

THE CONTRIBUTION OF JUDICIARY TO SOCIAL DYNAMICS IN INDIA SINCE INDEPENDENCE

**A THESIS SUBMITTED TO THE UNIVERSITY OF
NORTH BENGAL FOR THE AWARD OF THE DEGREE
OF DOCTOR OF PHILOSOPHY IN LAW**

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CHAPTER 1

INTRODUCTION

Society in India has always been very complex. Diversity of culture, religion, philosophy and political thought has been the essence of India. Even before it became a nation state, during the Islamic and Colonial period, the complexity of Indian society was no less. Administering such a society has been an uphill task for both Muslim and English rulers.

In 1950, the Constitution of India came into force and India became a 'Republic' and a nation with federal structure. States were divided on the basis of language and also culture. The multicultural characteristic of the country became more prominent than before. However the 'will of the people' was reflected in the Constitution and the foundation of 'Rule of Law', good governance and respect for multiculturalism was laid therein.

As a result there were two layers in the society, a layer of formal positive law enacted and implemented by the institutions and the agent of the government and another layer of socio-religio-customary legal practices which neither had a formal shape nor could be implemented formally. This was true of all the communities in India be it Hindu, Muslim, Christian, Parsi or Jew. In the latter four cases however the religious institutions supervised such socio-religious practices. These latter matters were termed 'personal' and largely became a matter of the community with restrained governmental intervention. The formal law

enacted by the organ of the government was strictly and rigidly positivist in approach and this came to be known as the public law.¹

It was not till the emergency period did the ramification of the strict positivist approach to the formal law became clear. It became clear that strict positive approach to law separated from morality could transform democracy to despotism and rob the country of its welfare character. Post emergency period, therefore, saw a sea change in the countries approach to law.

The phenomenal growth and ramification of the Government as a welfare State in the twentieth century and the consequent explosion of the legal and administrative expedencies for implementation of a new social order made the people to look upon some authority as a protector of their interest. The problems arising between the State and man; man and man as a result of the complexities of the functioning of the State needed to be resolved. The problem was to strike the right balance between efficient government on the one hand and the protection of the citizen against misgovernment on the other. This opened up a third social layer where people demanded that the government deliver the goods.

It may be worth recalling the cliché that law is made for man and not vice versa. According to the sociological school of thought, formal law is static and antiquated, lagging behind the living law. The law ordinarily comprehends vast area on the subject and it is not possible for the makers to deal with every contingency attached to human activity. In social dynamics the living law always changes faster than the formal law which is slow to recognise these changes. As a result there is inherent stress between the ruled and the ruler. Thus there is a gap between *lex*

¹ Both personal and public law are required to adhere to Article 13 of the Constitution of India.

scripta (formal law or written law) and *lex non scripta* (living law or uncodified law-or as Austin puts it law improperly so called, given by human beings not in position of political superiority or inferiority to each other). It is here that the judiciary plays a key role to uphold the values as enshrined in the Constitution on one hand and examine the validity of the popular demand of legal change on the other.

The founding fathers of the Indian Constitution created a mechanism for balancing the will of the people and the role of law separately. The doctrine of popular sovereignty was embodied in the legislature, reflecting the popular opinion whereas the task of being guardians of fundamental law and upholders of the rule of law was assigned to the judiciary. Furthermore, the doctrine of separation of powers which guided the drafting of the Indian Constitution ensures the functioning of the three organs, viz. the legislature, the executive and the judiciary separately while adhering to the principle of 'checks and balances.'

The makers of the Indian Constitution opted for the Westminster model of Cabinet Government of the United Kingdom, the theory of separation of powers delineating the functions of the legislature, the executive and the judiciary as embodied in the American Constitution and the Irish example of obligating the State to follow certain directives for the societal well-being. The drafters of the Indian Constitution had envisaged a clear distinction of powers and functions of the legislature, the executive and the judiciary. The enactment of laws is the exclusive domain of the Legislature at the State and Union level. The elected representatives are expected to know the pulse of the people and thus be aware of the aspirations of those whom they represent. They are supposed to be alive to the needs of the society and thus have to enact, amend and

repeal the laws which govern human conduct in the public sphere in a civilised society. The executive is responsible for implementing the legislations enacted by the legislature. To run the affairs of the State in accordance with law is an important obligation of the executive. The role of the judiciary is to administer justice in accordance with the law of the land. The Higher Judiciary is further empowered with the task of adjudicating the validity of the law enacted by the legislature. The High Courts and the Supreme Court are guaranteed the power of superintendence over all the Courts and Tribunals in the concerned State and the country respectively. While ensuring the system of checks and balances, the framers of the Indian Constitution had envisaged the three organs shall be complimentary and supplementary to each other so as to constitute India as a model welfare State.

The responsibility of interpreting the Constitution squarely rests on the judiciary in every democratic country which has a written Constitution. It is this assignment of the Indian Constitution that has entrusted the judiciary to expand and interpret law within the constitutional framework, so as to respond to the hopes and aspirations of the changing society. This process of constitutional adjudication by the judiciary has a dynamics of its own which contributes to the development of law by a methodology which is four-fold namely-

1. The judiciary interprets the laws in a manner to best serve the interest of the society;
2. It identifies the areas where there is need for enacting laws and their proper implementation;
3. The judiciary provides valuable inputs to the other wings of governance so as to secure an ideal enactment and implementation of laws; and

4. The judiciary not only irons out the creases left by the legislature in the texture woven by it, it also tries to fill in the gaps, if any, left by the legislature and when detected.

The old orthodox theory was that a judge never creates law, but then he only declares law. Thus it was not considered to be laws 'strictly so called'. This mechanical view of the judicial function was prevalent in Britain in the early twentieth century. This time-honoured fiction of the declaratory role of the judge has lost much support now. Law has to be interpreted according to the current social standards and popular demands. The law when enacted, in spite of the best efforts and capacity of the legislators cannot visualise all situations in future to which that law requires application. New situations develop and the law has got to be interpreted for the purpose of application to them, for the purpose of finding a solution to the new problems. This is how the law advances and the area or field of judicial creativity to fill in the gap between the existing law and the law as it ought to be. Lord Denning has said, "every decision on every new situation is a development of law. Law does not stand still. It moves continually (therefore it is dynamic). Once this is recognised, then the task of the judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason laying brick on brick, without thought to the overall design. He must be an architect thinking of the structure as a whole building for the society, a system of law, which is strong, durable and just. It is on his work the civilised society depends." He further says that the task of common law is to act as an instrument of evolution in accordance with the changing needs of the

society and the demands of justice.² The judiciary as an institution for social decision making must strive for an ultimate social purpose of establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man.

No game can be played without an umpire or a referee. No society can run without an arbitrator. Democracy cannot sustain its experiment in the absence of an adjudicator. In a democratic set-up, differences and disputes are inevitable incidents which can be resolved by the judiciary. The judiciary of the present should be a sentinel, monitor, mentor and ombudsman of the Constitution of India. Law, like any other social science, rapidly changes. The dynamic dimension of law which regards persons, individually and collectively, as the cynosure of social justice, the social engineering through law whereby adjustment of relations and ordering of conduct conducive to distributive equity and synthesis of computing claims becomes the end of the jural order, is the order of the day, which is smoothened up by the judiciary.

Rule of Law according to the Constitution is to prevail even amidst clash of arms and will. Human rights do not fade out when social atrophy begins. The inner strength of a system is put to test during these clashes of arms and wills. A more meaningful, modernized, and humanized system of judicial justice that works in Indian conditions as against a system with proud unconcern with social justice has been the clarion call of the hour. While the judiciary has to be alert and sensitive on one hand the law too must mutate and vacate, because social systems have to obey law for survival. In working for progress the Indian system had to discard

² Quoted in Justice Binod Kumar Roy, *Role of Judiciary in the Present Day Context*, AIR 1998 Journal 17 and Dr. Malikiat S. Rahi, *Judicial Activism and Judicial Restraint*, AIR 1999 Journal 44

hallowed past and sanctified orthodoxies. To borrow a leaf from George Bernard Shaw, if the English man had not repudiated the duty of absolute obedience to the king, his political progress would have been impossible. Similarly if popular unhappiness with *A.K.Gopalan*³ had not been there and excesses during the emergency had not taken place, the present transformation in judicial justice in India would not have happened.

Purpose of law is to establish justice. If law fails in this primary task, it is as good as dead. Karl Marx has said “your jurisprudence is but the will of your class made into law for all...”⁴ but the function of the judiciary is to hear the voice of the voiceless. Indian Constitution also stresses on justice. In order that justice should not become the hand maid of the powerful, the expression ‘social, economic and political’ has been added. However, the answer to the question what is justice is yet to be found.

Over the years legal justice has made way for social justice through a dynamic judicial process and creative jurisprudence which affirmatively rights both ancient and recent wrongs. There has now been a remedial realism to forensic formalism. The tryst with Constitution has been has been redeemed by effective strategies and actual access to curial and administrative justice and the highest articulation of this is Article 39-A.

Justice is not only judicial. The courts have built in limitations of jurisdiction, procedure. Legislative justice is basic and has no such limitation. Without this the judiciary and the executive cannot function. The plea of justice, however, is first directed to the judiciary alone. Legislature may give justice in print but judiciary dispenses justice in life.

³ *A.K.Gopalan v. State of Madras* AIR 1950 SC 27

⁴ Karl Marx, Manifesto of the Communist Party, as quoted in V. R. Krishna Iyer, *Judicial Justice-A New Focus towards Social Justice*, p. 6 (1st Edition 1985)

The latter is a process of actualization of social justice. The functional success of equality, liberty, dignity and life has been possible with Article 32 and Article 39-A.

Another significant development is the contribution of juridical sciences to the justice delivery system. The role of experts in science and social science is an important factor of justice delivery system. Substantial changes in attitude to justice delivery system law have been necessary in accommodating the auxiliary forces within the judicial process. Law alone is not enough where special knowledge of medicine, psychology, chemistry, economics etc are necessary for delivering justice. The judiciary has been able to step out of insulation⁵. It is now established that science and social sciences must be co-workers with law.

The main focus of this study is on remedial revolution and popular alternatives for dispensation of justice at the level of common people and State agencies. The problems, perplexities, and prospects of public interest litigation, the necessary innovations and important limitations within the accepted parameters of judicial justice also call for examination. The structural engineering and realignment of forensic process to enliven Article 14 and 21 is the focus of this work. How far does remedial jurisprudence bill is the matter of examination for this study.

Public interest law and related procedural formalities were welcome since traditional formalities and procedural strategies were conditioned by socio-economic matrix. The novelty of this process made it very popular and there also have been some abuse of the process. The

⁵ *Dhananjay Chatterjee v. State of W.B.* (2004) 9 SCC 751. See also *Dhananjay Chatterjee v. State of W.B.* (1994) 2 SCC 220 where the stress was on retributive theory of punishment.

other side of the story is that there is a popular belief that law has lost the primary function of protecting people's interest. This is the effect of the interpretation of 'procedure established by law' in *Maneka Gandhi's* case⁶ also called the procedural due process. The judgment ushered in people oriented jurisprudence. The vastness, diversity, and backwardness of penurious population hungry for social justice have given a boost to social dynamics in India. Thus judiciary has become the founding father for social dynamism.

The most important emerging awareness is the realisation that rights also work as a restriction upon the unbridled power of the sovereign. The post *Maneka Gandhi* era has shown two major trends:

1. That there are rights that are fundamental to the fundamental rights and hence are inalienable at any point of social turmoil. They can be briefly stated as the right to fairness [non arbitrariness], equality and freedom. However these inalienable rights are not free from benevolent maneuverability by the sovereign [government], and,

2. There are natural rights which are absolute which may be equated with the '*grundnorm*' of Kelsen or the '*volkgeist*' of Savigny, or the '*inner morality of law*' of Hart or the '*universal inner conscience*' of the natural school or '*pacta regalia*' of Bentham, or '*positive morality*' of Austin.

The cumulative effect has been a social transformation that demands governance according to the rule of law with more transparency.

A study that seeks to study the social dynamics set at work by the judiciary has but a single methodology. The research work is based on the study of the various decisions delivered by the High Courts and Supreme

⁶ *Maneka Gandhi v. Union of India* AIR 1978 SC 597

Court in India. The methodology adopted is doctrinaire and analytical to get the clear picture of the contribution made by judiciary to the social dynamics in India. The time frame fixed for this exercise is from 1950 till date. The study is topical and not chronological. However the nature of the study ensures a degree of chronological exposition. An analytical and critical study of the relevant cases and the laws has been done. The cases under the different categories of social dynamics have been catalogued, analysed and the decisions have been appraised. The consistency of the judicial decisions has been an important issue to be looked into. The interpretative techniques of the judiciary that maintains the sustainability and law and yet meets and accommodates the newer demands of the dynamic society has been noted and discussed.

The present work has been divided into five chapters. The first chapter, the current one, introduces the backdrop of the study and lays down the methodology and plan of work,

The second chapter explains the meaning of social dynamics and its dimensions. It also traces the development of social dynamics through Public Interest Litigation. This chapter elaborates and follows the development of the concept of Public Interest Litigation as a weapon in the hands of the people to enable the judiciary to bring about social transformation, especially after the emergency. The various procedures and methods of entertaining Public Interest Litigation; along with the misuse and safeguards while entertaining Public Interest Litigation has been discussed.

The third chapter focuses on the role of judiciary in bringing out changes in the society through social dynamics. The cases relating to the field of education, environment, election, women and children, rights of accused and convicts, labour and medical ethics after the Independence

have been examined to find out how the judiciary has developed and supplemented the vacuum in the legislation. The opinion of the Bench has been discussed in detail in order to show the reason of laying down new guidelines and law by the judiciary.

The fourth chapter visualizes the tussle between the legislative law and the judge made law. The function of the judiciary and the application of the doctrine of separation of power in India have been discussed. The power and function of the judiciary has been discussed. The validity of judge made law through Article 141 of the Indian Constitution has also been brought forward. The confrontation between the legislature and the judiciary before and after the emergency of 1975 has been highlighted. An insight into the opinion of the judiciary on the Uniform Civil Code has also been studied. The much heated debate on Judicial Activism and Judicial Restraint has also been discussed while concentrating on the present attitude of the judiciary.

Finally, in the last chapter some observations and recommendations based upon the study have been made.

CHAPTER 2

SOCIAL DYNAMICS: MEANING AND DIMENSIONS

The term social dynamics is an emerging terminology for studying the changing patterns of social behaviour and mechanics of social change. One of the prime concerns of social scientists is how to retain the dynamism of law. Law must keep pace with the demands of time and the generation; it cannot be reformulated all the time to accommodate new demands of changing time. To facilitate this, the route is through the supreme judicial body of this country, that is, the Supreme Court; by the process of interpretation of law by this august institution.

Social dynamics may include matter, motion and mechanics of society and societal behaviour. The area of social dynamics consists of studying the prevailing state of culture and social behaviour in the society and also the extent and rate of change-prevailing and desirable.

In the society there are things that are ever changing. These changes can be miniscule or substantial, depending upon the influence, which creates such changes. Such changes also bring about the alteration of social structures i.e. of patterns of social action and inter-action including consequences and manifestation of such structures embodied in the norms, values, cultural practice and symbols. The circumference of social dynamics means to include social changes referable to actual human behaviour as also to cultural changes.

Social dynamics is the study of the ability of a society to react to inner and outer changes and deal with its regulation mechanisms. Social

dynamics is a mathematically inspired approach¹ to analyse societies, building upon systems theory and sociology.²

2. 1. MEANING OF SOCIAL DYNAMICS

Social dynamics is also considered to mean social evolution; that is, the whole great process by which a society moves on. Social evolution is, of course, a process of extreme complexity. It can be illuminated, however, by theoretical models which are drawn essentially from the processes of biological evolution. Although there are great differences between biological evolution and social evolution, there are important similarities as well. The most important point of similarity is the fact that the notion of ecological succession and of a dynamic based on mutation and selection applies to both. Biological evolution can be regarded as a succession of short-run biological equilibria of the ecosystem.³

The influence of law on social dynamics is very much noteworthy. While society tries to bring about changes in the law according to internal

¹ Society and culture are things to which we are emotionally bound and for which we have no immediate alternative. Sociology and psychology deal with ratings, with subjectivity; they are supposed to provide objective findings to serve subjective needs. Sociology is a mix of human and nature sciences, philosophy and politics. As this has stalled the progress of sociology, some people meant to bring new life into it by applying mathematics and systemics to sociology. On a certain level, life and sciences are nothing more than systems dealing respectively with genes and culture. Therefore, we can try to describe social systems by signals which become modified by transmission functions. This approach is being used by sociologists, ethnologists, economists, social psychologists, criminologists, anthropologists and biologists in the study of systems and behaviour. Source-http://en.wikipedia.org/wiki/social_dynamics visited on 15th March 2008

² http://en.wikipedia.org/wiki/social_dynamics visited on 15th March 2008

³ Dr. (Mrs.) Mamta Rao, *Public Interest Litigation in India*, p. 47 (1st Edition 2002)

necessity; in the same way, law dictates change in the society according to the needs. These impacts of law on society and vice versa are very much dynamic which has given rise to dynamism of law.

The Britishers who remained in India were least concerned with the changing needs of the Indian society. As a result the Indian legal system before 1947 was static, stale and counter-productive to social change and social justice. It was anti-people where the human dignity was brutally suppressed in order to augment the mission of the British rule. This made the legal fraternity of judges, lawyers and jurists insensitive to the likes and dislikes of the Indian people. The Britishers had taken particular care to ensure that the courts of the *Raj* were not empowered to question governmental action. They imposed severe substantive restraints on the civil liability of the government.⁴ The judiciary was a unique bureaucracy within the imperial state. Judges were selected for their conservation, loyalty and independence.⁵ It was a safe institution for the cover of the British regime. The theory of John Austin was applied to the

⁴ The civil liability of the government was exempted in *Bank of Bengal v. United Company* (1831) 1 Bignall's Reports 87; *P. and O. Steam Navigation Co. v. Secy. Of State for India* (1861) 5 Bom HC Report Appendix 1; *Nobin Chander Dey v. Secretary of State for India* (1876) ILR 1 Cal 11; *Secretary of State for India-in-Council v. Hari Bhanji* (1882) ILR 5 Mad 273; *Salaman v. Secretary of State-in-Council for India* (1906) 1 KB 813. The clarity regarding civil, tortuous, constitutional liability of the government is also a product of post-emergency social dynamics evolved by the Supreme Court specifically after *Maneka Gandhi v. Union of India* AIR 1976 SC 597

⁵ The independence of the judiciary therefore became a key issue which was reiterated in *S.P. Gupta v. Union of India* AIR 1982 SC 149; *K. Veeraswami v. Union of India* (1991) 3 SCC 655; *Sub-Committee on Judicial Accountability v. Union of India* (1991) 4 SCC 699. The assertion of the independence of the judiciary reached its climax when a nine Judge Bench of the Supreme Court observed in *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441, that 'Independence of judiciary' is a basic feature of the Indian Constitution and a *sine quo non* of democracy.

fullest where "law was the command of the British sovereign". The concept of master-servant relationship was accepted by a section of Indian society and the Britishers administered justice according to their law, pretending to be impartial and neutral. The Indian society was divided and broken into sections on the basis of caste, creed, region, occupation, language and religion; best suited for the Britishers.

The dream of the freedom fighters to see a new India was realized in 1947 and with the passing of the Indian Constitution in 1950; the dawn of a new era was ushered. The Preamble of the Constitution along with the Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) gave a tool in the hands of the law-makers and law-enforcers to lay the foundations of social dynamics in India.

The goal of a new and vibrant India was in the minds of the Legislatures, who were mostly the freedom fighters and who had dreamt of a new India. However, with the passage of time the interest of the common man receded in the background and they were left helpless and hapless. It was at this time the judiciary took up the task of acting as a catalyst in bringing about social change according to the changing needs of the society. The Indian judiciary rejected the British concept of dictatorship in the legal framework and evolved new devices to balance the conflicting needs of the society. The Indian judiciary while rejecting the Austinian brand of legal positivism reconciled the conflicting interests of the society. This movement was largely possible due to the efforts of the Indian judges like Krishna Iyer, P.N. Bhagwati and others who rejected the Anglo-Saxon jurisprudence as being anti-people, draconian, cancerous and smuggled system which was alien to the genius of the

country.⁶ Moreover, the realist school of jurisprudence exploded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judges made the law. It stated that the law was what the courts said it was.

