907 AC 179,
7 (1878) 9 Ch D 469 (D)
The Privy Council in - 'New South Wales Taxation Commissioners v. Palmer', approved of the decision in 'In re Henley and Co', (D). At page 185 Lord Macnaghten who delivered the judgment quoted with approval the remarks of Macdonald C.B. in - 'The King v. Wells', that the prerogative of the Crown rested upon a principle:

"...perfectly distinct ... and far more general; determining a preference in favour of the 'Crown in all cases and touching all rights of what kind soever, where the Crown's and the subject's right concur, and so come into competition."

In that case in the administration of the assets of a bankrupt the Crown was claiming preferential payment over all other creditors in respect of amounts due for land and income-tax and fines. It is true that this was also a case of a specialty debt, but the observations of the Privy Council are sufficiently wide to cover also contractual debts due to the Crown.

**The Concept in India.**

The concept is not unknown to Indian territory and it has its roots in Indian legal system since ancient times.

The ancient Hindu Law seems to have recognised a priority in favour of the King, and quoting *Yajnavalkya*:

"A debtor shall be forced to pay his creditors in the order in which the debts were contracted, after first discharging those of a priest or of the King".

On this topic, *Katayana* says, "if there be many debts at once, that which was first contracted shall be first paid, after those of a King or of a priest learned in the Veda."

The doctrine was prevalent and in practice in medieval age of history too. The Muslim Rulers in India were also not prone to waive or abandon such royal prerogatives as they found existing in India.

The British rulers also followed the same path and recognised the philosophy of precedence of state, as it was a common law doctrine. Most of the legal principles which were applicable to English law or common law have been made applicable to the Indian territory for the simple reason that it was a British colony for a long period, and during the reign of reign of the English, all the modern laws were evolved and implemented, whether it was through enactments or through decisions of courts of colonial rule.

The application of this common law doctrine that Crown debts have priority over other debts in India was considered by the High Court of Bombay as early as in 1869 in *Secy. of State for India v. Bombay Landing and Shipping Co.*, . Westropp, J., who examined this problem elaborately held that a judgment-debt due to the Crown in Bombay is entitled to the same precedence in execution as a like judgment-debt in England, if there be no special legislative provision affecting that right in the particular case. Similarly, it was held that a judgment-debt due to the Treasury of the State is entitled to a like precedence for the reason that such a debt is vested in the Crown and when realised, falls into the State Treasury. It was concluded that:

"In England the right of the Crown to precedence does not arise out of any peculiar quality in the writ or extent. The reasoning of Lord Coke and Chief Baron Parker rests on..."
a broader foundation, namely, that the destination of the debt, when recovered, is the State Treasury”.

This case came to be considered in a later judgment reported in - 'Secretary of State v. Vedavyas',\textsuperscript{15} and the divisional bench consisting of Barlee and N.J. Wadia JJ. pointed out\textsuperscript{16} that it was not disputed that the Crown was given priority by Common law, and a reference was made to 'Secy. of State for India v. Bombay Landing and Shipping Co.'\textsuperscript{17}, and the comment made was that the Common law priority is confined to unsecured debts.

There is a judgment of a Full Bench of the Madras High Court reported in - 'Manickam Chettiar v. I.T. Officer, Madura',\textsuperscript{18}. There also it was observed that the debt due to the Crown was a debt due under a statute, viz. the Income-tax Act, and the facts which were rather significant were that a decree-passed in favour of a private individual was being executed, that moneys were realised in the execution of the decree, and the Income-tax Officer applied that he should be paid the income-tax dues by the debtor in preference to the judgment-creditor, and what the Full Bench held was that the Court had inherent jurisdiction under S.151 to recognise the prior claim of the Crown and to discharge the debt of the Crown although the procedure laid down in the Income-tax.

In that case it was contended that as a private person could not enforce payment without first obtaining a decree, the Crown was in the same position. The argument was that a private person was governed by the provisions of the Civil P.C. and as there was nothing in the Code which placed the Crown in a different position the procedure there contemplated must be followed. The Court did not agree and said that this argument ignored the special position of the Crown, the special circumstances and the Court's inherent powers. The Court also said that it cannot be denied that the Crown had the right of priority in payment of debts due to it. It is a right which has always existed and has been repeatedly recognized in India. If the Crown is entitled as it is, to prior payment over all unsecured creditors, the position of secured creditors does not arise. There is no reason why the Crown should not be allowed to apply to the Court for an order directing its debt to be paid out of moneys in Court belonging to the debtor, without having to file a suit. Of course it must be a debt which is not disputed or is indisputable.

But during English rule, for a great period the defacto ruler was the East India Company, before taking over of the Crown, and this rose the question whether such priority could be assigned to the Company too. There is one decision in which a note of dissent was struck by the Madras High Court, and that is the decision in the case of Ramachandra v. Pitchaikanni,\textsuperscript{19}. In that case, certain land had been sold under the provisions of S. 10 of the Madras Abkari Act, 1864, for arrears due by an abkari renter. It was held that the purchaser at the sale did not take the land free of all encumbrances as in the case of a sale for arrears of land revenue under the provisions of the Revenue Recovery Act (Madras Act II of 1864). In that case a reference was made to the question as to whether Crown debts have priority, and Court expressed the opinion that the said doctrine would not be universally applicable and three reasons were cited in support of this view. The first reason was that the East India Company was only a corporation with limited powers of sovereignty delegated to it, and in

\textsuperscript{15} AIR 1936 Bom. 213.
\textsuperscript{16} Id. at p.217
\textsuperscript{17} Supra note 14
\textsuperscript{18} AIR 1938 Mad 360 (G)F.B.
\textsuperscript{19}(84) ILR 7 Mad 434
the Court it was treated as a subject; the second reason was that the right of Government to priority to a mortgage was not recognised in the mufassil which was evident by the express language of the Act which declared the land revenue to be a first charge on the land; and according to the Court, such a provision would have been unnecessary, if by Common law every debt due to the Crown was a first charge on the land. The third reason given by the Court was that the Court hesitated to import into places outside the Presidency towns the doctrine of the common law of England which would cause inconveniences to purchasers. Having set out these reasons, the Court, however, took the precaution of adding that it was not necessary for the purpose of the appeal before it whether debts due to Government in this country have the same preference over private debts as Crown debts in England. This observation was made, because in the case with which the Court was concerned, the hypothecation was in 1874, and the abkari revenue fell into arrear in a subsequent year, and it was held that even in England the lien of the Crown attached only from the time when the owner of the land became a debtor to the Crown, and since 1839 the common law has been greatly modified in England by statute for the protection of purchasers.

But, this view has been dissented from by Bhashyam Ayyangar, J. of the Madras High Court in Bell v. Municipal. Commrs. for the City of Madras, and, in the words of Varadachariar, J. in Manickam Chettiar, the weight of authority in support of the applicability of the common law doctrine in regard to tax dues in this country is so strong that no significance can be attached to these obiter observations.

The Supreme Court also did not rely on the judgement and it said in the case of "Builders Supply Corporation, M/s. v. Union of India" that the observations in question were obiter observations and it did not appear that the matter was elaborately argued before the Court, and considerations relevant for the purpose of deciding the point as to priority of tax dues were not been fully examined.

In the case of Governor-General in Council v. Shiromani Sugar Mills Ltd., also the applicability of the doctrine was discussed and appreciated by the Federal Court. In that case, the Federal Court was examining the provisions of S. 230 of the Indian Companies Act. Section 230 prescribes the order in which preferential payments should be made in winding up proceedings. Clauses (a) to (f) of S. 230 (1) lay down the order of preference in which the payments should be made; cl. (a) gives the highest priority in that order to all revenues, taxes, cesses and rates, whether payable to the Government or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date. Reading this section along with S. 232(2) which provides that nothing in S. 232 applies to proceedings by the Government, the Federal Court held that it was difficult to think of any reason for qualifying the priority in respect of the Crown debts specified in S. 230(1)(a), if it was intended that other debts due to the Crown should enjoy unqualified priority. Spens, C. J., who spoke for the Court, contrasted the provision contained in S. 230(1)(a) with the provisions of S. 49 of the Presidency Towns Insolvency Act, and S. 61 of the Provincial Insolvency Act, and held that priority could

20. ILR 25 Mad 457
21. Supra note 18
22. AIR 1965 SUPREME COURT 1061
23. 1946 FCR 40 : (AIR 1946 FC 16)
24. (No. VII of 1913)
25. (No. III of 1909)
26. ( No. V of 1920)
be claimed by the Crown in winding up proceedings only as prescribed by S. 230(1)(a) and within the limits specified therein. This conclusion postulates the applicability of the doctrine of priority of the debts due to the Crown and holds that as a result of the specific provision contained in S. 230(1)(a) the said doctrine must be worked in the manner prescribed by the said section and not outside it. 27

The question was again considered in the landmark judgment in Bank of India v. John Bowman, 28 where Chagla, C. J., elaborately dealt with question and during the course of his judgment, observed:

"If the debts are of equal degree and the rights of the Crown and the subject are equal, the Crown's right will prevail over that of the subject".

He further observed:

"Whatever may be historical origin of the principle which gives priority to the debts due to the Crown, when the English Courts came to consider this question, the principle had become a part of the common law of England. It is not so much because the Crown had any special privileges in England that this principle has been upheld but it is because the State in England has taken the place of the Crown and the English Courts have continued the privilege which was once the privilege to the State because they have realised that the State has certain rights and privileges which cannot be overlooked."

Applicability to Former Indian States:

The Supreme Court has considered the applicability of this common law doctrine to India in its decisions, namely-

1 (1) Builders Supply Corporation v. Union of India, 29
2 (2) Collector of Aurangabad v. Central Bank of India, 30

In the first case the question was whether Respondent 1, the Union of India is entitled to claim that the tax due to it from respondent No. 2 on account of the assessment years 1946-47 and 1947-48 has priority and precedence over the decretal amount due to the appellant M/s. Builders Supply Corporation from Respondent No. 2. The Court, while discussing the question as to the applicability of the common law doctrine that the Crown debts have priority over other debts in India considered the two Bombay decisions 31 and the decisions of the Madras High Court 32 and stated that the claim for priority made by respondent No. 1 (Union of India) has to be sustained because it is based on a common law doctrine which has been applied and upheld in that part of India which was known 'British India' prior to the Constitution.

And such a question as to whether the Common Law doctrine was accepted in some Indian States did arise for consideration in the second case namely, Collector of Aurangabad

27. See Builders Supply Corporation, supra. Note 22
28. AIR 1955 Bom 305
29. AIR 1965 SC 1061 (see note 22, supra.)
30. AIR 1967 SC 1831
31. (1) Secy. of State for India v. Bombay Landing and Shipping Co. Ltd. (1868-69) 5 Bom HCR 23
   (2) Bank of India v. John Bowman AIR 1955 Bom 305 (V 42) : ILR (1955) Bom 654,
32. (1). Ramachandra v. Pitchaikanni ('84) ILR 7 Mad 434,
   (2). Bell v. Municipal Commrs. for the City of Madras ('02) ILR 25 Mad 457 : 12 Mad 208
   (3). Manickam Chettiar v. Income-tax Officer, Madura ('38) AIR 1938 mad 360 (V 25) :
      (1938) 6 ITR 180 (FB),
The said case arose from the area of the former State of Hyderabad and the question involved was whether the debt due to Government in respect of arrears of sales tax has priority over the dues of state. In other words, the question was, whether the State is entitled to claim priority towards payment of sales tax according to the common law doctrine of priority of Crown debts. The Court, while considering the question about the applicability of the common law doctrine or priority of Crown debts, referred with approval to the decisions considered in earlier decision in Builders Supply Corporation, held that, that the English Common law doctrine of priority of Crown debts was not given judicial recognition in the territory of Hyderabad State before its incorporation into the Indian Republic and therefore could not be applied in the instant case, because there was no proof that the doctrine was given judicial recognition in the territory of Hyderabad State prior to January 26, 1950 when the Constitution was brought into force.

Therefore, it is now clear from the two decisions of the Supreme Court that the Common Law doctrine that crown debts have priority over other debts was, in general, applicable in that part of India which was known 'British India' and that being 'the law in force' it continued to be in force by virtue of Article 372 (1) of the Constitution of India. But the applicability of that doctrine to cases from Indian States depends upon the proof that the said doctrine was given judicial recognition by the concerned State.

Some of the doctrines of common law of England were administered as the law in the Presidency Towns of Calcutta, Bombay and Madras. The Common Law of England was not adopted in the rest of India. Doubtless some of its principles were embodied in the statute law of our country. That apart, in the Muffasil, some principles of common Law were invoked by courts on the ground of justice, equity and good conscience. It is therefore, a question of fact in each case whether any particular branch of the Common Law become a part of the law of India or in any particular part thereof.

Post Constitution:-

It is true that our Constitution sets up a democratic socialist republic and we would be loath to accept and give effect to any principle of law which was inconsistent with the democratic or socialistic principles which we have accepted in our Constitution. But it would be an exaggeration even to suggest that the England of today is not democratic or socialistic, and if the English Courts have upheld this principle, they could not have done so if they had realised that it was no longer consistent with the modern trends of constitutional theory prevailing in England today. Even in a democracy and even under socialism the State must have certain rights and privileges. The State has to govern, the State has to find money to be used for socialistic principles, and the Courts have always given every facility to the State to realise moneys which are not collected for any private purpose but are intended for the public coffer and which are ultimately intended for the public need. This principle which has been enunciated in the English Courts and which has been accepted by our Courts is not a principle which is peculiar to British jurisprudence.
If this principle formed part of the Common law of England, then that law has been preserved under Art.372(1) of the Constitution. This was the law in force in India immediately before the commencement of the Constitution and it must continue in force until altered or repealed or amended by a competent Legislature or other competent authority.

In *Murli Tahirram v. T. Aasoomal and Co.*, the Calcutta High Court, dealt with the origin and constitutionality of the right as follows:

“The origin in jurisprudence recognising priority of debts owing to the State must be sought in the fact of the conception of a State. This claim for priority arose in connection with the revenue claims of the State. A State in order to function had to collect revenue for the purpose of its administration. If the collection of such revenue was to be defeated by private claims as between subjects then it will be embarrassing for the Public Exchequer and will complicate, harass and impede the basic functions of the State. That is the juristic reason based on common sense for the growth of the constitutional doctrine that the revenue claims of the State must have precedence over all other private claims. The peculiar evolution of English law gave it the character of a prerogative of the Crown to collect revenue and therefore Crown debt was given the Priority on the basis of the law of prerogative. But the main justification for preserving the revenue claim's priority must remain in every State whether it is under a Crown or under the people or any other forms off Government. Notwithstanding the prerogative ideas of State in the modern age, the State still remains and has to remain by the very nature of its functions a tax collector. The jurisprudence and the law of public finance has, therefore, recognised the necessity of the priority for revenue claims. That is the reason why the republican character of the Constitution of India does not and cannot do away with the necessity of this Constitutional doctrine of priority for State debts. It is a law of necessity and good sense”.

The Supreme Court in the *Director of Rationing and Distribution v. Corporation of Calcutta*, was called upon to consider the question as to whether the decision of the Privy Council in *Province of Bombay v. Municipal Corporation of the City of Bombay*, which had laid down a certain rule of interpretation could be said to be law in force within the meaning of Art. 372(1). The majority judgment indicates that the rule of interpretation of statutes enunciated by the Privy Council amounted to law in force and as such, it continued to be in force even after the Constitution was adopted, with the result that according to the majority opinion, the rule of interpretation of statutes that the State is not bound by a Statute unless it is so provided in express terms or by necessary implication, is still good law. The common law is included within the expression "law in force" used by Art. 372(1). The judgment expressly states that the relevant expression "law in force" includes not only statutory law, but also custom or usage having the force of law and as such, it must be interpreted as including the common law of England which was adopted as the law of this country before the Constitution came into force. Where, for example, a royal prerogative dealing with a substantive right has been accepted by the Courts in India as applicable here also, it becomes a law in force which will continue in force under Art. 372(1) of the Constitution. Therefore this decision clearly shows that the rules, of Common Law relating to substantive rights which had been adopted by this country and enforced by judicial decisions,

38. Supra. 37
39. AIR 1955 Cal 423.
40. (1961) 1 SCR 158 : (AIR 1960 SC 1355)
41. 73 Ind App 271 : (AIR 1947 PC 34)
amount to 'law in force' in the territory of India at the relevant time within the meaning of Art. 372(1).  

Art. 372(1) of the Constitution provides, inter alia, for the continuance in force of existing laws. It lays down that notwithstanding the repeal by this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. The question which arises is whether this doctrine of priority which is based on common law and which was recognised by our High Courts prior to 1950, can be said to constitute "law in force" in the territory of India at the relevant time. In other words, is this doctrine of common law which was introduced in this country and followed, law in force within the meaning of Art. 372(1)? If it is, then by virtue of Art. 372(1) itself, the same law would continue to be in force until it is validly altered, repealed or amended.  

Thus the principle of crown-debt as such pertains to the common law principle. A common law which is a law within the meaning of Article 13 of the Constitution is saved in terms of Article 372 thereof. Those principles of common law, thus, which were existing at the time of coming into force of the Constitution of India are saved by reason of the aforementioned provision.  

**The Doctrine and Art. 14 of the Constitution:**  

The law of equality before law is enshrined under Article 14 of our constitution, and precedence to state gives rise to apprehension of violation of it. In The case of *Bank of India*  

The Bombay High Court held that it is not true to say that the State is denying equality before the law to any person by claiming this special privilege. Article 14 would only be offended against if the State made a discrimination between one creditor and another or between one class of creditors and another. It may be a creditor, but the right which it claims is in its capacity as the State and its contention is that as it is the custodian of public welfare, as moneys which it is claiming belong to the coffers of the State and are to be used in public interest, it should be given precedence over private creditors who have not to discharge the duties or responsibilities of the State. The Court held that the Common law with regard to priority of debts due to the State is not in any way inconsistent with the fundamental rights embodied in Part III of the Constitution.  

**The Common law Doctrine and Statutory Provisions:**  

A debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property prevail over the Crown debt which is an unsecured one. It is trite that when a Parliament or State Legislature makes an enactment, the same would prevail over the common law. Thus, the common law principle which was existing on the date of coming into force of the Constitution of India must yield to a statutory provision. To achieve the same purpose, the Parliament as also the State Legislatures inserted provisions in various statutes, that the statutory dues shall be the first charge over the properties of the tax-payer.

42. See note 40 supra.  
43. See note 22, supra, builders' supply case.  
44. “Union of India v. SICOM Ltd.”2009 AIR SCW 635  
45. See Bank of India supra. Note 28 & 31(2)  
46. See note 44 supra.
In *M/s. Builders Supply Corporation* the Supreme Court construing Section 46(2) of the Income-tax Act, 1922 which enabled the Income Tax Officer to forward to the Collector a certificate specifying the amount of arrears due from an assessee and requiring the Collector, on receipt of such certificate, to proceed to recover from the assessee in question the amount specified as if it were an arrear of land revenue, held that Section 46(2) does not deal with the doctrine of the priority of Crown debts at all; it merely provides for the recovery of the arrears of tax due from an assessee as it were an arrear of land revenue. This provision cannot be said to convert arrears of tax into arrears of land revenue either; all that it purports to do is to indicate that after receiving the certificate from the Income-tax Officer, the Collector has to proceed recover the arrears in question as if the said arrears were arrears of land revenue. The other alternative remedies for the recovery of arrears of land revenue are prescribed by sub-sections (3) and (5) of section 46.

Where a first charge has been created by a statute it will be given preference to all other dues and debts. In Fisher and Lightwood's *Law of Mortgage* where the statutory charges are discussed. In dealing with a statutory charge in favour of rating authorities in respect of rating surcharges for unused commercial buildings under the General Rate Act, 1967, it is stated that "a statutory charge has priority to the interest of the mortgagee under a mortgage existing when the charge arose". In the case of *Westminster City Council v. Haymarket Publishing Ltd.* the English Court of Appeals was required to consider whether a statutory charge on the property under the General Rate Act would have priority over a legal mortgage on the property existing when the charge came into being. It was argued that the charge would be only on the mortgagor-owner's interest in the property i.e. on the equity of redemption. The court negatived this contention. It held that "charge on the land" imposed for an unpaid surcharge was not confined to a charge on the owner's interest in the premises when the charge arose, but extended to a charge on all the estates and interests in the premises existing when the charge arose. The rating authority's charge would have priority over the bank's interest as a mortgagee.

What is meant by a "first charge"? Does it have precedence over an earlier mortgage? As set out in *Dattatreya Shanker Mote v. Anand Chintaman Datar*, a charge is a wider term than a mortgage. It would cover within its ambit a mortgage also. Therefore, when a first charge is created by operation of law over any property, that charge will have precedence over an existing mortgage.  

**Secured and Unsecured Debts:**

The doctrine of priority of state is concerned about unsecured debts and there is no precedence to state in case of secured Debts. *Rasbehary Ghose* states in *Law of Mortgage* "it seems a government debt in India is not entitled to precedence over a prior debt."

The secured debts includes mortgages pledges and pawns. In *Giles v. Grover* it has been held that the Crown has no precedence over a pledgee of goods.

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47. See note 22 supra.
48. 10th Edn. at page 33
49. (1981) 2 All ER 555,
50. (1974) 2 SCC 799
52. TLL 7th Edn., P 386.
53. *1832 (131) ER 563*
In *Bank of Bihar v. State of Bihar and Ors.* 54, in which the sugar was seized from its custody as security for payment of the debts or advances made to Defendant in its cash credit account. There were arrears of certain cess due from Defendant. The Cane Commissioner took proceedings under the Public Demands Recovery Act and attached the price of the sugar which had been deposited by the appropriate authorities in the Government Treasury instead of being paid to the plaintiff. It was held that the Cane Commissioner indisputably did not have any right of priority over the other creditors of Defendant and, in particular, the secured creditors. Section 172 of the Contract Act defines a pledge to mean the bailment of goods as security for payment of debt or performance of a promise.

The Andhra Pradesh High Court in *Sitani Textiles and Fabrics (P) Ltd. v. Asstt. Commissioner of Customs and Central Excise, Hyderabad* 55 held that in the case of a pledge, pawnee has special property and lien which is not of an ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnor has any right to take away goods or its price. The right of a pawnee could not be extinguished by the subsequent attachment/seizure of the goods under any other law. It gives the Pawnee a primary right to sell the goods in satisfaction of the liability of the pawner. An unsecured creditor could not have any higher rights than the pawner and was entitled only to the surplus money after satisfaction of the secured creditor’s dues.

A Three Judge Bench of the Supreme Court in *Dena Bank v. Bhikhabhai Prabhudas Parekh and Co. and Ors.* 56 dealing extensively with the doctrine of priority to Crown Debts, held that, the Crown’s preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown’s right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already.

The principle laid down in *Dena Bank* 57 was reiterated in *Bank of India v. Siriguppa Sugars and Chemicals Ltd.* 58 wherein the sugar was pledged with the appellant Bank for securing a loan of the first respondent and the loan had not been repaid. The goods were forcibly taken possession of at the instance of the revenue recovery authority from the custody of the pawnee, the appellant bank. It was held that the goods were validly pawned to the appellant bank, the rights of the appellant bank as pawnee cannot be affected by the orders of the Cane Commissioner or the demands made by him or the demands made on behalf of the workmen. Both the Cane Commissioner and the workmen in the absence of a liquidation, under Sections 529 and 529-A of the Companies Act, 1956, stand only as unsecured creditor and their rights cannot prevail over the rights of the pawnee of the goods. Thus, the rights of the appellant bank over the pawned sugar had precedence over the claims of the Cane Commissioner and that of the workmen.

**Code of Civil Procedure:**

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54. [AIR 1971 SC 1210]
55. [1999 (106) ELT 296 (AP)]
56. [(2000) 5 SCC 694=AIR 2000 SCW 4237]
57. See note 56 supra.
58. [(2007) 8 SCC 353: AIR2007 SCW 5088]
Section 73 of C.P.C. is material on the point which provides that proceeds of execution sale are to be rateably distributed among the decree-holders, after deducting the cost of the realization. It also provides that it will not affect the rights of the government.

In *Union of India v. Somasundram Mills (P) Ltd. and Anr.* 59 The Supreme Court while construing the provisions of sub-sections (2) and (3) of Section 73 of the Code of Civil Procedure, held that it is a general principle of law that debts due to the State are entitled to priority over all other debts. If a decree holder brings a judgment-debtor's property to sale and the sale proceeds are lying in deposit in court, the State may, even without prior attachment exercise its right to priority by making an application to the executing court for payment out. If however, the State does not choose to apply to the court for payment of its dues from the amount lying in deposit in the court but allows the amount to be taken away by some other attaching decree holder, the State cannot thereafter make an application for payment of its dues from the sale proceeds since there is no amount left with the court to be paid to the State. However, if the State had already effected an attachment of the property which was sold even before its sale, the State would be entitled to recover the sale proceeds from whoever has received the amount from the court filing a suit. Section 73(3) read with 73(2) CPC contemplate such a relief being granted in a suit.

**Attachment and sale prior to claim of State:**

Where in relation to its dues the State had already effected an attachment of the property, though such property is sold in execution by private decree holder before its sale after attachment by State, the State would not be denied to recover the sale proceeds from such decree holder by filing a suit. The debts due to the State are entitled to priority over all other debts. And it cannot be said that the amount had already been taken away by the decree holder and the State could no longer exercise its right to priority. The Supreme Court in *Union of India v. M/s. Somasundaram Mills (P) Ltd.* 60 said that if a decree holder brings a judgment-debtor's property to sale and the sale-proceeds are lying in deposit in Court, the State may, even without prior attachment exercise its right to priority by making an application to the executing Court for payment out. If however, the State does not choose to apply to the Court for payment of its dues from the amount lying in deposit in the Court but allows the amount to be taken away by some other attaching decree holder, the State cannot thereafter make an application for payment of its dues from the sale proceeds since there is no amount left with the Court to be paid to the State. However, if the State had already effected an attachment of the property which was sold even before its sale, the State would be entitled to recover the sale proceeds from whoever has received the amount from the Court by filing a suit. S. 73(3) read with 73(2) C. P.C. contemplates such a relief being granted in a suit.

**Claim of priority after Ratable Distribution :-**

When the question of ratable distribution between the decree-holders and the State which has statutory priority is decided and determined, and then Court orders as to how to appropriate the assets of the judgment-debtor, the rights of the parties become crystallized and clear. What remains is to give effect to the determination made by the Court by officials in charge of concerned departments dealing with accounts and cash which is only a ministerial act. The rights of the respective decree-holders or claimants are governed by the order for ratable distribution passed by the Court as a result of the adjudication and determination made by the Court.

From the point of time that an order for ratable distribution is passed by the

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60. AIR 1985 SUPREME COURT 407
executing court the monies in question cease to be the property of the judgment-debtor and become the property of the decree-holder, regardless of whether or not actual payment pursuant to the said order is made. As early as in 1922 the Madras High Court in *Official Receiver of Tanjore v. M. R. Venkatarama Iyer*, 61 has taken the view and held that from the time of the order of rateable distribution the money must be treated as belonging, not to the judgment-debtor, but to the decree-holder in whose favour the order was passed. The section does not speak of distribution to the credit of the different decrees, but of distribution among the decree-holders. The latter are entitled to draw it out at will; and the judgment-debtor most certainly is not.

The Calcutta High Court in *Basanta Kumar Bhattacharjee v. Panchu Gopal Dutta*, 62, has also taken the same view and held that the order allowing the application for rateable distribution should be reasonably read as deciding that the decree-holders had title to the money. What remained to be done was the ascertainment of the exact amount which each decree-holder was entitled to and payment of the same. The decision as regards title had already been made and with the decision that the money was the decree-holder’s money, the position, was that it could no longer be considered in law to be the judgment-debtor’s money. The question of priority of the State’s claim does not, therefore, fall to be decided.

The High Court of Bombay has in *Income-tax Officer, Ward C, Sangli v. Chandanbai Balaram Doshi*, 63, articulated the principle that the scheme clearly indicates that until the Court has directed appropriation of the amount to the claim made by the decree-holder or of creditors entitled to rateable distribution, the amount received in Court continues to remain as of the judgment-debtor.

By necessary implication it means that as soon as an order for rateable distribution is made, the amount ordered to be distributed will cease to be the property of the judgment-debtor.

The Supreme Court also followed the same path and held that once the Court orders for the ratable distribution of the assets of the judgment-debtor, the rights of the parties are clear and nothing further remains to be done by the Court in the judicial sphere thereafter. The test which can be usefully applied is to pose the question whether the said officials can refuse to implement the order by refusing to make payment once the Court has passed the order. The answer is that, they cannot. 64

61. AIR 1922 Mad 31
62. AIR 1956 Cal 23
63. AIR 1957 Bom 91
64. The Supreme Court in case of *"Kotak and Co. v. State of U.P." AIR 1987S.C. 738* said:

“As soon as the question of rateable distribution between the decree-holders and the State having statutory priority is determined, and the Court passes an order as to how to appropriate the assets of the judgment-debtor, the rights of the parties become crystallised. What then remains is to give effect to the determination made by the Court by officials in charge of concerned departments dealing with Accounts and Cash which is a ministerial act. The rights of the respective decree-holders or claimants are governed ... by the order for rateable distribution passed by the Court as a result of the adjudication and determination made by the Court. Nothing further remains to be done by the Court in the judicial sphere thereafter. The order partakes of the character of a judgment and decree passed by the Court. What the officials of the Accounts and Cash department are required to do thereafter is to carry out the command of the Court by implementing or giving effect to the order. The test which can be usefully applied is to pose the question whether the said officials can refuse to implement the order by refusing to make payment once the Court has passed the order. Obviously and undoubtedly they cannot. Therefore it is evident that nothing turns on whether or not actual payment pursuant to the order of the Court is made. And when the Court officials make payment to the
Property in Hands of Receiver:-

What is the character of the money realised by the receiver in the perception of rents and profits of the hypotheca from the charged property in his possession in a case where he is appointed in a suit commenced by the mortgagee or the charge holder for the recovery of the amounts due to him? If the appointment of a Receiver in an action to enforce a mortgage or a charge cannot and does not enlarge the rights of the creditor by augmenting his security or by conferring further rights in his favour than what was created by the parties themselves under the terms of their contract or what enures in his favour by the operation of the substantive law governing the contract, the creditor cannot put forward any special right in preference to other simple money creditors of his debtor.

In this view of the matter any debt due by the debtor to the Crown will of course have priority over the claims of all the other creditors of the debtor inclusive of the creditor who made the properties custodia legis by the appointment of a receiver in enforcement of a mortgage or charge over the corpus of the properties.

Recall of Cheque for payment of Govt. dues:-

The Court can, in appropriate cases where it has directed to issue cheque, can recall it, if it later on finds that there are also government dues to be paid. The Andhra Pradesh High Court in *Badam Thripurasundaramma, v. State of A.P., Kakinada,* held as:

1. The position of law in commercial world is that cheque, unless dishonoured or established otherwise, is normally presumed to be a conditional payment. It is money's worth and on payment it operates as discharge of liability thereunder. Title in the money passed dates back to the date of cheque or payable due date. In case of dishonour the liability revises and the creditor would fall back on his original claim;
2. The drawer has power to treat the cheque cancelled on giving due instructions to his bankers to dishonour. The bank is bound as an agent to obey the instructions and pay at its peril;
3. (a) As a corollary to these principles, I hold that in case of payment by cheque by a Court, it serves as a voucher or authorisation to collect the money from its account with no legal consequences attended thereto;
   (b) encashment of the cheque and receipt of the sum, amount to appropriation;
   (c) title in the money passes on actual realisation,
   (d) the right of the judgment-creditor is nebulous and gets fruitioned only on actual receipt of the money; and
   (e) Mere passing an order to pay the amount does not amount to setting apart or earmarking the amount to the decree-holders;
4. Before withdrawal, if the Court is intimated of the preferential claim of State's debt due and payable by the judgment-debtor, court is to order payment thereof to the decree-holder, they make payment because the property in the said monies has vested unto them by virtue of the order of distribution passed by the Court. What is being paid by the officials of Accounts and CashSections will be the decree-holder's money, it having ceased to belong to the judgment-debtor the moment the order for distribution was made, even though actual disbursement was made later. If the State lays its claim after the order for distribution is made by the Court, it will be of no avail as the property would have gone beyond the reach of the State, it having ceased to be the property of the debtor against whom the State had a claim. No question of priority can arise in that situation - the State having missed the bus.”

65. Collector, Tiruchirapalli v. Trinity Bank Ltd. AIR 1962 MADRAS 59 (V 49 C 11)(FULL BENCH)
66. AIR 1984 A. P. 305
Government, in defeasance to the claim of the unsecured creditor. This is founded on
the principle that the loss of title in the money by the judgment-debtor is conterminous
with the acquisition of title thereof by the judgment-creditor. Till the happening of
that event, the Court continues to have jurisdiction to deal with the money at its
control and has power to take note of the priority of State's debt and to work out
equities. This conclusion could be well illustrated by a hypothetical case thus. The
judgment-debtor in pursuance of the notice in execution brings cash and in the
presence of the Court makes over payment to the decree holder. On its receipt the
latter acquires title and the Court after coming to know immediately thereafter of the
preferential claims of the State's debt, has no power to recall the payment and direct
the judgment-debtor to pay it over to the State Government. In this view, it was held
that the petitioner acquires title in the money only on her actual realisation on
encashment of the cheque.

The immediate question that then arises for consideration is whether the executing
Court has power to recall. As said earlier the Court exercises its inherent power as a Court
of equity, justice and good conscience. It is free to exercise its inherent power when the
exercise thereof is not inhibited by (a) express grant of power, or (b) necessary limitation or
(c) in conflict with settled principles of law or (d) against statutory intendment. The Court,
when it is intimated by the State of its debt due by the judgment-debtor and found to be a
preferential claimant; if the amount at its control is not withdrawn from its account, it is its
duty to meet the ends of justice; to avoid needless expenses to the State and multiplicity of
proceedings; in cognizance of the paramount public interest envisaged under the
Constitution, to exercise and in fact has power to recall the order and the cheque. This
exercise of the power is inherent in the Court.

Filing of Suit and Inherent powers:-

To recover its due in a matters under litigation the state or crown need not apply for a
fresh suit, rather it should give an application before the executing court for the purpose
of recovery of dues. In the case in 'Manickam Chettiar v. I.T. Officer, Madura', 67, it was
contended that as a private person cannot enforce payment without first obtaining a decree,
the Crown should do the same. But the Court held that the crown should not be
compelled to file suit afresh and court should exercise its inherent powers because of special
position of the crown.

The judgment then dealt with the inconveniences that would result if the Crown were
not able to apply to the Court without obtaining a decree, and said that both right and
convenience demand that the Court should exercise its inherent power. 68

67. AIR 1938 Mad 360 (FB)-- Leach, C.J., delivering the opinion of the Full Bench, dealt
with the contention as follows :-

"The argument is that a private person is governed by the provisions of the Civil P.C. and as there is
nothing in the Code which places the Crown in a different position the procedure there contemplated must be
followed. I am unable to agree. This argument ignores the special position of the Crown, the special
circumstances and the Court's inherent powers. It cannot be denied that the Crown had the right of priority
in payment of debts due to it. It is a right which has always existed and has been repeatedly recognised in
India. If the Crown is entitled as it is, to prior payment over all unsecured creditors the position of secured
creditors does not arise. I see no reason why the Crown should not be allowed to apply to the Court for an
order directing its debt to be paid out of moneys in Court belonging to the debtor, without having to file a
suit of course it must be a debt which is not disputed or is indisputable."

68. The said judgment has been relied upon and followed in "State of Kerala v. E. P.
Mathew"AIR 1961 KERALA 18 (Vol. 48, C. 5)
**Limitation Act:**

The fact that in the case of the Government, if a claim becomes barred by limitation, the loss falls on the public, i.e., on the community in general, and to the benefit of the private individual who derives advantage by the lapse of time, in itself, would appear to indicate a sufficient ground for differentiating between the claims of an individual and the claims of the community at large. Next, it may also be mentioned that in the case of governmental machinery, it is a known fact that it does not move as quickly as in the case of individuals. It is in this background that the question of the special provision in Art. 149 has to be viewed.

On these principles as well as on the ratio underlying the decisions upholding the validity of the special provisions for the recovery of the Government claims if has been held that there is a rational basis for treating the Government differently as regards the period of limitation and therefore Art. 149 does not offend Art. 14 of the Constitution. 69

The principle of priority of Government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well-recognised principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign government at all. It is essential that as a sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasises the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues. The justification of the priority, therefore, is that the debts to which it attaches feed the public funds and the reason why they are preferred to debts owed to private individuals is that the needs of the State are supreme and the necessity of keeping the State functioning is the first necessity of any organised society. We have seen that the common law doctrine of priority of crown debts would not extend to providing preference to crown debts over secured private debts. Principle of Crown debt as such pertains to the common law principle. A common law which is a law within the meaning of Article 13 of the Constitution is saved in terms of Article 372 thereof. It can hardly be said that the Crown's prerogative was a right personal to the monarch who held the Crown and since the form of the present Government of India is not monarchical but republican, there cannot possibly be any prerogative right, consistently with a Constitution which has an elected President at its head. Although the Crown's prerogative in England might have been a personal right in ancient theory and may historically have arisen out of the feudal character of the State-organisation, there can be no doubt that it has, since come to be equated with the rights enjoyed by the Government of the day as representing the State. This conception of the priority of State debts is equally valid in the case of States which are republican in form, because they also require funds to maintain themselves and to perform the high functions which are among the responsibilities of any State. The principle of the priority of State debts cannot be said to be repugnant to the provisions of our Constitution. The principle therefore has crossed over the dividing line between Crown-ruled and Republican India and become a part of the law of the latter.

