CHAPTER 3

ROLE OF JUDICIARY IN BRINGING OUT CHANGES IN THE SOCIETY THROUGH SOCIAL DYNAMICS

The post emergency period in India has largely been progressive. One unique mechanism has been to bring the fundamental principles of governance within the purview of fundamental rights in areas where sufficient attention or intervention was not there. In the area of education the right to education which figured in Article 45 (Directive Principles of State Policy-Part IV) was brought within the ambit of Fundamental Rights, forcing the legislature to incorporate a new Article 21A (Fundamental Rights-Part III).[1] The elevation of the directive principles of State policy to the status of inalienable fundamental rights, making them enforceable has resulted in an expansion in various areas beyond the purview of fundamental rights. The judiciary has tried to bring about changes in the society according to its needs in the areas of prisons and prisoners, the police, the armed forces, children, child labour, bonded labour, urban space, environment and resources, consumer issues, education, politics and elections, public policy and accountability, human rights and judiciary, etc. The dimension is too vast and cannot be contained in a single thesis. In view of that, only specified areas are focussed upon in this chapter where the judiciary has done commendable

[1] The Directive Principles of State Policy are not enforceable by any court under Article 37 of the Indian Constitution. However, the judiciary has made the fundamental rights and directive principles of State policy as supplementary and complementary to each other after the decisions in *Keshavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225; *Minerva Mills* v. *Union of India* (1980) 2 SCC 591; *Unni Krishnan, J.P.* v. *State of A.P.* (1993) 1 SCC 645.

work to bring about changes in the society through social dynamics after independence. This chapter is a survey of the decisional law of judiciary of India in the realm of social dynamics.

3. 1. EDUCATION

Education is a continual growth of personality, steady development of character, and the qualitative improvement of life.[2]

The Supreme Court has explained the meaning of education and educational institutions in *T.M.A.Pai Foundation* v. *State of Karnataka*[3] as-

> The expression "education" in the articles of the Constitution means and includes education at all levels from the primary school level up to the postgraduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove.[4]

The right to establish and administer educational institutions is guaranteed to all citizens under Articles 19(1)(g) and 26 and to minorities specifically under Article 30.[5]

Educational institutions are of different types. They have been classified broadly into Government and Private educational institutions. Private educational institutions have been classified into majority and minority educational institutions. There is a further classification on the

---

[2] *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537

[3] (2002) 8 SCC 481

[4] *Ibid* at 711

[5] *Ibid* at 711

basis of receipt of aid, i.e. classification into aided and un-aided educational institutions. A further classification exists on the basis of level of education that it imparts, e.g. schools, under-graduate or post-graduate colleges and professional institutions.

Prior to 2002, the judiciary was confronted with the question of 'Right to Education'. The development of the right to education has a chequered history. In *Francis Coralie* v. *Union Territory of Delhi*[6] the court has held that the right to live is not restricted to mere animal existence. It means something more than just physical survival. In the same case Bhagwati J. held-

> We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.[7]

Again, relying on *Francis Coralie*, in *Bandhua Mukti Morcha* v. *Union of India*[8], where the question of bondage and rehabilitation of some labourers was involved, Bhagwati, J. held-

> It is the fundamental right of everyone in this country... to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life and breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of article 39 and Articles 41 and 42 and at least, therefore, it must include protection of the health and strength of

---

[6] AIR 1981 SC 746

[7] *Ibid* at 753

[8] AIR 1984 SC 802

the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State....has the right to take any action which will deprive a person of the enjoyment of these essentials.[9]

The fundamental right to education under Article 21 was directly dealt with in *Mohini Jain* v. *State of Karnataka,*[10] also known as the 'Capitation Fee case'. In this case, the petitioner Miss Mohini Jain had challenged the challenged the validity of a Notification issued by the government under the 'Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984 which was passed to regulate tuition fee to be charged by the private Medical Colleges in the State. Under the Notification the tuition fee to be charged from students was as follows: Candidates admitted against Government seats Rs.2,000 per annum; the Karnataka students Rs. 25,000 per annum and students from outside Karnataka Rs. 60,000 per annum. The petitioner was denied admission on the ground that she was unable to pay the exorbitant tuition fee of Rs. 60,000 per annum. The court held that right to education is a fundamental right and observed-

The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution.

---

[9] *Ibid* at 811

[10] AIR 1992 SC 1858

The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens.[11]

In *Unni Krishnan, J.P.* v. *State of A.P.*[12] the Supreme Court was asked to examine the correctness of the decision given by the court in *Mohini Jain's* case. The petitioners running Medical and Engineering Colleges in the State of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu contended that *Mohini Jain's* decision is correct and followed by the respective State Government they will have to close down their colleges. The five Judge Bench by 3-2 majority partly agreed with the *Mohini Jain* decision and reiterated that the right to free education up to the age of 14 years is a fundamental right. The Court observed-

> The right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development. By saying so, we are not transferring Article 41 from part IV to Part III we are merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21. We cannot believe that any State would say that it need not provide education to its people even within the limits of its economic capacity and development. It goes without saying that the limits of economic capacity are, ordinarily speaking, matters within the subjective satisfaction of the State.
>
> In the light of the above enunciation, the apprehension expressed by the counsel for the petitioners that by reading the right to education into Article 21, this Court would be enabling each and

[11] *Ibid* at 1864-1865

[12] AIR 1993 SC 2178

every citizen of this country to approach the courts to compel the State to provide him such education as he chooses must be held to be unfounded. The right to free education is available only to children until they complete the age of 14 years. Thereafter, the obligation of the State to provide education is subject to the limits of its economic capacity and development.[13]

The declarations of the right to education as a fundamental right, has been further upheld and confirmed by the eleven judge constitutional bench of the Supreme Court, while deciding on minority rights in *T.M.A.Pai Foundation* v. *State of Karnataka.*[14]

As a result of the pronouncement of the judiciary that the right to education is a fundamental right, the legislature has been forced to insert 21-A by way of Constitutional (86th Amendment) Act, 2002 wherein it is provided "The State shall provide free and compulsory education for all children of the age of 6 to 14 years in such manner as the State may, by law, determine". Article 45 has also been modified which lays down that "The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years".

Inspite of laying down that the right to education is a fundamental right, the judiciary has many a times been confronted with cases relating to education and educational institutions, but it has showed its zeal by laying down guidelines and norms to solve the same.

3. 1. 1. Rights of Minorities in establishment and administration of Educational Institutions - The Constitution uses the term 'minority' in Articles 29 and 30 without defining it. The burden was taken up by the

[13] *Ibid* at 2234

[14] (2002) 8 SCC 481

judiciary in *Kerala Education Bill, 1957, Re,* [15] wherein the Supreme Court opined that while it is easy to say that minority means a community which is numerically less than 50 per cent, the important question is 50 per cent of what? Should it be of the entire population of India, or of State, or a part thereof? It is possible that that a community may be in majority in a State but in a minority in the whole of India. A community may be concentrated in a part of a State and may thus be in majority there, though it may be in minority in the State as a whole. If a part of a State is to be taken, then the question is where to draw the line and what unit is to be taken into consideration- a district, a town, a municipality or its wards. The Supreme Court did not define the term 'minority' with exact precision at that time.

In *D.A.V. College* v. *State of Punjab*[16] the Supreme Court rejected the contention of the State of Punjab that a religious or linguistic minority should be a minority in relation to the entire population of India. The Court has ruled that a minority has to be determined, in relation to the particular legislation which is sought to be impugned. If it is a State law, the minorities have to be determined in relation to the State population.

The Supreme Court has explained the meaning of minorities in *T.M.A.Pai Foundation* v. *State of Karnataka*[17] as-

> The person or persons establishing an educational institution who belong to either religious or linguistic group who are less than fifty percent of total population of the State in which the educational

[15] AIR 1958 SC 956

[16] (1971) 2 SCC 269

[17] (2002) 8 SCC 481

institution is established would be linguistic or religious minorities.[18]

Minority institutions can be unaided (which do not receive aid in the form of maintenance grant from the Central government, administration or local authority or any other authority designated by the Central government, administration or a local authority), aided (receiving government aid) and recognised (established and administered by minority communities which seek recognition but not aid from the government). The minorities have been guaranteed a two-fold right by way of Article 30(1) of the Constitution of India. The first right is the right to establish and secondly to administer educational institutions of their choice. This right is concomitant to the right under Article 29.[19]

The Supreme Court discussed the relation between Article 29(1) and 30(1) of the Constitution in *Kerala Education Bill, 1957, Re*[20] as follows-

> Article 30(1) gives certain rights not only to religious minorities but also to linguistic minorities....the right conferred on such minorities is to establish educational institutions of their choice. It does not say that minorities based on religion should establish educational institutions for teaching religion only, or that linguistic minorities should have the right to establish educational institutions for teaching their language only. What the Article says and means is that the religious and linguistic minorities should have the right

[18] *Ibid* at 598. It was also discussed that the expression "minority" has been derived from the Latin word "minor" and the suffix "ity" which means "small in number" at 592.

[19] However, the Supreme Court in *St. John Inter College* v. *Giradhari Singh* AIR 2001 SC 1891 and *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537 has held that the minorities rights to manage institutions of their choice is not an absolute one.

[20] AIR 1958 SC 956

to establish educational institutions of their choice. There is no limitation placed on the subjects to be taught in such educational institutions. As such minorities ordinarily desire that their children should be brought up properly and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering the public services, educational institutions of their choice will necessarily include institutions imparting general secular education also. In other words, the Article leaves it to their choice to establish such educational institutions as will serve their religion, language or culture and also for the purpose of giving a thorough good general education to their children.[21]

The Supreme Court further observed that 'the real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution'.[22]

In *D.A.V. College* v. *State of Punjab*[23] the Supreme Court while reading Articles 29 and 30 of the Indian Constitution observed-

A religious or linguistic minority has a right to establish and administer educational institutions of its choice for effectively conserving its distinctive language, script or culture, which right however, is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards. This right is further subject to clause (2) of Article 29 which provides

[21] *Ibid.* See also *Anjuman-e-Islamiah, Kurnool* v. *State of Andhra Pradesh* AIR 1997 AP 164

[22] *Ibid*

[23] (1971) 2 SCC 269

that no citizen shall be denied admission into any educational institution which is maintained by the State or receives aid out of State funds, on grounds only of religion, race, caste, language or any of them. While this is so these two Articles are not interlinked nor does it permit of their being always read together.[24]

The Supreme Court has further clarified in *St. Stephen's College* v. *University of Delhi*[25] that the choice of institution provided in Article 30(1) does not mean that the minorities could establish educational institution for the benefit of their own community people.[26]

In *T.M.A. Pai Foundation* v. *State of Karnataka*[27] a eleven Judge Bench of the Supreme Court has explained and laid down the right to establish and administer contemplated by Article 30(1) of the Indian Constitution as the following:

(a) to admit students;

(b) to set up a reasonable fee structure;

(c) to constitute a governing body;

(d) to appoint staff (teaching and non-teaching); and

(e) to take action if there is dereliction of duty on the part of any employees.[28]

It was further held that-

The right to administer is not absolute, but must be subject to reasonable regulations for the benefit of the institutions as the vehicle of education, consistent with national interest.[29]

---

[24] *Ibid* at 273

[25] (1992) 1 SCC 558

[26] *Ibid* at 607

[27] (2002) 8 SCC 481

[28] *Ibid* at 542. The same has been reiterated in *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537 at 599

In *Islamic Academy of Education* v. *State of Karnataka*[30] the Supreme Court has held that the right engrafted under Article 30(1) of the Constitution does not lay down any limitations or restrictions upon the right of a minority to administer its educational institution, yet the right cannot be used absolutely and unreasonably. It observed-

> Minorities, whether based on religion or language, however, have a fundamental right to establish and administer educational institutions of their choice. The right under clause (1) of Article 30 is not absolute, and subject to reasonable regulations which inter alia may be framed having regard to the public interest and national interest of the country. Regulations can also be framed to prevent maladministration as also for laying down the standard of education, teaching, maintenance of discipline, public order, health, morality, etc.[31]

In *Usha Mehta* v. *State of Maharashtra*[32] the petitioners had challenged the constitutional validity of the policy decision of the Maharashtra State Government whereby Marathi language was made compulsory throughout the schools in the State. As a result, the English-medium schools run by Gujarati linguistic minorities were compelled to teach four languages (Hindi, English, Marathi and mother tongue Gujarati) as against the accepted "three-language formula". The Supreme Court while reiterating the judgment of the Constitution Bench in *D.A.V. College* v. *State of Punjab*[33] and *D.A.V. College* v. *State of Punjab*[34]

---

[29] *Ibid* at 578. See also *St. John Inter College* v. *Giradhari Singh* AIR 2001 SC 1891

[30] (2003) 6 SCC 697

[31] *Ibid* at 738

[32] (2004) 6 SCC 264

[33] (1971) 2 SCC 261

observed that the right of minorities to establish and administer educational institutions of their choice under Article 30 (1) read with Article 29 (1) would include the right to have choice of medium of instruction but observed-

> This exercise of "choice" of instructive language in schools by the linguistic minorities is subject to the reasonable regulation imposed by the State concerned. A particular State can validly take a policy decision to teach its regional language.[35]

In *Brahmo Samaj Education Society* v. *State of West Bengal*[36] the Supreme Court while reading Article 19(1)(g) and Article 26(a) of the Indian Constitution together has held that religious minority have a right to establish and maintain educational institutions but the State can regulate the method of selection and appointment of teachers after prescribing requisite qualification for the same. It observed-

> Independence for the selection of teachers among the qualified candidates is fundamental to the maintenance of the academic and administrative autonomy of an aided institution. The State can very well provide the basic qualification for teachers. Under the University Grants Commission Act, 1956, the University Grants Commission (UGC) had laid down qualifications to a teaching post in a university by passing Regulations. As per these Regulations UGC conducts National Eligibility Test (NET) for determining teaching eligibility of candidates. UGC has also authorised accredited States to conduct State-Level Eligibility Test (SLET). Only a person who has qualified NET or SLET will be eligible for

---

[34] (1971) 2 SCC 269

[35] *Usha Mehta* v. *State of Maharashtra* (2004) 6 SCC 264 at 279

[36] (2004) 6 SCC 224

appointment as a teacher in an aided institution. This is the required basic qualification for a teacher. The petitioners' right to administer includes the right to appoint teachers of their choice among the NET-/SLET-qualified candidates.[37]

In *P.A. Inamdär* v. *State of Maharashtra*[38] a seven Judge Bench of the Supreme Court has reconciled the nature and content of Articles 29 and 30 as conferring protection on minorities rather than as a right. While following the judgment in *T.M.A. Pai Foundation* v. *State of Karnataka*,[39] it observed-

No right can be absolute. Whether a minority or a non-minority, no community can claim its interest to be above national interest.[40]

The general principles relating to establishment and administration of educational institutions by minorities has been summarised by the Supreme Court in *Secy., Malankara Syrian Catholic College* v. *T. Jose*[41] as-

(i) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:

(a) to choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;

(b) to appoint teaching staff (teachers/lecturers and Headmasters/Principals) as also non-teaching staff, and to take

---

[37] *Ibid* at 229

[38] (2005) 6 SCC 537

[39] (2002) 8 SCC 481

[40] *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537 at 590

[41] (2007) 1 SCC 386

action if there is dereliction of duty on the part of any of its employees;

(c) to admit eligible students of their choice and to set up a reasonable fee structure;

(d) to use its properties and assets for the benefit of the institution.

(ii) The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation, etc. applicable to all, will be equally apply to minority institutions also.

(iii) The right to establish and administer educational institutions is not absolute. Nor does it include the right to maladminister. There can be regulatory measures for ensuring educational character and standards and maintaining academic excellence. There can be checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. Regulations made by the State concerning generally the welfare of students and teachers, regulations laying down eligibility criteria and qualifications for appointment, as also conditions of service of employees (both teaching and non-teaching), regulations to prevent exploitation or oppression of employees, and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not in any manner interfere with the right under Article 30(1).

(iv) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will

have the freedom to appoint teachers/lecturers by adopting any rational procedure of selection.

(v) Extension of aid by the State does not alter the nature and character of the minority educational institution. Conditions can be impose by the State to ensure proper utilization of the aid, without however diluting or abridging the right under Article 30(1).[42]

The judgment of the Supreme Court and the High Courts is a strategy of implementing the secular aspect as enshrined in the Preamble of the Constitution. The defining of the term 'minority' and the liberal interpretation of Articles 29 and 30 has given some relief to the minorities as well as keeping the communal forces at bay.

3. 1. 2. Admission and Common Entrance Exams in Unaided (minority and non-minority) Educational Institutions- The admission of students in the educational institutions at all levels has been a matter of dispute in India although there has been a very steady growth of such institutions in India after independence. The situation has become more complex due to the concentration of admission in the engineering and medical sector. Although the judiciary has recognised the right to equal opportunity in the matter of education but the growth of population has resulted in a wide gap between the aspiring candidates and the availability of seats in many areas.

In *St. Stephen's College* v. *University of Delhi,*[43] exempting St. Stephan's College from the uniform procedure applicable to all affiliated and constituent colleges of the University of Delhi at the under graduate level, the Supreme Court has held admission of students is an important

---

[42] *Ibid* at 399-400

[43] (1992) 1 SCC 558

facet of administration. It can be regulated, but only to the extent that the regulation is conducive to the welfare of the minority institution or for the betterment of those who resort to it. However, Kasliwal, J., in a dissenting opinion, has expressed the view that-

> Education is a strong factor to unite the country and it was considered necessary that where any educational institution is maintained by the State or receives aid out of State funds then the right of equality was guaranteed to every citizen in the matter of admission in such institution. If the minorities, based on religion or language wanted to run any educational institution without any aid out of state funds, there was no restriction placed upon the minorities in the matter of admission in such educational institutions and they are free to admit students of their own community. But in a case where they were receiving aids out of State funds which money comes from the contributions by way of taxes from every citizen of this country, then such educational institutions run by minorities had to fall in line with all other educational institutions and were not entitled to deny admission to any citizen on the ground of religion, race, caste, language or any of them.
>
> We cannot overlook that religious fundamentalism and linguistic parochialism leads to fissiparous tendencies and obstructs the national unity as a whole.[44]

In *Unni Krishnan, J.P. v. State of A.P.*[45] the Supreme Court while laying down merit as the sole criteria of admission observed-

---

[44] *Ibid* at 638

[45] AIR 1993 SC 2178

Admission within all groups and categories should be based only on merit. There may be reservation of seats in favour of the weaker sections of the society and other groups which deserve special treatment. The norms for admission should be pre-determined, objective and transparent.

The concept of Common Entrance Examination has been stressed upon in *Priti Srivastava* v. *State of Madhya Pradesh.*[46] The Supreme Court observed-

A common entrance examination, therefore, provides a uniform criterion for judging the merit of all candidates who come from different universities....The purpose of such a common entrance examination is not merely to grade candidates for selection. The purpose is also to evaluate all candidates by a common yardstick....In the interest of selecting suitable candidates for specialized education, it is necessary that the common entrance examination is of a certain standard and qualifying marks are prescribed for passing that examination.[47]

In *T.M.A.Pai Foundation* v. *State of Karnataka*[48] the Supreme Court, while dealing with the question of admission of students to minority educational institution, whether aided or unaided, made the following observations-

Admission to students to unaided minority educational institutions viz. schools and undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the State or University concerned, except for providing the qualifications

---

[46] AIR1999 SC 2894

[47] *Ibid* at 2908

[48] (2002) 8 SCC 481

and minimum conditions of eligibility in the interest of academic standards.

The right to admit students being an essential facet of the right to administer educational of their choice, as contemplated under Article 30 of the Constitution, the State Government or the university may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. The right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it is so more so in the matter of admissions to professional institutions.

A minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent, and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not be tantamount to maladministration. Even an unaided minority ought not to ignore the merit of the students for admission, while exercising its right to admit students to the colleges aforesaid, as in that event, the institution will fail to achieve excellence.[49]

The Supreme Court also accepted that in case of unaided professional institutions, passing of the common entrance test held by the State agency is necessary to seek admission.[50]

---

[49] *Ibid* at 708-709

[50] *Ibid* at 709

While discussing the procedure of admission in private minority institutions, the Supreme Court in *Islamic Academy of Education* v. *State of Karnataka*[51] observed-

> Admission, even of members of their community/language, must strictly be on the basis of merit except that in case of their own students it has to be merit inter se those students only. Further, it the seats cannot be filled up from members of their community/language, then the other students can be admitted only on the basis of merit based on a common entrance test conducted by government agencies.[52]

The Supreme Court directed the State Governments to appoint a permanent Committee, headed by a retired Judge of a High Court, in order to ensure that the common entrance test conducted by the association of colleges is fair and transparent.[53]

While discussing the *T.M.A. Pai Foundation* case, the Supreme Court in *P.A.Inamdar* v. *State of Maharashtra*[54] laid down that the unaided minority and non-minority institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefore subject to the confirming of the triple test of being fair, transparent and non-exploitative. It observed-

> There may be a single institution imparting a particular type of education which is not being imparted by any other institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or

---

[51] (2003) 6 SCC 697

[52] *Ibid* at 727-728

[53] *Ibid* at 729

[54] (2005) 6 SCC 537

similar professional education can join together for holding a common entrance test satisfying the abovesaid triple tests. The State can also provide a procedure holding a common entrance test in the interest of securing fair and merit-based admissions and preventing maladministration.[55]

A two Judge Bench of the Madras High Court relied on *Dr. Preeti Srivastava's case*[56] has held the decision to abolish Common Entrance Test for admission to B.L. Degree course in Tamil Nadu is wholly arbitrary and violates Article 14 of the Constitution of India.[57]

3. 1. 3. Capitation Fee and Fee Structure in Private Educational Institutions-The private educational institutions, in order to meet its requirements charges fees according to their sweet will, at the time of admission. As a result, the courts get flooded with a plethora of cases with regard to fee structure and capitation fee.

Capitation fee means charging amount beyond what is permitted by law.[58] The aspect of capitation fee was fully discussed in *Mohini Jain* v. *State of Karnataka,*[59] also known as the 'Capitation Fee case'. The Supreme Court held that right to education is a fundamental right and observed-

> The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational

[55] *Ibid* at 604-605

[56] *Dr. Preeti Srivastava* v. *State of M.P.* AIR 1999 SC 2894.

[57] *R. Nirmalkumar* v. *Registrar, T.N. Dr. Ambedkar Law University* AIR 2007 Mad 263

[58] *Unni Krishnan, J.P.* v. *State of A.P.* AIR 1993 SC 2178

[59] AIR 1992 SC 1858

institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.

Charging capitation fee in consideration of admission to educational institutions is a patent denial of a citizen's right to education under the Constitution.

Capitation fee is nothing but a price for selling education. The concept of "teaching shops" is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage...

Capitation fee makes the availability of education beyond the reach of the poor. The State action in permitting capitation fee to be charged by State-recognized educational institutions is wholly arbitrary and as such violative of Article 14 of the Constitution of India. [60]

The Supreme Court further observed-

The capitation fee brings to the fore a clear class bias. It enables the rich to take admission whereas the poor has to withdraw due to financial inability. A poor student with better merit cannot get admission because he has no money whereas the rich can purchase the admission. Such a treatment is patently unreasonably, unfair and unjust. There is, therefore, no escape from the conclusion that charging of capitation fee in consideration of admissions to educational institutions is wholly arbitrary and as such infracts Article 14 of the Constitution....

[60] *Ibid* at 1864-1866

> Capitation fee in any form cannot be sustained in the eyes of law. The only method of admission to the medical colleges in consonance with fair play and equity is by ways of merit and merit alone.
>
> We, therefore, hold and declare that charging of capitation fee by the private educational institutions as a consideration for admission is wholly illegal and cannot be permitted.[61]

The correctness of the decision of *Mohini Jain* v. *State of Karnataka*[62] was examined in *Unni Krishnan, J.P.* v. *State of A.P.*[63] The Supreme Court observed-

> Right to free education upto the age of 14 years is a fundamental right. Since fundamental rights and directive principles are complementary to each other, there is no reason why this fundamental right cannot be interpreted in this manner.
>
> It is simply not possibly for the private educational institutions to survive if they are compelled to charge only that fee as is charged in Governmental institutions. The cost of educating an engineering or a medical graduate is very high. All that cost is borne by the State in Governmental colleges but the State does not subsidise the private educational institutions. The private educational institutions have to find their own finances and that can come only from the students.[64]

The majority of the five Judge Bench accordingly held that admission to all recognised private educational institutions, particularly

---

[61] *Ibid* at 1867

[62] AIR 1992 SC 1858

[63] AIR 1993 SC 2178

[64] *Ibid*

medical and engineering, shall based on merit, but fifty percent of seats in all professional colleges be filled by candidates prepared to pay a higher fee. There shall be no quota reserved for the management or for any family, caste or community, which may have established such college and the criteria of eligibility and all other conditions shall be the same in respect of both 'free seats' and 'payment seats', the only distinction shall be requirement of higher fee by payment students.

However the Supreme Court in *T.M.A.Pai Foundation* v. *State of Karnataka*[65] reconsidered and overruled the *Unni Krishnan* case[66] in the aspect of grant of admission and fixation of fee. It observed-

> The private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, *inter alia*, of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfils the conditions for grant of such affiliation and recognition.
>
> The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the Government.
>
> A rational fee structure should be adopted by the management, which would not be entitled to charge a capitation fee.[67]

The Supreme Court agreed with the contention of the private institutions that imposition of condition for grant of affiliation or recognition by statutory authorities destroys the institutional autonomy and the very objective of establishment of the institution.

---

[65] (2002) 8 SCC 481

[66] *Unni Krishnan, J.P.* v. *State of A.P.* AIR 1993 SC 2178

[67] *T.M.A.Pai Foundation* v. *State of Karnataka*(2002) 8 SCC 481 at 539

In *Islamic Academy of Education* v. *State of Karnataka*[68] the Five Judge Constitutional Bench of the Supreme Court tried to remove the doubt/anomalies of the *T.M.A. Pai Foundation case*. It directed the setting up of a Committee headed by a retired High Court Judge for deciding, approving and proposing the fee structure of the educational institutions. Capitation fee and profiteering was also forbidden.

In *Modern School v. Union of India*[69] a federation of parents' association filed a public interest litigation alleging large-scale commercialisation of education due to the fee hike. The court quoted extensively from The *T.M.A. Pai Foundation* case and the *Islamic Academy* case and reiterated that capitation fee and profiteering are forbidden.

Later in *P.A. Inamdar* v. *State of Maharashtra*[70] the Supreme Court observed –

> Capitation fee cannot be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee. "Profession" has to be distinguished from "business" or a mere "occupation". While in business, and to a certain extent in occupation, there is a profit motive, profession is primarily a service to society wherein earning is secondary or incidental. A student who gets a professional degree by payment of capitation fee, once qualified as a professional, is likely to aim more at earning rather than serving and that becomes a bane to society. The charging of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible.

---

[68] (2003) 6 SCC 697

[69] (2004) 5 SCC 583

[70] (2005) 6 SCC 537

Similarly, profiteering is also not permissible. Despite the legal position, this Court cannot shut its eyes to the hard realities of commercialisation of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited. It is permissible to regulate admission and fee structure for achieving the purpose just stated.

No capitation fee can be charged.[71]

As a result of the dynamism of the judiciary and its initiative to make education reach to the poorest section of the community, the private educational institutions are forced to stop profiteering and charging exorbitant fees.

3. 1. 4. Reservation in cases of Admission to Educational Institutions- The question of reservation of admission in educational institutions has assumed a great importance and relevancy in the present day due to the keen competition for limited opportunities available in the country. The scheme of reservation for various groups, apart from the reservation for Scheduled Caste (SC), Scheduled Tribe (ST) and backward classes under Article 15(4) of the Indian Constitution, is usually made by the government in order to meet certain exigencies. As a result, many deserving candidates do not get any opportunity and they seek to challenge the scheme of reservation as unconstitutional.

[71] *Ibid* at 605

In *Balaji* v. *State of Mysore*[72] had laid down that 'backwardness' as envisaged by Article 15(4) must be both social and educational and not either social or educational.