In the words of Justice Bhagwati,⁷

Today a vast revolution is taking place in the judicial process, the theatre of law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of the people who are denied their basic human rights and for whom, freedom and liberty have no meaning. Thus, a new sociological jurisprudential approach wherein law is committed to the service of the people, law as a vehicle of social transformation and above all with social objectives, is geared to remove the social disabilities, discrimination and inequalities. The courts have by now acquired a firm social philosophy founded on

⁶ Justice Reddy had observed that "The colonial rulers when they left our shores, bequeathed to the bourgeoisie who succeeded them, an ideology which paid homage to freedom and fair play. The doctrines were there. The weapons were there. The rulers seized the doctrines and the weapons and their judges fashioned a jurisprudence in which freedom was the key note. But this is now a ferment. The very weapons wielded by the earlier ruling classes are now being steadily turned against them. The courts have evolved a great jurisprudence around the doctrines of natural justice, ultra vires and habeas corpus. The doctrine of equality and the right to life have currently been seized upon to fight the cause of prisoners, destitute women, bonded labour, agricultural and industrial labour, etc. Despite the inherent conservatism of the existing system, public interest litigation has shown signs of warming up." Quoted in Dr. (Mrs.) Mamta Rao, *Public Interest Litigation in India*, p. 108 (1st Edition 2002).

This attitude of the Supreme Court lays the foundation of social dynamics and evolves a new jurisprudential theory blending positive law, natural law and realist interpretation.

⁷ *S.P. Gupta v. Union of India* AIR 1982 SC 149 at 189

humanism, socialism and secularism of the Constitution. It is, therefore, imperative both for Indian jurists and judges to be fully alive to this wind of change and reform and desist from measuring India's law from Austinian or even Poundian philosophy. The emergence of anti-poverty and egalitarian jurisprudence in India seems to have resurrected judicial conscience as the contemporary judicial process is more in tune with the social philosophy of the founding fathers of the Constitution rather than with the erstwhile British colonial rulers. It is now people oriented, social justice oriented, effect and result oriented and above all human rights oriented leaning more on Swadeshi values by ridding of the alien, abstract, legalistic and individualistic slant from Indian law. The fundamental thing for the Indian judges and jurists to remember is that law must work in order to deliver the much needed results or desired goals.

The progress of the society is dependent upon proper application of law to its needs and since the society today realises more than ever before its rights and obligations, the judiciary has to mould and shape the law to deal with such rights and obligations. The mere existence of a particular piece of beneficial legislation cannot solve the problems of the society at large unless the judges interpret and apply the law to ensure its benefit to the right quarters.⁸

⁸ The implementation of the various provisions of the Dowry Prohibition Act, 1961; Child Labour (Prohibition and Regulation) Act, 1986; The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994; The Commission of Sati (Prevention) Act, 1987, was not possible and the enactments lay dormant till the judiciary in order to uplift the welfare of the society and to see that justice is imparted to the various sections of the society irrespective of caste, creed, colour and religion interpreted and declared the law to suit the various social demands.

Judiciary's role in giving expression to the Constitution and the laws for doing justice is instrumental in the development of new dimensions of justice. Judicial process as a mission seeks justice and tries to do justice. It is a function of balancing interests.⁹ The function of the judiciary, therefore, is to derive its conclusions from issues before it in accordance with law and with impartiality.¹⁰

The age old myth in the Indian society that the judiciary is only interpreter of law and not the creators of law has receded into the background.¹¹ The judiciary has tried to enforce and augment the principles as laid down in the Constitution by evolving new techniques and methods to meet the changing needs of the society. Lack of legislative thinking and executive inaction coupled with exploitation of the masses by the opportuned few; made the judiciary to rise to the occasion and extend its hand of help to at least some of the needy people to bring justice within their easy reach. It is the gap between the text of law and the policy inspiring it, which leaves room for the Judge and some scope of dynamism.

It has been aptly remarked by a nine Judge Bench of the Supreme Court in *I.R. Coelho v. State of Tamil Nadu*¹² that-

It is the duty of this Court to uphold the constitutional values and enforce constitutional limitations as the ultimate interpreter of the Constitution.¹³

⁹ Justice J.S. Verma, *New Dimensions of Justice*, (1997) 3 SCC (Journal) 3

¹⁰ Justice D.M. Dharmadhikari, *Nature of Judicial Process*, (2002) 6 SCC (Journal) 1

¹¹ The traditional mechanical jurisprudence which treats law as a slot machine has undergone a drastic change due to the judicial activism which has discarded the *status quo* oriented positivism and adversial jurisprudence.

¹² AIR 2007 SC 861



The judiciary has grown up with the new demands of the society in order to be a protector not only of the traditional individual rights, but also of the new diffuse, collective, and fragmented rights and interests which is a characteristic of the masses. The judiciary has become an effective instrument of social change by introducing the concept of Public Interest Litigation (PIL) or Social Action Litigation (SAL) as stated by Prof. Upendra Baxi resulting in a new dimension of judicial process which has given some hope to the justice-starved millions of Indians.

2. 2. SOCIAL DYNAMICS THROUGH PUBLIC INTEREST LITIGATION

Under the Indian legal system, the concept of Public Interest Litigation has been said to be borrowed from the American system of Public Interest Law.¹⁴ However, in U.S.A. it has been invoked largely for the purpose of improving the life conditions of the Blacks and ensuring human rights to them. It was initiated for the benefit of a class of people, who had been denied their constitutional and legal rights because they were unable to have access to the Courts on account of their socio-economic disabilities. The main reason for the growth of Public Interest Law in U.S.A. was the failure of administrative agencies to protect public

¹³ *Ibid* at 871

¹⁴ Opinion expressed by Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36:3 JILI (1994) Page 302; P.M. Bakshi, *Public Interest Litigation*, p. 4 (2nd Edition 2004); S.K. Sarkar, *Public Interest Litigations and Public Nuisances*, p.13 (1st Edition 2002).

There is also a view that the idea came from *actio popularis* of the Roman jurisprudence which allowed court access to every citizen in matters of public wrongs-Dr. I.P.Massey, *Administrative Law*, p. 277 (4th Edition 1995)

interest. In India, the concept of Public Interest Litigation was invoked to represent genuine cases of downtrodden masses of our society before the court. It is essentially a social action covering a variety of rights and is wider than as used in U.S.A.¹⁵ The passage of time has infused changes in its working, especially in the common law based systems. The moulding of the concept of Public Interest Litigation as a weapon of social dynamics has been used by the judiciary in India after the emergency.

Public Interest Litigation has been called a very useful tool, having great educative value and improving future decision-making.¹⁶ As observed by Justice P.N.Bhagwati-

The judiciary has to play a vital and important role not only in preventing and remedying abuse and misuse of power but also in eliminating exploitation and injustice. For this purpose it is necessary to make procedural innovations in order to meet the challenges posed by this new role of an active and committed judiciary. The summit judiciary in India, keenly alive to its social responsibility and accountability to the people of the country, has liberated itself from the shackles of Western thought, made innovative use of the power of judicial review, forged new tools, devised new methods and fashioned new strategies for the purpose of bringing justice for socially and economically disadvantaged groups...During the last four or five years however, judicial

¹⁵ It is a socio-economic movement by the judiciary and one of the strategies to impart legal services to the poor. Unlike Public Interest Litigation in U.S.A. and Canada, Public Interest Litigation in India was initiated by the judiciary.

¹⁶ Justice J.S.Verma, *The Constitutional Obligation of the Judiciary*, (1997) 7 SCC (Journal) 1

activism has opened up a new dimension for the judicial process and has given new hope to the justice starved millions of Indians.¹⁷

The social politics that led to this initiation cannot just be traced to a seeming crisis of conscience amongst judges who had refrained from accepting judicial review of administrative detention during the emergency. It was a part and parcel of a deeper crisis in the untidy discourse of the Indian State. Indian socialism had perjured itself many times over. An alliance of protest and thinking was overdue, both amongst India's extremely "articulate middle class intellectuals" as well as the disadvantaged whose cause some of them espoused.¹⁸

No sooner was the Constitution promulgated, when landlords, whose property had been taken away by agrarian reform legislation, moved the courts to demand just compensation. This resulted in a tussle between the judiciary and the legislature, resulting in numerous amendments of the Constitution. The judgment in *Golak Nath's* case¹⁹ sent a shock wave in the minds of the legislature and they reacted spontaneously to it.²⁰ The judiciary was quick to react and lay down that the Parliament has wide powers of amending the Constitution but such was not unlimited and does not include the power to destroy or abrogate the basic structure of the Constitution.²¹

¹⁷ Justice P.N.Bhagwati, *Social Action Litigation: The Indian Experience* quoted in *Janata Dal v. H.S.Chowdhary* AIR 1993 SC 892 at 908

¹⁸ Rajeev Dhawan, *Law as Struggle: Public Interest Law in India*, 36:3 JILI (1994) Page 302

¹⁹ *Golak Nath v. State of Punjab* AIR 1967 SC 1643

²⁰ The Constitution (Twenty-fourth Amendment) Act, 1971

²¹ *Keshavananda Bharati v. State of Kerala* AIR 1973 SC 1461

The Emergency²² witnessed large-scale violations of basic rights of life and liberty. These were facilitated by the enactment of a draconian statute, the Maintenance of Internal Security Act (MISA) and suspension of basic fundamental rights. An overwhelming number of High Courts ensured that the State scrupulously followed the terms of the detention law. This obvious approach was however reversed by the Supreme Court in *A.D.M. Jabalpur v. Shivakant Shukla*²³ which granted virtual immunity to any action of the executive affecting the life and liberty of the citizen.

The aftermath of the emergency left behind seemingly contradictory traditions. Apart from the cacophony of electoral politics, people were weary of the theory of law and social change where the State and the regulatory agencies had more power and less judicial control without any productive value. It was top-heavy and cheated the people by making promises, which were fulfilled to the extent that they filled the pockets of administrative and political intermediaries, who pocketed the dividends of welfare.²⁴ If the judiciary was to gain any ground, it would have to rethink its position in the constitutional apparatus of governance as well as its basic juristic approach. The vigorous growth of Public Interest Litigation was in some measure a reaction to the criticism of the judiciary's role of lending support to the atrocities of the government during the emergency.

The seed of the concept of Public Interest Litigation were initially sown in India by Justice V.R.Krishna Iyer (without assigning the

²² National Emergency declared on 26th June 1975

²³ AIR 1976 SC 1207

²⁴ This situation is presently mitigated by the fairness clause of *Maneka Gandhi's* case and the legislative efforts made by enacting the Right to Information Act, 2005

terminology) in *Mumbai Kamgar Sabha v. Abdulbhai* ²⁵ when he observed as follows-

Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical misdescriptions and deficiencies in drafting pleadings and setting out the cause-title create a secret weapon to non-suit a part. Where foul play is absent, and fairness is not flouted, latitude is a grace of processual justice. Test litigations, representative actions, *pro bono public* and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural shortcomings.

The terminology Public Interest Litigation was coined by Justice P.N.Bhagwati in *Fertilizer Kamgar Union v. Union of India*²⁶ where the question was whether the workers in a factory owned by the Government could question the legality and/or validity of the sale of certain plants and equipments of the factory by the management. He used the expression of epistolary jurisdiction and observed-

Public Interest Litigation is a part of the process or participate justice and standing in civil litigation of that pattern must have liberal reception at the judicial door-steps.

This innovative approach of the judiciary started gaining momentum day by day, expanding its branches in the cosmos of Public

²⁵ AIR 1976 SC 1455

²⁶ AIR 1981 SC 344

Interest litigation and strengthening its roots firmly in the Indian judiciary and fully blossomed with fragrant smell in *S.P.Gupta v. Union of India*²⁷ wherein it was observed-

.....whenever there is a public wrong or public injury caused by an act or omission of the State or public authority which is contrary to the Constitution or the law, any member of the public acting *bonafide* and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceeding.

The meaning of public interest as given in *Stroud's Judicial Dictionary*²⁸ is-

Public Interest-A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.

In *Black's Law Dictionary*,²⁹ the meaning of public interest is as under-

²⁷ AIR 1982 SC 149

²⁸ Volume IV, 4th Edition quoted in *Janata Dal v. H.S.Chowdhary* AIR 1993 SC 892 and *State v. Union of India* AIR 1996 Cal 181

²⁹ 6th Edition quoted in *Janata Dal v. H.S.Chowdhary* AIR 1993 SC 892 and *State v. Union of India* AIR 1996 Cal 181

Public Interest-Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or National Government.

The expression "litigation" means a legal action including all proceedings therein initiated in a Court of law for the enforcement of right or seeking a remedy. Therefore, lexically the expression "Public Interest Litigation" means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities were affected.³⁰ Public interest litigation contemplates legal proceeding for vindication or enforcement of fundamental rights of a group of persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law.³¹

In *Bandhua Mukti Morcha v. Union of India*³² the ambit and nature of Public Interest Litigation was explained as-

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

³⁰ *Janata Dal v. H.S. Chowdhury* AIR 1993 SC 892

³¹ *Subhash Kumar v. State of Bihar* AIR 1991 SC 420

³² AIR 1984 SC 802

vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution.

The object of Public Interest Litigation has been explained in *People's Union for Democratic Rights v. Union of India*³³ as follows-

We wish to point out with all emphasis at our command that public interest litigation which is a strategic arm of the legal aid and movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the Court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. This would be destructive of the Rule of Law which forms one of the essentials elements of public interest in any democratic form of Government.

The scope of Public Interest Litigation has been further explained by the Supreme Court in the following words:

This is an innovative strategy which has been evolved by the Supreme Court for the purpose of providing easy access to justice to the weaker sections of Indian humanity and it is a powerful tool

³³ AIR 1982 SC 1473 at 1476

in the hands of public spirited individuals and social action groups for combating exploitation and injustice and securing for the under-privileged segments of society their social and economic entitlements. It is a highly effective weapon in the armoury of the law for reaching social justice to the common man.³⁴

In the traditional adversarial system, the lawyers of each party are expected to present contending points of view to enable the judge to decide the issue for or against a party. In Public Interest Litigation, there are no winners or losers and the mindset of both the lawyers can be different from that in ordinary litigation. The Court, the parties and their lawyers are expected to participate in resolution of a given public problem. This was explained by the Supreme Court in *Dr. Upendra Baxi v. State of U.P.*³⁵ as-

It must be remembered that this is not a litigation of an adversary character undertaken for the purpose of holding the State Government or its officers responsible for making reparation but it is a public interest litigation which involves a collaborative and cooperative effort on the part of the State Government and its officers, the lawyers appearing in the case and the Bench for the purpose of making human rights meaningful for the weaker sections of the community.

In *Sheela Barse v. Union of India*³⁶, the Supreme Court while distinguishing Public Interest Litigation with that of a traditional dispute-resolution mechanism held-

³⁴ *State of H.P. v. A Parent of a Student of Medical College, Shimla* (1985) 3 SCC 169

³⁵ (1986) 4 SCC 106 at 117

³⁶ AIR 1988 SC 2211

The proceedings in a Public Interest Litigation are, therefore, intended to vindicate and effectuate the public interest by prevention of violation and the rights, constitutional or statutory, or sizeable segments of the society, which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert and quite often not even aware of those rights. The technique of public interest litigation serves to provide an effective remedy to enforce these group rights and interests.

In *P.V.Kapoor v. Union of India*³⁷ it was observed as follows-

Public Interest Litigation is a new brand of litigation which is not meant to be adversarial in nature. It is intended to vindicate public interest where fundamental and other rights of people who are poor, ignorant or are in a socially or economically disadvantageous position, go undressed. Public Interest Litigation is meant to be a co-operative and collaborative effort of the parties and the Court to secure justice for the poor and the weaker sections of the community.

Public Interest Litigation is a socio-economic movement generated by the judiciary to reach justice especially to the weaker sections of the society for whom even after two and a half decades of independence justice is merely a teasing illusion. In other words it is a long-arm strategy of the judiciary to reach justice to those who due to socio-economic handicap cannot reach the doors of the courts. Therefore, it is a judge-led and judge-induced strategy and represents high bench-mark of judicial creativity and sensitivity to the weak and vulnerable. In India, inspiration to the court for the development of this strategy came from the oath

³⁷ 1992 Cri LJ 128

which a judge takes to defend the Constitution wherein socio-economic justice and equal access to court are the prime principles. It is also an instrument to give effect to the lofty ideals enshrined in the Preamble of the Indian Constitution and mete out justice, liberty, equality and fraternity to the citizens of India. Thus, this innovative strategy while providing easy access to justice to the weaker sections of Indian society also provides a powerful tool in the hands of public spirited individuals and social action groups for combating exploitation and injustice and securing for the underprivileged segment of society their social and economic entitlements.³⁸

Public Interest Litigation envisages the following:

(a) a court action by an individual or a group of individuals belonging to a community or an indeterminate class against an administrative wrong, remotely or equally affecting the members of that community or class; and

(b) a court action by a public spirited citizen, or a body devoted to the public cause, to vindicate the rights of individuals, groups, or even the public at large, against administrative wrongs, though the person or body undertaking the court action may not have suffered any injury.³⁹

It is a collaborative effort between the petitioner, court and the government and its instrumentalities to make socio-economic rescue programmes for the disadvantaged and deprived; making it meaningful and worthy for them, and is one of the most effective and important device used by the judiciary for social dynamics in India.

³⁸ Dr. I.P. Massey, *Administrative Law*, p. 277 (4th Edition 1995)

³⁹ M.P. Jain and S.N. Jain, *Principles of Administrative Law*, p. 497 (4th Edition 1986)

The judiciary has adopted some procedural innovations while entertaining Public Interest Litigation. They are:

(a) **relaxing the doctrine of *locus standi***- The principle of *locus standi* presupposes the presence of a person or body of persons who suffered a legal injury. It may also be taken to mean a legal capacity to challenge an act, an order or a decision. Further, the issue raised must be a justiciable issue. An issue is justiciable when it can be resolved through judicial process. This rule of private law adjudication was also applicable to public law adjudication. The only exception was in the case of *habeas corpus*. This writ is issued to liberate a person from illegal detention. The person held in such illegal detention may not be in a position to move the court and therefore a stranger or friend is given *locus standi* to move the court for such a writ.

The rule of *locus standi* was based on sound policy. The concept of *locus standi* is being liberalised and the scope of the concept is being expanded day to day. The liberalization of the rule of *locus standi* came out of the following considerations:

1. to enable the court to reach the poor and the disadvantaged sections who are denied their rights and entitlements,
2. to enable individuals or groups of people to raise matters of common concern arising from dishonest or inefficient governance, and
3. to increase public participation in the process of constitutional adjudication.⁴⁰

⁴⁰ S.P. Sathe, *Judicial Activism in India*, p. 202 (1st Edition 2002)

In *Fertilizer Kamgar Union v. Union of India*,⁴¹ where the terminology of public interest litigation was used for the first time, the Supreme Court held-

We have no doubt that in competition between Courts and streets and dispenser of justice, the rule of law must win the aggrieved person for the law Court and wean him from the lawless streets. In simple terms, *locus standi* must be liberalised to meet the challenges of the times. *Ubi jus ibi remedium* must be enlarged to embrace all interests of public minded citizens or organisations with serious concern for conservation of public resources and the direction and correction of public power so as to promote justice in its triune facets.

Justice V.S. Deshpande has tried to bring out the distinction between standing and justiciability as thus-

Standing is needed to get an entry for hearing by a court, justiciability is required if the petition is not to be thrown out as not suitable for adjudication.⁴²

While talking about the relaxation of the rule of *locus standi*, Justice P.N.Bhagwati has remarked in *S.P.Gupta v. Union of India*⁴³ as-

Procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities.

(b) treating letters as writ petitions and letters being addressed to individual judges, developing the idea of epistolary jurisdiction-

⁴¹ AIR 1981 SC 344

⁴² Justice V.S. Deshpande, *Standing and Justiciability*, 13 JILI (1971) Page 153

⁴³ AIR 1982 SC 189

The letters addressed to the Judges of the Supreme Court highlighting any suffering or grievances have been converted into writ petitions on the logic that Article 32(1) of the Constitution does not say as to 'who' shall have the right to move the Supreme Court, nor does it say by 'what' proceedings. The expression 'appropriate proceedings' is too wide, and so moving the Court through a letter can be appropriate proceedings because it would not be right to expect a person acting *pro bono publico* to incur expenses for having a regular writ petition prepared by a lawyer. It has to be appropriate not in terms of any particular form, but appropriate with reference to the purpose of the proceedings.