INTRODUCTION

As a small understanding child, my first introduction about poverty and its removal was in the context of the eternal story of “Krishna and Sudama”. Despite being far removed in terms of prosperity, Krishna and Sudama were great friends. Out of despair, when Sudama went to meet Krishna, the Great Lord removed the poverty of Sudama and endowed him with great endowments and prosperity. The story stayed with me, and, as a thinking adult, looking around the great despair and poverty in our country, I always have had the imagination, that the State which in a welfare state, is the guardian of all its citizens, some day like Krishna shall remove the poverty of millions of its Sudamas. I don’t know, if this wish of mine is ever going to be fulfilled, but I still have tremendous hope in the organs of the State and its instrumentalities, that before my soul departs from my body, my wish shall be fulfilled. Here like my other brother countrymen, by fault or design the greatest hope rests on the Judiciary.

On the occasion of the inauguration of the Supreme Court of India, M.C. Setalvad, the first Attorney General of the Republic of India had prophetically said “We hope and trust that this Court will play a great and singular role and establish itself in the consciousness of the Indian “people.”

These words have indeed proved to be prophetic in that while the faith of the people has been rudely shaken in the other two organs of the Government i.e. the Legislature and executive, as also in the subordinate judiciary in some parts of the country, our fellow citizens almost unanimously feel that our Supreme Court has indeed ‘established itself in the consciousness of people’.

Dr. Ambedkar who maintained that our constitution was essentially socialist warned the constituent Assembly:

“We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy”.

Social democracy means a way of life which recognises liberty and equality as the principles in life.

The dynamics of development means in the Indian setting, humanizing to a high degree the deprived tribals, dalits and other marginalized sections of the society. Gandhiji deploring the inequality in our society wrote, “A non-violent system of government is clearly

* Deputy Secretary, State Legal Service Authority, UP, Lucknow.

1 Speech on 28th January, 1950 (the day on which the Supreme Court of India was inaugurated)
an impossibility so long as the wide gulf between the rich and the hungry million persists. A violent and bloody revolutions is a certainty one day, unless there is a voluntary abdication of riches and the power that riches give and sharing them for the common good”.

All the institutions of national life are bound, under Article 38 of the Indian Constitution, to enliven social and economic justice and the three major instrumentalities of the State the Executive, the Judiciary and the legislature are equally obligated functionally to fulfill, in their respective spheres, this sublime responsibility.

Few years back, a prominent intellectual of our country has remarked, “India annually gets richer by 200 billion. India’s foreign resources have exceeded 140 billion. Remember the country had to mortgage its gold in London because the foreign exchange coffers were dry. In the list of world’s billionaires, 27 of the world’s richest people are Indian, most of them staying in India. A large portion of the world’s poorest people live in India too and you don’t need to go to Davos to meet them. Our country’s poor live below a poverty line that seems to be drawn just this side of the funeral pyre. 250 million people living in conditions that are a blot on our individual collective consciences is too grave a matter to be lightly dismissed”.

**Economic Reforms and the Question of its Constitutionality**

All the Institutions under the Constitution or under any Statute have to adhere to the principles provided under the Constitution. The Judiciary more particularly the Supreme Court of India is both a creation of the Constitution of India, as well as draws its powers directly from the same document. The Supreme Court over the years has zealously guarded the sanctity of the Constitution, and, has even in most challenging times largely tried to safeguard the Supremacy of the Constitution and the principles declared under it.

The jurists as well as the Courts have divergent views about the economic goal and philosophy of the Constitution. While H.M. Seervai holds that the only philosophy visible in the Indian constitution is economic philosophy; Prof. Upendra Baxi on the other hand advocates socialist ideology for constitutional set up.

“Prominent Judges like Dr. P.B Gajendragadkar, V.R. Krishna Iyer, D.A. Desai and O Chinnappa Reddy have also interpreted the Constitution as “Socialist”. But Socialism has many shades. Thus while Dr. P.B. Gajendragadker has favoured “Pragmatic Socialism”, D.A. Desai has interpreted it as “Gandhian Socialism”, V.R. Krishna Iyer sometimes spoke of “True Socialism” and sometimes Gandhian Socialism.

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1 (Sashi Tharoor, the Tiger Elephant, the Tiger and the Cell Phone)

2 Upendra Baxi ‘Pre-Marxist Socialism and Supreme Court of India’; (1983) SCC JOUR 3.

3 Falakchad Himatlal vs. State of Maharashtra; (1977)2SCC 670

4 Akadasi Pradhan Vs. State of Orissa; AIR 1963 SC 1047

5 D.S Nakara Vs. Union India; AIR 1983 SC 130

6 Dr. Debabrate Mukherjee, Economic Goal and Philosophy of the Constitution of India.
The Beginning:

The New Economic Policy of India was announced on 24.07.1991. It was aimed at meeting India’s competitiveness in the global market; rapid growth for exports, attracting foreign direct investment; and stimulating domestic investments. The reforms which gave a market orientation to our economy, also gave autonomy and flexibility in commercial sectors to the Government companies. Entry into production and services is not a barrier in most of the sectors. The state has shown eagerness to divest its capital from the public sector. Old foundations are being dismantled to give way to new. Likewise, to cope with the new realities old laws have given way to a new ones, for example, legislations like competition Act or the Foreign Exchange Management Act, have come to occupy the centre stage. Regulatory authorities have been established to provide level playing field in sectors such as telecom, insurance, security market, etc. This has become a subject matter of debate, while authorities like late H.M. Seervai have supported the reform, another group including Justice V.R. Krishna Iyer, Upendra Baxi and to some extent economist Amartya Sen are critical of the new economic policy.

Divergent Opinions:

Different shades of opinion have been expressed, about the constitutionality of economic reforms. The way in which such probing decisions can be looked at also varies, on many occasions according to the philosophical perspective of a Judge. According to Cardozo, the decisions of the courts on economic questions depend upon the economic philosophy of the Judges. When lawyers and judges adhere too rigidly to legal rules, they lose sight of the broader purposes for which those rules were created to do justice. Perhaps worse, rules create abstract categories that mark the humanity at the centre of legal controversies.

Justice O. Chinnappa Reddy, has stated that “the policies of privatization, denationalization and disinvestment appear to be in the teeth of several mandates contained in the Directive Principles of State Policy and also opposed to the principle of ‘Socialist State’ proclaimed in the preamble of the Constitution. The policies of liberalization and globalization appear to amount to a surrender of sovereignty to outside agencies”.

The Supreme Court has observed, “When considering an application for staying the operation of a piece of legislation, and that too pertaining to economic reform the Courts must bear in mind that unless the provision is manifestly unjust or glaringly unconstitutional, the courts must show judicial restraint in staying the applicability of the same. It is now well settled that there is always a presumption in favour of the constitutional validity of any legislation.”

Impact of The reforms on Poverty

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1 N. Cardozo, nature of Judicial Process
2 John T. Noonan
3 O Chinnappa Reddy, the Court and the Constitution of India.
4 Bhavesh D. Parish vs. Union of India; AIR 200 SC 2047
Despite the recent news stories highlighting the growth in India’s economy, and the new wealth this is creating, poverty is still rampant in India.

The Planning Commission of India in an affidavit on BPL estimates filed before the Supreme Court said the Tendulkar Committee recommendations, applied to 2004-2005, National Sample Survey data, has estimated poverty ratio of 37.2 per cent for the urban areas and 41.8 per cent in rural areas.

The World Bank estimates that a third of the global poor now reside in India and this country has a higher rate of malnutrition among children under the age of 5 (42 per cent in the year 2011) than any other country in the world.

Poverty is a social construct that may have material, social and even a psychological dimension. In the material sense, poverty may relate to a whole lot of deprivation syndrome that may mean lack of food, lack of shelter, lack of healthcare, lack of opportunities for development and so on. The poor may be identified as people suffering from hunger or victims of starvation, the homeless, the landless, the marginalized, etc.¹

The Supreme court in Islamic Education Society vs. State of Karnataka² has observed, “Right to Development is also a human right. “Development” connotes an ongoing process. An economic prosperity or elimination of poverty is not the only good to be achieved but along with it allows individuals to lead a life with dignity with a view to participate in the Governmental process so to enable them to preserve their identity and culture”

Views of the ex Chief Justice of India:

Justice K.G. Balakrishnan, as a Serving Chief Justice of India, analysing the overall impact of the economic reforms in an extra judicial uttering³ has made an elaborate analysis in these words “There is no doubt that the progressive lowering of restrictions on foreign investment and private enterprise has led to the expansion of several sectors such as banking, telecommunications, information technology, broadcast media and infrastructure among others. ......However, there is no consistent correlation between the quantitative growth of foreign trade and investment on the one hand and the indicators of social welfare and inclusive development on the other hand. Many economists have argued that the progressive financial sector reforms have only benefited the traditionally elite sections of society and that the ‘trickle-down’ benefits for the masses have been negligible. Some have even argued that the forces of economic globalisation have actually widened the existing socio-economic inequalities. A glaring symptom of the same is the rapidly increasing rates of migration between the rural areas and the urban centres.

Millions of people leave their country-side homes each year with the hope of better employment prospects. Instead many of them end-up living in even worse conditions in the cities where the infrastructure has not kept up with the rise in population. Our persistent

¹ B.B. Pandey, Poverty, the poor and Equality
² AIR 2003 SC 3724
³ Lecture on Judicial Protection of Rights in the context of changing Economic conditions, Minsk, Belarus ( April, 2010)
failure to provide quality education and healthcare to a large part of our population further exacerbates the socio-economic inequalities in our society. This on many occasions results in localised conflicts between the ‘haves’ and the ‘have-nots’, which are often re-enforced by traditional social divisions based on caste, religion and regionalism. In such a scenario the onus is on the government and the legal system to devise strategies for ensuring a more equitable distribution of the pie.

The construction of several large infrastructural projects as well as increasing investments in sectors such as steel manufacturing and mining has also created several legal complications. Especially in forested areas populated by tribal communities, several disputes have arisen from forcible land-acquisition. Sometimes companies take advantage of the lack of awareness and bargaining power on part of tribal communities to displace them from their traditional lands. Such disputes that involve questions of adequate compensation, rehabilitation and even environmental protection in some cases – are amongst the foremost challenges for the Indian legal system today. Policy-makers and judges are frequently called upon to walk a tightrope between the competing interests of promoting economic growth and protecting the rights of local communities. Even though the state exercises ‘eminent domain’ over land and natural resources, sometimes it is not appropriate to rely on utilitarian considerations to decide disputes involving the same. Due weight-age must be given to the customary rights as well as the ‘right to livelihood’ of local communalities, even if the same results in the loss of some investment opportunities.

Perspective of the Supreme Court to Economic Reforms

In Fertilizer Corporation Kamgar Union (Regd.) vs. Union of India¹, the Supreme Court observed “We certainly agree the judicial interference with the administration cannot be meticulous in our Montesquieu system of separation of power. The Court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded.

Recognizing the complexities involved in framing of economic policies and decision making in areas where economic activities are involved, the Supreme Court in R.K. Garg v. Union of India,² pointed out that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. In case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature.

One of the best known jurists of modern times Jus. Frankfurter of the United States in Morey v. Doud³ has admonished. ‘In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number

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¹ (1981) 1 SCC 568
² (1981) 4 SCC 675
³ 354 US 457: 1 L Ed 2nd 1485 (1957)
of times the judges have been overruled by events-self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.’

Again in Peerless General Finance and Investment Co. Ltd. vs. Reserve Bank of India, the Supreme Court stated, “It is not the function of the Courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ.”

In many other catena of decisions the Supreme has consistently refrained from quashing any policy decision in the economic matters. Dealing with the issue of disinvestment, the Court in BALCO case has laid down, “Process of disinvestment is a policy decision involving complex economic factors. unless the economic decision, based on economic expediencies, is demonstrated to be so abhorrent to reason, that the courts would decline to interfere. there is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the company is conducting its business, nevertheless it is an incidence of service for an employee to accept a decision of the employer taken honestly. government can, in the public interest ... can disinvest from the public sector companies.”

“The court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power”.

This continued to be the general trend of the Supreme Court of India, until 2nd February, 2012. On this day, in a historic judgment in what may come to be known as 2G Spectrum case, the Hon'ble Court has quashed the allocation of 2G spectrum on the ‘first-come-first-served’ basis. The court in its judgment has made the following important observation-

“The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest.

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1 (1992) 2 SCC 343
3 BALCO Employees Union (Regd.) V. U.O.I; (2002) 2 SCC 333
5 Centre for PIL & Ors. Vs. U.O.I & ors.; (Writ Petition (Civil) No. 423 of 2010
The State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good.

There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the court should not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency .... or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters.”

Thus, before what can well be heralded in history, as a defining moment, the court on the question of merits of the policy, its wisdom or its desirability, largely propounded and followed a hands-off policy.

The Causes and Forms of Poverty - Through the eye of the Court

Much before, the full-fledged economic liberalization course had been adopted, as a clear cut policy initiative in 1991, the Supreme Court in K.C. Vasanth Kumar vs. State of Karnataka¹ had eloquently stated “Chronic poverty is the bane of India society. Market economy and money spinning culture has transformed the general behaviour of the society towards its members. The Bank Balance, the property holding and the money power determine the social status of the individual and generate the opportunities to rise to the top, echelon”

Reforms and Social Upheaval:

Striking very hard, on the overall development paradigm adopted by the Government, and the ‘adverse effects’ thereto, the Supreme Court in a very recent judgment in Nandini Sundar &ors Vs. State of Chattisgarh² has made the following observations:

That violent agitator politics, and armed rebellion in many pockets of India have intimate linkages to socio-economic circumstances, endemic inequalities, and a corrupt social and State order that preys on such inequalities has been well recognized. In fact the Union of India has been repeatedly warned on the linkages. In a recent report titled “Development Challenges in Extremist Affected Areas”, an expert group constituted by the Planning Commission of India makes the following concluding observation:

“The development paradigm pursued since independence has aggravated the prevailing discontent among the marginalized sections of the society.......... The development paradigm as conceived by policy makers has always imposed on these communities.......... causing irreparable damage to these sections. The benefits of this

1 AIR 1985 SC 1495
2 2011(5) Supreme 33
paradigm have been disproportionately cornered by the dominant sections at the expense of the poor, who have borne most of the costs. Development which is insensitive to the needs of these communities has inevitably caused displacement and reduced them to a subhuman existence. In the case of tribes in particular it has ended up in destroying their social organization, cultural identity and resource base..... which cumulatively makes them increasingly vulnerable to exploitation............. the pattern of development and its implementation has increased corrupt practices of a rent seeking bureaucracy and rapacious exploitation by the contractors, middlemen, traders and the greedy sections of the larger society intent on grabbing their resources and violation of their dignity”.

It can only be concluded that the expert body, in characterizing the state of existence of large numbers of our fellow citizens, in large tracts of India, as “subhuman” is clearly indicating that such an existence is not merely on account of pre-existing conditions of significant material deprivation, but also that significant facets that are essential to human dignity have been systematically denied by the forces and mechanisms of the developmental paradigm unleashed by the State equally poignantly, and indeed tragically because the State in India seems to repeatedly insist on paying scant attention to such advice, the Experts Group further continues and advises:

“This concludes our brief review of various disturbing aspects of the socio-economic context that prevails in large parts of India today, and that may (and can) contribute to politics such as that of the Naxalite movement or erupt as other forms of violence. It should be recognized that there are different kinds of movements, and that calling and treating them generally as unrest, a disruption of law and order, is little more than a rational for suppressing them by force. It is necessary to contextualize the tensions in terms of social, economic and political background and bring back on the agenda the issues of the people the right to livelihood, the right to life and a dignified and honourable existence.

The root cause of the problem, and hence its solution, lies elsewhere. The culture of unrestrained selfishness and greed spawned by modern neo-liberal economic ideology, and the false promises of ever increasing spirals of consumption leading to economic growth that will lift everyone, under-gird this socially, politically and economically unsustainable set of circumstances in vast tracts of India in general, and Chhattisgarh in particular. It has been reported that:

Among the rapidly growing urban middle class, the corporate world is in a hurry to expand its manufacturing capacity. That means more land for manufacturing and trading. The peasants and tribals are the natural victims of acquisition and displacements”.

**Plight of the Farmers**

In another telling example of human deprivation and the government inaction or rather the over-enthusiasm of the Government of Maharashtra, to protect one of its sitting M.L.As., the Supreme Court in the context of poor plight of the farming lot of our country in,
State of Maharashtra & ors. V. S.S. Chavan & Another\(^1\) has stated, in what can raise the conscience of any person with a heart.

“We cannot shut our eyes to the stark realities. From the National Crime Records Bureau (NCRB), it is clear that close to two lakh farmers committed suicide in India between 1997 and 2008. This is the largest sustained wave of suicides ever recorded in human history. Even though Maharashtra is one of the richest States in the country and in its capital Mumbai Twenty five thousand of India’s one lack dollar millionaires reside, the Vidarbha region of Maharashtra, is today the worst place in the whole country for farmers. The position was so pathetic in Vidarbha region that families are holding funerals and weddings at the same time and some time on the same day. The gap between “haves” and “have-nots” of the society which existed even in pre-Independence India has widened to such an extent that it may take many decades before even a token equality is restored.”

The court in this matter coming very heavily on the unconstitutional acts of the Chief Minister, in subverting the rule of law by acting to protect one his party’s M.L.A., whose family had extended loans to the poor farmers at a very high interest rate, directed the police authorities to proceed according to law.

**Development at the cost of Land of the Unwilling:**

In another matter, the Supreme Court quashing the land acquisition in Greater NOIDA in a telling remark reflecting the general refrain has observed, “In recent years, the Country has witnessed a new phenomenon. Large tracts of land have been acquired in rural parts of the country in the name of development and transferred to private entrepreneurs who have utilized the same for construction of multi storied complexes, commercial centres and for setting up industrial units. The resultant effect of these acquisitions is that the land owners, who were doing agricultural operations and other ancillary activities in rural areas, have been deprived of the only source of their livelihood. ...................... This has become a land grabbing State ................. As judges we can’t close our eyes. We have a duty to perform. Land is not being acquired for building barrages, canals or roads. What are coming up are malls hotels and townships where common man has no access”\(^2\).

Likewise, in another matter\(^3\) quashing the acquisition of land by the Greater NOIDA Industrial Development Authority the Supreme Court has held-

“The situation in which the people belonging to this class are placed in the matter of acquisition of their land leave little choice to them but to make compromises and try to salvage whatever they can. Therefore, even though some persons may not have resisted the acquisition and may have accepted the compensation by entering into agreement, it is not possible to find any fault in approach adopted by the High Court.

\(^1\) (2011) 1 SCC 577 
\(^2\) Radhey Shyam (D) Through LRs Vs. State of UP; (Civil Appeal No. 3261 of 2011, dated 15\(^{th}\) April, 2011) 
\(^3\) Greater Noida Industrial Development Authority Vs. Devendra Kumar and others], decided on 6.7.2011
It must be remembered that the land is just like mother of the people living in the rural areas of the country. It is the only source of sustenance and livelihood for the land owner and his family. If the land is acquired, not only the present but the future generations of the landowner are deprived of their livelihood and the only social security. They are made landless and are forced to live in slums in the urban areas because there is no mechanism for ensuring alternative source of livelihood to them. Mindless acquisition of cultivable land may also lead to serious food crisis in the country."

In a likewise manner the Calcutta High Court in a recent judgment, has declared ‘The Singur Land Rehabilitation and Development Act, 2011’ to be constitutional under which the West Bengal Government has sought to reclaim the acquired land of the farmers, who were not willing to give their land for setting up the plant for the manufacture of ‘Nano Car’ by Tata Motors 1 at Singur, West Bengal The matter is sub-judice before the Supreme Court of India.

In the context of acquisition of land by the government, the Supreme Court in two recent decisions has laid down that even if the owners of the land, like forest dwellers, had no income, the state considering the fact that those hissedars were commercially using the forest land had a right to be duly compensated 2. At the same time the compensation for acquisition made in public purpose, has to be real and not illusory. 3

A very serious issue involved in all large projects is that of displacement and rehabilitation. The Supreme Court has dealt with this issue in great details in a catena of judgments. In a very recent judgment the Court has observed, that “In certain cases, the oustees are entitled to rehabilitation. Rehabilitation is meant only for those persons who have been rendered destitute because of loss of residence or livelihood as a consequence of land acquisition. The authorities must explore the avenues of rehabilitation by way of employment, housing, investment opportunities and identification of alternative lands. A blinkered vision of development, complete apathy towards those who are highly adversely affected by the development process and a cynical unconcern for the enforcement of the laws lead to a situation where the rights and benefits promised and guaranteed under the constitution hardly ever reach the most marginalized citizens. For people whose lives and livelihoods are intrinsically connected to the land the economic and cultural shift to a market economy can be traumatic. 4

Food Security & Right to Livelihood:

The Supreme Court, has in many cases recognized the necessity of providing food security and has in this light passed over a dozen of directions for the implementation of various food and social security schemes, but left creation of a right to food to the government as a policy matter in these words: the anxiety of the court is to see that the poor and the destitute and the weaker sections of the society do not suffer from hunger and

1 Tata Motors Ltd. And Anr. Vs. State of W. Bengal (Decided on 28th September, 2011)
3 K.T. Plantation Vs. State of Karnataka
4 Narmada Bachao Andolan case; 3 (2011) 7 SCC 639
starvation. The prevention of the same is the prime responsibility of the Government whether Central or State. How this is to be ensured would be a matter of policy which is left to the government.¹

Earlier, in this petition filed before the Supreme Court by the People Union for Civil Liberties on the streamlining of the Public Distribution system, Justice Dalveer Bhandari expressed his anguish by observing that, “In a country where admittedly people are starving, it is a crime to waste even a single grain” (In the context of reports of huge quantity of food-grains rotting in the open, due to insufficient storage capacity)

All said and done, it has to be accepted that in the recent years certain progressive legislations have been brought by the Government. Mahatama Gandhi National Rural Employment Guarantee Act, is one such landmark legislation, where “right to livelihood” declared earlier by the Supreme Court to be integral part of the “right to life”² has been placed at a higher pedestal than a mere legal right.³ But despite, all the good intentions of the legislature, on account of rampant bureaucratic corruption, the intended objective of the Act has not been achieved. The Supreme Court of India, through various judgments and orders has been forced to virtually monitor the operation of the law in many States. For this, the court has from time to time issued guidelines for the implementation of the Act in its right perspective, so that the intended beneficiaries in the rural areas are not denied of their rightful benefits.

**Initiatives of NALSA:**

The National Legal Services Authority (NALSA) has formulated a scheme for supporting the implementation MNREGA by generating awareness through Legal literacy and awareness campaigns. The scheme also talks about establishing a grievance redressal forum by organizing Lok Adalats to resolve the disputes/complaints or legal problems of any person in respect of implementation of the Scheme and employment guaranteed under the Act.

The Scheme which is to be implemented through the District Legal Services Authority and the Taluk Legal Services Committee, includes in its team people drawn from the judiciary, executive, social worker, panchayat, academics and the Bar.

The Scheme has given a broad outline for conduct of Lok Adalats on a frequent basis to settle any grievance relating to the implementation of the Act. Many states are utilising the services of ‘mobile vans’ for this purpose. I haven’t come across any ‘impact assessment’ about the impact of this initiative, but without doubt the subordinate judiciary in addition to its regular judicial work, has been spending time and resources for this initiative.

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¹ Supreme Court order in PUCL case, dated 21.8.2011, as quoted in Right to Food- Human Rights Law network
³ Centre for Environment & Food Security Vs. Union of India; (2011) 5 SCC 676 and (2011) 5 SCC 678
Rights of Workers:

Abysmal poverty has been the bane of Indian society and the root cause of large scale unemployment and underemployment. The laws which enabled large-scale lay-offs, retrenchments and closures by large companies and undertakings had resulted in all round demoralising effect on workmen\(^1\). “It is not only the shareholders who have supplied capital who are interested in the enterprise which is being run by a company but the workers who supply labour are also equally interested. While the former invest only a part of their moneys, the later invest their sweat and toil, in fact their life itself. They (workers) want security and the right to work to be secured. Our constitution has expressly rejected the old doctrine of the employers’ right to ‘hire and fire’.\(^2\)

Retrenchment has been held to mean termination by the employer of the service of a workman for any reason whatsoever otherwise than as punishment inflicted by way of disciplinary action.\(^3\) Stating that the laws which enabled large-scale lay-offs, retrenchments and closure by large companies had resulted in all round demoralising effect on workmen, the Constitution Bench in the Meenakshi Mills cases, declared the provision under Section 25N of the Industrial Disputes Act, 1947, which lays special provision by prescribing conditions precedent to retrenchment of workmen, as constitutional in not being in any way in violation of Article 19(1)(g) of the Constitution.

This may not be to the liking of the advocates of the so-called second generation reforms.

But at the same time in another case\(^4\) decided by a Constitution Bench, the Supreme Court declined to accept ‘right to employment’ to be included in the broad sweep of the ‘right to life’ protected under Article 21 of the Constitution. Herein, it was also clarified that-

Merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right.

Is it a case of Rights without Remedy

According to an independent commentator\(^5\), there is a paradox that exists in the country – the paradox of a poor man living with a rich assortment of rights. The paradox exists because through an activist interpretation of the Constitution, the fundamental rights of a poor man

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3. State Bank of India case; AIR 1976 SC 111
4. Secretary, State of Karnataka Vs. Umadevi; AIR 2006 SC 1806
have been growing in recent years, even while not making any significant impact on his/her life. This has led to a regime of substantial rights with slow remedies, with obvious implications on limiting access to justice.

While throughout history, poor people have been suffering the wrong, they have also failed to enforce even the most basic of the rights that have come their way. Even where the court has responded to the concerns of the needy and the marginalised, the compliance of its directions has remained a problem. There has been very little follow up of judicial decisions from the perspective of how these decisions impact the community for which the decision was meant in the first place.

A Study\(^1\) has brought out the startling story of one of the most celebrated judgments\(^2\) of the Supreme Court, not having bore fruits to its beneficiaries even after 16 years of the judgment i.e. 2000 when the work was published. As stated, the matter was caught in a web of judicial delay, multiple litigation, bureaucratic hassles and committee reports and importantly deliberate acts by the delinquent contractors and owners of mines to scuttle the judgment by employing illegal means at their disposal.

In a telling remark, the Supreme Court in a recent judgment\(^3\) consolidates the above view which may be true of many other judgments, has observed. ‘This is a very unusual and extraordinary litigation where even after fifteen years of the final judgment of this Court (Supreme Court) the litigation has been deliberately kept alive by filing one interlocutory application or the other in order to avoid compliance of the judgment. This is a classic example how by abuse of the process of law even the final judgment of the Apex Court can be circumvented for more than a decade and a half. This is indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the Apex Court in particular’.

To put this very simply, it points out to a scenario, that, despite there being a right, the relief has remained an illusion on account of the structural limitations of the judicial system. Under the adversarial system somehow the poor person whose rights have been violated has to reach out to the Court. Though, the Courts in India at the higher level have tried to overcome this inherent limitation, through the Public Interest litigations, but it has its own limitation. Different studies\(^4\) have shown, that only a miniscule percentage of the disputes, where rights have been violated manage to reach the Court. Despite the Apex Court having declared right to speedy trial,\(^5\) being a fundamental right, the legal system itself violates this right on a day to day basis with the staggering pendency before the courts. It has been analysed that even if no case is filed, its going to take 300 years, to clear the present backlog. The feeling is that the poor litigant is sitting on a mountain of rights, but no real means to get relief. The higher courts showing their concern have gradually practically declared every conceivable right to be a fundamental right, but no real mechanism has been created to enforce them.

\(^{2}\) Badhua Mukti Morcha vs. U.O.I.; AIR 1984 SC 802
\(^{3}\) India Council for Enviro-Legal Action vs. U.O.I.; (2011) 5 Supreme 227
\(^{4}\) National Judicial Academy study shows only 9% of the disputes reach the Court
\(^{5}\) A.R. Antulay Vs.R.S. Nayak; AIR 1998 SC 1531
The lack of enforcement of these rights can convert a rights regime into a right without remedies regime. As a recent study points out “Different sections of the citizenry may be differentially protected by the State, the rule of law may apply to some but not to all, an autonomous face of power may emerge that inflicts injustices on the weaker groups of society and so on. Examples of all these abound in India..............”\(^1\) It is thus not surprising that despite progressive legislation and even more progressive and activist role of the judiciary in extending the rights, but with no real means of execution, “justice still eludes the marginalised people”.

**Do we have a consistent Approach**

There have been concerns raised, that the approach of the Highest court of the land, with regard to rights of the under privileged has not been consistent for example, with regard to approach of the Court, pertaining to slum and pavement dwellers, a commentator\(^2\) has observed- “In the early and mid- eighties, when right to livelihood was seen as a fundamental right, slums were seen by the Supreme Court as a reflection of structural social inequality in the country and the principle that ‘humbler the dwelling greater the suffering and more intense the loss’\(^3\) animated the judgments. However, 15 years following such verdicts, the Supreme court in early 2000 held a completely different view on ‘encroachment’ by slum dwellers. Bemoaning the fact that instead of ‘slum clearance’ there is ‘slum creation’ in Delhi and simplistically dubbing slum dwellers as encroachers, it said, “the Promise of free land, at the taxpayers cost, in place of a jhuggi, is a proposal which attracts more land grabbers. Rewarding an encroacher with free alternate site is like giving a reward to a pickpocket”\(^4\)

A critique\(^5\) has pointed out that one of the most activist court (Supreme Court of India) in the world is biased in favour of some rights while ignoring the rest. He cites various reasons for this. One of the reasons given is that the Court is generally loath to find for a petitioner who is asserting rights that openly contradict either the dominance of the state or the vision of socio-economic and cultural change that is implied in the great vision of development. This is because the Court, as a governance mechanism, shares the ideologies of statism and developmentalism. ......... Developmentalism which is not a static concept has meant many things, from state led industrial growth to sustainable development to rights-based development to neoliberal development. Within these ideological matrix, the Courts justify the sacrifice of some human rights for others. Thus, in the Narmada case, the court decisively characterized the Narmada Bachao Andolan, as an ‘Anti-dam organization and declared that the “Displacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for the larger good”.

Another reason cited is in the context of social movement politics. The writer is of the view that, “Social movements tend to approach courts relatively rarely, unless, they stand to

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\(^2\) Videh Upadhyay, Judicial Reforms in India, Academic foundation (2007)
\(^3\) Olga Tallis vs. Bombay Municipal Corp.; AIR 1986 SC 180, (Five Judges)
\(^4\) Almitra H. Patel v. Union of India; AIR 2000 SC 1256
gain immediately either through publicity or to stave off deserters. Given that social movements tend to be primary driving force behind the enforcement of most socio-economic rights, this has the result of keeping these rights issues off the court’s agenda.”

The writer, also holds, that “the Social philosophy of the individual judges often determines the outcome of cases in India, as the Benches hearing the matter is not constant, “the individual ideology of judges becomes extraordinarily important”

The writer finally says that the extraordinarily talented bar has not aggressively pushed for adjudication of socio-economic rights.

Conclusion

Though a reality, but its very unfortunate that largely people have come to see the judiciary as the last hope in our democratic set-up. This is certainly a two edged sword, in as with expectations comes hope and with hope comes claim. The judiciary, in order to give the fruits of democracy and development, has done away with common law principle of locus standi and procedural hassles, by bringing in the Public Interest litigations. This revolutionising mechanism has found both support and criticism. Dealing with this aspect, the Supreme Court has recently reiterated1 “We deem it necessary to erase the impression and misgivings of some people that by entertaining petitions filed by social action groups for espousing the cause of those who, on account of poverty, illiteracy ...... and other handicaps cannot approach the Court, the Supreme Court exceeds the unwritten boundaries of their jurisdiction. In the last 63 years, the execution of the Parliament enacted laws has been extremely inadequate and tardy and benefit of welfare measures enshrined in those legislations has not reached millions of poor, downtrodden and disadvantaged sections of the society and the efforts to bridge the gap between the haves and have-nots have not yielded the desired result. Unfortunately, when the judiciary has issued directions for implementation of the laws enacted for the poor and illiterate, a theoretical debate is started by raising the bogey of judicial activism or judicial overreach.”

In the immediate aftermath of the 2G spectrum decision, the ex Speaker of the Lok Sabha, Somnath Chaterjee, in an interview to a Kolkata based daily ‘The Telegraph’2 saying that the judiciary is trying to appropriate executive powers, commented, “Well, the Supreme Court is supreme. But it cannot interfere with executive policies and decisions even by justifying that larger public interest are involved. It has to be remembered that nobody is above law”

Replying to this blunt criticism, Justice A.K. Ganguly the former judge of the Supreme Court who was one of the Judges in the Bench which delivered the judgment, in an article in the same newspaper responded by writing the judgment was not delivered either out of temptation or out of any desire to appropriate executive powers. The judgment was rendered in clear discharge of duty by the Court. Under our constitution, judicial review is

1 Delhi Jal Board v. National Compaign for dignity and Rights of Sewarage and Allied workers & Ors.; 2011(5) Supreme 162
2 The Telegraph, 4.2.2012
3 The Telegraph, 5.2.2012
one of its basic features and in exercise of such judicial review, the court can certainly scrutinise and even strike down policy decisions of the executive, when such decisions are unconstitutional”

Keeping aside limitations, the judiciary led by the Supreme Court of India has undoubtedly performed its constitutional obligations, largely in consonance with the objectives of the Constitution and the expectations of the society. “India is an ‘aspirational democracy’. It is the shared idea of India to emerge from society which has individuals of diverse ideologies, cultures and religious denomination”\(^1\) The judiciary within the broad parameters of the Constitution has been trying its best to fulfil its constitutional obligations. Certainly, any out of the box solution is not possible.

The business of theory is over. Today we are in the business of solution. This is the doctrine of “constitutional pragmatism”. We must solve the problems which the society is facing. But the judges and the lawyers can do so only if they are well equipped with the knowledge of development in socio-economic and legal fields. Its a shame, that a citizen of the country who is living below the poverty line has to come to the Supreme Court for Rs 75 pension per month\(^2\).

I am an optimist, and have great faith in all the institutions created by the Constitution and through various legislations of our legislative body. We have to remember, that prosperity and equality amongst all citizens of our country, in all sphere is a necessity, and no doubt we shall overcome all hurdles to create an egalitarian society.

\(^1\) Justice S.H Kapadia CJI in his Law Day Speech, 26\(^{th}\) November, 2011, New Delhi.

\(^2\) Justice S.H. Kapadia in J.K. Mathur Memorial lecture on 13.02.2008, Lucknow
COMMITTAL OF CASE: AN ASPECT OF FAIR TRIAL

Akhilendra Kumar Pandey

The assurance of a fair trial is the first imperative of the dispensation of justice. Conducting a fair trial is for the benefit of the society as well as the accused. An unfair trial is contrary to the concept of justice. The denial of fair trial has been regarded as crucification of human right. The right to fair trial though has not been explicitly provided in the Constitution of India but it has been recognised as an important aspect of the right to life and personal liberty. Fair trial is a sine qua non of Article 21 of the Constitution. Fair trial is the heart of criminal jurisprudence and an important facet of democratic polity that is governed by rule of law. It consists not only in the technical observance of the frame and form of law, but also in the recognition and just application of its principles in substance. Though the essential components of fair trial have not been deciphered with precision but it has also been extended to fair investigation.

On several occasions the issue has arisen before the superior courts that whether the trial by the Court of Session without the case being formally committed to it by the Magistrate stands vitiated. In other words, it has been argued that the entire trial by the Court of Session was vitiated as it had commenced and concluded without the committal of the case to the Session’s Court against the interdiction provided under section 193 of the Code of Criminal Procedure, 1973. In this paper an attempt has been made to analyse the approach of the judiciary in this regard.

The Criminal Procedure Code, 1973 exhaustively lays down the procedure to be followed in the administration of criminal justice. The Criminal Procedure Code lays down the procedure for investigation, enquiry and trial. The Code is primarily based on the principle of fairness and aims at avoiding any arbitrary action on the part of the machinery and men involved in

1 Associate Professor, Faculty of Law, Banaras Hindu University, Varanasi
2 Mrs. Maneka Sanjay Gandhi v. Ms. Rani Jethmalani (1979) 4 SCC 167 per Krishna Iyer, J.
3 Rattirarn v. State of M.P. AIR 2012 SC 1485
5 Nahar Singh Yadav v. Union of India AIR 2011 SC 1549
7 Nirmal Singh Kahlo v. State of Punjab AIR 2009 SC 904
8 Section 193 reads: Except as otherwise expressly provided by this Code or by any other law for the timer being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.
the dispensation of criminal justice. In A.K. Gopalan case, the Supreme Court had observed that the procedure laid down by the law should be strictly followed. The expression ‘procedure established by law’ in Article 21 of the Constitution means procedure prescribed by the law of the State. These words are taken to refer to procedure which has a statutory origin.