In *D.P.Joshi* v. *State of M.P.*[73] the Supreme Court has held that a law which discriminates on the ground of residence does not infringe Article 15. Without overruling *D.P.Joshi*, but rather admitting the reservation based on residence, the Supreme Court in *Pradeep Jain* v. *Union of India,*[74] where residential requirement for admission to medical colleges was challenged, has held that such conditions are inconsistent with the idea of national unity and integration and though in given circumstances may be justified both under Article 14 and 15(1) at the moment not more than 70% seats should be reserved on grounds of residence at the M.B.B.S. level. It further laid down that there should not be any reservation on the basis of residence at the M.S. and M.D. levels.

In *Indra Sawhney* v. *Union of India*[75] also known as the Mandal Commission case, the nine-Judge Bench of the Supreme Court has observed-

> The 'class' or 'classes' in Article 15(4) and 16(4) respectively are not to be construed in the Marxist sense. The Constitution does not define these classes nor does it lay down any methodology for their determination.

In *Indra Sawhney* v. *Union of India*[76] the Supreme Court has directed the exclusion of the creamy layer and non-backward classes of

---

[72] AIR 1963 SC 649

[73] AIR 1955 SC 334

[74] (1984) 3 SCC 654

[75] AIR 1993 SC 477

[76] AIR 2000 SC 498

citizens from the purview of 'reservation for a backward class citizen of a particular caste'.

In *Priti Srivastava* v. *State of Madhya Pradesh*[77] a five-Judge Constitution Bench of the Supreme Court, while dealing with the lowering of the minimum qualifying marks for admission to super speciality medical courses in favour of the reserved category candidates, has held that merit alone can be the criterion for selecting students to the super speciality courses in medical and engineering. It observed-

> At the super speciality levels there cannot be any relaxation in favour of any category of candidates. Admissions should be entirely on the basis of open merit. While the object of 15(4) is to advance the equality principle by proving for protective discrimination in favour of the weaker sections so that they may become stronger and be able to compete equally with others more fortunate, one cannot also ignore the wider interests of society while devising such special provisions. Undoubtedly, protective discrimination in favour of the backward, including Scheduled castes and scheduled tribes is as much in the interest of society as the protected groups. At the same time, there may be other national interests, such as promoting excellence at the highest level and providing the best talent in the country with the maximum available facilities to excel and contribute to society, which have also to be borne in mind. Special provisions must strike a reasonable balance between these diverse national interests.[78]

---

[77] AIR1999 SC 2894

[78] *Ibid* at 2920

While dealing with the question of admission to post-graduate course in All India Institute of Medical sciences (AIIMS), the court in *A.I.I.M.S. Students Union* v. *A.I.I.M.S.*[79] the Supreme Court observed-

> The basic rule is equality of opportunity for every person in the country which is a constitutional guarantee. A candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels and education like post-graduate courses. Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped-the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal or regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation.[80]

In *Islamic Academy of Education* v. *State of Karnataka*[81] the Supreme Court while dealing with the some issues relating to the fixation of fee structure by the minority and non-minority educational institutions observed with reference to Article 15 as-

> Clauses (3) and (4) are enabling provisions. The States were to take appropriate steps required therefor within the bounds, that is,

---

[79] AIR 2001 SC 3262

[80] *Ibid* at 3276. In *Mohan Bir Singh Chawla* v. *Punjab University* AIR 1997 SC 788, the Supreme Court had declared, "The higher you go in any discipline, lesser should be the reservations-of whatever kind."

[81] (2003) 6 SCC 697

limited only for uplifting the weaker sections and not for conferring upon them a preferential right. Reservation can be made, inter alia, by way of compelling State necessity. In any event the executive policy of the State cannot be trust upon the citizens without any valid legislation.[82]

In *Saurabh Chaudri* v. *Union of India*[83] writ petitions were filed involving the question of constitutionality of reservation whether based on domicile or institution in the matter of admission into postgraduate courses in government-run medical colleges. The five-Judge Bench answered in the negative on the question whether reservation on the basis of domicile is impermissible in terms of Article 15 (1) of the Constitution of India. The court was also against the institutional reservation in the present-day scenario. The Supreme Court came to the following conclusions:-

a) In the case of Central educational institutions and other institutions of excellence in the country the judicial thinking has veered around the dominant idea of national interest with its limiting effect on the constitutional prescription of reservations. The result is that in the case of these institutions the scope for reservations is minimal.

b) As regards the feasibility of constitutional reservations at the level of superspecialities, the position is that the judiciary has adopted the dominant norm i.e. "the higher the level of the speciality the lesser the role of reservation". At the level of superspecialities the rule of "equal chance for equal marks"

---

[82] *Ibid* at 767

[83] (2003) 6 SCC 224

dominates. This view equally applies to all superspeciality institutions.

c) As regards the scope of reservation of seats in educational institutions affiliated and recognised by state universities, the constitutional prescription of reservation of 50% of the available seats has to be respected and enforced.

d) The institutional preference should be limited to 50% and the rest being left open for competition based purely on merits on an all-India basis.

e) As regards private non-minority educational institutions distinction between government-aided and unaided institutions. While the Government/State can prescribe guidelines as to the process of selection and admission of students, the Government/State while issuing guidelines has to take into consideration the constitutional mandate of the requirement of protective discrimination in matters of reservation of seats as ordained by the decisional law in the country. Accordingly, the extent of reservation in no case can exceed 50% of the seats. The inter se merit may be assessed on the basis of a common all-India entrance test or on the basis of marks at the level of qualifying examination.

f) The position with respect to minority-aided institutions is that they are bound by the requirements of constitutional reservation along with other regulatory controls. However, the right to admit students of their choice being part of the right of religious and linguistic minorities, to establish and administer educational institutions of their choice, the managements of these educational institutions can *reserve seats to a reasonable extent*, not necessarily 50% as laid down in *Stephens College*

Case. Out of the seats left after deduction of management quota, the State can require the observance of the requirement of constitutional reservation.

g) As regards the unaided institutions, they have a large measure of autonomy even in matters of admission of students as they are not bound by the constraints of the demands of Article 29(2). Nor are they bound by the constraints of the obligatory requirements of constitutional reservation.[84]

In *Ashok Kumar Thakur (8)* v. *Union of India*[85] the Supreme Court, while dealing with the challenge to the policy of reservation of 27% reservation for Other Backward Classes (OBC) in educational institutions contained in the Central Educational Institutions (Reservation in Admission) Act, 2006[86] discussed the concept of creamy layer as relevant with an observation as-

> Nowhere else in the world do castes, classes or communities queue up for the sake of gaining backward status. Nowhere else in the world is there competition to assert backwardness and then to claim 'we are more backward than you'.[87]

However, the Supreme Court did not stay the Central Educational Institutions (Reservation in Admission) Act, 2006.

Similarly, in *Ashok Kumar Thakur (9)* v. *Union of India*[88] the Supreme Court framed several issues and placed the matter of reservation of 27% reservation for socially and educationally backward classes/Other

---

[84] *Ibid* at 185-186

[85] (2007) 4 SCC 361. Reference was made to *M. Nagaraj* v. *Union of India* (2006) 8 SCC 212: *Nair Service Society* v. *State of Kerala* (2007) 4 SCC 1

[86] Received the assent of the President on 3rd January 2007

[87] *Ashok Kumar Thakur (8)* v. *Union of India* (2007) 4 SCC 361 at 375

[88] (2007) 4 SCC 397

Backward Classes in educational institutions under Central Educational Institutions (Reservation in Admission) Act, 2006 before the Chief Justice of India for appropriate orders.

In *Ashok Kumar Thakur* v. *Union of India*[89] a five Judge Bench of the Supreme Court upheld the Government's move for initiating 27% quotas for Other Backward Classes (OBC) in Government funded institutions. The Court has categorically reiterated its prior stand that 'creamy layer' should be excluded from the ambit of reservation policy and private institutions are also not to be included in it. The Supreme Court has laid down that person with family income above Rs. 250,000/- per annum should be in the creamy layer and should be excluded from the reservation quota. The children of doctors, engineers, chartered accountants, actors, consultants, media professionals, writers, bureaucrats, defence officers of colonel and equivalent rank or higher, High Court and Supreme Court judges, all Central and State Government Class A and B officials should be excluded. The Supreme Court has requested Parliament to exclude the children of MPs' and MLAs'.

3. 1. 5. Ragging in Educational Institutions-Ragging is an indisciplined behaviour of students which leads to disturb the basic academic foundation of the institution for learning. This inhuman act results in considerable deterioration of performance among the students at all sphere of activity, wherever it occurs. The treatment meted out to the juniors or newcomers by the seniors in any academic institution, in the form of torture, results in great hardship to the victims. Sometimes the authorities initiate disciplinary action against the offenders while in majority of the cases, the offenders escape due to the absence of proper

[89] Judgment dated 10th April 2008 reported in http://www.judis.nic.in visited on 23rd May 2008

legislation to curb this inhuman, unsocial, uncivilized and indecent behaviour. At this juncture, the judiciary has stepped into this arena and has tried to supplement the absence of suitable legislation.

In *Vishwa Jagriti Mission* v. *Central Govt.*[90] the Supreme Court has defined the word 'ragging' as "any disorderly conduct whether by words spoken or written or by an act which has the effect of teasing, treating or handling with rudeness any other student, indulging in rowdy or undisciplined activities which causes or is likely to cause annoyance, hardship or psychological harm or to raise fear or apprehension thereof in a fresher or a junior student or asking the students to do any act or perform something which such student will not do in the ordinary course and which has the effect of causing or generating a sense of shame or embarrassment so as to adversely affect the physique or psyche of a fresher or a junior student."

In *Vishwa Jagriti Mission* v. *Central Govt.*[91] the Supreme Court, while entertaining a public interest litigation seeking directions of the court so as to curb the menace of ragging, exercised its jurisdiction under Article 32 and 142 of the Constitution and laid down the following guidelines-

a) Ragging can be stopped by creating awareness amongst the students, teachers and parents that ragging is reprehensible act which does no good to anyone and by simultaneous generating an atmosphere of discipline by sending a clear message that no act of ragging shall be tolerated and any act of ragging shall not go unnoticed and unpunished.

[90] (2001) 6 SCC 577

[91] (2001) 6 SCC 577

b) Anti-ragging movement should be initiated by the institutions right from the time of advertisement of admissions. The prospectus, the form for admission and/or any other literature issued to the aspirants for admission must clearly mention that ragging is banned in the institution and anyone indulging in ragging is likely to be punished appropriately, which punishment may include expulsion from the institution, suspension from the institution or classes for a limited period or fine with a public apology. The punishment may also take the shape of: (i) withholding scholarships or other benefits, (ii) debarring from representation in events, (iii) withholding results, and (iv) suspension or expulsion from hostel or mess, and the like. If there be any legislation governing ragging or any provisions in the statute/ordinances they should be brought to the notice of the students/parents seeking admission.

c) The application form for admission/enrolment shall have a printed undertaking to be filled up and signed by the candidate to the effect that he/she is aware of the institution's approach towards ragging and the punishments to which she shall be liable if found guilty of ragging. A similar undertaking shall be obtained from the parent/guardian of the applicant.

d) Such of the institutions as are introducing such a system for the first time shall ensure undertakings being obtained from the students-and their parents/guardians-already studying in the institutions before the commencement of the next educational year/session.

e) A printed leaflet dealing when and to whom one has to turn for information, help and guidance for various purposes, keeping in view the needs of new entrants in the institution, along with the addresses and telephone numbers of such persons, should be given to freshers at the time of admissions so that the freshers need not look up to the seniors for help in such matters and feel indebted to or obliged by them.

f) The management, the principal, the teaching staff should interact with freshers and take them in confidence by apprising them of their rights as well as obligation to fight against ragging and to generate confidence in their mind that any instance of ragging to which they are subjected or which comes in their knowledge should forthwith be brought to their knowledge and shall be promptly dealt while protecting the complainants from any harassment by the perpetrators of ragging. It would be better if the head of the institution or a person high in authority addresses meetings of teachers, parents and students collectively or in groups in this behalf.

g) At the commencement of the academic session, the institution should constitute a Proctorial Committee consisting of senior faculty members and hostel authorities like Wardens and a few responsible senior students:

   i. to keep continuous watch and vigil over ragging so as to prevent its occurrence and recurrence,

   ii. to promptly deal with the incidents of ragging brought to its notice and summarily punish the guilty either by itself or by putting forth its

findings/recommendations/suggestions before the authority competent to take decision.

All vulnerable locations shall be identified and especially watched.

h) The local community and the students in particular must be made aware of the dehumanizing effect of ragging inherent in its perversity. Posters, notice boards and signboards- wherever necessary, may be used for the purpose.

i) Failure to prevent ragging shall be construed as an act of negligence in maintaining discipline in the institution on the part of the management, the principal and the persons in authority of the institution. Similar responsibility shall be liable to be fixed on Hostel Wardens/Superintendents.

j) The hostels/accommodations where freshers are accommodated shall be carefully guarded, if necessary by posting security personnel, and placed in charge of a Warden/Superintendent who should himself/herself reside thereat, and wherein the entry of seniors and outsiders shall be prohibited after a specified hour of the night and before except under the permission of the person in charge. Entry at other times may also be regulated.

k) If the individuals committing or abetting ragging are not identified, collective punishment could be resorted to act as a deterrent punishment and to ensure collective pressure on the potential raggers.

l) Migration certificate issued by the institution should have an entry apart from that of general conduct and behaviour whether the student had participated in ad in particular was punished for ragging.

m) If an institution fails to curb ragging, UGC/funding agency may consider stoppage of financial assistance to such an institution till such time as it achieves the same. A university may consider disaffiliating a college or an institution failing to curb ragging.

n) The universities and the institutions shall, at a reasonable time before the commencement of an academic year, and thereafter at such frequent intervals as may be expedient, deliberate over and devise such positive and constructive activities to be arranged by involving the students generally so that the seniors and juniors and the existing students and the freshers interact with each other in a healthy atmosphere and develop a friendly relationship so as to behave like members of a family in an institution. Seniors or juniors should be encouraged to exhibit their talents in such events so as to shed their complexes.[92]

The above guidelines were laid down by the judiciary in order to supplement the lacunae in the field of ragging. On 6th November 2006 a two-Judge Bench comprising of Arijit Pasawat and Lokeshwar Singh Panta, JJ., made suggestion for setting up of a committee to look into the problems of ragging in educational institutions and remedial measures thereof.[93] In pursuance to the directive of the Supreme Court, the Ministry of Human Resources Development appointed a seven member panel headed by ex-CBI Director Dr. R.K. Raghavan to recommend anti-ragging measures. The Raghavan Committee submitted its report in May, 2007 which included a proposal to include ragging as a special section

---

[92] *Ibid* at 579-581

[93] *University of Kerala (2)* v. *Council, Principals' Colleges* (2006) 8 SCC 486

under the Indian Penal Code, 1860. The Supreme Court has made it obligatory for academic institutions to file an official First Information Report (FIR) with the police in any instance of a complaint of ragging so that all cases of ragging are formally investigated under the criminal justice system, and not by the academic institutions' own ad-hoc bodies.[94]

However, the Central Government has not taken any positive step to bring forth any legislation to curb this menace of ragging, inspite of the issuance of directions by the Supreme Court.

3. 1. 6. Mid Day Meals-The Mid-day Meal Scheme is the popular name for school meal programme in India. It involves provision of lunch free of cost to school-children on all working days. The key objectives of the programme are protecting the children from classroom hunger, increasing school enrolment and attendance, improved socialisation among children belonging to all castes, addressing malnutrition, and social empowerment through provision of employment to women. The scheme has a long history especially in Tamil Nadu and Gujarat, and has been expanded to all parts of India after a landmark direction by the Supreme Court on 28th November 2001. The success of this scheme is illustrated by the tremendous increase in the school participation and completion rates in the state of Tamil Nadu.

In April 2001 People's Union for Civil Liberties (Rajasthan) initiated the now famous right to food litigation. This public interest litigation has covered a large range of issues relating to right to food, but the best known intervention by the court is on mid-day meals. In one of its many direction in the litigation the Supreme Court, in its 'interim order' passed on 28th November 2001, converted the benefits of eight

[94] Interim Order dated 16th May, 2007 reported in http://en.wikipedia.org/wiki/ragging visited on 26th May, 2008

nutrition-related federal schemes into legal entitlements and directed the state governments to provide cooked mid-day meals for all children in government and government-assisted schools. This landmark direction converted the mid-day meal scheme into a legal entitlement, the violation of which can be taken up in the court of law. The direction and further follow-up by the Supreme Court has been a major instrument in universalising the scheme.[95]

The Right to Food petition asked three major questions:

1. Starvation deaths had become a national phenomenon while there was a surplus stock of food grains in government granaries. Does the right to life mean that people who are starving and who are too poor to buy food grains should be denied food grains free of cost by the State from the surplus stock of the State particularly when it is lying unused and rotting?

2. Does not the right to life under Article 21 of the Constitution of India include the right to food?

3. Does not the right to life which has been upheld by the apex Court imply that the State has a duty to provide food especially in situations of drought to people who are drought affected and are not in a position to purchase food?[96]

In its several hearings, the Court directed all state governments to ensure that all Public Distribution Shops are kept open with regular supplies and stated that it is the prime responsibility of the government to prevent hunger and starvation. On 23 July, 2001, recognising the right to food, the court said:

---

[95] http://en.wikipedia.org/wiki/Mid-day_Meal_Scheme visited on 23rd January 2008

[96] Jayna Kothari, *Social Rights and the Constitution*, (2004) 6 SCC (Journal) 31

In our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existent leading to mal-nourishment, starvation and other related problems.

The Supreme Court directed the state governments to implement the Mid-Day Meal Scheme by providing every child in every Government and Government assisted primary schools with a prepared mid-day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days. Those governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all Govt. and Govt. aided primary schools in at least half the districts of the State (in order of poverty) and must within a further period of three months extend the provision of cooked meals to the remaining parts of the State.

The orders of the Supreme Court of providing Mid-Day Meal in the Government Schools are already being implemented by the Central Government and the State Governments. These orders of the Supreme Court bear great relevance as it shows that courts do have the authority to order positive action by the State which has financial/budgetary implications. Pleas on financial constraints did not seem to have affected the Supreme Court in making the order for enforcement of the right to food of the thousands of people starving in the drought-struck States as

well as the poor children coming to school after sacrificing their day's labour in order to receive education.

3. 1. 7. THE SOCIAL TRANSFORMATION ACHIEVED

The judiciary has read the Directive Principles of State Policy in the light of the Fundamental Rights and has recognised them to be fundamental in matters of governance. This has strengthened Articles 41 and 45 of the Indian Constitution. The laying down of the right to education as a fundamental right[97] by the judiciary has prompted the legislature to insert Article 21A[98] providing for free and compulsory education for all children of the age of 6 to 14 years.

The judiciary has held that the minority rights in establishment and administration of educational institutions under Article 29 and 30 is not absolute. The dynamism of the judiciary has been seen in a series of judgments[99] where the judiciary while protecting the rights of the minorities has allowed education to reach all the classes of people. This is in tune with the concept of a plural society where all cultures and languages must be allowed to flourish. Furthermore, it is in conformity with the secular character of the country which is embodied in the

---

[97] *Mohini Jain* v. *State of Karnataka* AIR 1992 SC 1858; *Unni Krishnan, J.P.* v. *State of A.P.* AIR 1993 SC 2178; *T.M.A.Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481

[98] The Constitutional (86th Amendment) Act, 2002

[99] *Kerala Education, 1957, Re* AIR 1958 SC 956; *D.A.V. College* v. *State of Punjab* (1971) 2 SCC 261; *T.M.A.Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481; *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697; *P.A.Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537

Preamble of the Constitution. It is better if the duality (minority and majority) is permitted only in the area of religion and language and not to other areas.

The judiciary has taken the initiative of 'purifying' education by bringing it within the reach of every section of the society. The yardstick that merit alone can be the guiding factor in case of admission to any educational institution is the brainwork of the judiciary.[100] When merit is considered as the yardstick for admission, common entrance tests plays a vital part. This has also been highlighted by the judiciary in its various judgments.[101] The direction of setting up of a Committee in each State for fixing the fee structure in private educational institutions[102] has dealt a blow to the commercialisation of education in India. The charging of exorbitant fees by the private educational institutions in the name of capitation fees has also been checked[103] due to the dynamism of the judiciary. The net result is that the poor can now afford education which was once considered to be the exclusive domain of the rich.

The question of reservation of the backward classes in any educational institution has been a very knotty socio-political issue from the time of independence. The judiciary was quick to realize this and frame various norms and guidelines by providing for reservation to the

---

[100] *Unni Krishnan, J.P.* v. *State of A.P.* AIR 1993 SC 2178; *T.M.A.Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481; *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697

[101] *Priti Srivastava* v. *State of Madhya Pradesh* AIR 1999 SC 2894; *T.M.A.Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481; *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697; *P.A.Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537

[102] *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697

[103] *Mohini Jain* v. *State of Karnataka* AIR 1992 SC 1858; *T.M.A.Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481; *P.A.Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537

socially and economically backward classes after excluding the creamy layer from it.[104] This has achieved a double objective by securing reservation of seats to the needy and at the same time has excluded those who wanted to take the benefit of reservation without being eligible for it. At the same time, the judiciary has sounded a note of caution that in super speciality levels of admission there should not be any reservation.[105] The approach of the judiciary is most welcome as it is a very important step towards maintenance of a semblance of standard in education.

The peril of ragging in educational institutions has been a nightmare of the parents as well as the students. There is no Act to curb this menace and the judiciary tried to eradicate this by laying down guidelines and directions in *Vishwa Jagriti Mission* v. *Central Govt.*[106] The Supreme Court also suggested forming of a Committee to look into the problems of ragging in educational institutions and to provide remedial measures thereof.[107] The Supreme Court has made it obligatory for academic institutions to file an official First Information Report (FIR) with the police in any instance of a complaint of ragging so that all cases of ragging are formally investigated under the criminal justice system, and not by the academic institutions' own ad-hoc bodies.[108] It is lamenting to state the Central Government has not yet come up with any

---

[104] *Indra Sawhney* v. *Union of India* AIR 1993 SC 477; *Ashok Kumar Thakur (8)* v. *Union of India* (2007) 4 SCC 361; *Ashok Kumar Thakur (8)* v. *Union of India* (2007) 4 SCC 397; *Ashok Kumar Thakur* v. *Union of India*- Judgment dated 10th April 2008 reported in http://www.judis.nic.in visited on 23rd May 2008

[105] *Priti Srivastava* v. *State of Madhya Pradesh* AIR 1999 SC 2894; *A.I.I.M.S. Students Union* v. *A.I.I.M.S.* AIR 2001 SC 3262

[106] (2001) 6 SCC 577. *Vishwa Jagriti Mission* v. *Central Government* (2001) 6 SCC 581

[107] *University of Kerala (2)* v. *Council, Principals' Colleges* (2006) 8 SCC 486

[108] Interim Order dated 16th May 2007 reported in http://en.wikipedia.org/wiki/ragging visited on 26th May, 2008

Act to curb the menace of ragging and the directions and orders of the Supreme Court in *Vishwa Jagriti Mission* is the only solution to provide relief to the terror of ragging.

The introduction of Mid Day Meals at primary levels in the government schools is the outcome of the interim order of the Supreme Court.[109] This has increased the enrolment of poor students who come to the schools in order to have some food (as their parents cannot feed them and they have to go to work) and at the same time it enables them to have education which has now been declared to be a fundamental right till the age of 14 years. The judgment of the Supreme Court is laudable as it has served a dual purpose by education reach to every section of the society as well as reducing child labour.

3. 2. ENVIRONMENT

The idea of protecting and improving the environment seized the judiciary after its judgment in *Municipal Council, Ratlam* v. *Vardichand.*[110] The first indication of the right to a wholesome environment may be traced to *Rural Litigation and Entitlement Kendra, Dehradun* v. *State of U.P.*[111] The evolution of the right to a clean and healthy environment was laid down in *Chhetriya Pardushan Mukti Sangharsh Samiti* v. *State of Uttar Pradesh.*[112] Although the petitioner was not allowed *locus standi* to move the petition under Article 32 of the Indian Constitution as the case went to show that he had an ancient

---

[109] http://en.wikipedia.org/wiki/Mid-day_Meal_Scheme visited on 23rd January 2008

[110] AIR 1980 SC 1662.

[111] AIR 1988 SC 2187

[112] AIR 1990 SC 2060

grudge against the respondent oil mill, it is significant to note that Chief Justice Sabyasachi Mukherjee observed 'that it is beyond any doubt that Article 21 contains the right to enjoy the quality of life'. He said-

> Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution of India. Anything, which endangers or impairs by conduct of anybody either in violation or in derogation of laws, that quality of life and living by the people is entitled to be taken recourse of Article 32 of the Constitution.[113]

The right to a healthy environment was reiterated in *Subhash Kumar* v. *State of Bihar.*[114] Although the Supreme Court rejected the petition on the ground of bias and malafide, its observations on the right to life under Article 21 and right to remedy under Article 32 laid down a substantial foundation for the development of the right to a healthy environment in Article 21 of the Constitution. It observed-

> 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 right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be determined to the quality of life.[115]

The real opportunity came before the Supreme Court in *Bangalore Medical Trust* v. *B.S. Mundappa,*[116] when an interesting question as to

---

[113] *Ibid* at 2062

[114] AIR 1991 SC 420

[115] *Ibid* at 424

[116] AIR 1991 SC 1902

whether an open space laid down as such in a development scheme could be leased out for private nursing home had to be decided. The question was answered in the negative. Although the judgment did not refer to Article 21 and the right to environment, Justice Thommen's words are emphatic on the constitutional mandate for the protection of individual freedom and dignity and attainments of a quality of life, which a healthy and clean environment guarantees. The Supreme Court observed-

> Protection of the environment, open spaces for recreation and fresh air, play grounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme....Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of quality of life which makes the guaranteed rights a reality for all citizens.[117]

Going a step further, the Karnataka High Court in *V. Lakshmipathy* v. *State of Karnataka* [118] has laid down-

> Entitlement to a clean environment is one of the recognised basic human rights and human rights jurisprudence cannot be permitted to be thwarted by status quoism on the basis of unfounded apprehensions.[119]

---

[117] *Ibid* at 1913

[118] AIR 1992 Kant 57

[119] *Ibid* at 67

Expanding upon the right to a clean environment as a fundamental right, the Supreme Court in *Virender Gaur* v. *State of Haryana* [120] observed-

> Article 21 protects the right to life as a fundamental right. Enjoyment of life and its attainment including the right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation, without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a human and healthy environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment.[121]

In *Vellore Citizens Welfare Forum* v. *Union of India*[122] the Supreme Court has observed that-

> The Constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common law right of clean environment...Our legal system having being founded on the

---

[120] (1995) 2 SCC 577

[121] *Ibid* at 580-581

[122] AIR 1996 SC 2715

British Common Law, the right of a person to pollution free environment is a part of the basic jurisprudence of the land.

The importance of the environmental aspects of right to life under Article 21 was emphasized in the case of *A.P. Pollution Control Board* v. *M.V. Nayadu.*[123] This public interest litigation was filed challenging the permission given by the appellate authority under the Water Act to a company which sought to set up an industry for production of castor oil derivatives within 10 kms radius of the two important Lakes namely Himayat Sagar and Osman Sagar which supplied drinking water to the twin cities of Hyderabad and Secundrabad. While holding that environmental concerns are of equal importance as human rights concern, the Supreme Court observed-

> While environmental aspects concern 'life', human rights aspects concern 'liberty'. In our view, in the context of emerging jurisprudence relating to environmental matters, -as in the case of matter relating to human rights, -it is the duty of the court to render justice by taking all aspects into consideration.[124]

While dealing with the affect of mining activities on the flora and fauna around Kudremukh National Park, the Supreme Court held that the right to life guaranteed in Article 21 of the Constitution of India includes a right to an environment adequate for health and well being.[125] In *Ramji Patel* v. *Nagrik Upbhokta Marg Darshak Manch*[126], the Supreme Court while drawing a nexus between protection of the environment and Article 21 of the Constitution, held any disturbance of the basic environmental

---

[123] (1999) 2 SCC 718

[124] *Ibid* at 741

[125] *T.N.Godavarman Thirumulpad* v. *Union of India* (2002) 10 SCC 606

[126] (2000) 3 SCC 29

elements, namely, air, water and soil, which are necessary for 'life' would be hazardous to 'life' within the meaning of Article 21 of the Constitution.