However, there has been a change of such method and regular writ petitions are filled. As observed by Justice Pathak-

It is only comparatively recently that the Court has begun to call for the filing of a regular petition on the letter.⁴⁴

This form and procedure of entertaining letters as writ petitions has been supported by Justice P.N.Bhagwati when he observed-

If the Court were to insist on an affidavit as a condition of entertaining the letters the entire object and purpose of epistolary jurisdiction would be frustrated because most of the poor and disadvantaged persons will not be able to have easy access to the Court and even the social action groups will find it difficult to approach the Court.⁴⁵

(c) *suo motu* intervention by the Judges-*Suo motu* intervention by the Judges are directed to check a continuing abuse of power by the

⁴⁴ *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802: Such was also done in *Neeraja Chaudhary v. State of M.P.* AIR 1984 SC 1099

⁴⁵ *M.C.Mehta v. Union of India* AIR 1987 SC 1086

executive especially in allegation of atrocity or torture in police custody or jail.

(d) adoption of non-adversarial procedure of justice and appointment of commissioners for fact-finding-The reason for the disapproval of the adversarial procedure for public interest litigation matters are that it sometimes leads to injustice where the parties are not evenly balanced in social or economic strength due to the difficulty in getting competent legal representation and due to the inability to produce relevant evidence before the court.⁴⁶ The Supreme Court has sometimes appointed a District Judge⁴⁷, a professor of law, a journalist, an officer of the Court, an advocate⁴⁸, and sometimes a social scientist⁴⁹ as a commissioner, for the purpose of carrying out an enquiry or investigation and making a report to the Court.

2. 2. 1. MISUSE AND SAFEGUARDS WHILE ENTERTAINING PUBLIC INTEREST LITIGATION

Where a group of people is small and is not likely to have any organized strength to make itself felt politically, judicial process is preferred through Public Interest Litigation, which has by now come to be accepted as a new method by which, to some extent, public injuries can

⁴⁶ Justice P.N.Bhagwati in *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802

⁴⁷ *Kamla Devi Chattopadhyay v. State of Punjab* AIR 1984 SC 1895; *Sheela Barse v. Union of India* AIR 1986 SC 1773

⁴⁸ *Sunil Batra v. Delhi Administration* AIR 1980 SC 1579; *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802

⁴⁹ *People's Union for Democratic Republic v. Union of India* AIR 1982 SC 1473

be redressed or the Government, its agents or instrumentalities compelled to do their own duty in the interest of the citizen. This exercise by the courts is aimed to serve the cause of justice and wean the people away from the lawless street and bring them to the court of law-to maintain rule of law.⁵⁰

However, the judiciary has sounded a note of caution while entertaining Public Interest Litigation as a weapon. More often than not, the Courts are confronted with frivolous petitions by the litigants wearing the mantle of Public Interest Litigation. It is only a grab for them. Many rumour-mongers and mischief-makers are making their way into the portals of justice in the name of Public Interest Litigation. The prophecy that Public Interest Litigation is Publicity Interest Litigation has to be proved wrong. The streams of justice have to be kept pure and unpolluted. The Court has a duty to insist that the public interest litigation is free from political motivation, lest the Court itself may be caught up in the political vortex.

In *S.P.Gupta v. Union of India*,⁵¹ Justice P.N.Bhagwati has observed as follows-

But we must hasten to make it clear that the individual who moves the Court for judicial redress in cases of this kind must be acting *bonafide* with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be activated at the instance of such person and must reject his application at the threshold, whether it be in the form of a

⁵⁰ Dr. Justice A.S.Anand, *Public Interest Litigation as Aid to Protection of Human Rights*, (2001) 7 SCC (Journal) 1

⁵¹ AIR 1982 SC 149

letter addressed to the Court or even in the form of regular writ petition filed in Court.

In *State of H.P. v. A Parent of a Student of Medical College, Shimla*⁵² the Supreme Court observed-

Public interest litigation is a weapon which has to be used with great care and circumspection and judiciary has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature.

In *Sachidanand Pandey v. State of West Bengal*⁵³ the Supreme Court indicated in clear terms as to when the Court should leave aside procedural shackles and hear public interest petitions as-

It is only when Courts are appraised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the Courts, especially this Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the underdog and the neglected. I will be second to none in extending help when such help is required. But this does not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self-imposed restraint on public interest litigants.

⁵² (1985) 3 SCC 169

⁵³ AIR 1987 SC 1109; Also see *Ramsharan Autyanuprasi v. Union of India* AIR 1989 SC 549

The same view has been reiterated in *Subhash Kumar v. State of Bihar*⁵⁴ wherein the Supreme Court observed-

Personal interest cannot be enforced through the process of this Court under Article 32 of the Constitution in the garb of public interest litigation. Public interest litigation contemplates legal proceeding for vindication or enforcement of fundamental rights of a group of persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law. A person invoking the jurisdiction of this Court under Article 32 must approach this Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity. It is the duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this Court for personal matters under the garb of the public interest litigation.

The case of *Janata Dal v. H.S. Chowdhury*⁵⁵ is an example of misuse of Public Interest Litigation by an advocate for which the Supreme Court strongly observed-

It is depressing to note that on account of such trumpety proceedings initiated before the Courts innumerable days are wasted which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we are second to none in fostering and developing the newly invented concept of PIL and extending our long arm of sympathy to the poor, the

⁵⁴ AIR 1991 SC 424

⁵⁵ AIR 1993 SC 892 at 918

ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from the undue delay in service matters, Government or private persons awaiting the disposal of tax cases wherein huge amounts of public revenue or unauthorised collection of tax amounts are locked up, detenus expecting their release from the detention orders, etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busy bodies, meddlesome interlopers, way farers or officious interveners having absolutely no public interest except for personal gain or private profit either for themselves or as proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffling their faces by wearing the mask of public interest litigation, and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result to which the queue standing outside the doors of the Court never moves which piquant situation creates a frustration in the minds of the genuine litigants and resultantly they lose faith in administration of our judicial system.

In *S.P.Anand v. H.D.Devegowda*⁵⁶ the Supreme Court observed as follows-

No person has a right to waiver of the *locus standi* rule and court should permit it only when it is satisfied that the carriage of proceedings in the competent hands of a person, who is genuinely concerned in public interest and is not moved by other extraneous considerations, so also the court must be careful to ensure that the process of the court is not sought to be abused.

The majority opinion in *Narmada Bachao Andolan v. Union of India*⁵⁷ is noteworthy, wherein the Supreme Court observed-

With the passage of time the Public Interest Litigation jurisdiction has been ballooning so as to encompass within its ambit subjects such as probity in public life, granting of largess in the form of licenses, protecting environment and the like. But the balloon should not be inflated so much that it bursts...It is only where there has been a failure on the part of any authority in acting according to law or in non-action or acting in violation of the law that the Court has steeped in. No directions are issued which are in conflict with any legal provisions. Directions have, in appropriate cases, been given where the law is silent and inaction would result in violation of the Fundamental Rights or other legal provisions.

The judge's task is particularly difficult in the field of Public Interest Litigation. That is because in a large number of such cases, the material is wanting, and whatever little material is placed, is unfiltered. The entire proceeding tends to become inquisitorial in character with the

⁵⁶ AIR 1997 SC 272

⁵⁷ AIR 2000 SC 3751

judge, or judges, playing a more active, participatory role. The role of the judiciary is extremely delicate in such cases because it must not appear to be playing to the gallery or playing a role which may be described as being partisan. Great care must be taken to ensure that while the judge or judges play a participatory role, they do not appear to be entering the arena or give the impression of bias to the opposite party. It must also be realised that the position of the opposite party in such cases is precarious, in that, it has to meet with allegations which are incomplete and often half-truths. In the absence of properly drawn up pleadings, it is always difficult to counter the charge levelled against the opposite party. Therefore, while in Public Interest Litigations the opposite party is always at the receiving end, a fair chance to put forth his defence must be ensured to such a party, and the judge or judges hearing such cases, must not give the impression that they have pre-judged the issue. This is the caution which the judge or judges must exercise; otherwise the proceedings will lose direction and will move in a circular or wayward manner.⁵⁸

Public interest petition, when filed bona fide, not seeking publicity, not seeking political vendetta, not for personal gains is always welcome. PIL should only stand for Public Interest Litigation. It should not be

⁵⁸ Justice A.M. Ahmadi, *Judicial Process: Social Legitimacy and Institutional Viability*, (1996) 4 SCC (Journal) 1. This is also the manner in which the process of judicial activism has evolved. The inquisitorial characteristic of the procedure offers an opportunity for the judge to participate in the process and also be more pro-active. At the same time the judge is cautious and restrained so that the judgment is not vitiated by arbitrariness or unfairness. This process is not confined to Public interest Litigation alone and now extends to all judicial reviews.

publicity interest litigation, or private interest litigation, or politics interest litigation, or paisa income litigation.⁵⁹

Justice Markandey Katju while holding that much of Public Interest Litigation is really blackmail, has observed in *Common Cause v. Union of India*⁶⁰ as-

Public Interest Litigation which was initially created as a useful judicial tool to help the poor and weaker section of society who could not afford to come to the courts, has, in course of time, largely developed into an uncontrollable Frankenstein and a nuisance which is threatening to choke the dockets of the superior courts obstructing the hearing of the genuine and regular cases which have been waiting to be taken up for years together.

The misuse of Public Interest Litigation can be curtailed if the judiciary takes note of the following safeguards and act within these parameters:

- 1) Whether Public Interest Litigation is diluting the procedural norms?
- 2) What is the subject matter of Public Interest Litigation?
- 3) Whether the decisions in Public Interest Litigation will promote the public interest?⁶¹

The need is to prevent misuse of Public Interest Litigation and not to criticise the process. And this is what the courts will have to do so that

⁵⁹ Justice Arijit Pasayat, *Public Interest Litigation vis-à-vis Human Rights*, (2001) 7 SCC (Journal) 11

⁶⁰ Judgment dated 11th April 2008 reported in <http://www.judis.nic.in> visited on 7th June 2008

⁶¹ Dr. Paramjit S. Jaswal and Dr. Nishtha Jaswal, *Judicial Activism: The Genesis and Progress*, Vol. 28 (2 & 3) 2001, Page 221

misuse of Public Interest Litigation is prevented and proper use of it has not been blunted. Every innovation takes time to get into proper shape. Any attempt to curb it would be to throw the baby with the bathwater. It is primarily for the courts who devised this procedure to practise self-restraint and to also devise proper checks and balances to ensure that even persons who want to misuse it are not able to do so.⁶² Public Interest litigation can only provide pro tem, often knee-jerk responses and no long term solutions they seek to solve. The society should also realise that public Interest Litigation is only a quick fix pill.⁶³

The legislatures derive their strength from their popularity amongst their electors and the judiciary derives its strength from the faith of the people. This faith of the people has made the task of the judiciary to be onerous, nationalist, creative and crusading. It has infused into the judiciary to be social architects rather than being simple masons. In the centre of a social order changing with dynamic speed, the court needs to balance the authority of the past with the urges of the future. The impact of globalization has made the judiciary to be always on the watch out for new and innovative methods to protect the society.

In a federal constitutional system, any attempt to cut off the courts from the power to reflect major evolutions in public policy, would possibly be more fatal even than in unitary systems, where legislative change is easier. Ultimately, the proper balance between the conflicting

⁶² Justice J.S. Verma, *The Constitutional Obligation of the Judiciary*, (1997) 7 SCC (Journal) 1

⁶³ Madhavi Divan, *The Viability of Public Interest Litigation*, (2008) 2 SCC (Journal)

values of stability and change can only be struck by judicial tact rather than abstract principle.⁶⁴

Dr. N.R. Madhava Menon has appositely remarked that “concepts such as ‘Rule of Law’, ‘Judicial Restraint’, ‘Separation of Powers’, ‘Supremacy of Fundamental Rights over Directive Principles’, ‘Independence of Judiciary’, ‘Contempt of Court’ and ‘Certainty of Law’ were used conveniently to avoid change wherever possible, delay it whenever inevitable and dilute it as far as practicable.”⁶⁵

The judiciary applies the law to resolve the controversies and creates an important by-product beyond the peaceful settlement of disputes, which helps in the development of rules for future cases virtually supporting the legislative enactments. History bears testimony to the fact that tradition dictated by necessity has helped the judiciary in solving the social problems. Judges are considered lawmakers, law reformers and even social reformers whose job is to apply the law and make it fit for the prevailing situation. The judiciary cannot be a mere positive spectator to the host of new ideas galloping around the outskirts of a society’s thought. The judiciary has acted like a valve to the engine by abrogating the old rules, which are no longer beneficial or necessary for the society.

As a result of such development and relaxation of the adversarial form of litigation the judiciary has contributed to the society by interpreting the laws in a manner to best serve the interest of the society, identifying the areas where there is a need for enacting laws and their

⁶⁴ W. Friedmann, *Law in a Changing Society*, p.67 (2nd Edition 1972)

⁶⁵ Dr. N.R. Madhava Menon, *The Dawn of Human Rights Jurisprudence*, (1987) 1 SCC (Journal) 1

proper implementation, providing valuable inputs to the other wings of governance and trying to fill in the gaps, if any, left by the legislatures.

2. 3. THE STARTING POINT OF SOCIAL DYNAMICS

Every new decision of the judiciary on every new situation contributes to the development of law and society and is thus born the relationship between law and social dynamics. This dynamism of the judiciary has been hailed by many as Judicial Activism (or Judicial Creativity). Dr. N.V. Paranjape⁶⁶ is of the opinion that judicial activism and public interest litigation are two sides of the same coin. They go hand in hand. It is a means of evolving new juristic principles for the development and growth of law and is an accepted and well-recognised role of the judiciary.

Justice V.G. Palshikar has said-

Judicial Activism means an active interpretation of existing legislation by a Judge, made with a view to enhance the utility of that legislation for social betterment. Judicial Passivism, to be put very loosely, liberally, is interpretation of existing legislation, without an attempt to enhance its beneficial aspects by so interpreting the existing law as to advance and progress the beneficial extent of that legislation.⁶⁷

In interpreting the existing law, that is to say, what the law is, the courts are required to keep the particular situation in view and interpret the law so as to provide a solution to the particular problem to the extent

⁶⁶ Dr. N.V. Paranjape, *Social Justice and Public Interest Litigation*, CILQ 1991 Page 202

⁶⁷ Justice V.G. Palshikar, *Judicial Activism*, AIR 1998 Journal 201

possible. This is a legitimate exercise by the judiciary and its constitutional obligation by virtue of the role assigned to it in the constitutional scheme. The gaps in the existing law which are filled by updating the law result in the evolution of juristic principles, which in due course of time get incorporated in the law of the land and thereby promote the growth of law.⁶⁸

If the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind. It must shake off the inhibiting legacy of its colonial past and assume a dynamic role in the process of social transformation.⁶⁹ A Court while entertaining public interest litigation can even exercise a jurisdiction to set aside a decision of a constitutional authority.⁷⁰

2. 4. SUMMING UP

A glaring example of the by product of judicial dynamism and activism of the judiciary is the restructured Article 21. The emergence of the Supreme Court as a custodian of people's right in a democratic way is the most significant and important development in the judicial history of independent India. The judiciary is being envisaged not as a redressal

⁶⁸ Dr.Justice A.S.Anand, *Protection of Human Rights-Judicial Obligation or Judicial Activism*, (1997) 7 SCC (Journal) 11

⁶⁹ Justice Bhagwati in *National Textile Workers' Union v. P.R. Ramakrishnan* AIR 1983 SC 75 at 87

⁷⁰ *M.C. Mehta v. Union of India* (2008) 1 SCC 407 at 413

forum of elite class in the society, but it is perceived as a forum for raising, redressing and articulating the problems of have nots, deprived, oppressed, downtrodden, women and children, environmental groups, against exploitation and abuse of powers and position by persons holding high public offices.

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 necessities 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 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”.

In spite 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. Inamdar 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 imposed 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. Stephen'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, if 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 up to 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 possible 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* case⁶⁶ 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 providing 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, 2006⁸⁶ 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 right⁹⁷ by the judiciary has prompted the legislature to insert Article 21A⁹⁸ 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 judgments⁹⁹ 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 institutions¹⁰² 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 checked¹⁰³ 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 21 of 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. In spite 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 tortious 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 tortious 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 principles¹⁹² 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* cases¹⁹⁶, 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 indispensable 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 Committee²³⁰ 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 chauffeur-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 chauffeur 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 amendment²⁴⁶ 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.

In spite 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 disgusting 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. In spite 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 and all 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, 1994²⁷⁸ 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 Pradesh²⁸²

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, 2000²⁸³ 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 handle 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 effected, 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 incurred 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 send 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 his 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 must 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 be 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 be relevant to be 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 Trilokhbhai 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 Adoption²⁹³ 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 aforementioned 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 legislations³¹⁰ 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 Acts³¹⁴ 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 Adoption³¹⁶ 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, 1986³¹⁷ 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 dénué 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 *Khatari (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 comradeship (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 21 and 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)* cases³⁸⁷ 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 decisions³⁸⁸ 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 police³⁸⁹ 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 violence³⁹⁰ 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 Asiatic 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 affects 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 labourers⁴²⁷ 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 Sewerage 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 guidelines⁴³⁵ 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 21 of 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 law⁴⁴⁴ 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* case⁴⁵⁴ 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 patient⁴⁵⁵ 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

CHAPTER 4

SOCIAL DYNAMICS: LEGISLATIVE LAW VERSUS JUDGE MADE LAW

One of the desirable qualities of law is its dynamism coupled with stability and continuity. As rightly pointed out by Justice Benjamin N. Cardozo, law is never static.¹ That the human society by its very nature is progressive, is evident from the fact that more societies on the globe, are found progressing in their legal system and fewer are those which are yet to be found chained in their archaic and customary legal system, which operate through a complex phenomenon of psycho-mysticism and pragmatic compulsions of association with tribes and groups. Social necessities and social opinions are always in advance of law and degree of happiness of people is in direct proportion to the speed and promptitude with which the gulf between law and progressive society is bridged. Law as an instrument of social control is more static and its function is to reinforce the existing modes to design legal sanctions to minimise deviances and to maintain stability. Yet law is dynamic enough to keep pace with the changing demands of the society. This dual and apparently characteristic of law is harmonised by the checks and balances shared between the legislature and the judiciary in law making process. There is also an element of law making by the executive, but that is not within the purview of this thesis. As said by Karl Llewellyn, 'Law, as a going concern in society, may on his view best be viewed as a series of

¹ Benjamin N. Cardozo, *The Growth of Law*, p. 2

“cluster of attributes”, varying constantly in proportion and degree, but all to be found in group life of all kinds’.²

There are usually two main sources of law. The first source is the legislation and the second source is the judge made law that is, the judicial interpretation of existing legislation.³ The realistic school of jurisprudence exploded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judges made the law. It stated that the law was what the courts said it was. This is known as legal skepticism and was really a reaction to Austin’s definition of law as a command of the political sovereign. According to analytical jurisprudence a court merely found the law or merely interpreted the law. The American realistic school of jurisprudence asserted that the judges made law, though interstitially. Jerome Frank, Justice Holmes, Cardozo and Llewellyn were the chief exponents of this school. Judicial law-making in the realistic sense is what the court does when it expands the meanings of the words ‘personal liberty’⁴ or ‘procedure established by law’⁵ or ‘freedom of speech and expression’.⁶ As remarked by Julius

² Quoted in Julius Stone, *Social Dimensions of Law and Justice*, p.647 (1966)

³ There is also a third source of law making by the executive through rules and bye-laws which is also subject to judicial scrutiny.

⁴ In *A.K. Gopalan v. State of Madras* AIR 1950 SC 27 the word ‘personal liberty’ was construed narrowly to mean only liberty of the physical body. This restrictive approach was not followed in *Kharak Singh v. State of U.P.* AIR 1963 SC 1295. In *Maneka Gandhi v. Union of India* AIR 1978 SC 597 the Supreme Court overruled *Gopalan’s case* and held that “the expression ‘personal liberty’ in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under Article 19.”

⁵ In *A.K. Gopalan v. State of Madras* AIR 1950 SC 27 the Supreme Court held that the ‘procedure established by law’ did not mean ‘due process of law’ as understood in America. However, the Supreme Court in *Maneka Gandhi v. Union of India* AIR

Stone, "Precedents present, for the instant case, a rapid review of social contexts comparable to the present and of results though to be apt in those contexts by other minds after careful inquiry".⁷

Most British judges and lawyers all the time, and all of them some time, do regard judicial decisions as either direct applications of existing law, or deductions from existing legal principle. It has been observed that the object of the common law was to solve difficulties and adjust relations in social and commercial life, grow with the development of the nation, and deal with changing and novel circumstances in an expanding society demanding an expanding common law. The dynamic nature of law is its quality to bring about social change by influencing behavior, beliefs and values. As an instrument of social change, judicial process involves interrelated processes. When new principles are enunciated, the institutionalisation of new pattern of behaviour starts manifesting in itself, new social values, though confined to relatively minorities.