Though under certain circumstances the Court of Session has power to take cognizance as a court of original jurisdiction but the general rule is that it has no power to take the cognizance of any offence as a court of original jurisdiction unless the case was committed to it by a Magistrate. There are certain circumstances under the Criminal Procedure Code, 1973 where the trial is to be exclusively conducted by the Court of Session and in such cases the Magistrate is not empowered to try the case and thus he commits the case to the Court of Session under Section 209 of the Code after complying with the requirements of section 207 or 208, as the case may be.

With a view to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes and Special Courts for the trial of such offences, the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted. Section 14 of this Act makes a provision for the creation of Special Courts by the State Government in consultation with the Chief Justice of the High Court. Further, it is also specified that a Court of Session shall be the Special Court to try the offences committed under the Act. In several cases it has been decided that the Special Court created under section 14 of the SC/ST (Prevention of Atrocities) Act, 1989 is a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Criminal Procedure Code.

Two Views of Justice Thomas:

Two views of Mr. Justice K.T. Thomas on this issue are discernable. While in Gangula Ashok v. State of Andhra Pradesh, he delivered the judgment with Shah, J., and in State of M.P. v. Bhooraji with Balkrishnan, J. A brief discussion on both the views are desirable.

First View:

In Gangula Ashok case, the appellant was a practicing lawyer and the second appellant was his wife working as Matron in a Girl’s Hostel run by the Social Welfare Department. A

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2 Id. Kania, CJ at 39, Patanjali Shastri at 72, Mukherjea, J. at 103 and Das, J. at 115
3 See, Section 199 Criminal Procedure Code, 1973
4 Section 193 of the Criminal Procedure Code, 1973
6 AIR 2000 SC 740. The judgment was delivered on January 28, 2000.
7 AIR 2001 SC 3372; 2001 Čri LJ 3372 (SC) The judgment was delivered on August 24, 2001.
8 Supra
complaint against them was lodged with the police by a girl who was a resident of the said hostel. It was alleged that the appellant outraged or attempted to outrage the modesty of the complainant girl. The police, after investigation, filed a charge sheet directly before the Court of Session which was designated as the Special Court for the trial of offences under Section 14 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. While the first appellant was charged under Section 3(1)(xi) of the SC/ST Act (which was later on dropped by the police in its revised charge sheet) as well as in Section 354 of the Penal Code, the second appellant was charged under Section 201 of the Penal Code. The Special Court framed the charges against the appellants and at this stage the appellant moved to the High Court for quashing the charge and charge sheet. A single judge of the High Court found that the procedure of filing the charge sheet straightway to the Special court was not in accordance with the provisions of law. The Special Judge had no jurisdiction to take cognizance of any offence under the SC/ST Act without the case having been committed to it. The High Court thus setting aside the proceedings of the Special Court directed it to return the charge sheet and other related papers to the concerned police officer who in turn was directed to present the same before the Judicial Magistrate First Class, who is competent to take the cognizance, for the purpose of committal to the Special Court.

The appellant, however, aggrieved by certain directions of the High Court moved a special leave petition before the Supreme Court. One of the issues before the Supreme Court was whether the Special Judge could have taken the cognizance of the offence straightway without the case being committed to him. The Court took the view that the Special Court was essentially a Court of Session and the order of the High Court setting aside the proceedings before the Special judge was held to be right. Thomas, J. observed that:

“…it (Special Court)\(^1\) can take cognizance of the offence when the case was committed to it by the magistrate in accordance with the provisions of the Code. In other words, a charge sheet cannot straightway be laid before Special Court under the Act.\(^2\)

Prior to Gangula Ashok case, various High Courts were confronted with the same issue and the High Courts of Allahabad,\(^3\) Madhya Pradesh,\(^4\) Patna\(^5\) and Punjab & Haryana\(^6\) had adopted the same view which the Supreme Court subsequently approved in Gangula Ashok case\(^7\). However, the Kerala High Court in re Director General of Prosecution\(^8\) took a contrary view that the Special Court can straightway take the cognizance of the offence under the SC/ST Act and can proceed with the trial remaining unaffected by the prohibition laid down in Section 193 of the Criminal Procedure Code. The Full Bench of Kerala High Court in

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1 Parenthesis is mine.
2 Supra note 13 at 743
4 Meerabai v. Bhujbal Singh 1995 Cri LJ 2376 (M.P.) However, a contrary view was taken by the Full Bench in Anand Swaroop v. Ram Ratan 1996 MPLJ 141 that Section 193 of the Criminal Procedure Code does not apply to the proceedings of SC/ST Act and thus committal order is not required.
5 Jhagru Mahto v. State of Bihar 1993 Cri LJ 643 (Pat)
7 Supra
8 1993 Cri LJ 760 (Ker)
Hareendra v. Sarada,\(^1\) reiterated the view taken in Director General of Prosecution case\(^2\) on two grounds. First, that Section 20 of the SC/ST Act, 1989 stipulates that the provisions of the Act shall have overriding effect in view of the expression ‘notwithstanding anything inconsistent contained in any law for the time being in force’. Secondly, there was nothing in the SC/ST Act to indicate that the Special Court would get the jurisdiction only on the committal order made by the Magistrate. In other words, the Full Bench of the Kerala High Court was of the view that there should be a specific indication in the legislation indicating that the Special Court would get the jurisdiction to try the case only on the committal order and in absence of such specific indication the Special Court must have the right to take cognizance as if it were the court of original jurisdiction. On these grounds, the Full Bench observed that ‘it was difficult to hold that the committal proceeding was indispensable as a prelude to the case being tried by the Special Court.’

It may be submitted that the SC/ST Act was enacted with a view to prevent commission of atrocities against the members of the Scheduled Castes and Tribes but as it does not lay down the specific procedure of investigation, enquiry and trial of offences committed under the Act and thus the general rules of procedure is applicable unless otherwise is provided in the legislation.\(^3\) The Supreme Court in Gangula Ashok case \(^4\) rejected the view of Full Bench of Kerala High Court and held that the interdict of section 193 of the Criminal Procedure Code cannot be circumvented unless there were express provisions removing such interdiction.\(^5\) Thus, Gangula Ashok case made it clear that committal by a magistrate was an important step and due to its non–observance the Special Court could not jurisdiction to try the case under the SC/ST Act.

**Second View:**

Later on Thomas, J. however, deviated from his view expressed in Gangula Ashok case\(^6\) on the ground of expediency and unnecessary insistence on retrial will adversely affect the persons involved in trial. In State of M.P. v. Bhooraji,\(^7\) the police after the investigation

\(^1\) (1995) 1 Ker LT 231  
\(^2\) Supra  
\(^3\) The Division Bench of the Andhra Pradesh High Court in State of A.P. v. Shekar Nair 1999 Cri LJ 4173 (A.P.) did not approve the view of Kerala High Court on the ground that in absence of a particular procedure provided in the SC/ST Act as regarding the mode of taking cognizance, enquiry and trial, the procedure under the Criminal Procedure Code shall be followed in view of the judgment of the Supreme Court in Enforcement Directorate v. Deepak Mahajan AIR 1994 SC 1775  
\(^4\) Supra  
\(^5\) For example, there is a provision under Section 36 – A sub – section (1) (d) of the Narcotic Drugs and Psychotropic Substances Act, 1985 that notwithstanding anything contained in the Criminal Procedure Code, 1973 a Special Court may, upon the perusal of police report of the fact constituting offence under this Act or upon complaint made by the officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial. Similar provision exists under Section 5(1) of the Prevention of Corruption Act, 1988.  
\(^6\) Supra  
\(^7\) AIR 2001 SC 3372
submitted charge sheet indicting several persons for various offences including Section 302/149 of the Penal Code and Section 3 (2) of the SC/ST Act. The case started before the Additional Session Court which was specified as the Special Court under Section 14 of the SC/ST Act. The Court framed charges against all the accused and proceeded with the trial which continued for almost five years. All the accused were convicted and sentence including life imprisonment was imposed. The accused preferred an appeal before the High Court and during the pendency of appeal the Supreme Court decided Gangula Ashok case.

It is relevant to mention that when the appeal was preferred the law applicable in such situation in the State of Madhya Pradesh decided by the Division Bench in Meerbai v. Bhujbal Singh1 was applicable and subsequently the Full Bench of Madhya Pradesh High Court in Anand Swaroop v. Ram Ratan2 took a contrary view but the Supreme Court’s judgment in Gangula Ashok eclipsed the effect of Anand Swaroop case and revived the opinion of Meerbai v. Bhujbal Singh3. The convicted persons with a view to take the advantage of the pronouncement made in Gangula Ashok case filed an appeal before the High Court for quashing the trial proceedings on the ground that the said trial was without jurisdiction. It was contended that the specified Special Court did not acquire jurisdiction to take cognizance in absence of its being committed by a magistrate. The High Court accepted the contention of the appellants and ordered the Special Court to return the charge sheet and connected papers to the prosecution for the re-submission to the magistrate for further proceeding in accordance with law. In this backdrop, the State of Madhya Pradesh filed the appeal by Special leave in Bhooraji case. The issue before the Supreme Court was whether the High Court should have necessarily quashed the trial proceeding and to repeat the trial process in view of the non-observance of trial procedure. In this case, Thomas J. opined that "a de novo trial should be the last resort and that too only when such a course becomes necessarily indispensable. It should be limited only to extreme exigency to avert failure of justice."4

In Bhooraji case5, the Court compared the role of the magistrate under the Criminal Procedure Code, 1973 with that of the 1898 Code. The Court pointed out there was difference between the old Code and the new one. The committal court under 1898 Code could examine, in the police charge sheeted cases, material witnesses and such records which were required to be sent the Court of Session along with the committal order but under 1973 Code the committal court, in police charge sheeted cases, cannot examine any witness at all. The magistrate in such case is to commit the case involving offences exclusively triable by the Court of Session.

The Supreme Court also pointed out that in case where the magistrate has not committed the case and the Court has concluded or started the trial of the case, there was nothing in the Code to affect the competence of the court in view of Section 465 of the Criminal Procedure Code, 1973. Thomas, J. observed:

1 Supra
2 Id.
3 Id.
4 Supra note 14 at 3375
5 Supra
“such a court will not be denuded of its competence to try the case on account of any procedural lapse and the competence would remaining unaffected by non-compliance of procedural requirement. The inability to take cognizance of an offence without a committal order does not mean that a duly constituted court becomes an incompetent court for all purposes.”

Justice Thomas tried to distinguish Bhooraji case with that of Gangula Ashok merely on the ground that the objection on the issue of committal should have been raised at the earliest occasion and not after the conclusion of trial unless it occasioned failure of justice. It may be submitted that despite the observation of the Law Commission of India in its 41st Report regarding the futility of committal provision in the Code, the provision of committal has been retained and so long as this provision exists it is the procedure of law and it should be complied with strictly. It is the rule of interpretation that the criminal statutes – substantive and processual both must be interpreted strictly. The statutes dealing with the procedure if it relates to infliction of penalties are to be strictly construed. The compliance with the procedural provisions will be stringently exacted from those proceeding against the person liable to be penalized and if there is any ambiguity or doubt it will be resolved in his favour. This is so even if it may enable him to escape due to technicality. The pre-trial procedure thus cannot be brushed aside on the sheer ground of expediency. The doctrine of factum valet is alien to the criminal justice system. The committal procedure is one of the aspects of fair trial, which has been regarded as a right under Article 21 of the Constitution, and when this necessary procedure has not been observed it may affect the outcome of the trial. The non-observance of trial procedure goes against the tenets of fair trial. Moreover, it is for the court to ensure that the trial is being conducted in a fair manner.

On three subsequent occasions, namely, in Vidyadharan v. State of Kerala, Moly v. State of Kerala, and M.A. Kutappan the Supreme Court got the opportunity to decide the same issue whether the non-committal of case to the Special Court vitiated the trial. The judgment in these cases was delivered by Mr. Justice Arjit Pasayat and Mr. Justice Doraiswamy. In Vidyadharan case, the appellant faced trial for offences under the Indian Penal Code and the SC/ST Act. He was convicted and sentenced. An appeal before the High Court could not bring him any relief and ultimately the matter reached to the Supreme Court. The vital issue was again whether the Special Judge could take the cognizance straightway without the case being committed to him. If the Special Court is the Court of Session, the interdict contained in Section 193 would stand in the way. Pasayat, J. referring to Gangula Ashok case held that the Special Court under the SC/ST Act is essentially a Court of Session and it can take the cognizance of the offence when the case is committed to it by the magistrate in accordance

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1 Supra note 14 at 3378
2 Supra
3 Supra
4 Section 465 (2) of the Criminal Procedure Code, 1973
5 See, Maxwell on Interpretation of Statutes (1976, 12th Ed.) at 245
7 AIR 2004 SC 536 Pasayat and Doraiswamy Raju, JJ.
8 AIR 2004 SC 1890 Pasayat and Doraiswamy Raju, JJ.
9 AIR 2004 SC 2825 Pasayat and Doraiswamy, JJ.
10 Supra
with the provisions of law. The Charge sheet or complaint cannot be laid down straightway to
the Special Court. In the case in hand, the court pointed out, acted as one of the original
jurisdiction and the requirements of Section 193 Criminal Procedure Code were not met.
Pasayat, J. observed:

“Neither the Code nor in the Act is there any provision whatsoever, not even by implication,
that the specified court of session (Special Court) can take cognizance of the offence under
the Act as a court of original jurisdiction without the case being committed to it by a
magistrate. If that be so, there is no reason to think that the charge sheet or a compla

The court observed further,

“It can be discerned from the hierarchical setting of the criminal courts that the Court of
Session is given a superior and special status. Hence we think that the legislature would have
thoughtfully relieved the Court of Session from the work of performing all the preliminary
formalities which magistrate have to do until the case is committed to the Court of Session.”

Similarly, in Moly case, a suo moto complaint was entertained and registered by the trial
court against the appellants. They faced trial for commission of offences punishable under
various provisions of the Indian Penal Code and under Section 3(1)(iii), 3(1)(iv) and 3(1)(x)
of the SC/ST Act. The trial court found them guilty and imposed sentence. Appeal was filed
before the High Court but it was dismissed. Thereupon, the matter went before the Supreme
Court on the ground that the trial court could not have suo moto entertained and registered the
complaint as a court of session. The Supreme Court reiterated the view taken in Gangula
Ashok and observed that ‘the court of session in the case in hand undisputedly has acted as
the court of original jurisdiction and the requirement of Section 193 of the Criminal
Procedure were not met.’

On this issue again the matter reached to the Supreme Court in Rattiram v. State of M.P.
through Inspector of Police. The Supreme Court approved the view taken in Bhoorji case and
Vidyadharan and Moly cases were held to be per incurium. The Supreme Court
insisted that unless the non-observance of procedural requirement resulted into failure of
justice, the proceeding in those cases where the Special Court took cognizance without the
case being committed to it by the magistrate should not be resorted to and it observed:

1 Supra note 42 at 540
2 Ibid
3 Supra note 43
4 Supra
5 Supra note 43 at 1893
6 AIR 2012 SC 1485 with Satyanarayan v. State of M.P. The Bench comprised Bhandari,
Thakur and Misra, JJ.
7 Supra
8 Supra
9 Supra
10 Jus ignotantium, that is, carelessness.
“While emphasising the principle of ‘fair trial’ and the practice of the same in the course of trial, it is obligatory on the part of the Courts to see whether in an individual case or category of cases, because of non-compliance of a certain provision, reversion of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial injustice has in fact occurred. The seminal issue is whether protection given to the accused under the law has been jeopardised as a consequence of which there has been failure of justice or causation of any prejudice.”

The Supreme Court in this case also emphasised upon the restricted role of the magistrate at the stage of commitment under the present Criminal Procedure Code which is distinct from that of the old Code of 1898. The non-compliance of committal procedure and raising of any objection in that regard after conviction attracts the application of the principle of ‘failure of justice’ and the convict must establish before the appellate court that he was prejudiced and deprived of fair trial. The Supreme Court observed:

“The concept of fair trial and the conception of miscarriage of justice are not in the realm of abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of the facts and not to be deduced from procedural lapse or an interdict like commitment as enshrined under section 193 of the Code for taking cognizance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has roots in appearance sans any reality.”

On the aforesaid ground, the Supreme Court arrived at the conclusion that in the case in hand it was impossible to conceive of any failure of justice, causation of prejudice or miscarriage of justice consequent upon the non-observance of committal procedure. It may be submitted that fairness in the administration of justice includes both the form and substance and the emphasis on substance, ignoring the form may affect the confidence of society in the judicial system and thus there is a need to synchronise form and substance both.

The Criminal Procedure Code seeks to administer criminal justice with fairness. Despite of the limited role to be played by the magistrate and also the dis-satisfaction of the Law Commission as to the requirement of committal procedure in cases exclusively triable by the Court of Session, the legislature retained this provision in the Code. The substantive rights may be brought to naught by ignoring the procedural laws. As the fair trial includes the application of both the substance and the form of law, the procedural law as well should be construed strictly. Such an approach will also make the society to feel that the courts strictly comply with the procedural laws. The right to life and personal liberty cannot be assured without following the procedure of committal.

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1 Supra note 51 at 1495
2 AIR 2012 SC 1485 at 1500
Introduction: If we are to understand the emerging concept of separation of power, we must understand the idea that the condition which gave birth to the holy trinity of Separation of powers i.e. (Comprising of legislature, executive and judiciary) were completely different and Montesquieu’s own analysis were not correct. It can be said that the three organs of the government were born in the nascent stages of a liberal paradigm which had allowed the birth of state in its nascent form. The three tiers were created because the state was construed as an entity that would perform only the minimal functions i.e. the theory of night watchman. It was the era of classical laissez faire. Then the Second World War and Beveridge Report paved way for a Modern Welfare State. In the 1950s behaviouralism conceptualized the functional aspect of the government. Gabriel Almond took it to a whole new level by coming up with structural Functional Analysis of government. The Latin American countries have showed the way as to how to incorporate the institutional/independent agencies in constitution. Peter Strauss and John Ackerman both exponents of functional aspect of government ,have provided justification to dismantle the old doctrine.

The new dimension of separation of powers owes its origins to the debate between Formalist and Functionalist. It was engineered by the American Legal Scholars who were aware of the increasing power of the administrative agencies and at the same time this idea had been institutionalized by the U.S. Supreme Court in some of its decisions. The idea of the Functionalist especially those of Peter Strauss are worth mentioning. The following section with explore the argument and differences of both the schools.

1. **Formalism:** For the Formalist questions of horizontal governmental structure are to be revolved by reference to a fixed set of rules and not by reference to some purpose to those rules. As to the source of the rules, they are to be derived from the text of the constitution and original understanding of that text.

As Gary Lawson explain:

"Formalist treats the constitution's three "resting" clauses as effecting a complete division of otherwise unallocated federal governmental authority among the constitutionally specified legislative, executive and judicial institutions. Any exercise of governmental power and any governmental institutions exercising that power must either fit within one of the three formal categories thus established or find explicit constitutional authorization for such a deviation. The separation of powers and the exercising institutions do not match and the constitution does not specifically permit such a blending". 1

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Thus, the structural provisions of the constitution specify the type, especially in American Constitution (legislative, executive and judicial) and place (Congress/Parliament, President/Prime Minister, Supreme Court) of all government power.

**Criticism:** To identify and place rules create some serious problems for the formalist. To start with, the emerging growth of independent agencies is overlooked. They perform a variety of functions which show a mixture of all functions in three organs of government like rule making and adjudication. Rule making, general rules that bind the parties, resemble in many cases the exercise of power vested exclusively in legislative. The point is well described by Elizabeth Magill who goes on to criticize the formalist by quoting Madison from "Federalist paper itself".

"......... formalist approach there presupposes an ability to distinguish among the three types of government power.... to understate the point elusive. James Madison famously admonished that "Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary. The formalist position would, then, if consistently followed in the courts, require dramatic alternation of contemporary institutional arrangements and prevent experimentation along similar lines in future........"2

**Functionalism:** While a formalist is committed to a rule based decision making a functionalist would resolve structural disputes not in terms of fixed rules but in terms of evolving standards designed to advance the ultimate purpose of a system. The leading exponent of functionalism Professor Peter L. Strauss had developed a comprehensive approach that captures the virtues of a new system. Functionalist share the same tools as that of the Functionalists i.e. the text, original understanding and interpretation but read them in a different manner. They are more concerned with the reality of existing government. For functionalist the new administrative/ independent agencies can be accommodated in the theory of separation of power.

Professor Strauss makes a simple observation that the "identify and place" rule of the formalist is not applicable to the administrative agencies.

".......So long as separation of powers is maintained at the very apex of government a checks and balances inquiry into the relationship of the three named bodies to the agencies and each other seems capable in itself..."3

Strauss would thus abandon the formalist effort to place administrative agencies in one branch on other. Instead he would direct focus on the relationship between administrative agencies and all three of the acts at the apex of government.

The new emerging concept of separation of powers which is trying to get over the tripartite concept of government and the value laden concept of "Power" was also recognized by noted scholar MJC Vile in his book "Constitutionalism and Separation of Power"4. The demands made upon modern governments, the complexity of their aims, demand new
techniques, new procedure, and new forms. The relevance of older theories and traditional systems of thought are doubted, and certain schools of government have adopted a scientific approach to the study of politics and constitutionalism. What is emphasized is the functional aspect of government and a breakaway from the fetish of the word "power" in the concept of separation of power.

New trends in the institutional development of advanced Western Countries are somewhat difficult to fit into the older categories, and new concepts are to be found. Account must be taken or the concept of powers, which has intrigued modern sociological, thought, and should be considered alongside the older concepts of power and novel area of function and structure.

The constitutional theory has to study from the point of view of function, structure and process. It shows that the idea of power was never prevalent, new branches of government are possible and other organs are interdependent mutually interacting and connected to value pattern. The concept of function has its roots in Greek Political thought. The idea is well described by MJC Vile.

"……….. The nature of the functions of government thus requires considerable clarification. The abstract concepts of legislative, executive and judiciary emerged after a long period in which man thought mainly in terms of the tasks which government had to perform, such as conducting was and diplomacy etc. The emergence of the idea of legislative and executive powers or functions had in itself little to do with an analysis of the essential nature of government, it was concerned move with the desire, by delimiting certain functional areas, to be able to restrict the rules to a particular aspect of government and so as to exercise limits on his powers……………."

The emphasis is on the terms of the functions of political system rather than the government. The problem of the control of the government action lies at the heart of constitutional thought necessitates on over all view of function, rather then a concern merely with the relationship with the relationship between government and citizens. This emphasis upon the political system, rather upon the machinery of government is a characteristic of functional analysis of government by Gabriel Almond in Politics of Developing Areas. Almond attempts to incorporate into the functional aspect developed by political theorist and functional analysis of socialist.

"……….. He distinguishes the input functions of the political system from the governmental "output" functions. The former includes

a) Political Socialization
b) Recruitment
c) Interest articulation, aggregation
d) Political communication.
The latter includes

a) Rule making
b) Rule application
c) Rule adjudication
Almond attempts to rid these concepts of their attachment to particular structure of governments by adopting these terms instead of the more familiar legislative, executive, judicial categories. This shows the fact that the structures of government are in fact in Almond's terms "multi functional". That is to say that rules are made by civil servants and by judges as well as by legislature.\(^6\)

Thus the purposive nature of the older concept is removed and the scientific generality of these tools for analysis of government is established. It is in fact the procedure of government which is purposive for they are chosen or rejected to perform certain tasks because of the values they embody.

The pure doctrine of separation of powers implied that the functions of government could be uniquely divided up between the branches of government in such a way that no branch need ever exercise the function of another in practice; such a division of function has never been achieved. It can be suggested that the multifunctionality of political structure can and perhaps most, be carried to the point where any attempt at a division of function is impossible. The most common cited example is that of a civil servant. They without any intention of abusing them powers, inevitably make rules, interpret them and apply them. In the case of judge, it seems to be inherent in the tasks which the administration of any complex governmental programme involve the taking of many decision at all stages of operation, many of which will become precedents for later administrative decisions. This situation arises from the fact that statute or other policy decision can never present a rigid plan to be followed by civil servants, who must be allowed certain discretion in the administrative of government programmes.

The idea has been eloquently summed up by Talcott and Parsons

"……….The misconception of separation of powers, therefore, stemmed from the naïve view that there were distinct actions of willing and execution that could be isolated and kept in separate compartments. Such a distinction might possibly be applied to extremely simple actions ………… most operations of government are much too complex, requiring a whole stream of decisions to be taken, such that it is impossible to divide them up into acts of will and acts of execution. In the same way the later distinction between policy and administration", which was intended to replace the legislative execution dichotomy also breaks down………………."\(^7\)

If one pursues the analysis to its limits one can see that the exclusive allocation of rule making rule application or rule adjudication to particular organs of government is not only inconvenient it is almost impossible. Every act of every official embodies all the three types of activity. This further raises idea of doubt over the legitimacy of traditional doctrine of separation of powers.

The conflict can best be summarized in the following words:-

"The function of control, therefore, requires in some fashion a notion of balance; whether this balance is expressed within the government machinery, between government and people, or between the media of control themselves. The historic motion of balance cannot be jettisoned at the present stage of development of human institutions. We must reformulate the earlier theories so that they no longer seek a balance merely between
executive legislative judiciary but so they encompass also there essential part modern government, political parties, pressure groups, radio and television……..”

Over the past two decades there has been a veritable explosion in the number and power of independent accountability agencies throughout the globe. The spread of electoral institutes Ombudsman, anti corruption agencies and other institutions has paralleled the equally important wave of creation of independent regulatory agencies. The new accountability agencies have their own institutional dynamics and must be understand in their own terms. Questions arise as to why they were created on what are its strengths and weakness, whether it is effective or not.

John M. Ackerman's study reveals that there are almost 250 independent accountability agencies with constitutional backing. They are responsibilities and have very different legal designs and powers. According to John M. Ackerman there are three different ways in which these agencies have been integrated into the overall constitutional framework.

1) One path is formally to group together the most important agencies under a new branch of government like Venezuela and Ecuador.

2) Second way is to include all of the agencies under a single heading in the constitution and subject them to a series of common regulations.

3) The third and the most common path is the ad hoc creation of such agencies at different times and in different sections of respective constitutions.

John Ackerman and other scholars who have adopted 'Peter Strauss Powers' tend to focus more on the functional aspect of government. The term 'Power' according to them should be replaced and the correct phrase should be separation of functions. The term function is in consonance with Max Weber's bureaucratic culture and Gabriel Almond's Structural Functional analysis which acts as the intellectual sort of the new movement. The global wave of creation of independent accountability agencies means a lot for the future of separation of powers. It is a breakaway from the Holy Trinity of Legislature, Executive and Judiciary. It implies a sea change in the organization of State authority, which needs to be given its rightful place within contemporary theories of constitutional design. It is an example of innovation which flows principally from global 'South' and is important for India as well as new democracies. Independent Accountability Agencies in the Constitutions of the world.

John Ackerman in his research has shown that at present there are 81 countries with independent agencies at the constitutional level. The total number of agencies is 248 and is distributed in America, Europe, African and Asia. The list of countries with four of more independent agencies in their constitutions also provides an interesting profile of the phenomena. It can be said that the creation of independent agencies has become a strategy use by government reformers to start a new beginning. In authors own words:

"……..In context as different as the U.S Invasion of Iraq and the Bolivianian revolution, independent agencies seems to offer the possibility of a new face to government…….."
In terms of political context these leading countries appear to fall into three different categories:

i) There are those countries which have recently experienced a democratic transaction brought about principally by domestic political forces. E.g.: Chile, Greece, Philippines and Hungary.

ii) There are those countries which recently have gone through significant internal strife and where foreign nations have had an important rule in imposing the new institution framework. E.g.: Afghanistan, Iraq.

iii) There is the case of relatively long standing democracies which have recently undergone radical political change. E.g.: Ecuador, South Africa, Peru and Venezuela.

The question that can be asked is whether these institutions tend to short circuit or complement deeper democratic reform. Case such as Chile, Greece, Mexico, and Ecuador seem to offer particular hope with regard to possible complimentary of democracy and independent accountability agencies. It can be seen as the birth of a truly new and different form of organization of state power in a democratic context. The case of Ecuador is particularly interesting. The new constitution of 2008 definitively breaks with the almost religious obsession with the trinity of three branches of government. This is an inspiring trend of a field of constitutional theory.

John Ackerman has succinctly described the position of constitution of Ecuador in the following words:

"......... The constitutional text divides power into five different ‘Functions’ Executive, Legislative, Judicial and indigenous Justice, Transparency and social control and Electoral. In addition, the office of the Procurador General, the Fiscal General and the Constitutional Court are established as independent powers. The transparency and Social Control “Functions” includes four separate agencies:

i) Citizen Participation
ii) Social Control Council
iii) General State Comptroller
iv) Ombudsman
v) Network of Superintendents.

All of these are "accountability agencies in so far as their principle mandate is to control and avoid the abuse and corruption of power. They are also supposed to help strengthen citizen participation in government........."

Constitution of Venezuela: The 1999 constitution is a fascinating example of institutional engineering. As in the Ecuadorian case, it also formally enshrines five "Power"
The citizen power is made up to the Public offender ombudsman, Comptroller and Fiscal General. The leadership of each one of these agencies makes up the Republican Moral Council which co-ordinates the activities of each and presents a voice on national issues of national importance related to corruption and the abuse of power.

In the words of John Ackerman

"………… When the constitution does not explicitly group together or sufficiently recognize the importance of independent agencies as such in the exercise of power. The corresponding judiciary had to intervene in order to carve out a legal space for these agencies in Mexico; The Supreme Court finally gave the Country’s Independent Agencies a formal role within the constitutional order in an historic decision in 2007……. Independent agencies impulse and "evolution of the traditional theory of the separation of powers….." the creation of this type of institutions does not alter or destroy the traditional separation of power... Their principle lies in alternating to central needs both of state and of society in general……”¹³

The most common agencies are by for those responsible for budget overnight, electoral administration and human rights protection.

Conclusion and Suggestion: A new pattern is clearly emerging before us. Its exponents are the underdogs of the emerging political actors who have recently emerged out of chaotic political misadventure and have vouched never to retain to the same problem. This has been the case in Latin America. We can learn the new techniques adopted by the Latin countries to institutionalize the problem of transparency and democracy in the constitution. It is a scientific and legal way to institutionalize ‘right based jurisdiction’ in the constitution. Constitutionalism has been given a new lease of life as the new process focus not on the Powers of Government but on its Functions. It is ‘participatory democracy in motion on the chariot of constitutionalism’.

According to the new thinking the old, mundane, archaic model of trinity of legislature, executive, judiciary is the symbol of a draconian, lethargic state which has slept over its weakness. The new organs are in reality 'for the people'. People’s response to the anomalies in the administration of the government has resulted in the popularity of agencies like Ombudsman.

Hence by taking the precedent of its entire predecessor and institutionalizing the new dimension of separation of power we can achieve better governance. One should not be afraid to take chances as Noah’s Ark was built by amateur and titanic was built by professionals.

END NOTES


2. Ibid pg 16-1

3. Ibid pg 19
5. Ibid pg 216
10. Ibid Table 1.1 pg 13
11. Ibid Table 1, Table 2 pg 13
12. Ibid pgs 15-16
13. Ibid pg 18
Memorable Events- 2012-13 at JTRI, UP

Hon’ble the Lady Chief Justice alongwith Mrs. Shashi Sharma wife of Hon’ble Mr. Justice Bhanwar Singh, Mrs. Indu Dixit wife of Hon’ble Mr. Justice V.K. Dixit at the function of UP Judicial Service Association at JTRI, UP

Smt.Vijai Laxmi, District Judge, Sultanpur presenting the bouquet to Hon’ble the Lady Chief Justice in the function of UP Judicial Service Association at JTRI, UP
Hon’ble Mr. Justice Bhanwar Singh, Chairman, JTRI, UP welcoming the Hon’ble Mr. Justice Shiva Kirti Singh, Chief Justice of Uttar Pradesh at JTRI, UP Campus during UP Judicial Service Association function.

Shri V.P. Singh, President UP Judicial Service Association garlanding the Hon’ble Mr. Justice Shiva Kirti Singh, Chief Justice of Uttar Pradesh in the function of UP Judicial Service Association at JTRI, UP.
RIGHT TO DEVELOPMENT: REDRESSAL OF ECONOMIC INEQUALITY AND A NEW APPROACH TO DEVELOPMENT

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Dr. Priti Mishra²
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I- INTRODUCTION:

The concept of human right has gained momentum worldwide. The idea has travelled a great deal of journey from the hammurabai code to the post 9/11 concept of responsibility to protect. The struggle for entitlement has eluded humans since time immemorial. The movement of human rights has given a new lease of life to the oppressed. The form of human rights itself has taken a broad leap itself. Traditionally, human rights were interpreted in an atomistic view i.e. in traditional western philosophy only the individual was considered the bearer of rights. This idea was based on the concept of possessive individualism propagated by philosophers like Locke, Rousseau and Mill. Even today an individual is considered sovereign and State is the duty bearer of citizen’s right.

But the situation changed drastically with the advent of decolonisation. The former colonies gained independence and emerged as the new players in the international arena. The interesting thing about these colonies was that inspite of independence they were not ready to embrace the atomistic concept of human rights propagated by their masters. Colonies specially in Africa, were still attached to their roots in community. Tribes, Kinsmen and elderly brethren still had a say in shaping the life of an individual. Individuals were the ultimate recipient of rights but the rights had to pass through the filter of community.

It is in this context that we must understand the concept of ‘right to development’. It is a species of third generation of human rights. Karel Vasak, introduced and popularised the idea of third generation human rights with Keba M’baye, sought to justify the three generations of human rights with the famous principles of French Resolution of 1789-Liberty, equality and fraternity he contended that the first generation of civil and political rights were based on the principle of liberty, while the second generation of economic, social and cultural rights were based on principle of equality and the third generation of rights of solidarity were based on principle of fraternity. They were collective or group rights, in contrast with the rights belonging to the first and second generations, which were individual rights in nature. They were in his opinion a response to the phenomenon of global interdependence. Their essential features was that they could be realised only “by the combined efforts of all social factors individual states, public and private associations and the international community”.

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It is important to mention these ideas in the beginning as they form the base for right to development. Right to development as a collective right was a movement started by third world continues who has raised their voice against the economic inequality in the world. The discrimination in the economic model of the world which has been fuelled and led by the developed countries reached its melting point in the 1960s and 1970s. The process of right to development was seen as a result by the colonies on third world countries against the existing discrimination in economic forum. The concept of right to development was also connected to the concept of ‘self determination’. Initially, self determination (as expounded by woodrew-wilson in the treaty of Versailles) meant participatory democracy and geographical determination of the nation state by its citizens but in modern scenario it also includes economic self determinism. Where each country decides its own economic model and control of natural resources. The concept of right to Development was not well received by the developed countries and they attacked the ambiguity of the third generation. It has been said that a group as such cannot possess right, only an individual can be the right bearer. The idea of right to development was linked to the concept of new International Economic Order [NIEO].

Most of the demand of the developing countries during the 1970s, when the content of the right to development was negotiated can be put forward in these terms. The integrated program of commodities, generalized preference scheme, industrialization and technology transfers and all the essential components of the New International economic Orders were the claims made on behalf of the developing countries which were all meant to be preconditions for development of all peoples in these countries. These ideas were relevant in 1970s and 80s, but lost its sheen in the post 1990s globalized world. However this concept has become relevant once again in the wake of subprime mortgage crises of 2008 and worldwide recession. The State of world economy has shaken the faith in the present economic system.

Before we discuss the importance of right to development as an important tool to remove economic inequalities it is pertinent to discuss the controversies regarding the nature of right to development.

Controversies regarding right to development:
With the onset of cold war, the concept of human rights found two ideological sponsors one block, led by USA embraced the civil and political rights and the other block led by USSR accepted the economic, social and cultural rights. The situation was complicated by the third world countries putting forward the case of right to development in the name of collective rights of a group of countries to bring about a New International Economic order. Those who support the atomistic view of rights i.e. civil and political rights oppose the idea of right to development and third generation of human rights on the following grounds:

a) Human rights are individual rights
b) Each right holder must have a corresponding duty holder.
c) Human rights must be justiciable.

It is an interesting observation that the supporters of the first generation of human rights are of the view that ‘market’ is the best provider of development. The impersonal


170
forces of market working through the laws of demand and supply benefits the entrepreneurs. On the other hand, third generation brings in individual state as well as community. Some of the rights can be realized in a group and right to development is one of them. The difference between collective right and individual right is described by Yoram Dinsein and Jean Rivero. According to Dinstein1 “...... a cardinal distinction must be drawn between individual and collective rights granted directly to human beings. Individual human rights are bestowed upon every single human being personally. Collective human rights are afforded to human beings communally, that is to say in conjunction with one another or as a group a people or a minority”. Rivero2 more precisely contended that what distinguished collective rights from individual rights was that the former could not be implemented except by the agreement of many wills. In addition, collective rights still retained their character as direct human rights as both authors stressed. The only difference between individual rights and collective rights is how they are exercised: the former can be realised individually whereas the latter can be implemented solely by the attendance of many wills.