In *State of M.P.* v. *Kedia Leather & Liquor Ltd.*[127], the Supreme Court while dealing with a case of public nuisance, held-

- Environmental, ecological, air and water pollution amount to violation of the right to life assured by Article 21of the Constitution of India. Hygienic environment is an integral facet of healthy life. Right to live with human dignity becomes illusory in the absence of humane and healthy environment.[128]

The judiciary tried to protect the environment by bringing it within the ambit of the fundamental rights as envisaged in the Constitution of India. Inspite of developing such concept, it was found inadequate to protect and improve the environment. The question arose as to what are the new dimensions to which the right to life extends and how to bring a balance between the environment and development? The judiciary had to evolve various doctrines and principles in order to solve these questions and also to preserve, protect and improve the environment.

3. 2. 1. Sustainable Development- The concept of Sustainable Development received impetus for the first time in modern developmental era through the Stockholm Declaration during the United Nations Conference on Human Environment in 1972 which was further strengthened by the Rio Declaration (Earth Summit) in 1992.

The first case in India involving issues relating to environment and development was *Rural Litigation and Entitlement Kendra, Dehradun* v.

---

[127] (2003) 7 SCC 389

[128] *Ibid* at 394

State of U.P.[129] also known as the Doon Valley case, wherein the Supreme Court observed-

> We are not oblivious of the fact that natural resources have got to be tapped for the purposes of the social development but one cannot forget at the same time that tapping of resources have to be done with the requisite attention and care so that ecology and environment may not be affected in any serious way, there may not be depletion of water resources and long term planning must be undertaken to keep up the national wealth. It is always to be remembered that these are permanent assets of mankind and are not intended to be exhausted in one generation.

In *M.C.Mehta* v. *Union of India*[130] the court observed that economic and social development was essential for ensuring a favourable living and working environment for man and for creating condition on earth that are necessary for the improvement of the quality of life.

In *Indian Council for Enviro-Legal Action* v. *Union Of India*[131] popularly known as Coastal Zone Protection case, which was filed alleging blatant violation of the notification made by the Ministry of Environment and Forest regarding the protection of Coastal Zone resulting in serious damage to the environment and ecology of the area, the Supreme Court emphasized the importance of the doctrine of sustainable development as under-

> While economic development should not be allowed to take place at the cost of ecology or by causing wide spread environmental destruction and violation; at the same time, the necessity to

---

[129] AIR 1985 SC 652

[130] AIR 1987 SC 965

[131] (1996) 5 SCC 281

preserve ecology and environment should not hamper economic and other developments. Both development and environment must go hand in hand, in other words, there should not be development at the cost of environment and vice-versa, but there should be development while taking due care and ensuring the protection of environment.[132]

The Supreme Court in *Vellore Citizens Welfare Forum* v. *Union of India*[133] has emphasized the recognition of the concept of Sustainable Development wherein, it observed-

> Sustainable Development as defined by the Brundtland Report means development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. We have no hesitation in holding that sustainable development as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalized by the international law jurists.[134]

The concept has been further explained in *M.C.Mehta* v. *Union of India*[135] wherein the Supreme Court observed-

> The development and the protection of environments are not enemies. If without degrading the environment or minimising adverse effects thereupon by applying stringent safeguards, it is possible to carry on development, in that eventuality, the development has to go on because one cannot lose sight of the need

---

[132] *Ibid* at 296

[133] AIR 1996 SC 2715

[134] *Ibid* at 2720

[135] AIR 2004 SC 4016

for development of industries, irrigation resources and power projects, etc. including the need to improve employment opportunities and the generation of revenue. A balance has to be struck.[136]

In *Vellore Citizens Welfare Forum* v. *Union of India*[137] the Supreme Court was apprised of the pollution caused by the enormous discharge of untreated effluent by tanneries and other industries in the state of Tamil Nadu. The petitioner highlighted the evil on the strength of reports from Tamil Nadu Agricultural University Research Centre, an independent survey conducted by NGOs and a study of two lawyers deputed by the Legal Aid and Advice Board of Tamil Nadu. The main allegation was that the untreated effluents contaminated the underground water resulting in non-availability of potable water and thereby causing immense harm to agriculture. Despite the persuasion of the Tamil Nadu government and the Board and despite the Central Government offer of subsidy to construct common treatment plant, most of the tanneries hardly took any steps to control the pollution. The Supreme Court after referring to its earlier orders and quoting extensively from the report of NEERI has listed some of the salient principles of sustainable development as under-.

- Inter-Generational Equity
- Use and conservation of natural resources
- Environmental Protection
- Precautionary Principle
- Polluter Pays Principle
- Obligation to assist and co-operate

---

[136] *Ibid* at 4045

[137] AIR 1996 SC 2715

- Eradication of poverty and financial assistance to the developing countries

The Supreme Court after quoting from Article 21, 47,48A and 51(g) of the Indian Constitution and referring to the Water, Air and Environment Acts further observed that the precautionary principle and the polluter pays principle have been accepted as part of the law of the land. It observed that once the above principles are accepted, as a part of the customary international law, there would be no difficulty in accepting them as part of the domestic law. The Supreme Court opined that it was an accepted proposition of law that the rule of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law. It was further directed that a "Green Bench" would be constituted to deal with this case and other environmental matters.[138]

In *K.M.Chinnappa* v. *Union of India*[139] the Supreme Court reiterated the need to strike a balance between the interest of the people and the necessity to maintain the environment. It observed-

> Sustainable development is essentially a policy and strategy for continued economic and social development without detriment to the environment and natural resources on the quality of which continued activity and further development depend. Therefore, while thinking of the developmental measures the needs of the present and the ability of the future to meet its own needs and requirements have to be kept in view. While thinking of the present, the future should not be forgotten. We owe a duty to future generations and for a bright today, bleak tomorrow cannot be

[138] *Ibid* at 2727

[139] AIR 2003 SC 724

countenanced. We must learn from our experiences of past to make both the present and the future brighter. We learn from our experiences, mistakes from the past, so that they can be rectified for a better present and the future. It cannot be lost sight of that while today is yesterday's tomorrow, it is tomorrow's yesterday.[140]

In *Research Foundation for Science Technology National Resource Policy* v. *Union of India*[141], it has been observed that precautionary principle and polluter-pays principle is a part of the concept of sustainable development. In *Karnataka Industrial Areas Development Board* v. *C. Kenchappa*[142] the Supreme Court has observed that sustainable development means "a development which can be sustained by nature with or without mitigation." It has directed to maintain delicate balance between industrialization and ecology and observed-

> While development of industry is essential for the growth of economy, at the same time, the environment and the ecosystem are required to be protected. The pollution created as a consequence of development must not exceed the carrying capacity of the ecosystem.[143]

The Supreme Court has accepted that the concept of precautionary principle, polluter-pays principle and public trust doctrine as essential features of sustainable development.[144]

---

[140] *Ibid* at 737

[141] (2005) 10 SCC 510

[142] (2006) 6 SCC 371

[143] *Ibid* at 391

[144] *Ibid* at 391

In *Intellectuals Forum* v. *State of A.P.*[145] the Supreme Court has discussed the duty of the courts in relation to sustainable development as thus-

> In the light of the above discussions, it seems fit to hold that merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. What this Court should follow is a principle of sustainable development and find a balance between the developmental needs which the respondents assert, and the environmental degradation, that the appellant alleges.[146]

In *T.N. Godavarman Thirumulpad* v. *Union of India*[147] the Supreme Court has emphasized the adherence to the principle of sustainable development as-

> As a matter of preface, we may state that adherence to the principle of sustainable development is now a constitutional requirement. How much damage to the environment and ecology has got to be decided on the facts of each case. While applying the principle of sustainable development one must bear in mind that development which meets the needs of the present without compromising the ability of the future generations to meet their own needs is sustainable development. Therefore, courts are required to balance development needs with the protection of the environment and ecology.[148]

---

[145] (2006) 3 SCC 549

[146] *Ibid* at 574

[147] (2008) 2 SCC 222

[148] *Ibid* at 225

The development of the doctrine of sustainable development indeed is a welcome feature but while emphasising the need of ecological impact, a delicate balance between it and the necessity for development must be struck. Whereas it is not possible to ignore intergenerational interest, it is also not possible to ignore the dire need which the society urgently requires.[149]

3. 2. 2. Precautionary Principle-The concept of "assimilative capacity" was in operation at the international level before 1972. According to the concept of assimilative capacity, the environment, having assimilative process, absorbs itself the shock of pollution, but beyond a certain limit the pollution may cause damage to the environment requiring efforts to repair it. Hence it is satisfied with the environmental self-purifying, pollution recycling capacity and treatment of pollution. In 1982 the pendulum swung towards precautionary approach when the United Nations laid down that the activities should not be permitted to proceed when their adverse effects are not fully understood. The Rio Declaration of 1992 stressed on the precautionary approach or the "precautionary principle" which hits at the root of the process of pollution and confines its attention to preventive envirocare.[150] In *Vellore Citizens Welfare Forum* v. *Union of India*[151] the Supreme Court has accepted the concept of "precautionary principle" as part of the environmental law of the

---

[149] *Bombay Dyeing & Mfg. Co. Ltd. (3)* v. *Bombay Environmental Action Group* (2006) 3 SCC 434 at 526

[150] C.M.Jariwala, *Complex Enviro-Techno science Issues: The Judicial Direction,* 42(1) JILI (2000) pg.29

[151] AIR 1996 SC 2715

country. It has explained the concept of precautionary principle in the context of the municipal law as under-

(i) Environmental measures-by the State Government and the statutory authorities-must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The "Onus of proof" is on the actor or the developer/industrialist to show that his action is environmentally benign.[152]

The concept of precautionary principle was directly applied by the Supreme Court in *M.C.Mehta* v. *Union of India*[153] in order to protect the Taj Mahal from air pollution and pollution caused by the nearby industries. Various studies had proved that the emissions from coke/coke-based industries in the Taj Trapezium Zone (TTZ) had damaging effect on the Taj Mahal. The Supreme Court observed-

> That the atmospheric pollution in TTZ has to be eliminated at any cost. Not even 1% chance can be taken when-human life apart-the preservation of a prestigious monument like the Taj is involved.

The Supreme Court ordered the industries, identified by the Pollution Control Board as potential polluters, to changeover to the natural gas as an industrial fuel or stop functioning with the aid of coke/coal in the Taj Trapezium and relocate themselves as per the directions of the court.

---

[152] *Ibid* at 2721

[153] AIR 1997 SC 734

In *A.P.Pollution Control Board* v. *M.V.Nayadu*,[154] the Supreme Court relied on the Vellore case before pondering over the various dimensions of the precautionary principle. It observed-

> The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on scientific uncertainty. Environmental protection should not aim at protecting health, property and economic interest but also protect the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by justified concern or risk potential.[155]

The concept of burden of proof in environmental cases evolved in the *Vellore* case that the "onus of proof" is on the actor or the developer/industrialist was further elaborated and synthesized by the Supreme Court in the *Nayadu* case. The special principle of burden of proof was placed on those who wanted to change the *status quo*. This is often termed as a reversal burden of proof, because otherwise, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure that is not fair.

In *M.C.Mehta* v. *Union of India*[156] the Supreme Court reiterated the concept of precautionary principle and observed-

> Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable

---

[154] AIR 1999 SC 812

[155] *Ibid* at 820

[156] AIR 2004 SC 4016

suspicion. It is not always necessary that there should be direct evidence of harm to the environment.[157]

3. 2. 3. Polluter Pays Principle-The principle of making the polluter pay is a doctrine evolved and adopted by the courts in India in order to restrain and control the problem of pollution.

In *M.C.Mehta* v. *Union of India*[158] a petition was filed under Article 32 of the Constitution of India seeking the closure of a factory (Shriram Food and Fertilizer Corporation) engaged in manufacture of hazardous products. The Supreme Court impliedly applied the polluter pays principle and observed-

> We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule *Rylands* v. *Fletcher*.
>
> We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be correlated to the magnitude and the capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of an

[157] *Ibid* at 4045

[158] AIR 1987 SC 1086

accident in carrying on the hazardous or inherently dangerous activity by the enterprise.[159]

It was in the case of *Indian Council for Enviro-Legal Action* v. *Union of India*[160] that the Supreme Court for the first time explicitly applied the polluter pays principle. The case tells the story of a Rajasthan village whose living environment became highly polluted by the sludge that was left out even after the closure of the 'rogue' industries licensed to produce 'H' acid, which is prohibited in other countries. The court held that the polluting industries are "absolutely liable to compensate for the harm caused by them to the villagers in the affected area, to the soil and to the underground water and hence they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas".

In *Vellore Citizens Welfare Forum* v. *Union of India*[161] the Supreme Court has declared in unequivocal terms that the polluter pays principle is part of the environmental jurisprudence in India. While explaining the meaning and scope of the polluter pays principle, the Supreme Court observed-

> The polluter pays principle as interpreted by this court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of sustainable development and

[159] *Ibid* at 1099-1100

[160] AIR 1996 SC 1446

[161] AIR 1996 SC 2715

as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.[162]

The Supreme Court directed the Central Government to constitute an authority to assess the damage and it also enforced a pollution fine of Rs.10,000 each on all the polluting tanneries in the area. The fine collected was directed to be deposited along with the compensation amount recovered from the polluters, under a separate head called 'Environment Protection Fund'. The amount so collected was to be utilized for compensating the affected persons and also for restoring the damaged environment.

The principle of polluter pays was also followed in *M.C.Mehta* v. *Union of India*,[163] a case dealing with the yellowing and decaying of the Taj Mahal.

In *S.Jagannath* v. *Union of India*,[164] the Supreme Court once again applied the polluter pays principle and passed orders against the shrimp farming culture industry found guilty of polluting coastal areas.

In *M.C.Mehta* v. *Kamalnath*[165] the Supreme Court after referring the *Vellore* case reiterated, "one who pollutes the environment must pay to reverse the damage caused by his acts". It was proved in this case that Span Motels Private Limited used earth-movers and bulldozers to turn the course of the Beas river in order to save the Motel from future floods. Applying the polluter pays principle, the Supreme Court observed-

The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The

---

[162] *Ibid* at 2721

[163] AIR 1997 SC 734

[164] AIR 1997 SC 811

[165] (1997) 1 SCC 388

pollution caused by various constructions made by the Motel in the riverbed and the banks of river Beas has to be removed and reversed.[166]

In *M.C.Mehta* v. *Kamalnath*[167] the Himachal Pradesh Government was also held liable along with the Span Motels for committing breach of public trust by leasing the ecologically fragile land to the Motel.

As a result of the dynamism of the judiciary in this area, the legislature has passed The Public Liability Insurance Act, 1991 and The National Environment Tribunal Act, 1995.

3. 2. 4. Inter Generational Equity- An important element of Sustainable Development is the principle of Intergenerational Equity, which gives emphasis to the need of preservation of the environment for the benefit of present as well as future generation. It envisages that each generation has to use the natural resources in a sustainable way so that the coming generations' get their due share and the existing civilization further continues happily its onward journey.

In *Rural Litigation and Entitlement Kendra* v. *State of Uttar Pradesh*[168] the Supreme Court, while dealing with indiscriminate tapping of natural resources observed-

It has always to be remembered that these are permanent assets of mankind and are not intended to be exhausted in one generation.

The doctrine was again reiterated in *State of H.P.* v. *Ganesh Wood Products*[169] and *S. Jagannath* v. *Union of India.*[170] The Supreme Court for

---

[166] *Ibid* at 415

[167] (2002) 3 SCC 653

[168] AIR 1987 SC 359

[169] (1995) 6 SCC 363

the first time discussed the principle of intergenerational equity in *A.P.Pollution Control Board* v. *M.V.Nayadu*,[171] by referring to the Stockholm Declaration, 1972 but did not explain the nature, scope and meaning of the principle. The principle was also followed in *Consumer Education and Research Society* v. *Union of India*.[172]

In *K.M.Chinnappa v. Union of India*[173] the Supreme Court while applying the principle of intergenerational equity held-

> Sustainable development is essentially a policy and strategy for continued economic and social development without detriment to the environment and natural resources on the quality of which continued activity and further development depend. Therefore, while thinking of the development measures the needs of the present and the ability of the future to meet its own needs and requirement have to be kept in view. While thinking of the present, the future should not be forgotten. We owe a duty to future generations and for a bright today, bleak tomorrow cannot be countenanced. We must learn from our experiences, mistakes from past, so that they can be rectified for a better present and the future. It cannot be lost sight of that while today is yesterday's tomorrow, it is tomorrow's yesterday.[174]

---

[170] AIR 1997 SC 811

[171] AIR 1999 SC 812. Referred in *Intellectuals Forum* v. *State of A.P.* (2006) 3 SCC 549 at 575

[172] (2002) 2 SCC 599

[173] AIR 2003 SC 724

[174] *Ibid* at 737

In *T.N. Godavarman Thirumulpad* v. *Union of India*[175] the Supreme Court has emphasized the adherence to the principle of sustainable development and intergenerational equity as-

> As a matter of preface, we may state that adherence to the principle of sustainable development is now a constitutional requirement. How much damage to the environment and ecology has got to be decided on the facts of each case. While applying the principle of sustainable development one must bear in mind that development which meets the needs of the present without compromising the ability of the future generations to meet their own needs is sustainable development. Therefore, courts are required to balance development needs with the protection of the environment and ecology. It is the duty of the State under our Constitution to devise and implement a coherent and coordinated programme to meet its obligation of sustainable development based on inter-generational equity.[176]

3. 2. 5. Public Trust Doctrine- The doctrine of Public Trust was for the first time explained in *M.C.Mehta* v. *Kamal Nath.*[177] In this case there was an attempt to divert the flow of Beas river for augmenting the facilities of Span Motel. Tracing the origin of the Doctrine of Public Trust, the Supreme Court observed-

> The ancient Roman Empire developed a legal theory known as the "Doctrine of Public Trust." It was founded on the ideas that certain common properties such as rivers, seashores, forests and the air

---

[175] (2008) 2 SCC 222

[176] *Ibid* at 225

[177] (1997) 1 SCC 388

were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary concerns about "the environment" bear a very close conceptual relationship to this legal doctrine. Under the Roman law these resources were either owned by no one (*res nullious*) or by every one in common (*res communious*). Under the English law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public.[178]

The Supreme Court further laid down that "the Indian legal system which is based on English Common Law includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership".[179]

The Supreme Court observed that this case reflects the class struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under pressures of the changing needs of an increasing complex society, find it necessary to encroach to some extent open lands heretofore considered inviolate to change. In the absence of any legislation, the executive acting under the

[178] *Ibid* at 407

[179] *Ibid* at 413

doctrine of public trust cannot abdicate the natural resources and convert then into private ownership or for commercial use.[180]

The Supreme Court held that the Himachal Pradesh government committed parent breach of public trust by leasing the ecologically fragile land to the motel management.[181] The Supreme Court reiterated the principle that one who pollutes the environment must pay to reverse the damage caused by his acts. The court directed that the motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the motel in the riverbed and the banks of the river Beas has to be removed and reversed. It was also directed that the motel shall neither discharge untreated effluents into the river nor encroach/cover/utilize any part of the river basin.

M.I.Builders Pvt. Ltd. v. *Radhey Shyam Sahu*[182] was a case which was filed challenging the agreement between the Municipal Corporation of Lucknow and a private builder through which a park of historical importance that was located in a congested commercial-cum-residential area was handed over to the builder for the construction of an underground air-conditioned shopping complex. The Supreme Court observed-

> The park is of historical importance. Because of the construction of underground shopping complex and parking it may still have the appearance of a park with grass grown and path laid but it has lost the ingredients of a park inasmuch as no plantation now can be grown. Trees cannot be planted and rather while making

[180] *Ibid* at 413

[181] *Ibid* at 413

[182] AIR 1999 SC 2468. Followed in *Intellectuals Forum* v. *State of A.P.* (2006) 3 SCC 549 at 574

underground construction many trees have been cut. Now it is more like a terrace park. Qualitatively it may still be a park but it is certainly a park of different nature. By construction of underground shopping complex irreversible changes have been made.[183]

The Supreme Court went on to say that the Mahapalika is the trustee for the proper management of the park. When true nature of the park, as it existed, is destroyed it would be violative of the doctrine of public trust as expounded.[184]

In *K.M.Chinnappa* v. *Union of India*,[185] a petition was filed challenging the renewal of mining lease granted to Kudremukh iron ore company in the Kudremukh National Park. The Supreme Court held that-

> The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for public good and in public interest to encroach upon the said resources.[186]

3. 2. 6. Absolute Liability-The principle of Strict Liability in *Rylands* v. *Fletcher*[187] holds a person strictly liable when he brings or accumulates on his land something likely to cause harm if it escapes, and damage arises as a natural consequence of its escape. However, the rule of strict liability is subject to a number of exceptions like an act of God (natural disasters such as an earthquake or flood); the act of third party (e.g. sabotage); the

---

[183] *Ibid* at 2497

[184] *Ibid* at 2498

[185] AIR 2003 SC 724

[186] *Ibid* at 736

[187] (1886) LR 3 HL 330

plaintiff's own fault; the plaintiff's own consent and statutory authority. As a result of the exceptions, the operation of the principle is considerably reduced and the offender can escape the law.

With the expansion of chemical-based industries in India, increasing number of enterprises store and use hazardous substances. These activities are not banned because they have great social utility. Traditionally, the principle was considered adequate to regulate the hazardous and inherently dangerous enterprises if any hazardous substance escapes but after the Bhopal gas leak tragedy in 1984, this age old principle was replaced by the absolute liability principle.

The genesis of the growth of the absolute liability principle was in *M.C.Mehta* v. *Union of India*[188] also known as 'oleum gas leak case'. A writ petition under Article 32 of the Constitution of India by way of public interest litigation seeking closure of Shriram Foods and Fertilizers Industries, in the city of Delhi, belonging to Delhi Cloth Mills Ltd. was filed. While the case was pending, oleum gas leaked from the factory killing one advocate and injuring several others. The Supreme Court was quite sure that the exceptions evolved in England to the strict liability, formulated at a time when developments of science and technology had not taken place, are not applicable at present in a fast developing country like India. The Supreme Court observed-

> We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of

[188] AIR 1987 SC 1086

the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost of carrying on the hazardous or inherently dangerous activity.

This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warnings against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous and inherently dangerous activity resulting, for example, the escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule in *Rylands* v. *Fletcher*.

We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be

correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.[189]

The viability of the absolute liability was examined in *Indian Council for Enviro-Legal Action* v. *Union of India*,[190] a case relating to the pollution by some industries licensed to produce 'H' acid, which is prohibited in other countries. While supporting and reiterating the principle of absolute liability as evolved in the 'oleum gas leak case' the Supreme Court observed-

> According to this rule, once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. This rule is premised upon the very nature of the activity carried on.[191]

The absolute liability principle as laid by the Supreme Court of India has, now to some extent, attained the status of a statutory liability after the passing of The Public Liability Insurance Act, 1991 and The National Environment Tribunal Act, 1995.

---

[189] *Ibid* at 1099

[190] AIR 1996 SC 1446

[191] *Ibid* at 1465

3. 2. 7. THE SOCIAL TRANSFORMATION ACHIEVED

The formulation and application of the doctrines in the judicial process for environmental protection are remarkable milestones in the path of environmental law in India. Undue influence of political bigwigs who make environmentally malign designs is blocked. Illegal contracts with adverse impact on ecology have been invalidated. An indigenous jurisprudence unaffected by the Anglo-Saxon theory of liability was developed to compensate victims of environmental assaults.

Apart from evolving the various doctrines and principles[192] as well as laying down the right to life in a healthy environment as a constitutional and basic human right, the judiciary has also tried to protect, preserve and improve the environment by various directions and orders in tune with the modern day needs.

In *L.K.Koolwal* v. *State of Rajasthan*[193] the Rajasthan High Court decided that the Jaipur municipality had to keep the streets and roads clean. In *Murli S. Deora* v. *Union of India*[194] the Supreme Court prohibited smoking in public places(namely Auditoriums, Hospital buildings, Health institutions, Educational institutions, Libraries, Court buildings, Public offices and Public conveyances, including railways) as it infringed the right to life of the passive smokers. In *Burrabazar Fire Works Dealers Association* v. *The Commissioner of Police, Calcutta*[195]

---

[192] The principle of sustainable development, precautionary principle, polluter pays principle, inter generational equity, public trust doctrine and absolute liability are the sole contribution of the judiciary in the field of protecting and preserving the environment.

[193] AIR 1988 Raj 2

[194] AIR 2002 SC 40

[195] 1997 (2) CLJ 468

the Division Bench of the Calcutta High Court restricted the use of microphones and fireworks and guaranteed the citizen's right to leisure, right to sleep, right to speak, right to read, right to worship and right to think. In *T.N. Godavarman Thirumulpad* cases[196] , the judiciary tried to put a check on felling of trees in the tropical wet evergreen forests and the movement of the cut trees and timber. In *Samatha* v. *State of Andhra Pradesh,*[197] the Supreme Court went into the entire gamut of the rights of tribal groups living in the scheduled areas and dealt with the question on how far the state could attempt to restrict their rights by leasing out the lands for mining purposes. In *M.C.Mehta* v. *Union of India*[198] the Supreme Court directed the Central Government to convert the diesel vehicles plying in the metropolitan city of Delhi to convert to CNG (Compressed Natural Gas) vehicles in order to reduce automobile pollution in Delhi.

The Supreme Court stressed the need for establishment of Environment Courts to deal with all matters, civil and criminal, relating to the environment.[199] A draft Environment Courts Bill was prepared in the year 1990 but the said Bill was not introduced in the Parliament.[200]

The directives of the Supreme Court went to the extent of spreading environmental awareness and literacy, as well as launching

---

[196] *T.N.Godavarman Thirumulpad* v. *Union of India* AIR 1997 SC 1228;
T.N.Godavarman Thirumulpad v. *Union of India* AIR 1997 SC 1233;
T.N.Godavarman Thirumulpad v. *Union of India* AIR 1998 SC 769

[197] AIR 1997 SC 3297

[198] AIR 2002 SC 1696

[199] *M.C. Mehta* v. *Union of India* AIR 1987 SC 965; *Indian Council for Enviro-legal Action* v. *Union of India* AIR 1996 SC 1446

[200] The Law Commission of India had also submitted in its 186th Report dated 23rd September 2003 a proposal for setting up of Environment Courts.

environmental education. In *M.C. Mehta* v. *Union of India*[201] the Supreme Court stressed the need for introducing such schemes in the following words-

> In order for the human conduct to be accordance with the prescription of law it is necessary that there should be appropriate awareness about what the law requires. This should be possible only when steps are taken in adequate measures to make people aware of the indispensible necessity of their conduct being oriented in accordance with the requirements of law.[202]

The Supreme Court had directed the All India Radio and Doordarshan to focus their programmes on various aspects of the environment. It further directed every State Government and the Education Board to take steps for environment education.[203] The Supreme Court also scrutinized the need for spreading environmental awareness through education up to the matriculation level and directed the NCERT to prepare and submit a module syllabus for different grades.[204]

The Courts have interfered in cases where no proper assessment of the project was made before a license is given, permission granted or project approved. It was a remarkable situation, especially when the

---

[201] AIR 1992 SC 382

[202] *Ibid* at 384

[203] *Ibid* at 385. As per the directions of the Supreme Court, the Bar Council decided to introduce 'Environmental Law' as a compulsory paper for legal education at the graduate level and requested the Registrars of all Universities imparting legal education, Deans of all Faculties of Law of all the Universities and the Principals of all the Law Colleges to comply with the same.