In the nineteenth century, even when the separation of powers was not a constitutional imperative, it was deemed to be a moral and political imperative for the preservation of liberty. The precise boundaries between the powers were assumed to be fixed and discoverable, for without this the imperative would be brought to naught. So that what was not for the judicial power must be either for the legislature or the executive; and if the subject-matter was also not within preconceived legislative power, it must fall to the executive. The allocation of subject-matters thus tended to

1978 SC 597 overruled *Gopalan's case* and held that the procedure prescribed by law has to be fair, just and reasonable not fanciful, oppressive or arbitrary. The concept of 'due process of law' has further found implementation in *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675

⁶ S.P.Sathe, *Judicial Activism in India*, p. 249 (2nd Edition 2003)

⁷ Julius Stone, *Legal System and Lawyers' Reasonings*, p.282 (1964)

begin not from the subject-matter itself, as a basis for asking which kind of organ was functionally most apt for just and efficient handling of this. It began rather from the ambit of power of each kind of organ, as this was assumed to be pre-set.⁸

Separation of powers, in the American sense of the expression, hardly exists in countries with a parliamentary regime of government: although the judiciary is independent, the other two powers are intertwined. Montesquieu advocated very forcefully that Constitutions should be arranged in such a way that one power can always stop the other.⁹ The proper balance between the three powers which the 'founding fathers' had in mind was inspired by the view that the liberty of the citizens would be better assured if none of the federal institutions was strong enough to impose arbitrary or authoritarian decisions.

4. 1. THE JUDICIAL ROLE

Filling gaps¹⁰ is one of the most obvious forms of judicial interpretation. Law has to be interpreted according to the current societal standards. The law when enacted, in spite of the best effort and capacity of the legislators cannot visualize all situations in future to which that law requires application. New situations develop and the law has got to be interpreted for the purpose of finding a solution to the new problems. This is how the law advances. No statute, no code, no Constitution can be complete and detailed that it renders the interpretive work of the judge

⁸ Julius Stone, *Social Dimensions of Law and Justice*, p. 696 (1966)

⁹ Tim Koopmans, *Courts and Political Institutions-A Comparative View*, p. 175 (1st Edition 2003)

¹⁰ The best examples of such filling gaps by the judiciary in India are *Vishaka v. State of Rajasthan* (1997) 6 SCC 241; *M.C. Mehta* cases, *Laxmi Kant Pandey* cases.

superfluous. Great legislators have been aware of this. When the draft for the original French Civil Code, the *Code Napoleon*, was presented, one of the drafters, Portalis, made an introductory speech which included the warning that legislation is necessarily incomplete:

Un code, quelque complet qu'il puisse paraître, n'est pas plus tôt achevé que mille questions inattendues viennent s'offrir au magistrat. Car les lois, une fois rédigées, demeurent telles qu'elles ont été écrites. Les hommes, au contraire, ne se reposent jamais.

(A code may look very complete, but a thousand unexpected questions present themselves to the judges as soon as it is finished: for laws, once drafted, remain as they have been written down, but people never rest.)¹¹

For this reason, the judicial task consists in grasping the true meaning of the laws, to apply them with understanding and to supplement them in cases they have not provided for. Every judge must play an active role in the discharge of his duties as "adjudicator of disputes". His role as an interpreter of law and dispenser of justice according to law should not be allowed to be diminished either because of the perceived notions of the other two wings of the State-the Legislature and the Executive or any section of the public.¹² The same has been reiterated by Justice Benjamin N. Cardozo:

It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are

¹¹Tim Koópmans, *Courts and Political Institutions-A Comparative View*, p. 224 (1st Edition 2003)

¹² Justice M.N.Rao, *Reflections on Law and Society*, p.35 (1st Edition 2000)

gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided.¹³

It has also been observed by Dennis Lloyd¹⁴ that-

It has long been received opinion that judges filled in the gaps left by rules by using their discretion. Positivistic jurisprudence from Austin to Hart placed emphasis on the part played by judicial discretion.

Justice K.N. Goyal has enumerated the duty of a Judge while making law as under-

- (a) Discovering the true intention of the legislature;
- (b) Resolving ambiguities;
- (c) Filling in the gaps;
- (d) Avoiding absurdity or hardship; and
- (e) Making the statute harmonious with the Constitution and other laws.¹⁵

In filling gaps, judges may not be founding their decisions on a specific constitutional provision, but they remain faithful to the constitutional system as they find it. For such purposes, it is not necessary to evoke the 'spirit' of the Constitution or the 'mind' of its framers. The Constitution, or the constitutional traditions it reflects, will suggest parallels, with the result that solutions to be devised by the courts will be as close as possible to those explicitly envisaged by the written texts. A Constitution cannot be regarded as a collection of isolated provisions; in order to be applied in practice, it must be considered as a coherent body of rules and principles. If courts have difficulty in finding any cohesion at

¹³ Benjamin N. Cardozo, *The Nature of the Judicial Process*, p. 14 (1961)

¹⁴ M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, p. 1389 (7th Edition 2001)

¹⁵ Justice K.N. Goyal, *Limits of Judicial Law Making*, AIR 1994 Journal 21

all, they should make an additional effort: they will find it by examining the constitutional rules in their relations to each other and to the professed aims of the constitutional document in question. This cohesion will usually suggest solutions for cases that are not explicitly covered by any constitutional provision.¹⁶

The acceptance enjoyed by the judicial process in any society depends mostly upon the historic role played by that process in the shaping of lego-social institutions in that society. With the advent of common law and the judicial institutions employing common law techniques, courts in India have played undeniably an important role in moulding legal concepts and institutions according to changing social circumstances. With a written Constitution providing for entrenchment of basic human rights and for division of legislative and administrative power in a federal context, the place for judicial review has gained greatly in value and importance. The prestigious position of the judiciary in this respect has also focused attention on greater creative involvement of judiciary in law reform and upon social accountability of judicial process for the said reform. Greater the creative opportunity for judges to make adaptations and innovations in the law, greater is the scope for legal profession to participate in this judicial law-making process for, in the adversary system of adjudication judicial approach to law-reform is to a considerable extent determined by the extent of fruitful interaction judges have with counsel. Creative abilities of judges are to a large extent shaped by professional capacity of the lawyer to persuade the judiciary to adopt the change in the law argued for.

¹⁶ Tim Koopmans, *Courts and Political Institutions-A Comparative View*, p. 225 (1st Edition 2003)

The advent of sociological jurisprudence and legal realism has shifted the emphasis in the twentieth century from the nature and ultimate source of law to an examination of the structure, objectives and functions of legal institutions. Students of Judicial process and behavior can benefit from comparisons of the Judge as rule-maker and rule interpreter with administrators who make and interpret rules in other types of organizational settings, including administrative law agencies. The Judge is a man whose profession has been rule oriented and control-oriented for centuries, in different types of social systems and through bewildering social changes.¹⁷

4. 2. THE LEGISLATIVE ROLE

The constitutional philosophy, the underlying political-social ethos, the relative dominance and leadership resources provided by democratised legislators in key areas of social change and the opportunities available for pressure groups, elastic or otherwise, to articulate their positions and to make those available in a viable form to be taken cognizance of by the judicial process, are all important elements. In any democratic society under conditions of modernisation and social change in an era of transition from a colonial legal culture to a dynamic social order, society tends to legitimise adoption of vast social control measures in terms of representation which more by fiction than as an operationally viable model, affords opportunity for association of popular will with the law making process tending thereby to eliminate the superficial separation of the people from participating in the legislative decision making process. The legislature in such a situation is universally

¹⁷ A. Lakshminath, *Precedent in Indian Law*, p. 117 (2nd Edition 2005)

respected as an agent of social change and as an authentic expression of populist mandate. In comparison the judicial process is institutionally weak and in the absence of the representative element it cannot claim legitimacy for its activist assertion as an agent of social change.¹⁸ The judiciary may through the political question rationale respect the exclusive authority of the political branches for decision making in key areas of public life where it is institutionally ill-adapted for goal formulation, clarification and implementation. Outside of these areas which are covered under the rubric of political question, the judicial branch claims to share political power, albeit in an interpretative sense with the rest of the branches of Government.¹⁹ It is argued that the political process involves an element of accountability which has no equivalent in judicial decision making. If the decision ultimately turns out to have been incorrect, or even bad or dangerous, the political decision-makers, or their political party, will have to face the distress or rage of the electorate. In judicial decision making, the judgment of the final appellate court closes the argument.

The political institutions are also in a strong position as far as accessibility of information is concerned. Courts are bound by the law of evidence. In civil litigation, which habitually respects the autonomy of the parties, the evidence available to the courts concerns the facts the

¹⁸ According to the positivist approach and especially according to Kelsen, law is recognised by the society to be such because it has a particular form and is enacted through a particular process which has a representative element. Due to these characteristics people are able to recognise it as law and respect it as an agent of control and social change. Judicial activism/social dynamics on the other hand neither has form nor a particular process or a representative element. To this extent the latter is considered to be weak and less assertive. Interestingly however, much social transformation has been achieved through the latter process of law making than the former.

¹⁹ A. Lakshminath, *Precedent in Indian Law*, p. 116 (2nd Edition 2005)

parties have thought fit to produce. The administrative courts, such as exist in France and Germany, are in a somewhat stronger position: they can ask for documents and other information on their own initiative, and the public authority which is party to the proceedings will usually comply. Governments and parliamentary committees have, however, an entirely free hand in collecting every kind of information they consider as relevant.²⁰

4. 3. THE LEGISLATURE VERSUS THE JUDICIARY

There are, however, also important arguments in favour of decision-making by judges. Governments may rush legislation through the representative bodies, in particular in those parliamentary regimes where the government can rely on a stable majority in Parliament. Courts will rarely, if ever, indulge in behaviour of this kind: they are restrained by their professional attitudes. Judges are professionally trained to consider every argument, however curious, and to balance different arguments against each other. Normally they will give reasons for their decisions, thereby enabling others to reconstruct the court's line of thought. A further advantage of judicial decision-making is that those who decide have no personal interest in the result. They are more unprejudiced than politicians, who are more frequently linked to the business community or to interest groups, or to single-issue movements such as anti-hunting lobbies or environmental groups.²¹

²⁰ Tim Koopmans, *Courts and Political Institutions-A Comparative View*, p. 92 (1st Edition 2003)

²¹ *Ibid* at 94

The legislature, when it enacts the law is naturally unable to visualize all the situations to which it would apply in future. In the myriad situations which arise thereafter there are some occasions when the existing law appears to be deficient to provide for the felt needs of the time. In such a situation the role of the judiciary is not only to interpret but also to expound the law to provide for those situations as well, though within the bounds of law, since rule of law which does not permit any vacuum, must prevail to respond to the needs of the society.²²

The observations of the Supreme Court in this regard has been highlighted in *Vishaka v. State of Rajasthan*²³ as thus-

The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.²⁴

²² Dr. Justice A.S. Anand, *Protection of Human Rights-Judicial Obligation or Judicial Activism*, (1997) 7 SCC (Journal) 11

²³ (1997) 6 SCC 241. The Supreme Court of India laid down certain guidelines to ensure the prevention of sexual harassment of women in workplaces which were made binding and enforceable in law until suitable legislation is enacted to occupy the field. However, even after eleven years of the passing of the judgment (the judgment was delivered on 13th August 1997); no suitable legislation has been passed to deal with the prevention of sexual harassment of women in workplaces.

²⁴ *Ibid* at 247

It is also seen that the legislators are not always best suited for the role of adopting the law to the necessities of time for, the legislative process is too slow and the legislatures are often divided by politics, slowed down by politics, slowed by periodic elections and overburdened with myriad and other legislative activities. Sometimes, the drafting of the laws is also poor and ambiguous. Even the executive can sometimes fail to implement the law. Thus, the task must, therefore, of necessity fall upon the courts because the courts can by the process of interpretation or judicial activism adopt the law to suit adopt the law to suit the needs of the society.²⁵

Merely because the judiciary is unelected, it cannot be said that it has no competence to mould the law by interpretation. Framing or amending law and putting it in actual action poses problems and issues of different kinds. They arise from time to time, event to event and case to case. In judicial process and the adversarial system, all sections of people involved in an issue are heard. Everyone's point of view, including those volunteering to assist the court, is given due consideration and weight. The judiciary adopts a participatory process, which is sometimes more effective than the process of law-making adopted by the legislature.²⁶ As remarked by Roscoe Pound-

Judicial finding of law has a real advantage in competition with legislation in that it works with concrete cases and generalizes only after a long course of trial and error in the effort to work out a practicable principle.²⁷

²⁵ Dr. Paramjit S. Jaswal and Dr. Nishtha Jaswal, *Judicial Activism: The Genesis and Progress*, Vol. 28 (2 & 3) 2001, Page 221

²⁶ Justice D.M.Dharmadhikari, *The Principle of Constitutional Interpretation: Some Reflections*, (2004) 4 SCC (Journal) 1

²⁷ *Ibid*

The essence of a parliamentary government is that it has a head of State who is also the constitutional head although; the real executive powers are vested in the Council of Ministers with the Prime Minister at its head. The Prime Minister and the Council of Ministers take executive action on behalf of the head of the State (the President in the case of India). The legislature consisting of the President, the central Parliament (the Lok Sabha and Rajya Sabha) and the state legislatures, form the second organ of India. The third organ is the judiciary which draws its powers from the Constitution.

All the three organs have a definite role to play under the constitutional framework. The legislature frames the laws, the executive enforces the law and the judiciary interprets the law. In theory all the three organs act exclusively within the sphere allotted to them by the Constitution. However, in actual practice, there is a certain amount of overlapping in the fields of all the three organs of the State. The legislature while framing a law has to strictly abide by the provisions of the Constitution and it cannot frame a law which is contrary to any provisions of the Constitution. The validity or otherwise of a law framed by the legislature can be considered by the judiciary and if the law is found to be *ultra vires*, the judiciary can strike down such a law and thus the law is obliterated from the statute books. On the other hand, if the judiciary finds the law to be valid, it upholds such a law and it is then enforced in terms of the interpretation placed on the law by the courts. The executive, when it enforces the law framed by the legislature, its action are subject to scrutiny by the judiciary. The judiciary then checks the actions of the executive not only on the touchstone of the law sought to be enforced, but also on the touchstone of the Constitution. The decisions of the courts are binding on both the legislature as well as the executive. There is no power vested either with the legislature or the

executive to ignore the decisions of the courts or to act contrary to such decisions. Any action of either the executive or the legislature contrary to any decision of the courts would be liable to be struck down without any doubt.

4. 4. THE JUDICIARY IN INDIA

The members of the Indian Constituent Assembly brought to the framing of the judicial provisions of the Constitutions an idealism equaled only by that shown towards the Fundamental Rights. Indeed, the Judiciary was seen as an extension of the Rights, for it was the courts that would give the Rights force. The Judiciary was to be an arm of the social revolution, upholding the equality that Indians had longed for during colonial days, but had not gained-not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule. The courts were idealized because, as guardians of the Constitution, they would be the expression of the new law created by Indians for Indians. The courts were, therefore, widely considered one of the most tangible evidences of independence.²⁸ As remarked by Chief Justice Marshall in *Marbury v. Maddison*²⁹, “it is for the Court to say what the law is”.

It was realized that democracy cannot survive without an independent judiciary assisted by an independent legal profession. There are inevitable conflicts of view between an executive taking action which ministers deem to be in the public interest and an independent judiciary

²⁸ Granville Williams, *The Indian Constitution-Cornerstone of a Nation*, p.164 (5th Edition 2002)

²⁹ (1803) 2 L Ed 60 quoted by Justice R.C.Lahoti, *Judicial Activism-Constitutional Obligation of the Courts*, AIR 2005 Journal 177

charged with ensuring that executive action does not exceed the powers conferred by the Constitution or infringes the rule of law. The Supreme Court has also to be vigilant to protect the integrity of the Constitution from an impatient Parliament asserting total supremacy through the operation of the express power contained in the Constitution for the amendment of the Constitution. It was aptly remarked by M. Ananthasayanam Ayyangar during the Constituent Assembly Debates that the Supreme Court is the supreme guardian of the citizen's rights in any democracy³⁰.

Mr. Alladi Krishnaswami Ayyer, during the Constituent Assembly Debates, had remarked on the importance of the Supreme Court while interpretation of the Constitution of India-

The future evolution of Indian Constitution will thus depend to a large extent upon the work of the Supreme Court and the direction given to it by the Court. While its function may be one of interpreting the Constitution, it cannot in the discharge of its duties afford to ignore the social, economic and work tendencies of the time, which furnish the necessary background.³¹

However, the framers of the Indian Constitution did not incorporate a strict doctrine of separation of powers but envisaged a system of checks and balances. Policy-making and implementation of policy are conventionally regarded as the exclusive domain of the executive and the legislature, with judiciary enforcing the law.

As early as in 1951, the Supreme Court noted that though there are no specific provisions in the Constitution vesting legislative powers

³⁰ Constituent Assembly Debates, Vol. VII, pg. 940

³¹ Justice R.C.Lahoti, *Judicial Activism-Constitutional Obligation of the Courts*, AIR 2005 Journal 177

exclusively in the legislature and the judicial power in the judiciary, the essence of the doctrine of separation of powers was implicit in the constitutional scheme.³² The Supreme Court has itself recognized that the 'Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another'.³³

Chief Justice S.M. Sikri observed in *Keshavananda Bharati v. State of Kerala*³⁴ that-

Separation of powers between the legislature, the executive and the judiciary is a part of the basic structure of the Constitution.

Chief Justice A.N. Ray³⁵ is of the opinion that in the Indian Constitution, there is separation of powers in a broad sense only. A rigid separation as under the American Constitution or under the Australian Constitution does not apply to India.

The observations of the Supreme Court in *Asif Hameed v. State of J & K*³⁶ are-

Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the

³² *In re Delhi Laws Act* AIR 1951 SC 332

³³ *Ram Jawaya Kapur v. State of Punjab* AIR 1955 SC 549 at 556

³⁴ AIR 1973 SC 1461

³⁵ *Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299

³⁶ AIR 1989 SC 1899 at 1905. This line of demarcation between the three organs of the State was later followed in *Supreme Court Employees' Welfare Association v. Union of India* AIR 1990 SC 334 and *Mallikarjuna Rao v. State of A.P.* AIR 1990 SC 1251

Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs.

Justice Markandey Katju has observed in *Indian Drugs & Pharmaceutical Ltd. v. Workmen* ³⁷ that “there is broad separation of powers under the Constitution”. Justice Markandey Katju has also remarked that, “it is true that there is no rigid separation of powers under our Constitution but there is broad separation of powers, and it is not proper for one organ of the State to encroach into the domain of others”.³⁸

Pandit Thakur Das Bhargava during the Constituent Assembly Debates had opined, “Every constitution provides for three basic requirements, viz., firstly, an independent judiciary: secondly, a legislature, and thirdly an executive. It would be a mistake for one to ask as to which of the three is of greater or lesser importance, because all the three, though independent in their respective spheres are component parts of the body politic of the State”.³⁹

The working of the three organs has been explained by Justice A.S.Anand⁴⁰ as follows-

³⁷ (2007) 1 SCC 408 at 426

³⁸ *State of U.P. v. Jeet S. Bisht* (2007) 6 SCC 586. He followed the same view in *Divisional Manager, Aravali Golf Club v. Chander Hass* (2008) 1 SCC 683 at 689

³⁹ Constituent Assembly Debates, Vol. VIII, pg. 393

⁴⁰ Dr. Justice A.S.Anand, *Judicial Review-Judicial Activism-Need for a Caution*, 42 JILI (2000) Page 149

The necessity of empowering the courts to declare a statute unconstitutional arises not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and the executive on the one hand and the judiciary on the other hand provides the means by which mistakes committed by one are corrected by the other and vice versa. The function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of a statute in the light of the policy of the Constitution. The duty of the judiciary is to consider and decide whether a particular statute accords or conflicts with the Constitution and make a declaration accordingly....When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution. For the progress of the nation, however, it is imperative that all the three wings of the state function in complete harmony.