It is also seen that the supporters of first generation are obsessed with the Hohfeld concept of rights where every right must have a corresponding duty. This is not the right criteria. Amartyasen in his monumental work “Development as Freedom” has refuted this claim. According to him human rights are rights shared by all irrespective of citizenship the benefits of which every person has his right fulfilled. The claim can be generally addressed to all those who was in a position to help. Sen defines perfect obligation following Immanual Kant as a specific duty of a particular agent for the realization of a right, and then describes what Kant himself had characterized as “imperfect obligation” when the claim are addressed generally to anyone who can help even through no particular person or agency may be changed to bring about the fulfilment of the rights involved”.3

This means that assertion of a human right would require the identification of asset of duty holders who are in a position to help to deliver the rights and that demands are placed on them that they should try to help. If they are enforced by a legal covenant or treaty then they become legally binding otherwise they remain a moral standard which may not have a legel sanction, but in many situation may be as forceful in persuading all the duty holders to deliver those rights.

Arjun Sengupta clears the above mentioned point. According to him, all the rights of all generation have been adopted by the international community of states through a legitimate persons of consensus building at the united Nations and states along with international community are the duty holders. Human rights are confused with legal rights. Human rights are based on moral standards on a view of human dignity, and depends on an ethical base. It human rights are translated into legal rights they become justiciable in courts. But to say only legal rights are acceptable is most inappropriate.4

II -THE CONCEPT OF RIGHT TO DEVELOPMENT:

The content of right to development: The Declaration on the Right to Development, which stated that the right to development is a human right, was adopted by the United

2 Jean Rivero, Ssur Le Droit au developpment, UNESCO UN doc 55-78/conf/630/Supp 2 (1978) translated to English by Texas International Law General
3 Amrtya Sen, in “Development as Freedom” quoted in Arjun Sengupta Pg.10
4 Ibid Pg.10
Nations in 1986 by an overwhelming majority, with the United States casting the single dissenting vote. A new consensus emerged in Vienna at the second UN world Conference on Human rights in 1993. The Declaration adopted there reaffirmed, “the right to development, as established in the Declaration on right to Development, as a universal and inalienable right and as integral part of fundamental human rights. Right to development as a human right raises issues like justice, equity and priorities of international policy.

The first article of right to development states: “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in and contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedom can be fully realized”.

Subsequent articles in Declaration clarify the nature of this process of development further and elaborate on the principles. Art. 1 recognises that not only “every human person” but “all peoples” are entitled to the right of development. Art. 1 clause 2 refers to the right of self determination. Art. 2 categorically states that it is human person who is the central subject of development. Even if “people” are entitled to some rights, such as full sovereignty over the natural wealth and resources in terms of territory, it is the individual human person who must be the active participant in and beneficiary of this right.

The process of development, “ in which all human rights and fundamental freedoms can be fully realized”, would lead to, according to Article 2 clause 3, the consistent improvement of the well being of the entire population and of all individuals, on the basis of their active free and meaningful participation in development and in the “ fair distribution of benefits resulting there from Article 8 elaborates this point further by stating that the measures for realizing the right to development shall ensure “equality of opportunity for all” in their access to basic resources, education health services, food, housing employment and in the fair distribution of income. According to Article 2 clause 2, “all human beings have a responsibility for development individually and collectively” human persons thus are recognised to function both individually and as members of collectives or communities and to have duties to communities that are necessary to be carried out in promoting the process of development. According to Article 3 it is the primary responsibility of the states to carry out the right to development. According to Article 2 clause 3 states have the right and the duty to formulate appropriate national development polices and Article 8 says that states should undertake “all necessary, measures for the realization of the right to development” and encourage popular participation in all spheres.

The main proposition of the declaration are as follows:

a) Right to Development is a human right.

b) It is a right to a particular process if development in which all human rights and fundamental freedoms can be fully realized.

c) Free effective and full participation of all the individuals concerned in the decision making and the implementation of the process. This is an important point because this is the crux of the matter. The process of development as promoted by the capitalist is solely development on market forces. The free choice of the individual is the ultimate panacea. The unregulated market auto corrects itself and performs best when left unregulated. This thinking led to the onset of globalisation and was embraced by most of the countries. But, there was trouble in paradise globalisation with its glamorous concept of “trickle Down” turned out to be an “ideology of promises”. It only widened the gap between the rich and the poor nations. Instead of development it led to discrimination on basis of economic inequality. The Asian Crises of 1997 and subprime mortgage crises of 2007 present the fault lines. “Profits were
privatized and losses were socialized”. This is the point where right to
development comes in. It is at this juncture that this third generation right
should be red along with a rebooted version of New International Economic
Order. According to right to development the process must be “transparent and
accountable individuals must have equal opportunity” of access to the
resources for development and “equal opportunity” of access to resources for
development and receive “fair distribution of the benefits of development and
income.

d) The right confers unequivocal obligation on duty holders, individuals in the
community states both at national and international level. States and
international agencies have the responsibility to help realize the process of
development through appropriate development policies. This is important
because it talks about global governance and regulation of world markets, so
that it does not break out into a case of recurring juggernaut disaster.
Combining the implementation of the right to development with the other
rights and a manner of exercising it which is consistent with fundamental
freedoms envisions an approach to development which elevates the process of
its realization to the exercise of a process of its realization to the exercise of a
human right. The right to development can be further broken down to the
following can be further broken down to the following sub categories: a) Right
to food, b) Right to education, c) Right to Housing, d) Right to work

Of course, all the above mentioned rights depend on the economic capacity of the
State but at least they play an “aspirational role” guiding the world towards the right way of
development. Here is the point where the Human Development Approach should be
differentiated from the liberal theory of development. The liberal theory of development
believed that the development process can be fuelled only by the impersonal market forces.
This system has suffered a backlash recently and has taken a back seat.

**Basic Human Needs Approach:** The Human dimension of development gained its
momentum in the 1970s with the advent of dependency theory. Advocates of basic human
needs approach argue that the “trickle down approach” predicted by classical economic
development theory have failed to materialise because of official corruption and many other
barriers to growth caused by the ruling elites of the third world countries. Particularly
disturbing is the fact that more than a quarter of the developing world’s people are still living
in absolute poverty without access to drinking water, inadequate nutrition, sanitation and
health services.

**Human Development approach:** The basic human needs approach required new ways to
measure development beyond those focusing exclusively on economic indicators eventually,
the United Nation development constructed a human development index to measure state’s
comparative ability to provide for citizens well being. The UNDP human development index
spreads broadly across rest only economic factors but also the environment politics and social
welfare in both the developing and the developed worlds, “to encompass the growing
consensus that the real purpose of development should be to enhance people’s choices”. This
is where right to development ideas of right to food health and education come into play.

### III- THE EFFECT OF GLOBALISATION ON THE WORLD ORDER AND THE
CONCEPT OF NEW INTERNATIONAL ECONOMIC ORDER:

The idea of globalisation in its modern form had its roots in the OPEC crisis of 1971.
The problem of ‘stagflation’ of the 1970s allowed think took all over the world to embrace
the supply side of economics. Unregulated market became the order of the day. The concept took an unprecedented turn in the 1980s in the era of Ronald Regan, when the President famously said, “read my lips, no more taxes”. But the robust growth suffered a setback first in 1997 in the form of ‘Asian crisis’ and then in 2007 with the subprime ‘mortgage crisis’. This has brought disaster for the world. This concern has also been aired by the UN general Assembly recently. In a report presented in 2010 the assembly observed:¹

The food and fuel crises of 2007-2008 and the current global financial and economic crisis are recent examples of how problems originating in one part of the world have quickly engulfed the entire world economy and adversely affected developing countries. This the transmission of shocks through channels of reduced trade, remittances, investment and financial flows has exacerbated inequities associated with globalization jeopardizing development and human welfare. With aid flows also declining the impact have been even more devastating for low income countries and the poor…”

The main drawbacks of the globalization can be summed up under the following points:

a) Globalization and its impact on equality and poverty, critics of globalization have drawn attention to the emergence of new pattern of inequality globalization is thus a game of winners & losers the MNCs and industrially advanced states are the winners the developing world, where wages are low, regulation is weak or nonexistent are the losers.

b) Problem of risk and uncertainty: Economic decision making is increasingly influenced by global financial markets that are inherently not stable. Fate of companies, industries and economies and even regions of the world is subject to whims of financial markets.

c) The notorious nature of structural adjustment programme: structural adjustment policies are economic policies which countries must follow in order to qualify for world bank and International Monetary Fund [IMF]. It require countries to devolve their currencies against the dollar, lift import and export restrictions, balance their budgets and not overspend and removal of subsidies and price controls. The structural adjust programme has led people’s lives into degraded standards of living, reduced access to public services and other untold miseries.

New International Economic Order and right to development: the concept of New International Economic Order is based on the assumption that the prevalent international order perpetuates and aggravates international inequalities and that new relationship of interdependence should replace the older patterns of dependence and unequal exchange.²

The developing countries raised the question of establishing New International Economic Order (NIEO) and demanded restructuring of international economic relations on just, democratic principles on the basis of full equality. They asserted their determination to dispose freely their own national resources, this is also an aspect of self determination on

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¹ UN, 65th session, 9th August, A an overview of the major international economic and policy challenges for equitable and inclusive sustained economic growth and sustainable development, and of the role of the UN in addressing these issues in the light of the New International order, report of secretary General, Sec. I, Introduction Para 2 Pg. 2. The report was prepared pursuant to General Assembly Resolution No. 64/209 entitled, “towards new economic order”.

1 May 1974 the general Assembly adopted the Declaration on the Establishment of a New International Economic Order. It stipulated the principles on which the international economic relations should be based. The main principles emphasised by the declaration were sovereign equality of states, their territorial integrity noninterference in the internal affairs right to adopt an economic system of their own choice, inalienable and permanent sovereignty of each state over their natural resources and all economic activities. This was a solid international legal basis for establishment of truly equal international economic relations meeting the interests of all states and people. At this juncture it is important to evaluate the role of right to development as a third generation right. The commission on Human rights in a resolution\textsuperscript{1} in 1975 before the declaration on the right to development was adopted and stated that, “development is as much a prerogative of nations as of individuals within nations”. According to Arjun Sengupta many individual rights can be satisfied only in a collective context and the right of a state or a nation to develop is a necessary condition for the fulfilment of the rights and the realization of the development of individuals”.\textsuperscript{2} All the demands of right to development and NIEO are congruent. It presents an integrated programme of commodities industrialization and technology transfers. These were claims made on behalf of the developing countries which were all meant to be preconditions for development of all peoples in these countries.

The main motivation behind the developing countries claiming for the New International Economic Order was the demand for equity in dealing with the running of the international economic system, in all its trade, financial and technological relationships. The basic requirements for equity and justice in the process of development fulfilling the human right to development have not changed. So if one wishes to develop along the path of the right to development, it must ensure the fulfilment of all the human rights consistent with equity and justice.

The weakness of the globalization system and the added advantage of the New International Economic Order were noticed by the general Assembly recently: “Nevertheless, the global crises have also provided a rare opportunity for the international community to guide the world economy onto a path of more sustainable economic growth and recovery by simultaneously addressing the problems of food and energy insecurity, climate change and the developmental aspirations of Developing countries this goal can be achieved through inclusive multilateralism and the equitable participation of all countries, both developed and developing, as envisioned in the declaration and the programme of action on the establishment of a new international economic order, adopted by the general assembly at its sixth special session in 1974 [resolution 3201(S-VI)and 3202 (S-VI)].\textsuperscript{3} The ill effect of structural adjustment programme is also noticed in the same report of general assembly. “......Meanwhile, lower tax revenues and increasing insistence on balanced budgets, or even fiscal surpluses, have further constrained government spending, including

\textsuperscript{1} No. 5 XXXV
\textsuperscript{2} Supra foot note 3
\textsuperscript{3} UN, 65\textsuperscript{th} session, 9\textsuperscript{th} August, A an overview of the major international economic and policy challenges for equitable and inclusive sustained economic growth and sustainable development, and of the role of the UN in addressing these issues in the light of the New International order, report of secretary General, Sec. I, Introduction Para 4 Pg. 2. The report was prepared pursuant to General Assembly Resolution No. 64/209 entitled, “towards new economic order”.
social expenditure with deflationary and pro cyclical consequences...‖\(^1\) The problem of recession of 2007-2008 is also addressed. “.... the disorderly unwinding of global imbalances during the great Recession highlights the urgent importance of building a global financial safety net in order to address these problems...‖\(^2\)

Millennium Development Goals and the right to development: with the elaboration of the Millennium development goals especially goal No. 8, which aims at developing a “global partnership for development”, the right to development has come into the focus of renewed interest. The Millennium goals are those goals for development that were named in the Millennium Declaration.\(^3\) They were later compiled and listed as eight main goals.

The Eight goals are as follows:
1) Eradicate extreme poverty and hunger
2) Achieve universal primary education
3) Promote gender equality and empower women
4) Reduce child mortality
5) Improve maternal health
6) Combat HIV/AIDS, Malaria and other diseases
7) Ensure environmental stability.
8) Develop a global partnership for development.

This 8\(^{th}\) goal is specifically concerned with the right to development and provides a basis for the achievement of the other seven goals. The 8\(^{th}\) goal envisages to develop further an open trading and financial system that is rule based, predictable and non discriminatory and includes commitment to good governance, to address the least developed countries special needs, to deal comprehensively with Third World’s country’s debt problems, access to drugs and new technologies.

The right to development is seen as a great opportunity for developing countries to push for a global trade system that is more in their favour as well as for the realization of the financial commitments made by developed countries. So it is not surprising that recent debates on the right to development have focused on the application of their right in the context of Millennium Development goals.

IV- CONCLUSION AND SUGGESTIONS:

Right to development is an idealistic and an aspiration. It is also presented as an alternate to the “neo conservative” economic model. But the road is full of formidable obstacles. It includes political opposition and a relative conceptual clarity of the topic itself. The political opposition from the developed world is obvious as it demands a wholesome participation of state, a model that is not in sync with market forces, as far as conceptual clarity is concerned, it suffers from two weaknesses, one is weakness of conceptual thinking on the right to development itself and lack of literature found in human rights. Secondly there is lack of empirical knowledge on matter. According to Ibrahim Salama the explicit reference of right to development was avoided in numerous conferences such as Beiging+5, Copenhagen+5 and Monetary consensus on Financing development.\(^4\) It shows that it is not yet an understandable convincing operational tool for development policies. Therefore, the

\(^{1}\) Ibid Sec.3 Para 28 Pg. 8
\(^{2}\) Ibid Sec. 5 Para 62 Pg. 4
\(^{3}\) A/RES/5512
right to development should be mainstreamed into the policies, norms and decisions making process. The objective of any new approach should be to move it from generalities to specifics, from rhetoric to action and from declarations to field. This involves public awareness, impact assessment, and involvement of development practitioners.

Another problem is that whether right to development should be drafted as a legally binding standard in the form of a convention or treaty. The group led by Non Aligned Movement, G-77 and China are its ardent supporters. Countries including Japan, U.S., Canada, Australia and New Zealand oppose conceptions of the right to development as a collective right. But it should be made into a legally binding document just like ICCPR and ICESCR. This is the only right that talks about the true idea of development. It secures not only the rights but also the appropriate devices for securing those rights. These devices are non discrimination, accountability, transparency, equity, rule of law and good governance.
AN INSIGHT TO CHILD PORNOGRAPHY

Swasti Agarwal

“Technology is a queer thing. It brings you great with one hand, and it stabs you in the back with the other.”

- Carrie P. Snow

Fast and furious development in technology has brought revolutionary changes. Internet is a kind of ‘blank slate’ which any person can use who has access to it. The birth of internet was with the endeavour to make the people’s life sophisticated but now, human ingenuity has used the same technology for committing crimes. Internet has become a tool for accessing pornographic contents which have harmful effects on the society as it increases the incidence of sex crime resulting in degradation of social values.

**Definition of child pornography**

Pornography is a wider concept and child pornography is an offspring of it. In order to understand child pornography one needs to know what is “pornography”.

The word “pornography” has been derived from the Greek word *Porne* ("Prostitute") and *graphein* (to write). The word pornography originally referred to any work or art or literature dealing with sex and sexual themes. According to Oxford English Dictionary, 2000 “Pornography may be defined as explicit representation of sexual activity virtually or descriptively to stimulate erotic rather than aesthetic feelings, films, literature etc. According to Collins Dictionary, “Pornography means writing, films or pictures or designs to be sexually exciting. The term “Pornography” is not given any legal connotation neither in India nor in any part of the world. It is deemed to be covered under the term “obscenity”.

**Child Pornography**

International Criminal Police organization (Interpol) defines child Pornography as “means of depicting or promoting sexual abuse of a child, including print and/ or audio, centered on sex acts or genital organs of children. Article 9(2) of European Union Convention on Cyber Crimes 2001 states that the term “Child pornography” shall include pornographic material that visually depicts: (a) a minor engaged in sexually explicit conduct, (b) a person appearing to be a minor engaged in sexually explicit conduct; (c) realistic images representing a minor engaged in sexually explicit conduct.

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1 Student of Symbiosis Law School, Pune B.B.A.LL.B. (Vth year)
2 Dr. Mrs. K. Sita Manikyam, Cyber Crimes, Law & Perspectives, 2009 Ed., Hind Law House. Pg. No. 1
3 Chaubey, R.K; An Introduction to Cyber Crime & Cyber Law Kamal Law House, Kolkata 2009.
5 Supra 3

178
Cyber pornography is the most visible shade of all other cyber crimes. Child pornography is one of the branch of cyber pornography. The legal definition of a "child" varies among nations. The United Nations Convention on Rights of Child (UNCRC) defines a child as a person under 18 years of age. This definition, however, is far from being universally adopted. For example, in all Australian States and Territories, child pornography legislation defines "child" as a person under 16 years of age. In Canada (Penal Code Sec. 163), a minor, for purposes of child pornography, is a person under 18 years of age. In various jurisdictions of the United States (U.S.), minors as young as 15 may legally consent to sexual activity with an adult. However, that same adult could not create, distribute, or possess a visual record of that activity because federal child pornography statutes (18 U.S.C. 2252, 2256) define a minor as any person under that age of 18 years.

There is no such definition of child pornography under any Indian Legislation. According to section 2556(8) of Child Pornography Prevention Act, 1996, child pornography means any visual depiction, including computer images, of sexually explicit conduct.

Under United Kingdom law, a "child pornography" image is an "indecent photograph of a child"; there is no specific requirement of sexual content, as nudity is sufficient for an image to be indecent. With Sexual Offences Act, 2003 the word pornography is used for the first time, defined to mean that "indecent images are recorded".

There is no specific legal definition of pedophiles in any of the Indian Legislation. But in general, a pedophile is a person who has an obsession with children as sex objects or an adult who is sexually attracted to children.

With the amendment brought into the Information Technology Act in 2008, has specifically mentioned cyber pornography as an offence.

Child pornography is one of the branches of cyber pornography in which children become victim to the cyber crime. Section 67B of the IT (Amendment) Act, 2008 does not specifically uses the word “child pornography” but it prohibits publication and transmission of material which depicts children who are engaged in sexually explicit act.

**Effects of pornography on social behaviour:**
Historically, the problem of child sexual abuse has been grossly neglected. It is only in relatively recent times that the nature and scale of the problem have come to be publicly acknowledged and politically addressed. Consequently, the past few decades have seen concerted legal efforts to address child pornography in general, and internet pornography in particular.

In democratic country like India, the Constitution under Part III guarantees certain fundamental rights to both citizens and non citizens. Article 19(1) of Indian Constitution guarantees the right of Freedom of speech and expression which is not an absolute right in itself. It imposes some reasonable restrictions under Article 19(2). With regard to obscenity, it is subject to reasonable restriction in the interest of decency and morality.

In Ranjit D Udeshi v. State of Maharashtra, the court held that indecent or immoral publication are prohibited under Article 19(2) of the Indian Constitution and also under

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3. AIR 1965 SC 881
sections 292, 293 and 294 of IPC because these obscene publications corrupt the minds of younger generation.  

But under, **American Constitution**, since freedom of speech is governed by the first amendment of the Constitution and since first amendment did not talk about obscenity and freedom of speech, so the Supreme Court refused to give any protection to obscenity.  

There are different views of both defenders and opponents of pornography. The opponents believe that it encourages immorality, sexual violence, and negative attitude towards women while defenders see pornography for adults as harmless diversion that may serve to relieve sexual tensions.  

Pornographic material arouses sexual desire and use of such material by its very nature isolates individuals and they start focusing on their selfish needs. Therefore, the addiction make them inclined towards such material more and more and thus, negative consequences such as divorce can creep in. Society has made a number of efforts to impose upon itself the ethical and moral standard which make the limits within which the freedom of speech and expression should be exercised. When one steps over this line, it constitutes stepping into the area of obscenity. Therefore, it is important to draw the boundary that shall be used to distinguish the activities which can be called as obscene.  

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**Comparative analysis on laws relating to child pornography in U.S.A., U.K. and India-**  

**A. HISTORICAL BACKGROUND**  

In **U.S.A.**, the first attempt to regulate pornography on the internet was the Federal Communications Decency Act of 1996. It prohibited the “knowing” transmission of “indecent” messages to minors and publication of materials which depict, in a manner “patently offensive as measured by contemporary community standards, sexual or excretory activities or organs”, unless those materials are protected from access by minors. Then, another attempt made by the U.S. government was Child Online Protection Act (COPA) of 1998, which forced all commercial distributors of “material harmful to minors” to protect their sites from access by minors. But this Act was struck down on 22nd March, 2007 as it violates the First and Fifth Amendments of the United States Constitution.  

In **U.K.**- The key legislations in relation to pornographic material are the Obscene Publications Act, 1959(OPA), the Obscene Publications Act, 1964 and Indecent Displays (Control) Act, 1981. In England, and Wales the law on child pornographic material is strictly defined by Protection of Children Act, 1978, Section 160 of Criminal Justice Act, 1988, further amended by Criminal Justice and Public Order Act, 1994 to include pseudo-  

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photographs, and Sexual Offences Act, 2003 which raised the age from 16 to 18 (the age of consent in UK is still 16).\(^1\) The UK has taken an additional step towards regulating child pornography on the internet. Internet service providers started the new organization patrolling the internet i.e., the Internet Watch Foundation (IWF) which began in 1996 to address child pornography in the internet. It is an independent organization which aims to implement the proposals jointly agreed by the government, police, and two major United Kingdom internet service provider trade associations, ISPA (Internet Service Providers’ Association) and LINX (London Internet Exchange).\(^2\)

**In India-**
Information Technology Act, 2000 is a legislation which deals with the cyber crimes. Pornography is also covered under cyber crimes and so it is an offence punishable under the said Act. Section 67 of Information Technology Act, 2000 prohibits publication of obscene information in electronic form. The Act did not specifically mention cyber pornography and does not provide any specific rule to prevent and control child pornography in cyberspace. Now, this Act has been amended in 2008 and a new section has been added i.e. section 67B which prohibits publication and transmission of material which depicts children who are engaged in sexually explicit act.

**B. Various tests followed in USA, UK and India to determine the pornography-**
In USA- Hicklins test was followed till 1957 and thereafter as in Roth v. United States (1957), the Supreme Court rejected this test and was superseded by **Millers Test** which was devolved in Miller v. California (1973). This case rules that material could be banned as obscene if it met a reformulated three-part test:

- The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest (Roth Test);
- The work depicts, in a patently offensive way, sexual conduct specifically defined by the applicable state law;
- The work, taken as a whole, lacks serious literary, artistic, political or scientific value (LAPS Test).\(^3\)

In U.K. - In Regina v. Hicklin\(^4\), the court enunciated the “Hicklin’s test” so as to guide courts and commonwealth and to determine whether a material could be considered as obscene or not. Though this test was used for a long period of time in UK it suffers lot of

\(^2\) Since 1997 the IWF has been funded solely by the United Kingdom Internet Industry. Id. See also, Internet Safety Net to Tackle Child Porn, R3 Safety-Net - Rating Reporting Responsibility - For Child Pornography & Illegal Materials on the Internet, Sept. 23, 1996. <http://www.iwf.org.United Kingdom/about/R3Safety.html>. LINX and ISPA have also established the Safety-Net Foundation. The foundation was established to take action against illegal materials found on web sites and in news groups.
\(^3\) http://www.cas.okstate.edu/jb/faculty/senat/jb3163/obscenity.html
\(^4\) (1868) 3QB 360
flaws for the reason that it focuses mainly on the reader of the material and not on the person who is involved in making such material or distributing it.\(^1\)

**In India:-**
Indian judiciary adopted “Hicklin Test” following “harm to others” principle in several cases to maintain synthesis between law and morality which was laid down in Regina v. Hicklin\(^2\). Under Hicklins test, judges considered a work to be obscene if any portion of the material had a tendency "to deprave or corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."\(^3\)

**C. Possession of child pornographic material-**

In USA- In *Osborne v. Ohio*\(^4\), the court held that the possession of child pornography is illegal.

In UK-, the possession of pornographic images for private use has never been an offence. Under Obscene Publications Act, 1959, mere possession is not an offence, there must be publication or an intent to publish. Under Protection of Children Act, 1978, mere possession of child pornography is an offence. Section 160 of Criminal Justice Act, 1988, makes it an offence for a person to have any indecent or pseudo-photograph of a child in his possession and the punishment prescribed is only 6 months.

In India-, possession is punishable under section 292 of IPC.
In this way, possession of child sex abuse images is punishable under a general provision of national legislation. Even though the word 'possession' of online child sexual abuse material is not used per se, however, 'collecting' of such material is punished under sub clause (b) of section 67B of Information Technology Act, 2008.\(^5\)

**Comparative analysis of child pornography in relation to IPC and IT Act**

Obscenity is punishable under both IPC and IT Act, 2008. Section 292 of IPC and section 67B of IT Act, 2008 deals with the offence of obscenity.

1. Under Section 292 of IPC, it prescribes the punishment on first conviction with imprisonment which may extend to \textbf{two years} and with fine which may extend to two thousand rupees and in the event of subsequent or second conviction, with imprisonment which may extend to 5 years and also with fine which may extend to five thousand rupees whereas under section 67B of Information Technology Act, 2008, it prescribes the punishment on first conviction with imprisonment which may extend to \textbf{5 years} and fine which may extend to 10 lakh rupees and in the event of second or subsequent conviction with imprisonment which may extend to seven years and also with fine which may extend to 10

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\(^1\) Supra 10  
\(^2\) Supra 15  
\(^3\) Supra 9  
\(^4\) 495 U.S. 103 (1990)  
lakh rupees. Therefore, the punishment prescribed under section 67 of IT Act is more severe than under section 292 of IPC, 1860.

2. Section 292 of IPC speaks of any book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it tends to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it whereas section 67 of IT Act, 2008 covers “electronic form” only.

**Similarity between IPC and IT Act**

(A) Both the sections of different laws, Indian Penal Code and Information Technology Act, makes it clear that the chief ingredients of obscenity are as follows-
1. it is lascivious or appeals to the prurient interest or,
2. if its effect is such as to tend to deprave and corrupt person who are likely to read or gear the matter contained in the publications.

(B) In both the Acts, if the person publishes or possesses the obscene material without any intention or knowledge that the material is an obscene one, then he can take defence under law as both the sections in different laws does not mention the words “intention” or “knowledge”.

**RECOMMENDATIONS TO REGULATE CHILD PORNOGRAPHY**

1. The government should propose to form an independent foundation or organization similar to International Watch Foundation in UK which solely works to prevent and control child pornography.
2. The punishment mentioned in both the Acts i.e. IPC and Information Technology Act should be increased in order to curb the number of pedophiles.
3. The cyber cell authorities should immediately take strict action as soon as the offence of child pornography comes to their notice.
4. To combat child pornography, the legislatures in India should add another section in the Indian Penal Code, 1860 which deals with the offence of child pornography as there is no specific provision dealing with it and also the definition of “pedophiles” should be included to know the basis of conviction.
5. What precisely constitutes indecency is left vague and is upto the court to decide\(^1\), so precisely the definition of as to what constitutes indecency should be laid down in the Act.
6. Under the present provision, one can take a defence that he did not have any knowledge or intention that he possesses child pornography or that he did not have any intention to distribute it. This provision should be made stricter by criminalizing the simple possession of child pornography so that it may prevent further incidents of sexual abuse.
7. The age of child should be reconsidered in relation to this offence as according to the biological aspect, the children are attaining puberty much earlier than before.

\(^1\) Yar, Majid, Cybercrime and Society, 2006, Sage Publications Ltd.
CONCLUSION-

For committing cyber crime, a computer can be used as a tool or a target or both. Here, it may be used as a tool in crimes like cyber stalking, snooping, cyber squatting, pornography whereas it may be used as a target in cases of unauthorised access to computer system, e-bombing, salami attack, trojan attack etc.

Due to increasing cyber pornography, the incidence of rape cases are also increasing at a higher rate as people get sexually excited by watching the sexually explicit contents on pornographic sites. Child pornography has garnered even further more attention over the recent years due to a number of high profile cases. For eg. In Avinish bajaj v. State¹, the Delhi High Court observed that the proliferation of internet and the possibility widespread use through instant transaction of pornographic material calls for strict standards.

Cyber crime covers child pornography. Although, it is very difficult to regulate child pornography as the standard of morality differs from country to country. But if the authorities detect the crime timely and there are proper regulations and legislations, it can be prevented. Crime prevention in 21st century can be done by enforcement of law and legal training, making awareness principle known to the public at large, support the victims in reporting computer crime, adding the compliments of security to various sites and programmes.²

From Ranjeet’s case till today, judiciary is the sole authority to decide the parameter of obscenity. So, it is high time that India should enact a legislation which totally deals with the offence of pornography and its punishments as the crime rate of pornography is increasing day by day which ultimately results in degradation of social values.

¹ 2008(105)DRJ721
² Paul T. Augastine, cyber Crime and Legal Issues, ed. 2007, pg. 73-86
TERRORISM AND HUMAN RIGHTS- AN ANALYSIS

Dr. Prashant Mishra*

Introduction:

Terrorism is described as the greatest crime against humankind and society which poses a great threat to the enjoyment of human rights. Though, the phenomenon of terror was present since centuries, the spread of international terrorism across borders thereby threatening not only the friendly relations among states but posing an extremely serious threat to the human right and fundamental freedom is an unprecedented phenomenon of the last few decades. Today, this problem is not limited to territory of a single country or region rather it is universal. In this paper, an attempt has been made to highlight the human rights violations in cases of terrorism. Further, some sensible suggestions are also given to root out the hydra-headed problem of terrorism.

What is Terrorism?

The term “Terrorism” has been taken from the French word “Terrorisme” which is based on the Latin word “Terrere” (to cause to tremble). The word terrorism comes from the Reign of Terror instigated by Maxmilien Robespierre in 1793, following the French revolution. Robespierre, one of twelve heads of the new state, had enemies of the revolution killed, and installed a dictatorship to stabilize the country. He justified his methods as necessary in the transformation of the monarchy to a liberal democracy. Some government agencies have defined terrorism for their own purpose. The FBI’s definition is frequently cited and borrowed logically, since the FBI leads counterterrorism efforts both at home and abroad. President Ronald Reagan assigned this lead role to the FBI in 1982. Following are the important definitions of terrorism:

League of Nations:

All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.

UN Resolution of 1999:

All criminal acts intended or calculated to provoke a state of terror in the general public a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, and religious or other nature that may be invoked to justify them.

Code of Federal Regulations:

Terrorism includes the unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or a segment thereof, in furtherance of political or social objectives. (Section 0.8, the Code of the Federal Regulation)

United States Department of Defence:

The calculated use of violence or threat of violence to inculcate fear intended to coerce or to intimidate governments or societies in the pursuit or goals that are generally political religious or ideological.

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Gilmore Commission: (Advisory Penal to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction)

Terrorism is violence, the threat of violence, calculated to create an atmosphere of fear and alarm, through acts designed to coerce others into actions they otherwise would not undertake or into refraining from actions that they desired to take. All terrorist acts are crimes. Many would also be violations of the rules of war, if a state of war existed. The violence of threat of violence is generally directs against civilian targets. The motives of terrorists are political, and terrorist actions are generally carried out in a way that will achieve maximum publicity. The perpetrators are usually members of an organized group.... Unlike other criminals, terrorists often claim credit for their acts. Finally terrorist acts are intended to produce effects beyond the immediate physical damage that they cause. (Rana and Brian Michall, “International Terrorism. A New Kind of Warfare”, 82, (1974)

POTA defined terrorism as:

Any violence with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people.( Section , 3(1), the Prevention of Terrorism Act, 2002.)

Through the Unlawful Activity (Prevention) Amendment Act, 2008 few new changes have been made. Section 15 now contains new definition of Terrorist act. It says:

Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,- (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause-(i) death of, or injuries to, any person or persons; or(ii) loss of, or damage to, or destruction of, property; or(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act. (Section 15, ibid inserted through the Unlawful Activity (Prevention) Amendment Act, 2008.)

Terrorism has been described variously as both a tactic and strategy; a crime and a holy duty; a justified reaction to oppression and an inexcusable abomination. (http://www.terrorism-research.com/ accessed on 28.12.2010)

Hon’ble Supreme Court of India has observed:

It is not possible to give a precise definition of terrorism or to lay down what constitutes terrorism but it may be possible to describe it as a use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. ... if the object of the activity is to disturb harmony of the society or to terrorize people and the society, with a view to disturb even tempo, tranquillity of the society, and a sense of fear and
insecurity is created in the minds of a section of society at large, then it will, undoubtedly be held to be terrorist act... (Mohd. Iqbal M. Shaikh v. State of Maharashtra, (1998) 4 SCC 494)

There are five major characteristics of terrorism: (i) it is premeditated and aims to create a climate of extreme fear or terror; (ii) it is directed at a wider audience or target than the immediate victims of violence (iii) it inherently involves attacks on random and symbolic targets, including civilians; (iv) the acts of terrorism breach the social norms; and (v) it is used to influence political behaviour. Terrorism is distinguished from other acts of violence, and from war, by always having these four characteristics:

a) Terrorists violate the rules of modern warfare,
b) Its goal is to achieve political change;
c) Its targets are symbolic of the political issue in question;
d) Acts of terror are designed to get attention from the public and media.

Terrorism is a method of combat in which random or symbolic victims serve as an instrumental target of violence. These instrumental victims share group or class characteristics which form the basis for their selection for victimization. Through previous use of violence or the credible threat of violence other members of that group or class are put in a state of chronic fear. This group or class, whose member’s sense of security is purposefully undermined, is the target of terror. The victimization of the target of violence is considered extra-normal by most observers from the witnessing audience on the basis of its atrocity, the time, or place of victimization or the disregard for rules of combat accepted in conventional warfare. The norm violation creates an attentive audience beyond the target or terror; sectors of this audience might in turn form the main object of manipulation. The purpose of this indirect method of combat is either to immobilize the target of terror in order to produce disorientation and compliance or to mobilize secondary targets of demand e.g., a government, or targets of attention e.g. public opinion, to changes of attitude or behaviour favoring the short or long term interests of the users of this method of combat.

International Perspective:

Terrorism has attracted the attention of international community without any fear. The U.N. Charter, which laid out basic principles of international relations, established the U.N. on October 24, 1945. At its founding, the U.N. had 51 member countries; it now has 193 members. Each member has a seat and a vote in the General Assembly. The U.N. has five other permanent bodies, including the 15-member Security Council, which is responsible for peacekeeping and international security and is thus intimately involved in issues of terrorism. Actually, terrorism has been of concern to the international community since 1937 when the League of Nations elaborated the Convention for the Prevention and Punishment of Terrorism. Subsequently, the United Nations and regional inter governmental organization have dealt with terrorism from a legal and political perspective. Since 1963, the international community has elaborated universal legal instruments related to the prevention and suppression of international terrorism. One of the recent International Convention for the Suppression of acts of Nuclear Terrorism opens for signature on 14 September 2005. In addition, the United Nations General Assembly and Security Council have adopted several resolutions pertaining to terrorism. In response to the attacks of 11 September 2001, the Security Council adopted resolution which declared that:

"Acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations". It called upon Member States to “become parties as soon as possible to the relevant international conventions and protocols" and to increase cooperation and fully implement the relevant international conventions and protocols."( The Security Council Resolution 1373/2001, 28 September (2001))
In nutshell, the United Nations and its specialized agencies have played very crucial role to root out the menace of terrorism. Reiterating strong and unequivocal condemnation of terrorism in all its forms and manifestations, “by whomever [...] and for whatever purposes” they were committed, the General Assembly today reaffirmed its support for the United Nations Global Counter-Terrorism Strategy and called on the world body’s Member States and entities, along with other international and regional organizations, to step up implementation of the four-year-old initiative.( GA/10977, 8 September 2010, Sixty-fourth General Assembly Plenary- 116th & 117th Meetings)

**Indian Perspective:**

India is wedded to the concept of rule of law. Through the Constitution, India resolved to strive for good governance and with this object set out certain Directive Principles of State policy the prime object of which was to secure the welfare of its people. They embody the concept of a welfare State. It has throughout been conscious and alive to its obligations under the International multi-lateral treaty regime. These International Treaties and Conventions have established a very substantial jurisprudence on the subject of basic human rights for the preservation of which India stands committed, particularly in view of the declaration in the Constitution itself that the State shall endeavour, amongst others, to promote International peace and security and foster respect for International law and treaty obligations in the dealings of organized people with one another. Indian Parliament has converted a number of International Conventions on the subject of Human Rights into legislative measures.