[204] *M.C. Mehta* v. *Union of India* AIR 2004 SC 1193 at 1194

written law did not make it compulsory to have an Environment Impact Assessment (EIA) before initiating the action.[205]

3. 3. ELECTION

The principle of Democratic Republic embedded in the Preamble is a basic feature of the Indian Constitution. Such democracy can only survive if the elections are free and fair. According to Douglas W. Rae, the election laws "are of special importance for every group and individual in the society, because they help to device those who write others laws".[206]

While Part XV (Article 324 to 329) of the Indian Constitution deals with elections, the judiciary has often tried to fill the gaps in the law relating to election. Article 326 makes the right to vote a constitutional right which has also been accepted by the courts. In *N.P.Ponnuswami* v. *Returning Officer, Namakkal*[207] the Supreme Court has declared-

> The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subjected to the limitations imposed by it.[208]

---

[205] The application of Environment Impact Assessment was judicially considered in *Goa Foundation* v. *Konkan Railway Corporation* AIR 1992 Bom 471; *Centre for Social Justice* v. *Union of India* AIR 2001 Guj 71; *Narmada Bachao Andolan* v. *Union of India* AIR 2000 SC 3751; *Tehri Bandh Virodh Sangarsh Samiti* v. *State of Uttar Pradesh* (1992) 1 SCC 44 (Supp); *N.D. Jayal* v. *Union of India* AIR 2004 SC (Supp) (1) 867; *M.C. Mehta* v. *Union of India* AIR 2004 SC 4016

[206] Quoted in Justice Pana Chand Jain, *Judges Do Make Law*, AIR 2000 Journal 218

[207] AIR 1952 SC 64

[208] *Ibid* at 71

In *Jamuna Prasad Mukhariya* v. *Lachhi Ram*[209] the Supreme Court has observed-

> The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute.[210]

Again, in *Jyoti Basu* v. *Debi Ghosal*,[211] the Supreme Court has observed-

> A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a Fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation.[212]

A similar view has been reiterated by the Supreme Court in *P. Nalla Thampy* v. *B. L. Shankar*[213] wherein the court observed-

> Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and, therefore, subject to statutory limitation.[214]

While upholding section 62 (5) of the Representation of the People Act, 1951 which debars a person from voting at an election if he is confined in a prison under a sentence of imprisonment, or is in the lawful

---

[209] AIR 1954 SC 686

[210] *Ibid* at 688

[211] AIR 1982 SC 983

[212] *Ibid* at 986

[213] AIR 1984 SC 135

[214] *Ibid* at 138

police custody, but not if he is in preventive detention, the Supreme Court in *Anukul Chandra Pradhan* v. *Union of India*[215] has held-

> The right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute.[216]

After the amendment in 1966 in the Representation of the People Act, 1951 there exists a two-tier system to decide an election dispute. Election Tribunals are no longer appointed now. The election petitions are heard directly by the High Court from which an appeal may be taken to the Supreme Court under Articles 132, 133 and 136.

In *Keshavananda Bharati* v. *State of Kerala*,[217] the court had laid down that democracy based on 'free and fair election' is a basic feature of the Indian Constitution.

3. 3. 1. Declaration of Assets and Criminal Record- The High Courts and the Supreme Court have not interfered with the process of election as a matter of judicial policy, a matter of self-imposed discipline, and not a matter of judicial powers. However, in *Union of India* v. *Association for Democratic Reforms*[218] the Supreme Court while entertaining an appeal on the decision of the Delhi High Court framed a question as to whether a voter has a right to get the relevant information, such as assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA, observed-

---

[215] AIR 1997 SC 2814

[216] *Ibid* at 2817

[217] (1973) 4 SCC 225

[218] (2002) 5 SCC 294

> The people of the country have a right to know every public act, everything that is done in a public way by the public functionaries. MPs or MLAs are undoubtedly public functionaries. Public education is essential for functioning of the process of popular government and to assist the discovery of truth and strengthening the capacity of an individual in participating in the decision-making process. The decision-making process of a voter would include his right to know about public functionaries who are required to be elected by him.[219]

While including the citizen's right to know about the MPs or MLAs collection of wealth after being elected under the freedom of speech and expression, the court further held-

> Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, **voters speaks out or expresses by casting vote**. For this purpose, information about the candidate to be selected is a must. Voter's (little man-citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. **The little man may think over before making his choice of electing law-breakers as law-makers.**[220]

The court also said that it is not possible for the Supreme Court to give any directions for amending the Act or the statutory Rules as such is the duty of the Parliament. However, it observed that it is equally settled that in case when the Act or Rules are silent on a particular subject and

---

[219] *Ibid* at 314

[220] *Ibid* at 322

the authority implementing the same has constitutional or statutory power to implement it, the court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.[221] The Supreme Court used its powers by virtue of Article 32,141 and 142 and directed the Election Commission to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or State Legislature as a necessary part of his nomination paper furnishing therein information on the following aspects in relation to his/her candidature:

(1) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past-if any, whether he is punished with imprisonment or fine.

(2) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law. If so, the details thereof.

(3) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependants.

(4) Liabilities, if any, particularly whether there are any overdues of any public financial institution or government dues.

(5) The educational qualifications of the candidate.[222]

---

[221] *Ibid* at 309

[222] *Ibid* at 322

In order to invalidate the directions of the Supreme Court in *Union of India* v. *Association for Democratic Reforms* ,[223] the Representation of the People (Amendment) Ordinance, 2002 (4 of 2002) was promulgated on 24-8-2002. The Ordinance was later replaced by the Representation of the People (Third Amendment) Act, 2002 (72 of 2002) which received the assent of the President on 28-12-2002. Sections 33-A and 33-B as inserted by the said Amending Act read as under-

"33-A. *Right to information*-(1) A candidate shall apart from any information which he is required to furnish under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of Section 33, also furnish the information as to whether-

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section(2), or covered in sub-section (3) of Section 8 and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the Returning Officer the nomination paper under sub-section (1) of Section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The Returning Officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit,

[223] (2002) 5 SCC 294

delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

33-B. *Candidate to furnish information only under the Act and the rules*- Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instrument issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder."

A bare comparison of the statutory provisions with the directions issued by the Supreme Court in *Union of India* v. *Association for Democratic Reforms*[224] reveals that only some of the aspects and not all of the right to information raised by the Court are incorporated by the Legislature. In fact, the remaining aspects relating to acquittal or discharge in criminal offences, or amassing of assets and incurring liabilities, or educational attainments, are clearly excluded, for it is specifically stated that no candidate shall be liable to disclose or furnish any such information which is not required to be disclosed or furnished under the Act or the rules made thereunder despite the directions issued by the Court on the contrary. While the Representation of the People (Third Amendment) Act, 2002 takes a small step towards decriminalisation of politics, the newly added Section 33-B seeks to deny to the people the right to be informed about the credentials of the candidate for whom they are prompted to vote.

[224] (2002) 5 SCC 294

The validity of Section 33-B was challenged in *People's Union for Civil Liberties* v. *Union of India*[225] on the ground that it was arbitrary, unjustifiable and void being violative of the fundamental right of the citizens/voters to know the antecedents of the candidates. The Supreme Court while holding Section 33-B of the Representation of the People Act, 1951 invalid, as it did not pass the test of constitutionality, observed-

> The voters' right to know the antecedents of the candidates is based on interpretation of Article 19(1)(a) which provides that all citizens of this country would have fundamental right to "freedom of speech and expression" and this phrase is construed to include fundamental right to know relevant antecedents of the candidate contesting the elections.[226]

The Supreme Court laid down that democratic republic is part of the basic structure of the constitution for which free and fair periodical elections based on adult franchise is a must.[227] In order to have unpolluted healthy democracy, citizens-voters should be well informed and observed-

> The foundation of a healthy democracy is to have well-informed citizens-voters. The reason to have right of information with regard to the antecedents of the candidate is that the voter can judge and decide in whose favour he should cast his vote. It is the voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his

---

[225] (2003) 4 SCC 399

[226] *Ibid* at 424

[227] *Ibid* at 424

19(1)(a) of the Indian Constitution, the judiciary has tried to bring reform in the society by eradicating criminalisation in politics.

3. 3. 2. Office of Profit-Under Article 102(1)(a) of the Constitution a person is disqualified for being a member of either House of Parliament "if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder". The restriction under Article 102(1)(a) of the Constitution which disqualifies a person from the membership of Parliament if he is obliged to the Government for an office which carries profit or benefit, compromising his independence has generated much debate and confusion, especially since the Constitution or the Representation of the People Act, 1951 or the Parliament (Prevention of Disqualification) Act, 1959 does not define the term 'office of profit'.

As early as in 1955, the Bhargava Committee[230] had stated that the emoluments attached to offices may be in the nature of pay, salary, honorarium, fees, daily allowance and travelling allowance. Where salary is attached to an office it immediately and indisputably makes the office an office of profit.

In *Shivamurthy Swami Inamdar* v. *Agadi Sanganna Andanappa*[231] Court summarised the tests which may be applied to determine whether an "office" is an office of profit under the State Government as thus:

(1) Whether the Government makes the appointment;

(2) Whether the Government has the right to remove or dismiss the holder;

---

[230] *Committee on Offices of Profit (Bhargava Committee), 1955*, Part I and II quoted in Shruti Bedi, *Amendments in "Office of Profit"-A Dilution of the Spirit of the Indian Constitution*, 48:3 JILI (2006) Page 409

[231] (1971) 3 SCC 870

(3) Whether the Government pays the remuneration;

(4) What are the functions of the holder; and

(5) Does the Government exercise any control over the performance of those functions?

In *Satrucharla C. Raju* v. *Vyricheria P.K. Dev*[232] the Supreme Court has observed-

> The true test of determination of whether a person holds an office of profit under the Government depends upon the degree of control the Government has over it, the extent of control exercised by very other bodies or committees, and its composition, the degree of its dependence on the Government for its financial needs and the functional aspect, namely, whether the body is discharging any important Governmental function or just some function which is merely optional from the point of view of the Government.[233]

The Supreme Court further observed-

> The payment from out of the Government revenues is another test. But payment from a source other than the Government revenue is not always a decisive factor.[234]

The Supreme Court in *Shibu Soren* v. *Dayanand Sahay*[235] has elaborately dwelt upon the concept of 'office of profit' as follows-

> In common parlance the expression "profit" connotes an idea of some pecuniary gain. If there is really some gain, its label- "honorarium", "remuneration", "salary"-is not material. Nor the quantum of the amount may always be material to determine the

---

[232] (1992) 4 SCC 404

[233] *Ibid* at 414

[234] *Ibid* at 427

[235] (2001) 7 SCC 425

issue. Indeed "honorarium" is a concept different than salary or remuneration and its payment cannot constitute an "office of profit" unless there is some "pecuniary gain" for the recipient. It is the substance and not the form which matters and even the quantum or amount of "pecuniary gain" is not relevant-what needs to be found out is whether the amount of money receivable by the person concerned in connection with the office he holds, gives to him some "pecuniary gain", other than as "compensation" to defray his out-of-pocket expenses, which may have the possibility to bring that person under the influence of the executive, which is conferring that benefit on him.[236]

The Supreme Court further observed-

The receipt of honorarium at the rate of Rs 1750 per month, besides daily allowances, rent-free accommodation and a chauffer-driven car at the State expense, to the appellant was a benefit capable of bringing about a conflict between the duty and interest of the appellant as a Member of Parliament-the precise vice to which Article 102(1)(a) is attracted.[237]

The question of Government's control over the post which the incumbent was holding at the time of filing of nomination in order to explain the meaning of 'office of profit' has been followed in *Rajashekaran* v. *Vatal Nagaraj*[238]

The meaning of 'office of profit' has been elaborately dealt with by a three- Judge Bench of the Supreme Court in *Jaya Bachchan* v. *Union of*

---

[236] *Ibid* at 440

[237] *Ibid* at 449

[238] (2002) 2 SCC 704

India.[239] The petitioner filed an application under Article 32 of the Constitution challenging the order of disqualification as a member of the Rajya Sabha as she was holding an office of profit by virtue of being the Chairperson of the U.P. Film Development Council. Dismissing her application, the Court observed-

> An office of profit is an office which is capable of yielding a profit or pecuniary gain. Holding an office under the Central or State Government, to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is "holding an office of profit". The question whether a person holds an office of profit is required to be interpreted in a realistic manner. Nature of the payment must be considered as a matter of substance rather than of form. Nomenclature is not important. In fact, mere use of the word "honorarium" cannot take the payment out of the purview of profit, if there is pecuniary gain for the recipient. Payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffer driven car at State expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit. For deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the "pecuniary gain" is "receivable" in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not. If the office carries with it, or entitles the holder to, any pecuniary gain other than reimbursement of out of pocket/actual

[239] (2006) 5 SCC 266

expenses, then the office will be an office of profit for the purpose of Article 102(1)(a).[240]

The Supreme Court further observed-

It is well settled that where the office carries with it certain emoluments or the order of appointment states that the person appointed is entitled to certain emoluments, then it will be an office of profit, even if the holder of the office chooses not to receive/draw such emoluments. What is relevant is whether pecuniary gain is "receivable" in regard to the office and not whether pecuniary gain is, in fact, received or received negligibly.[241]

However, by exempting some of the office under Section 3 of the Parliament (Prevention of Disqualification) Act, 1959 by passing of the Parliament (Prevention of Disqualification) Amendment Act, 2006, the Parliament has nullified the effect of the Supreme Court's judgment on the office of profit. The amendment passed by the government has diluted the spirit of the Indian Constitution. The Parliament (Prevention of Disqualification) Act, 1959 needed no amendment and the list of exempted offices needed no expansion. Instead of playing with the Parliament (Prevention of Disqualification) Act, 1959 the legislatures could have defined the meaning of 'office of profit' after careful scrutiny and incorporation of the various judgments of the High Courts and Supreme Court in this regard.

In India, as it is, the line of separation between the executive and the legislature is very thin. This is because the executive emerges out of and is a part of the legislature. In case, the Members of Parliament are

---

[240] *Ibid* at 269-270

[241] *Ibid* at 271

allowed to hold various offices of profit under the government, the government would lose the already miniscule responsibility and accountability it owes to the legislature. It is difficult to carry on opposing your employer who has bestowed you with benefits. In such a case, the line of separation totally vanishes. The theory of separation of powers loses its essence and parliamentary control ceases to have effect.[242]

3. 3. 3. THE SOCIAL TRANSFORMATION ACHIEVED

The meaning of democracy as enshrined in the Preamble of the Constitution can only survive if the elections are free and fair as it reflects the true popular will. The Supreme Court has laid down that democracy based on free and fair election is a basic feature of the Indian Constitution.[243] In furtherance of such, the judiciary has linked the right to vote under Article 326 with the fundamental right of speech and expression under Article 19(1)(a).[244] The right of a voter to know the antecedents of the election candidates was alien to the citizen of India. The Supreme Court by laying down this novel feature has introduced reforms in the election process in India and has provided a new dynamism as well as a new protective dimension to this right.

---

[242] Shruti Bedi, *Amendment in "Office of Profit"-A Dilution of the Spirit of the Indian Constitution*, 48:3 JILI (2006) Page 409

[243] *Keshavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225

[244] *Union of India* v. *Association for Democratic Reforms* (2002) 5 SCC 294. In order to invalidate the judgment, an amendment in 2002 was made in The Representation of the People Act, 1951 but the same was declared arbitrary and void in *People's Union for Civil Liberties* v. *Union of India* (2003) 4 SCC 399

The expression of the term of 'office of profit' under Article 102 has been given a very wide meaning by the judiciary.[245] This has been done to introduce fairness as well as remove the lurking suspicion of biasness in the minds of the general public. However, the legislature has diluted the spirit of the judgments by way of an amendment[246] so that the legislatures can enjoy the dual status without any hindrance. The judiciary has tried to bring fairness in the system by way of its dynamism but such has been retarded by the legislature.

3. 4. WOMEN AND CHILDREN

Man and woman are two pillars of the social structure. Their roles, duties and rights are complementary and supplementary towards each other. It is an established fact that woman represents the very kernel of the human society around which social change takes place. The last decade of the last century has seen a growing recognition of women's rights as human rights and as an integral and indivisible part of universal human rights. In India, women have been awarded the fundamental right of 'gender equality' and 'right to life and liberty' in order to ensure dignified and equal status to that of a man under the Constitution of India.

Inspite of such protection, the men-oriented conspiracy has prevented the significant contributions of women from receiving due contribution and has resulted in the violation of these fundamental rights and other allied rights. The biological weakness of a woman particularly

---

[245] *Shivamurthy Swami Inamdar* v. *Agadi Sanganna Andanappa* (1971) 3 SCC 870; *Satrucharla C. Raju* v. *Vyricheria P.K. Dev* (1992) 4 SCC 404; *Shibu Soren* v. *Dayanand Sahay* (2001) 7 SCC 425; *Jaya Bachchan* v. *Union of India* (2006) 5 SCC 266

[246] Amendment in 2006 to The Parliament (Prevention of Disqualification) Act, 1959

makes her an easy vulnerable victim of tyranny at the hands of man, in addition to socio-economic and educational factors. It is the judiciary which steps into the arena and devises new laws and methods in order to emancipate and liberate women from the shackles of ancient law, traditions and customs whereby the new claims, interests and needs of the women are promoted and readjusted through law with men folk on a footing of equality, dignity and non-exploitation.

3. 4. 1. Violence against Women-Women's issues has increasingly been brought before the judiciary with the growth of women's movement and investigative journalism exposing harassment for dowry, rape, sexual harassment and discrimination.

In *Delhi Domestic Working Women's Forum* v. *Union of India*[247] a public interest litigation was filed to espouse the pathetic plight of four domestic servants who were subjected to indecent sexual assault by seven army personnel while traveling in a train from Ranchi to Delhi. The Supreme Court with a view to assisting rape victims, laid the following broad parameters-

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

[247] (1995) 1 SCC 14

complainant's interest in the police station represents her till the end of the case.

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

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

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

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

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

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

(8) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to

pregnancy and the expenses of child birth if this occurred as a result of the rape.[248]

While following the principles laid down in *Delhi Domestic Working Women's Forum* v. *Union of India*[249] the Supreme Court in *Bodhisattwa Gautam* v. *Subhra Chakraborty*[250] has awarded interim compensation of Rs.1000 every month to the victim of rape, during the pendency of the criminal case against the accused on the basis of a complaint filed by the victim of rape. The Court has observed-

> Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is therefore the most hated crime. It is a crime against basic human rights and is violation of the victim's most cherished of the Fundamental Rights, namely the Right to Life contained in Article 21.[251]

In *Chairman, Railway Board* v. *Chandrima Das*[252] a Bangladeshi woman was raped by some railway employees at Howrah Railway Station, West Bengal. The Supreme Court while agreeing with the judgment of Calcutta High Court of awarding compensation of Rs 10 lakhs to the victim and holding that rape violates the right of women, observed-

---

[248] *Ibid* at 19-20

[249] (1995) 1 SCC 14

[250] (1996) 1 SCC 490

[251] *Ibid* at 500

[252] (2000) 2 SCC 465

> Life is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word "life" cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a 'person' who may not be a citizen of the country.[253]

The question of sexual harassment has received little systematic study in our country despite its multiple adverse effects both on women and work. In addition to the feeling of fear, anxiety, intimidation and helplessness that harassment produces in working women, it also creates a significant barrier to women's equal opportunity by discouraging them from remaining in their job or keeping them away from advancing in their service career.[254] In the absence of specific legislation and guidelines, the judiciary in India specifically depend on two sections of the Indian Penal Code, namely Section 354 (Assault or criminal force to woman with intent to outrage her modesty) and Section 509 (Word, gesture or act intended to insult the modesty of a woman) in order to protect woman in general from certain categories of sexual misconducts that seem offensive or disgustive in nature. Moreover, these offences are compoundable in nature and in majority of the cases, the complainant is forced to withdraw her complain due to the surrounding circumstances and pressure.

In order to supplement the absence of specific legislation in this field and to introduce reforms in the society, the Supreme Court laid

---

[253] *Ibid* at 483

[254] Dr. Devinder Singh, *Human Rights Women and Law*, page 163 (5th Edition-2005)

certain guidelines in *Vishaka* v. *State of Rajasthan.*[255] The writ petition was brought as a class action by certain social activists and NGOs with the aim of focussing attention towards the societal aberration, and assisting in finding suitable methods for realisation of the true concept of 'gender equality'; and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation. The immediate cause for the filing of the writ petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan.

The Supreme Court observed that each incident of sexual harassment of woman at workplace results in violation of the fundamental rights of 'gender equality' and the 'right to life and liberty' under Articles 14, 15 and 21 of the Indian Constitution. It further observed-

> The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse.[256]

In exercise of its powers under Article 32 for the enforcement of fundamental rights and Article 141, the Supreme Court made it necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women as follows:

1. Duty of the Employer or other responsible persons in work places and other institutions:

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of

---

[255] AIR 1997 SC 3011

[256] *Ibid* at 3015

acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. Definition:

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

a) physical contact and advances;

b) a demand or request for sexual favours;

c) sexually coloured remarks;

d) showing pornography;

e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps:

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action:

Where such conduct amounts to mis-conduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counselor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them.

The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative:

Employees should be allowed to raise issues of sexual harassment at workers meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness:

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in suitable manner.

10. Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

The Supreme Court also made the above guidelines binding and enforceable until suitable legislation was enacted to occupy the field.

In *Apparel Export Promotion Council* v. *A.K.Chopra*[257] the Supreme Court while upholding the dismissal of the respondent from the service, who was found guilty of sexual harassment of a subordinate female employee at the work place, applied the guidelines as laid down in *Vishaka* v. *State of Rajasthan*[258] and observed regarding the nature of approach that courts should take while dealing with cases of sexual harassment at the place of work of female employees as-

> Sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to

[257] AIR 1999 SC 625

[258] AIR 1997 SC 3011

or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. Any action or gesture, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment.[259]

The Supreme Court further observed-

There is no gainsaying that each incident of sexual harassment at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty-the two most precious Fundamental Rights guaranteed by the Constitution of India.....In our opinion, the contents of the Fundamental Rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those Fundamental Rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate.[260]

The judiciary has tried to create new norms to conserve the social philosophy and safeguard the economic values within the parameters of the Constitution. The judiciary in exercise of its normative primacy and innovative approach tried to propound and expound new legislation for

---

[259] *Apparel Export Promotion Council* v. *A.K. Chopra* AIR 1999 SC 625 at 633

[260] *Ibid* at 634

the working women who have been subjected to various forms of exploitation, harassment and torture both in physical and sexual capacities in all working places.

3. 4. 2. Maintenance of a Muslim Woman-The controversy as to the manner of the 'maintenance' of a divorced Muslim woman was clarified in *Mohd. Ahmed Khan* v. *Shah Bano Begum*[261] wherein the Court observed-

> Since the Muslim Personal Law, which limits the husband's liability to provide maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by section 125, it would be wrong to hold that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance, beyond the period of iddat, to his divorced wife who is unable to maintain herself. The argument of the appellant that, according to the Muslim Personal Law, his liability to provide for the maintenance of his divorced wife is limited to the period of iddat, despite the fact that she is unable to maintain herself, has therefore to be rejected. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of section 125 and those of the Muslim husband's obligation to

[261] AIR 1985 SC 945

provide maintenance for a divorced wife who is unable to maintain herself.[262]

The decision of the Supreme Court in *Shah Bano's* case generated a good deal of sound and fury amongst the Muslim community in India, who agitated strongly against it. As a result, the Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed wherein under Section 3(1)(a) a divorced Muslim woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband.

The judiciary interpreted Section 3 and 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 in order to save the divorced Muslim woman. In *Arab Ahemadhia Abdulla* v. *Arab Bail Mohmuna Saiyadbhai*[263] the Gujarat High Court observed-

> A divorced Muslim woman is entitled to maintenance after contemplating her future needs and the maintenance is not limited only up to *iddat* period.....
>
> The phrase used by the Parliament in section 3(1)(a) i.e. "reasonable and fair provision and maintenance to be made and to be paid to her", it seems that the Parliament intended to see that the divorced woman gets sufficient means of livelihood after the divorce and she does not become destitute or is not thrown on the streets without a roof over her head and without any means of sustaining herself and her children.[264]

While upholding the Muslim Women (Protection of Rights on Divorce) Act, 1986 and the right of a divorced Muslim woman to receive

---

[262] *Ibid* at 950-951

[263] AIR 1988 Guj 141

[264] *Ibid* at 149

maintenance even after the period of iddat, a five-Judge Bench of the Supreme Court in *Danial Latifi* v. *Union of India*[265] has concluded-

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

(4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.[266]

The payment of maintenance to a divorced Muslim woman even after the period of iddat was followed and applied in *Sabra Shamim* v. *Maqsood Ansari*[267] and *Iqbal Bano* v. *State of U.P.*[268]

---

[265] (2001) 7 SCC 740

[266] *Ibid* at 765

[267] (2004) 9 SCC 616

[268] (2007) 6 SCC 785

By giving a liberal interpretation of the Muslim Women (Protection of Rights on Divorce) Act, 1986 the judiciary has given a blow to the dreams of those Muslim husband's who had thought of depriving their divorced wife from their right of maintenance. The interpretation and extension of providing maintenance to a divorced Muslim woman even after the period of iddat is in tune with the needs of the present society and will reduce the whimsical pronouncement of divorce by the Muslim husband's.

3. 4. 3. Prostitution and Rehabilitation-From the behavioural point of view, prostitution can be defined as the act or practice of a person, female or male, who for some kind of reward-monetary or otherwise-engages in sexual relations with a number of persons, who may be of the opposite or same sex. Unless otherwise stated, in reality prostitution implies women providing sexual pleasure to men in exchange of cash or kind.[269]

The Constitutional mandate under Article 23 is prohibition of trafficking and all forms of exploitation. This was aimed at putting an end to all forms of trafficking in human beings including prostitution and beggary. The Immoral Traffic in Women and Girls Act, 1956 also known as SITA was passed with an objective to punish brothel keepers, procurers and pimps and to prevent prostitution in or in the vicinity of public places. The Act was amended in 1978 and later in 1986; it was titled as The Immoral Traffic (Prevention) Act or PITA making it applicable to both men and women with more stringent penalties, particularly with reference to offences against children and minors. Inspite of the presence of legislation in the arena of prostitution and

[269] Dr Devinder Singh, *Human Rights Women and Law*, p. 65 (5th Edition-2005)

trafficking, the Supreme Court had to interfere and fill in the gaps in the legislation.

In *Vishal Jeet* v. *Union of India*[270] a writ petition under Article 32 of the Constitution of India at the instance of an Advocate was filed by way of a Public Interest Litigation seeking issuance of certain directions, directing the Central Bureau of Investigation (1) to institute an enquiry against those police officers under whose jurisdiction Red Light areas as well as Devadasi and Jogin traditions are flourishing and to take necessary action against such erring police officers and law breakers; (2) to bring all the inmates of the red light areas and also those who are engaged in 'flesh trade' to protective homes of the respective States and to provide them with proper medical aid, shelter, education and training in various disciplines of life so as to enable them to choose a more dignified way of life and (3) to bring the children of those prostitutes and other children found begging in streets and also the girls pushed into 'flesh trade' to protective homes and then to rehabilitate them. The Court confined itself to the issues of child prostitution and issued the following directions-

1. All the State Governments and the Governments of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.

2. The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists,

[270] (1990) 3 SCC 318

criminologists, members of the women's organisations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well the members of various voluntary social organisations and associations etc., the main objects of the Advisory Committee being to make suggestions of:

(a) the measures to be taken in eradicating the child prostitution, and

(b) the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.

3. All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.

4. The Union Government should set up a committee of its own in the line, we have suggested under direction No.(2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation etc. of the young fallen victims namely the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.