At the time of inauguration of the Supreme Court, our first Chief Justice H.C. Kania said-

The people make the laws through their Legislature. It is not for the Court to supervise or correct the laws as superior authority. Only function is to point out, while examining the lacuna or loop-holes solely with the view to rectify them by the legislative authority, if necessary.⁴¹

The Constitution of India has recognized the two modes of law making. Article 141 of the Constitution of India lays down that the law as declared by the Supreme Court of India shall be binding on all courts

⁴¹ Justice Ashok A. Desai, *Justice Versus Justice*, p. 100 (2000)

within the territory of India. Article 142 further gives the Supreme Court in exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India.

The verdict of Supreme Court has a command of a law having binding force on all the Courts within the territory. One may *prima facie* understand the term, which has been known in a common parlance as well as referring to that the Supreme Court has laid down the law. However, it is felt that the Supreme Court merely declares the position of law on a statute, which is in vogue and does not legislate. The view is founded on the basis that the words of the Supreme Court are not the solemn will of the people and is not akin to a legislative enactment. The law of the Legislature, which is in conformity with the Constitution, always has an upper edge.⁴²

The judiciary has always remained active. It cannot afford to be passive. While the other two wings of the government, i.e. executive and legislature sometimes remain passive and sometimes become overactive, but judiciary functions within its framework and is bound to work within its parameters because of constitutional device of division of powers. The main and prior function of the judiciary is to deliver justice to all without fear or favour. The judiciary endeavours to protect the oppressed, powerless, poor and helpless people against the injustice committed by omnipotent persons, authority or body. Judiciary protects the weakest persons from the oppressive acts of either executive or legislatures. When judiciary protects and provides justice to the poorest people against oppressive acts of a private persons, authority or body, there is no hue

⁴² *Ibid* at 63

and cry but when it protects against tyranny of the Government, everyone thinks about judicial activism.

In the previous chapter it has been shown that in several *pro bono public* litigations the Supreme Court is attracting judicial attention in almost every aspect of human life including simplification of judicial procedure. This initiative of the Supreme Court followed by the High Courts was backed by the Parliament to some extent. In this regard, the incorporation of Article 39A in the Constitution which enjoined upon the State to secure that the operation of legal system promotes justice on the basis of equal opportunity, and to provide free legal aid to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic and other disability has strengthened the hands of the judiciary in its quest to impart justice to every common man. The initiative of the judiciary and the use of its judicial mind in various public interest litigation's and other regular cases relating to environment, education, electoral reforms, women atrocities, child exploitation, etc. has resulted in adding new legislations to our statute books. It is the endeavor of the judiciary which has made the Indian society more aware about their legal rights and remedies and has resulted in the judiciary 'legislating' exactly in the way in which a legislature legislates.

It has been said that Justices, bound by solemn oaths to uphold the Constitution, without fear or favour, the Indian Constitution must remain the sacrosanct text.⁴³

⁴³ Upendra Baxi, *Judicial Activism, Legal Education & Research in a Globalising India*, p. 8 (1996)

The activist⁴⁴ role of the judiciary has been explained by Justice P.N.Bhagwati as under-

The Indian judiciary has adopted an activist goal-oriented approach in the matter of interpretation of fundamental rights. The judiciary has expanded the frontiers of fundamental rights and in the process rewritten some parts of the Constitution through a variety of techniques of judicial activism. The Supreme Court judiciary in India has undergone a radical change in the last few years and it is now increasingly being identical by justices as well as by people as “the last resort for the purpose of the bewildered”.⁴⁵

Holland has beautifully blended his view with that of Aristotle while explaining about the duty of a judge. He writes⁴⁶ -

When the balance of justice is distributed by wrong-doing, or even by a threat of it, the law intervenes to restore, as far as possible, the *status quo ante*. ‘The judge’, says Aristotle, ‘equalises’.

⁴⁴ There is a difference between an active and an activist judge. An active judge regards himself a trustee of State regime, power and authority. Accordingly, he usually defers to the executive and legislature; shuns any appearance of policy-making; supports patriarchy and other forms of violent social exclusion; and overall promotes ‘stability’ over ‘change’. In contrast, an activist judge regards himself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples, especially the disadvantaged, disposed, and the deprived and does not regard adjudicatory power as repository of the reason of the State-See Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice* in S.K. Verma and Kusum(ed.), *Fifty Years of the Supreme Court of India-Its Grasp and Reach*, p.165 (2nd Edition 2006)

⁴⁵ Justice P.N.Bhagwati, *Enforcement of Fundamental Rights: Role of the Courts*, Indian Bar Review, Vol. 24 (1& 2) 1997 Page 197

⁴⁶ Thomas Erskine Holland, *The Elements of Jurisprudence*, p. 325 (13th Edition 1924)

In *The Authorised Officer, Thanjavur v. S. Naganatha Iyer*⁴⁷ it has been observed-

The judiciary is not a mere umpire, as some assume, but is an active catalyst in the constitutional scheme.

While explaining about the role of an activist judge, Justice V.R.Krishna Iyer has stated that "Judicial activism is no more a serendipity. It is the conscious fulfillment of the obligation implied in the oath of office of a judge. That is his discipline, his ethic, his tryst with the people of India"⁴⁸. He further observed-

The Indian Constitution is not a neutral document but has a definite slant towards social justice and the weaker sections and, therefore, judges have to share the values of the Supreme Lex. Then alone class actions, test cases, representative litigation and social action proceedings will meet with expected results. Our courts are on trial and judicial performance is under scrutiny. A people-oriented perspective, a dynamic vision and instrumental obligation with a passion to see that the State secures, through the operation of the legal system, social justice on a basis of equal opportunity is the desideratum. It follows that the Constitution fulfills itself in its Preambular pledges only when the right type of judge with activism and imagination capacity for affirmative action and courage to resist proprietariat pressure sits on the bench and commits himself to a constituency which embraces the entire Indian people.⁴⁹

⁴⁷ AIR 1979 SC 1487

⁴⁸ Justice V.R.Krishna Iyer, *Legally Speaking*, p. 215 (2003)

⁴⁹ V.R.Krishna Iyer, *Judicial Activism-A Democratic Demand*, Indian Bar Review Vol. XXXI (1 & 2) 2004 Page 1

The observations of Justice K. Ramaswamy on the importance of judicial law-making is-

The judge cannot retain his earlier passive judicial role when he administers the law under the Constitution to give effect to the constitutional ideals. The extraordinary complexity of modern litigation required him not merely to declare the rights to citizens but also to mould the relief warranted under facts and circumstances and often command the executive and other agencies to enforce and give effect to the order, writ or direction or prohibit them to do unconstitutional acts. In this ongoing complex of adjudicator process, the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality. Therefore, the judge is required to take judicial notice of the social and economic ramification, consistent with the theory of law. Thereby, the society demands active judicial role, which formerly were considered exceptional but not a routine.⁵⁰

Justice A.S.Anand has called the duty of the courts as a judicial sentinel. His opinion in regard to judicial institution is worth mentioning. He observed⁵¹-

Judicial institutions have a sacrosanct role to play not only for resolving *inter-se* disputes but also to act as a balancing mechanism between the conflicting pulls and pressures operating in a society. Courts of law are the products of the Constitution and the

⁵⁰ *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee* (1995) 5 SCC 457 at 471

⁵¹ Dr. Justice A.S.Anand, *Judicial Review-Judicial Activism-Need for a caution*, 42 JILI (2000) Page 149

instrumentalities for fulfilling the ideals enshrined therein. Their function is to administer justice according to the law and in doing so, they have to respond to the hopes and aspirations of the people because the people of this country, in no uncertain terms, have committed themselves to secure justice-social, economic and political-besides equality and dignity to all.

Dr. G.B.Reddy⁵² has set a *raison de etre* for the functioning of an active judge as-

The constitutional mandate to the judiciary is that while exercising its functions and powers, it should keep in view the social and economic objectives which the constitution seeks to protect, promote and provide as embodied in the law. When each of the three organs of the State respects and appreciates the role of the other organs and functions within its own sphere and parameters, the harmony which would be the resultant product would go a long way in bringing about socio-economic changes in the country. However, when the political organs of the state fail to discharge their constitutional obligations effectively or if their indifference to certain constitutional objects especially the object of rendering social, economic and political justice to the people at large, the judiciary can assert its judicial power, to meet the constitutional ends. In the process, the judiciary may assume the role of a policy maker, legislator and even the role of a monitor to oversee the implementation of its directions.

Where a judge interprets the law or the Constitution not merely by giving effect to the literal meaning of the words of the statute, or the

⁵² Quoted in Justice V.R.Krishna Iyer, *Legally Speaking*, p. 218 (2003)

Constitution but, by giving such meaning as he thinks is in consonance with its spirit, he is said to be an activist judge.⁵³

In modern democratic society, judge must steer his way between the Scylla of subservience to government and the Charybdis of remoteness from constantly changing social pressures and economic needs.⁵⁴ There is little to point out the dangers of complete political subservience which the judiciary has experienced where the administration of law becomes a predominantly political function and an instrument of government policy. The concept of stitching the cloth is the business of the legislature whereas straightening the creases is the province of the judiciary, has long been abandoned as a broken tool.⁵⁵

The judiciary has evolved three contours in its effort to adopt an activist role. The concept of public interest litigation (PIL) being the first contour. Secondly, giving of a wide interpretation to various fundamental rights of Part III of the Constitution and the third is related to the accountability of the officials, who are the trustee of public power, for their misuse of the power. The mission of the judiciary is not merely to decide the case but to secure justice to every citizen of the country and of creating a just democratic order amidst us. As stated by Upendra Baxi, Justices are, explicitly and implicitly, asked to make the Indian Constitution compatible with the sacred texts of globalization⁵⁶.

However, the judiciary has not adopted a uniform and consistent approach in dealing with its emerging role as a policy-maker. While in

⁵³ S.P.Sathe, *Judicial Activism in India*, p. 30 (1st Edition 2002)

⁵⁴ W. Friedmann, *Law in a Changing Society*, p.88 (2nd Edition 1972)

⁵⁵ Justice Pana Chand Jain, *Judges do Make Law*, AIR 2003 Journal 218

⁵⁶ Upendra Baxi, *Judicial Activism, Legal Education & Research in a Globalising India*, p. 8 (1996)

some cases, the Court has expressed its reluctance to step into the legislative field, in others it has laid down detailed guidelines and explicitly formulated policy. The former approach was taken by the Supreme Court when dealing with the question of ragging of students in Medical Colleges. The Supreme Court overturned the High Court's direction to the State Government to introduce anti-ragging legislation and observed-

The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging....It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation. The court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the court may consider it to be. If the executive is not carrying out any duty laid upon it by the Constitution or the law, the Court can certainly require the executive to carry out such duty and this is precisely what the Court does when it entertains public interest litigation.....But at the same time the Court cannot usurp the functions assigned to the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature.⁵⁷

Speaking on the same lines, the Supreme Court has observed in *M.P. Oil Extraction v. State of M.P.*⁵⁸ as-

⁵⁷ *State of H.P. v. A Parent of a Student of Medical College, Shimla* (1985) 3 SCC 169

⁵⁸ (1997) 7 SCC 592 at 611

The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State....The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in the respective fields of operation needs to be emphasized.

This attitude was also followed in the Disinvestment case⁵⁹ by Justice Kirpal on behalf of a unanimous Court-

Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority.

These observations might have been prompted by the reasoning given by W. Friedmann⁶⁰ wherein he had observed-

⁵⁹ *BALCO Employees' Union (Regd.) v. Union of India* (2002) 2 SCC 333

⁶⁰ W. Friedmann, *Legal Theory*, p. 503 (5th Edition 1967)

Courts can and indeed are called upon to adjust rights and liabilities in accordance with changing canons of public policy. But because they develop the law on a case-by-case basis they cannot as can the legislature, undertake the establishment of a new legal institution, “an elaborate procedure of investigation and consideration eventuating in the approval of a particular form of words as law”.

Lord Devlin had said:

Judicial law-making power must not be interpreted as implying that judges have the power, let alone the right to make any type of law they wish, some types of legal regulations are inherently and completely outside their powers.⁶¹

The idea of leaving legislation as the sole authority of the Legislature was also supported by the majority in *P. Ramachandra Rao v. State of Karnataka*⁶² wherein it was observed-

The primary function of the judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation.⁶³

This view notwithstanding, the more recent trend, however, is for the judiciary to assert its new role as policy-maker, as the decision in *Visakha*⁶⁴ demonstrates wherein the Supreme Court observed-

Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation,

⁶¹ Quoted by Justice M.N. Venkatachaliah, *Indian Judges as Law Makers: Some Glimpses of the Past*, (1995) 1 SCC (Journal) 1

⁶² (2002) 4 SCC 578

⁶³ *Ibid* at 600

⁶⁴ *Visakha v. State of Rajasthan* (1997) 6 SCC 241

and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.⁶⁵

The same view has been reiterated by the Supreme Court in *Vineet Narain v. Union of India*⁶⁶ wherein the Court observed-

It is the duty of the executive to fill the vacuum by executive orders because its field is conterminous with that of the legislature and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.

Going a step further, the Supreme Court laid down the objectives and the functions of the judiciary as under-

(a) to ensure that all persons are able to live securely under the Rule of Law:

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.⁶⁷

⁶⁵ *Ibid* at 247

⁶⁶ (1998) 1 SCC 226

⁶⁷ *Ibid*

The power and function of the judiciary was explained by the Supreme Court in *Minerva Mills v. Union of India*⁶⁸ as under-

Our Constitution is founded on a nice balance of power amongst the three organs of the State namely the Executive, the Legislature and the Judiciary. It is the function of the Judges nay their duty to pronounce upon the validity of laws. If the Courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies is a writ in water. A controlled Constitution will become uncontrolled.⁶⁹

In *Bandhua Mukti Morcha v. Union of India*⁷⁰ the Supreme Court explained the role of courts while entertaining public interest litigation as under-

When the court entertains public interest litigation, it does not do so in a cavaling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive framed for the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive.

A look at the Constituent Assembly Debates⁷¹ shows that the members of the Assembly were apprehensive in the matter of clothing the Supreme Court with a wide jurisdiction in dealing with issues regarding

⁶⁸ AIR 1981 SC 1787

⁶⁹ *Ibid* at 1799

⁷⁰ (1984) 3 SCC 161

⁷¹ Constituent Assembly Debates, Vol. VIII, p. 930-950

fundamental rights as it may usurp of the powers of the Parliament. The heat of the Constituent Assembly Debates was felt by the judiciary for which it tried to adopt a balance view in matters coming before.

Initially, the judiciary followed a policy of adhering to a narrow doctrine and tended to shy away from the development of law. In *A.K.Gopalan v. State of Madras*,⁷² the Supreme Court placed a rather narrow and restrictive interpretation upon Article 21 of the Constitution.⁷³ The Court gave a very restrictive interpretation of 'procedure established by law' and refused to include the principles of natural justice akin to the 'due process of law' under the American Constitution. It remarked-

In India the position of the judiciary is somewhere in between the Courts in England and the United States....But our Constitution, unlike the American Constitution, does not recognise the absolute supremacy of the Court over the legislative authority in all respects, for outside the restricted field of constitutional limitations our Parliament and the State Legislatures are supreme in their respective legislative fields and in that wider field there is no scope for the Court in India to play the role of the Supreme Court of the United States.⁷⁴

A similar restrictive view was taken in *Romesh Thappar v. State of Madras*⁷⁵ where the Supreme Court permitted the restriction on freedom of speech in the interest of 'security of State' while invalidating the pre-censorship even if there was danger to public order.

⁷² AIR 1950 SC 27

⁷³ Dr. Justice A.S.Anand, *Justice for Women*, p.44 (2nd Edition 2003)

⁷⁴ *A.K. Gopalan v. State of Madras* AIR 1950 SC 27

⁷⁵ AIR 1950 SC 124

The judiciary was, however violent in smashing the *zamindari* system without paying adequate compensation to the *zamindars*.⁷⁶ It struck down the land reforms law which the Parliament felt that the Judges of the Supreme Court were trying to impose their personal philosophy on the nation rather than accepting the national philosophy. Such judgment resulted in a strong criticism of the legal system by the then Prime Minister, Pandit Jawaharlal Nehru. The judgment of the Supreme Court was neutralised by the Parliament by way of amendment under Article 368 of the Constitution. This was done by the Legislature and the Executive on the belief that the Supreme Court was trying to defeat the socio-economic base of the Constitution.

In *Golak Nath v. State of Punjab*⁷⁷ the Supreme Court laid down that the amendments to the Constitution could not encroach upon the fundamental rights and if they did so, the amendments had to be declared void by reason of Article 13(2) of the Constitution. The Supreme Court applied the doctrine of prospective overruling and did not upset the amendments and the judgments before the *Golak Nath* case. The legislatures were quick to react and passed the Constitution (Twenty-fourth Amendment) Act in 1971 by which Article 13 and Article 368 was amended, clothing the Parliament with unlimited powers to amend all the provisions of the Constitution. The Supreme Court was quick to apply the brakes on such unfettered powers of the Parliament and in *Keshavananda Bharati v. State of Kerala*⁷⁸ held by a majority of 7 to 6 that the Parliament has wide powers of amending the Constitution and it extends to all the Articles, but the amending power is not unlimited and does not

⁷⁶ *Kameshwar Prasad v. State of Bihar* AIR 1962 SC 1166

⁷⁷ AIR 1967 SC 1643

⁷⁸ AIR 1973 SC 1461

include the power to destroy or abrogate the 'basic structure' or 'framework' of the Constitution. The 'basic structure' theory propounded by the Supreme Court was revolutionary and perhaps without a parallel anywhere in the world.

The executive came to enact laws nationalising banks⁷⁹, abolishing Privy Purse⁸⁰ and imposing restrictions on import of newsprints.⁸¹ The Supreme Court while adopting a balanced approach held that the legislation nationalising banks was unconstitutional due to inadequacy of compensation⁸² but upheld the legislation abolishing Privy Purse.⁸³ The Supreme Court did not permit the government to put pressure on newspapers in the supply of newsprint but permitted the government to have some restraints on the newspapers.⁸⁴

The conflict between the executive and the judiciary resulted in the declaration of the national emergency on 26th June, 1975 and suspension of Articles 14, 19 and 21 of the Constitution of India. The Supreme supported the stand of the Parliament by declaring that the right to life and liberty was automatically suspended during the emergency.⁸⁵ The majority (A.N.Ray, M.H.Beg, Chandrachud and Bhagwati,JJ.) held that

⁷⁹ Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969

⁸⁰ The Constitution (Twenty Sixth Amendment) Act, 1971 where Article 363A was inserted

⁸¹ The Newsprint Policy for 1972-73, The Import Control Order, 1955 and the Newsprint Control Order 1962 passed by the Central Government under sec 3 and 4A of the Imports and Exports Control Act, 1947

⁸² *R.C.Cooper v. Union of India* AIR 1970 SC 564

⁸³ *H.H.Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India* AIR 1971 SC 530

⁸⁴ *Bennet Coleman and Co. Ltd. v. Union of India* AIR 1973 SC 106

⁸⁵ *A.D.M.Jabalpur v. Shivakant Shukla* AIR 1976 SC 1207

in view of the Presidential Order dated 27th June, 1975 no person had any *locus standi* to move any writ petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order was not under or in compliance with the Act or was illegal, or was vitiated by *mala fides* factual or legal or was based on extraneous consideration. The dissenting opinion was given by Justice H.R.Khanna as he observed-

More is at stake in these cases than the liberty of a few individuals or the correct construction of the wording of an order. What is at stake is the rule of law...A dissent in a Court of last resort....is an appeal to the brooding spirit of law, to the intelligence of a future day, when a later decision may possibly correct into which the dissenting judge believes the Court to have been betrayed.⁸⁶

The lifting of emergency ushered in an era where the judiciary developed its innovativeness to bring in a social revolution and upholding the rule of law. The passing of the Constitution (Forty fourth Amendment) Act, 1978 tried to restore the lost independence of the judiciary. The epistolary jurisdiction, public interest litigation (PIL), and development of the law in tune with the international developments embracing all aspects of human life has ameliorated the conditions of the people of the Indian society.

Twenty-eight years after the coming into existence of the Constitution of India, the Supreme Court in *Maneka Gandhi v. Union of India*⁸⁷ pronounced that the 'procedure' as intended by Article 21 must conform to the principles of natural justice. The judgment in *Maneka*

⁸⁶ *Ibid*

⁸⁷ AIR 1978 SC 597

Gandhi is a watershed in the history of Indian judiciary. By giving a wide interpretation to Article 21 and interrelating it with Article 14 and 19, the ambit of its application was enhanced to a high pedestal.