Terrorism has cross-border fingerprints. India’s answers to the bane were initially an endeavour to control through general law. But since the menace reached alarming levels, it escalated into the need for special measures in the shape of enactment called Terrorists and Disruptive Activities (Prevention) Act, 1985 (commonly known as TADA, 1985). The enactment was justified by the Legislature *inter alia* in the wake of state of fear of panic sought to be created and the object of disruption of communal peace and harmony sought to be achieved by the perpetrators in certain parts of India. TADA, 1985 created two new offences, namely, terrorist act and disruptive activities. The disruptive activities were required to be such as to be intended to disrupt the sovereignty and territorial integrity of India or to bring about, amongst others the secession of any part of India from the Union.

TADA, 1985 established a system of Designated Courts and placed restriction on the grant of bail unless the Court recorded the existence of reasonable grounds for believing that the accused was not guilty. The police were given enhanced powers of detention of suspects; provision was made for protection of witnesses and at the same time it was provided that trials under the law shall be speedy by being accorded precedence over other cases. The Legislature renewed the law in the form of Terrorist and Disruptive Activities (Prevention) Act, 1987 commonly known as TADA, 1987. TADA, 1987 sought to strengthen the mechanism that had been provided in TADA, 1985. TADA, 1987 was initially enacted for limited period. But its life was extended from time to time, finally in 1993 so as to make it valid till 1995.

The Indian legislature recognized the fact that terrorist organizations, having a close inter-linkage with organized crime, are taking advantage of modern means of communication and technology while the existing criminal justice system was not designed to deal with such types of heinous crimes. The Prevention of Terrorism Act, 2002 commonly called as POTA was enacted to make provisions for the prevention of and for dealing with terrorist activities, in the face of multifarious challenges in the management of internal security of the country.

POTA conferred special powers of arrest or detention of suspected terrorists, of seizure and forfeiture of terrorist property, for prohibiting and penalizing terrorist funding,
the interception of communication amongst suspects and for dealing with terrorist organizations by, *inter alia*, making their membership an offence. POTA contained revised form of definition of the offence of terrorist act requiring, as the first and foremost ingredient, the intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people.

Besides introduction of statutory safeguards for abuse of confession before the police, POTA also provided for speedy trials, and introduced the concept of quasi judicial review of the State action *vis-a-vis* organizations declared to be terrorist organizations. It may be added that POTA also came with a sunset clause for expiry at the end of three years but came to be repealed ahead of its time with effect from 21st September 2004. The constitutionality of POTA was challenged in Peoples Union for Civil Liberties v U.O.I., and the Court held that the protection and promotion of human rights under the rule of law is essential in the prevention of terrorism, involving courts responsibility and that if human rights are violated in the process, it will be self-defeating.

The *Second Administrative Reforms Commission* recommended the establishment of a federal agency to investigate acts of terror in the country and comprehensive anti-terror legislations and said that no person accused of an offence punishable under the National Security Act should be released on bail. ARC chairman M Veerappa Moily, while releasing the report, that the commission was of the view that a federal agency was necessary to investigate terrorist offences. The Administrative Reforms Commission recommends for comprehensive anti-terror legislations with observation that special fast track courts should be set up for trial of terrorism-related cases and measures should be taken to block flow of funds for financing terrorist activities. It defined terrorism as the use of firearms, explosives or any other lethal substance to cause or likely to cause damage to life and property, and essential infrastructure which would include installations, establishments having military significance.

**Human Rights Issues:**

The issue of terrorism and human rights has long been a concern of the United Nations Human Rights Program, but it has become more urgent following the worldwide surge in acts of terrorism. The Office of the High Commissioner for Human Rights (OHCHR) condemns terrorism unequivocally and recognizes the duty of States to protect those living within their jurisdictions from terrorism. It has placed a priority on protection of human rights, notably the right to life and emphasized that human rights norms must be rigorously respected.

The Protection of Human Rights Act of 1993 established India's National Human Rights Commission (NHRC). The NHRC is empowered to receive complaints broadly relating to any human rights violations.( C. Raj Kumar, "Role and Contribution of National Human Rights Commissions in Promoting National and International Human Rights Norms in the National Context", 47 *Ind. J. Pub. Admin.* 222 (2001)) Over the years, the NHRC has developed a good reputation both nationally and internationally with regard to intervention on human rights matters and its opinions on numerous issues are inconsistent with the Indian government's position. The NHRC also engages State governments on various human rights and law reform matters, the most important of which is ensuring that legislation conforms to the human rights obligations in the Indian Constitution and other laws. The NHRC's moral legitimacy is based on its members' impartiality and integrity, and not on its institutional independence or its guaranteed powers in the Protection of Human Rights Act of 1993.
Concluding Observation:

In recent years, however, India has taken several positive steps, repealing POTA and seeking to transform the police and criminal justice institutions that is inherited from the British. Following the recent bomb blasts in Mumbai, the Indian government wisely chose not to re-enact new draconian legislation to replace POTA. It is a good step that the Indian government to maintain this position, even as it seeks to upgrade its intelligence and investigative capacity to more effectively prevent acts of terrorism and hold perpetrators accountable. Independent India's constitutional tradition is a proud one, and in combating a threat of terrorism a durable, enduring, and ever-improving commitment by India to protecting fundamental rights can serve as an important international example. In order to protect human rights, both the rule of law and long-term security, even more effectively, following are some suggestions:

a) Repeal all provisions in UAPA raising human rights concerns, and ensure that all antiterrorism and other security laws contain provisions for tighter administrative and judicial oversight of investigative and prosecutorial decision-making, and transparency in that decision-making, to ensure nationwide uniformity and adherence to fundamental rights.

b) Establish Central Government Review Committees to review and dispose of all pending prosecutions, and with a comparable, one-year deadline to dispose of those cases.

c) Establish mandatory nationwide guidelines and standards for investigative and prosecutorial decisions under central security laws by both the Central and State Governments.

d) Consider eliminating or restricting the authority of state governments to independently investigate and prosecute violations of Central Government security laws, limiting enforcement of those laws to the Central Government or to State Government institutions subject to Central Government oversight and control.

e) If state authority to enforce central security laws remains, ensure greater Central Government oversight and review of state prosecution decision-making under those laws, through requirements such as Central Government authorization before investigations or prosecutions are initiated and authority for the Central Government to terminate or take over state investigations and prosecutions that are not proceeding in a manner consistent with Central Government guidelines and standards.

f) Ensure full judicial review of all executive decisions, including the decision to designate "terrorist organisations" under UAPA.

g) Compile, maintain, and publicly disclose statistics concerning prosecution and detention under all central and state security laws that are disaggregated by religion, caste, and tribal status, in order to facilitate accountability and oversight for arbitrary and selective enforcement.

h) State Human Right Commission and National Human Rights Commission and State Minority Commission should take up such matters seriously and should come to independent finding itself and awarding adequate compensation in suitable cases. It should not wait for somebody to approach the commission but should take action *suo moto*. They should utilize their own agency to find out the truth.
JUDICIAL REVIEW: THE INDIAN SCENARIO

Saksham Dwivedi*

The power of Judiciary to review and determine validity of a law or an order may be described as the power of "Judicial Review." It means that the Constitution is the Supreme law of the land and any law inconsistent there with is void. The term refers to "the power of a court to inquire whether a law, executive order or other official action conflicts with the written constitution and if the court concludes that it does, to declare it unconstitutional and void." Judicial Review has two prime functions: (1) Legitimizing government action; and (2) to protect the constitution against any undue encroachment by the government.

The most distinctive feature of the work of United States Supreme Court is its power of judicial review. As guardian of the constitution, the Supreme Court has to review the laws and executive orders to ensure that they do not violate the constitution of the country and the valid laws passed by the congress are protected. The power of judicial review was first acquired by the Supreme Court in Marbury vs. Madison case. 1803.1

The Constitution of India, in this respect, is more a kin to the U.S. Constitution than the British. In Britain, the doctrine of parliamentary supremacy still holds goods. No court of law there can declare a parliamentary enactment invalid. On the contrary every court is constrained to enforce every provision of the law of parliament. Under the Constitution of India, the Parliament is not supreme. Its powers are limited in two ways. First, there is the division of powers between the union and the states. Parliament is competent to pass laws only with respect to those subjects which are guaranteed to the citizens against every form of legislative encroachment. Being the guardian Fundamental Rights and the arbiter of constitutional conflicts between the union and the states with respect to the division of powers between them, the Supreme Court stands in a unique position where from it is competent to exercise the power of reviewing legislative enactments both of parliament and the state legislatures.

This is what makes the court a powerful instrument of judicial review under the constitution. As Dr. M.P. Jain has rightly observed: “The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the constitution.”2

In the framework of a constitution which guarantees individual Fundamental Rights, divides power between the union and the states and clearly defines and limits the powers and functions of every organ of the state including the parliament, judiciary plays a very important role under their powers of judicial review. The power of judicial review of legislation is given to the judiciary both by the political theory and text of the constitution. There are several specific provisions in the Indian Constitution regarding judicial review of legislation such as Article 13,32, 131-136, 143, 226, 145, 246, 251, 254 and 372. Article 372 (1) establishes the judicial review of the pre-constitutional legislation similarly. Article 13 specifically declares that any law which contravenes any of the provision of the part of Fundamental Rights shall be void.

The court would have the power to declare any enactment which transgresses a

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1 5 U.S. 137 (1803)
Fundamental Right as invalid. The Supreme Court and High Courts are constituted the protector and guarantor of Fundamental Rights under Articles 32 and 226. Articles 251 and 254 say that in case of inconsistency between union and state laws, the state law shall be void. The basic function of the courts is to adjudicate dispute between individuals and the state, between the states and the union and while so adjudicating, the courts may be required to interpret the provisions of the constitution and the laws, and the interpretation given by the Supreme Court becomes the law honoured by all courts of the land. There is no appeal against the judgement of the Supreme Court.

In Shankari Prasad vs. Union of India (1951)\(^1\) the first Amendment Act of 1951 was challenged before the Supreme Court on the ground that the said Act abridged the right to property and that it could not be done as there was a restriction on the amendment of Fundamental Rights under Article 13 (2). The Supreme Court rejected the contention and unanimously held, "The terms of Article 368 are perfectly general and empower parliament to amend the constitution without any exception whatever. In the context of Article 13 law must be taken to mean rules or regulations made in exercise of ordinary legislative power and amendments to the constitution made in exercise of constituent power, with the result that Article 13 (2) does not affect amendments made under Article 368."

In Sajjan Singh’s case (1964)\(^2\), the competence of parliament to enact 17th amendment was challenged before the constitution bench comprising of five judges on the ground that it violated the Fundamental Rights under Article 31 (A). Supreme court reiterated its earlier stand taken in Shankari Prasad’s cases\(^3\) and held, "when Article 368 confers on parliament the right to amend the constitution the power in question can be exercised over all the provisions of the constitution, it would be unreasonable to hold that the word law in Article 13 (2) takes in Amendment Acts passed under Article 368. Thus, until 1967 the Supreme Court held that the Amendment Acts were not ordinary laws, and could not be struck down by the application of Article 13 (2).

The historic case of Golak Nath vs. The State of Punjab (1967)\(^4\) was heard by a special bench of 11 judges as the validity of three constitutional amendments (1st, 4th and 17th) was challenged. The Supreme Court by a majority of 6 to 5 reversed its earlier decision and declared that parliament under article 368 has no power to take away or abridge the Fundamental Rights contained in chapter II of the constitution. The court observed. (1) Article 368 only provides a procedure to be followed regarding amendment of the constitution. (2) Article 368 does not contain the actual power to amend the constitution. (3) The power to amend the constitution is derived from Article 245, 246 and 248 and entry 97 of the union list. (4) The expression 'law' as defined in Article 13 (3) includes not only the law made by the parliament in exercise of its ordinary legislative power but also an amendment of the constitution made in exercise of its constitution power. (5) The amendment of the constitution being a law within the meaning of Article 13 (3) would be void under Article 13 (2) of it takes away or abridges the rights conferred by part III of the constitution. (6) The First Amendment Act 1951, the fourth Amendment Act 1955 and the seventeenth Amendment Act 1964 abridge the scope of Fundamental Rights and, therefore, void under Article 13 (2) of the constitution. (7) Parliament will have no power from the days of the decision to amend any of the provisions of part III of the constitution so as to take

1. AIR 1951 SC 458
2. AIR 1965 SC 845
3. Supra 3
4. AIR 1967 SC 1643
away or abridge the Fundamental Rights enshrined there in.

In Kesavananda Bharati v. State of Kerala\(^1\), the Supreme Court upheld the constitutionality of the Twenty-fourth and Twenty-fifth Amendments, and most importantly it also ruled that an amendment could not alter the basic structure of the Constitution. The Govt. of India claimed that it had the right as a matter of law to change or destroy the entire fabric of the constitution through the instrumentality of parliament’s amending power. In Minerva Mills case (1980)\(^2\) the Supreme Court by a majority decision has struck down section 4 of the 42nd Amendment Act which gave preponderance to the Directive Principles over Articles 24, 19 and 31 of part III of the constitution, on the ground that part III and part IV of the constitution are equally important and absolute primacy of one over the other is not permissible as that would disturb the harmony of the constitution. The Supreme Court was convinced that anything that destroys the balance between the two part will ipso facto destroy an essential element of the basic structure of our constitution.

Judicial Review of Legislative Enactment and ordinances:

One of the first major case A.K. Gopalan Vs. State of Madras\(^3\) 1951 that came up before the Supreme Court in which the Preventive Detention Act, 1950 was challenged as invalid. The court by a unanimous decision declared section 14 of the Act as invalid and thus manifested its competence to declare void any parliamentary enactment repugnant to the provisions of the constitution.

In Champakan Dorairajan’s case\(^4\); the Supreme Court held that the order of the state government fixing proportionate scales, for different communities for admission to medical colleges was unconstitutional. The presidential order de-recognizing privy purses was also challenged in the Supreme Court which declared the order as unconstitutional and void. Between 1950-1980 parliament passed as many as 1977 Acts and out of them, the Supreme Court invalidate laws passed on 22 occasions.

Conclusion:

Indian judiciary has been able to overcome the restrictions that were put on it by the 42nd amendment, with the help of the 43rd and 44th amendments. Now the redeeming quality of Indian judiciary is that no future governments could cut its wings or dilute its right of Judicial Review. So, from the above references we come to the conclusion that the power of judicial review is a part of the basic structure of the Constitution, permanent even by a constitutional amendments. Representative democracy as an expression of the people's will, speaking through their elected representatives is a non-negotiable principle of our republican agreement which itself is the product of an exercise of the unbroken sovereign power. The Supreme Court of India as the guardian of democratic morality will without a doubt remember that the exercise of constitutional power is persistent in the final analysis by the intellectual integrity, independence and fearlessness of judges.

\(^1\) AIR 1973 SC 1461  
\(^2\) (1980) 3 SCC 625  
\(^3\) AIR 1950 SC 27  
\(^4\) AIR 1951 SC 226
Introduction

The spirit behind S.197 Code of Criminal Procedure 1973 is the necessity to protect public servant in the discharge of their duties. The rationale behind S.197 is to ensure immunity to public servants from being harassed in criminal proceedings and prosecution. The privilege of immunity from prosecution without sanction only extends to acts which are manifestly in the discharge of official duty. The object of S.197 is to guard against any vexatious proceedings against public servants and to ensure that proceeding is started only when there is substantial basis for the charges.

Essential conditions for the application of S.197

For invoking S.197 following conditions must be satisfied:

1. Firstly, offence mentioned therein must be committed by a public servant.
2. Secondly, the public servant employed in connection with the affairs of the Union or State is not removable from office save by or with the sanction of Central Government or the State Government as the case may be.
3. Thirdly, the protection is available only when the alleged act done by the public servant is reasonably connected with discharge of his official duty and is not merely a cloak for doing an objectionable act.
4. Fourthly, if in doing his official duty he acted in excess of his duty, but there is a reasonable connection between the act and performance of official duty, the excess will not be sufficient ground to deprive the public servant of protection.
5. Fifthly, the question is not as to the nature of offence such as whether an alleged offence contained an element necessarily dependent upon the offender being a public servant but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity.
6. Sixthly, before S.197 can be invoked it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of official duty. The act must fall within the scope and range of official duty of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of its official duty.

Lastly, the act can be performed in discharge of the official duty as well as in dereliction thereof.

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Relation between office and sanction

S.197 Crpc is applicable only to the cases where the public servant belongs to the category of such public servant who is not removable from his office accept with the prior sanction of government. The word “not removable from his office” has reference only to the expression public servant” and not to “judge”. Thus the sanction of government is necessary for the prosecution of any judge subordinate to High Court if a complaint is made against him as a judge but in case of a Judge of High Court even the Central Government is not the competent authority for according sanction for prosecution. Obviously, the procedure for removal of a High Court Judge is specified in A.124(4) and (5) of the Constitution of India. The Constitution being the supreme law of the land its provisions will take precedent over any statutory provisions. Obviously, Section 197 is applicable to the Gazetted and above office of both Central and State Government. This Section does not apply to offences alleged to have been committed by public servant where appointed and also are removable by some authority subordinate to State Government. Such authority may be exercising power delegated by the State Government. Thus S.197 demarcates a line between two public servants. It is well established principle of administrative law in India that a public servant cannot be removed from his office by an officer who is below the rank of the officer who sanctions the appointment.

Nature of the Official Duty

For the application of S.197, it is imperative that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. The act must fall within the range of official duty of public servant concerned.

In Centre of Public Interest Litigation v. Union of India\(^1\),

It was held that one safe and sure test in this regard would be to consider if the omission or neglect on part of the public servant to commit the act complained of could have made him answerable for the charge of dereliction of his official duty. It has to be seen that the public duty itself may provide a public servant an opportunity to commit crime or act in becoming of the public servant. Whether the veneer is a camouflage is required to be examined by the sanctioning authority or the court. Such nefarious activities cannot be integral part of his duty. Thus it is apparent that all acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be reserved for mandatory sanction. This aspect has been affirmed by the apex court in catena of judgment.\(^2\)

The expression “purporting to act” and “official duty” contained in Section 197(1) needs elaboration.

In Azimunnissa & Ors v. Deputy Custodian Evacuee Properties Devaria\(^3\),

The Constitution bench of Supreme Court had the occasion to deal with the expression purporting. The court held that the word “purport” has many shades of meaning. It means fictitious what appears on the face of the instrument, the apparent and not the legal import and therefore any act which purports to be done in exercise of a power is to be deemed to be done within that power not withstanding that the power is not exercisable…. Purporting

\(^1\) (2005) 8 SCC 2002
\(^3\) AIR 1961 SC 365.
is therefore indicative of what appears on the face of it or is apparent even though in law it may not be so.

Thus it means that the act must have an official character. Even if the act is not justified or authorized by law he will still be purporting to act in the execution of his duty. If he acts on a mistaken view of it. Thus the expression purporting to act implies that something is deficient or amiss.

The use of the expression “official duty” implies that the act or omission must have been done by the public servant in the course of the service and that it should have been done in discharge of his duties. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts his scope of operation to only; those acts or omissions which are done by a public servant in discharge of official duty. If on fact therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty, then it must be held to lie official to which applicability of S. 197 Crpc cannot be disputed.

In Matajog Dobey v. SC Bhari,

The Constitution Bench of Apex Court held that the necessity for sanction may surface during the course of trial and it would be open to the accused to place the material on record for showing what his duty was and also the act complained of were so interrelated or inseparably connected with official duties so as to attract the protection accorded by law. The court further observed that the difference between expression “acting or purporting to act” is merely of language and not of substance.

The Court also dealt with the question who is to decide the requirement of sanction the court or the competent authority under the statute. The Court held that whether sanction is to be accorded or not is for the government to consider. The absolute power to accord or withhold sanction conferred on the government is irrelevant and foreign to the duty cast on the Court. The Court affirmed that it is the duty of the Court to ascertain that true nature of the act. The court made it clear that there must be reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on merit. The court emphasized “what we must find out is whether the act and the official duty are so inter related that one can postulate reasonably that it was done by the accused in the performance of official duty, though possibly in the excess of the needs and requirements of the situation.

In S.D. Saha & Ors v. M.S. Kochar,

The Apex Court dealt with the expression “official” as contained in provision S. 197 Crpc. The court held:

“In considering the question whether sanction for prosecution was or was not necessary, these criminal acts attributed to the accused are to be taken as alleged….the word ‘any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty’ employed in S. 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly the section will be rendered altogether sterile, it is no part of an official duty to commit an offence, and never can be.” In the wider sense, these words will take under their umbrella every act constituting an offence committed in the course of the same transaction in which the official duty is

1 General Officer Commanding v. CBI, AIR 2012 SC 190.
2 AIR 1966 SC 44.
3 AIR 1979 SC 1841.
performed or purports to be performed. The right approach in the import of these words lies between two extremes, while on one hand, it is not every offence committed by a public servant while engaged in the performance of official duty is entitled to protection of S.197(1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision.

The Apex Court reaffirmed the above view while interpreting the phrase “official duty” in Prakash Singh Badal v. State of Punjab & Ors, The Court observed “Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The Section has, thus, to be construed strictly, by determining its applicability to any act or omission is any course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to be committed by a public servant in discharge of his duty, then it must be given liberal and wide construction so far its official nature is concerned……”

The chain of events surrounding the discharge of duty has to be accessed for finding out whether the act is actually dutiful and not ill motivated obviously the intention to act comes under scrutiny. The sincerity of professional execution of the official duty often reflects. The honesty of the intention of the public servant. The official who acts in the frame work of his official duties actually shows the trust deposed in him. Very often the allegation pin point to the fact that the alleged act does not come within the purview of lawful discharge of duty.

In General Officer Commanding v. CBI, The Apex Court held “Sudden decision to do something under authority or the purported exercise of such authority may not necessarily be predetermined except for the purpose for which the official proceeds to accomplish. For example, while conducting a raid an official may not have the apprehension of being attacked but while performing his official duty he has to face such a situation at the hands of criminals and miscreants persons. The official may in his defense perform a duty which may be on account of some miscalculation or wrong information but such a duty cannot be labeled as an act in bad faith unless it is demonstrated by positive material in particular that the act was tainted by personal motive and was not connected with the discharge of any official duty.”

The court has to take into account that the alleged action which constituted an offence has a rational nexus with the official duty which the public servant in question is expected to discharge. A public servant taking advantage of his position to commit the alleged act will not automatically lead to the conclusion that the act comes under the purview of S.197 what is further required is that the act complained of comes under the purview of official act.

The test is whether the public servant can reasonably claim that what he has done has been done by him virtue of his office.

In Matajog Dobey v. SC Bahari, The Apex Court had anticipated inbuilt aberration in different situations where the official might exceed his duty and blur the thin line separating appropriate act. The court observed “where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly in inhibiting the exercise of the power or the performance of the duty

1 AIR 2007 SC 1274.
2 AIR 2012 SC 1909.
3 AIR 1966 SC 44.
by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution.

If in the exercise of the power or performance of the official duty, improper or unlawful obstruction or resistance is encountered, there must be right to use reasonable means to remove the obstruction or overcome the resistance. This accords with common sense and does not seem contrary with any law.”

**Application of mind**

The sanctioning authority has to apply its mind on the specific offence with reference to which sanction has been sought. If the sanction fails to satisfy the offence with which the accused is charged then validity of such a sanction would be doubtful. In Jaswant Singh V. State\(^1\), it was held that it should be clear from the sanction that the sanctioning authority considered the evidence before it and after the consideration of all the circumstances of the case sanction the prosecution and therefore, unless the matter can be proved by other evidence in the sanction itself, the facts would be referred to indicate that the sanctioning authority had applied its mind to the facts and circumstances of the case.

It is imperative that the sanctioning authority takes into account all the relevant facts, material and evidence before according sanction.

**Acts done in discharge of official duties**

**In Awtar Singh v. State of MP\(^2\),**

The accused medical officer issued false medical certificate. The High Court held that the alleged offence was done in the discharge of official duty, therefore sanction for prosecution under S. 197 Crpc was necessary.

**In Ramesh Kumar Verma v. State of Bihar\(^3\),**

It was alleged that the accused committed excesses in the course of search of business premises and seizure of documents for the complainant. The High Court held that the acts were done by the public servants in the course of official duty, therefore, sanction under S.197 of Crpc was a must.

**In Om Kumar Dhankar v. State of Haryana\(^4\),**

The commissioner was accused of misappropriation of passenger tax alleged to be paid to him. He was charged under S.420, 406 and 161 of IPC. The Punjab and Haryana High Court held that the act of cheating or breach of trust were inextricably linked with the official duty of accused. Therefore sanction under S.197 Crpc was necessary.

**In A.K. Sahdev v. Ramesh Navjit Shah\(^5\),**

The complainant was arrested for hawala transaction and when he was arrested on the airport he was alleged to have been assaulted by officers of enforcement department. The High Court held that the alleged assault was in discharge of official duty therefore sanction under S.197 was necessary.

**In Abdul Waheb Ansari v. State of Bihar\(^6\),**

Accused, a deputy magistrate, was entrusted with a task of removal of encroachment. He ordered firing on a mob which had become violent resulting in the death of 2 persons.

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\(^1\) AIR 1958 SC 124.
\(^2\) 1994 CrLJ 1515 (M.P.).
\(^3\) AIR 2003 Jhar HC 206.
\(^4\) 2007 CrLJ 3820.
\(^5\) 1998 CrLj 2645 (Bom)
\(^6\) (2000) 8 SC 500.
Apex Court held that since the act of accused was during the course of discharge of official duty, therefore sanction for prosecution under S.197 Crpc was necessary.

In Satish Chandra v. UOI

The accused, a railway traffic officer took possession of railway book stall in pursuance of order of competent authority and committed some excesses. It was held that sanction for prosecution under S.197 Crpc was necessary because the act complained of were directly connected with his official duties and were done by virtue of the office.

In Ram Nath Goenka v. A.R. Raji

The accused was the principle information officer of government of India. He was charged under S.500 IPC by a newspaper magnet. The allegation was that the accused issued hand outs with an intention to lower the reputation of the complainant in the estimation of general public. The High Court held that issuing hand outs for publication was part of the official duty of the accused and the acts complained of were integral to its official duty. Therefore sanction under S.197 Crpc was necessary.

Act not in discharge of official duty

In Prabhakar V. Sinari v. Shankar Anant Verlekar

The complainants land was encroached upon by hawkers, a complaint was made to the police in this respect meanwhile deputy superintendent came to the spot in civilian dress. The DSP threatened the complainant that he would arrest him if he interfered with the hawkers and at the same time encouraged the hawkers to enter upon the land of the complainant. The complainant was also threatened that he would be slapped. The superintendent held that if a person is in possession of some property and other persons are threatening to dispossess him, then it is no part of duty of police officer to take sides and decide the dispute in favour of one party or the other or to force one party to give up possession to the other even if he was satisfied that the party seeking to take possession was lawfully entitled to do so. This, the police officer could only do if there had been any direction by a competent court for rendering help in the matter of delivery of possession. The court held that since the act alleged could not be regarded to have been committed in the discharge of official duty therefore sanction for prosecution under Section 197 was not required.

In Manager, Recovery Officer v. Supervisor of Bhumi Vikas Bank

The accused manager, recovery officer and supervisor of Bhumi Vikas Bank were charged for offences under section 294, 452, 500 & 506 IPC. The allegation was that they trespassed in the house of the complainant and seized movable property. The High Court held that the act of the accused persons were not an integral part of their official duty and therefore sanction for their prosecution under S.197 Crpc was not necessary.

In Padamma v. A.V.R Narsinha Rao

It was alleged that the accused police officer had beaten the complainant who had approached him for the registration of complaint. The A.P. High Court held that the assault was not linked with discharge of public duty. Therefore sanction under S.197 Crpc was not required.

Hurdles in impartial and speedy grant of sanction

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1 1997 CrLJ 1210 (Delhi)
2 1982 Cr.LJ 1153 (Madras)
4 2008 CrLJ 1294 (M.P.)
5 2005 Cr LJ 1160 (A.P.).
The grant of sanction is not a mere formality. The sanctioning authority cannot go about the job in a casual and mechanical manner. The grant of sanction under S.197 Crpc has serious implication for career prospect for public servant. It puts his or her entire career advancement in jeopardy. The very fact of facing criminal proceedings carries a stigma on the concerned public servant. Even if he is absolved of all the charges in the criminal proceedings he may still have to face departmental enquiry. Therefore the sanctioning authority must apply its mind to the facts of each case, evidence collected and other material before according sanction.

But at the same time S.197 of CrPC must not be allowed to be abused as a protective shield by dishonest public servants to escape prosecution for their nuiscemeanour committed in official capacity the lure of government job is no longer for service of people but for personal aggrandizement to misuse the official capacity. This tendency has snapped the efficiency and integrity of the whole system. The services under the Union and the State are no longer the steel frame that uses to withstand the shock within the frame work of Indian political system.

The public has now come to put up with the unproprietaries of public servants as a way of life. In India public has a limited attention time span. Otherwise scams like Bofors, Fodder, 2G spectrum Coalgate, Telegi would not have happened.

Procedural check like S.197 Crpc serve as inbuilt restraint on the arbitrary functioning of public servant both government official and persons. The socialist economy of 60’s and 70’s promoted license Quota permit raj in India. Bureaucratic discretion casually designated into arbitrariness but privatization and liberalization of 1990 created new avenues of illegal activities for public servant and honest citizens who still found himself at the receiving end of the mischief of public servant feels disillusioned and helpless because loopholes in the system comes to the rescue of erring public servants. Dishonest bureaucrats and ministers are still flouting all canons of propriety with impunity.

Fear of prosecution of public servant has also been weakened by the way polity has evolved in India. The last 20 years have witnessed the gradual decline of one-party dominance and rise of coalition politics twin emotive issues – implementation of Mandal Commission and Ram Janam Bhumi brought to the fore the fault lines of Indian society. The society was split along caste and religions mobilization of voters by political parties produced fractured mandate in the State Assemblies and Lok Sabha elections. No single party could muster majority at the center since 1996 thereafter coalition politics became dominant feature of Indian political system but the rise of coalition politics has had serious implications for State apparatus and bureaucrats. In most of the States, bureaucracy has also got split along caste line. A patron client relationship has developed between political masters and Government officials. Government officials are often being used as a tool for accomplishing illegal acts on behalf of politicians in power. These officials advance the cause of political masters in the hope that they would be shielded by government in power. In fact sanction for prosecuting government officials is not forth coming because it would also bring out the involvement of politicians in power in the act of omission and commission. The coalition politics has further made it difficult for procuring sanction under S.197 Crpc. The government is run on working majority, the instinct of political class is to cling to power anyhow. All political parties who contribute to the coalition party in power commit illegal act because the Government of the day dare not prosecute their members. They know it well, that the stability of the governments depends on their support.

The allegation about abuse or misuse of official power has to be thoroughly enquired into. If the allegations seem to be true sanction for prosecution under section 197 should be granted without delay. Prosecutions under S.197 would depend upon fact of each case. It
cannot be based on conjectures and surmises. The alleged act has to lie official in nature and not private. The sanctioning authority has to apply his own mind and use his or her discretion without being influenced by any other authority. In this context, proper assessment of facts or complaint is necessary before according sanction. Grant of sanction without proper assessment of the circumstances in which the acts are alleged to have been committed by official will put stigma on the officer and besmirch his reputation. If sanction for prosecution is based on falsified facts then such a sanction would be void ab initio.

Today, right to information had got a statutory status and has empowered the citizens like never before. Every official act is now under public gaze and scrutiny. The growing cloud and reach of media, the strengthening of institution of Chief Vigilance Officer and Comptroller and Auditor General of India, the desperation of the middle class with the unresponsive administration has now brought the issue of sanction into lime light.

CONCLUSION

In the light of above fact and judicial pronouncement certain suggestions can be made.

Firstly, grant of sanction is decided by political executive. To break the nexus between political executive and permanent executive (Government official) a statutory ban should be imposed on IAS, IFS,IPS and other class 1 Central and State services also district and additional District and Session Judges from joining a political outfit post retirement. This will ensure the neutrality of the bureaucracy because they will not be able to exploit their proximity to their political masters and indulge in nefarious activities on the behalf of political masters. The interest of political and permanent executive will not overlap and the patron client relationship will come to an end. Pliable government officials will not see their fortunes swing with the rise and fall of their political masters. Pliable officers prosper because they bend the rules for the benefit of their political masters and in turn are protected from departmental and criminal prosecution.

Secondly, a multi member quasi-judicial body should be set up to oversee all matters relating to grant of sanction under S.197 Crpc. For this purpose suitable amendment should be made in S.197 Crpc. These self-correcting mechanisms should be headed by either judges of Supreme Court or High Court. This will go a long way in snapping the protective patronage of political executive. Even prosecution of ministers will become smooth.

Thirdly, while High Court and Supreme Court and media and civil society and public spirited persons do scrutinize and probe the acts of omission and commission of higher echelons of bureaucracy. It is the middle order bureaucracy which escapes the public scrutiny it deserves. The rampant misuse of power by mid order bureaucracy creates much more dissatisfaction among the citizens of the country. Common people have to put up with their tantrums and whims in day to day life. Therefore non gazetted government official should be brought within the purview of S.197 of Crpc.

Fourthly, stringent punishment and hefty fines should be imposed on vested interest who misuse S.197 Crpc to file frivolous and vexatious proceeding against honest public servants.

Lastly, at the training level official should be taught the implication of deviation and misuse of their official position. Officials who do not met their ways and indulge in inappropriate acts should be penalized through departmental inquiry and no leniency should be shown in granting sanction for prosecution under S.197.
Ownership Puzzle in Human Genetic Material: Legal Perspective

Ownership issue relating to human genetic material has sparked great debates among the lawyers, policy makers and social scientists. Human genetic material refers to those materials which are found in the nucleus, mitochondria and cytoplasm of a human cell and perform fundamental role in determining the structure and nature of cell substances, and capable of self-propagating and variation. It includes human gene, a part of a gene, a group of genes, a DNA molecule, a fragment of DNA, a group of DNA molecules, or the entire genome of a human organism. There exists enormous confusion regarding the ownership of human genetic material. The most obvious answer to the question who owns an individual’s genetic material is the individual himself. There is no confusion as to the ownership of human genetic material when they remain inside the human body. The dilemma starts when the genetic material is extracted from the human body.

Initially, human genetic material such as human gene was considered as product of nature and excluded from the ambit of property. However, in recent years, with rapid advances in the field of molecular biology and genetics, our DNA unit of genetic material has evolved from the ‘Secret of Life to a potentially valuable Commodity.’

Modern biotech techniques such as recombinant DNA technology have made it possible to transform human genetic materials from products of nature to products of man. A human DNA now can be isolated, amplified, recombined and converted into valuable products such as human insulin or protein. The potential commodification of human genetic material occurs in myriad ways such as; DNA can be collected, stored and used for diagnostic and therapeutic purposes; it can also be sequenced and stored in databases, where it can be linked with other data to assist the studies relating to complex diseases. These different ways of commodification leads to conflicting perspectives as to the ownership of human genetic material.

Multiple Claims as to the Ownership of Human Genetic Material

Variety of claims is being made regarding the legal title to human genetic material. It has been claimed that human DNA is a universal property shared by the entire human race. The potential value of human DNA for diagnostic and therapeutic applications has prompted

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3 Any of the various techniques for separating and recombining segments of DNA or genes, often employing a restriction enzyme to cut a gene from a donor organism and inserting into a plasmid or viral DNA for transplantation into a host organism, where the gene causes the production of a desired substance either for harvesting or for the benefit of the host organism itself. Recombinant DNA Technology, Dictionary.com Unabridged. Random House, Inc., available at http://dictionary.reference.com/browse/recombinantdna technology (last visited on May 23, 2012).
4 Bovenberg, supra note 2.
5 Ibid.
6 Ibid.
7 Ibid.
industry to claim DNA to be patentable subject matter. Human gene has become patentable, as patenting of isolated and purified human gene become a norm. Various other forms of intellectual property rights are being extended to the human genome including human genome sequence data.

The rapid growth of DNA banks and gene banks encouraged various countries to establish national health sector database. Further, in response to the aggressive patenting of human genetic resources, developing countries have sought to extend its sovereign control over human genetic resources. Here, human genetic resource is considered as national property. Moreover, academic researchers claim the blood genes and data they have collected in the course of their research as their academic property. Due to the commodification of human genome in different ways, patients and research subjects are claiming personal proprietary claims in their genetic material used in research. The present paper focuses upon the conflicting ownership claims of research subjects, research sponsors such as universities and research institutions, and patent holders in human genetic material and advocates for the recognition of research subjects’ ownership rights in their extracted genetic material.

**Objections against the Commercialisation of Human Genetic Material**

The moral argument against the commercialisation of human genetic material is that human genome should not be controlled by market as it controls other external things. Property rights over things can be more easily conferred to persons on things that are external to the self than they are on constituents of one’s own being. Another argument against the commercialisation of human genetic material is that the God prepared the layout of the genetic sequence of human being and any modification in it should be considered as interference in the divine pattern. The Environmental concern is that “you can’t own a gene; to do so is to embrace a system in which nature, even our own nature, is to be manipulated, traded and commodified.” Since technologically advanced countries are well placed to exploit the genetic resources of less developed and developing countries, which lack advance technologies, some see the extension of property rights over genetic resources by technologically advanced countries as a form of second colonial expansion. The opponents of enclosure of human genetic material have claimed that “our common genome “belongs to

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2 *Id.* at 3.
3 In 1998, the Parliament of Iceland passed the Act on the Centralized Health Sector Database. This Icelandic initiative has been followed by Estonian Gene Bank and the U.K. Gene Bank. The common object of these projects is to compile national or large scale collections of human biological material and to link these with associated clinical and personal health data and genealogical information; *Id.* at 3-4.
4 *Id.* at 4.
5 *Id.* at 1.
6 *Id.* at 4.
9 *Id.* at 102.
10 *Id.* at 103.
everyone that is the common heritage of humankind,” that it should not and perhaps in some sense cannot be owned, and that the consequences of turning over the human genome to private property rights will be dreadful, as market logic invades areas which should be the farthest from the market.”