5. The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.

6. The Advisory Committee can also go deep into devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the Government could do in that regard.[271]

In *Gaurav Jain* v. *Union of India*[272] the Supreme Court rejected the prayer for locating separate schools and hostels for children of the prostitutes and observed-

> Children of prostitutes should, however, not be permitted to live in inferno and the undesirable surroundings of prostitute homes. This is particularly so for young girls whose body and mind are likely to be abused with growing age for being admitted into the profession of their mothers. While we do not accept the plea for separate hostels for prostitute children it is necessary that accommodation in hostels and other reformatory homes should be adequately available to help segregation of these children from their mothers living in prostitute homes as soon as they are identified.[273]

In *Gaurav Jain* v. *Union of India*[274] a public interest litigation petition was filed seeking appropriate directions to the Government for the improvement of the plight of prostitutes, fallen women and their children. A two-Judge Bench of the Supreme Court issued the following directions-

(a) It is the duty of the State and all voluntary non-government organisations and public spirited persons to come in to their aid to retrieve them from prostitution, rehabilitate them with a helping hand to lead a life with dignity of person, self-employment through provisions of

---

[271] *Ibid* at 323-324

[272] AIR 1990 SC 292

[273] *Ibid* at 293

[274] (1997) 8 SCC 114

education, financial support, developed marketing facilities as some of major avenues in this behalf.

(b) Marriage is another object to give them real status in society. Acceptance by the family is also another important input to rekindle the faith of self-respect and self-confidence. Housing, legal aid, free counseling assistance andall other similar aids and services are meaningful measures to ensure that unfortunate fallen women do not again fall into the trap of red light area contaminated with foul atmosphere.

(c) Emphasis on the review of the relevant law in this behalf, effective implementation of the scheme to provide self-employment, training in weaving, knitting, painting and other meaningful programmes to provide the fallen women the regular source of income by self-employment or, after vocational education, the appropriate employment generating schemes in governmental, semi-governmental or private organisations.

(d) Economic rehabilitation is one of the factors that prevent the practice of dedication of the young girls to the prostitution as Devadasis, Jogins or Venkatasins. Their economic empowerment and education gives resistance to such exploitation; however, economic programmes are necessary to rehabilitate such victims of customs or practices.

(e) Various factors have led to the perpetuation of prostitution which in turn has given rise to a large nature of work, status, income, etc. often leave the children wanting in attention and care for their overall development. However, it is not enough to perceive them as more victims of neglect. Their cause has to be taken up to prevent them from taking to prostitution or its promotion and curbing their proneness to delinquency. It is believed that children's energies Child Development and Care Centres are envisaged to provide localised services through which the

larger interests of these children can be attended to. These Centres will be run by voluntary organisation with government fund and have Advisory and Monitoring Committees at Central, State and Local levels.

(f) To ensure effective implementation of the scheme Advisory and Monitoring Committees will be set up at various levels. There would be a Central Committee with State and Local Committees under it. While there will be a State Committee in every state, there may be as many Local Committees as the number of Child Development and Care Centres operative in the respective state.

(g) We are of the view that the suggestions require earnest examination to give force and content to them. The rescue and rehabilitation of the child prostitutes and children should be kept under the nodal Department, namely, Department of Women and Child Development under the Ministry of Welfare and Human Resource, Government of India. It would devise suitable schemes for proper and effective implementation.

(h) The Minister of Welfare, Government of India will constitute a Committee consisting of the Secretary in charge of Department of Women the Child Development as the chairperson and three or four Secretaries from the concerned State Governments, to be nominated by the Minister of Welfare. They would make an in-depth study into these problems and evolve such suitable schemes as are appropriate and consistent with the directions given above.[275]

However in *Gaurav Jain* v. *Union of India*[276] the directions given in *Gaurav Jain* v. *Union of India*[277] relating to prostitution and/or its

---

[275] *Ibid* at 150

[276] (1998) 4 SCC 270

[277] (1997) 8 SCC 114

amelioration or eradication were set aside due to procedural complications of Article 142 and 145(5) of the Constitution of India.

3. 4. 4. Female Foeticide- The scientific advancements in medical science made things convenient for the human kind, by unfolding the secret portal of the quality and status of the growing, within the womb of the pregnant woman and allowed scope to exercise considered choice in the matters of welcoming the new member into the life form. This has giving an opportunity to discriminately eliminate the female foetus after identification and reduce the number of girl child in India.

The Indian Penal Code, 1860 and the Medical Termination of Pregnancy Act, 1971 were there to deal with the abortion law. The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994[278] was passed to provide for the regulation of the use of prenatal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain malformations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide, and for matters connected therewith and incidental thereto.

The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 made it mandatory for registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic. It prohibited the unregistered bodies from undertaking any activity relating to prenatal diagnostic. It prohibited employment of any unqualified personnel at the registered centres of genetic techniques. Any pre-natal tests shall have to

[278] The Act came into effect from 1st January 1996. Later it was renamed as the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act in 2003 by way of amendment

be conducted at the registered address of the centre by the person qualified and registered for the purpose.

The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 remained a dead letter as on the date of the petitions filed by Centre for Enquiry into Health and Allied Themes (CEHAT) and other voluntary organizations. The judiciary has tried to check the sex determination tests and female foeticide by giving suitable directions for the implementation of Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

In *Centre for Enquiry into Health and Allied Themes (CEHAT)* v. *Union of India*[279] the Supreme Court laid down certain directions-

I. Directions to the Central Government

1. The Central Government is directed to create public awareness against the practice of prenatal determination of sex and female foeticide through appropriate releases/programmes in the electronic media. This shall be done by the Central Supervisory Board ("CSB" for short) as provided under Section 16(iii) of the PNDT Act.

2. The Central Government is directed to implement with all vigour and zeal the PNDT Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under sub-section (5) of Section 17 of the PNDT Act to advise the appropriate authority shall not exceed 60 days. It would be seen that this Rule is strictly adhered to.

II. Directions to the Central Supervisory Board (CSB)

1. Meetings of CSB will be held at least once in six months [re proviso to Section (1)]. The constitution of CSB is provided under Section 7. It empowers the Central Government to appoint ten members

[279] (2001) 5 SCC 577. Also followed in *Vijay Sharma* v. *Union of India* AIR 2008 Bom 29

under Section 7(2)(e) which includes eminent medical practitioners, including eminent social scientists and representatives of women welfare organisations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.

2. CSB shall review and monitor the implementation of the Act [re Section 16(ii)].

3. CSB shall issue directions to all State/UT appropriate authorities to furnish quarterly returns to CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:

(i) survey of bodies specified in Section 3 of the Act;

(ii) registration of bodies specified in Section 3 of the Act;

(iii) action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records;

(iv) complaints received by the appropriate authorities under the Act and action taken pursuant thereto;

(v) number and nature of awareness campaigns conducted and results flowing therefrom.

4. CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government (re Section 16)

5. CSB shall lay down a code of conduct under Section 16(iv) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that the public at large can know about it.

6. CSB will require medical professional bodies/associations to create awareness against the practice of prenatal determination of sex and female foeticide and to ensure implementation of the Act.

III. Directions to State Governments/UT Administrations

1. All State Governments/UT Administrations are directed to appoint by notification, fully empowered appropriate authorities at district and sub-district levels and also Advisory Committees to aid and advise the appropriate authorities in discharge of their functions [re Section 17(5)]. For the Advisory Committee also, it is hoped that members of the said Committee as provided under Section 17(6)(d) should be such persons who can devote some time to the work assigned to them.

2. All State Governments/UT Administrations are directed to publish a list of the appropriate authorities in print and electronic media in their respective States/UTs.

3. All State Governments/UT Administrations are directed to create public awareness against the practice of prenatal determination of sex and female foeticide through advertisement in print and electronic media by hoardings and other appropriate means.

4. All State Governments/UT Administrations are directed to ensure that all State/UT appropriate authorities furnish quarterly returns to CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:

(i) survey of bodies specified in Section 3 of the Act;

(ii) registration of bodies specified in Section 3 of the Act;

(iii) action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records;

(iv) complaints received by the appropriate authorities under the Act and action taken pursuant thereto;

(v) number and nature of awareness campaigns conducted and results flowing therefrom.

IV. Directions to appropriate authorities.

1. Appropriate authorities are directed to take prompt action against any person or body who issues or causes to be issued any advertisement in violation of Section 22 of the Act.

2. Appropriate authorities are directed to take prompt action against any person or bodies specified in Section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.

3. All State/UT appropriate authorities are directed to furnish quarterly returns to CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:

(i) survey of bodies specified in Section 3 of the Act;

(ii) registration of bodies specified in Section 3 of the Act including bodies using ultrasound machines;

(iii) action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records;

(iv) complaints received by the appropriate authorities under the Act and action taken pursuant thereto;

(v) number and nature of awareness campaigns conducted and results flowing therefrom.[280]

[280] *Ibid* at 578-580

In *Centre for Enquiry into Health and Allied Themes (CEHAT)* v. *Union of India*[281] petition was filed praying that as the Pre-natal Diagnostic Techniques contravene the provisions of the PNDT Act, the Central Government and the State Governments be directed to implement the provisions of the PNDT Act (a) by appointing appropriate authorities at State and District levels and the Advisory Committees; (b) the Central Government be directed to ensure that Central Supervisory Board meets every 6 months as provided under the PNDT Act; and (c) for banning of all advertisements of pre-natal sex selection including all other sex determination techniques which can be abused to selectively produce only boys either before or during pregnancy. The Supreme Court directed the Central Government/State Government/Union Territories-

a) For effective implementation of the Act, information should be published by way of advertisements as well as on electronic media. This process should be continued till there is awareness in public that there should not be any discrimination between male and female child.

b) Quarterly reports by the appropriate authority, which are submitted to the Supervisory Board should be consolidated and published annually for information of the public at large.

c) Appropriate authorities shall maintain the records of all the meetings of the Advisory Committees.

d) The National Monitoring and Inspection Committee constituted by the Central Government for conducting periodic inspection shall continue to function till the Act is effectively implemented. The reports of this Committee be placed before the Central Supervisory Board and State Supervisory Board for any further action.

---

[281] (2003) 8 SCC 398

e) As provided under Rule 17(3), public would have access to the records maintained by different bodies constituted under the Act.

f) Central Supervisory Board would ensure that the following States appoint the State Supervisory Board as per the requirement of Section 16A.

1. Delhi 2. Himachal Pradesh 3. Tamil Nadu 4. Tripura 5.Uttar Pradesh.

g) As per requirement of Section 17(3)(a), the Central Supervisory Board would ensure that the following States appoint the multi-member appropriate authorities:

1. Jharkhand 2. Maharashtra 3. Tripura 4. Tamil Nadu 5. Uttar Pradesh[282]

The efforts of the Supreme Court are laudable in sitting over the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 and turning it into a workable legislation for a continuous period of more than three years. The work of listing the matter periodically inspite of a huge backlog of cases in the Supreme Court and issuing direction after direction to all the concerned authorities responsible under the Act in order to implement it in its spirit and letter is praiseworthy. While making the regulation norms more stringent and implementation more rigorous, the illegal killing of the girl child will be prevented in the near future.

3. 4. 5. Adoption-Adoption is the act of establishing a person as parents to one who is not in fact or in law his child. It signifies the means by which a status of parent and children is created or legal relationship is established between persons who are not so related by nature.

[282] *Ibid* at 405-406

In India, the basic law of adoption is the Hindu Adoption and Maintenance Act, 1956 but it contains no provision for pertaining to inter-country adoptions. The Juvenile Justice (Care and Protection of Children) Act, 2000[283] having provisions relating to adoptions of delinquent and abandoned children also has no bearing on inter-country adoption. Such adoptions in India have been taking place by resorting to the provisions of the Guardians and Wards Act, 1890 wherein a prospective foreign adoptive parent is required to submit an application for being appointed as a guardian of the child before a District Court which will pass the order prayed for, only if it is satisfied that it (order) is for the welfare of the minor. Although the Adoption of Children Bills of 1972 and 1980 had some provisions relating to inter-country adoption but such could not be passed and were allowed to lapse.

The absence of a common adoption law in India led the judiciary to lay down various norms and guidelines to monitor and regulate inter-country adoptions and adoption made by members belonging to communities other than Hindu.

In *Lakshmi Kant Pandey* v. *Union of India*[284] a writ petition was filed on the basis of a letter complaining of malpractices indulged in by social organisation and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. It was alleged that in the guise of adoption, Indian children of tender age were not only exposed to the long dreadful journey to distant foreign countries at great risk to their lives but in case they survive, they were not provided any shelter and relief homes and in course of time, they become beggars or prostitutes for want of proper care. Bhagwati, J. laid down principles and

[283] It came into effect on 22nd August 2006. Previously it was The Juvenile Justice Act, 1986

[284] (1984) 2 SCC 244

norms to be followed in determining whether a child should be allowed to be adopted by foreign parents. They are-

(1) Every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency of India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court.

This is essential primarily for three reasons.

Firstly, it will help to reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might, in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency to individual procuring the child.

Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handler trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely.

Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in

the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it.

(2) Every application of a foreigner for taking a child in adoption must be accompanied by a home study report and the social or child welfare agency sponsor in such application should also send along with it a recent photograph of the family, a marriage certificate of the foreigner and his or her spouse as also a declaration concerning their health together with a certificate regarding their medical fitness duly certified by a medical doctor, a declaration regarding their financial status alongwith supporting documents including employer's certificate where applicable, income-tax assessment orders, bank references and particulars concerning the properties owned by them, and also a declaration stating that they are willing to be appointed guardian of the child and an undertaking that they would adopt the child according to the law of their country within a period of not more than two years from time of arrival of the child in their country and give intimation of such adoption to the court appointing them as guardian as also to the social or child welfare agency in India process. Sing their case, and that they would maintain the child and provide it necessary education and up-bringing according to their status and they would also send to the court as also to the social or child welfare agency in India reports relating to the progress of the child alongwith its recent photograph, the frequency of such progress reports being quarterly during the first two years and half yearly for the next three years.

(3)The application of the foreigner must also be accompanied by a Power of Attorney in favour of an officer of the social or child welfare

agency in India which is requested to process the case and such Power of Attorney should authorize the Attorney to handle the case on behalf of the foreigner in case the foreigner is not in a position to come to India.

(4) The social or child welfare agency sponsoring the application of the foreigner must also certify that the foreigner seeking to adopt a child is permitted to do so according to the law of his country. These certificates, declarations and documents must accompany the application of the foreigner for taking child in adoption, should be duly notarised by Notary Public whose signature should be duly attested either by an officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an officer of the Indian Embassy or High Commission or Consulate in that country.

(5)The social or child welfare agency sponsoring the application of the foreigners must also undertake while forwarding the application to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is affected, it will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly during the first year and half yearly for the subsequent year or years until the adoption is ffected, and it must also undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the

court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India.

(6) The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter-country adoption by the Government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. Such lists shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operation in India in the area of inter-country adoption under licence or recognition from the Government of India.

(7) If the biological parents are known, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filling an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the

child in adoption or they want to take it back. But in order to eliminate any possibility of mischief and to make sure that the child has in fact surrendered by its biological parents, it is necessary that the Institution or Centre or home for Child Care or social or Child Welfare Agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. The biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of a child or within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

(8) It should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating. Since an application for appointment as guardian can be processed only by a recognised social or

child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter country adoption, and in that event it must send without any undue delay the name and must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in inter-country adoption. The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the area of child care and welfare they should also be recognised by the Government of India or the Government of the State for the purpose of inter-country adoptions. But before taking a decision to recognise any particular social or child welfare agency for the purpose of inter country adoptions the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that

actually in cured by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

(9) Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child, the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it.

(10) The recognised social or child welfare agency must insist upon approval of a specific known child and once that approval is obtained the recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption. It is also necessary that the recognised social or child welfare agency, through which an application of a foreigner for taking a child in adoption is routed must before offering a child in adoption, make sure that the child is free to be adopted. The recognised social or child welfare agency must place sufficient material before the

court to satisfy it that the child is legally available for adoption. It is also necessary that the recognised social or child welfare agency must satisfy itself, firstly, that there is no impediment in the way of the child entering the country of the prospective adoptive parent; secondly, that the travel documents for the child can be obtained at the appropriate time and lastly, that the law of the country of the prospective adoptive parent permits legal adoption of the child and that on such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file alongwith the application for guardianship, a certificate reciting such satisfaction.

(11) In cases where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, there should be no objection to a social or child welfare agency taking the child to another State, even if he object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any malpractice. There should also be no difficulty to apply for guardianship of the child in the court of the latter State, because the child not having any permanent place of residence would then be ordinarily resident in the place where it is in the care and custody of such agency or individual. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hardship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is

the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. For the same reasons, notice of the application for guardianship should also not be published in any newspaper. If the court is satisfied, after giving notice of the application to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application, that it will be for the welfare of the child to be give in adoption to the foreigner making the application for guardianship, it will only then make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The Court will introduce the following conditions in the order, namely:

(i) That the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for any reason.

(ii) That the foreigner who is appointed guardian shall submit to the court as also to the Social or Child Welfare Agency processing the application for guardianship, progress reports of the child alone with a recent photograph quarterly during the first two years and half yearly for the next three years.

(iii) The order appointing guardian shall carry, attached to it, a photograph of the child duly counter-signed by an officer of the court.

Where an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situated and copies of such order shall also be forwarded to the two respective Ministries of

Social Welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Government of India will also sent to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars of the children taken by them and requesting the Embassy or High Commission to maintain and unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible maltreatment exploitation or use for ulterior purposes and to immediately report and instance of maltreatment, negligence or exploitation to the Government of India for suitable action.

(12) The social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate of not exceeding Rs. 60 per day (this outer limit being subjective to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to is new home as also medical expenses including hospitalization charges, any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent.

(13) If a child is to be given in inter-country adoption, it would be desirable that it is given in such adoption as far as possible before it

completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding; it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Children above the age of 3 years may also be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 to 7 years may be able to assimilate themselves in the new surroundings without any difficulty. Even children above the age of seven years may be given in inter-country adoption but their wishes may be ascertained if they are in a position to indicate any preference.

(14) The proceedings on the Application for guardianship should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed.

(15) The social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate of not exceeding Rs. 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only

through the recognised social or child welfare agency. However, a foreigner may make voluntary donation to any social or child welfare agency but no such donation from a prospective adoptive parent shall be received until after the child has reached the country of its prospective adoptive parent.

In *Lakshmi Kant Pandey* v. *Union of India*[285] clarifications/further directions of certain points of *Lakshmi Kant Pandey* v. *Union of India*[286] and *Lakshmi Kant Pandey* v. *Union of India*[287] were made as under-

(1) When the court makes an order appointing a foreign parent as guardian of a child with a view to its eventual adoption in the foreign country, the court will provide that such amount shall be paid to the scrutinising agency for its services as the court thinks reasonable having regard to the nature of the case and the extent and volume of the services rendered by the scrutinising agency. In case of an application for appointment of a foreign parent as guardian of a child the Court would be justified in directing payment of any reasonable amount varying between Rs.450 and Rs.500 but in appropriate cases where the courts so think fit, such amount may even exceed Rs.500.

This amount shall be directed to be paid to the scrutinising agency by the recognised placement agency and such placement agency shall have the right to recover such amount from the foreign parent whose application for guardianship it has processed. This direction will also apply mutatis mutandis in cases where an Indian parent makes an application for appointing himself or herself as guardian of a child or a Hindu parent applies for permission to adopt a child under section 9(4) of

---

[285] (1987) 1 SCC 66

[286] (1984) 2 SCC 244

[287] (1985) Supp SCC 701

the Hindu Adoptions and Maintenance Act, 1956 and the case is referred to a scrutinising agency by the Court, but in such cases the amount to be fixed by the Court for meeting the expenses of the scrutinising agency shall not exceed Rs.150.

(2) All nursing homes and hospitals which come across abandoned or destitute children or find such children abandoned in their precincts or otherwise shall immediately give information in regard to the discovery or find of such children to the Social Welfare Department of the concerned Government where such nursing homes or hospitals are situate in the capital of the State and in other cases to the Collector of the District and copies of such intimation will also be sent to the Foster Care Home where there is such a home run by the Government as also to the recognised placement agencies functioning in the city or town where such nursing homes or hospitals are situate.

(3) Each Indian parent who is registered with the Foster Care Home or a recognised placement agency as a prospective parent wishing to take a child in adoption and who has been informed by the recognised placement agency that a child is available for adoption will be entitled to information about all the children available for adoption in the group specified by him, according to the consolidated list maintained by the recognised placement agency.

(4) The Supreme Court had directed in paragraph 22 of the main judgment that the notice of the application for guardianship in cases of adoption by foreign parents should not be published in any newspaper because otherwise the biological parents would come to know as to who are the parents taking the child in adoption. This direction must also cover the cases where Hindu parents make an application under s.9 sub-(4) of the Hindu Adoptions and Maintenance Act, 1956.

(5) No recognised placement agency shall make and process an application for appointment of a foreigner as guardian of a child with a view to its eventual adoption, unless the child has been in the custody of the recognised placement agency for a period of at least one month before the making of the application and it shall not be permitted to act merely as a post office or conduit pipe for the benefit of an unrecognised agency.

(6) Whenever a child is produced before the Juvenile Court by a recognised placement agency for a release order declaring that the child is abandoned or destitute so as to be legally free for adoption, the Juvenile Court must in all such cases complete the inquiry within one month from the date of the application and proper vigilance should be exercised by the High Court. High Courts should call for monthly reports from the Juvenile Courts stating as to how many applications for release orders, that is, for declaring children abandoned or destitute, are pending before each Juvenile Court, when they were filed and if they have not been disposed of within one month, what is the reason for the delay. Where the Juvenile Court is not in existence, application for release order is required to be made to the Social Welfare Department in the capital of the State or to the Collector of the District in other places. The Social Welfare Department or the Collector, as the case may be, will dispose of such application within one month of its making.

(7) The Court entertaining an application for appointment of a foreigner as guardian of a child should not require the representative, of the recognised placement agency processing the application to join the application as a co-petitioner nor should the court insist on appointing such representative as joint guardian of the child alongwith the foreigner.

(8) Where a child is relinquished by its biological parents or by an unwed mother under a Deed of Relinquishment executed by the biological parents or the unwed mother it should not be necessary to go

through the Juvenile Court or the Social Welfare Department or the Collector to obtain a release order declaring the child free for adoption but it would be enough to produce the Deed of Relinquishment before the court which considered the application for appointment of a foreigner as guardian of the child.

(9)Where an abandoned or destitute child is found by a recognised placement agency or is brought to it by another social or child welfare agency or individual it should be open to such recognised placement agency to transfer the child to its branch in another State after the completion of the inquiry by the juvenile court or Social Welfare Department or the Collector, as the case may be. Where such recognised placement agency has an associate social or child welfare agency in another State, it should be open to the recognised placement agency to transfer the child to such associate social or child welfare agency in the other State, provided firstly, that the inquiry is complete by the juvenile court or the Social Welfare Department or the Collector and a release order is passed, and secondly, the associate social or child welfare agency has been notified by the recognised placement agency as its associate to the Government of the State where the recognised placement agency is functioning as also to the Government of the State where the associate social or child welfare agency is operating. If, for any compelling reason, it becomes necessary for the recognised placement agency to transfer a child either to its own branch or to an associate social or child welfare agency before completion of the inquiry by the juvenile court or the Social Welfare Department or the Collector, as the case may be, the recognised placement agency shall be allowed to do so after obtaining permission of the juvenile court or the Social Welfare Department or the Collector in that behalf.

(10) The Government of India is directed:

(i) to publish at least once in a year a list of recognised placement agencies and all their associate social or child welfare agencies operating in each State in two leading newspapers; and

(ii) to send to the District Courts in each State through the High Court a list of the recognised placement agencies functioning within the State together with the names and particulars of their associate social or child welfare agencies. Such list must be supplied to the District Judges at least once in a year and whenever any changes or modifications are made in the list, such change or modifications most be intimated to the District Judges through the High Court.

(11)The recognised placement agency processing the application of a foreigner for being appointed guardian of a child with a view to its eventual adoption, should be entitled to recover from the foreigner, cost incurred in preparing and filing the application and prosecuting it in court including legal expenses, administrative expenses preparation of child study report, preparation of medical and I.Q. Reports, passport and visa expenses and conveyance expenses and that such expenses may be fixed by the court at a figure not exceeding Rs.6000.

(12) In case of a foreigner who has been living in India for one year or more, the home-study report and other connected documents may be allowed to the prepared by the recognised placement agency which is processing the application of such foreigner for guardianship of a child with a view to its eventual adoption and that in such a case the court should not insist on sponsoring of such foreigner by a social or child welfare agency based in the country to which such foreigner belongs nor should a home-study report in respect of such foreigner be required to be obtained from any such foreign social or child welfare agency.

(13) The court entertaining an application on behalf of a foreigner for being appointed guardian of a child with a view to its eventual

adoption need not insist on security or cash deposit or bank guarantee and it should be enough if a bond is taken from the recognised placement agency which is processing the application and such recognised placement agency may in its turn take a corresponding bond from the sponsoring social or child welfare agency in the foreign country.

In *Lakshmi Kant Pandey v. Union of India*,[288] some minor clarifications of the earlier *Lakshmi Kant Pandey* cases were made as under-

1. If the Indian citizenship is allowed to continue until the adopted child attains the age of majority, it would run counter to the need of quick assimilation and may often stand as a barrier to the requirements of the early cementing of the adopted child into the adoptive family.

2. The birth certificate of the adopted child be obtained on the basis of application of the society sponsoring adoption. On the basis of the application and such other material which may he relevant to he found in an affidavit to accompany the application made by a responsible person belonging to the agency, the local magistrate should have the authority to make an order approving the particulars to be entered in the birth certificate and on the basis of the magisterial order the requisite certificate should be granted. This process should be done only after adoption is finalised and the particulars of the adopting foreign parents are available to be included. The Chief District Medical Officer (CDMO) may be involved in the matter of ascertainment of the age and the magistrate may ordinarily act on the certificate granted by the CDMO.

3. Registered societies to entitle themselves for renewal of registration of licence should exhibit their involvement in the process of

---

[288] (1991) 4 SCC 33

adoption and the authority should have evidence to satisfy that the agency is really involved in the activity.

4. The licensing authority should ordinarily ensure that the registered agency has proper child care facilities so that an agency which does not have such facilities may over a period of years go out of the field.

5. In the event of registration/licence being proposed to be cancelled, an opportunity should be granted to such agency. That would answer the requirements of natural justice and would uphold a healthy scheme of administration.

6. The setting up of CARA is justified. Such an institution would be an organisation of primacy and would work as a useful agency in the field. Although there should be no keen competition for offering adoptions, regulated competition may perhaps keep up the system in a healthy condition. Existence of CARA in that field is, therefore, welcome.

7. Keeping in view the general rise in cost of living an escalation by 30% is allowed. The matter may be reviewed once in three years so far as escalation of expenses is concerned.

8. The children, who can be transferred for the purposes for placement, would be those, whose parents are not known, orphans and perhaps those who are declared as abandoned children. The homes are not set up in several States and areas. Even Juvenile Boards have not been properly functioning and the recognised agencies do not have the facility of child care. In these circumstances to order transfer of children from statutory homes to recognised agencies can indeed not be accepted as a rule.

9. As and when such a request is received from recognised agencies, the Juvenile Court or the Board set up under the Act may

consider the feasibility of such transfer and keeping the interest of the child in view, the possibility of an adoption within a short period and the facilities available in the recognised agency as also other relevant features, make appropriate orders. A strait-jacket formula may very often be injurious to the interest of the child.

The guidelines and suggestions of the Supreme Court in *Lakshmi Kant Pandey* cases from 1984 and 1991 have been approved and followed in *Sumanlal Chhotalal Kamdar* v. *Asha Trilokbhai Shah*,[289] *Anokha* v. *State of Rajasthan*[290] and *St Theresa's Tender Loving Care Home* v. *State of A.P.*[291] Later in *Lakshmi Kant Pandey* v. *Union of India*[292] the Supreme Court issued some modifications/clarifications by reducing the period of three months, for the biological parents to take decision regarding relinquishment of the child for giving in adoption, to a period of two months.

As a result of the initiative of the judiciary in the *Lakshmi Kant Pandey* cases, the vacuum created due to the absence of law relating to inter-country adoption in India was in existence and was being followed across the country. On 26th August 1994, the Law Commission of India in its 153rd Report on Inter-Country Adoption[293] stressed the need for a law in order to regulate the inter-country adoption. The Government of India incorporated the Supreme Court's guidelines along with the 153rd Report

---

[289] (1995) 3 SCC 700

[290] (2004) 1 SCC 382

[291] (2005) 8 SCC 525

[292] (2001) 9 SCC 379

[293] 10th Report of the 13th Law Commission. Justice K.N. Singh was the Chairman of the Commission which presented its report on 26th August, 1994. The matter was *suo motu* taken up for study. The Commission also drafted an Inter-Country Adoption Bill

of the Law Commission of India and issued guidelines in 1995 in order to regulate the inter-country adoption.