The development of the judiciary as a force after the emergency as remarked by S.P.Sathe⁸⁸ is-

Judicial activism of the post-emergency period might have been inspired by the emergency experience. The Court might have realized that its independence and neutrality towards various political formations depended upon the support of the people. Post-emergency activism clearly marked the Court's distance from legal positivism. The Court took an opportunity to expand the rights of the people through liberal interpretation of the constitutional provisions regarding the right to equality and right to personal liberty.....

Post-emergency judicial activism was inspired by a philosophy of constitutional interpretation that looked at the Constitution not as a mere catalogue of rules but as statements of principles of constitutional governance. The provisions of the Constitution had to read in the light of the principles that were supposed to underline and transcend the formally enacted legal rules.

During the post-emergency period the judiciary came forward with a plethora of judgments to protect a wider range of interests covering almost every field of human rights. The decision in *M.H.Hoskot v. State of Maharashtra*⁸⁹ for providing free legal service to the poor and needy was an essential element of the 'reasonable, fair and just procedure'.

⁸⁸ S.P.Sathe, *Judicial Activism in India*, p.12 (1st Edition 2002)

⁸⁹ AIR 1978 SC 1548

Again in the series of *Hussainara Khatoon (I to VI)*⁹⁰ cases from 1979 to 1980 the Supreme Court stressed on the right to speedy trial for the under trials languishing in various jails. The judiciary has been making its presence felt by its intervention in cases concerning violation of human rights as an ongoing judicial process. Decisions on such matters as the right to protection against solitary confinement⁹¹, the right not to be held in fetters⁹², the right against handcuffing⁹³, the right against custodial violence⁹⁴ rights of an arrestee⁹⁵, rights of female employees not to be sexually harassed at the place of work⁹⁶ are a few examples in this regard.

Over the years an enforceable right to compensation in cases of torture or other injuries inflicted by the State or its agencies has also been crystallized.⁹⁷ Starting with decisions like *Rudal Sah*,⁹⁸ *Bhim Singh*,⁹⁹ etc. it was authoritatively laid down in *Nilabati Behara's*¹⁰⁰ case; wherein the Supreme Court had expanded the enforceable right to compensation in cases of custodial death as under-

⁹⁰ AIR 1979 SC 1360, (1980) 1 SCC 91, (1980) 1 SCC 93, (1980) 1 SCC 98, (1980) 1 SCC 108, (1980) 1 SCC 115

⁹¹ *Sunil Batra v. Delhi Administration* AIR 1978 SC 1575

⁹² *Charles Sobraj v. Superintendent, Central Jail* (1978) 4 SCC 494

⁹³ *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68

⁹⁴ *Nilabati Behara v. State of Orissa* (1993) 2 SCC 476

⁹⁵ *D.K. Basu v. State of West Bengal* (1997) 1 SCC 426

⁹⁶ *Vishaka v. State of Rajasthan* (1997) 6 SCC 241 and *Apparel Export Promotion Council v. A.K. Chopra* AIR 1999 SC 625

⁹⁷ This is often termed as "Compensatory Jurisprudence"

⁹⁸ *Rudul Sah v. State of Bihar* (1983) 4 SCC 141

⁹⁹ *Bhim Singh v. State of J & K* (1985) 4 SCC 677

¹⁰⁰ *Nilabati Behara v. State of Orissa* (1993) 2 SCC 476

The Court, where the infringement of fundamental right is established, therefore cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of citizen. To repair the wrong done and give judicial redress for legal injury is a judicial conscience.

The decisions of the Supreme Court in *Sunil Batra v. Delhi Administration*,¹⁰¹ *Municipal Corporation, Ratlam v. Vardichand*,¹⁰² *Akhil Bharitya Soshit Karamchari Sangh v. Union of India*,¹⁰³ and umpteen number of decisions thereafter by the Supreme Court and more particularly the decision of the Supreme Court in *S.P.Gupta's case*¹⁰⁴ represent watersheds in the development of public interest litigation and liberalisation of the concept of *locus standi* to make access to the courts easy. The principle underlying Order 1 Rule 8 of the Code of Civil Procedure has been applied in public interest litigation to entertain class action and at the same time to check misuse of public interest litigation. The appointment of *animus curiae* in these matters ensures objectivity in the proceedings. Judicial creativity of this kin has enabled realisation of the promise of socio-economic justice made in the preamble to the Constitution of India.

¹⁰¹ (1978) 4 SCC 494

¹⁰² AIR 1980 SC1622

¹⁰³ AIR 1981 SC 293

¹⁰⁴ *S.P.Gupta v. President of India* AIR 1982 SC 149. See also *Supreme Court Advocates' on Record Association v. Union of India* (1993) 4 SCC 441

During the first phase of public interest litigation, the emphasis was on human rights of the weaker sections of the society which included prisoners, undertrial prisoners, bonded labourers, unorganised labourers, or women in protective homes. During the second phase, the emphasis shifted on governance. Professor Wadhwa petitioned the Court against promulgation of ordinances in Bihar,¹⁰⁵ lawyers petitioned the Court against arbitrary termination of judicial appointments and transfer of judges¹⁰⁶, and M.C.Mehta filed petitions against private corporations' or government's disregard of anti-pollution safeguards,¹⁰⁷ against the erosion of the Taj Mahal,¹⁰⁸ and against pollution of the river Ganges.¹⁰⁹ Common Cause asked the Court to lay down guidelines for the storing and transfusion of blood¹¹⁰ and appointment of consumer forums in each district to provide quick, cheap and informal delivery of justice to consumers.¹¹¹ In the 1990s, the emphasis shifted from governance to environment, education, right to gender justice, election and other related subjects which were the need of the hour.

¹⁰⁵ *D.C.Wadhwa v. State of Bihar* AIR 1987 SC 579

¹⁰⁶ *S.P.Gupta v. President of India* AIR 1982 SC 149. *Supreme Court Advocates' on Record Association v. Union of India* (1993) 4 SCC 441

¹⁰⁷ *M.C.Mehta v. Union of India* AIR 1986 SC 965; *M.C.Mehta v. Union of India* AIR 1987 SC 1086

¹⁰⁸ *M.C.Mehta v. Union of India* AIR 1997 SC 734

¹⁰⁹ *M.C.Mehta v. Union of India* (1997) 2 SCC 411

¹¹⁰ *Common Cause v. Union of India* (1996) 1 SCC 753

¹¹¹ *Common Cause v. Union of India* (1992) 1 SCC 707

It was the judgment of the Supreme Court in *Unni Krishnan v. State of A.P.*¹¹² and in *T.M.A. Pai Foundation v. State of Karnataka*¹¹³ for which the Parliament had to insert Article 21A¹¹⁴ providing for free and compulsory education to children below the age of 14 years. The existing Article 45 has also been suitably modified to provide for early childhood care and education for all children until they complete the age of six years. The judgment of the Supreme Court in *Priti Srivastava*¹¹⁵ of laying down the standard of education in an institution is an example of judicial craftsmanship. Although the decisions in *T.M.A. Pai Foundation*¹¹⁶ to *P.A.Inamdar*¹¹⁷ signifies that the Supreme Court in its enthusiasm to set things right in the vital area of higher education created conflicts calling for legislative interference; but usually developmental jurisprudence leading to social change emerges from debates and conflicts.

The decision of the Supreme Court in the field of control of noise pollution,¹¹⁸ ban on smoking in public places,¹¹⁹ conversion of diesel vehicles plying in Delhi to convert to CNG (Compressed Natural Gas) to reduce automobile pollution¹²⁰ are a few examples of providing reprieve and relief for the public from the menace of the noise, air and sound

¹¹² AIR 1993 SC 2178

¹¹³ (2002) 8 SCC 481

¹¹⁴ Constitutional (86th Amendment) Act, 2002

¹¹⁵ *Priti Srivastava v. State of Madhya Pradesh* AIR 1999 SC 2894

¹¹⁶ *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481

¹¹⁷ *P.A.Inamdar v. State of Maharashtra* (2005) 6 SCC 537

¹¹⁸ *Noise Pollution (V), In re* (2005) 5 SCC 733 where *Noise Pollution (II), In re* (2005) 5 SCC 728 was affirmed

¹¹⁹ *Murli S Deora v. Union of India* AIR 2002 SC 40

¹²⁰ *M.C.Mehta v. Union of India* AIR 2002 SC 1696

pollution. The modernisation of the judiciary was felt when the principle of absolute liability¹²¹ was developed by discarding the principle of strict liability.¹²²

The decision of the Supreme Court of the declaration of assets of a candidate contesting election as MP or MLA and the right of a voter to know the qualifications and involvement of the candidate in any offence received applause from the common people.¹²³ However, the Parliament was quick to react and tried to invalidate the judgment by making amendments in the Representation of the People Act, 1951.¹²⁴ When the said amendment was challenged before the Supreme Court,¹²⁵ the Court showed its boldness to declare the said amendment¹²⁶ as unconstitutional.

The judiciary was active enough to give due recognition to the theme that man and woman are two pillars of the social structure. Their roles, duties and rights are complementary and supplementary towards each other. The judgment in CEHAT¹²⁷ wherein directions were given for the implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 is noteworthy. The various laboratories and scan centres all throughout the country have been forced to display notices regarding the Act and resulting in a check of female foeticide.

¹²¹ *M.C.Mehta v. Union of India* AIR 1987 SC 1086

¹²² *Rylands v. Fletcher* (1886) LR 3 HL 330

¹²³ *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294

¹²⁴ Representation of the People (Third Amendment) Act, 2002

¹²⁵ *People's Union for Civil Liberties v. Union of India* (2003) 4 SCC 399

¹²⁶ Section 33-B of Representation of the People (Third Amendment) Act, 2002

¹²⁷ *Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India* (2001) 5 SCC 577

In *Lakshmi Kant Pandey* cases¹²⁸ the Supreme Court gave directions as to what procedures should be followed and what precautions should be taken while allowing Indian children to be adopted by foreign adoptive parents. There was no law to regulate inter-country adoptions and such lack of regulation could cause incalculable harm to Indian children, considering the possibility of child trade for prostitution as well as slave labour. When the Court was approached, it did not throw up its hands in despair and say that since there was no legislation it could do nothing. Justice Bhagwati laid down an entire scheme for regulating inter-country adoptions and intra-country adoptions which has been taken recourse to by the social activists for protecting children and promoting desirable adoptions for the last two decades.

Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as an essential component of its role as a constitutional court. In *M.C.Mehta v. State of Tamil Nadu*,¹²⁹ 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 matchbox manufacture, the Court thought it fit to 'travel beyond the confines of Sivakasi' and to 'deal with the issue in wider spectrum and broader perspective taking it as a national problem'. The Supreme Court laid down detailed guidelines for the abolition and rehabilitation of child labourers. Justice Hansaria, while referring to the Directive Principles of State Policy, observed-

¹²⁸ *Lakshmi Kant Pandey v. Union of India* (1984) 2 SCC 244; *Lakshmi Kant Pandey v. Union of India* (1987) 1 SCC 66; *Lakshmi Kant Pandey v. Union of India* (1991) 4 SCC 33

¹²⁹ (1996) 6 SCC 756

It is the duty of all the organs of the State according to Article 37 to apply these principles. Judiciary being also one of the three principles organs of the State, has to keep the same in mind when called upon to decide matters of great public importance. Abolition of child labour is definitely a matter of great public concern and significance.¹³⁰

4. 4. 1. JUDICIARY AND THE UNIFORM CIVIL CODE

The process of unification of India by breaking all types of differences in the personal laws and introduction of a uniform civil code has been a long cherished dream of the judiciary. In *Mohd. Ahmed Khan v. Shah Bano Begum*,¹³¹ a five-Judge Bench of the Supreme Court observed-

It is also a matter of regret that Article 44 of our Constitution has remained a dead letter....A Common Civil Code will help the cause of national integration by removing disparaging loyalties to laws which have conflict of ideologies. No community is likely to bell the cat by making gratuitous concessions on the issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably has the legislative competence to do so.....We understand the difficulties involved in bringing persons of different faith and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have nay meaning. Inevitably the role of the reformer has to be assumed by the courts because; it is beyond the

¹³⁰ *Ibid* at 766

¹³¹ (1985) 2 SCC 556

endurance of sensitive minds to the injustice to be suffered when it is so palpable.

The Parliament was quick to react and passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 taking the maintenance of a Muslim woman outside the purview of section 125 of the Code of Criminal Procedure, 1973.

While dealing with a suit for declaration of nullity of marriage by a Presbyterian Christian wife against her husband in *Jordan Diengdeh v. S.S. Chopra*¹³² the Supreme Court observed-

It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform code applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has been completely and signally broken down. We suggest that the time has come for intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take.

¹³² (1985) 3 SCC 62

In *Sarla Mudgal v. Union of India*¹³³ a case of three Hindu men who embraced Islam to marry again, while their Hindu wives, who were not legally divorced, remained Hindus. Justice Kuldeep Singh, while delivering the leading judgment observed-

Those who preferred to remain in India after partition fully know that the Indian leaders did not believe in two-nation or three - nation theory and that in the Indian Republic there was to be only one nation - the Indian Nation-and no community could claim to remain a separate entity on the basis of religion. "

Mr. Justice R.M.Sahay, delivering a separate but concurring judgment observed-

The desirability of uniform code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesman amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change..... Therefore, a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the first step should be to rationalise the personal law of the minorities to develop religious and cultural amity. The Government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about a comprehensive legislation in keeping with modern day concept of human rights for women. The Government may also consider feasibility of appointing a Committee to enact a Conversion of Religion Act, immediately, to check the abuse of religion by any person.¹³⁴

¹³³ (1995) 3 SCC 635

¹³⁴ *Ibid*

In *Lily Thomas v. Union of India*¹³⁵ the desirability of a uniform civil code was admitted in a diluted manner when the court observed-

The desirability of uniform civil code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change

In *John Vallamattom v. Union of India*,¹³⁶ while talking about the Doctrine of Suspect Legislation, the Supreme Court stressed the need for a uniform civil code and observed-

It is matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.

Going a step further for the introduction of a uniform Civil Code, a two-Judge Bench of the Supreme Court comprising of Arijit Pasawat and S.H.Kapadia, JJ., in *Seema v. Ashwani Kumar*¹³⁷ has directed the State Governments and the Central Government to take steps for compulsory registration of marriages of all persons who are citizens of India belonging to various religions. Earlier the National Commission for Women had indicated in its proposal for the importance of compulsory registration of marriage on the following issues:

¹³⁵ AIR 2000 SC 1650

¹³⁶ (2003) 6 SCC 611

¹³⁷ (2006) 2 SCC 578. See also *Seema v. Ashwani Kumar* (2008) 1 SCC 180 where three months time was given to comply with the directions of the judgment of *Seema v. Aswani Kumar* (2006) 2 SCC 578

(a) Prevention of child marriages and to ensure minimum age of marriage,

(b) Prevention of marriages without the consent of the parties,

(c) Check illegal bigamy/polygamy,

(d) Enabling widows to claim their right to live in the matrimonial house, maintenance, etc,

(e) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband,

(f) Deterring men from deserting women after marriage, and

(g) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the grab of marriage.

The Supreme Court, while agreeing with the contention of the National Commission for Women, observed-

If the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non-registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage per se, and it would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage.¹³⁸

¹³⁸ *Ibid* at 582

4. 4. 2. NECESSITY OF JUDICIAL ACTIVISM

The dynamism of the judiciary has been often called as ‘Judicial Activism’ by many critics. The main thrust of the criticism is that the judiciary by its directives to the administration is usurping the functions of the legislatures and of the executive and is running the country and, according to some, ruining it. What these critics of the judiciary overlook is that it is the tardiness of legislatures and the indifference of the executive to address it to the complaints of the citizens about violations of their human rights which provides the necessity for judicial intervention. In cases where the executive refuses to carry out the legislative will or ignores or thwarts it, it is surely legitimate for courts to step in and ensure compliance with the legislative mandate. When the court is apprised of and is satisfied about gross violations of basic human rights it cannot fold its hands in despair and look the other way. The judiciary can neither prevaricate nor procrastinate. It must respond to the knock of the oppressed and the downtrodden for justice by adopting certain operational principles within the parameters of the Constitution and pass appropriate directions in order to render full and effective relief. If the judiciary were to shut its door to the citizen who finds the legislature as not responding and executive indifferent, the citizen would take to the streets and that would be bad both for the rule of law and democratic functioning of the State.¹³⁹ Courts have come to realise and accept that judicial response to human rights cannot be blunted by legal bigotry.

¹³⁹ Dr. Justice A.S.Anand, *Public Interest Litigation as Aid to Protection of Human Rights*, (2001) 7 SCC (Journal) 1

Judiciary in this country has been the most vigilant defender of democracy, democratic values and constitutionalism.¹⁴⁰

If it is admitted that the judiciary has entered the areas that traditionally did not belong to it and ought to be the concern of the legislature and the executive, then why have such transgressions of the separation of power not evoked protest from the executive? Although sometimes it is whispered that the judiciary is overreaching itself, not only are the political players as well as the people obeying the decisions of the Courts, but there is a general feeling that such obedience is necessary and obligatory. As appositely remarked by Soli Sorabjee-

That it is the executive's failure to perform its duty and the notorious tardiness of legislatures that impels judicial activism and provides its motivation and legitimacy. Even gross violations of human rights are brought to its notice, the judiciary cannot procrastinate.¹⁴¹

While discussing about the permissibility of the Parliament under Article 31B of the Constitution to immunize legislations from the purview of fundamental rights by inserting them into the Ninth Schedule, it has been remarked by a nine Judge Bench of the Supreme Court that "the jurisdiction conferred on this Court by Article 32 is an important and integral part of the basic structure of the Constitution of India and no act of Parliament can abrogate it or take it away except by way of impermissible erosion of fundamental principles of the constitutional

¹⁴⁰ Dr. Justice A.S. Anand, *Judicial Review-Judicial Activism-Need for a caution*, 42 JILI (2000) Page 149

¹⁴¹ H.S. Mattewal, *Judiciary and the Government in the Making of Modern India*, (2002) 1 SCC (Journal) 17

scheme are settled propositions of Indian jurisprudence”.¹⁴² The Supreme Court further observed-

The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision-making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.¹⁴³

4. 4. 3. JUDICIAL RESTRAINT

Judicial Activism is not an aberration. It is an essential aspect of the dynamics of a constitutional Court. It is a counter-majoritarian check on democracy. Judicial activism does not however mean governance by the judiciary. It also must function within the limits of the judicial process.¹⁴⁴ Judicial activism reinforces the strength of democracy and reaffirms the faith of the common man in the ‘rule of law’. The judiciary,

¹⁴² *I.R. Coelho v. State of Tamil Nadu* AIR 2007 SC 861

¹⁴³ *Ibid* at 871

¹⁴⁴ Justice R.C.Lahoti, *Judicial Activism-Constitutional Obligation of the Courts*, AIR 2005 Journal 177

however, can act only as an alarm clock but not as a timekeeper. After giving the alarm call it must ensure to see that the executive performs its duties in the manner envisaged by the Constitution.¹⁴⁵ Judicial Activism is a response to a lawlessness of the State, which is the most intransigent problem of the people of India.

The survey of the decisional law of the High Courts and the Supreme Court shows that the judiciary has clearly transcended the limits of the judicial function and has undertaken functions that really belonged to either the legislature or the executive. Its decision clearly violated the limits that the doctrine of separation of powers had imposed on it. A court is not equipped with the skills and competence to discharge functions that essentially belong to the other co-ordinate organs of government. Its institutional equipment is not adequate for undertaking legislation or administrative functions. It cannot create positive rights such as the right to work, the right to education, or the right to shelter. It does not have the equipment for monitoring various steps that are required for the abolition of child labour. It cannot entirely stop environmental degradation or government lawlessness. Its actions in these areas are bound to be symbolic.¹⁴⁶

No doubt the judiciary has a duty to shape the progress of law and react to the changing conceptions of social values having regard to public policy of law as determined by new conditions and in case of deprivation of the weaker sections, the judiciary must rise to occasion and grant relief to the seeker of justice. The judiciary while resorting to judicial activism has to keep in mind that it has certain inherent limitations and should

¹⁴⁵ Dr. Justice A.S. Anand, *Judicial Review-Judicial Activism-Need for a caution*, 42 JILI (2000) Page 149

¹⁴⁶ S.P. Sathe, *Judicial Activism in India*, p. 251 (1st Edition 2002)

normally avoid judge-made amendments to the provisions over and above the available legislation. Where the legislative intention is clear, the court should not interpret the provisions contrary to it or add something to it.¹⁴⁷ Judges are not superstars and should not be expected to behave as such.¹⁴⁸

Justice M.M. Punchhi¹⁴⁹ has remarked-

Thus, the judiciary can evolve new methods, tools and procedure to promote the rule of law and enforce fundamental rights. But there is no fundamental right to compel the Union of India to bring forth a particular legislation or to exercise its discretion in legislation or to exercise its discretion in Parliament in a particular manner. The courts in exercise of their power of judicial review should not interfere in policy matters of the State, unless the policy so formulated either violates the mandate of the Constitution or any statutory provision or is otherwise activated by *malafides*.