**Human Genome: A Common Heritage to the Mankind**

The objection against the commercialisation of human genome on the basis that it is the common heritage to the mankind shared by all led to the adoption of UNESCO’s *Universal Declaration on the Human Genome and Human Rights, 1997*. The Declaration was endorsed by the United Nations General Assembly on 9 December 1998, which proclaims that: “The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity.” This proclamation is considered as the cornerstone of the Declaration as all the subsequent provisions revolves around it. Another important provision regarding the commercialisation of human genome is Article 4 which provides that “the human genome, in its natural state, shall not give rise to financial gains.”

Here, the question arises as how and where to draw the line between natural and artificial form of human genome. In common parlance, the words “in its natural state” seem to refer to the human genome as it occurs in natural form, within the human body. However, it would be a limited interpretation of the terms which may restrict the scope of the Declaration. Under such interpretation even the raw genomic data that were being assembled by the Human Genome Project would not qualify as common heritage subject matter. The Declaration does not give any clue as to how it intended to delineate between the natural and artificial. However, the landmark decision of the U.S. Supreme Court in *Diamond v. Chakrabarty* that “anything under the sun that is made by man” is patentable has restricted the product of nature doctrine and following this decision it has been established in various jurisdictions that isolated and purified DNA sequences can be the subject matter of patent applications. The Declaration on Human Genome has incorporated the essence of *Diamond v. Chakrabarty* which seems to narrow down the scope of the human genome as common heritage subject matter to those sequences that have not been isolated and purified.

**Current trends in Property and Intellectual Property Laws and the Human Genetic Material**

The current trends in property and intellectual property law are approaching to a point where anyone can have property rights in your excised cells except you. If a researcher works with a sample of human blood or tissue, the researcher, or the lab, has a property rights in those cells. Likewise, if the researcher isolates a protein or a segment of DNA from the sample, the researcher, or the lab has the property rights in the tangible isolated elements. Further, the sample or tissue or the cell lines developed from the tissue are treated under the contract law according to the agreements related to the transfer of tangible property.

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1. *Id.* at 98-99.
2. Art. 1 of UNESCO’s *Universal Declaration on Human Genome and Human Rights 1997*.
3. Art. 2 of UNESCO’s *Universal Declaration on Human Genome and Human Rights 1997*.
7. *Ibid*.
commonly called “material transfer agreements.” In addition to property rights, a researcher may also obtain intellectual property rights through observation, isolation, and manipulation of the sample. However, there is some ambiguity regarding the property rights of an individual who contributed the sample in the first place. Researchers and sponsors of clinical research are well placed to commercially exploit the research carried on human genetic material of research subjects. They are capable of using genetic materials, information and other specimens collected during primary research study for future unspecified research purposes. In such situation the position of research subjects becomes vulnerable.

There is no certain answer to the legal question of what ownership rights patents and research subjects have in their biological materials and their medical data. In 1987, a study by the Office of Technology Assessment (OTA) reviewed the available legal, ethical, and scientific literature relating to this issue, but concluded that there was no certain answer to the questions of ownership and control. The OTA report appropriately mentioned that biological materials themselves have little use or value, until and unless scientists manipulate and use the materials to develop cell lines, products, or useful data. One can draw an inference from this point of reasoning that it is contribution of researchers that add value to the raw biological material. Human cells cannot be the subject matter of patent as they exist in one’s body i.e. in a state of nature because patent requires manipulation of human cells. This is why while others can end up with intellectual property rights related to those cells, the person who contributed the cells can claim no such rights by virtue of his or her association with the cells. However, denying all the rights of research subject relating to his excised cells is not justified in the light of recent transformations in the scope of property. Before delving into the discussion relating to the ownership of research subjects in their excised genetic material and property status of human genetic material, it becomes pertinent to throw light upon the definition and scope of property.

The Concept of Property

Property is not a monolithic concept; its meaning varies according to a particular purpose in hand. According to Paton, “The term “property” has a bewildering variety of uses; firstly it sometimes means ownership or title, sometimes the res over which ownership may be exercised.” Lawyers consider “property” more in terms of rights to subject matter than subject matter per se, meaning there by they see it as entitlements of something exercisable against third parties than a thing in respect of which those entitlements exist. Therefore a property is not a relation between a person and a thing but “the rights of a person with respect

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1 Ibid.
2 Id. at 1379.
5 Feldman, supra note 25 at 1379.
6 G.W. Paton, A Text Book of Jurisprudence 114 (Oxford University Press, New Delhi, 4th edn., 2010).
It is usually defined in terms of a bundle of rights, which includes: right to possession; right to use and right to alienation or disposition. If a person holds the unrestricted right to possess, use and dispose of a thing then that thing is the subject of property rights vested in that person. “The key element one may have in relation to something is the right to possess exclusively—the corollary of which is the right to exclude others from accessing to. This right of exclusivity is the hallmark of property.”

This definition of property is workable in vacuum because certain restrictions on the rights are essential for the smooth running of society. Considering this practical difficulty, Andrew Beckerman-Rodau explains:

A workable definition of property can be expressed only in the form of a bipolar continuum. If a person has the unrestricted right to possess, use, and dispose of a thing, then that thing is the subject of property rights vested in that person. This represents one end of the continuum. At the other end of the continuum are things which are subject to limitations that deny anyone the right to possess, use, or dispose of the thing. Such things are not the subject of property rights vested in an individual. These two ends of the continuum are theoretical. Few, if any, things fit at either end. The majority of things fall between these two poles of the continuum. So the difficult question that arises is whether something should be treated as subject to property rights or not since things must be placed at one end of the continuum or the other.

The determination of when a particular thing is granted property status depends upon the underlying policy considerations of the law in a specific factual setting. A property status is granted to a thing when it furthers these considerations. It is, therefore, a legal conclusion and this conclusion is supported by numerous things that are granted property status despite the existence of limitations and restrictions on the possession, use, or transferability of the thing.

**Extension of the term Property to New Subject Matters**

The subject matter of a right to property is either tangible (material) thing or intangible (immaterial thing). Tangible thing represents the physical object while an intangible thing is anything else which may be the subject matter of right. Traditionally tangible things were the subject matter of property but over the years due to development of intangible assets and varied nature of commercial transactions, the term “property” has been extended to embrace other valuable things, which were not the subject matter of property earlier. In the modern world, the meaning of property varies according to the purpose in hand.

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2 Bosworth & Webster, supra note 32 at 26.
4 For example, India’s Biological Diversity Act 2002 recognise sovereign rights over biological resources including plants, animals and microorganisms but does not recognise those rights to human genetic material; See the Preamble and Sec. 2 (c) of The Biological Diversity Act 2002.
5 Rodau, supra note 35.
Considering it as an example of the “instrumentalist” theory of definition, Paton reflects the definitional problem of property as: “we cannot describe the real essence of the term property; we can define it only for a particular purpose and that definition is valid only within the given context.”\footnote{Paton, supra note 31 at 117.} Further, commenting on the growing importance of intangible property, Paton opines; “the once overwhelming importance of the landed property is now eclipsed by the growth of new forms of wealth. Much of the most valuable property today consists in the right to share in a particular fund, for example shares in a company.”\footnote{Id. at118.}

**Ownership of Human Genetic Material**

Human cells have been used significantly in medical research. The first human cells reproduced prolifically in laboratory setting was of a poor black woman, Henrietta Lacks, who died of a particularly virulent form of cervical cancer in 1950. Using Mrs. Lacks’ cancer cells, scientists have reproduced fifty million metric tons of her cells over time. Mrs. Lacks’ cell line contributed to significant advancements in the field of life sciences, including the polio vaccine, cancer treatments, and in vitro fertilization.\footnote{Feldman, supra note 25 at 1381.} Despite Mrs. Lacks’ cells’ contribution to the development of life science industry, her family has not shared any benefit.\footnote{Ibid.} This reflects the vulnerable condition of research subjects whose biological materials were used in profitable research without tendering them any benefit. However, in due course of time research subjects approached courts to define their ownership rights in their biological material used in medical research.

The property rights in human tissue were first contested in *Moore v. Regents of the University of California*.\footnote{Moore v. Regents of the University of California, 51 Cal. 3d 120; 271 Cal. Rptr. 146; 793 P.2d 479 (1990).} In the said case, John Moore was suffering from leukemia and approached University of California (UCLA) Hospital for his treatment. During treatment and follow up care, doctors at UCLA Hospital removed his spleen and took samples of tissue and blood. The doctors informed Moore that the procedures were necessary for treatment of his life-threatening cancer. However, they had not informed that his cells were unusual and offered great potential for scientific research. Researchers had established “Mo” cell line while working on Moore’s cell. By the time when the case came to the trial, UCLA had received large sum of money from the cell line, and the estimated value of the cell line reached to the billion dollars mark.\footnote{Feldman, supra note 25 at 1381.}

Moore sued the medical centre and his physicians asserting various claims including the property claim. At the California Supreme Court, the case primarily revolved around two potential theories of liability. The first involved a claim for the conversion of the plaintiff’s genetic material by the action of the defendant. This claim pre-supposed that the defendant had a property interest in his genetic material in the first place and that it was not “abandoned” during the course of surgery.\footnote{Epstein, supra note 14 at 157.} In the property claim, Moore maintained that he had never consented to the use of his cells in commercially profitable medical research and claimed that using his cells in such manner constituted a conversion of his personal property.\footnote{Feldman, supra note 25 at 1381-82.}
The second theory was based on an analogy of the law of informed consent in medical malpractice and claimed that the defendants breached their fiduciary duty when they did not disclose the reasons why they continued to call the plaintiff back for more and more tests, all of which increased their available supplies of this critical cell lines, without disclosing to him their ulterior beneficial purpose.¹

The California Supreme Court rejected the property claim and concluded that whatever rights Moore might have had, they did not amount to property or ownership rights.² The Court, however, allowed Moore to proceed with his suit on the basis of causes of action related to a doctor’s fiduciary duty to the patient and obligation to obtain informed consent. While the case settled for an undisclosed sum, however, estimation by the experts showed that the potential damages from a claim for breach of fiduciary duty would be far lower than the damages Mr. Moore had sought on the basis of property rights.³ Since the Court refused to accept the conversion claim, it had not entertained the question of abandonment. In deciding against the property rights approach in this context, the California Supreme Court anticipated many of the concerns in this area when it noted any claims of private ownership of genetic materials could dull the pace of medical innovation in much the same way that interlocking patents, subject to different holder, could block research on the genome.⁴

The prerequisite for establishing the conversion claim is that the plaintiff must establish an actual interference with his ownership or right of possession. Where plaintiff misses both the title to the property alleged to have been converted, as well as possession thereof, he cannot maintain an action for conversion. In the present case, the court held that since the plaintiff did not expect to retain possession of his cells, he cannot maintain the conversion claim. The Court provided several reasons which create doubt that he retained such interest. First, there is no precedent in support of plaintiff’s claim. Second, California statutes drastically limit any continuing interest of a patient in excised cells by requiring that they be destroyed after use. Third, the subject matter of the patent (i.e. the patented cell line and the technology and products derived from it) cannot be Moore’s property.⁵ When cells are removed from a person’s body, the disposition of those cells is limited in that (1) the person cannot sell them under some circumstances, and (2) after the cells are used for research, they must be disposed of according to health department guidelines. Considering the concept of property, one can expect an array of rights, including the right to dispose of the property. If the disposition rights are missing or sufficiently circumscribed, one can draw a conclusion that whatever rights may exist in such situation, they are not property rights.⁶

Expressing his dissent Mosk J. recognised that “[o]wnership is not a single concrete entity but a bundle of rights and privileges as well as of obligations.”⁷ He maintained that same bundle of rights does not attach to all forms of property. According to variety of

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¹ Epstein, supra note 14 at 157.
² Feldman, supra note 25 at 1382.
³ Ibid.
⁵ Ibid.
⁶ Feldman, supra note 25 at 1382.
⁷ Moore, 51 Cal. 3d 166 (Mosk J., dissenting) quoting Union Oil Co. v. State Bd. of Equal. (1963) 60 Cal.2d 441, 447 [34 Cal.Rptr. 872, 386 P.2d 496].
policy objectives, the law sets limits or even forbids the exercise of certain rights over certain forms of property. Restrictions as to the time, place, and manner of use may be imposed on the owners of myriad forms of property. Therefore, limitations may be imposed on the disposition of real property. Some types of personal property may be sold but not given away, (e.g. a person contemplating bankruptcy may sell his property at its “reasonably equivalent value,” but he may not make a gift of the same property), while others may be given away but not sold (e.g. a sportsman may give away wild fish or game that he has caught or killed pursuant to his license, but he may not sell it), and still others may neither be given away nor sold (e.g. a license to practice a profession, or a prescription drug in the hands of the person for whom it is prescribed).

In each of the aforementioned instances, the limitation or prohibition diminishes the bundle of rights. What remains is, however, still deemed in law to be a protectable property interest. Since property or title is a complex bundle of rights, duties, powers and immunities, the pruning away of some or a great many of these elements does not entirely destroy the title .... Giving equal importance to the contributions made by patients and researchers, Mosk J. quoted an excerpt from University of California, Los Angeles Law Review (UCLA L. REV):

Recognizing a donor’s property rights would prevent unjust enrichment by giving monetary rewards to the donor and researcher proportionate to the value of their respective contributions. Biotechnology depends upon the contributions of both patients and researchers. If not for the patient’s contribution of cells with unique attributes, the medical value of the bioengineered cells would be negligible. But for the physician's contribution of knowledge and skill in developing the cell product, the commercial value of the patient’s cells would also be negligible. Failing to compensate the patient unjustly enriches the researcher because only the researcher's contribution is recognized.

The conversion claim was contested again in Greenberg v. Miami Children’s Hospital, where the Court dismissed the claim by denying any property interest regarding the body tissue and genetic information voluntarily given to defendants. The Court maintained that the body tissues and genetic samples were donations to research without any contemporaneous expectation of return. The issue of ownership was contested again in Washington University v Catalona, where the point of contention was whether patients who donate tissues to a researcher or university may lose all rights to those tissues or they retain some. The U.S. District Court for the Eastern District of Missouri held that, on the basis of

1 Ibid.
2 Id. at 166-67
3 Id. at 167.
4 Id. quoting People v. Walker (1939) 33 Cal. App. 2d 18, 20 [90 P.2d 854].
8 Washington University v. Catalona, No. 4:03CV1065 (E. Dist. Mo. April 14, 2006), on appeal Nos. 06-2286 & 06-2301 (8th Cir.).

209
the facts presented, Washington University owns the biological samples and associated clinical data, and that research participants did not retain any ownership interest beyond the right to withdraw their samples from the repository. Against this decision, Dr. Catalona made an appeal to the U.S. Court of Appeals for the Eighth Circuit, and the Eighth Circuit upheld the district court’s ruling on June 20, 2007.¹

The Eighth Circuit held that individuals who make an informed and voluntary decision to contribute their biological material to a particular research institution for the purpose of medical research do not retain an ownership interest allowing such individuals to direct or authorize the transfer of such materials to a third party. The court ruled that the university held sole ownership of the biological samples, and Dr. Catalona could not transfer the samples to a third party, even with the donors’ consent. The court also made it clear that under the specific facts of the case, the men who participated had given their tissue to the university as a gift and they could not get it back or have it sent to another researcher.² The court did acknowledge that the research participants had a right to withdraw (i.e., by destroying) their samples from the database, but did not conclude that a right to transfer the samples can be implied from the right to withdraw. Dr. Catalona appealed the Eighth Circuit’s decision to the Supreme Court of the United States, but the Supreme Court denied certiorari without comment on January 22, 2008.³

Justifications for the Ownership Rights of Research Subjects and Patient

The case law denies any possibility of treating human body parts as a form of property. In various cases serious concerns have been made that conferring property rights to research subjects over their extracted genetic material may interfere with advancements in medical science. This suggests that an individual whose body provided the sample has no property rights in them. He is also denied any intellectual property rights either.⁴ As mentioned earlier, courts recognized certain rights, which are generally grounded in the notions of the fiduciary duty that a doctor owes to a patient and are frequently centered on the doctor’s obligation to obtain informed consent. Conclusively, it can be said that humans do not have any particular right to their cells or to the information contained in their cells, outside of their relationship with health care providers.⁵

Under the property law concepts, however, individuals should have a continuing property interest in their own cells.⁶ The person from whom the cells have been excised must have some rights with respect to such cells and such rights cannot be completely explained through the fiduciary duty of the physicians.⁷ Excised human cells are first of all a tangible property that must belong to an individual. The logical ownership of cells lies in a person who contributed his cells.⁸ Arguments are being made that conferring property rights to individuals in their excised cells may endanger the basic concept of human dignity. This could encourage the commercialization of basic elements of human body. This could also erode the reverence of human life that infuses a number of legal doctrines, particularly those

² Ibid.
³ Ibid.
⁴ Feldman, supra note 25, at 1379.
⁵ Id. at 1380.
⁶ Ibid.
⁷ Id. at 1383.
⁸ Ibid.
that forbid ownership of human beings in the form of slavery. Moreover, treating human cells as property could also give rise to a situation where those in financial need will be coerced into selling parts of their body\(^1\), either by unscrupulous brokers or by the circumstances of their poverty, raising serious concerns regarding health.\(^2\) Professor Robin Feldman of UC Hastings College of the Law, however, considered these contentions superfluous by contending that “if our concern truly lies with health risks to those who contribute their cells to research, denying property rights is a remarkably overbroad solution to the problem.”\(^3\)

Moreover, it is a paternalistic approach to deny individual’s property rights in the cells of their body in order to protect them from coercion while allowing property rights in the same cells to research labs.\(^4\) Professor Feldman remarks: “You have no property rights in the cells of your body when they are outside your body because we must protect you from economic exploitation, but we are perfectly comfortable letting biotechnology companies and research labs profit from the transfer of such cells.”\(^5\) If we consider that no one should have property rights in human cells, the material transfer agreements highlight the property-like nature of those cells. This justifies the fact that someone must have legal dominion over excised human cells as tangible items.\(^6\)

Although, research protocols have adapted to the need for informed consent, however, there is a dire need of creating indemnification agreements for cells donated. In the utmost enthusiasm of scientific advancements, we should not forget the necessity of thinking through the interests of the people, whose cells provide the raw materials. We must ensure that those raw materials are properly obtained. Now, when we have enormous experience regarding this type of scientific research, courts in the appropriate jurisdiction should revisit these issues in tune with the recent scientific and technological development.\(^7\) Patent rights should be limited so that it will ensure a nice balance between the interests of society and access for scientific research and innovation and provide benefit to the individual.\(^8\) Prof. Feldman concludes:

A careful and more considered application of both property and intellectual property doctrines should provide more appropriate respect for the disparate

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\(^1\) See, the Preamble of the Transplantation of Human Organs Act 1994 of India, which aims “to provide for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs and for matters connected therewith or incidental thereto.”

\(^2\) Feldman, *supra* note 25, at 1384.

\(^3\) *Ibid.*

\(^4\) *Id.* at 1385.


\(^6\) *Ibid.* For example, in India, the Biodiversity Act 2002 recognizes sovereign rights over non-human genetic resources. *See* the Preamble and Sec. 2 (c) of the Biodiversity Act 2002; Further, Department of Biotechnology, Ministry of Science and Technology constituted National Bioethics Committee in 1999 that has formulated Ethical Policies on the Human Genome, Genetic Research & Services. These policies emphasize that “International Law allows for the identification of ownership of sovereign rights over human genetic material (like any other biodiversity plants, animals and microbes) which shall be implemented.” *See* Department of Biotechnology, Ministry of Science and Technology, *Ethical Policies on the Human Genome, Genetic Research & Services* 1999, available at http://dbtindia.nic.in/uniquepage.asp?id_pk=113 (last visited on May22, 2012).

\(^7\) Feldman, *supra* note 25, at 1385.

\(^8\) *Id.* at 1402.
interests in a way that is consistent with the doctrinal and theoretical roots in both areas. Perhaps in the end, it is our body, anyway.¹

**Sovereign Ownership over Human Genetic Resources:**

Human genetic material was considered as a global common resource and no single user or nation could claim exclusive property rights in it. However, the concept of human genetic material as global commons has been eroded by the extension of patents to living organisms and later to genetic material as patenting of isolated and purified genes and genetic sequences has been allowed in various countries.² The laws dealing with the access to genetic material and equitable benefit sharing excludes human genetic material from their scope.³ These laws recognize sovereign ownership over non-human genetic resources.⁴

Although a decision of the Parties to the Convention on Biological Diversity (CBD) excluded human genetic material from the Conventions, however, a trend towards viewing human genetic material as a natural or national resource is apparent.⁵ It is expected that the distinction between human and non-human genetic resources in the existing legal regimes may not hold over time.⁶ After establishing extensive control to non-human genetic material, national governments, can make the jump to human genetic material, with the attended risk of human liberty and autonomy.⁷ Some suggests that CBD should be considered as a model for drafting law relating to human genetic material. For example, a 2002 report by an advisory committee to the World Health Organization on Genomics and World Health suggests CBD’s approach to benefit sharing as a potential guide for such sharing in the human genetics context⁸

**Conclusion**

The ownership issue relating to human genetic material has not been resolved yet. However, there is a growing demand for the recognition of ownership rights of research subjects and patients over their extracted genetic material. Research institutions and biotech companies

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³ See, Art. 2 (c) of India’s Biological Diversity Act; Art. 4 of the Asian Framework Agreement on Access to Biological and Genetic Resources (draft text February 24, 2000); Art. 2 of the Convention on Biological Diversity (It defines “Genetic resources” as “genetic material of actual or potential value” and “genetic material” is broadly as “any material of plant, animal, microbial or other origin containing functional units of heredity.” All UN discussions to date indicate that the Convention does not cover human genetic resources).

⁴ Art.15 (1) of the Convention on Biological Diversity states: “Recognising the sovereign rights of the States over their genetic resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation”; Preamble of the Biological Diversity Act recognise the sovereign rights of the States over their biological resources; Art.1 (a) of the the Asian Framework Agreement on Access to Biological and Genetic Resources states: “That the Member States have sovereignty over biological and genetic resources within their territories in accordance with the provisions of the Convention on Biological Diversity.”

⁵ For example, reports on human genetic research in China trumpet the importance of ethnic diversity as a national resource, describing the distinct characteristics of China's numerous ethnic groups as a “goldmine” for population geneticists; Safrin, *supra* note 79 at 662.


⁷ *Id.* at 663.

involved in genetic research are indemnifying the research subjects through out of court settlements. However, the time is ripe to recognize the ownership rights of research subjects in the light of recent technological developments. There is no doubt that medical science, especially genetic research cannot progress without the contributions from patients and research subjects; however, it is equally important that their interests should not be pitted against such progress. Attempts should be made to strike a balance between ownership rights of patients and research subjects and accessibility of scientific advances. A research subject, who supplies his genetic material for research is also making significant contribution and there is every reason to recognize his contribution. Research subjects in developing countries can be easily exploited by the researchers and research sponsors because they suffer from basic problems such as illiteracy, poverty, unawareness regarding the biomedical research. In India, despite the Organ Transplantation Act 1994, illegal trade of human organs is still prevalent. This creates fear that the increased commercialization of human genetic material may open new opportunities for illegal trade. Here, the situation warrants that the ownership rights of the research subjects must be recognized. Moreover, since, the existing international and national legal regimes dealing with non-human genetic resources such as CBD and Indian Biodiversity Act contain provisions relating to benefit-sharing arrangements for non-human genetic material; it becomes pertinent to draft laws which recognize the concept of benefit sharing in the context of human genetic material. Extending sovereign ownership to human genetic material, however, seems to be problematic as it may pose risk to human dignity, individual autonomy and human liberty. These attendant risks justify the distinction between human genetic material and other forms of genetic material and necessitates a specific approach regarding the ownership of human genetic material. CBD may be a model for drafting laws relating to human genetic material in few respects such as benefit-sharing and informed consent, however, the regulation of human genetic material demands specific legal approach.

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213
In a Social Welfare State, constituted by three organs, the Legislature, the Executive and the Judiciary, the judicial system is an empirical process to protect a social order commanding the "Rule of Law". It is said that the judiciary is the weakest of the three organs since it has neither the powers of the purse, nor the powers of the sword; neither the money, nor the patronage, nor even, physical force to enforce its decision. On the other hand it is also felt and said that an independent and effective judicial system is the hallmark of democratic polity. The judiciary is also said to control the other two wings of the State, whenever their actions are ultra vires, malafide; arbitrary or discriminatory and tainted with the abuse of power.

Law is an instrument of society having its own object—"the dispensation of justice". Law is not an abstract or altruistic imagination but its nature, shades and province is largely defined according to its purpose, practice and functions. Law may be said," as the dictate of reason, or the command of the Sovereign or a system or Rules and even as the practice of the Court, yet it can never be doubted that it requires constant review, revision and examination for improving and reforming the legal/judicial system as a whole.

Law is a developing organism and it is a continuing process. The ever increasing criticism of the Justice Delivery System demands for having introspection in examining the problems faced by judicial system and recommending solutions for them so that justice may become "simple, speedy, less costly, effective and substantive".

Despite all odds the Courts have, by and large enjoyed high prestige amongst the people and have commanded great respect on the basis of moral authority and the confidence of the people in the judicial system. The judges are said to be “living oracles of the Law”, interpreting and developing the law in their "legal smithy". In a growing World, judicial system can ill afford to remain static. In order to satiate the needs of a growing society it has to evolve and refine itself to successfully meet the complexities of problems and serious challenges to the system itself.

Indian constitution aims at a Welfare State. Importance of a Welfare State is twofold; it provides a wide range of benefits to be made available by the State to the citizens as of right but at the same time it enhances the power of bureaucracy, since the benefits thus provided are inevitably administered by government departments or their agents. Hence a Welfare State creates its own legal Problems. These problems before the judicial system require at times, “The economist’s understanding, the poets might, the executive's experience, the politicians' scientific understanding, and the historian's perspectives”.

To achieve the goal of socio-economic justice, the judicial system has always
reformed itself and evolved strategies to meet the growing challenges. The process is ongoing one and requires to be given more momentum looking to serious problems, the judicial system is facing. At present judicial process sincerely requires an "introspective scrutiny" in so far as its methods and functions are concerned. As a necessary corollary we are required to identify various aspects and areas of the judicial system where the judicial process is prone to fail; the "strains and stress" found in the system is realized to be responsible for shaking, in some measures, the confidence of the people in the capacity of the Courts to timely redress their grievances. Therefore, for efficient discharge of the responsibilities on the shoulders of the judicial system and for maintaining broad confidence of the people at large, studies of the system are necessary. And the process must remain an ongoing one.

THEME OF THE SEMINAR

The judicial system at the Subordinate Court Level in the light of the guiding principles of the Constitution of India, works to provide justice to all without fear or favour. The underlying objective is to make way for a State where justice prevails and in an inherently unequal society no one is prevented from seeking and getting justice on account of his disadvantaged position. Despite the best efforts, the Judicial system has been inflicted by docket explosion, huge arrears and pendency, inadvertent delay, poor conviction rate, sense of inability in getting justice among the poor etc. No system works only through the efforts of a single individual or group. There are many stakeholders, and each has to make a contribution. The effort of the Institute, through this 'Regional Conference' is to bring all the stakeholders on one platform, to understand each other's perspectives. The intention is not to play a blame game, but to introspect and ultimately to come out with a solution. The intended solution oriented objective is to create a system of courts where no one fears the courts of law and everyone has access to courts. The endeavour is to enhance the faith of the people in the judicial system by providing timely, effective, inexpensive and efficacious justice.

The Institute prepared a questionnaire which is an effort to instill the importance of understanding their roles in each stakeholder i.e. Judges, Civil Administration, lawyers, police, Public Prosecutors, Medical Officers, Civil Society and the litigant. At the same time, it was also intended to make an honest assessment as to the performance of the other stakeholders. It was expected that while filling the questionnaire, everyone will be making an honest and well thought out assessment. Most importantly the Institute expects to give a well thought out solution, so that at the end we may be able to chalk out a common strategy, where all may work together for the common end of establishing an effective justice system.

QUESTIONNAIRE

| Question.1 | What is the year wise pendency on 29.2.2012 of different types of cases in the District? |
| Question.2 | What is the year wise disposal from 1.4.2011 to 29.2.2012 in the District of different types of cases? |
| Question.3 | How many cases have been referred to mediation in the District during 1.4.2011 to 29.2.2012? |
| Question.4 | How many cases have been successfully settled during the above period by mediation? |
| Question.5 | What is the condition of Plea Bargaining in the District? How many cases have been disposed during the above period through Plea Bargaining? |
Question 6: Specify some area you feel that Judicial Officers need training at Institute?

Question 7: Whether Court Manager has been appointed in the District, if yes, what work has been assigned to him, and if not, what work you plan to assign when he is appointed?

Question 8: What is the pendency of petty cases in Magisterial Courts? Specify the court having highest pendency and court having lowest pendency.

Question 9: Specify the number of suits in which ex parte injunction has been issued.

Question 10: Specify the percentage of bail granted in case of Juvenile Offences.

Question 11: Specify the percentage of bail granted in case of Juvenile Offences.

Question 12: Give an instance when you feel satisfied while working as a judge.

Question 13: Do you feel that related agencies provide full and fruitful cooperation in the administration of justice? Specify three areas where you feel unsatisfied and require improvements.

Question 14: Do you feel that monitoring cell meeting are effective and add improvement in the administration of justice?

The workshop was organised on Sunday 25th March, 2012 in Hotel Clarks, Varanasi. The Chief Guest for the conference was Hon’ble Mr. Justice Ravindra Kumar, Judge, High Court Allahabad who inaugurated the workshop on 10.15 AM. The Hon’ble Chief Guest took note of the huge pendency of cases at district level and the delay in disposal of cases and pointed out that this requires collective efforts of all the stake holders. He also said that the people have faith in the judicial system for the reason that the judges are capable of dispensing justice without fear and favour and with reasonable speed. This faith should be maintained and it is possible only when all of us take this task with dedication, service and commitment. He congratulated the Institute for bringing all the stakeholders associated with judicial system to one platform for discussing the problems and difficulties faced by the system and people and formulating solutions to them.

Sri A.N. Mittal, Director, Judicial Training & Research Institute, UP, Lucknow welcomed the chief guest, guests and participants in workshop and said that in view of the initiative taken by the Ministry of Law and Justice, the huge pendency in district courts, delay in disposal of cases, varying interests and outlook of different stakeholders, absence of modern scientific equipments, absence of management expertise and appropriate training, the institute has decided to organize regional workshops in different regions of the state and this workshop in Varanasi is the first in the series. The purpose is to explore the possibility of speedy justice to the people in the existing infrastructure and constraints. He also informed that ADR mechanism and Plea Bargaining will also be a point of discussion to infuse awareness amongst the participants. Sri A.K. Tripathi, District Judge, Varanasi rendered vote of thanks in the inaugural session. Inaugural session was compered by Sri Rajeev Maheshwaram, Deputy Director, Judicial Training & Research, U.P.

Sri P.K. Srivastava, Additional Director, Judicial Training & Research Institute introduced the topic in the second session and pointed out that the stakeholders associated with the judicial system have never had an integrated view so far as, the working of the courts is concerned. Apart from the judicial officers, all other agencies take the view that justice delivery comes within the exclusive domain of the judges. The justice delivery system will not be able to work efficiently unless with the cooperation and support of other agencies.
Prof. D.P. Verma, Head and Dean, Law School, BHU, Varanasi said in his address that delay in justice is violation of human rights. International Communities are always in favour of reform in judicial process. It is necessary that judicial institutions are strengthened. Legal study and research based on empirical study should be encouraged. In Bihar fast track courts and evening courts and in Uttar Pradesh Lokadalats are working and they are needed to be promoted more.

This session was followed by a working session in which 04 brake-out groups were formed to discuss on the questionnaire. These brake-out groups were presided by a District Judge and one faculty. All the four groups discussed the issues in their respective groups. One of the participants of each group presented the views of group in the last session. The last session was also addressed by some of the Office Bearers of Bar Association. The last session was compered by Mohd. Faiz Alam Khan, Additional Director (Research) and Dr. Rajesh Singh, Additional Director (Administration).

The questionnaire though sent in advance but it was not returned by participants in sufficient numbers after filling the same. A further leaf of questionnaire to document suggestions to improve the functioning of the judicial system was also supplied which required suggestions on infrastructure, court management, access to justice, conduct of different stakeholders in terms of court culture with reference to Bar, Judges, Public Prosecutors, Social Activists and Police, Monitoring and Supervision Mechanisms, Tool for Public Accountability, Vision of an Ideal Court and Constraints and Challenges before courts. The discussion covered these aspects.

From the group reports and views expressed during discussions and emerged from the filled questionnaire of participants, though very less in number, have been compiled as below. Repetition of same views has been mostly avoided.

**INFRASTRUCTURE**

**Chandauli**
- The district court has no building of its own. The court is working at two places, one in Tahasil campus and other is working in a building of a degree college. Both the buildings are in a ruined condition and are situated on a distant place from each other. There is no residence for judges and staff nor a place for the sitting of members of bar. Basic facilities and electric supply is in poor condition.
- Court room, retiring room, office building, space and shed for litigants with basic facilities, computer lab is not available.
- Facilities like drinking water, sanitation, generator and adequate number of fan and coolers are not available.
- Infrastructural development required.
- Complete computerisation is necessary for maintenance and upkeep of documents.
- There should be increase in library allowance of judges in order to purchase Law Books etc.

**Jaunpur**
- Sufficient court rooms are not available and most of the existing court rooms are in dilapidated condition.
- No place for sitting of Litigants and Advocates.
- Power supply is poor. Generator and budget for fuel should be easily provided.
- Court rooms and chamber should be air-conditioned.
Varanasi
Court rooms are sufficient. Light and air including ordinary human facilities are not available in court rooms. Most of the court rooms do not have chairs and benches for advocates and litigants except a few broken ones. Security of inmates and of records is burning problem. Inspection rooms are small. Approaches to court rooms on upper floors of the buildings for aged advocates and litigants are also troublesome. There is a need for new premises for the District Court with multi-storied buildings with underground multi-layer parking facilities and safe place for keeping files and records.

Ghazi pur
- Courts are working in inadequate infrastructure and staff. Sufficient furniture has not been made available to courts.
- There is no place for litigants and basic facilities for them is not available.
- There is no suitable place for prosecutor. A place in the form of room or enclosure attached to court room should be made available to the prosecutor.
- Power supply is very poor and generator with budget for fuel required.

COURT MANAGEMENT

Chandauli
- No management is possible in absence of court building, adequate infrastructure and staff and basic facilities.
- Creation of infrastructure and basic facilities necessary.
- Litigants shelter is required.
- There are inadequate number of judges, APO, staff and steno and it affects the working very adversely.

Jaunpur
- Number of Judges should be increased.
- There should be a financial expert in Civil Court.
- Two Stenos should be given to the judicial officer of HJS Rank.
- There is shortage of employees.
- Every court should be allotted separate fund for purchase of stationary and other necessary items for court.
- Court Managers have been appointed but it is not clear what kind of function they have to discharge.

Varanasi
- Courts and court campus are overcrowded. There is no space for further construction. Court Manager has to show his utility in the judicial system especially in administrative and financial side.
- There is a need for clubbing of same nature of cases so that speedy disposal can be made. In order to have uniformity in bails matters, all bail matters should be decided by one senior judge.
- Sufficient well trained administrative staff is required.
- Information technology should be used for court management.

Ghazi pur
- Court Manager has been appointed but they have not been given a specific work and their utility in the system is still to be seen.
ACCESS TO JUSTICE
(Including access to information: Current Situation of the Court)

Chandauli
- There is extreme formalism in court procedure and the disposal is unreasonably delayed. Poor litigants either may not come to the courts or who have come to the courts may leave during pendency because of delay and expenses. The approach of judges and staff and all other associates in the court working is also not litigant friendly resulting in great disappointment in the common man. Lawyers strike also adds a great deal in the problem.
- Online case status should be made available.
- Easy recourse to RTI should be promoted.
- Bar & Bench should harmoniously respond to the cause of justice and pain and sufferings of common man.
- Enforcement and execution of courts orders should be on top priority.
- Ban on Lawyers Strike
- Strict and time bound scheme for producing evidence

Jaunpur
- Gramin Nayalaya should be established.
- Access to Justice can be ensured through legal aid and legal literacy camp and through educational growth in the society.

Varanasi
- It is not an easy job to get justice from law courts with the present setup. Justice delayed is justice denied. Besides that, justice has become very costly. Regarding access to information it is almost negative in the court matters.

Ghazipur
- A public booth/counter should be opened in the court campus at some conspicuous place where common people may have information to facilitate access to courts.

CULTURE OF THE COURT
(Conduct of various stakeholders)

BAR
Chandauli
- Relationship between Bar and Bench is normally cordial and cooperation exists. During strike of lawyers, there remains a tension as lawyers resist for no work whereas judges want to work.
- Training of lawyers at the time of entry is necessary and they should realize their important role in justice administration.
- The strike call should only be accommodated after lunch.
- In order to make legal aid effective and legal knowledge updated, the library of bar and judgeship must be enriched.
- A tensed relationship and lack of cooperation between the two will always affect the judicial work.