3. 4. 6. Abolition of Child Labour-After a plethora of laws containing provisions to prevent child labour, it was soon realized that child labour is still a problem. Taking this into consideration, efforts were made to regulate the conditions of child labour in order to avoid exploitation in areas where child labour could not be avoided. The Child Labour (Prohibition and Regulation) Act, 1986 repealed the Employment of Children Act, 1938. The main and the most important thrust in the Act were to ban child labour in hazardous processes and industries and regulate conditions for children in non-hazardous occupations. However, the presence of legislation in the field of abolition of child labour could not stop the employment of children in hazardous industries and processes. The judiciary had to step in the arena and lay down certain guidelines to supplement the law.

In *People's Union for Democratic Rights* v. *Union of India*[294] the Supreme Court has held construction work to be a hazardous employment. In Labourers Working on *Salal Hydro Project v. State of J & K*[295], the Supreme Court again reiterated that construction work is a hazardous employment attracting Article 24 of the Constitution of India.

In *M.C. Mehta* v. *State of Tamil Nadu*[296] the petitioner by way of public interest litigation highlighted the problems of employment of children in match factories in Sivakasi (Kamraj District of Tamil Nadu). Considering the health hazards involved in the employment of children in

[294] (1982) 3 SCC 235

[295] (1983) 2 SCC 181

[296] (1992) 1 SCC 283

match factories, directions were given against employment of children in that area as well as setting up a compulsory insurance scheme for both the adult and child employees.

In *M.C.Mehta* v. *State of Tamil Nadu*[297] although the actual petition was in respect of child labour in Sivakasi in Tamil Nadu, where a large number of children were engaged in the hazardous work of manufacturing matchbox, the Court thought it 'fit to travel beyond the confines of Sivakasi' and 'to deal with the issue in wider spectrum and boarder perspective taking it as a national problem'. While tackling the problem of child labour, the Supreme Court laid down the following observations and directions-

> The offending employer must be asked to pay compensation for every child employed in contravention of the provisions of the Child Labour (Prohibition and Regulation) Act, 1986 a sum of Rs 20,000; and the Inspectors, whose appointment is visualised by Section 17 to secure compliance with the provisions of the Act, should do this job. The Inspectors appointed under Section 17 would see that for each child employed in violation of the provisions of the Act, the employer concerned pays Rs 20,000 which sum could be deposited in a fund to be known as Child Labour Rehabilitation-cum-Welfare Fund. The liability of the employer would not cease even if he would desire to disengage the child presently employed. It would perhaps be appropriate to have such a fund districtwise or areawise. The fund so generated shall form corpus whose income shall be used only for the child concerned. The quantum could be the income earned on the corpus deposited qua the child. To generate greater income, fund can be

[297] (1996) 6 SCC 756

deposited in high-yielding scheme of any nationalized bank or other public body.

As the aforesaid income could not be enough to dissuade the parent/guardian to seek employment of the child, the State owes a duty to come forward to discharge its obligation in this regard since the aforementioned constitutional provisions have to be implemented by the appropriate Government, as defined in Section 2(i) of the Child Labour (Prohibition and Regulation) Act.

Strictly speaking a strong case exists to invoke the aid of Article 41 of the Constitution regarding the right to work and to give meaning to what has been provided in Article 47 relating to raising of standard of living of the population, and Articles 39(e) and (f) as to non-abuse of tender age of children and giving opportunities and facilities to them to develop in a healthy manner, for asking the State to see that an adult member of the family, whose child is in employment in a factory or a mine or in other hazardous work, gets a job anywhere, in lieu of the child.....In those cases where it would not be possible to provide job as above-mentioned, the appropriate Government would, as its contribution/grant, deposit in the aforesaid Fund a sum of Rs 5000 for each child employed in a factory or mine or in any other hazardous employment. In case of getting employment by an adult, the parent/guardian shall have to withdraw his child from the job. Even if no employment would be provided, the parent/guardian shall have to see that his child is spared from the requirement to do the job, as an alternative source of income would have become available to him. The employment

given or payment made would cease to be operative if the child would not be sent by the parent/guardian for education.[298]

The Supreme Court laid down a blueprint for implementation of the schemes as mentioned above-

(1) A survey would be made of the aforesaid type of child labour which would be completed within six months from today.

(2) To start with, work could be taken up regarding those employments which have been mentioned in Article 24, which may be regarded as core sector, to determine which hazardous aspect of the employment would be taken as criterion. The most hazardous employment may rank first in priority, to be followed by comparatively less hazardous and so on.

(3) The employment to be given as per our direction could be dovetailed to other assured employment.

(4) The employment so given could as well be the industry where the child is employed, a public undertaking and would be manual in nature inasmuch as the child in question must be engaged in doing manual work. The undertaking chosen for employment shall be one which is nearest to the place of residence of the family.

(5) In those cases where alternative employment would not be made available as aforesaid, the parent/guardian of the child concerned would be paid the income which would be earned on the corpus, which would be a sum of Rs 25,000 for each child, every month. The employment given or payment made would cease to be operative if the child would not be sent by the parent/guardian for education.

(6) On discontinuation of the employment of the child, his education would be assured in suitable institution with a view to make

---

[298] *Ibid* at 771-772

him a better citizen. It may be pointed out that Article 45 mandates compulsory education for all children until they complete the age of 14 years; it is also required to be free. It would be the duty of the Inspectors to see that this call of the Constitution is carried out.

(7) A district could be the unit of collection so that the executive head of the district keeps a watchful eye on the work of the Inspectors. Further, in view of the magnitude of the task, a separate cell in the Labour Department of the appropriate Government would be created. Monitoring of the scheme would also be necessary and the Secretary of the Department could perhaps do this work. Overall monitoring by the Ministry of Labour, Government of India, would be beneficial and worthwhile.

(8) The Secretary to the Ministry of Labour, Government of India would apprise this Court within one year from today about the compliance of aforesaid directions.

(9) We should also like to observe that on the directions given being carried out, penal provision contained in the aforenoted Act would be used where employment of child labour, prohibited by the Act, would be found.

(10) Insofar as the non-hazardous jobs are concerned, the Inspector shall have to see that the working hours of the child are not more than four to six hours a day and it receives education at least for two hours each day. It would also be seen that the entire cost of education is borne by the employer.[299]

---

[299] *Ibid* at 773-774

In *Bandhua Mukti Morcha* v. *Union of India*[300] the Supreme Court has reiterated the directions given in *M.C.Mehta* v. *State of Tamil Nadu*[301] as feasible and inevitable. The Supreme Court observed-

> The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him....Neglecting the children means loss to the society as a whole. If children are deprived of their childhood-socially, economically, physically and mentally-the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry.[302]

The Supreme Court further observed-

> Various welfare enactments made by Parliament and the appropriate State Legislatures are only teasing illusions and a promise of unreality unless they are effectively implemented and the right to life to the child driven to labour is made a reality, meaningful and happy....Pragmatic, realistic and constructive steps and actions are required to be taken to enable the child belonging to poor, weaker sections, Dalits and Tribes and minorities, enjoy their childhood and develop their full blossomed personality-educationally, intellectually and culturally-with a spirit of inquiry, reform and enjoyment of leisure. Child labour, therefore, must be eradicated through well-planned, poverty-focussed alleviation, development and imposition of trade actions in employment of the

---

[300] (1997) 10 SCC 549

[301] (1996) 6 SCC 756

[302] *Ibid* at 553

children, etc. Total banishment of employment may drive the children and mass them up into destruction and other mischievous environment, making them vagrant, hard criminals and prone to social risks, etc. Therefore, while exploitation of the child must be progressively banned, other simultaneous alternatives to the child should be evolved including providing education, health care, nutrient food, shelter and other means of livelihood with self-respect and dignity of person.[303]

The orders and directions of the judiciary providing for rehabilitation, rather than abolition, have supplemented the legislation in the field of eradication of child labour in India.

3. 4. 7. THE SOCIAL TRANSFORMATION ACHIEVED

The Supreme Court's decision in *Vishaka*[304] which was the first attempt to comprehensively deal with the rights of working women against sexual harassment in the workplace impresses upon the need to pass a comprehensive law to deal with the menace of sexual harassment. Yet, in the last eleven years or so, no such legislation has been passed. Undoubtedly, the Supreme Court's decision in *Vishaka* is an excellent example of judicial law-making to fill the lacuna that existed in the law, but the same has not been availed of by the legislature. Although, various attempts have been made to write a law on sexual harassment, the most important being the Sexual Harassment of Women at their Workplace (Prevention) Bill, 2003, drafted by the National Commission for Women but the same was of no success. The Bill provides for prevention of

---

[303] *Ibid* at 556

[304] *Vishaka* v. *State of Rajasthan* AIR 1997 SC 3011. Reiterated in *Apparel Export Promotion Council* v. *A.K. Chopra* AIR 1999 SC 625

sexual harassment of women and women employees that is work-related or arises during the course of employment by anyone including their employers, superiors and colleagues. The idea of providing compensation to the victim of sexual harassment by the Supreme Court as done in *Delhi Domestic Working Women's Forum* v. *Union of India*,[305] *Bodhisattwa Gautam* v. *Subhra Chakraborty*[306] and *Chairman, Railway Board* v. *Chandrima Das*[307] is noteworthy. This approach of compensatory jurisprudence will provide some relief to the victims of the crime as well as deter the commission of violence against women.

The judgment of the Supreme Court in *Mohd. Ahmed Khan* v. *Shah Bano Begum*[308] seemed to be direct challenge to an old standing rule of interpretation of the Islamic Law (*Shariat*). The old rule had held the field for over a thousand years. This rule was evolved in the Abbasid period when the early Islamic Caliphate had yielded its republican form to a dynastic monarchy and empire. It was the boldness of the Supreme Court which introduced a change in the field of maintenance of a Muslim woman by denouncing the opposition of the conservatives. The legislature tried to neutralize the effect of the *Shah Bano* decision by passing the Muslim Women (Protection of Rights on Divorce) Act, 1986 but this did not deter the judiciary. The judiciary interpreted the Muslim Women's Act of 1986 to best suit the needs of the present day society and ameliorate the conditions of the Muslim women.[309] The rousing of the

---

[305] (1995) 1 SCC 14

[306] (1996) 1 SCC 490

[307] (2000) 2 SCC 465

[308] AIR 1985 SC 945

[309] *Arab Ahemadhia Abdulla* v. *Arab Bail Mohmuna Saiyadbhai* AIR 1988 Guj 141; *Danial Latifi* v. *Union of India* (2001) 7 SCC 740; *Sabra Shamim* v. *Maqsood Ansari* (2004) 9 SCC 616; *Iqbal Bano* v. *State of U.P.* (2007) 6 SCC 785

conscience of the general public to the plight of divorced Muslim women may take some more time to achieve its full objective but the initiative of the judiciary is salutary.

Prostitution is the worst form of exploitation of women and as an institution it speaks of man's tolerance of this exploitation on an organized level in the society. There were various legislations[310] in force but the same were not strictly interpreted or adhered to achieve their objectives. The judgments of the Supreme Court in *Vishal Jeet*[311] and *Gaurav Jain*[312] of laying down norms and regulations have gone a far way to uplift the conditions relating to the prostitutes and their children as well as providing rehabilitation to them.

The male dominated society placed the women into the watertight bearing compartment of motherhood making her look as a male-child producing machine. The increasing use of sex determining and sex pre-selection techniques has added a new weapon in the hands of husbands and in-laws whose craving craze for a male child is frustrated by forces of nature. The judiciary has come down heavily on such sex determination tests and tried to curb the evils of female foeticide by various judgments.[313] As a result of the dynamism of the judiciary the various Acts[314] in force which lay dormant were given a new direction.

---

[310] The Immoral Traffic in Women and Girls Act, 1956 also known as SITA. The Act was amended in 1978 and later in 1986 and was titled as The Immoral Traffic (Prevention) Act or PITA

[311] *Vishal Jeet* v. *Union of India* (1990) 3 SCC 318

[312] *Gaurav Jain* v. *Union of India* AIR 1990 SC 292

[313] *Centre for Enquiry into Health and Allied Themes (CEHAT)* v. *Union of India* (2001) 5 SCC 577; *Centre for Enquiry into Health and Allied Themes (CEHAT)* v. *Union of India* (2003) 8 SCC 398

[314] The Indian Penal Code, 1860 and the Medical Termination of Pregnancy Act, 1971 was in existence. The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 which came into effect from 1st January 1996 was later renamed as

There was no suitable legislation in the area of inter-country adoption of children. The judiciary was quick to react and lay down various norms and regulations in its judgments.[315] This initiative of the judiciary was supported by the Law Commission of India in its 153rd Report on Inter-Country Adoption[316] but the legislature has not yet reacted to the same by passing any suitable legislation dealing with inter-country adoptions. In the absence of such, the directions of the Supreme Court in this regard are the only path for dealing with inter-country adoption.

The Child Labour (Prohibition and Regulation) Act, 1986[317] was in existence in order to deal with the abolition of child labour. However, the enforcing system was very weak and it could not achieve its desired objective. The judiciary had to interfere and supplement the law with additional directions and guidelines.[318] The dynamism of the judiciary has been hailed as noteworthy as it understood the pulse of the society by taking into account the socio-economic conditions of the family of the child labourers; and went for rehabilitation rather than abolition of child labour.

---

the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act in 2003 by way of an amendment. This was due to the initiative of the judicial direction and orders.

[315] *Lakshmi Kant Pandey* cases from 1984 to 2001.

[316] The 10th Report of the 13th Law Commission. Justice K.N. Singh was the Chairman of the Commission which presented its report on 26th August, 1994. The matter was *suo motu* taken up for study. The Commission also drafted an Inter-Country Adoption Bill

[317] This repealed The Employment of Children Act, 1938

[318] *M.C.Mehta* v. *State of Tamil Nadu* (1992) 1 SCC 283; *M.C.Mehta* v. *State of Tamil Nadu* (1996) 6 SCC 756; *Bandhua Mukti Morcha* v. *Union of India* (1997) 10 SCC 549

3. 5. RIGHTS OF ACCUSED AND CONVICTS

Inspite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidents of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence of confession often resort to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the Rule of Law and the administration of criminal justice system.

One of the most dynamic and powerful role of the judiciary is relating to the upliftment of the conditions in prisons and of the rights of the prisoners. Although immunity against torture, cruelty and inhuman and degrading punishment or treatment is not specifically enumerated in the Indian Constitution but the judiciary has held that such torture, punishment or treatment is violative of basic human dignity and therefore forbidden by Article 21.

A prisoner is entitled to all his fundamental rights unless his liberty has been constitutionally curtailed. Any imposition of a major punishment within the prison system is conditional upon the observance of the procedural safeguards enshrined in Article 21, even though he is not in a position to enjoy the full panoply of fundamental rights due to the very nature of the regime to which he is lawfully committed. In *Sunil Batra* v. *Delhi Administration*[319] the Supreme Court observed as follows-

[319] AIR 1978 SC 1675

It is no more open to debate that convicts are not wholly denuded of their fundamental rights. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed. However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial and his rights are not subjected to the whims of the prison administration....Prisoners have enforceable liberties devalued may be but not demonetized.....Part III of the Constitution does not part company with the prisoner at the gates.[320]

The Supreme Court has observed in *State of A.P.* v. *Challa Ramkrishna Reddy*[321] that-

A prisoner, be a convict or undertrial or a detenu, does not cease to be human being. Even when lodged in the jail, he continues to enjoy all his fundamental rights including the right to life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights.[322]

On 23rd December 1996, a three-Judge Bench of the Supreme Court pointed out that the prison system is affected by nine major problems viz. overcrowding, delay in trial, torture and ill-treatment, neglect of health and hygiene, insubstantial food and inadequate clothing, prison vices, deficiency in communication, streamlining of jail visits and

---

[320] *Ibid* at 1727

[321] (2000) 5 SCC 712

[322] *Ibid* at 723-74

management of open-air prisons. It was directed that the authorities should take appropriate steps to solve these problems.[323]

The judiciary has actively tried to reform the prison conditions and give a new lifeline to the prisoners' rights by laying down norms and conditions to be observed by the police and prison administration.

3. 5. 1. Speedy Trial- Speedy trial in criminal cases is considered an essential ingredient of the right to fair trial. Unnecessary prolonged detention of undertrial prisoners would be considered by the Court as violation of fundamental right to life and personal liberty implicit in Article 21 of the Indian Constitution and it would also be considered as 'an affront to all civilised norms of human liberty.'

This right came up in series of cases, namely *Hussainara Khatoon (I)* to *(IV)* involving undertrials, who were in jail for a period longer than the maximum sentence that could be imposed on conviction. In *Hussainara Khatoon (I)* v. *Home Secretary, State of Bihar*[324] the attention of the Court was drawn to the incredible situation in Bihar undertrials that were languishing in jails for three to ten years awaiting trial. The court observed-

> A procedure which keeps large numbers of people behind bars without trial for long cannot possibly be regarded as reasonable, just or fair so as to be in conformity with the requirement of Article 21. The law as enacted by the legislature and as administered by the courts must radically change its approach to pre-trial detention and ensure 'reasonable, just and fair' procedure....

---

[323] *Rama Murthy* v. *State of Karnataka* AIR 1997 SC 1739

[324] AIR 1979 SC 1360

> Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. Speedy trial though not specifically enumerated as a fundamental right, is implicit in the broad sweep and content of Article 21... No procedure which does not ensure a reasonable quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, meaning thereby expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.[325]

In *Hussainara Khatoon (II)* v. *Home Secretary, State of Bihar*[326] the court re-emphasized the expeditious review for withdrawal of cases against undertrials for more than two years. In *Hussainara Khatoon (III)* v. *Home Secretary, State of Bihar*[327] the court reiterated that the investigation must be completed within a time-bound programme in respect of the undertrials and gave specific orders to be followed for quick disposal of cases of undertrials. In *Hussainara Khatoon (IV)* v. *Home Secretary, State of Bihar*[328] while holding continuance of detention as illegal and in violation of the fundamental right under Article 21, also recognised the right to free legal services to the poor and the needy as an essential ingredient of Article 21. The Supreme Court continued its efforts to ensure speedy trial in *Hussainara Khatoon (V)* v. *Home Secretary, State of Bihar*[329] and *Hussainara Khatoon (VI)* v. *Home*

---

[325] *Ibid* at 1365

[326] (1980) 1 SCC 91

[327] (1980) 1 SCC 93

[328] (1980) 1 SCC 98

[329] (1980) 1 SCC 108

Secretary, State of Bihar.[330] As a result of the dynamism of the judiciary in the *Hussainara Khatoon* cases, a large number of cases involving accused charged with serious and non-serious offences, mentally retarded persons and others have come up before the Court. The judiciary has been very dynamic and has laid down various guidelines in order to ensure speedy trial.

The Supreme Court in *Kadra Pahadiya* v. *State of Bihar*[331] reiterated that speedy trial is a fundamental right and commented against the cases of several undertrial prisoners who were languishing in jail for eight years without proper trial. The Supreme Court observed-

> It seems that once a person is lodged in the jail everyone forgets about him and no one bothers to care what is happening to him. He becomes a mere ticket number-cut off and alienated from the society, an unfortunate victim of a heartless legal and judicial system which consigns him to long unending years of oblivion in jail.[332]

In *Abdul Rehman Antulay* v. *R. S. Nayak*[333] the court held that right to speedy trial is the right of the accused and observed-

> Right to speedy trial flowing from Article 21 encompasses all stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial.[334]

The directions and prescribed time limits laid down by the Supreme Court in *Common Cause, A Registered Society* v. *Union of*

---

[330] (1980) 1 SCC 115

[331] AIR 1981 SC 939

[332] *Ibid* at 940

[333] AIR 1992 SC 1701

[334] *Ibid* at 1731

India,[335] *Common Cause, A Registered Society* v. *Union of India*,[336] *Raj Deo Sharma* v. *State of Bihar*[337] and *Raj Deo Sharma* v. *State of Bihar*[338] for release of certain accused person languishing in jails for more than the prescribed period were overruled by a seven-Judge Bench in *P. Ramachandra Rao* v. *State of Karnataka*.[339]

In *Surinder Singh* v. *State of Punjab*[340] the Supreme Court has held-

> Speedy trial is a fundamental right implicit in the broad sweep and content of Article 21. The aforesaid article confers a fundamental right on every person not to be deprived of his life or liberty except accordance with the procedure prescribed by law. If a person is deprived of his liberty under a procedure which is not reasonable, fair, or just, such deprivation would be violative of his fundamental right under Article 21 of the Constitution. It has also been emphasized by this Court that the procedure so prescribed must ensure a speedy trial for determination of the guilt of such person. It is conceded that some amount of deprivation of personal liberty cannot be avoided, but if the period of deprivation pending trial becomes unduly long, fairness assured by Article 21 would receive a jolt.[341]

---

[335] (1996) 4 SCC 33

[336] (1996) 6 SCC 775

[337] (1998) 7 SCC 507

[338] (1999) 7 SCC 604

[339] AIR 2002 SC 1856

[340] (2005) 7 SCC 387

[341] *Ibid* at 390

Speedy trial is implicit in the spectrum of Article 21 of the Constitution. Speedy trial is one of the facets of the fundamental right to life and liberty enshrined in Article 21.[342] The reiteration of such facet of speedy trial by the Supreme Court and High Courts has made the executive wing of the Government as well as the subordinate judiciary to be more cautious and vigilant.

3. 5. 2. Free Legal Aid-The judiciary has invoked the provisions of Article 21 and 39A of the Indian Constitution in extending its arm to provide free legal aid to thousands of poor prisoners languishing in various jails of India due to the economic incompetence to engage the services of a lawyer.

In *M.H.Hoskot* v. *State of Maharashtra*[343], while discussing the right to free legal aid, Krishna Iyer, J., declared-

This is a State's duty and not Government's charity.[344]

He further held that if a prisoner is unable to exercise his constitutional and statutory right of appeal including special leave of appeal for want of legal assistance, there is implicit in the court under Article 142, read with Articles 21 and 39A of the Constitution, the power to assign counsel to the prisoner provided he does not object to the lawyer named by the court and that the State which sets the law in motion must pay the lawyer an amount fixed by the Court. He observed-

> Article 19 joins hand with Article 21 necessitating the two requirements: (A) Service of a copy of the judgment in time to the prisoner intending to file an appeal, and (B) Provision for the free

[342] *Moti Lal Saraf* v. *State of J & K* (2006) 10 SCC 560

[343] AIR 1978 SC 1548

[344] *Ibid* at 1556

legal services to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service.[345]

The right to free legal services has been held to be implicit in Article 21 without which the procedure cannot be said to be 'reasonable, fair and just' to those who cannot secure such services.[346] The Supreme Court has also held that free legal aid at State expense to the indigent accused is a constitutional mandate obligating all State Governments to make adequate provisions for it, if not done so already.[347]

The provision of free legal aid was further widened in *Khatri (II)* v. *State of Bihar*[348] wherein the Supreme Court observed-

> The right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is first produced before the Magistrate as also when he is remanded from time to time. The State cannot avoid this obligation by pleading financial or

---

[345] *Ibid*

[346] *Hussainara Khatoon (IV)* v. *Home Secretary, State of Bihar* AIR 1979 SC 1369

[347] *Hussainara Khatoon (V)* v. *Home Secretary, State of Bihar* AIR 1979 SC 1377

[348] AIR 1981 SC 928

administrative inability or that none of the aggrieved prisoners asked for any legal aid at the expense of the State.[349]

The Court has considered free legal aid to be a *sine quo non* of justice in *Sheela Barse* v. *State of Maharashtra*[350] wherein the Supreme Court observed-

> The legal assistance to a poor or indigent accused who is arrested and in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by Article 39A but also by Article 14 and 21 of the Constitution.[351]

While reiterating the directions as stated in *Khatri (II)* v. *State of Bihar*,[352] the Supreme Court has set aside a conviction and observed in *Suk Das* v. *Union Territory of Arunachal Pradesh*[353] that-

> It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.[354]

3. 5. 3. Solitary Confinement and Bar Fetters-The Supreme Court has supplemented the Code of Criminal Procedure and the Prisons Act, 1894 by holding that solitary confinement during detention must be avoided.[355]

---

[349] *Ibid* at 931

[350] AIR 1983 SC 378

[351] *Ibid* at 380

[352] AIR 1981 SC 928

[353] AIR 1986 SC 991

[354] *Ibid* at 993

[355] *Sampat Prakash* v. *State of J & K* AIR 1969 SC 1153

The question of solitary confinement was raised before the Supreme Court in *Sunil Batra* v. *Delhi Administration.*[356] While accepting the argument of the petitioners that Section 30 of Prisons Act did not empower the prison authorities to impose solitary confinement upon a prisoner under a sentence of death, the Supreme Court observed-

> If by imposing solitary confinement there is total deprivation of comraderie (friendship) amongst co-prisoners commingling and talking and being talked to, it would offend Article 21 of the Constitution. The liberty to move, mix, mingle, talk, share company with co-prisoners if substantially curtailed would be violative of Article 21 unless curtailment has the backing of law.[357]

In *Kishore Singh Ravinder Dev* v. *State of Rajasthan*[358] the Supreme Court has held that "solitary confinement disguised as 'keeping in separate cell' and imposition of fetters are not to be resorted to save in the rarest of rare cases and with strict adherence to the procedural safeguards contained in the decision of the Supreme Court relating to the punishment of prisoners. Solitary confinement is justified only in extreme cases of compelling necessity for security of other prisoners or against escape, after complying with rules of natural justice." It has directed the State Governments to change their rules relating to prisoners' in accordance with the ruling of Supreme Court relating to prison reforms.

3. 5. 4. Handcuffing-One of the biggest threats to the dignity of a human being is the threat of being humiliated by handcuffing. The judiciary has

---

[356] AIR 1978 SC 1675. See also *Charles Sobraj* v. *Supdt., Central Jail, Tihar* AIR 1978 SC 1514

[357] *Ibid* at 1732

[358] AIR 1981 SC 625

on several occasions laid down important decisions condemning the conduct of escort police in the use of handcuffs without any valid reason or justification.

In *Prem Shankar* v. *Delhi Administration*[359] the Supreme Court has considered the matter of handcuffing of prisoners under-trial as well as convicts in the context of the provisions contained in Punjab Police Rules, 1934. Krishna Iyer, J., delivering the majority judgment held that provisions in paras 26 and 22 that every under-trial who was accused of a non-bailable offence punishable with more than three years jail-term would be handcuffed, were violative of Articles 14, 19 and 21 of the Indian Constitution. Handcuffing would be resorted to only when there is 'clear and present danger of escape breaking out of the police control' and for this there must be clear material, not merely an assumption. In special circumstances the application of iron is not ruled out. But even where in extreme cases, handcuffing is to be put on the prisoner, the escorting authority must record simultaneously the reasons for doing so otherwise it would be violative of Article 21. The Supreme Court observed-

> Handcuffing is prima facie inhuman and, therefore, unreasonable, is overharsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict 'irons' is to resort to zoological strategies repugnant to Article 21.[360]

In *Sunil Gupta* v. *State of M.P.*[361] the petitioners who were educated persons and social workers had staged a 'dharna' for a public cause. They had voluntarily submitted themselves for arrest and were

---

[359] AIR 1980 SC 1535

[360] *Ibid* at 1541

[361] (1990) 3 SCC 119

remanded to judicial custody. They were handcuffed and taken to court from jail and back from court to jail by the escort party handcuffed. While holding that the act of the escort party to be violative of Article 21 of the Indian Constitution, the court observed-

> One should not lose sight of the fact that when a person is remanded by a judicial order by a competent Court, that person comes within the judicial custody of the Court. Therefore, the taking of a person from a prison to the Court or back from Court to the prison by the escort party is only under the judicial orders of the Court. Therefore, even if extreme circumstances necessitate the escort party to bind the prisoners in fetters, the escort party should record the reasons for doing so in writing and intimate the Court so that the Court considering the circumstances either approve or disapprove the action of the escort party and issue necessary directions.[362]

In *Citizens for Democracy v. State of Assam*[363] the attention of the Supreme Court was drawn through a letter written by Kuldip Nayar, an eminent journalist, wherein he stated that seven TADA detenues lodged in the hospital in the State of Assam were handcuffed and tied with a long rope to check their movement. Security guards were posted outside the hospital. The Court held that handcuffing and in addition tying the patient-prisoners with ropes when lodged in the hospital is inhuman and in utter violation of the human rights guaranteed under the international law and the law of the land. It observed and laid down certain directions for the police and prison authorities-

---

[362] *Ibid* at 129

[363] (1995) 3 SCC 743

We declare, direct and lay down as a rule that handcuffs or other fetters shall not be forced on a prisoner-convicted or undertrial-while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to Court or back. The Police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport from one jail to another or from jail to Court and back.