In order to confine their activities to judicial determination or a controversy and not to involve themselves with determination of policy-oriented issues or matters with political overtones the courts have developed many doctrines which operate as self-imposed restrictions. Justice Pathak¹⁵⁰ had opined-

¹⁴⁷ *Raghunath Rai Bareja v. Punjab National Bank* (2007) 2 SCC 230; *Indian Drugs & Pharmaceuticals Ltd. v. Workmen* (2007) 1 SCC 408; *Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala* (2001) 5 SCC 175; *Basawaraj R. Patil v. State of Karnataka* (2000) 8 SCC 740; *Rishabh Agro Industries Ltd. v. PNB Capital Service Ltd.* (2000) 5 SCC 515.

¹⁴⁸ Justice Binod Kumar Roy, *Role of Judiciary in the Present Day Context*, AIR 1998 Journal 17

¹⁴⁹ *Madhu Kishwar v. State of Bihar* (1996) 5 SCC 125

¹⁵⁰ *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161

The courts must never forget that the jurisdiction extends no further than the legitimate limits of its constitutional powers and avoid trespassing into political territory which under the Constitution has been appropriated to the other organs of the State.

A note of caution has been sounded by Justice Venkataramiah in *National Textile Workers' Union v. P.R. Ramakrishnan*¹⁵¹ when he observed-

It is true that law should not be static and it should grow but it should have its legitimate birth in the precincts of the legislature. It should be the result of the exercise of legislative judgment, particularly when a departure from express provisions of a statute or an established practice is to be made. Participation by the public at large in the legislative process cannot be ignored.

Even though there is no express statement in our constitutional law incorporating in it the doctrine of separation of powers, in the interpretation of the Constitution the Supreme Court has broadly adopted the said doctrine. Even though by virtue of its powers of interpretation of law the court in an indirect way is making law, there are well recognised limitations on the power of the court making inroads into the legislative domain of the legislature. If the legislature exceeds its power, Supreme Court steps in, if the Executive exceeds its power, then also Supreme Court steps in, but if the Supreme Court exceeds its power, what can people do? Should they be driven to seek an amendment of the law on every occasion? Judges are not expected to know all aspects of every such matter. As discussion involving a comprehensive view of all interests which are likely to be affected by any decision which

¹⁵¹ AIR 1983 SC 75

makes a serious departure from a well-settled principle of law would not take place before a court where only the parties to a case or their lawyers are heard. Therefore, it is always better and safe to leave such matters to the decision of the legislature, instead of the court, sometimes by a majority of one assuming power to make a new law. The court should observe restraint in its pronouncements so that they do not go beyond its own legitimate sphere.¹⁵²

A seven judge Bench in *P. Ramachandra Rao v. State of Karnataka*¹⁵³ has observed-

The primary function of the judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature.

Justice Markandey Katju has remarked that the Supreme Court cannot direct legislation and the judiciary must exercise self-restraint.¹⁵⁴ He felt that judicial restraint tends to protect the independence of the judiciary and separation of powers for which he observed-

Judicial restraint is consistent with and complimentary to the balance of power among the three independent branches of the State.¹⁵⁵

¹⁵² *Ibid* at 101

¹⁵³ (2002) 4 SCC 578

¹⁵⁴ *State of U.P. v. Jeet S. Bisht* (2007) 6 SCC 586. The same line of approach was followed in *Tata Cellular v. Union of India* AIR 1996 SC 11 at 26

¹⁵⁵ *Ibid* at 612

Justice Markandey Katju has also observed that judicial legislation is an oxymoron and the temptation to do judicial legislation should be eschewed by the courts.¹⁵⁶

In *Divisional Manager, Aravali Golf Club v. Chander Hass*¹⁵⁷ it has been observed by Justice Markandey Katju that the judiciary should exercise self-restraint. The Supreme Court observed-

Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the State. It accomplishes this in two ways. First, judicial restraint not only recognizes the equality of the other two branches with the judiciary, it also fosters that equality by minimizing inter-branch interference by the judiciary. In this analysis, judicial restraint may also be called judicial respect, that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism's unpredictable results make the judiciary a moving target and thus decrease the ability to maintain equality with the co-branches. Restraint stabilizes the judiciary so that it may better function in a system of inter-branch equality.

Second, judicial restraint tends to protect the independence of the judiciary. When courts encroach into the legislative or administrative fields almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators. This would be counterproductive.

¹⁵⁶ *Raghunath Rai Bareja v. Punjab National Bank* (2007) 2 SCC 230 at 245

¹⁵⁷ (2008) 1 SCC 683.

The touchstone of an independent judiciary has been its removal from the political or administrative process. Even if this removal has sometimes been less than complete, it is an ideal worthy of support and one that has had valuable effects.¹⁵⁸

However, 'judicial activism' and 'judicial restraint' are two expressions generally misunderstood describing one class of judges as progressive and the other as conservative. In judicial process both concepts have their own role to play depending upon the constitutional issues involved. If an issue of policy of legislation is under question, sometimes 'judicial restraint' is exercised by the court as the policy is found to be one among various reasonable policies and the choice must be left to the legislation. Where the issue raises encroachment on fundamental rights of citizens the judge may become active and give greater importance to the fundamental freedoms by subjecting the legislation to strict scrutiny and if necessary, declare the same as unconstitutional.

4. 5. SUMMING UP

Judicial Activism, however, is not an unguided missile. It has to be controlled and properly channelized. Courts have to function within established parameters and constitutional bounds. People of this country have reposed faith and trust in the courts and therefore, the judges have to act as their trustees. Betrayal of that trust would lead to judicial despotism

¹⁵⁸ *Ibid* at 693-694. Reiterated in Judgment dated 11th April 2008 in *Common Cause v. Union of India* reported in <http://www.judis.nic.in> visited on 7th June 2008

which posterity would not forgive.¹⁵⁹ The dividing line between judicial activism and judicial overreach is a thin one.¹⁶⁰ Judicial Activism should not become 'judicial adventurism' and lead a Judge going in pursuit of his own notions of justice and beauty, ignoring the limits of law, the bounds of his jurisdiction and the binding precedents.¹⁶¹ The Judges must act like Statesman in the exercise of the vast powers entrusted to them in the name of justice. The duty of activating the other two organs of the Government for the Constitutional purpose falls on the shoulders of the judiciary.¹⁶²

The judiciary while following the activist role in view of their constitutional obligation must remember the following warning of Benjamin N. Cardozo:¹⁶³

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiments, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to "the primordial necessity of order in social life". Wide enough in all conscience is the field of discretion that remains.

¹⁵⁹ Dr. Justice A.S.Anand, *Judicial Review-Judicial Activism-Need for a caution*, 42 JILI (2000) Page 149

¹⁶⁰ Dr. A.B.Kafaltiya, *Interpretation of Statutes*, p. 361 (2008)

¹⁶¹ Dr. Justice A.S.Anand, *Protection of Human Rights-Judicial Obligation or Judicial Activism*, (1997) 7 SCC (Journal) 11

¹⁶² Dr. Malkit S. Rahi, *Judicial Activism and Judicial Restraint*, AIR 1999 Journal 44

¹⁶³ Benjamin N. Cardozo, *Nature of the Judicial Process*, p. 141 (1961)

It has been aptly said that to be active without a check is tyranny; but a self-generated check on activity may well undermine the possibility of great contributions.¹⁶⁴ The dynamic role of the judiciary which is characterised by moderation and self restraint is bound to restore the faith of the people in the efficacy of the democratic institutions which alone, in turn, will activate the executive and the legislature to function effectively under the vigilant eye of the judiciary as ordained by the Constitution. In the modern age, it has been established beyond doubt that co-operation rather than separation, in a constant interchange of give and take between the legislature, executive and judiciary, reflects the reality of the legal process.

¹⁶⁴ John Agresto, *The Supreme Court and Constitutional Democracy*, p. 37 (1984)

CHAPTER 5

CONCLUSION

The complex and articulate social conditions in the present day society has increased the problem of evolution of law making by the judiciary. This problem persists in every legal order, whether federal or unitary, whether of civilian or common-law background. The nineteenth century opinion was almost unanimous that there was a clear-cut division of function between the various spheres of the legislature, the executive and the judiciary. The doctrine of separation of powers derived from the contents of the development in the British constitutional history of the early eighteenth century by John Locke and Montesquieu was strongly favoured and advocated for. The function of the legislature was to pass new laws; the judiciary was to interpret them and the executive was to enforce them.

The concept started changing after the First World War when the tempo of social change was accelerated beyond all imagination. This resulted in throwing up a new challenge to the law which was becoming too stereotype and stale, overlooking the growing changes in the society. The changing acceptance of the fact by the leading jurists and scholars that the duty of the judge was to take note of the fundamental changes in the society accelerated the process of law making by the judges. Indeed, it is almost certain that the common law would have never developed if, the judges had not from time to time accepted and recognised the diverse needs and changes in the society and developed the law by laying down new principles to meet the challenge.

The modern Indian world was restructured by the British between the end of the eighteenth century and middle of the twentieth. Various branches of Indian law, apart from modern constitutional law, were developed and defined on the basis of the British model. In spite of several difficulties faced after Independence, the Indian legal elite have succeeded in preserving a very admirable judicial system, the most Europeanized of Indian institutions and at the same time advanced and revitalized it to play a crucial role in the development of social and political life of the country. Various principles and concepts that have been developed in the English and American Courts served as a reference point for the Indian judiciary and furnished the jurisprudential basis for ruling on cases in India, necessarily tempered to the conditions prevalent here.

In order to facilitate the study of the contribution of the judiciary to social dynamics in India since Independence, the working of the judiciary has been divided into five phases or periods. Each period is significant and of historical importance. The first period (1950-1960) deals with the nascent India and the struggle of the judiciary to grapple with the metamorphosis from colonial rule to the ground realities of a free nation. The second period (1961-1970) is a period when the Indian judiciary was trying to determine the voice of "we the people" in interpreting and creating roadmaps in the Constitution of India. The third period (1971-1976) unfortunately will always remain an aberration in Indian political history. This period has not only been marked as an oppressing and dark era but also an era that triggered off remarkable growth in Indian judicial activism. The fourth period (1977-1979) has seen the jurisprudential change in the immediate aftermath of the emergency. The last and fifth period (1980-2008) is regarding the boom in activism. Judicial techniques

of interpretation, stare decisis, social contribution reached a new height. The danger of a crash cannot be ruled out but for the moment the barometer of activism is still rising.

5. 1. THE FIRST PERIOD (1950-1960)

The first period (1950-1960) of the judiciary in India led by the Supreme Court functioned with commendable prescience. It was a Nehruvian era of economic progress, political stability and nascent optimism in the country when the Supreme Court maintained a balance of power among the three wings of the State and slowly tried to expand its authority. The judiciary, especially the Supreme Court moved forward and backward, eventually drawing a line, combining the orthodox judicial function with policy making seeking to protect, in particular, the rights of the rural landowning class from legislation that threatened them.

The Supreme Court took a positivist stand in *Gopalan* case¹ and gave a very narrow and restrictive interpretation to the words 'personal liberty' under Article 21 of the Indian Constitution. The Supreme Court rejected the contention of the petitioner that the words 'personal liberty' include the freedom of movement and should satisfy the requirement of Article 19. The Supreme Court interpreted the 'law' under Article 21 as 'state made law' and rejected the plea that by the term 'law' in Article 21, natural law should be understood.

In response to the citizens' petitions, several High Courts and the Supreme Court interpreted the word 'compensation' in Article 31 in a

¹ *A.K.Gopalan v. State of Madras* AIR 1950 SC 27

classic manner to mean a fair equivalent value for the property taken.² They read Articles 19 (1) (a) and 19 (g) as protecting free expression (including freedom of the press) and the right to carry on trade or business.³ When the Government intruded on these rights, the judiciary prevented them.

In order to level these situations, the Government brought in the Constitution (1st Amendment) Act in 1951 which was challenged in *Shankari Prasad v. Union of India*.⁴ However, the Supreme Court upheld the Constitution (1st Amendment) Act, 1951 and held that a constitutional amendment will be valid even if it abridges or takes away any of the fundamental rights.

5. 2. THE SECOND PERIOD (1961-1970)

During the second period (1961-1970) the economic situation of India was depressing. The Third Five Year Plan had proved a dismal failure. Mr. Jawaharlal Nehru died on 27th May 1964 and was succeeded by Mr. Lal Bahadur Shastri. Mr. Lal Bahadur Shastri died at Tashkent, USSR on 11th January 1966 and was succeeded by Mrs. Indira Gandhi. The fourth General Elections were held in 1967 but the fourth Lok Sabha was dissolved in 1970. The political climate was vitiated by uncertainty and corruption. Political instability, economic decline, and lack of political morality were the challenges before the judiciary. The

² Interpretation of the Supreme Court in *Chiranjit Lal Chowdhuri v. Union of India* AIR 1951 SC 41 is noteworthy

³ *Romesh Thappar v. State of Madras* AIR 1950 SC 124; *Brij Bhushan v. State of Punjab* AIR 1950 SC 129

⁴ AIR 1951 SC 455

government resorted to populist measures like nationalization of the banks and abolition of privy purses. This prompted the judiciary to take corrective measures in order to establish a just economic, political and moral order in the interest of the country.

In 1951, the Supreme Court had unanimously repelled the challenge to the First Amendment to the Constitution but on 30 October, 1964 a few months after the death of Mr. Jawaharlal Nehru, there was a dissenting opinion in *Sajjan Singh* case⁵ by Justice Hidayatullah and Mudholkar who otherwise agreed with the majority in upholding the Seventeenth Amendment to the Constitution. Their observations laid the foundation of the basic structure doctrine which was later enunciated by the Supreme Court.

Faced with a situation where judgment after judgment rendered by it mainly in the area of land reforms was nullified by the Parliament by amending the Constitution, an eleven Judge Bench of the Supreme Court in *Golak Nath v. State of Punjab*⁶ held that the Parliament had no power from the date of the decision to amend Part III (Fundamental Rights) of the Constitution so as to take away or abridge the fundamental rights. The doctrine of prospective overruling was applied to save the existing constitutional amendments⁷ which put a check on the power of the Parliament to use Article 368 and amend the Constitution on its sweet will.

⁵ *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845

⁶ AIR 1967 SC 1643. *Shankari Prasad v. Union of India* AIR 1951 SC 455 and *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845 overruled.

⁷ The Constitution (1st Amendment) Act, 1951, The Constitution (4th Amendment) Act, 1955 and The Constitution (17th Amendment) Act, 1964.

The bank nationalisation law⁸ was struck down by the Supreme Court in the *Bank Nationalisation* case⁹ as it failed to provide to the expropriated bank compensation determined according to relevant principles. In the *Privy Purse* case,¹⁰ the Supreme Court held the Presidential order withdrawing constitutional recognition to the erstwhile princely states was violative of the fundamental rights.

5. 3. THE THIRD PERIOD (1971-1976)

In 1971, the General Elections were held in India and Mrs. Indira Gandhi became the Prime Minister. The Constitution (24th Amendment) Act, 1971 was passed in order to remove the difficulties created by the decision in *Golak Nath*. The Constitution (25th Amendment) Act, 1971 and the Constitution (26th Amendment) Act, 1971 were passed to remove the problems generated as a result of the *Bank Nationalisation* case and the *Privy Purse* case respectively. The Constitution (29th Amendment) Act, 1972 was passed which inserted two Kerala Land Reforms Acts in the Ninth Schedule. These amendments were challenged in *Keshavananda Bharati v. State of Kerala*¹¹. The hearing took place for sixty-nine days spread over five months before a thirteen Judge Bench of the Supreme Court. It was held by a majority of seven to six that the power of the Parliament to amend the Constitution was wide but the

⁸ The Banking Compensation (Acquisition and Transfer of Undertaking) Act, 1969

⁹ *R.C.Cooper v. Union of India* AIR 1970 SC 564

¹⁰ *H.H.Maharajadhiraja Madhav Rao Jiawaji Rao Scindia Bahadur v. Union of India* AIR 1971 SC 530

¹¹ AIR 1973 SC 1461

power was not unlimited and does not include the power to destroy the basic structure or framework of the Constitution.

In the meantime Mrs. Indira Gandhi's election was set aside by the Allahabad High Court. On 24th June 1975, sitting as a Vacation Judge, Justice Krishna Iyer through an interim order directed that the Prime Minister (Mrs. Indira Gandhi) was not to function as a member of the Parliament but could exercise the powers and functions of the Prime Minister. On 26th June 1975, a National Emergency was declared. The Constitution (39th Amendment) Act, 1975 was passed in order to validate the election of Mrs. Indira Gandhi. Later, the Constitution (42th Amendment) Act, 1976 was also passed wherein drastic amendments in the Constitution were made.

In pursuance of the declaration of emergency, a large number of persons in the various states were detained and the detenus challenged their arrest in *Habeas Corpus* petitions before their respective High Courts which were held maintainable by the High Courts. However, on appeal, the Supreme Court in the *Habeas Corpus*¹² case held that that in view of the Presidential Order dated 27th June, 1975 no person had any *locus standi* to move any writ petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order was not under or in compliance with the Act or was illegal, or was vitiated by *mala fides* factual or legal or was based on extraneous consideration. Justice Khanna gave a dissenting opinion and held that life and liberty are basic assumptions to the Rule of Law.

¹² *A.D.M. Jabalpur v. Shivakant Shukla* AIR 1976 SC 1207

5. 4. THE FOURTH PERIOD (1977-1979)

The Lok Sabha was dissolved on January, 1977 and the General Elections were held on March, 1977. The Janata Party came to power and Mr. Morarji Desai became the Prime Minister. The judiciary realised the mistakes done during the emergency and tried to revive the lost prestige and trust of the people.¹³ The momentous judgment in the *Maneka Gandhi* case¹⁴ was passed which widened the scope of the expression 'procedure established by law' to include a variety of rights which go to make up the personal liberty of a man other than those dealt within Article 19 of the Indian Constitution. The nail in the coffin was hammered in the *Minerva Mills* case¹⁵ when the Supreme Court held that Article 368 did not enable the Parliament to alter the basic structure of the Constitution.

The Lok Sabha was dissolved on August 1979 and mid-term polls were declared. Mrs. Indira Gandhi assumed the office of the Prime Minister on 14th January, 1980.

5. 5. THE FIFTH PERIOD (1980-2008)

The start of the fifth period (1980-2008) saw the dynamism of the judiciary led by Justices namely Krishna Iyer, Bhagwati, Desai, Chinnapa

¹³ The post-emergency judicial activism was probably inspired by the realization of the judiciary that its elitist social image would not make it strong enough to withstand the future onslaught of a powerful political establishment.

¹⁴ *Maneka Gandhi v. Union of India* AIR 1978 SC 597. *A.K.Gopalan v. State of Madras* AIR 1950 SC 27 overruled

¹⁵ *Minerva Mills v. Union of India* AIR 1980 SC 1789

Reddy and Thakkar. The concept of Public Interest Litigation was born and it became the philosophy of a new judicial movement in India. Several benefits were conferred through Public Interest Litigation. The doctrine of *locus standi* was liberated from Anglo-Saxon fetters and a new strategy evolved for the benefit of the poor and lowly. The age-old precedents, procedures and technical rules were dumped by some judges in order to simplify the procedure of access to justice by the poor and the illiterate. Judicial activism in favour of the weaker class in fulfillment of the Directive Principles was promoted. Empathy with lowly individuals became constitutional culture. Law was sought to be interpreted keeping in view the word 'Socialist' in the Preamble of the Constitution and the Directive Principles echoed the familiar language of the philosophy of socialism. The second-generation rights such as economic and social rights developed due to this dynamic attitude of the judiciary.

The right to education received an impetus when the Supreme Court in *Mohini Jain* case¹⁶ declared it to be concomitant to the fundamental right enshrined under Part III of the Constitution. Although the right to education was not included in Part III of the Constitution; but the pronouncement of the judiciary that the State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens made the legislature think about the right to education to be included in Part III of the Constitution. The approach of the Supreme Court in *Mohini Jain* case was accepted by the Supreme Court in *Unni Krishnan* case¹⁷ wherein it was held that that the right to free education up to the age of 14 years is a fundamental right. The right to education as

¹⁶ *Mohini Jain v. State of Karnataka* AIR 1992 SC 1858

¹⁷ *Unni Krishnan, J.P. v. State of A.P.* AIR 1993 SC 2178

a fundamental right was 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* case.¹⁸ The dynamism of the judiciary of holding the right to education as a fundamental right has forced the legislature to insert 21-A by way of the 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”.