Jaunpur
- There should be training of the Advocates.

Varanasi
- The role of bar is very important and indispensable in the administration of justice. Rich bar is essential for delivering justice. Bar and bench are two wheels of this chariot and one cannot work without other.
The status of bar has to be improved by all means arranging of proper place for their sitting in the Court Campus and in the Court Rooms. Gap between the bar and bench should be removed. In this district there are at least 8 thousand advocates working daily in different branches but the space is too scanty for them to stand even. They are even unsafe and insecure in their profession. Safety and security should be guaranteed at par with bench, they should be equipped with modern means.

Ghazipur

- Cooperation and communication between Bar and Bench is necessary to ensure smooth working and curtail strikes

JUDGES Chandauli

- Number of Judges should be increased in view of heavy pendency
- Able, independent, impartial and fearless judges should be appreciated, protected and encouraged.
- Mediation and Conciliation to be encouraged
- For registration as lawyer some examination should be made mandatory and there should be character verification by the local police.
- Medical facilities for judges should be better.

Jaunpur

- Fast Track Courts should be created to expedite disposal of civil cases.

Varanasi

- Judges discharge their duties, exception apart, only as salaried government servants instead of functioning for imparting justice which they are deemed to do. They work as any other government employees for salaries, whereas, they are persons bestowed upon godly virtues as judge. They must remember that it is their duty to do justice more than getting remuneration. They have a pious job of dignity in the society. Judge should be honest and merciful. He should discharge his function without fear and favour. In all his activities humanitarian ground must be explicit. Improvement in judge’s situation is dire requirement of the day. The number of judges should also be adequate.
- The over-all atmosphere of the court is unhealthy, various short coming in the functioning of the court are deep routed. They require overhauling from above to meet the situations.
- Prompt justice and that it should appear that litigant will get justice from the court.
- There are several challenges in the administration of justice. There is lack of morality, lack of enthusiasm, lack of knowledge and lack of resources among all who are connected with the administration of justice.
- Judiciary is the backbone of the society. It requires full strength to keep the society free from all the vices.
- Quota system is affecting the quality of judgments and it should be abolished.

Ghazipur

- Number of Judge should increase with better infrastructure
PUBLIC PROSECUTOR
Chandauli

- The condition of prosecution is not satisfactory. There are two mode of appointment, one from Public Service Commission and other from the members of bar. They are designated as Assistant Prosecuting Officer and District Government Counsel (Criminal). There is great dissatisfaction in APOs as they are expected to work in Magistrate Court whereas DGCs are to work in Sessions Court.
- Their competence and impartiality is doubted mostly by all stakeholders and they have not been able to get appropriate confidence of the people.
- The number of prosecutors is not appropriate in view of pendency.
- There should be one system of appointment.
- There is no proper office, basic facilities and required numbers of residence available for them.
- There should be adequate number of prosecutors with proper arrangements for training and infrastructural facilities and adequate opportunity to appear for the state before session’s court.

Jaunpur

There is no responsibility on the prosecution to ensure presence of witnesses. Some responsibility should be fixed.

Varanasi

- Prosecutors are attached to the job of imparting justice by judges. Morality and discipline should be guiding factor for them.
- There should be only quality appointment and not political appointment of the prosecuting officers.

Ghazipur

- Public prosecutors need a proper office/accommodation and they should get opportunity to conduct session trial also.

SOCIAL ACTIVIST
Chandauli

- NGO to be encouraged to play active role in social change
- A list of NGOs having credibility should be made available by the Government to the High Court who can be utilized by the district courts so that the objectives of welfare legislations aiming to achieve justice to marginalized sections such as juvenile, women, aged persons, persons with disability and weaker sections.
- At present, leaving apart the limited role in free legal aid programme and legal literacy programme, the role of NGOs in justice delivery system is not significant.

Jaunpur

There is no immediate need to involve social activists in the working of the court.

Varanasi

Good NGO should be identified and listed so that they can be utilized in administration of justice and enforcement of welfare laws.

Ghazipur

NGOs have no fruitful role in justice administration at district level.
POLICE
Chandauli
- Police to become more sensitive to the problems of common man.
- Quick police intervention may minimize the tension and disputes.
- Police has various functions and the priority has been always law and order. Against the heavy workload, the strength of police force is greatly inadequate.
- Scientific temperament and modern technique should be promoted in the police force with regular training in quick interval.
- There should be separate police for judiciary for execution of the orders of the courts.

Jaunpur
- Police does not appear as witness nor does execute the process issued by the courts. Some responsibility should be fixed at departmental level.
- The role of police regarding discharge of functions relating to court proceeding has been disappointing. There should be a provision for punishment of police for their neglect in executing orders of the court.
- Police should be given scientific training and their strength should be substantially increased.

Varanasi
- The police are over burdened and the department suffers from high level corruption and lack of investigative skills. Investigative wing should be separated from law and order wing of police. Training should be given in J.T.R.I., Lucknow.
- Role of the police is that of assistant of the court in criminal cases.

Ghazipur
- There should be separate police for civil courts for security and service of process in criminal cases.

MONITORING AND SUPERVISION MECHANISMS
Chandauli
- There is a system of periodical inspection, monthly meeting, jail visit; meeting of monitoring cell in which problems are discussed and way out is searched. Members of Bar also get opportunity to discuss the problems with the District Judge and other Judges.
- In Judicial side, legal remedies in terms of revision, appeal and writ are available to the aggrieved persons. District Judge and High Court also time to time monitor and supervise the working.
- The stakeholders inter se are expected to work with check and balance and work with support and cooperation so that to serve purpose of justice.

Jaunpur
- There should be regular meeting of monitoring cell.
- Summon cell and service of process should be improved.
- The need of speedy justice should be publicised in media to create awareness in the public.

Varanasi
- This matter concerns the government of Uttar Pradesh and the High Court. However, administrative control at all level is loose. Complaints are not properly disposed off. Officials have their subordinates who are called
‘outsiders’ and available in every office. They have their own command and defile the sanctity of the temple of justice. Strict vigilance and tight administration is required.

- There should be monitoring of the contribution of other agencies in court working.
- A few cases have been referred for mediation.

**Ghaziapur**

- There is enough monitoring and supervision mechanism but will not become effective unless honesty and discipline is maintained amongst all the stakeholders.

**VISION OF AN IDEAL COURT**

**Chandauli**

- The Court system should be able to protect rights and enforce liability and should dispose of cases within reasonable time.
- The Court system should work in such way so as to maintain the confidence of the people in formal adjudicatory system.
- ADR system and Plea Bargaining should be properly adhered to and promoted.

**Jaunpur**

- There should be a committee of members of Bar and Bench to resolve the inter se conflict and day to day problems. Both should behave with each other with courtesy.
- Sufficient staff and adequate infrastructure will help in speedy disposal.
- There is need for special investigating police and separate police force for civil court.
- Court staff should be given proper training.
- Number of prosecutors should be increased.
- The judges should be humble in their response during the court work.

**Varanasi**

- In the light of the Judicial Standard and Accountability Bill 2010, guidelines should be framed for the Judicial Officers of District Judiciary.
- In an ideal court speedy and qualitative justice should be given. There should be good infrastructure and judges, lawyers and prosecutors should have updated legal knowledge. Courts should not operate mechanically and judges should have humane approach and a sense of service.
- Fast track court should continue. There should be three courts for old cases and three courts for execution cases.
- Copy should be made available online which will save enough time.

**Ghaziapur**

- Security arrangement is poor and there should be separate police force for district judiciary.
- Quota system should be either abolished or rationalized.
- There should be internet service, inquiry booth for common man to facilitate them.
- Village court should be established.
- The Court Mangers should assist in finance matters and development.
- There should be a finance officer in district court.
• Officer of C.J.Ms. rank should be given authority to try session’s trials punishable up to 10 years.
• Frequent strike of lawyers is a big cause for delay.

In Chandauli, it has been informed, there is no mediation centre and therefore, no case has been referred as yet.

The submission of the participants and discussion shows that the condition of District Chandauli is peculiar as this district was created in May 1997 and in July, 1999 district courts were established and till now there is no infrastructure and building in the name of district court. This is the main cause of all the problems that the district justice administration is facing. So far as the questionnaire is concerned, consolidated statement of judgesthip regarding pendency and disposal has not been provided, but, from the filled information of CJM it is clear that on 29-2-2012, 17,678 cases are pending and he has been able to dispose of 2419 cases in the previous year. It has been also stated that due to non-availability of infrastructure and building, court manager has not been appointed. All the participants agree that non-availability of infrastructure and building is the major hurdle in the administration of justice. Judges take the view that other agencies do not render required cooperation whereas officers of other departments count their problems.

It appears from the statements given by district Varanasi that on 1.3.2012 the pendency in the court of District & Sessions Judge and all Additional District & Sessions Judges was 13,083. Before criminal court up to Chief Judicial Magistrate the pendency was 87,732 and pendency before court of Civil Judge (J.D.) to JSCC court the pendency was 30,572. Only one view of District Ghazipur from SPO, Ghazipur was made available. During discussion the participants form Ghazipur expressed similar view like Varanasi.

Except Chandauli, in all the three districts mediation centre is functional but it was said that the reference rate is slow and therefore, not much cases have been decided. Except Chandauli, in all places court managers have been appointed but it is not clear what kind of work has to be taken from them. However, it was said by the District Judges that they are assisting in administrative and infrastructural matters. There was no consensus with regards to equitable distribution of work at magistrate level and it was informed that CJMs make distribution under the guidance of the District Judge. In all district, in monthly meetings, annual inspections and otherwise, priority wise disposal of old cases is emphasized and monitored by the District Judge. The participants agreed that the reason for old pendency in civil side has been frequent adjournments, delayed processing, recourse to appeal and revision at interlocutory stage, lawyers strike and work load. In criminal side nonappearance of accused and formal witnesses are additional reasons.

Participants agreed to the need of collective efforts from all associated agencies and judges for speedy disposal. But it was also pointed out that other agencies do have their departmental priorities and they also face the problems of workload and shortage of officers and employees. All insisted on the need of better cooperation and coordination between the different stakeholders of the court system. Regarding the role of NGO in court system, all agreed that there is a very limited role and emphasized on need of a list of credible NGOs prepared at higher level. Regarding the cooperation of lawyers, need of a better understanding between Bar and Bench was felt. It was also said that there should be a scheme of training of Advocates and some disciplinary authority should be vested in district judge to control and inject discipline in lawyers.
GENDER JUSTICE
&
HISTORICAL AND SOCIAL PERSPECTIVE

(Workshop of Public Prosecutors of State on Gender Justice)

Prepared by:
P.K. Srivastava,
Additional Director,
JTRI, UP, Lucknow

(\textit{It is an edited version of the views expressed by the Group A formed by Ms. Sarojmati Gupta, Sri Ramesh Kumar Gautam, Sri Nag Bhusan Pathak and Sri Manish Kumar all APO’s undergoing Induction Training at IJTR, UP, Lucknow from 04 June, 2012 to 3 July, 2012})

Gender Justice means that no one be denied justice or discriminated only because of one’s gender or sex. Gender justice is a concept to bring about equality, attempts to confer equal rights on women to secure equal decisional autonomy in social, economic and political sphere.

In ancient India, if we refer to Veda Puran and Smriti, there was no uniformity in the treatment with women; as a consequence, conflicting conclusions emerged. In an organized society, women were in the control and supervision of father, husband or son. Even though, we find mention of women with exceptional virtues and knowledge and they were taken to be symbol of intellect, grace and property. In Rig Veda a new bride was taken to be mistress of the house and was called as a better half. No Yagya was permissible in the absence of wife. Instance may be taken of Ashwamedh Yagya by Lord Ram who completed the Yagya with an idol of Mother Sita in her absence.

In Vedic period, women were as free and independent as the men were and they used to participate freely in religious and social functions. In Smriti period, gradually freedom was restricted and a restriction was also imposed on their dress etc. Even then, they were regarded better than man. There is a reference in Vishnu Dharma Sutra that women were punished by half of the punishment in comparison to men. In view of Narad Sanhita, women could not be subjected to any kind of tax and she cannot be tried in night, amongst enemies or inside the house and in such cases, a rehearing was required. In getting stridhan they were preferred over male counterparts.

However, the status of widow was not respectable and even Manu expected them to forget all worldly pleasure in terms of food, shelter and dress and in no case she should have thought of another man. Such a woman, unfortunately, was taken to be inauspicious for the society and family. On death of Pandu, his queen Madri became Sati and so did Rukmini and Jamwanti including six more queens on death of Lord Krishna whereas other queens including Satybhama went to exile (Vishnu Puraan and Vishnu Dharm Sutra). More examples of observing Sati on death of husband may be found in various literatures. Thus, there are conflicting views in respect of status of women in ancient India. At times, they were taken to be worth of worship and sometimes they have been described as very inferior class.
Even Mahabharata, Ramayana, Manu Smriti and other Purans contain derogatory remarks against the women in relation to their moral character.

The deterioration in the social status of women becomes visible during the period when Satipratha, Child marriage, Pardapratha, Devdasi system took a very extensive stay in the society and it is said that this increased in the period of Muslim Rulers. But during that time also Razia, Chandbibi and Noorjahan assumed great prominence. Women like Jeejabai, Laxmibai and Durgawati are remembered for their achievements and good work. During independence struggle, Annie Besent, Vijay Laxami Pandit, Princess Amrit Kaur, Aruna Asaf Ali, Sucheta Kriplani and Kasturba Gandhi Contributed no less than men. Laxmi Sehgal remained a captain of Indian National Army organized by Subhash Chandra Bose.

After Independence, we can mention the name of Indira Gandhi, Pratibha Devi Patil, Mamta Banarjee, Jaylalita and Mayawati who made a lot of contribution for making of strong and prosperous India. But there are certain ground level harsh realities of our society which may be enumerated as follows:

1. The divorce system in Muslim society is disappointing to women and is a big obstruction in the way of development.
2. After making an extensive study on the status of women in the world, Thomas Reuters has remarked that ‘India is the fourth most dangerous country in the world for women’.
3. According to the Report (1998) of National Crime Bureau, the crime against women in India is increasing faster than the population of the country.
4. Rape victims are stigmatized for whole life and are treated by society as if they are guilty themselves.
5. According to some activists, sexual crime is result of western culture.
6. Roughly five thousands women die yearly out of dowry death.
7. 40% of infant marriages take place in India.
8. The sex ratio is decreasing yearly and in 2011 the girl boy ratio is 914 to 1000.

According to Television Serial ‘Satyamev Jayate’, female infanticide is prevalent in highly educated groups with the co-operation of those doctors who are expected to save life as they are involved in sex determination by way of ultrasound. In case of female child they report as ‘Jai Mata Di’ and in case of male as ‘Jai Sri Krishan’.

Thus, after evaluating the socio-historical facts and literature one can easily come to a conclusion that from the ancient period till now, there has been double standard in the behavioral pattern on the basis of Gender bias and it created the most negative impact on the women society. For the complete development of the nation, Gender Justice needs to be promoted so as to ensure women empowerment and equality of sex in terms of Constitutional goals. Society’s standard is assessed how it behaves with and respects the women. A society which respects the worth and dignity of women, is considered to be good and civilized society.
GENDER JUSTICE:
JUDICIAL INTERVENTION AND ROLE OF SUBORDINATE JUDICIARY
(Workshop of Public Prosecutors of State on Gender Justice)

Prepared by:
P.K. Srivastava,
Additional Director,
JTRI, UP, Lucknow

(It is an edited version of the views expressed by the Group E formed by Sri Shalendra Kumar, Sri Srinivas Yadav, Sri Pragynand Sharma and Sri Vivek Chandra all APO’s undergoing Induction Training at IJTR, UP, Lucknow from 04 June, 2012 to 3 July, 2012)

For proper and balanced development of society, Gender Justice is as important as two wheels of a cart. Keeping this goal in mind, the framers of the Indian Constitution incorporated Article 14, 15 (3), 16, 21, 23, 39, 42, 44 and 51A in the Constitution and they attempted to ensure to the women, equality of status and opportunity. The Legislatures also made certain laws to check domestic violence and secure equal rights to son and daughter in the ancestral property. Likewise, the judiciary in the country has also played active role to eliminate inequality and disparity based on sex from the society. According to Justice Saghir Ahmad, ‘women have several dimensions in their personality, mother, sister, daughter and wife. Discrimination against a woman is a crime against the society and this tendency needs to be checked.’

In AIR vs. Narges Mirza, (AIR 1981 SC 1929), a condition not to become mother within stipulated time for the job of Air hostess was declared unconstitutional being discriminatory and violative of Article 14 of the Constitution. In Modh. Ahmad Khan vs. Shahbano (AIR 1985 SC 945), the Supreme Court pleaded for uniform civil code and said that ‘right of maintenance is a right available to every divorced woman irrespective of her religion and cast’. Similarly, in Uttarakhanda Mahila Kalayan Parirad vs. State of U.P. (1993 (Supplement) SCC 480, equal pay for equal work was recognized. Again, the Supreme Court, in Delhi Domestic Working Women Forum vs. Union of India, (1995(1) SCC 14) laid down that women have a right to live with dignity and respect. In Bodhisatta Gotum vs. Shubhra Chakrobaty, (1996 (1) SCC 490), right of interim maintenance to rape victim was recognized. In Vishakha vs. State of Rajasthan, (AIR 1997 SC 3011), the Supreme Court ruled in favour of working women for a right against sexual harassment at workplace and issued various directions to ensure safe environment at workplace.

In Sehat Masoom vs. Union of India, (2001 (5) SCC 577) & also in Sucheta Srivastava vs. Chandirah Administration, (AIR 2010 SC 235), the Supreme Court laid down that sex determination for girl infanticide is a heinous crime. The Supreme Court further said that the woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual
activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling State interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the Medical Termination of Pregnancy Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

The District Judiciary is expected to enforce the constitutional provisions and laws laid down by the Supreme Court and High Courts. The Judge is expected to behave justly and respectfully with the victim, accused and witnesses.
Memorable Events- 2012-13 at JTRI, UP

Shri U. S. Awasthi, Director, JTRI, UP presenting the bouquet to Hon’ble Mr. Justice Shiva Kirti Singh, Chief Justice of Uttar Pradesh in the function of UP Judicial Service Association at JTRI, UP

Shri S.K. Pandey, Principal Secretary (Judicial) & L.R. Govt. of UP presenting the bouquet to Hon’ble Mr. Justice Shiva Kirti Singh, Chief Justice of Uttar Pradesh in the function of UP Judicial Service Association at JTRI, UP
Plantation Programme on the Occasion of 15th August, 2012 at JTRI Campus

Group Photograph of Newly appointed HJS Officers undergoing Induction Training
THE INSTITUTE

Hon'ble Mr. Justice Bhanwar Singh  
The Chairman

Sri Uday Shanker Awasthi, HJS  
Director

Sri P.K. Srivastava, HJS  
Additional Director

Sri Anupam Goyal, HJS  
Additional Director (Research)

Sri Rajeev Bharti, HJS  
Additional Director (Training)

Dr. Rajesh Singh, HJS  
Additional Director (Admn.)

Ms. Saran Piarie Varma  
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

Sri Arvind Kumar Singh  
Assistant Director
INTRODUCTION

The Judicial Training & Research Institute, U.P. was established by the Government of Uttar Pradesh in pursuance of a decision taken at All India Conference of the Chief Justices of High Courts in August/September, 1985 in New Delhi. This landmark conference which was also attended by the Chief Ministers and the Law Ministers of the States, mooted the idea of providing institutional induction and in-service training to the judges of the subordinate courts in the country. The initiative of the State Government, after being readily agreed to, by the Hon’ble High Court of Judicature at Allahabad, saw the Institute coming into the existence and becoming functional on 25th April, 1987. Hon'ble Mr. Justice K.N. Goyal, Former Lokayukta, Uttar Pradesh and Former Honorary Chairman State Law Commission, U.P. was its first honorary Director. Thereafter Late Sri J.K. Mathur was appointed as Director of the Institute. He was succeeded by Sri I.S. Mathur, Sri A.B. Hajela, Sri M.L. Singhal, Sri D.P. Varshney, Sri D.P. Gupta, Sri Allah Raham, Sri. Vedpal, Sri V.K. Mahur, Sri Aditya Nath Mittal, and Sri Pratyush Kumar as Directors.

Hon’ble Mr. Justice U.C. Srivastava was first Chairman of the Institute thereafter Hon’ble Mr. Justice A.N. Gupta graced the office.

Hon’ble Mr. Justice Bhanwar Singh, Former Judge, Allahabad High Court is the present Chairman of the Institute.

VISION

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

OBJECTIVES

The Institute has been established to pursue the following objectives:

1. To give induction training to new appointees to the judicial and prosecution services.
2. To conduct in-service training/refresher courses for the judicial officers of U.P. in order to update their legal knowledge, skills and techniques.
3. To conduct research work in the field of law to make the legal system more effective.
4. To find out ways and means for expeditious disposal of cases.
5. To improve knowledge and skill of Judicial Officers so that they can perform their duties more effectively and efficiently.
6. To foster the innovation and creativity amongst Judicial Officers and to help prevent obsolescence of manpower.
7. To provide the participants a wider awareness, and enlarge skill and enlightened altruistic philosophy, and make enhanced personal growth possible.
8. To conduct study, analysis and research relating to judicial education and practical problems in the working of District Courts.
9. To organize seminars/workshops on current legal issues.
10. To author and publish journals, digests, and brochures of law and distribution thereof to the judicial officers of the State.

INSTITUTE’S LOGO

The Institute is committed to improve knowledge and skill of Judicial Officers and to facilitate them to perform their duties effectively and efficiently by providing induction training to new appointees to the Judicial and Prosecution services and conducting in-service/refresher courses and also conducting research work in the field of law with a view to find out ways and means for expeditious disposal of cases.

The motto of the Institute as inscribed in its Logo is “;ksx$ deZ1q dks’ kye~”. These golden words which have been borrowed from the 50th Verse of the 2nd Chapter of the Sri Bhagwat Geeta simply means “Adroitness in Human Action is Yoga”.

INTELLECTUAL CAPITAL

The Chairman

The Institute is functioning under the able guidance of Hon’ble Mr. Justice Bhanwar Singh, Former Judge, Allahabad High Court. Hon’ble Mr. Justice Bhanwar Singh is a post graduate in law (LL.M) from Meerut college, Meerut. His Lordship was appointed in U.P. Judicial Service on April 18, 1970. He has a vast judicial and administrative experience of working as District & Sessions Judge, Registrar, Allahabad High Court and Registrar General, Supreme Court of India. His Lordship was elevated as permanent Judge of Allahabad High Court on March 26, 1999. During his tenure, he had experience of deciding matters involving Civil, Criminal, Company matters & Contempt jurisdiction. He presided over Division Benches on Civil & Criminal side both. As judge of High Court he was also a member of the Governing Council of Meerut University. After superannuation, His Lordship was appointed as President, U.P. State Consumer Dispute Redressal Commission for five years. At present his Lordship is gracing the office of Chairman, Judicial Training & Research Institute, U.P. Lucknow.

The Director

Shri U.S Awasthi H.J.S., is the present Director of the Institute. He is one of the senior most officers in the cadre of District Judges of the State. He has a vast Judicial and administrative experience of about 33 years. He has been District & Session Judge in Auraiya & Lakhimpur Kheri before Joining as Director of the Institute.

Intellectual Resources

The other resources of the Institute includes Shri P.K. Srivastava, Additional Director; Shri Anupam Goyal, Additional Director (Research); Shri Rajeev Bharti, Additional Director (Training); Dr. Rajesh Singh, Additional Director (Admn.) from HJS cadre and Ms. Saran Pyari Verma, Additional Director (Finance) from U.P. Finance and Accounts Service, Shri Mahendra Singh, Shri Pushpender Singh, Shri A.P. Mishra and Shri
R.K. Dwivedi as Deputy Directors from the cadre of U.P. Nyayik Sewa.

CAMPUS

The Institute is located in sylvan and tranquil surroundings, spread over an area of 32 acres, away from the din and bustle of the city in Vineet Khand, Gomtinagar, Lucknow, at a distance of about 25 Kms. from Amausi Airport and 13 Kms. from main Charbagh Railway station and 15 Kms. from Aalambagh Bus Stand.

The Institute has a separate Training Wing, Administrative Block, Conference Hall, Library, Officers’ Hostel with attached dining facility, gymnasium and Yoga Hall, Brochure room, Computer Lab and residential facility for the Director and the senior faculty.

TRAINING WING

The Training Wing comprises of 4 air-conditioned lecture theatres of total seating capacity of 200 trainee officers and 8 tutorial rooms each having a seating capacity of 20 trainee officers. The lecture theaters are well furnished and air-conditioned and equipped with L.C.D. projectors, white boards, sound systems and close circuit cameras.

CONFERENCE HALL

Fully furnished air-conditioned Conference Hall having seating capacity of about 150 persons, is part of the training wing. The Hall has been renovated recently and is well furnished and air-conditioners and equipped with latest state of art technologies, LCD projectors, sound systems and computers.

SEMINAR HALL

The Seminar Hall for carrying out the interactive sessions during training is located at the top floor of the Administrative Block. It has the seating capacity of around 70 persons and has been developed by the Institute specially for group discussions and interactive method of training. The Hall is fully furnished and equipped with latest audio visual systems.

LOUNGE

The Institute has a lounge attached to the conference hall of the training wing. Around 40 persons can be accommodated at a time in the lounge it has been prepared and developed especially for hospitality purposes to the guest speakers and dignitaries coming to the Institute.

COMPUTER LAB

Recognizing the necessity of becoming technology friendly and establishment of full fledged e-courts in the near future, the Institute provides necessary training of handling computers to all the trainee officers. To facilitate this process, the Institute's Computer Lab is equipped with new latest Core i processor systems and laptops with latest configuration.
LIBRARY

The Library of the Institute is housed in a beautiful ambience into two spacious air-conditioned halls in the Training Wing with one being dedicated to Law books and commentaries and books of general interest, and other exclusively for storing Journals. This centre of knowledge has more than 35000 books. The Institute has been subscribing 22 legal journals of varied nature including All England Reports. SCC online has been provided in the library for the use of trainee officers. Library has been equipped with AIR database also to facilitate the officers with the judgments and precedents laid down by Hon’ble Supreme Court and High Courts of the Country. The Institute is working on to develop e-knowledge hub and e-library in near future.

ADMINISTRATIVE BLOCK

The Administrative Block is a three storied building. The nerve centre of the Institute houses the Chairman’s Office with attached meeting hall of the capacity of 50 persons, alongwith the office of the Director. It also has the main office and the offices of the faculty members, along with the newly established Seminar Hall, Gymnasium and the Brochure Room.

OFFICERS’ HOSTEL

All training courses are residential. The in-campus officers’ hostel is a three storied building with 114 air-conditioned rooms. The officers hostel of the Institute is located at a distance of about 150 meters from the training wing. The hostel is fully furnished and equipped with the best house-keeping and hospitality facilities.

OFFICERS’ MESS AND DINING HALL

The mess of the Institute is attached to the officers’ hostel, with a Dining Hall which can accommodate 250 persons at a time. To ensure proper hygienic conditions, the kitchen of the mess has been equipped with ultra modern gadgets and utensils. The cafeteria of the Institute is fully air conditioned and well furnished with entertainment facilities too.

GYMNASIUM

Keeping in view that a healthy mind rests in a healthy physique, the Institute has recently established and developed a gymnasium. The physical training is generally part of the training programmes organized by the Institute. The facilities of gym has been made available to the trainee officers during the training programmes. It has been fitted with state-of-the-art modern equipments and machines.

TRAINING AT J TRI

The Institute conducts various training programmes mainly on legal and judicial orientations for the Judicial Officers of the state. The Institute undertakes induction training for newly recruited probationers of civil judge (Junior Division) cadre and also for direct recruit to Higher Judicial Service. The duration for Induction Training Programme for Civil Judges (JD) is one year while the
duration for Induction Training of officers of Higher Judicial Services is three months. The Institute has so far trained 1413 probationers of Civil Judges (JD), which includes the training of the officers of Himachal Pradesh, and Delhi. Induction training of 129 officers of direct H.J.S. has been organized by the Institute, apart from newly appointed A.P.Os. The Institute has also successfully imparted training to about 900 newly appointed DGC/Addl. DCG and Asstt. DGC in the month of Dec/Jan.2012.

Refresher courses for Civil Judges (Junior Division), Civil Judges (Senior Division), Additional District Judges, Judges (Family Courts) and District Judges, have also been organized. The Institute has trained about 1400 Additional District and Sessions Judges, 1204 officers of Civil Judges (S.D.) and 1700 officers of Civil Judges (J.D.) cadre, in its refresher programmes. Apart from it, Refresher Training Programmes for Public Prosecutors is being organized in cycles regularly.

The Institute has been organizing training programmes on Finance and Administration for Senior Additional District Judges and District Judges of the State.

The following are the various induction trainings, refresher courses and special training programmes which the Institute undertakes:-

**INDUCTION TRAININGS**

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<tr>
<th>Sl. No.</th>
<th>Name of Training Programme</th>
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<tr>
<td>1.</td>
<td>Induction Training Programme for Civil Judge (JD)</td>
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<td>2.</td>
<td>Induction Training Programme for A.D.Js (Direct Recruits)</td>
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<tr>
<td>3.</td>
<td>Induction Training Programme for A.P.Os</td>
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**REFRESHER TRAININGS**

| 1. | Refresher Training Programme for Assistant Prosecution Officers/Prosecution Officers |
| 2. | Refresher Training Programme for Civil Judge (J.D)/ Judicial Magistrate |
| 3. | Refresher Training Programme for Civil Judge (S.D.) /Chief Judicial Magistrate |
| 4. | Refresher Training Programme for Additional District Judges |
| 5. | Refresher Training Programme for District Judges |

**SPECIAL TRAININGS**

| 1. | Training Programme for Civil Judges (J.D.), likely to be promoted as Civil Judges (S.D.) |
| 2. | Training Programme for Civil Judges (S.D.), likely to be promoted as Additional District Judges (Regular Side) |
3. Training Programme for Senior District Judges likely to be elevated to the Hon’ble High Court

4. Training Programme on Financial and Office Management for District Judges/ Senior Addl. District Judges

5. Training Programme on Land Acquisition and Motor Vehicle Compensation

6. Training Programme for Members of District Consumer Forum

7. National Level Training Programme on Legislative Drafting and Parliamentary Affairs

8. Training Programme for Officers of Stamp & Registration Department

9. Training Programme for District Government Counsels (Civil)

10. Training Programme for Officers of Labour Department

11. Training Programme on Office Management for Senior Administrative Officers/Sadar Munsarims of Civil Courts

**SPECIAL TRAINING PROGRAMME (Under 13th Finance Commission Scheme)**

Under the 13th Finance Commission Scheme two modules of training for all the Judicial Officers numbering around 2100 in three rounds have been developed for a duration of 10 days and 5 days. The emphasis of this training is on capacity building of the Judicial Officers and on development of perspective and attitude in tune with the core constitutional and judicial values. The effort is also to sensitize the officers regarding access to justice to the marginalized people. The Institute since January, 2011 has so far provided refresher training to 2000 officers which includes 900 DGCs/ ADGCs (Cri). In January, 2012, a special training programme on Financial Management and Administrative Management for District Judges was also organized very successfully. The Institute has also conducted induction/foundation training programme for newly appointed Court Managers.

**MANAGEMENT TRAINING**

The Institute is also taking services of Army Institute of Management and Technology, Greater NOIDA for providing Management Training to Judicial Officers of all rank. The focus of this programme is on enhancing the managerial skills particularly in the context of Court Management, Docket Management, Office Management and Personnel Management. Judicial Officers are finding the training to be very useful which has been especially designed for them.

**NATIONAL LEVEL CONFERENCES**

A three day North Zone Judicial Conference on “Enhancing Timely Justice: Strengthening Criminal Justice Administration” was held from 26.09.2009 to 28.9.2009 at the Institute. The conference was organized by the National Judicial Academy, Bhopal in collaboration with the Hon’ble High Court of Allahabad and the JTRI. Around one hundred delegates from 6 High Courts namely Allahabad, Delhi, Jammu & Kashmir, Himachal
Pradesh, Punjab & Haryana, and Uttrakhand participated in the conference.

On the same pattern the Institute organized three days North Zone Judicial Conference on theme- “Role of Courts in Protection of human Rights” from January 27, to 29, 2012 in collaboration with National Judicial Academy, Bhopal. The judicial officers from the High Courts of North Zone, as aforesaid, participated and deliberated on various issues and challenges relating to the protection of the human rights. The dignitaries as Hon’ble Judges of the Supreme Court and High Court of Judicature at Allahabad, alongwith legal luminaries and academicians participated in the programme.

PUBLICATION

The Institute has so far published 27 books and around 235 brochures on different law topics and other fields of general importance. The Institute regularly publishes a Quarterly Digest containing notes on the reported judgments of Hon’ble Supreme Court and Allahabad High Court. The Institute also publishes JTRI Journal containing legal articles by Hon’ble Judges, other luminaries and Jurists. The Institute has published compilations of General Rules (Civil), General Rules (Criminal) and Circular Orders of Hon’ble Court for all the Judicial Officers.