Where the police or the jail authorities have well-grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being so dangerous/desperate and the finding that no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner.

In all cases where a person arrested by police is remanded to judicial or non-judicial custody, as given by the Magistrate the person concerned shall not be handcuffed unless special orders in that respect are obtained from the Magistrate at the time of the grant of the remand.

When the police arrests a person in execution of a warrant of arrest obtained from a magistrate, the person so arrested shall not be handcuffed unless the police has also obtained orders from the Magistrate for the handcuffing of the person to be so arrested.

Where a person is arrested by the police without warrant, the police officer concerned, may, if, he is satisfied, on the basis of the

guidelines given by us in para above, that it is necessary to handcuff such a person, he may do so till the time he is taken to the police station, and, thereafter, his production before the Magistrate. Further use of fetters, thereafter, can only be under the orders of the Magistrate as already indicated by us.[364]

In Re: M.P. Dwivedi[365] the Supreme Court issued directions to the State Government of M.P. to take suitable steps to amend the Police Regulations in the light of the law as laid down in *Prem Shankar Shukla's* case.[366]

3. 5. 5. Custodial Torture- Custody commences from the time restrictions are imposed on the movements of an accused and he is kept under detention by the authorities. It includes a situation where the detenu is called to the police station for the purpose of interrogation and from the time a person is placed under arrest.[367] It implies that in every arrest, custody is necessarily involved but vice-versa need not necessarily exist.

The police in Independent India persisted with the colonial frame of mind. In discharge of their duty to maintain law and order and with a view to extracting evidence and gathering information during the course of investigation, the police often use third-degree method, which has been considered as a flagrant violation of law. The executive as well as administrative reluctance to prevent them from doing so has added 'fuel to the fire'. The judiciary took the burden of upholding the 'rule of law'

---

[364] *Ibid* at 751

[365] (1996) 4 SCC 152

[366] *Prem Shankar* v. *Delhi Administration* AIR 1980 SC 1535

[367] *Joginder Kumar* v. *State of U.P.* AIR 1991 SC 1349

and to protect the accused/convicts from the atrocities committed within the parameter of the police station.

The question of the rights of an arrested person inherent in Articles 21 and 22(1) of the Indian Constitution was considered by the Supreme Court in *Joginder Kumar* v. *State of U.P.*[368] Considering arrest and detention as incalculable harm to the reputation and self-esteem of an individual, it laid down the following requirements-

i. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or is likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.

ii. The police officer shall inform the arrested person when he is brought to the police station of this right.

iii. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.[369]

It was further directed that the Magistrate, before whom the arrested person is produced, is to ensure and satisfy that the above requirements have been complied.[370]

In *Sheela Barse* v. *State of Maharashtra*[371] a petition was filed with regard to custodial violence to women prisoners whilst confined in police custody. The Supreme Court laid down the following directions-

---

[368] AIR 1994 SC 1349

[369] *Ibid* at 1354

[370] *Ibid* at 1354

[371] AIR 1983 SC 378

(i) We would direct that four or five police lock ups should be selected in reasonably good localities where only female suspects should be kept and they should be guarded by female constables. Female suspects should not be kept in police lock up in which male suspects are detained. The State of Maharashtra has intimated to us that there are already three cells where female suspects are kept and are guarded by female constables and has assured the Court that two more cells with similar arrangements will be provided exclusively for female suspects.

(ii) We would further direct that interrogation of females should be carried out only in the presence of female police officers/constables.

(ii) Whenever a person is arrested by the police without warrant, he must be immediately informed of the grounds of his arrest and in case of every arrest it must immediately be made known to the arrested person that he is entitled to apply for bail. The Maharashtra State Board of Legal Aid and Advice will forthwith get a pamphlet prepared setting out the legal rights of an arrested person and the State of Maharashtra will bring out sufficient number of printed copies of the pamphlet in Marathi which is the language of the people in the State of Maharashtra as also in Hindi and English and printed copies of the pamphlet in all the three languages shall be affixed in each cell in every police lock up and shall be read out to the arrested person in any of the three languages which he understands as soon as he is brought to the police station.

(iv) We would also direct that whenever a person is arrested by the police and taken to the police lock up, the police will immediately give an intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance. The State Government will

provide necessary funds to the concerned Legal Aid Committee for carrying out this direction.

(v) We would direct that in the city of Bombay, a City Sessions Judge, to be nominated by the principal Judge of the City Civil Court, preferably a lady Judge, if there is one, shall make surprise visits to police lock ups in the city periodically with a view to providing the arrested persons an opportunity to air their grievances and ascertaining what are the conditions in the police lock ups and whether the requisite facilities are being provided and the provisions of law are being observed and the directions given by us are being carried out. If it is found as a result of inspection that there are any lapses on the part of the police authorities, the City Sessions Judge shall bring them to the notice of the Commissioner of Police and if necessary to the notice of the Home Department and if even this approach fails, the City Sessions Judge may draw the attention of the Chief Justice of the High Court of Maharashtra to such lapses. This direction in regard to police lock ups at the districts headquarters shall be carried out by the Sessions Judge of the district concerned.

(vi) We would direct that as soon as a person is arrested, the police must immediately obtain from him the name of any relative or friend whom he would like to be informed about his arrest and the police should get in touch with such relative or friend and inform him about the arrest; and lastly

(vii) We would direct that the magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody and inform him that he has right under section 54 of the Code of Criminal Procedure, 1973 to be medically examined. We are aware that section 54 of the Code of Criminal Procedure, 1973 undoubtedly provides for

examination of an arrested person by a medical practitioner at the request of the arrested person and it is a right conferred on the arrested person. But very often the arrested person is not aware of this right and on account of his ignorance, he is unable to exercise this right even though he may have been tortured or maltreated by the police in police lock up. It is for this reason that we are giving a specific direction requiring the magistrate to inform the arrested person about this right of medical examination in case he has any complaint of torture or mal-treatment in police custody.[372]

In *D.K.Basu* v. *State of West Bengal*[373] the Supreme Court has tried to check the abuse of police power and has extensively dealt with the cases of custodial violence, including torture and death in the lock-ups, by laying down certain requirements to be followed in all cases of arrest or detention-

a) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
b) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

---

[372] *Ibid* at 382

[373] AIR 1997 SC 610

c) A person who has arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of memo of arrest is himself such a friend or a relative of the arrestee.

d) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

e) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

f) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

g) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

h) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

i) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

j) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

k) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.[374]

It was further directed to broadcast the requirements on All India Radio and National Network of Doordarshan.

The proving of custodial torture has vexed the complainants for a long time. The burden of proof lies on the prosecution, barring a few exceptions, to prove any offence of custodial torture. It is the police officers who can give evidence regarding the circumstances of custodial atrocities and they often try to circumvent the relevant evidence and mislead the courts. As a result of this procedural lacuna, there has been an increase of the number of cases of acquittals, leading to an increase of

[374] *Ibid* at 623

custodial atrocities. The Supreme Court took a serious note of this lacuna and observed-

> The law as to the burden of proof in such cases may be re-examined by the legislature so that handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection. [375]

This recommendation of the Supreme Court was subsequently referred to the Law Commission of India, which in its 113th Report recommended amendment of the law of evidence by incorporating a new section, section 114-B in the Indian Evidence Act, 1872 providing that if there is evidence to show that the injury was caused to a person, when he was in police custody, "the Court may presume that the injury was caused by the police officer having custody of that person during that period". This recommendation was made in 1985 and has not been given serious attention to by the legislature, despite several reminders by the Supreme Court to the Parliament to give a serious thought to it.[376]

With a view to ensure that the public bodies or officials do not act unlawfully but perform their public duties properly, particularly, where the fundamental rights of citizens are involved, the judiciary has given enough directions to safeguard the fundamental rights and freedoms of the accused and to protect them from the custodial tortures, assault and death in police custody.

---

[375] *State of U.P.* v. *Ram Sagar Yadav* AIR 1985 SC 416 at 421

[376] *Sube Singh* v. *State of Haryana* (2006) 3 SCC 178; *State of M.P.* v. *Shyamsunder Trivedi* (1995) 4 SCC 262; *D.K.Basu* v. *State of West Bengal* AIR 1997 SC 610; *Shakila Abdul Gafar Khan* v. *Vasant Raghunath Dhoble* (2003) 7 SCC 749; *Munshi Singh Gautam* v. *State of M.P.* AIR 2005 SC 402

3. 5. 6. Right to Wages-The judiciary has tried to bring the prisoners right to receive wages within the ambit of Article 21and 23 of the Constitution.

In the matter of: Prison Reforms Enhancement of Wages of Prisoners[377] the Kerala High Court entertained petitions from prisoners in the State of Kerala and laid down that 'the prisoners are entitled to payment of reasonable wages for the work taken from them'. The Court observed-

> If on a proper understanding of Article 23(1) of the Constitution there is no justification to read that Article 23(1) is excluding the case of a prisoner who is asked to do work on payment of illusory wages, we see no compelling reason to do so. The consequence is that to deny a prisoner reasonable wages in return for his work will be to violate the mandate in Article 23(1) of the Constitution. Consequently the State could be directed not to deny such reasonable wages to the prisoners from whom the State takes work in its prisons.[378]

In *Gurudev Singh* v. *State of H.P.*,[379] the Himachal Pradesh High Court while entertaining a case filed by prisoners claiming minimum wages and challenging irregularities and deplorable conditions existing in the jail, observed-

> Remuneration which is not less than the minimum wages, has to be paid to anyone who has been asked to provide labour or service by the State. The payment has to be equivalent to the services rendered, otherwise it would be 'forced labour' within the meaning

---

[377] AIR 1983 Ker 261

[378] *Ibid* at 272

[379] AIR 1992 HP 76

of Article 23 of the Constitution. Here, there is no difference between a prisoner serving sentence inside the prison walls and a free man in the society. Although on account of incarceration, a prisoner may lose enjoyment of some of the rights, but there is no total extinction by reason of the jail sentence. Section 53 of the Indian Penal Code may provide for assignment of work in cases of rigorous imprisonment, however, it does not say that the labour provided by such a prisoner has to be free. Again, it does envisage subjecting the prisoner(s) to obnoxious, harsh and uncalled for duties which are ex facie condemnable.[380]

The Court further observed-

We, therefore, proceed to reject the submission that the State can put the prisoners, sentenced to rigorous imprisonment, to hard labour without payment of any wages in view of the nature of the sentence they serve. Equally untenable is the plea that that giving of better facilities and payment of wages to them would mean creating an impression that committing of crime and going to the prison is a better mode of living and earning wages. This kind of understanding of the matter is completely misconceived. It is difficult to comprehend the matter in this way. No one would like to commit crime, suffer indignity and undergo obligatory hard labour by losing all benefits which a free man can otherwise avail in the society.[381]

In *State of Gujarat* v. *Hon'ble High Court of Gujarat*,[382] the three-Judge Bench of the Supreme Court while dealing with the question of

[380] *Ibid* at 89

[381] *Ibid* at 90

[382] (1998) 7 SCC 392

quantum of wages to be paid to the prisoners came to the following conclusions-

1. It is lawful to employ the prisoners sentenced to rigorous imprisonment to do hard labour whether he consents to do it or not.
2. It is open to the jail officials to permit other prisoners also to do any work which they choose to do provided such prisoners make a request for that purpose.
3. It is imperative that the prisoners should be paid equitable wages for the work done by them. In order to determine the quantum of equitable wages payable to prisoners, the State concerned shall constitute a wage-fixation body for making recommendations. We direct each State to do so as early as possible.
4. Until the State Government takes any decision on such recommendations, every prisoner must be paid wages for the work done by him at such rates or revised rates as the Government concerned fixes in the light of the observations made above....
5. We recommend to the State concerned to make law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode.[383]

[383] *Ibid* at 412-413

The judgment of the Supreme Court of laying down the equitable wages to be paid to the prisoners as well as showing equal concern to the victim and the victim's family, while fixing wages for the prisoners is indeed salutary. Wadhwa, J. stated in his judgment that 'criminal justice would look hollow if justice is not done to the victim of the crime'.[384]

3. 5. 7. Police Reforms-A three-Judge Bench of the Supreme Court in *Prakash Singh* v. *Union of India*[385] has laid down measures to insulate police machinery from political/executive interference, to make it more efficient and effective and to strengthen and preserve the rule of law. In 1996, two former Director General of Police had filed a petition under Article 32 of the Constitution, *inter alia*, praying for issue of directions to the Government of India to frame a new Police Act on the lines of the model Act drafted by the National Police Commission in order to ensure that the police was made accountable essentially and primarily to the law of the land and the people. In exercise of its jurisdiction under Article 32 and 142 of the Constitution of India, the Supreme Court issued the following directions-

State Security Commission

(1) The State Governments are directed to constitute a State Security Commission in every State to ensure that the State Government does not exercise unwarranted influence or pressure on the State Police and for laying down the broad policy guidelines so that the State Police always acts according to the laws of the land and the Constitution of the country. This watchdog body shall be headed by the Chief Minister or Home Minister as Chairman and have the DGP of the State as its ex-

---

[384] *Ibid*

[385] (2006) 8 SCC 1

officio Secretary. The other members of the Commission shall be chosen in such a manner that it is able to function independent of Government control. For this purpose, the State may choose any of the models recommended by the National Human Rights Commission, the Ribeiro Committee or the Sorabjee Committee.....

The recommendations of this Commission shall be binding on the State Government.

The functions of the State Security Commission would include laying down the broad policies and giving directions for the performance of the preventive tasks and service oriented functions of the police, evaluation of the performance of the State police and preparing a report thereon for being placed before the State legislature.

Selection and Minimum Tenure of DGP

(2) The Director General of Police of the State shall be selected by the State Government from amongst the three senior-most officers of the Department who have been empanelled for promotion to that rank by the Union Public Service Commission on the basis of their length of service, very good record and range of experience for heading the police force. And, once he has been selected for the job, he should have a minimum tenure of at least two years irrespective of his date of superannuation. The DGP may, however, be relieved of his responsibilities by the State Government acting in consultation with the State Security Commission consequent upon any action taken against him under the All India Services (Discipline and Appeal) Rules or following his conviction in a court of law in a criminal offence or in a case of corruption, or if he is otherwise incapacitated from discharging his duties.

Minimum Tenure of I.G. of Police & other officers

(3) Police Officers on operational duties in the field like the Inspector General of Police in-charge Zone, Deputy Inspector General of

Police in-charge Range, Superintendent of Police in-charge district and Station House Officer in-charge of a Police Station shall also have a prescribed minimum tenure of two years unless it is found necessary to remove them prematurely following disciplinary proceedings against them or their conviction in a criminal offence or in a case of corruption or if the incumbent is otherwise incapacitated from discharging his responsibilities. This would be subject to promotion and retirement of the officer.

Separation of Investigation

(4) The investigating police shall be separated from the law and order police to ensure speedier investigation, better expertise and improved rapport with the people. It must, however, be ensured that there is full coordination between the two wings. The separation, to start with, may be effected in towns/urban areas which have a population of ten lakhs or more, and gradually extended to smaller towns/urban areas also.

Police Establishment Board

(5) There shall be a Police Establishment Board in each State which shall decide all transfers, postings, promotions and other service related matters of officers of and below the rank of Deputy Superintendent of Police. The Establishment Board shall be a departmental body comprising the Director General of Police and four other senior officers of the Department. The State Government may interfere with decision of the Board in exceptional cases only after recording its reasons for doing so. The Board shall also be authorized to make appropriate recommendations to the State Government regarding the posting and transfers of officers of and above the rank of Superintendent of Police, and the Government is expected to give due weight to these recommendations and shall normally accept it. It shall also function as a forum of appeal for disposing of representations from

officers of the rank of Superintendent of Police and above regarding their promotion/transfer/disciplinary proceedings or their being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State.

Police Complaints Authority

(6) There shall be a Police Complaints Authority at the district level to look into complaints against police officers of and up to the rank of Deputy Superintendent of Police. Similarly, there should be another Police Complaints Authority at the State level to look into complaints against officers of the rank of Superintendent of Police and above. The district level Authority may be headed by a retired District Judge while the State level Authority may be headed by a retired Judge of the High Court/Supreme Court. The head of the State level Complaints Authority shall be chosen by the State Government out of a panel of names proposed by the Chief Justice; the head of the district level Complaints Authority may also be chosen out of a panel of names proposed by the Chief Justice or a Judge of the High Court nominated by him. These Authorities may be assisted by three to five members depending upon the volume of complaints in different States/districts, and they shall be selected by the State Government from a panel prepared by the State Human Rights Commission/LokAyukta/State Public Service Commission. The panel may include members from amongst retired civil servants, police officers or officers from any other department, or from the civil society. They would work whole time for the Authority and would have to be suitably remunerated for the services rendered by them. The Authority may also need the services of regular staff to conduct field inquiries. For this purpose, they may utilize the services of retired investigators from the CID, Intelligence, Vigilance or any other organization. The State level Complaints Authority would take

cognizance of only allegations of serious misconduct by the police personnel, which would include incidents involving death, grievous hurt or rape in police custody. The district level Complaints Authority would, apart from above cases, may also inquire into allegations of extortion, land/house grabbing or any incident involving serious abuse of authority. The recommendations of the Complaints Authority, both at the district and State levels, for any action, departmental or criminal, against a delinquent police officer shall be binding on the concerned authority.

National Security Commission

(7) The Central Government shall also set up a National Security Commission at the Union level to prepare a panel for being placed before the appropriate Appointing Authority, for selection and placement of Chiefs of the Central Police Organisations (CPO), who should also be given a minimum tenure of two years. The Commission would also review from time to time measures to upgrade the effectiveness of these forces, improve the service conditions of its personnel, ensure that there is proper coordination between them and that the forces are generally utilized for the purposes they were raised and make recommendations in that behalf. The National Security Commission could be headed by the Union Home Minister and comprise heads of the CPOs and a couple of security experts as members with the Union Home Secretary as its Secretary.

The judgment is the first tangible step towards police reform in a long time but also only an initial step. It is for the legislature to introduce a long-lasting reform by way of introduction of a suitable legislation, keeping in view the directions of the Supreme Court.

3. 5. 8. THE SOCIAL TRANSFORMATION ACHIEVED

The decision of the Supreme Court in *Maneka Gandhi* v. *Union of India*[386] marks a watershed in the history of constitutional law and criminal justice system in India. By their creative interpretation, inspired by judicial activism, the judges gave a new dimension to Article 21 by holding that it confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and that the procedure should be 'reasonable, fair and just'.

Speedy trial in criminal cases is considered an essential ingredient of the right to fair trial. The Supreme Court in *Hussainara Khatoon (I)* to *(VII)* cases[387] has held that speedy trial is a part of fundamental right to life and personal liberty under Article 21 of the Indian Constitution. The expanding horizon of Article 21 by the judiciary has paved the way for ensuring complete justice to all those accused languishing in jails for years without a fair trial.

Denial of free legal services to the poor accused persons or undertrial prisoners would vitiate the principles of 'reasonable, fair and just' procedure which is implied in the right to life and personal liberty under Article 21 of the Indian Constitution. The Supreme Court has in a

---

[386] AIR 1978 SC 597

[387] *Hussainara Khatoon (I)* v. *Home Secretary, State of Bihar* (1980) 1 SCC 81; *Hussainara Khatoon (II)* v. *Home Secretary, State of Bihar* (1980) 1 SCC 91; *Hussainara Khatoon (III)* v. *Home Secretary, State of Bihar* (1980) 1 SCC 93; *Hussainara Khatoon (IV)* v. *Home Secretary, State of Bihar* (1980) 1 SCC 98; *Hussainara Khatoon (V)* v. *Home Secretary, State of Bihar* (1980) 1 SCC 108; *Hussainara Khatoon (VI)* v. *Home Secretary, State of Bihar* (1980) 1 SCC 115; *Hussainara Khatoon (VII)* v. *Home Secretary, State of Bihar* (1995) 5 SCC 326

series of decisions[388] extended its arm to the poor accused persons or undertrial prisoners and held that right to free legal services is an essential ingress of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21.

The judgments of the Supreme Court while dealing with the 'third-degree' methods adopted by the police[389] has dealt a blow to the primitive concept of the police authorities who feel that solitary confinement, putting bar fetters and handcuffing of accused persons and suspects and parading them on the roads on the way to court or jail will minimise the crime rate. The judiciary has also upheld the trust of the common people by taking a serious and prompt action against the wrongdoers and has controlled the unlawful activities of custodial violence[390] to a large extent by holding that police cannot be a law unto themselves expecting others to obey the law. The Supreme Court has added further dimension to the above initiative by laying down a number of requirements to be followed strictly in cases of arrest and detention.[391] The judiciary has also tried to provide some relief to the prisoners by compensating their labour in prison and recommending 'equitable' (not equal) wages for the work done during their term in jail.[392] The judiciary has also realised that the

---

[388] *M.H.Hoskot* v. *State of Maharashtra* AIR 1978 SC 1548; *Khatri (II)* v. *State of Bihar* AIR 1981 SC 928; *Sheela Barse* v. *State of Maharashtra* AIR 1983 SC 378

[389] *Sunil Batra* v. *Delhi Administration* AIR 1978 SC 1675; *Prem Shankar* v. *Delhi Administration* AIR 1980 SC 1535; *Kishore Singh Ravinder Dev* v. *State of Rajasthan* AIR 1981 SC 625; *Sunil Gupta* v. *State of M.P.* (1990) 3 SCC 119; *Citizens for Democracy* v. *State of Assam* (1995) 3 SCC 743

[390] *Joginder Kumar* v. *State of U.P.* AIR 1994 SC 1349; *Sheela Barse* v. *State of Maharashtra* AIR 1983 SC 378

[391] *D.K.Basu* v. *State of West Bengal* (1997) 1 SCC 416

[392] *In the matter of: Prison Reforms Enhancement of Wages of Prisoners* AIR 1983 Ker 261; *Gurudev Singh* v. *State of H.P.* AIR 1992 HP 76; *State of Gujarat* v. *Hon'ble High Court of Gujarat* (1998) 7 SCC 392

reform in the prison conditions and the prisoners cannot be achieved without the reformation of the police system. It has laid down exhaustive guidelines in order to separate the police from the executive interference and make it accountable to the people.[393] The above dynamism of the judiciary has tried to uplift the conditions of the persons behind bars without denuding their right to life and personal liberty.

3. 6. LABOUR

During the twentieth century a new branch of jurisprudence popularly known as Industrial Jurisprudence has developed in our country. Industrial Jurisprudence existed in our country in a rudimentary stage before independence. Industrial Jurisprudence owes its origin to the labour and industrial legislations and also to the innovative judgments of the judiciary. The change in the definition of an "industry" as a result of the judgment of the Supreme Court in *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa*[394] is noteworthy in this regard.

3. 6. 1. Abolition of Bonded Labour System-Inspite of the existence of the Bonded Labour System (Abolition) Act, 1976 the system of bonded labour continues to prevail in the society. The judiciary has taken commendable steps to eradicate bonded labour system in India.

In *People's Union for Democratic Rights* v. *Union of India,*[395] also known as the Asiad Labour case, a writ petition was filed on the ground that the workers were not getting the minimum wages. The Court

---

[393] *Prakash Singh* v. *Union of India* (2006) 8 SCC 1

[394] (1978) 2 SCC 213

[395] AIR 1982 SC 1473

successfully transformed the constitutional guarantee of equality and the Labour law provision from sloganeering to materialization by giving multi-dimensional meanings to the expression 'forced labour' as used in Article 23 of the Constitution which paved the way for the Court in future to interpret the Bonded Labour System (Abolition) Act, 1976 and the bonded labour system as a crude form of forced labour. The Court opined-

> Labour which is rendered not willingly but as a result of force or compulsion is 'forced labour'. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such force, it would be forced labour.[396]

In *Bandhua Mukti Morcha* v. *Union of India*,[397] the Supreme Court entertained a matter concerning release of bonded labourers of quarry workers raised by an organisation dedicated to the release of bonded labourers and challenged the provisions of Bonded Labour System (Abolition) Act, 1976 in Haryana. The State steadfastly contended that there was no bonded labourer. The Court however in this case went on to emphasize that public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and the vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The Court laid down a broader test to determine whether a workman is a bonded labourer or not. The Court rejected the pure legalistic approach to

---

[396] *Ibid* at 1490

[397] AIR 1984 SC 802

the Act and adopted a functional and practical approach for the effective implementation of the Act. The Court observed-

> Whenever it is shown that a labourer is made to provide forced labour, the Court would raise a presumption that he is required to do so in consideration of an advance or other economic consideration received by him and he is therefore a bonded labourer. This presumption may be rebutted by the employer and also by the State Government if it so chooses but unless and until satisfactory material is produced for rebutting this presumption, the Court must proceed on the basis that the labourer is a bonded labourer entitled to the benefit of the provisions of the Act.[398]

The Supreme Court gave twenty-one directions for the effective implementation of the social and labour welfare legislations applicable to stone quarries. It further appointed Sri Laxmi Dhar Mishra, Joint Secretary in the Ministry of Labour, Government of India as a monitoring agency and directed him to visit the stone quarries of Faridabad in order to ascertain the compliance of the directions of the Court by the Central and State Government and the contractors.

In *Neeraja Chaudhary* v. *State of M.P.*,[399] the Supreme Court entertained a letter petition in which a complaint about the non-implementation of the Bonded Labour System (Abolition) Act, 1976 was made. The court observed-

> It is the plainest requirement of Articles 21 and 23 that bonded labourers must be identified and released and on release, they must be suitably rehabilitated. The Bonded Labour System (Abolition) Act, 1976 has been enacted pursuant to the Directive Principles of

---

[398] *Ibid* at 827

[399] AIR 1984 SC 1099

State Policy with a view to ensuring basic human dignity to the bonded labourers and any failure of action on the part of the State Government in implanting the provisions of this legislation would be the clearest violation of Article 21 apart from Article 23.[400]

In *Bandhua Mukti Morcha* v. *Union of India*,[401] the Supreme Court constituted a Committee to identify bonded labourers and to collect all material in respect of them so as to assist the Court to make further directions in terms of the scheme to rehabilitate them. In pursuance to the direction of the Supreme Court, the Committee submitted a report and the Supreme Court laid down some directions for the State of Haryana to comply with.[402]

On 11th May 1997, the Supreme Court had ordered the Human Rights Commission (NHRC) to take over the monitoring of the implementations of the directions of the Supreme Court and that of the provisions of the Bonded Labour System (Abolition) Act, 1976. The NHRC submitted its report along with its proposal for identification, release and rehabilitation of bonded labourers. The Supreme Court in *Public Union for Civil Liberties* v. *State of Tamil Nadu*[403] laid down the following guidelines for the rehabilitation of the bonded labourers-

1. All States and Union Territories must submit their status report in the form prescribed by NHRC in every six months.

---

[400] *Ibid* at 1106

[401] (1991) 4 SCC 174

[402] *Bandhua Mukti Morcha* v. *Union of India* (1991) 4 SCC 177. Further directions were given in *Bandhua Mukti Morcha* v. *Union of India* (2000) 9 SCC 322

[403] (2004) 12 SCC 381 quoted in Justice Rajendra Babu, *A Landmark Judgment of the Supreme Court on the Measures to Solve the Problem of Bonded Labour*, Legal News & Views, October 2004, Page 38

2. All the State Governments and Union Territories shall constitute Vigilance Committees at the District and sub-Divisional levels in accordance with Section 13 of the Act within a period of six months from today.
3. All the State Governments and Union Territories shall make proper arrangements for rehabilitating released bonded labourers.....
4. The State Government and Union Territories shall chalk out a detailed plan for rehabilitating released bonded labourers either by itself or with the involvement of such organisations or NGOs within a period of six months.
5. The Union and State Governments shall submit a plan within a period of six months for sharing the money under the modified Centrally Sponsored Scheme, in the case where the States wish to involve such organisations or NGOs.
6. The State Governments and Union Territories shall make arrangements to sensitize the District Magistrate and other statutory authorities/committees in respect of their duties under the Act.