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 judgments¹⁹ 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 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

¹⁸ *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481

¹⁹ *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

that merit alone can be the guiding factor in case of admission to any educational institution is the brainwork of the judiciary.²⁰ 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.²¹ The direction of setting up of a Committee in each State for fixing the fee structure in private educational institutions²² 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 checked²³ 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 socially and economically backward classes after excluding the creamy layer from it.²⁴ This has achieved a double objective by securing

²⁰ *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

²¹ *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

²² *Islamic Academy of Education v. State of Karnataka* (2003) 6 SCC 697

²³ *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

²⁴ *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)

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.²⁵ 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* cases.²⁶ 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.²⁷ 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.²⁸ It is lamenting to state the Central Government has not yet come up with any Act to curb the menace of ragging and the directions and orders of the Supreme Court

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

²⁵ *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

²⁶ *Vishwa Jagriti Mission v. Central Government* (2001) 6 SCC 577; *Vishwa Jagriti Mission v. Central Government* (2001) 6 SCC 581

²⁷ *University of Kerala (2) v. Council, Principals' Colleges* (2006) 8 SCC 486

²⁸ Interim Order dated 16th May 2007 reported in <http://en.wikipedia.org/wiki/ragging> visited on 26th May, 2008

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.²⁹ 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 of reaching education to every section of the society as well as reducing child labour.

The 1980s saw a sea-change in the perception of the law of the environment. This was largely possible due to the initiation of Public Interest Litigation, the timely demise of the law of standing and expansive interpretation of Article 21 of the Constitution.³⁰ Another remarkable feature of this evolution was the shift from mere enforcement of the statutory provisions of the Air Act, Water Act, the Wildlife Protection Law, the Forest Protection Law and the Town Planning Law to founding restitutionary as well as injunctive relief on the basis of constitutional jurisprudence and weaving environmental law buzzwords such as sustainable development, precautionary principle, polluter pays principle, inter generational equity, public trust doctrine and absolute

²⁹ http://en.wikipedia.org/wiki/Mid-day_Meal_Scheme visited on 23rd January 2008

³⁰ *L.K.Koolwal v. State of Rajasthan* AIR 1988 Raj 2; *Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P.* AIR 1990 SC 2060; *Subhash Kumar v. State of Bihar* AIR 1991 SC 420 ; *V.Lakshmipathy v. State of Karnataka* AIR 1992 Kant 57; *Virender Gaur v. State of Haryana* (1995) 2 SCC 577; *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715; *T.N.Godavarman Thirumulpad v. Union of India* (2002) 10 SCC 606

liability into Article 21 of the Constitution. In environmental cases, the judiciary has had to balance the competing claims of environment and development.

The output of the entire judicial exercise from *Ratlam*³¹ to the present day was that in nearly eighty percent of the cases the balance was titled in favour of environment. This should not be taken to mean that the judiciary retarded the development growth; rather it has caught and taught a lesson to eco-enemies. The judiciary mixed its vigilance with restraint to guarantee a discipline and orientation for administrative and legislative authorities in the battle for environment.

In the industrial mass disaster the judiciary came down heavily on the eco-killers and opened a new vista for a comprehensive mass-disaster enviro-jurisprudence. The judiciary exposed flaws in the laws, areas of legislative inaction; and also the inactive executive authorities. The judiciary, in order to effectively administer and attain environmental justice, on the one hand adopted important principles like the Indianized principles of absolute and strict liability,³² sustainable development,³³

³¹ *Municipal Council, Ratlam v. Vardichand* AIR 1980 SC 1662

³² *M.C.Mehta v. Union of India* AIR 1987 SC 1086

³³ *Rural Litigation and Entitlement Kendra, Dehradun v. State of U.P.* AIR 1985 SC 652; *Indian Council for Enviro-Legal Action v. Union of India* AIR 1996 SC 1446; *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715; *K.M.Chinnapa v. Union of India* AIR 2003 SC 724; *Research Foundation for Science Technology National Resource Policy v. Union of India* (2005) 10 SCC 510; *Karnataka Industrial Areas Development Board v. C. Kenchappa* (2006) 6 SCC 371; *Intellectuals Forum v. State of A.P.* (2006) 3 SCC 549; *T.N.Godavarman Thirumulpad v. Union of India* (2008) 2 SCC 222

precautionary principle,³⁴ polluter pays principle,³⁵ inter generational equity,³⁶ public trust doctrine,³⁷ etc. and on the other hand suggested forums like environment court,³⁸ judicial environment information regime, court officers, green bench,³⁹ etc. The concept of environmental education in schools and colleges is also the outcome of the dynamic attitude of the judiciary.⁴⁰ Environmental offences, having very wide and deep ramifications, were provided with multi-treatment, including not only preventive, punitive and precautionary measures but also corrective,

³⁴ *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715; *M.C.Mehta v. Union of India* AIR 1997 SC 734; *A.P.Pollution Control Board v. M.V.Nayadu* AIR 1999 SC 812; *M.C.Mehta v. Union of India* AIR 2004 SC 4016

³⁵ *M.C.Mehta v. Union of India* AIR 1987 SC 1086; *Indian Council for Enviro-Legal Action v. Union of India* AIR 1996 SC 1446; *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715; *M.C.Mehta v. Union of India* AIR 1997 SC 734; *S.Jagannath v. Union of India* AIR 1997 SC 811; *M.C.Mehta v. Kamalnath* (2002) 3 SCC 653;

³⁶ *Rural Litigation and Entitlement Kendra v. State of U.P.* AIR 1987 SC 359; *State of H.P. v. Ganesh Wood Products* (1995) 6 SCC 363; *S.Jagannath v. Union of India* AIR 1997 SC 811; *Consumer Education and Research Centre v. Union of India* AIR 1995 SC 922; *K.M.Chinnapa v. Union of India* AIR 2003 SC 724; *Intellectuals Forum v. State of A.P.* (2006) 3 SCC 549; *T.N.Godavarman Thirumulpad v. Union of India* (2008) 2 SCC 222

³⁷ *M.C.Mehta v. Kamalnath* (1997) 1 SCC 388; *M.I.Builders Pvt. Ltd. v. Radhey Shyam Sahu* AIR 1999 SC 2468; *K.M.Chinnapa v. Union of India* AIR 2003 SC 724; *Intellectuals Forum v. State of A.P.* (2006) 3 SCC 549

³⁸ *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

³⁹ *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715

⁴⁰ *M.C. Mehta v. Union of India* AIR 1992 SC 382. 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.

rehabilitative and reclamatory treatment. The judiciary has been a subject of admiration by courts around the world for its reception of international environmental norms such as the Declaration adopted by the United Nations Conference on the Human Environment at the Stockholm Conference in 1972 and 1984 United Nation Resolution; and its use of such norms as a tool for interpretation of constitutional provisions. Thus, in the field of administrative of enviro-justice, the judiciary has stood tallest not only before the other two organs of the State-the legislature and the executive-but also, before its other counter counterparts, age-old or young, in the developed and developing countries by laying down that protection and improvement of the environment is a mandate to every institution, public or private, and individual, to be followed in all spheres of their activities.

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.⁴¹ 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).⁴² 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

⁴¹ *Keshavananda Bharati v. State of Kerala* (1973) 4 SCC 225

⁴² *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

reforms in the election process in India and has provided a new dynamism as well as a new protective dimension to this right.

The expression of the term of 'office of profit' under Article 102 has been given a very wide meaning by the judiciary.⁴³ 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 amendment⁴⁴ 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.

The Supreme Court's decision in *Vishaka*⁴⁵ 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. It was a nationally progressive judgment creating a law against sexual harassment at workplace.⁴⁶ 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

⁴³ *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

⁴⁴ Amendment in 2006 to The Parliament (Prevention of Disqualification) Act, 1959

⁴⁵ *Vishaka v. State of Rajasthan* AIR 1997 SC 3011. Reiterated in *Apparel Export Promotion Council v. A.K. Chopra* AIR 1999 SC 625

⁴⁶ Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice* in S.K. Verma and Kusum (ed.), *Fifty Years of the Supreme Court of India-Its Grasp and Reach*, p.165 (2nd Edition 2006)

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 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*,⁴⁷ *Bodhisattwa Gautam v. Subhra Chakraborty*⁴⁸ and *Chairman, Railway Board v. Chandrima Das*⁴⁹ 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*⁵⁰ 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

⁴⁷ (1995) 1 SCC 14

⁴⁸ (1996) 1 SCC 490

⁴⁹ (2000) 2 SCC 465

⁵⁰ AIR 1985 SC 945

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.⁵¹ The rousing of the 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 legislations⁵² in force but the same were not strictly interpreted or adhered to achieve their objectives. The judgments of the Supreme Court in *Vishal Jeet*⁵³ and *Gaurav Jain*⁵⁴ 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 Supreme Court noted that it was a matter of great importance and warranted 'a comprehensive and searching analysis requiring a humanistic rather than purely legalistic approach.'

The male dominated society placed the women into the watertight bearing compartment of motherhood making her look as a male-child

⁵¹ *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

⁵² 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

⁵³ *Vishal Jeet v. Union of India* (1990) 3 SCC 318

⁵⁴ *Gaurav Jain v. Union of India* AIR 1990 SC 292

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.⁵⁵ As a result of the dynamism of the judiciary the various Acts⁵⁶ in force which lay dormant were given a new direction.

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.⁵⁷ This initiative of the judiciary was supported by the Law Commission of India in its 153rd Report on Inter-Country Adoption⁵⁸ 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.

⁵⁵ *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

⁵⁶ 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 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.

⁵⁷ *Lakshmi Kant Pandey* cases from 1984 to 2001.

⁵⁸ 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

The Child Labour (Prohibition and Regulation) Act, 1986⁵⁹ 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.⁶⁰ 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 decision of the Supreme Court in *Maneka Gandhi v. Union of India*⁶¹ 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'.

In the early years of Public Interest Litigation, the judiciary focussed on the rights of prisoners and the conditions of prisons. The judiciary acted upon postcards, letters, articles in newspapers, press reports, and petitions from a wide cross-section of citizens including lawyers and journalists to open the doors of the courts to the millions of undertrials living in inhuman conditions in the country's prisons. First,

⁵⁹ This repealed The Employment of Children Act, 1938

⁶⁰ *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

⁶¹ AIR 1978 SC 597

the Supreme Court would convert the facts brought before it into a petition under Article 32 of the Constitution of India. It would then issue directions to the state agency concerned to provide information, and if this was not forthcoming, it would appoint a commissioner to elicit the facts. Once convinced that the matter required its intervention, the Supreme Court would issue a mandamus to state agencies to carry out its directions within a specified time-frame. This would include release of persons unlawfully detained, ensuring the closure of their cases if found to be pending for a very long time, and even directing that the detenus be compensated and rehabilitated. The Supreme Court also took the opportunity to give directions to state agencies to minimise further violations of human rights.⁶²

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*⁶³ 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.

⁶² Ashok H. Desai and S. Muralidhar, *Public Interest Litigation: Potential and Problems* in B. N. Kripal (ed.), *Supreme But Not Infallible-Essays in Honour of the Supreme Court of India*, p.168 (1st Edition 2000)

⁶³ *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

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 series of decisions⁶⁴ 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 police⁶⁵ 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 violence⁶⁶ 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.⁶⁷ The judiciary has also tried to

⁶⁴ *M.H.Hoskot v. State of Maharashtra* AIR 1978 SC 1548; *Khatari (II) v. State of Bihar* AIR 1981 SC 928; *Sheela Barse v. State of Maharashtra* AIR 1983 SC 378

⁶⁵ *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.

⁶⁶ *Joginder Kumar v. State of U.P.* AIR 1994 SC 1349; *Sheela Barse v. State of Maharashtra* AIR 1983 SC 378

⁶⁷ *D.K.Basu v. State of West Bengal* (1997) 1 SCC 416

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.⁶⁸ The judiciary has also realised that the 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.⁶⁹ 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.

The decision of the Supreme Court in *Bangalore Water Supply*⁷⁰ 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 labourers⁷¹ 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

⁶⁸ *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

⁶⁹ *Prakash Singh v. Union of India* (2006) 8 SCC 1

⁷⁰ *Bangalore Water Supply and Sewerage Board v. A. Rajappa* (1978) 2 SCC 213

⁷¹ *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802; *Neeraja Chaudhary v. State of M.P.* (1984) 3 SCC 243

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 at ransom by the government employees has been severely criticised by the Supreme Court.⁷² 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.*⁷³ 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.

The judiciary has been vibrant enough to expand the horizons of Article 21 by incorporating within its ambit the right to health and

⁷² *T.K.Rangarajan v. State of Tamil and others* (2003) 6 SCC 581

⁷³ *Steel Authority of India Ltd. v. National Union Waterfronts Workers* (2001) 7 SCC

medical treatment.⁷⁴ This has ensured that the State is obliged to extend medical facilities to every section of the society. The recommendations and suggestions of the Supreme Court in providing for supply of uncontaminated blood in *Common Cause* case⁷⁵ 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 patient⁷⁶ and now it is the duty of the legislature to frame separate legislations and enactments to protect the basic civil rights of AIDS patient.

The Constitution enjoins upon the State to 'secure for the citizens a uniform civil code throughout the territory of India.'⁷⁷ This provision had reference to the existence of personal laws for different communities that govern matters such as marriage, divorce, matrimonial remedies, inheritance and succession, and adoption. When the Constitution was made, many members of the Constituent Assembly were obsessed with the question of national integration. The partition of the country had created fears of further balkanization. Therefore, the debate on uniform civil code was dominated by concerns for national integration and secularism.

⁷⁴ *Paramanand Katra v. Union of India* (1989) 4 SCC 286; *Paschim Banga Khet Mazdoor Samity v. State of W.B.* (1996) 4 SCC 37

⁷⁵ *Common Cause v. Union of India* (1996) 1 SCC 753

⁷⁶ *Mr. 'X' v. Hospital 'Z'* (1998) 8 SCC 296

⁷⁷ Article 44 of the Constitution of India.

In contrast to its interventions on affirmative action, the courts have attempted to steer clear of controversies over the uniform civil code. On occasions the judiciary has strongly advocated for a uniform civil code⁷⁸ and on some, it has even gone for a common civil code rather than a uniform civil code.⁷⁹ The direction of the Supreme Court in *Seema v. Ashwani Kumar*⁸⁰ to the State Governments and the Central Government to take steps for compulsory registration of marriages of all persons who are citizens of India belonging to various religions is seen by some fundamentalists as a step towards the introduction of a uniform civil code. However the observations of the Supreme Court is noteworthy-

If the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non-registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage per se, and it would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the

⁷⁸ *Mohd. Ahmed Khan v. Shah Bano Begum* (1985) 2 SCC 556; *Jordan Diengdeh v. S.S. Chopra* (1985) 3 SCC 62; *Sarla Mudgal v. Union of India* (1995) 3 SCC 635

⁷⁹ *John Vallamattom v. Union of India* (2003) 6 SCC 611

⁸⁰ (2006) 2 SCC 578. See also *Seema v. Ashwani Kumar* (2008) 1 SCC 180 where three months time was given to comply with the directions of the judgment of *Seema v. Aswani Kumar* (2006) 2 SCC 578

wedlock of the two persons whose marriage is registered and the age of parties to the marriage.⁸¹

Uniformity of laws is not a condition precedent to national integration. Different laws may apply for different communities since every community wants to retain its identity. The aim should be to gradually reform these personal laws. Some changes have already been started in the Hindu, Parsi and the Christian law. The reforms in the Muslim personal law will have to wait until the political environment improves. It is vitiated by aggressive majoritarianism from within and embittered India-Pakistan relations from outside.⁸² This process of reform can only be initiated by the legislature, keeping in mind the religious sentiments of the various religions as well as the goal of a secular India.⁸³ The judiciary has done what it could do in its limited sphere of action in this debatable and controversial area.

It is wrong to apprehend that the judiciary, especially the Supreme Court, is trying to function as a super-legislature or usurping jurisdiction in matters which squarely lies within the competence of the executive. The activist attitude of the judiciary has been performed to keep the executive as well as the legislature within the limits of the law. Only the judiciary can ascertain the legality of legislation and the exercise of this

⁸¹ *Ibid* at 582

⁸² S.P.Sathe, *Judicial Activism in India*, p. 193 (2nd Edition 2003)

⁸³ In view of the recent developments, it would be advisable to create a social climate before introducing any legislation for amending any of the family laws of the Hindus, Muslims, Christians and Parsis in order to provide social justice to them. It would be better to reform Hindu law to stop its violation by Hindu men and to rid it of its present position of all round anti-woman attitude. Muslim law is to be reformed to stop the gross misuse of the rules relating to bigamy and *Talaq*. Christian and Parsi law is to be reformed so that they are at par with the other laws in the twenty-first century.

power should not be misconstrued as usurpation of powers of the executive or the legislature. Law cannot remain static; it is an effective and the most important weapon of the judiciary to bring in changes in the society according to its changing needs, if such is not done by the legislature. There is no fixed parameter of the functioning of the judiciary, the executive or the legislature. In spite of the absence of such limits, the judiciary has in recent years imposed self-restraint upon itself.⁸⁴

While remaining activist, the judges must maintain a fine balance between activism and excessivism. In other words, they must not take on issues, which though pressing, are outside the domain of the judiciary. They must be activists only within the confines of the judiciary. The tradition may be expanded but it should remain within the confines of the judiciary otherwise, the judges would forfeit their legitimacy and be accused of overstepping their limits and resorting to judicial populism. It must be remembered that judicial creativity even when it takes the form of judicial activism should not result in re-writing of the Constitution or any legislative enactments irrespective of the nature of the procedural jurisprudence resorted to by it.

Democracy cannot survive in a system in which civil rights and freedoms have no protection. The preservation of freedoms requires the elimination of concentration of power and the distribution of whatever

⁸⁴ *National Textile Workers' Union v. P.R. Ramakrishnan* (1983) 1 SCC 228; *Madhu Kishwar v. State of Bihar* (1996) 5 SCC 125; *Tata Cellular v. Union of India* AIR 1996 SC 11; *P. Ramachandra Rao v. State of Karnataka* AIR 2002 SC 1856; *Raghunath Rai Bareja v. Punjab National Bank* (2007) 2 SCC 230; *State of U.P. v. Jeet S. Bisht* (2007) 6 SCC 586; *Divisional Manager, Aravali Golf Club v. Chander Hass* (2008) 1 SCC 683; *Common Cause v. Union of India* Judgment dated 11th April 2008 reported in <http://www.judis.nic.in> visited on 7th June 2008

power has to be achieved as a part of a system of 'checks and balances.'⁸⁵ The notion of democracy is not merely a simple majoritarian idea. The democracy also implies participation; and it means tolerance and freedom. A judiciary reasonably independent from majoritarian whims can contribute much to democracy; and so can a judiciary-active, dynamic and creative enough to be able to assume both the preservation of a system of 'checks and balances' vis-à-vis the political branches and adequate controls vis-à-vis those other non-governmental or quasi-governmental centres of power which are so typical of our modern societies.

However, the judicial process cannot by itself bring about this social change and social welfare without the active support of the executive. Moreover, the people who are denied their civil liberties should also come forward to assert their right. Social welfare and relief institutions must help the people in exercise of their fight in the war to implement the rights denied to them. The social institutions should also put pressure upon the government to properly implement and mete out the rights as enshrined in the Constitution as well as forge new rights according to the changing circumstances. The legislature, comprising of the citizens of India, should also realise the need to adapt itself to the modern conditions of change. If they do not adapt themselves then the people of this country will show their grievance in the ballot box. If the politicians want to remain in power, they have to understand the pulse and the need of the society and act accordingly.

The judiciary has to find a golden mean between passivism, dynamism and excessivism. It cannot be forgotten that the judiciary has

⁸⁵ *All India Judges' Association (II) v. Union of India* (1993) 4 SCC 288

the obligation to expand and interpret the law within the Constitutional framework so as to respond to the hopes and aspirations of the changing society. The Trinity-Legislature, Judiciary and Executive-is an accomplished phenomenon. Harmonious existence is a theory and the differences a reality. If the three organs work hand in hand, the dream of the freedom fighters and the founding fathers of a free, strong, united and developed India will be a reality in the true sense.

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