LIST OF BOOKS PUBLISHED BY THE INSTITUTE

1. Nyayik Marg Darshika Khand I & II
2. U.P. General Clauses Act
3. General Rules (Criminal)
4. General Rules (Civil) Vol. I and II.
5. Continental System of Criminal Justice
6. Forum Selection Clauses and other Lectures
7. Dand Nyayalayon, Police evam jail adhikariyon ko Uchhatam Nyayalayon ke Nirdesh
8. Social Justice
9. Interpretation of Taxing Statutes
10. Parliamentary Privileges and Courts
11. Lectures on Constitutional Law and Legislative Drafting
12. Remand
13. Circular orders of High Court ( New updated edition )
14. Parliamentary Democracy and Nehru
15. Vibhagiya Janch
16. Law and Medicine
17. Juvenile Justice System in India
18. Maintenance of wives, children & parents

19. Arbitration and the Courts

20. Relations between Bench and Bar and Strikes in Courts

21. Adhiniyam Naam Sangraha

22. Finger Prints

23. Quantification of Sentence in Rape Cases

24. Law, Society and Obscenity

25. Tragic Roads


27. Select Writings for Judge - Compiled by Justice Yatindra Singh, Judge, Allahabad High Court.

Brochures

1. Judicial Miscellany

2. Conduct, Behaviour and Etiquette

3. Practical Guidance

4. Contempt of Court

5. Notable Murder Trial

6. Land Acquisition

7. Sentencing

8. Parliamentary Privileges

9. Prisons, Remand Homes etc. (Article 21)

10. Practice and Procedure of Courts

11. Forms of Charges

12. Vividhika (Miscellany)

13. Word Power

14. Recent Civil and Criminal Decisions

15. B.A.A. Civil Courts Act and P.S.C.C. Act

16. Lectures for Munsif Probationers – 1987 (Vol I & II)

17. Office Inspection: Imposition, Realization, Deposit of Fines

18. Legal Miscellany

19. English Idioms from the Law

20. Judicial Training

21. Words and Phrases

22. Miscellaneous Articles on Administrative law, Legislation etc.

23. Articles from Law Quarterly Review and other Journals

24. Lectures to Senior Civil Judges & C.J.Ms.

25. Lectures to Senior Munsif Magistrates
26. Expert Evidence
27. Legislative Drafting – I
28. Legislative Drafting – II
29. Legislative Drafting – III
30. Legislative Drafting – IV
31. Legislative Drafting – V
32. Legislative Drafting – V1
33. Legislative Drafting – VII
34. Legislative Drafting – VIII
35. Lectures on Constitutional Law and Legislative Drafting Vol I. & Vol II.
36. Extracts from Law Quarterly Review – I
37. Extracts from LQR – II
38. Extracts from LQR – III
39. Habeas Corpus
40. Reference to High Court under various Taxation Laws
41. Creditor’s Petition for winding up of company
42. Contempt of Court
43. Protection of Minority, Shareholders and Creditors of a Company
44. Malice in Fact and Malice in Law
46. Legislative Privileges
47. Judicial Review of Discretionary Powers: Concept of Misdirection in Law
48. Rights and obligations of Administrator General and official Trustee
49. Mandamus & Quo Warranto
50. Certiorari, Prohibition and Art. 227 of the Constitution
51. Writs in Public Interest Litigation
52. Speaking Orders
53. Executive Powers of the Government; Articles 73, 77, 162, 166, 298 and 299 in the context of Articles 19, 21, 25, 265 and 300A.
54. Writs against Non statutory Bodies
55. Delegated Legislation; Excessive Delegation; Ultra Vires; “As if enacted in the Act”.
56. Probate and Letters of Administration
57. Right to Property
58. Minorities Educational Rights: Article 30
59. Amendment of Election Petition after the Expiry of Limitation for Filing Petition
60. Promissory Estoppel in relation to
a) Purely Administrative Orders
b) Statutory Powers and
c) Legislative Actions
61. Distribution of Legislative Powers between the Union and States.
63. Recovery of Public Moneys Vol. – II
64. Recovery of Public Moneys Vol. – III
65. Recovery of Public Moneys Vol. – IV
66. Recovery of Public Moneys Vol. – V
68. Bar of Jurisdiction of Courts and Enforcement of Non common Law Rights
69. Termination, Discharge, Reversion and Compulsory Retirement
70. Powers of High Court under Art. 226 of the Constitution and Sec. 482 Cr.P.C. in relation to F.I.R, Arrest; Investigation; Inquiry and Trial
71. Lectures at the First Refresher Course for District Judges
72. Lectures at the 2nd Refresher Course for District Judges
73. Lectures at the 3rd Refresher Course for District Judges
74. Land Acquisition Ss. 4,5,5A, 6, 17 & 41.
75. Tax Statutes: Construction (Interpretation of Tax Law: Charging and Machinery Provisions)
76. Bar to Writs
77. Industrial Disputes (Reference of Industrial Disputes to Labour Court or Industrial Tribunal by Government)
78. Article 21
79. Directive Principles
80. Right to Equality
81. Preventive Detention
82. Article 14, 19
83. Bias
84. Audi Alteram Partem
85. Nyayalayon Mein Hindi Ka Prayog
86. Lectures at the Fourth Refresher Course for the District Judges
87. Lectures to the Senior Civil Judges/Chief Judicial Magistrates and Munsif Magistrates
88. Expert Evidence (Handwriting)
89. Expert Evidence (Thumb impression)
90. Expert Evidence (Medico Legal)
91. Yes Minister
92. Injunction
93. Validating Legislation
94. Income and Trust
95. Model Clauses
96. Managing Juvenile Courts
97. Material for Programme on Financial and Personnel Management
98. Judicial Officer’s & Staff Service Rules
99. Legislative Drafting IX
100. Model Judgment – Vol. I & II.
101. Model Judgment – Vol. II.
102. Appearance of Parties in Civil Proceedings and Consequences of Non appearance
103. Legislative Drafting Vol. XI
104. Jurisdiction of Civil Courts Vis à vis Revenue Court
105. Lectures of Senior Munsif Magistrate
106. Lectures of Senior Civil Judge/ Munsif Magistrate
107. Lectures “Vittiya Prabhandh”
108. Case Law on Substitution
109. Case Law on Suit by or against government
110 "Aarop”
111. Case Law on S.9, 0.13 and 0.14 R.2. C.P.C.
112. “Shashkiya Yatra evam Batte”
113. Lectures for Munsif Probationers
114. Self Management
115. Self Development
116. Behaviour
117. Important Aspects of the Guardian and Wards Act
118. Law of Possession Vol. I & II
119. Karya Bhar grahan kaal, pension evam kalyankari yojnain
120. Law of Railway Claims Part I, II
121. Disposal of Property in Criminal Cases
122. Amendment of Pleadings
123. Sentencing in Murder Trials
124. Motor Accident Compensation
125. Dying Declaration
126. Legal Quiz Vol. I
127. Suit by or against Minor or Person of unsound Mind (0.XXXII CPC)
128. Jamanat
129. ‘Upbhokta Sarankshan evam vidhi’ par sangosthi
130. Leading Decisions of the Supreme Court
131. Shashnadeshon ka sangraha
132. Court on Criminal Law
133. Dockets for the Dock
134. Crime Investigation and Trial
135. Terrorism
136. Declarations on Human Rights
137. Contempt of Court
138. Law of Bails
139. Right to Life
140. Judgment in Rem
141. Statement of Accused
142. Samanya Vittiya Prabbandh
143. Deewani vodon ka nistaran main vilamb; kaaran evam nidan
144. Child Labour abuse in India
145. Legal Research and Methodology
146. Green Jurisprudence
147. Development of Legal Aid in India
148. Profile of Trial Judge
149. Law Morals, Judges and Justice
150. Appeals
151. Human Rights Profile of Jammu and Kashmir
152. Reading Materials for
   i. Newly recruited Civil Judges (J.D.)
   ii. Newly recruited Asstt. Prosecuting Officers
   iii. Refresher Course for Civil Judges (S.D.)
   iv. Members of District Consumer Forum
153. Computer Application and Information Technology.
154. Computer Application and Information Technology (Revised)
155. Vittiya Niyam Sanklan
156. Upbhokta Sanrakshan Vyawhar evam Prakriya
157. Reading Material for Refresher Course for Civil Judges (J.D.)
158. Aide Memoir for Enquiry Officers and Presenting Officers of H.A.L.
159. Reading Material for Special Training Programme on Child Psychology and Child Welfare
160. Comments on provisions of C.P.C. with reference to Amendment Act, 1999 and 2002 by Dr. Justice B.S. Chauhan
161. Essays on Expert Evidence & Presumption under the Evidence Act, 1872
162. Sewa Nrivatti evam Mrutyuoperanta Deya Parlabdhiyan
163. Labour Law Compendium
164. Aide Memoir for Judicial and Forest Officers
165. Reading Material for Special Training Programme for Senior Officers of Registration Department
166. Select Writing for Judges – By Hon’ble Mr. Justice Yatindra Singh
167. Training of Judicial officers Juridical Supplement
168. Framing of Charge
169. The U.P. Govt. Servants Conduct Rules, 1956
170. Computer Applications
171. Plea Bargaining
172. Training Programme for Public Information Officers and Assistant Public Information Officers
173. Reading Material on Court and Cast Management
174. Reading Material on Financial Management Part I
175. Reading Material on Financial Management Part II
176. Judicial Officers and Officials
177. Motor Accident Compensation
178. Reading Material for Civil Judges (J.D.) Refresher
179. Speech at the Foundation Laying Ceremony of the New Building of the U.P. Human Right Commission
180. Training for Senior Administrative Officers and Sadar Munsarim of Civil Courts on Office Management
181. Alternative Dispute Resolution
182. Philosophy of Bail
183. Supreme Court Cases July 2007
184. Conference and Report
185. Promises and Challenges of Mediation
186. Central Act No. 185
187. Important Government Orders
188. Financial Handbook Vol. II
189. Aide Memoire for the Officers of Indian Defence Account Services
190. Aide Memoire for Forest Officers
191. Speedy Justice – A new approach
193. Reading Material on Alternative Dispute Resolution and Lok Adalat
194. Shashnaadeshon ki Suchi
195. Report of Committee on Home Affairs for Judiciary and Some Important Ruling
196. Financial Management
197. Reading Material on Court Management
198. Vittiya Prabandh Yojna evam Samanya Prashshan
199. Human Rights
200. Noble Speech
201. Right to Information Act
202. Sarkari Sewaon hitu Aachar Sahinta ka Prastavit Praroop
203. Appearance of parties in the suit and consequence of non-appearance
204. Civil Service Regulations adopted in U.P.
205. Land Acquisition
206. What the Supreme Court has said.
207. Reading material on Plea Bargaining (for Training cum Workshop)
208. Reading material on Domestic Violance (Training cum Workshop)
209. Juvenile Justice
210. Service Law
211. Criminal Law Referencer By Hon’ble Mr. Justice B.S.Chauhan
213. Collection of lectures of Sri T.N. Saxena, Retd. District Judge
214. Brochure Law Referencer (A to L and M to Z)
216. Sentencing on Murder Trial
217. Court and Financial Management Vol. II
218. New Biology of Criminal Investigation
219. The Maintenance and the Welfare of parents, senior citizens Act 2007 and reading material
220. Reading material for Special Training Programme of Asstt. I.Gs. of Stamp and Registration Department
221. Reading Material for District Judges
222. Reading Material for Judges, Fast Track Courts (FTC)
223. Reading Material for Judges, Fast Track Courts (FTC)
224. Reading Material for Senior Additional District Judges
225. Reading Material for Senior Additional District Judges
226. Reading Material for Senior Additional District Judges
227. Reading Material for Induction Training Programme (IT-2) for newly appointed Direct Recruits to H.J.S.
228. Reading Material for Induction Training Programme (IT-2) (Non Judicial Side)
229. Reading Material for Induction Training Programme (IT-2) (Judicial Side)
230. Reading Material for Civil Judges (Junior Division) (Foundation Course)
231. Inherent Powers of the Civil Courts.
232. Remand and Police Custody Remand.
233. The Subordinate Civil Court Staff Service Rules.
234. Execution Proceedings.
235. Disposal of Property in Criminal Cases.

RESEARCH

The Institute has published the following research works in the legal field:

1. Rationalizing Sentencing (Food Adulteration Cases)
2. Quantification of Sentence in Rape Cases
3. Relationship between Bench and Bar
5. “Land Use”
6. “Improving Legal Governance in U.P.”

The Institute has also undertaken research work on the causes of delay in disposal of civil and criminal cases.

Draft legislation on “Court Fees and Suits Valuation Act” has been submitted by the Institute to the Govt. of U.P. A project report on “Deregulation for good governance” and “Moral Code of Conduct for Government Servants” has already been submitted to Government.

The Institute has recently undertaken a research project with the object to identify practical difficulties in the working of courts relating to Judicial, Non-Judicial, Administrative side and also relating to infrastructural setup and relation with bar and other agencies. Various workshops have been organized on state and regional basis. Many more are planned. A report after extensive research on the basis of available data has been submitted to Hon’ble Court.
JUDICIAL HELPLINE

The object of the Judicial Training and Research Institute, U.P., Lucknow has been not only to provide judicial education and skill but also to shorten and minimize the difficulties faced by the Judicial Officers in their day to day working.

Keeping in view the demand of the judicial officers of different cadres of the District Judiciary in U.P., a need is felt to start ‘Judicial Helpline’ at the Institute.

The Judicial Officer can convey their legal problems / difficulties to the Institute on Phone No. 0522-2300545, Cell-phone, Fax or E-mail.

JTRI’S CONTINUED PLANS

- Construction of 500 seating capacity auditorium (Extendable upto 700 seating capacity.) – Status: Construction is in full swing.
- Lady Officers’ Hostel – for 50 officers. Status: Construction is in full swing.
- Foreign study tour to Singapore for selected Judicial Officers.
- Visit of Judicial Officers to certain identified States like Kerala, Maharashtra, Gujarat, Delhi and Tamil Nadu for observing best practices being adopted there by the Courts.
- All hostel rooms have been planned to be facilitated with Computers and TV panels. The computers will be internet ready.
- Institute is also planning to connect all the computers through intranet so that there may be better connectivity and coordination amongst different organs of the institute and access to e-library may be made more swift, easy and convenient to the officers under going training.

Some Opinions About the Institute

It gives me immense pleasure to be in midst of you all and to be associated with today's programme. This Institute was conceptualized, its building design and its foundation was laid, when I was a Judge of Allahabad High Court. In fact I was very much associated with establishing the present Institute.

Justice V.N. Khare,
Chief Justice,
Supreme Court of India.
There are only couple of such institutions in the Country which provide training to Judicial Officers with an eye to provide improved services to the consumers of Justice. Those in-charge of the Institution in particular its Director Mr. Mathur, are a source of inspiration to the trainees. The services provided are variegated and will be of considerable assistance to the trainees in discharging their duties. I wish the institution and its officers every success.

Justice A.M. Ahmadi,
Chief Justice,
Supreme Court of India.

I was glad to see the working of the Institution. It is doing a pioneer work in the field of law, and judiciary. An enlightened judiciary is an asset to the administration of justice. Justice K.N. Goyal is rendering great service to the State.

Justice K.N. Singh
Chief Justice,
Supreme Court of India

I had occasion to spend the afternoon in the Institute and addressed a group of District Judges who were undergoing the course. I have taken round the library also. I find that the Institute is maintained in an excellent condition and imparts useful in-service training to the officers.

Justice Rang Nath Misra,
Chief Justice,
Supreme Court of India.

Training, reflection, and refresher courses to update the judicial and legal skills of the adjudicators are the only means of ameliorating, the manifestations of the inadequacies of Legal education. This Institute holds great promise in this direction. May God bless its efforts.

Justice M. N. Venkatachaliah
Chief Justice, Supreme Court of India.

I was delighted to visit the Institute. Justice Goyal must be complimented in founding this institution, which will serve a lasting purpose and could serve as a model institution for judicial training in India. If the project is completed as planned it could well be turned to a National College for judicial training.

Justice M.H. Kania,
Judge, Supreme Court of India
Visiting the Institute has been a very satisfying experience. The Institute is set to render pioneer service in the field of training the personnel to man the judiciary. It is commendable that it has been started with the facilities available without succumbing to the common failing of waiting to first get all the needed facilities for the venture. The spirit which permeates the project is an assurance to success of the venture. It has satisfied a felt need of the State and should encourage rest of the country to follow suit.

The value of training is in preparing the personnel to give them best in the course of public service. The authorities concerned deserve to be congratulated and encouraged.

Justice J.S. Verma
Judge, Supreme Court of India.

I have the pleasure to visit the Institution for the first time. It is of necessity to impart reorientation courses to our judicial officers to equip with development in law in diverse branches so that it would be added material in the qualitative dispensation of justice.

The Institution has been, I am told, doing invaluable service to legal fraternity and I wish the Institution to become one of the leading lights in this country in right direction.

Justice K. Ramaswamy
Judge, Supreme Court of India.

I had the opportunity to discuss the working of the Institute with Shri Hajela, the Director and other members of faculty. I was highly impressed by the progress that has been made within the short period since the Institute commenced functioning. The Institute has been making valuable contribution in the training of judicial officers at various levels as well as officers in other branches of Government. The work of the Institute is handicapped on account of lack of accommodation. It is a matter of great satisfaction that the State Government has agreed to provide the necessary land and the funds for complex of the Institute. The Director and members of the faculty appear to be dedicated to the work they are carrying on at the Institute.

Justice S.C. Agarwal
Judge, Supreme Court of India

This Institution, within a short span of time, has rendered good service and risen high in stature. It has acquired national status and the training imparted is useful. I wish the Institution all success.

Justice B. L. Hansaria
Judge, Supreme Court of India.

The Institute is doing remarkable work in field of educating and training the officers. I have been associated with this Institute as a High Court Judge. I can say it with my personal knowledge that Institute is not less either in contribution to the field of law or training with any other Institution in this Country. I wish the Institute a great success.

Justice R. M. Sahai
Judge, Supreme Court of India.
I am very impressed by the facilities provided at the Training Institute. The library is very well stocked. I am sure that the dedicated faculty will be able to impart valuable training to judicial officers and make them more effective in their work.

**Justice Sujata V. Manohar**  
Judge, Supreme Court of India

It is a great pleasure to go round this institute and find the activities. The Library also is quite well equipped. I am sure, this institute will prove highly beneficial in the administration of justice of the State. The Govt. should come forward liberally in funding the institute, to make it the best in the country. I wish the institute great success.

**Justice GB. Patnaik,**  
Judge, Supreme Court of India.

I heard a lot about it but today I have seen myself as to how good the Institute is, how efficiently it is working and as to how modern it acts and futuristic it is in its thinking.

**Justice B. N. Kirpal,**  
Judge, Supreme Court of India.

It was a great pleasure to come back to the glorious institute, which is now scaling new heights in all its activities. I wish it all success.

**Justice S. Saghir Ahmad,**  
Judge, Supreme Court of India.

An institution which came up in the recent past (1987) and got a reputation for organizing systematically training courses for subordinate judiciary is the Institute of Judicial Training and Research, U.P. located in Lucknow. The Institute has its own campus with infrastructural facilities, a core faculty drawn from Higher Judicial Service and a moderate Library.

**Justice K. J. Shetty,**  
Judge, (Retd.) Supreme Court of India.

It is a matter of great pleasure to see the Judicial Training Institute getting into stride. In just one year it has acquired a name for the excellent training courses. The Institute has attracted many distinguished speakers and their presence has added to the stature and the quality of training imparted. The staff here is doing a great service and I hope that in course of time it will be the premier training institute for Judicial Service in India.

I wish the director and his colleagues all the best in their quest for making this Institute an Institution for Excellence.

**Justice Amitav Banerji**  
Chief Justice, Allahabad High Court.
Legal problems that judges have to contend with in court are human problems, which require understanding, learning and compassion - attributes which often have to be acquired. This institute is designed to ensure and ongoing effort to improve quality of justice to the common man. May this objective be achieved.

**Justice S.S. Sodhi**  
**Chief Justice, Allahabad High Court.**

I have visited the library of the Institute and found it well equipped. I hope that the trainees and the research fellows would be profited by the collection of books that the library has in prosecuting their studies and research work.

**Justice N.K. Mitra,**  
**Chief Justice, Allahabad High Court**

I have watched the progress of the Judicial Training Institute with keen interest. I am glad to note that it has made substantial progress. It badly needs a building of its own. Land has already been acquired. I hope it will come up soon. I wish the Institute and its members all the best.

**Justice S.C. Mathur**  
**Chief Justice, J & K High Court**

It has given me great pleasure to visit this institute and to see its working. It is doing excellent work, both research and guiding Judicial Officers. I am certain that in course of time it will acquire commendable stature.

I wish the Director and his other colleagues success in their endeavour.

**Justice H.N. Seth**  
**Chief Justice, Punjab & Haryana High Court.**

I have the opportunity to visit the library today. It is good. Requires to be better equipped, which may need more funds for more books. It is back bone of study and research. It is being kept well. With addition of more books, it will definitely be better.

**Justice Brijesh Kumar**  
**Chief Justice, Gauhati High Court**

My visit to your Institution on 27th November, 2003 was a very revealing and educative experience because I saw a premier Institution of judicial training, complete with all infrastructural facilities, permeating a very conducive atmosphere. I came back brining with me the fond memories of that experience.

**Justice V.K. Gupta**  
**Chief Justice, High Court of H. P., Shimla**
A visit to this Institute is like home coming for me. Thanks to Justice K.N. Goyal, right from the inception of this grand institution the only one of its kind in this part of the Country. I have been visiting it frequently. I wish we had more such well organised and planned institutions. The Director and the staff members deserve all thanks for giving to this state, an institution of this kind.

Justice V.K. Mehrotra  
**Acting Chief Justice, H. P. High Court.**

I am overawed by the activities of this august Institution. Training of the judicial officers has become a must, keeping in view the changes in law and the magnitude thereof. This Institute has taken all possible steps to make the judicial officers know, what they should. I wish this Institute all success.

Justice S.B.Sinha,  
**Acting Chief Justice, Calcutta High Court.**

Very Impressive Institution. Wishing them the best of luck in what ever they do.

Justice S.W.W. Wambuzi  
**Chief Justice (Retd.) Kampala, Uganda.**

The various sections of the Library, particularly the references section is nicely maintained. It is scientific maintenance of the library which alone can prove the efficacy of it. The training pursuits can be well served by a scientifically maintained library. I am sure, the present one will cater to the need of all the trainees.

I wish the Institute every success.

Justice Palok Basu,  
**Judge, Allahabad High Court.**

I was delighted to see this Institute. I do not think that any other State in India has anything of this kind. The Institute has a fine library. The U.P. Government has rendered a great public service by setting up the Institute.

I congratulate the Director and others concerned for rendering a great service to the judiciary and the public.

Justice M.P. Mehrotra  
**Judge, Allahabad High Court.**

I am simply charmed.

Justice S.K. Phaujdar  
**Judge, Allahabad High Court.**
Came to visit this place but feel to have become part of this Institute because of the cordiality and very impressive arrangement about training and research of the Judicial Officer.

Mr. Justice N.N. Bhattacharjee,  
Judge, Calcutta High Court

It was a pleasure to be here. The way it has flourished is worth noting. Wish all states had an institution like this one.

Justice Barin Ghosh,  
Judge, Calcutta High Court.

What a wonderful infrastructure for imparting training to the Judicial Officers. I am of the firm belief that this Institute has excelled in every sphere and aspect of the training programme. What a library! What a Computer room! And what an atmosphere! I wish I myself could have been here as a trainee to learn more.

Justice Samaresh Banerjea,  
Judge, High Court, Calcutta.

A great institution! I had heard about it and it was today I got opportunity to visit it. I am deeply impressed. It is a self-contained institution in the field of training of judicial officers. Faculty is excellent. It will be my endeavour that District Consumer Forum President & Members not only from U.P. but also from other states come and attend sessions on Consumer Law. Thanks.

Justice D.P. Wadhwa,  
President,  
National Consumer Disputes Redressal Commission,  
New Delhi.  
Former Judge, Supreme Court of India

Highly impressed, not only by the infrastructure and the facilities, but also more by the faculty, their competence, dedication & knowledge. Director Shri Gupta deserved special mention. I am sure under his leadership the institute will have the "national" reputation & status. In fact, it has started going international. My hearty congratulation to him, his team and the Institute. UP Judiciary has bright future because of this Institute, which provides useful training round the year; to about 500 judicial officers. Other judicial Academies have a lot to learn and adopt from this Institute.

Sri V.S. Malimath  
Chairman, CAT,  
New Delhi
I had the unique privilege of visiting this reputed Training Institute which is holding the torch of (legal) knowledge on the National Level. Its service in imparting legal knowledge to the judicial officers is a very welcome feature. I place on record my high appreciation of the service of this institute.

Justice S.R. Pandian,  
Chairman, V Central Pay Commission.

The Judicial Training and Research Institute, Lucknow is an excellent and indeed much needed body for the Judicial Profession. The Judiciary has a great responsibility of dispensing justice without fear or favour and in the most objective manner. It is even more so at the lower levels as this where the common man goes to seek redressal. Proper training of the judicial officers thus becomes an essential input.

I hope that the Institute will also be able to provide training to judicial officers of other states.

Sri Romesh Bhandari,  
Governor of Uttar Pradesh.

I was delighted to visit the Institute today. This is a unique organization which has been set up on very sound lines and a tremendous lot has been achieved already in a year and half. My felicitations to the Director and everyone else connected with the setting up and running this Institute.

Hon'ble Sri B.B. Lal  
Governor of Sikkim

It was a pleasure to come to the Institute and visit the library also. Thanks to the energy and drive of Mr. Justice Goyal and his colleagues, the Institute is developing into an excellent training centre. The library adds to the utility. I wish the Institute all Success.

Mr. P.M. Bakshi  
Member,  
Law Commission of India.

We are so interested in this Institute for district judiciary training. You have a very good and useful library collected very useful books to help the trainees. We learnt from your programmes and best wish your Institute will become a training Centre for the whole India. We eager to look forward to.

Mr. Justice Zhang Xiang Ming, Judge, & Interpreter, People's Court, China for Justice (Mr.) Zhou Daoluan, Member of the Judicial Committee and Director of the General Office, Supreme People's Court of the People's Republic of China (5 PC), Member of the Council for the Chinese Training Centre, for Senior Judges (Training Centre)
I am thrilled with joy to see the functioning of U.P. Institute of Judicial Training and Research. Of course it ought to be, because the renowned judge, jurist and research genius Justice K.N. Goyal and his team have completely dedicated to the task. I am impressed by the progress, the Institute has made within such a short time.

It has a bright future and would be a model for others too.

Sri H.R. Bharadwaj  
Minister of Law & Justice,  
Govt. of India,  
New Delhi.

An ideal Institution with dedicated persons for imparting most needed legal education.

I record my thanks and appreciatin for the works of the Chairman, Justice Srivastavaji, the Director Sri M.L. Singhalji and the teaching and non-teaching staff attached to the Institute.

Sri Raghunath Patnaik  
Minister of Law, Orissa.

I greatly admire the important work you are achieving here in support of the judiciary, for a prepared and an independent judiciary is the backbone of democracy.

Mr. Charles Norchi  
Yale University,  
U.S.A.

I am very impressed by the facilities, hospitality and the work of the Institute.

Ms. Ann Stewart  
University of Warwick,  
England

I am very content of my visit to your Institute and I propose collaboration between two countries.

Dr. Simen Gelevski  
President of Supreme Court,  
Macedonia

It was pleasure to be guest of these wonderful people to see what are their achievements in Law.

Eli Isely,  
CO, USA

A pleasant place for Comprehensive Legal Studies.

Prof. Philip D. Lakewood,  
Colorado
I along with the Director and two Deputy Directors of our Institute visited this Institute as a part of Study tour to different Judicial Training Institutes and National Law School at Bangladesh. Though this Institute is only 11 years old, it has established itself as a model in the Sub-continent. We are highly impressed by the training syllabus, methodology of training, Library and Publication section. This visit will help us a lot in developing our Institute which has recently been set up by an Act of the parliament.

We wish that this Institute in course of time will develop itself as an Institute of international standard.

Sri Md. Badruzzaman  
Director General,  
Judicial Administration Training Institute,  
Dhaka, Bangladesh.

This Institution has tremendous potential to develop as a National Centre for judicial and legal training. It must function with autonomy under professional leadership and with adequate resources. A 5-10 year plan should be worked out for its development so that by the turn of the century this Institute can compare well with institutions of its kind elsewhere in the world.

On behalf of the National Law School of India, I would like to extend my sincere support to the development of its research and training programmes.

Dr. N.R. Madhava Menon  
Director  
National Law School of India,  
Bangalore.

A great pleasure to visit this unique Institution. There should be many more of such refresher Courses in the country for the law is an ever growing subject of which no one (at any stage) can claim total mastery.

Mr. Fali S. Nariman  
Senior Advocate,  
Supreme Court of India.

I am greatly impressed by the work being done by this infant Institute.

Mr. R. Venkataramani  
Senior Advocate,  
Supreme Court of India.

I have the satisfaction of seeing a good law library in the making but not confined to law alone. The Institute is doing work and I am sure that it will flourish with the help of dedicated Chairman and all his members of staff.

Sri P.P. Rao,  
Sr. Advocate,  
Supreme Court of India.
A remarkable enterprise, is for practical and theoretical enlightenment of the Judiciary.

Mr. Y.S. Chitale
Sr. Advocate,
Supreme Court of India.

Institutions like yours are the need of the hour. It is gratifying to know of the excellent work it is doing. I wish it all success in the future.

Mr. Soli J. Sorabji,
Advocate,
Supreme Court of India.

I am very pleased to visit this Institute of reputed learning for the valediction of a course for Indian Defence Accounts Service Officers and also go around the complex. My best wishes for the excellent work being carried out by IJTR. My special thanks to Chairman, Hon'ble Mr. Justice A.N. Gupta.

Sri N. Gopalan,
IDAS,
CGDA,
New Delhi.

I am delighted to see the Institute, one of the oldest of the country to have developed well over the years contributing to the betterment of administration of justice. I hope together we can take judicial education and training to the greater heights in the coming years.

Sri N. R. Madhava Menon
Director National Judicial Academy, Bhopal

It was indeed a pleasure to visit this institute of great repute. It has built up a reputation for itself for its activities. I have no doubt that Institute shall be able to fulfil the objectives of imparting training to the judicial officers the need of which is well known.

Justice S.B. Sinha,
Judge, Supreme Court of India

Very happy to see the institute and I hope and wish that soon there would be computerization and office facility provided for. I wish best of luck to trainee judicial officers.

Justice Y.K. Sabharwal,
Judge, Supreme Court of India
My visit to this institute of excellence is memorable and unforgettable one. I had the good fortune of delivering valedictory address to the trainees (Judicial Officers) from Rajasthan in the august presence of Hon’ble Mr. Justice Jagdish Bhalia and Hon’ble Mr. Justice Dhiresh Maheshwari.

I wish the trainees, and the institute as well, my heartiest greetings to all and in particular to the Director Shri Vedpal.

Justice (Dr.) AR Laxmanan,
Judge, Supreme Court of India

I had heard about this institution before many years but had no occasion to visit it. Today, I got an opportunity to come and I am very happy to see the institution working.

The library and other blocks have been kept extremely well and staff is also cooperative.

I would like to visit again.

Justice C.K. Thakkar,
Judge, Supreme Court of India

I have visited first today though I am attached to Allahabad H.C. for 5 years. It is wonderful place of legal learning. I wish all success.

Justice Amitava Lala,
Judge, Allahabad High Court

My first impression on entering the academy was sylvan surroundings and its well designed buildings a perfect place to impart knowledge and to imbibe it. The well maintained library and enthusiastic Director, a faculty committed to raising the standards of performance and eager and happy judicial trainees, ever willing to learn lends me assurance that the institute has served our judiciary and will continue to serve it, so that the judges in the U.P. Judicial Service can compete with the best in the country.

Let us not rest on what we have achieved by now, but work tirelessly to reach greater heights.

Justice F.I. Rebello,
Chief Justice, Allahabad High Court

It gives me great pleasure to visit institute of judicial training and research, U.P., Lucknow. The facilities are very good. Being the oldest and one of the best maintained institute, this institute can be a model for other similar State Judicial Academies. The Judicial Academy discharges the crucial function of nurturing and shaping young judicial officers into the Torch bearers of the judiciary. Let this Institute continue the good work.

Justice R.V. Raveendran,
Judge,
Supreme Court of India
## Statement Showing in Service Professional Training Programmes Conducted by the Institute

### Annexure-1

<table>
<thead>
<tr>
<th>Sl.No.</th>
<th>Details of Training</th>
<th>Programmes conducted so far</th>
<th>Number of Trainees attending the programme</th>
<th>Number of Trainees coming from other states</th>
<th>Particular of States from where these trainees appeared besides U.P.</th>
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<tbody>
<tr>
<td>(4)</td>
<td>National Level Training Programme for District &amp; Sessions Judges</td>
<td>3</td>
<td>66</td>
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<td>Delhi, Himachal Pradesh</td>
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<td>National Level Training Programme for Addl. District &amp; Sessions Judges</td>
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<td>(6)</td>
<td>Special Training Programme for Sr. District Judges on Acquitting them with working of Hon’ble High Court</td>
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<td>Training Programme for Addl. District &amp; Sessions Judges (Direct Recruitment)</td>
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<td>Special Training Programme for Judges of Fast Track Court Likely to be Promoted as Regular Addl. District Judges</td>
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<td>Special Training Programme for Civil Judges (SD) / CJMs Likely to be Promoted as Judges Fast Track Court</td>
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<td>Refresher Course for Civil Judges (J.D.)</td>
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<td>Foundation Training Programme for newly appointed Civil Judges (J.D.)</td>
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<td>Delhi, Himachal Pradesh</td>
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<td>Sl.No.</td>
<td>Details of Training</td>
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<td>Training Programme on Juvenile Justice (Civil Judges/CJMs)</td>
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<td>Professional Training Programme on “Legislative Drafting and Conveyancing” for Civil Judge (SD)</td>
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<td>Financial Management for District Judges</td>
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<td>Training Programme for Judges of Family Court</td>
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<td>9.</td>
<td>Training Programme on Criminal Law and Motor Accident Claims for Addl. District Judges</td>
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<td>Training Programme on Court Management (Docket Management) for Civil Judges (SD)</td>
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<td>12</td>
<td>Special Training Programme for Judicial Officer on Child Rights and UNO Treaty</td>
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<td>Training Programme on District Legal Authorities Services Act for Secretaries</td>
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<td>One Day Computer Culture-Training Programme for Nodal Officers (Computer) of various Judgeships of Uttar Pradesh</td>
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<td>Training Programme for Information Officers &amp; Asstt. Information Officers (Officers of Judicial &amp; other Departments)</td>
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<td>Special Training Programme on Human Rights for Judicial Officers &amp; Police Officers</td>
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<td>24</td>
<td>Training Programme on Child Welfare &amp; Child Psychology</td>
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**Statement Showing Training Programmes Conducted by the Institute for Officers of Other Departments**

**Annexure-3**

<table>
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<tr>
<th>Sl.No.</th>
<th>Details of Training</th>
<th>Programmes conducted so far</th>
<th>Number of Trainees attending the programme</th>
<th>Number of Trainees coming from other states</th>
<th>Particular of States from where these trainees appeared besides U.P.</th>
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<tr>
<td>1.</td>
<td>Legal Training to Officers of Tripura Civil Services</td>
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<td>Legal Training to Newly Recruited P.C.S. Executive Officers</td>
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<td>Training Programme for Law Officers of UPSRTC</td>
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<td>4.</td>
<td>Legal training to Executive Engineers of PWD/Prescribed Authority under U.P. Road Side Land Control Act.</td>
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<td>5.</td>
<td>Training Programme for Law Officers in the U.P. Govt. Departments/Nationalised Banks</td>
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<td>6.</td>
<td>Refresher Course for Judicial Officers Working on Deputation</td>
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<td>Training Programme for Standing Counsel/Govt. Advocates</td>
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<td>Training Programme for District Govt. Counsel (Criminal)</td>
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<td>Training Programme for Dy. Labour Commissioners Presiding Officers Industrial</td>
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<td>13.</td>
<td>Foundation Training Programme for newly appointed Asstt. Prosecuting Officers</td>
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<td>Training Programme Jail Officers on Law Subjects</td>
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<td>16.</td>
<td>Spl. Training Programme for Members of District Consumer Forum</td>
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<td>17.</td>
<td>Spl. Training Programme Officers of Avas evam Vikas Parishad, U.P.</td>
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<td>18.</td>
<td>Training Programme for Officers of Labour Department</td>
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<td>Training Programme for Officers of Forest Dept. on Forest Laws &amp; Wild Life Protection Act</td>
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<td></td>
<td></td>
<td>Judicial Officer +Officers of Forest Dept.</td>
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<td>21.</td>
<td>Training Programme on Financial Management &amp; General Administration for Medical Officers of Homeopathy</td>
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<td>Training Programme on Court fee and suit valuation for Asstt./Dy. Registrar</td>
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### Statement Showing Training Programmes Cum Workshops Conducted by the Institute

#### Annexure-4

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<th>Sl.No.</th>
<th>Details of Training Programmes Cum/Workshops</th>
<th>Programmes conducted so far</th>
<th>Number of Trainees attending the programme</th>
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<th>Particular of States from where these trainees appeared besides U.P.</th>
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<tr>
<td>1.</td>
<td>Parliament, Democracy &amp; Nehru</td>
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<td>Workshop on Finger Prints Science</td>
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<td>Workshop on Human Rights</td>
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<td>Workshop on Tragic Roads</td>
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<td>Law Society and Obscenity</td>
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<td>Law &amp; Media</td>
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<td>Military Justice System in India</td>
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<td>8.</td>
<td>Work Shop on Intellectual Property Rights</td>
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<td>Orientation Programme for Judicial Officers on PC-PNDT Act in Collaboration with “Vatsalya” NGO</td>
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Table: Statement of Training Programmes Conducted under 13th Finance Commission Scheme

### Training Programmes Conducted During Financial Year 2010-2011

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Programmes</th>
<th>Number of Programmes</th>
<th>Number of Participants</th>
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<tr>
<td>1.</td>
<td>Refresher Training Civil Judges (J.D.)</td>
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<td>2.</td>
<td>Induction Training Programme for Newly Appointed Civil Judges (JD) of U.P.</td>
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<td></td>
<td>Three Months Programme</td>
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<tr>
<td>3.</td>
<td>Workshop of CJM/CMM of U.P. “Strengthening Justice Administration- Challenges Before District Judiciary”</td>
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<td></td>
<td><strong>Total Number of Officers Participated</strong></td>
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### Statement of Training Programmes Conducted under 13th Finance Commission Scheme

#### Training Programmes Conducted During Financial Year 2011-2012

<table>
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<th>Sl. No.</th>
<th>Programmes</th>
<th>Number of Programmes</th>
<th>Number of Participants</th>
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<tr>
<td>1.</td>
<td>Induction Training Programme for Newly Appointed Civil Judges (JD) of U.P</td>
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<td>Three Months Programme</td>
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<td>2.</td>
<td>Refresher Training Civil Judges (S.D.)</td>
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<td>Spl. Training Programme for Financial &amp; Administrative Management</td>
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<td>4.</td>
<td>Foundation Training Programme(IT-2) for Newly Appointed H.J.S of U.P</td>
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<td></td>
<td>Three Months Programme</td>
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<tr>
<td>5.</td>
<td>Refresher Training (RTFC) / ADJs</td>
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<td>Spl. Trg. Prog. For DGC (Cri.) of U.P.</td>
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<td>7.</td>
<td>Special Training for APOs</td>
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<td>8.</td>
<td>“Special Training Programme Civil Court Staff”</td>
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<td>9.</td>
<td>Management Skills Development Programmes For Judicial Officers at Army Institute of Management &amp; technology, Greater Noida.</td>
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<td>10.</td>
<td>Regional Workshop on “Standing Together for Strengthening the Administration of Justice”</td>
<td>One Regional Workshop</td>
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</table>

**Total Number of Officers Participated**: 2405
Statement of Training Programmes Conducted under 13th Finance Commission Scheme

Training Programmes Conducted During Financial Year 2012-2013

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<th>Sl. No.</th>
<th>Programmes</th>
<th>Number of Programme(s)</th>
<th>Number of Participants</th>
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<tbody>
<tr>
<td>1.</td>
<td>Refresher Training Civil Judges (J.D.)</td>
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<tr>
<td>2.</td>
<td>Foundation Training Programme(IT-2) for Newly Appointed H.J.S of U.P</td>
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<td></td>
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<tr>
<td>3.</td>
<td>Refresher Training (RTFC) / ADJs</td>
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<td>4.</td>
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<tr>
<td>5.</td>
<td>Special Training for APOs</td>
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<td>6.</td>
<td>Management Skills Development Programmes For Judicial Officers at Army Institute of Management &amp; technology, Greater Noida.</td>
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<td>7.</td>
<td>“Special Training Programme for Newly Appointed Court Managers”</td>
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<tr>
<td>8.</td>
<td>Three Day Crash Course for Chief Judicial Magistrates of U. P. On Criminal Justice Administration, Management &amp; Gender Justice : Role of Chief Judicial Magistrates</td>
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<td>68</td>
</tr>
</tbody>
</table>

**Total Number of Officers Participated** 954