The Supreme Court tried to infuse life into the Bonded Labour System (Abolition) Act, 1976 by way of giving it a liberal interpretation in tune with the present day. As a result, the suffering and hardship of the bonded labourers has been reduced to a considerable extent and suitable steps for their rehabilitation have been taken. However, the directions of the Supreme Court have not been fully given effect to, and it is upon the Government to work in cooperation with the Supreme Court and see that the bonded labour system is completely wiped out from India.

3. 6. 2. Strike and Bandh (Bundh) - Strike means concerned stoppage of work by workers done with a view to improving their wages or conditions, or giving vent to a grievance or making a protest about something or the other, or supporting or sympathizing with other workers in such endeavour.[404]

'Bundh' is a Hindi word meaning closed or locked. The expression therefore conveys the idea that everything is to be blocked or closed.[405]

The judiciary has come down heavily upon the calling of strikes and bandhs by the employees, political parties, organized bodies or associations and has tried to rid the society of the menace of strikes and bandhs. In *Kameshwar Prasad* v. *State of Bihar*[406] the Supreme Court has settled that the right to strike is not a fundamental right. The Court in this case followed its earlier decision in *All India Bank Employees Association* v. *The National Industrial Tribunal (Bank Disputes), Bombay.*[407]

In *T.K.Rangarajan* v. *State of Tamil Nadu and others*[408] the Supreme Court was dealing with the action of the Tamil Nadu government terminating the services of all employees who had resorted to strike for their demands. Expressing its anguish and disapprobation of the action of the employees, the Supreme Court observed-

> Apart from statutory rights, Government employees cannot claim that they can take the society at ransom by going on strike. Even if

---

[404] Halsbury's Laws of England,4th Edition quoted in Mallikarjuna Sharma, *Right to Strike*, 46 JILI(2007) Page 522

[405] *Bharat Kumar K. Palicha* v. *State of Kerala* AIR 1997 SC 291

[406] AIR 1962 SC 1166

[407] AIR 1962 SC 171

[408] (2003) 6 SCC 581

there is injustice to some extent, as presumed by such employees, in a democratic welfare State, they have to resort to the machinery provided under different statutory provision for redressal of their grievance. Strike as a weapon is mostly misused which results in chaos and total maladministration. Strike affects the society as a whole and particularly when two lakh employees go on strike en masse, the entire administration comes to a grinding halt. In the case of strike by a teacher, entire educational system suffers; many students are prevented from appearing in their exams which ultimately affect their whole career. In case of strike by Doctors, innocent patients suffer; in case of strike by employees of transport services, entire movement of the society comes to a stand still; business is adversely affected and number of persons find it difficult to attend to their work, to move from one place to another or one city to another. On occasions, public properties are destroyed or damaged and finally this creates bitterness among public against those who are on strike.[409]

Earlier the Supreme Court had expressed its dissatisfaction at the calling of bandh by political parties, organized bodies or associations in *Communist Party of India (M)* v. *Bharat Kumar*.[410] While accepting the reasoning given by the Full Bench of Kerala High Court in *Bharat Kumar K. Palicha* v. *State of Kerala*[411] the court pointed out that the calling of a bundh entails the restriction of the free movement of the citizen and his right to carry on his avocation. The Kerala High Court had observed-

---

[409] *Ibid* at 591.

[410] (1998) 1 SCC 201

[411] AIR 1997 Ker 291

> No political party or organisation can claim that it is entitled to paralyse the industry and commerce in the entire State or Nation and is entitled to prevent the citizens not in sympathy with its viewpoint, from exercising their fundamental rights or from performing their duties for their own benefit or for the benefit of the State or the Nation. Such a claim would be unreasonable and could not be accepted as a legitimate exercise of a fundamental right by a political party or those comprising it.[412]

The Supreme Court supported the view of the Kerala High Court that the political parties and the organisations which call for bundhs and enforce them are really liable to compensate the Government, the public and the private citizen for the loss suffered by them, for destruction of public and private property during the enforcement of bundhs.[413]

In *Harish Uppal (Ex-Capt)* v. *Union of India*[414] the Supreme Court, while holding that the 'lawyers have no right to go on strike or give a call for boycott, not even on a token strike', observed-

> The law is already well settled. It is the duty of every advocate who has accepted a brief to attend trial, even though it may go on day to day and for a prolonged period. He cannot refuse to attend court because a boycott call is given by the Bar Association. It is unprofessional as well as unbecoming for him to refuse to attend court even in pursuance of a call for strike or boycott by the Bar Association or the Bar Council. It is settled law that courts are

---

[412] *Ibid* at 300

[413] *Communist Party of India (M)* v. *Bharat Kumar* (1998) 1 SCC 201

[414] (2003) 2 SCC 45

under an obligation to hear and decide cases brought before them and cannot adjourn matters merely because lawyers are on strike.[415]

In *Dr. P.G. Najpande* v. *State of M.P.*[416] the Madhya Pradesh High Court held that 'chakkajam' should not paralyse life of the civilised society. It laid down certain directions and orders and observed-

> It should be borne in mind that in the name of demonstration or protestation, the life in a civilized society cannot be paralyzed, in the name of legitimate exercise of ones right to protest the fundamental right of the others cannot be scuttled. In a democratic policy the fundamental right of each citizen is sacrosanct. The collective cannot destroy the same. No one, however big he may be should foster a misgiving that he can create a tremor in the fundamental rights of others and tremble the spine of the members of the society at large by forming a group or a political party. The splendor of right to move the glory to live with dignity by carrying out a lawful profession or calling cannot be abridged in the name of mass protest or mass demonstration. The collective protest cannot be allowed to take the shape of collective passion to project a fractured mind thereby creating a dent in the concept of 'Rule of Law' and bringing in a concavity in the constitutional philosophy which sings the song of highly cherished fundamental rights of millions of people. Be it noted the rights of others cannot be crucified at the fanciful pedestal of a group or a party and by no stretch of imagination it can be guillotined in a cavalier fashion from any pupil. The law of this country does not so countenance.[417]

---

[415] *Ibid* at 64

[416] AIR 2008 MP 55

[417] *Ibid* at 58-59

However, it is seen that the political parties, organized bodies or associations have not paid any heed to the judgment of the Supreme Court in *Communist Party of India (M)* v. *Bharat Kumar.*[418] The legislature has not taken any initiative to bring in any suitable legislation whereby the calling of strikes, bundhs or hartals by the political parties can be curtailed to a great extent. The calling of strikes, bundhs and hartals paralyses the economy as well as effects the 'bread and butter' of a common man, but such has not affected the political parties, organized bodies or associations.

3. 6. 3. Contract Labour-The question of absorption of contract labourers has been a question of heated discussion and an area of conflict between the management and the workers. The judiciary has tried to eradicate this tussle and conflict by realizing the need of the hour and in tune with the changing needs of the society.

In *Air India Statutory Corporation* v. *Union of India*[419] the appellants engaged the respondent union's members as contract labour for sweeping, cleaning, dusting and watching of the building owned and occupied by the appellant. Since the appellant did not abolish the contract system and failed to enforce the notification of the Government of India, the respondents came to file writ petitions for direction to the appellant to enforce forthwith the aforesaid notification abolishing the contract labour system in the aforesaid services and to direct the appellant to absorb all the employees doing cleaning, sweeping, dusting, washing and watching of the building owned or occupied by the appellant-establishment, with effect from the respective dates of their joining as contract labour in the

[418] (1998) 1 SCC 201

[419] (1997) 9 SCC 377

appellant's establishment with all consequential rights/benefits, monetary or otherwise. While holding that the Contract Labour (Regulation and Abolition) Act, 1970 does not provide for total abolition of the contract labour system, the Court observed-

> The contractor is an intermediary between the workmen and the principal employer. The moment the contract labour system stands prohibited under Section 10(1), the embargo to continue as a contract labour is put an end to and direct relationship has been provided between the workmen and the principal employer. Thereby, the principal employer directly becomes responsible for taking the services of the workmen hitherto regulated through the contractor. The object of the penal provisions was to prevent the prohibition of the employer to commit breach of the provisions of the Act and to put an end to exploitation of the labour and to deter him from acting in violation of constitutional right of the workmen to his decent standard of life, living, wages, right to health etc.[420]
>
> In a separate concurring judgment, S.B.Majmudar, J. observed-
>
> If on abolition of contract labour system, contract labour itself is to be abolished, it would cause economic ruin and economic death to contract labourer and his dependents for amelioration of whose lot order under Section 10 is to be passed. If it is held that on abolition of contract labour system, the erstwhile contract labourers are to be thrown out of the establishment lock, stock, and barrel, it would amount to throwing the baby out with the bath water.[421]

---

[420] *Ibid* at 435

[421] *Ibid* at 443

In *Steel Authority of India Ltd.* v. *National Union Waterfronts Workers*[422] prospectively overruled *Air India Statutory Corporation* v. *Union of India*[423] and observed the following effects of a notification under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act, 1970-

(1) contract labour working in the concerned establishment at the time of issue of notification will cease to function;

(2) the contract of principal employer with the contractor in regard to the contract labour comes to an end;

(3) no contract labour can be employed by the principal employer in any process, operation or other work in the establishment to which the notification relates at any time thereafter;

(4) the contract labour is not rendered unemployed as is generally assumed but continues in the employment of the contractor as the notification does not sever the relationship of master and servant between the contractor and the contract labour;

(5) the contractor can utilise the services of the contract labour in any other establishment in respect of which no notification under Section 10 (1) has been issued; where all the benefits under the CLRA Act which were being enjoyed by it, will be available;

(6) if a contractor intends to retrench his contract labour he can do so only in conformity with the provisions of the I.D. Act.[424]

The judgment of the Supreme Court in denying the right of contract labour to be absorbed on abolition of contract labour system has succeeded in satisfying the management's desire to give them a free hand

---

[422] (2001) 7 SCC 1

[423] (1997) 9 SCC 377

[424] (2001) 7 SCC 1 at 43. The judgment was followed in *A.P. SRTC* v. *G. Srinivas Reddy* (2006) 3 SCC 674

to employ contract labour without imposing any liability to absorb them on abolition of the contract labour system in order to compete in the international market. Indeed, the decision is in conformity with the recommendations of the Fifth Pay Commission that in certain jobs the Government of India should also engage contract labour to facilitate outsourcing of activities to contract labour.[425]

3. 6. 4. THE SOCIAL TRANSFORMATION ACHIEVED

The decision of the Supreme Court in *Bangalore Water Supply*[426] case has revamped the whole concept of the definition of 'industry' under the Industrial Disputes Act, 1947. The work which was to be done by the legislature in the changing circumstances has been done by the judiciary.

The existence of the Bonded Labour System (Abolition) Act. 1976 could not eradicate the system of bonded labour in India. The judicial dynamism gave an impetus to the Act by providing for abolition as well as rehabilitation of the bonded labourers[427] and reinforcing of the antagonists of judicial activism that judicial legislation is possible even within the parameters of the interpretative role theory. The judicial initiative provided a thrust for social action groups to work with more vigour and commitment to expose the areas susceptible to bonded labour system.

The attitude of the judiciary towards strikes and bandhs (bundh) has provided some relief to the general public. The holding of the society

---

[425] Suresh C. Srivastava, *Impact of the Supreme Court Decision on Contract Labour*, 43:4 JILI (2001) Page 531

[426] *Bangalore Water Supply and Sewarage Board* v. *A. Rajappa* (1978) 2 SCC 213

[427] *Bandhua Mukti Morcha* v. *Union of India* AIR 1984 SC 802; *Neeraja Chaudhary* v. *State of M.P.* (1984) 3 SCC 243

at ransom by the government employees has been severely criticised by the Supreme Court.[428] The calling of bandhs by the political parties, organised bodies or associations which restricts the free movement of the citizen and his right to carry on his avocation has been deterred by the judiciary. This has provided some relief to the general public and the daily wage workers who are the worst sufferers in the bandhs and has provided balance and tried to harmonise the competing and conflicting claims of individual vis-à-vis, the society. However, the duty of implementation of the directions rests upon the legislature comprising of the political parties who themselves call for such bandhs.

The judgment of the Supreme Court in *Steel Authority of India Ltd.*[429] has denied the right of contract labour to be absorbed, on abolition of contract labour system. This has removed the conflict between the management and workers which would have stalled the progress of the country. Furthermore, it has introduced flexibility in the appointment of contract labour without any future liability and is in tune with the current demand of industrialisation and globalisation.

3. 7. MEDICAL ETHICS

The expanding horizons of the interpretation of right to life under Article 21 received impetus after the decision in *Maneka Gandhi* v. *Union of India.*[430] As a result, the right to health and access to medical

---

[428] *T.K.Rangarajan* v. *State of Tamil and others* (2003) 6 SCC 581

[429] *Steel Authority of India Ltd.* v. *National Union Waterfronts Workers* (2001) 7 SCC 1

[430] AIR 1978 SC 597. In *Kirloskar Brothers Ltd.* v. *Employees' State Insurance Corp.* (1996) 2 SCC 682 the Supreme Court held that the right to health is a fundamental right under Article 21 of the Indian Constitution.

treatment has been included in the plethora of rights brought under the ambit of Article 21.

In *Vincent Panikurlangara* v. *Union of India*[431] the petitioner challenged the drug policy of the Government by way of public interest litigation. The Supreme Court observed-

> Maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society which the Constitution-makers envisaged. Attending to public health, therefore, is of high priority-perhaps the one at the top.[432]

In *Parmanand Katara* v. *Union of India*[433] a petition was filed under Article 32 of the Constitution when a private doctor refused to treat a patient, who met with an accident, because of non-compliance of formalities regarding accident victims. The Supreme Court while giving a very wide expansion of Article 21 of the Indian Constitution observed-

> There can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man. The patient whether he be an innocent person or be a criminal liable to punishment under the laws of the society, it is the obligation of those who are in charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished. Social

---

[431] AIR 1987 SC 990

[432] *Ibid* at 995

[433] (1989) 4 SCC 286

laws do not contemplate death by negligence to tantamount to legal punishment.

Article 21 of the Constitution casts the obligation on the State to preserve life. A doctor at the government hospital positioned to meet this State obligation is, therefore, duty bound to extend medical assistance for preserving life. Every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life.[434]

The Court laid down certain guidelines[435] to be followed by all government hospitals and medical institutes in medico-legal cases-

1. Whenever any medico-legal case attends the hospital, the medical officer on duty should inform the Duty Constable, name, age, sex of the patient and place and time of occurrence of the incident, and should start the required treatment of the patient. It will be the duty of the Constable on duty to inform the concerned police station or higher police functionaries for further action.

Full medical report should be prepared and given to the police, as soon as examination and treatment of the patient is over. The treatment of the patient would not wait for the arrival of the police or completing the legal formalities..

2. Zonalisation as has been worked out for the hospitals to deal with medico-legal cases will only apply to those cases brought by the police. The medico-legal cases coming to hospital of their own (even if the incident has occurred in the zone of other hospital) will not be denied the treatment by the hospital where the case reports, nor the case will be

---

[434] *Ibid* at 293

[435] Submitted by The Committee under the Chairmanship of the Director-General of Health Services discussed in *Parmananda Katra* v. *Union of India* (1989) 4 SCC 286 at 291

referred to other hospital because the incident has occurred in the area which belongs to the zone of any other hospital. The same police formalities as given in para 1 above will be followed in these cases.[436]

In *Consumer Education and Research Centre* v. *Union of India*[437] and *Kirloskar Brothers Ltd.* v. *Employees State Insurance Corporation*[438] the Supreme has held that right to health, medical aid to protect the health and vigour of a worker while in service or post retirement is a fundamental right under Article 21, read with Article 39(e), 41, 43 and 48A.

In *Paschim Banga Khet Mazdoor Samity* v. *State of W.B.*[439] the petitioner was denied admission to Government hospitals due to non-availability of beds for which he had to take admission in a private hospital and incur a huge expenditure towards his medical treatment. Aggrieved by the attitude of the State run hospitals, he filed a writ petition claiming compensation on the contention that right to access to treatment, which is an essential element of health was denied and the right to life has been deprived by the State. The Supreme Court held that providing adequate medical facilities for the people is an essential part of the obligation undertaken by the Government in a welfare State. It laid down some recommendations so that proper medical facilities are available for dealing with emergency cases-

1. Adequate facilities are available at the Primary Health Centres where the patient can be given immediate primary treatment so as to stabilize his condition.

---

[436] *Parmananda Katra* v. *Union of India* (1989) 4 SCC 286 at 294

[437] AIR 1995 SC 922

[438] (1996) 2 SCC 682

[439] (1996) 4 SCC 37

2. Hospitals at the district level and Sub-division level are upgraded so that serious cases can be treated there.

3. Facilities for giving specialist treatment are increased and are available at the hospitals at district level and Sub-Division level having regard to the growing needs.

4. In order to ensure availability of bed in an emergency at State level hospitals there is a centralized communication system so that the patient can be sent immediately to the hospital where bed is available in respect of the treatment which is required.

5. Proper arrangement of ambulance is made for transport of a patient from the Primary Health Centre to the district hospital or Sub-Division hospital and from the district hospital or Sub-Divisional hospital to the State hospital.

6. The ambulance is adequately provided with necessary equipment and medical personnel.

7. The Health Centres and the hospitals and the medical personnel attached to these centres and hospitals are geared to deal with larger number of patients needing emergency treatment on account of higher risk of accidents on certain occasions and in certain seasons.[440]

The observations of the judiciary in bringing the right to health and access to medical treatment as a part of right to life under Article 21of the Constitution was very much necessary in this age. Furthermore, the judiciary has tried to make the State realize its obligation towards its people and at the same time extended the medical facilities to every corner of the country and every section of the society.

---

[440] *Ibid* at 47-48

3. 7. 1. Supply of Blood-In order to ensure that the supply of contaminated blood is checked, the Supreme Court has issued recommendations/suggestions for revamping the system of blood banks in the country in *Common Cause* v. *Union of India.*[441] A writ petition was filed under Article 32 of the Constitution high-lighting the serious deficiencies and short-comings in the matter of collection, storage and supply of blood through the various blood centres operating in the country with a prayer to ensure that proper positive and concrete steps in a time bound programme for obviating the malpractices, malfunctioning and inadequacies of the blood banks all over the country. The Supreme Court observed-

> Blood is an essential component of the body which provides sustenance to life. There can be no greater service to the humanity than to offer one's blood to save the life of other fellow human-being. At the same time blood, instead of saving life, can also lead to death of the person to whom the blood is given if the blood is contaminated.[442]

The Supreme Court directed the Union Government to take steps to establish a National Council of Blood Transfusion as a society registered under the Societies Registration Act. In consultation with the National Council, the State Governments/Union Territory Administration shall establish a State Council in each State/Union Territory. The Court laid down the following directions in this regard-

> The programmes and activities of the National Council and the State Council shall cover the entire range of services related to operation and requirements of blood banks including the launching

---

[441] AIR 1996 SC 929

[442] *Ibid* at 929

of effective motivation campaigns through utilization of all media for stimulating voluntary blood donations, launching programmes of blood donation in educational institutions, among the labour industry and trade, establishments and organisations of various services including civic bodies, training of personnel in relation to all operations of blood collection, storage and utilization, separation of blood groups, proper labeling, proper storage and transport, quality control and archiving system, cross-matching of blood between donors and recipients, separation and storage of components of blood, and all basic essentials of the operations of blood banking.

The National Council shall undertake training programmes for training of technical personnel in various fields connected with the operation of blood banks.

The National Council shall establish an institution for conducting research in collection, processing, storage, distribution and transfusion of whole human blood and human blood components, manufacture of blood products and other allied fields.

The National Council shall take steps for starting special post-graduate courses in blood collection, processing, storage and transfusion and allied fields in various medical colleges and institutions in the country.[443]

The Court also directed that licensing of blood banks should be done, the professional donors should be eliminated and periodical checking by duly trained Drugs Inspectors in blood banking operation be ensured.

---

[443] *Ibid* at 936

The orders and directions of the Supreme Court in the *Common Cause* case has helped to supplement the law[444] as laid down regarding the collection, storage, processing and distribution of whole human blood, human blood components by the blood banks all throughout the country.

3. 7. 2. Rights of HIV/AIDS patient- Due to the association of stigma, isolation and social prejudice associated with HIV/AIDS, individuals infected with such deadly diseases are obviously more concerned with maintaining confidentiality of their health status and accordingly need better protection from unauthorized disclosures of their intimate health information. Physician-patient confidentiality deserves enhanced protection in the context of HIV/AIDS. Protecting the confidentiality of HIV/AIDS related information is also necessary for encouraging high-risk group members to come forward for testing, counselling and treatment.

In *Mr. 'X'* v. *Hospital 'Z'*[445] a civil appeal was filed by a HIV positive patient for damages against a hospital on the ground of breach of medical duty. The appellant's blood was to be transfused to another and, therefore, sample thereof was tested at the respondents, hospital and he was found to be HIV (+ve). On account of disclosure of this fact, the appellant's proposed marriage to one Ms. 'Y' which has been accepted was called off. Moreover, he was severally criticised and was also ostracized by the community. Balancing the clash of two fundamental rights, that is, the right of privacy of the appellant (Mr. 'X') and right of Ms. 'Y' (Mr. 'X's' fiancée) to lead a healthy life, the Court observed-

---

[444] Drugs and Cosmetics Act, 1940 and Drugs and Cosmetics Rules, 1945

[445] AIR 1999 SC 495

> The Right which would advance the public morality or public interest, would alone be enforced through the process of Court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected sit as mute structures of clay, in the Hall, Known as Court Room.[446]

The Court accepted the fact that in the doctor-patient relationship, the most important aspect is the doctor's duty of maintaining secrecy but upheld the action of the hospital, in disclosing the HIV (+ve) status of the appellant to the hitherto prospective bride and others by observing-

> Having regard to the fact that the appellant was found to be HIV (+ve), its disclosure would not be violative of either the rule of confidentiality or the appellant's right of privacy as Ms. 'Y', whom the appellant was likely to marry, was saved in time by such disclosure, otherwise, she too would have been infected with the dreadful disease if the marriage had taken place and consummated.[447]

While discussing the right of an AIDS patient to marry, the Court held-

> Having regard to the age and the biological needs, a person has a right to marry but this right is not without a duty. If that person is suffering from any communicable venereal disease or is impotent so that marriage would be a complete failure or that his wife would seek divorce from him on that ground, that person is under a moral, as also legal duty, to inform the woman with whom the marriage is proposed that he was not physically healthy and that he was suffering from a disease which was likely to be communicated to

---

[446] *Ibid* at 503

[447] *Ibid* at 503

her. In this situation, the right to marry and duty to inform about his ailment are vested in the same person. It is a right in respect of which a corresponding duty cannot be claimed as against some other person. Such a right, for these reasons also, would be an exception to the general rule that every "RIGHT" has a correlative "DUTY". Moreover, so long as the person is not cured of the communicable venereal disease or impotency, the RIGHT to marry cannot be enforced through a Court of law and shall be treated as a "SUSPENDED RIGHT".[448]

However, in *Mr. 'X'* v. *Hospital 'Z'*,[449] a three Judge Bench of the Supreme Court has partly overruled the observations of its earlier decision on the suspension of the right to marry of a HIV(+ve) patient during his/her period of illness. The Supreme Court observed that the observations made concerning the right to privacy and marriage as well as commission of an offence was unnecessary and the decision concerning the non-violation of the right of an applicant as a doctor should be treated as binding.

The judiciary has even maintained confidentiality in cases concerning the HIV (+ve) patients by deleting their names in the judgment of the Court. This policy was adopted after the decision in *MX of Bombay Indian Inhabitant* v. *M/s ZY*[450]

In *M. Vijaya* v. *Chairman and Managing Director, S.C.C. Ltd.*[451], the Full Bench of the Andhra Pradesh High Court has observed-

---

[448] *Ibid* at 502

[449] AIR 2003 SC 664

[450] AIR 1997 Bom 406

[451] AIR 2001 AP 502

There is an apparent conflict between the right to privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV-infected persons for the purpose of stopping further transmission of the virus. In the interest of the general public, it is necessary for the State to identify HIV-positive cases and any action in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the State was under an obligation to take all steps for the improvement of the public health. A law designated to achieve this object, if fair and reasonable, in our opinion, will not be a breach of Article 21 of the Constitution of India.

An anti-discrimination law is needed to protect the basic civil rights of HIV/AIDS patients. It is a lamenting fact that the Legislature has not come forward with any such legislation to uplift the condition of the HIV/AIDS patients in India.[452] It is the judiciary which has delivered far reaching judgments affecting the right of HIV/AIDS patient in India, dispelling many misconceptions about the right of unfortunate AIDS victims.

3. 7. 3. THE SOCIAL TRANSFORMATION ACHIEVED

The judiciary has been vibrant enough to expand the horizons of Article 21 by incorporating within its ambit the right to health and medical treatment.[453]This has ensured that the State is obliged to extend medical facilities to every section of the society. The recommendations

[452] The United Nations General Assembly adopted a Declaration of Commitment on HIV/AIDS in June 2001 and recognised the connection between HIV/AIDS and human rights.

[453] *Paramanand Katra* v. *Union of India* (1989) 4 SCC 286; *Paschim Banga Khet Mazdoor Samity* v. *State of W.B.* (1996) 4 SCC 37

and suggestions of the Supreme Court in providing for supply of uncontaminated blood in *Common Cause* case[454] is salutary in ensuring the proper working of the blood banks all throughout the country.

The judiciary has examined the issues relating to HIV/AIDS patients with a human rights lens by drawing a fine balance between the importance of maintaining confidentiality and that of disclosure which has given a new dimension to the fight against the misconceptions regarding HIV/AIDS. The judiciary has discussed about the rights of an AIDS patient[455] and now it is the duty of the legislature to frame separate legislations and enactments to protect the basic civil rights of AIDS patient.

3. 8. SUMMING UP

After Independence, the situation in India was intensely political, with economic development high on the national agenda, and awash with diverse ideas on the direction and form that developments could take. The Constitution has conferred on the Supreme Court vital responsibility to act as the apex arbitrator of disputes and the fountain-head of jurisprudence.

The judiciary had to make a difficult choice between different alternatives so as to strengthen the fabric of democracy, constitutionalism and rule of law as well as to promote social and economic justice in India. This necessarily involves judicial creativity of a high order. Judged on this touchstone, the judiciary has lived up to its reputation of upholding and promoting democratic values assigned to it under the Indian

---

[454] *Common Cause* v. *Union of India* (1996) 1 SCC 753

[455] *Mr. 'X'* v. *Hospital 'Z'* (1998) 8 SCC 296

Constitution by maintaining a balance between different interest groups, as well as between the government and the individual. When faced with a liberal and enlightened executive the judiciary sought to cooperate with it, confronted with an aggressive and bellicose one it stepped aside, and when the executive was weak or negligent it stepped in to ensure that the needs of the people were met. It has played a creative and dynamic role in uplifting the conditions of the people of India.

Since the inauguration of the Constitution of India,[456] thousands of cases have been spawned by the constitutional provisions wherein the changing demands of the society have been brought before the judiciary. The judiciary has shown its dynamism by interpreting the law to suit the changing needs of the society as well as supplementing the law in cases where there exists a vacuum.

[456] The Constitution of India was adopted on 26th November 1949 and came into force on 26th January 1950.The Supreme Court was inaugurated on 26th January 1950 and the inaugural session of the Supreme Court was held on 28th January 1950